Hearing Date: December 2, 2022
J:\MANDATES\2021\TC\21-TC-01 Juveniles Custodial Interrogation\TC\TOC.docx

ITEM 3
TEST CLAIM
PROPOSED DECISION

Welfare and Institutions Code Section 625.6

As Amended by Statutes 2020, Chapter 335 (SB 203)

Juveniles: Custodial Interrogation

21-TC-01

County of Los Angeles, Claimant

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Exhibit A

For CSM Use Only
Filing Date: RECEIVED December 22, 2021 Commission on State Mandates
Test Claim #: 21-TC-01

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Section 1

Proposed Test Claim Title:

Senate Bill 203: Juveniles: Custodial Interrogation

Section 2

Local Government (Local Agency/School District) Name:

County of Los Angeles

Name and Title of Claimant's Authorized Official pursuant to CCR, tit.2, § 1183.1(a)(1-5):

Arlene Barrera, Auditor-Controller

Street Address, City, State, and Zip:

500 West Temple Street, Room 525, Los Angeles, CA 90012

Telephone Number	Fax Number	Email Address
(213) 974-8302	(213) 626-5427	abarrera@auditor.lacounty.gov

Section 3

Claimant Representative: Fernando Lemus Title Principal Accountant-Auditor

Organization: County of Los Angeles, Department of Auditor-Controller

Street Address, City, State, Zip:

500 West Temple Street, Room 603, Los Angeles, CA 90012

Telephone Number	Fax Number	Email Address
(213) 974-0324	(213) 617-8106	flemus@auditor.lacounty.gov

Section 4 – Please identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to Government Code section 17553 and don't forget to check whether the code section has since been amended or a regulation adopted to implement it (refer to your completed WORKSHEET on page 7 of this form):

Senate Bill No. 203 (2019-2020 Reg. Sess.)

Welfare and Institutions Code Section 625.6

Statutes of 2020, Chapter 335, Section 2; Juveniles: Custodial Interrogation

☒ Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 12 / 22 / 2021

☐ A: Which is not later than 12 months following [insert the effective date of the test claim statute(s) or executive order(s)] ___/___/_____, the effective date of the statute(s) or executive order(s) pled; or

☒ B: Which is within 12 months of [insert the date costs were *first* incurred to implement the alleged mandate] 01 / 01 / 2021, which is the date of first incurring costs as a result of the statute(s) or executive order(s) pled. *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred.*

(Gov. Code § 17551(c); Cal. Code Regs., tit. 2, §§ 1183.1(c) and 1187.5.)

Section 5 – Written Narrative:

☒ Includes a statement that actual and/or estimated costs exceed one thousand dollars ($1,000). (Gov. Code § 17564.)

☒ Includes all of the following elements for each statute or executive order alleged ***pursuant to Government Code section 17553(b)(1) (refer to your completed WORKSHEET on page 7 of this form)***:

☒ Identifies all sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate, including a detailed description of the *new* activities and costs that arise from the alleged mandate and the existing activities and costs that are *modified* by the alleged mandate;

☒ Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;

☒ Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

☒ Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;
Following FY: 2021 - 2022 Total Costs: $6,427,500

☒ Identifies all dedicated funding sources for this program; State: N/A

Federal: N/A Local agency's general purpose funds: _____

Other nonlocal agency funds: N/A

Fee authority to offset costs: N/A

☒ Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: N/A

☒ Identifies a legislatively determined mandate that is on the same statute or executive order: N/A

Section 6 – The Written Narrative Shall be Supported with Declarations Under Penalty of Perjury Pursuant to Government Code Section 17553(b)(2) and California Code of Regulations, title 2, section 1187.5, as follows (refer to your completed WORKSHEET on page 7 of this form):

☒ Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

☒ Declarations identifying all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

☒ Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program).

☒ If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Government Code section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Government Code section 17574.

☒ The declarations are signed under penalty of perjury, based on the declarant's personal knowledge, information, or belief, by persons who are authorized and competent to do so.

Section 7 – The Written Narrative Shall be Supported with Copies of the Following Documentation Pursuant to Government Code section 17553(b)(3) and California Code of Regulations, title 2, § 1187.5 (refer to your completed WORKSHEET on page 7 of this form):

☒ The test claim statute that includes the bill number, and/or executive order identified by its effective date and register number (if a regulation), alleged to impose or impact a mandate. Pages 14 to 16.

☒ Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate. Pages 157 to 160.

☒ Administrative decisions and court decisions cited in the narrative. (Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement.) Pages 17 to 160.

☒ Evidence to support any written representation of fact. *Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.* (*Cal. Code Regs., tit. 2, § 1187.5*). Pages 8 to 13.

Section 8 –TEST CLAIM CERTIFICATION Pursuant to Government Code section 17553

☒ The test claim form is signed and dated at the end of the document, under penalty of perjury by the eligible claimant, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief.

Read, sign, and date this section. Test claims that are not signed by authorized claimant officials pursuant to California Code of Regulations, title 2, section 1183.1(a)(1-5) will be returned as incomplete. In addition, please note that this form also serves to designate a claimant representative for the matter (if desired) and for that reason may only be signed by an authorized local government official as defined in section 1183.1(a)(1-5) of the Commission's regulations, and not by the representative.

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations. (Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

Arlene Barrera	Auditor-Controller
Name of Authorized Local Government Official pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)	**Print or Type Title**
Arlene Barrera	12/21/21
Signature of Authorized Local Government Official pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)	**Date**

Test Claim Form Sections 4-7 WORKSHEET

Complete Worksheets for Each New Activity and Modified Existing Activity Alleged to Be Mandated by the State, and Include the Completed Worksheets With Your Filing.

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: Senate Bill 203 (2019-2020 Regular Session), Statutes of 2020, Chapter 335, Section 2

Activity: Requires youth offenders age 17 years and under be provided legal consultation prior to a custodial interrogation and before the waiving of any Miranda rights. As a result, the County of Los Angeles has provided the required legal consultations to arrested youth.

Initial FY: 20 - 21 Cost: $5,821.45 Following FY: 21 - 22 Cost: $13,000

Evidence (if required): Declaration of Cris Mercurio and Declaration of Sung Lee

All dedicated funding sources; State: $0.00 Federal: $0.00

Local agency's general purpose funds: $0.00

Other nonlocal agency funds: $0.00

Fee authority to offset costs: $0.00

COUNTY OF LOS ANGELES TEST CLAIM

SENATE BILL 203: JUVENILES: CUSTODIAL INTERROGATION

Statutes of 2020, Chapter 335, Section 2; Juveniles: Custodial Interrogation
Senate Bill No. 203 (2019-2020 Regular Session)
Amending Welfare and Institutions Code Section 625.6

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SENATE BILL 203: JUVENILES: CUSTODIAL INTERROGATION

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(CONTINUED)

SECTION 5: WRITTEN NARRATIVE

COUNTY OF LOS ANGELES TEST CLAIM

SENATE BILL 203: JUVENILES: CUSTODIAL INTERROGATION

Statutes of 2020, Chapter 335, Section 2; Juveniles: Custodial Interrogation
Senate Bill No. 203 (2019-2020 Regular Session)
Amending Welfare and Institutions Code Section 625.6

SECTION 5: WRITTEN NARRATIVE
COUNTY OF LOS ANGELES TEST CLAIM
Statutes of 2020, Chapter 335, Section 2; Juveniles: Custodial Interrogation
Senate Bill No. 203 (2019-2020 Regular Session)
Amending Welfare and Institutions Code Section 625.6

I. STATEMENT OF THE TEST CLAIM

In 2020, the California Legislature enacted Senate Bill (SB) 203, Chapter 335, Statutes of 2020, requiring that, prior to any custodial interrogation and before the waiver of any Miranda rights, a youth 17 years of age or younger must consult with legal counsel in person, by telephone, or by video conference. The law under *Miranda v. Arizona* (1996) 384 U.S. 436 requires that a person "taken into custody or otherwise deprived of his freedom of action in any significant way" must be informed of his or her constitutional rights prior to any interrogation.

Custodial interrogation is a legal term of art discussed prolifically in case law. The term "custodial" refers to the suspect being in the custody of law enforcement and interrogation refers to questioning by officers. *Rhode Island v. Innis* (1980) 446 U.S. 291, 298.

SB 203, titled "Juveniles: Custodial Interrogations" amended section 625.6 of the Welfare and Institutions Code (WIC) relating to "Delinquents and Wards of the Juvenile Court". In SB 203, the State considered that youth under 18 years of age have a lesser ability than adults to comprehend the meaning of their rights and the consequences of waiving those rights. The Legislature found that police interrogation may have a minimal impact on adults, but can overwhelm an early teen child, noting that no matter how sophisticated the child may be, the interrogation of a child cannot be compared to the interrogation of an adult.

SB 203 expanded the rights of juveniles beyond the Miranda decision to require that a youth 17 years of age or younger "shall consult with legal counsel in person, by telephone, or by video conference" prior to a custodial interrogation. Furthermore, SB 203 mandates that a minor may not waive their right to legal consultation prior to a custodial interrogation. Therefore, in passing SB 203, the State created a new program requiring that arrested youth be provided legal counsel prior to a custodial interrogation.

The County of Los Angeles (County or Claimant) Office of the Public Defender (Public Defender) is responsible for providing legal advice and defense to indigent persons, including juveniles. Prior to WIC § 625.6, the Public Defender was not required to provide legal consultations to juveniles absent a formal court appointment at arraignment. Now, in compliance with SB 203, law enforcement agencies across the County contact the Public Defender to arrange for legal consultation prior to juvenile custodial interrogations.

The Claimant hereby submits this Test Claim seeking to recover its costs in performing the activities of legal consultation as imposed by SB 203.

A. DESCRIPTION OF THE NEW MANDATED ACTIVITIES

SB 203 amended WIC § 625.6(a) and mandates that, prior to a custodial interrogation and before the waiver of Miranda rights, a youth 17 years of age or younger "shall consult with legal counsel in person, by telephone, or by video conference." The consultation may not be waived. Prior to WIC § 625.6, the law under the seminal case *Miranda v. Arizona* required that a person "taken into custody or otherwise deprived of his freedom of action in any significant way" must be informed of his or her constitutional rights prior to any interrogation.[1] These rights include the right to remain silent, the right against self-incrimination, and the right to an attorney or court appointed attorney, if applicable.

To comply with WIC § 625.6, law enforcement agencies in the County contact the Public Defender to arrange Miranda consultations (consultations) for juveniles prior to custodial interrogations. These contacts by law enforcement agencies are referred to by the Public Defender as Miranda Calls.[2] The Public Defender created the Juvenile Miranda Duty program to perform these consultations.[3] The Public Defender is the primary agency that provides indigent defense services to those accused of crimes and is the only agency providing consultations in the County.

The Juvenile Miranda Duty program is staffed by Public Defender attorneys who are available 24 hours a day, every day of the year.[4] The attorneys are assigned shifts that are referred to by the Public Defender as Miranda Duty. Consultations are conducted over the telephone or in person. An attorney will interview the youth and discuss with the youth his or her Miranda rights. The duration of the consultation may vary depending on various factors, including the youth's level of education, experience, maturity, and sophistication.

Pursuant to SB 203, a law enforcement agency contacts the Public Defender's Juvenile Headquarters or County Operator to arrange for a legal consultation prior to a custodial interrogation.[5] The supervising attorney then arranges the consultation or designates another attorney to handle the Miranda Call. The supervising attorneys are assigned Miranda Duty on a weekly rotating basis.

Prior to the passage of these laws, the Public Defender was not obligated to provide any representation before appointment at the arraignment stage of a criminal proceeding. Now, the Public Defender is required to provide consultations for juvenile arrestees prior to their appointment at the arraignment stage.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 46.

[2] See Declaration of Cris Mercurio

[3] See Declaration of Cris Mercurio

[4] See Declaration of Cris Mercurio

[5] See Declaration of Cris Mercurio

B. DESCRIPTION OF THE EXISTING ACTIVITIES AND COSTS MODIFIED BY THE MANDATE

Prior to SB 203, the legislature passed SB 395, which enacted WIC § 625.6 to require that, prior to a custodial interrogation and before the waiver of Miranda rights, a youth 15 years of age or younger shall consult with legal counsel. In accordance with the statute, minors age 15 and under received legal consultations prior to custodial interrogations. In these circumstances, the respective law enforcement agency would contact the Claimant's Office of Public Defender to provide legal consultation. SB 203 has extended the requirement of legal consultation to all minors age 17 and under, which has resulted in increased costs to Claimant.

C. ACTUAL INCREASED COSTS INCURRED BY THE CLAIMANT DURING THE FISCAL YEAR FOR WHICH THE TEST CLAIM WAS FILED TO IMPLEMENT THE ALLEGED MANDATE

The Claimant's increased costs to comply with the SB 203 mandates in Fiscal Year (FY) 2020-21 totaled $5,821.45. These costs exceed $1,000, pursuant to Government Code § 17564.

D. ACTUAL OR ESTIMATED ANNUAL COSTS THAT WILL BE INCURRED BY THE CLAIMANT TO IMPLEMENT THE ALLEGED MANDATE DURING THE FISCAL YEAR IMMEDIATELY FOLLOWING THE FISCAL YEAR FOR WHICH THE TEST CLAIM WAS FILED

The Claimant estimates that it will incur $13,000 in increased costs for complying with WIC § 625.6 in FY 2021-22, the fiscal year after the implementation of the mandate.

E. STATEWIDE COST ESTIMATE OF THE INCREASED COSTS THAT ALL LOCAL AGENCIES WILL INCUR TO IMPLEMENT THE MANDATE

According to the California Department of Justice, there were 25,710 juvenile arrests in 2020.[6] According to the California Assembly Appropriations Committee, the average hourly rate for attorneys in California is approximately $250.[7] Therefore, annual costs across the state for legal services will be approximately $6,427,500.[8]

[6] Juvenile Justice in California 2020 report, https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Juvenile%20Justice%20In%20CA%202020.pdf

[7] California Assembly Appropriations Committee, Senate Rules Committee, Office of Senate Floor Analyses, Bill No. 203, amended July 27, 2020.

[8] 25,710 juvenile arrests in 2020 multiplied by the $250 average hourly rate for attorneys in California equals $6,247,500

F. IDENTIFICATION OF ALL DEDICATED FUNDING SOURCES FOR THIS PROGRAM

The claimant is not aware of any State, federal, or other non-local agency funds available for this program. All the increased cost was paid and will be paid from the Claimant's General Fund appropriations.[9]

G. IDENTIFICATION OF PRIOR MANDATED DETERMINATIONS MADE BY THE BOARD OF CONTROL OR COMMISSION ON STATE MANDATES

The Claimant is not aware of any prior determination by the Board of Control or the Commission on State Mandates related to this matter.[10]

H. IDENTIFICATION OF LEGISLATIVELY DETERMINED MANDATES THAT IS ON THE SAME STATUTE OR EXECUTIVE ORDER

Claimant is not aware of any legislatively-determined mandates related to SB 203, Chapter 335, Statutes of 2020, pursuant to Government Code § 17573.[11]

II. MANDATE MEETS BOTH SUPREME COURT TESTS

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, the U.S. Supreme Court was called upon to interpret the phrase "new program or higher level of service" that was approved by the voters when Proposition 4 was passed in 1979, which added Article XIII B to the California Constitution. In reaching its decision, the Court held that:

> …the term 'higher level of service' … must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in Article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state.[12]

A program can either carry out the governmental function of providing services to the public or be a law that implements State policy that imposes unique requirements on the

[9] Declaration of Sung Lee

[10] Declaration of Sung Lee

[11] Declaration of Sung Lee

[12] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

local government that does not apply to the entire State. Only one part of this definition has to apply in order for the mandate to qualify as a program. SB 203's mandated activities meet both prongs. *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

III. MANDATE IS UNIQUE TO LOCAL GOVERNMENT

The sections of the law alleged in this Test Claim (TC) are unique to local government. The activities described in WIC § 625.6 are provided by local governmental agencies.

IV. MANDATE CARRIES OUT STATE POLICY

The new State statute, the subject of this TC, imposes a higher level of service by requiring local agencies to provide the mandated activities described in Section A of the Narrative.

V. STATE MANDATE LAW

Article XIII B § 6 of the California Constitution requires the State to provide a subvention of funds to local government agencies any time the legislature or a State agency requires the local government to implement a new program or provide a higher level of service under an existing program. Section 6 states in relevant part:

> 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 governments for the cost of such program or increased level of service . . .

The purpose of Article XIII B § 6 "is to preclude the State from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume the increased financial responsibilities because of the taxing and spending limitations that Articles XIII A and XIII B imposes."[13] This section "was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues."[14] In order to implement § 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.[15] Under this provision, the Legislature established the parameters regarding what constitutes a State-mandated cost, defining "costs mandated by the state" to include:

> …any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1,

[13] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[14] *County of Fresno, supra, 53 Cal.3d at 487.*

[15] Government Code § 17500, et seq.; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333

1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution.[16]

The new State statute, the subject of this TC, imposes a higher level of service by requiring that juveniles consult with counsel prior to custodial interrogation thereby requiring that the County provide legal consultation.

VI. STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code § 17556, which could serve to bar recovery of "costs mandated by the State", as defined in Government Code § 17556. None of the seven disclaimers apply to this TC:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statute, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. 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.

4. 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.

5. 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 costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposes duties which were expressly included in a ballot measure approved by the voters in Statewide election.

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

[16] Government Code § 17514

None of the disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement apply to this TC.

VII. CONCLUSION

SB 203 imposes State-mandated activities and costs on the Claimant. Those State-mandated costs are not exempted from the subvention requirements of § 6 of the State Constitution. There are no funding sources and the Claimant lacks authority to develop and impose fees to fund any of these new State-mandated activities. Therefore, Claimant respectfully requests that the Commission on State Mandates find that the mandated activities set forth in the TC are State mandates that require subvention under the California Constitution.

SECTION 6: DECLARATIONS

COUNTY OF LOS ANGELES TEST CLAIM

SENATE BILL 203: JUVENILES: CUSTODIAL INTERROGATION

Declaration of Cris Mercurio

I, Cris Mercurio, declare under penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I am employed by the County of Los Angeles (County) Public Defender's Office (Public Defender) and hold the title of Head Deputy. I am assigned to the Public Defender's Juvenile Division and my responsibilities include the supervision of the Public Defender's Juvenile Miranda Duty program.

2. Welfare and Institutions Code (WIC) section 625.6, effective January 1, 2018, requires that "[p]rior to custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger shall consult with legal counsel. Senate Bill (SB) 203 amended WIC § 625.6, effective January 1, 2021, to expand this requirement to youth 17 years of age or younger.

3. Prior to WIC § 625.6, the law under *Miranda v. Arizona*, 384 U.S. 436 (1966) required that a person "taken into custody or otherwise deprived of his freedom of action in any significant way" must be informed of his or her constitutional rights prior to any interrogation. These rights provide:
   a. You have the right to remain silent
   b. Anything you say can and will be used against you in a court of law
   c. You have the right to an attorney
   d. If you cannot afford an attorney, one will be appointed for you.

4. Not only must these rights be advised, but the individual must make a knowing, intelligent and voluntary waiver of those rights before an interrogation proceeds.

5. In enacting WIC § 625.6, the California Legislature recognized that children and adolescents are much more vulnerable to psychologically coercive interrogation techniques. Thus, the bills expanded the rights of juveniles beyond the Miranda decision to include a consultation with an attorney prior to any custodial interrogation or waiver of his or her Miranda rights.

6. To comply with WIC § 625.6, law enforcement agencies in the County contact the Public Defender to arrange Miranda consultations (consultations) mandated by WIC § 625.6. These contacts by law enforcement agencies are referred to by the Public Defender as Miranda Calls.

7. Prior to the passage of these laws, the Public Defender was not obligated to provide any representation until they are appointed at the arraignment stage of a criminal proceeding. Now, the Public Defender is required to provide consultations for juvenile arrestees at a point prior to their appointment at the arraignment.

8. The Public Defender created the Juvenile Miranda Duty program to perform these consultations. The Public Defender is the primary agency that provides indigent

defense services to those accused of crimes and is the only agency providing consultations in the County.

9. The Juvenile Miranda Duty program is staffed by Public Defender attorneys who are available 24 hours a day, every day of the year. The attorneys are assigned shifts that are referred to by the Public Defender as Miranda Duty.

10. Consultations are conducted over the telephone or in person. An attorney will interview the youth and discuss with the youth his or her Miranda rights. The duration of the consultation may vary depending on various factors, including the youth's level of education, experience, maturity, and sophistication.

11. The Juvenile Miranda Duty program categorizes Miranda Calls as business hours and non-business hours calls. Miranda Calls on workdays between the hours of 8 a.m. and 5 p.m. are categorized as business hours calls. Miranda Calls made on workdays between the hours of 5 p.m. and 8 a.m. and on weekends and holidays are categorized as non-business hour calls.

12. Law enforcement has been instructed to contact the Public Defender's Juvenile Headquarters for business hours Miranda Calls. An incoming Miranda Call is taken by Juvenile Headquarters staff. Juvenile Headquarters staff then send an e-mail and text message to a supervising attorney at one of the seven Juvenile Court Branches about the Miranda Call. The supervising attorney will call law enforcement to arrange the consultation or may designate another attorney to handle the Miranda Call. The supervising attorneys are assigned Miranda Duty on a weekly rotating basis.

13. Law enforcement agencies have been instructed to call the County Operator for non-business hours Miranda Calls. The County Operator is available 24 hours a day, every day of the year. The County Operator has the Public Defender's Miranda Duty assignment schedule and will contact the assigned attorney when a Miranda Call is received. The County Operator will patch the attorney through to law enforcement or will provide the attorney a telephone number where he or she can reach law enforcement. The attorney will then speak to law enforcement and arrange the consultation.

14. Non-business hours calls may be handled by any Public Defender attorney requesting Miranda Duty. Miranda Duty for non-business hours calls are divided into three shifts: 5 p.m. to 12 a.m. Monday through Sunday, 12 a.m. to 8 a.m. Monday through Sunday, and 8 a.m. to 5 p.m. on weekends and holidays. Attorneys may be assigned any of these shifts.

15. The Public Defender creates Miranda Duty consultation records in the ordinary course of business, at or near the time of the act, condition, or event. A spreadsheet for the Miranda consultations is attached as Exhibit A and

incorporated herewith. Exhibit A is also incorporated as a table in the Declaration of Sung Lee.

I have personal knowledge of the foregoing facts and information presented in this Test Claim and, if so required, I could and would testify to the statements made herein.

Executed this 16th day of November 2021 in Los Angeles, CA

Cris J. Mercurio

Cris Mercurio
Head Deputy, Juvenile Division
Public Defender's Office
County of Los Angeles

Declaration of Cris Mercurio

Fiscal Year 2020-21 Miranda Consultations Costs

Month	Cost
Jan-21	$ 581.34
Feb-21	$ 738.14
Mar-21	$ 1,283.43
Apr-21	$ 1,139.33
May-21	$ 1,057.18
Jun-21	$ 1,022.03
Total	**$ 5,821.45**

Declaration of Sung Lee

I, Sung Lee, declare under penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I am employed by the County of Los Angeles (County) Public Defender's Office and hold the title of Departmental Finance Manager II. I am responsible for oversight and management of the Fiscal/Budget Services division, including the complete and timely recovery of costs related to services mandated by the State.

2. Senate Bill (SB) 203 imposes Miranda consultation requirements for youth offenders. Under SB 203, the County is required to provide legal counsel to youths 17 years of age or younger who have been arrested and are in custody to assist in their understanding of their rights and the consequences of waiving those rights.

3. I was provided a spreadsheet by Cris Mercurio, Juvenile Head Deputy, from which I calculated costs associated with our Office's consultations, as required by the State under Welfare and Institutions Code (WIC) section 625.6. Below is a chart reflecting my calculations:

Month	Cost
Jan-21	$ 581.34
Feb-21	$ 738.14
Mar-21	$ 1,283.43
Apr-21	$ 1,139.33
May-21	$ 1,057.18
Jun-21	$ 1,022.03
Total	**$ 5,821.45**

4. The County first incurred costs related to implementing the SB 203 mandate on January 1, 2021.

5. The County has incurred $5,821.45 in Fiscal Year (FY) 2020-21 and estimates incurring $13,000 in increased costs in FY 2021-22 for complying with SB 203.

6. The County has not received any local, State, or federal funding to offset the increased direct and indirect costs associated with the mandatory provision of legal counsel to arrested or in-custody youths under 17 years of age or younger pursuant to SB 203 and will incur an estimated cost of $13,000 for FY 2021-22.

7. For the statewide cost estimate of increased costs that local agencies will incur to implement the mandated activities, the County reasonably estimates an increased cost of at least $6,427,500 for FY 2021-22 for the State.[1]

I have personal knowledge of the foregoing facts and information presented in this Test Claim and, if so required, I could and would testify to the statements made herein.

Executed this 6th day of December 2021 in Los Angeles, CA.

Sung Lee
Departmental Finance Manager II
Office of the Public Defender
County of Los Angeles

[1] According to the California Department of Justice, there were 25,710 juvenile arrests in 2020 (see https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Juvenile%20Justice%20In%20CA%202020.pdf). According to the California Assembly Appropriations Committee, the average hourly rate for attorneys in California is approximately $250. Therefore, annual costs across the state for legal services will be approximately $6,427,500 (25,710 juvenile arrests x $250).

SECTION 7: SUPPORTING DOCUMENTS

COUNTY OF LOS ANGELES TEST CLAIM

SENATE BILL 203: JUVENILES: CUSTODIAL INTERROGATION

STATE AND SENATE BILL

COMMITTEES AND RULES

CASELAW AND CODES

2019 California Senate Bill No. 203, California 2019-2020 Regular Session

CALIFORNIA BILL TEXT

TITLE: Juveniles: custodial interrogation

VERSION: Adopted
September 30, 2020
Bradford

Image 1 within document in PDF format.

SUMMARY: An act to amend Section 625.6 of the Welfare and Institutions Code, relating to juveniles.

TEXT:

Senate Bill No. 203

CHAPTER 335

An act to amend Section 625.6 of the Welfare and Institutions Code, relating to juveniles.

[Approved by Governor September 30, 2020. Filed with Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

SB 203, Bradford. Juveniles: custodial interrogation.

Existing law authorizes a peace officer to take a minor into temporary custody when that officer has reasonable cause to believe that the minor has committed a crime or violated an order of the juvenile court. In these circumstances, existing law requires the peace officer to advise the minor that anything the minor says can be used against the minor, that the minor has the right to remain silent, that the minor has the right to have counsel present during any interrogation, and that the minor has the right to have counsel appointed if the minor is unable to afford counsel. Existing law requires, until January 1, 2025, that a youth 15 years of age or younger consult with legal counsel in person, by telephone, or by video conference prior to a custodial interrogation and before waiving any of the above-specified rights. Existing law directs a court deciding the admissibility of statements made by a youth 15 years of age or younger during or after a custodial interrogation to consider the effects of failing to provide counsel before the custodial interrogation. Existing law directs the Governor to convene a panel of experts to examine the effects and outcomes of these provisions, including the appropriate age of youth to whom these provisions should apply.

This bill would instead apply these provisions to a youth 17 years of age or younger, and would indefinitely extend the operation of these provisions. The bill would direct a court to consider any willful failure of a law enforcement officer to allow a youth 17 years of age or younger to speak with counsel before a custodial interrogation in determining the credibility of that law enforcement officer, and would eliminate the above-specified provisions requiring the Governor to convene a panel of experts.

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

SECTION 1. The Legislature finds and declares all of the following:

(a) Developmental and neurological science concludes that the process of brain development continues into adulthood, and that the human brain undergoes significant changes throughout adolescence and well into young adulthood.

(b) The United States Supreme Court has recognized the following:

(1) Children are generally less mature and responsible than adults, often lacking the experience, perspective, and judgment to recognize and avoid choices that could be harmful to them.

(2) Children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.

(3) Children are generally more vulnerable to outside influences than adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it.

(c) (1) Custodial interrogation of an individual by the state requires that the individual be advised of the individual's rights and make a knowing, intelligent, and voluntary waiver of those rights before the interrogation proceeds.

(2) Youth under 18 years of age have a lesser ability than adults to comprehend the meaning of their rights and the consequences of waiving those rights.

(3) A large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions.

(d) Addressing the specific context of police interrogation, the United States Supreme Court observed that events that would have a minimal impact on an adult can overwhelm an early teen child, noting that no matter how sophisticated the child may be, the interrogation of a child cannot be compared to the interrogation of an adult.

(e) The law enforcement community now widely accepts what science and the courts have recognized: that children and adolescents are much more vulnerable to psychologically coercive interrogations and other psychologically coercive dealings with the police than resilient adults experienced with the criminal justice system.

(f) For these reasons, in situations of custodial interrogation and prior to making a waiver of rights under Miranda v. Arizona (1966) 384 U.S. 436, a youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights.

SEC. 2. Section 625.6 of the Welfare and Institutions Code is amended to read:

625.6. (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

(b) The court shall, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a) and, additionally, shall consider any willful violation of subdivision (a) in determining the credibility of a law enforcement officer under Section 780 of the Evidence Code.

(c) This section does not apply to the admissibility of statements of a youth 17 years of age or younger if both of the following criteria are met:

(1) The officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat.

(2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

(d) This section does not require a probation officer to comply with subdivision (a) in the normal performance of the probation officer's duties under Section 625, 627.5, or 628.

End of Document

190 Cal.App.3d 521 (1987)
234 Cal. Rptr. 795

CARMEL VALLEY FIRE PROTECTION DISTRICT et al., Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA et al., Defendants and Appellants. RINCON DEL DIABLO MUNICIPAL WATER DISTRICT et al., Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA et al., Defendants and Appellants. COUNTY OF LOS ANGELES, Plaintiff and Respondent,

v.

THE STATE OF CALIFORNIA et al., Defendants and Appellants.

Docket Nos. B006078, B011941, B011942.

Court of Appeals of California, Second District, Division Five.

February 19, 1987.

529 *529 COUNSEL

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Marilyn K. Mayer and Carol Hunter, Deputy Attorneys General, for Defendants and Appellants.

De Witt Clinton, County Counsel, Amanda F. Susskind, Deputy County Counsel, Ross & Scott, William D. Ross and Diana P. Scott, for Plaintiffs and Respondents.

OPINION

EAGLESON, J.

These consolidated appeals arise from three separate trial court proceedings concerning the heretofore unsuccessful efforts of various local agencies to secure reimbursement of state-mandated costs.

Case No. 2d Civ. B006078 (Carmel Valley et al. case) was the first matter decided by the trial court. The memorandum of decision in that case was judicially noticed by the trial court which heard the consolidated matters in 2d Civ. B011941 (Rincon et al. case) and 2d Civ. B011942 (County of Los Angeles case). Issues common to all three cases will be discussed
530 together *530 under the County of Los Angeles appeal, while issues unique to the other two appeals will be considered separately.

We identify the parties to the various proceedings in footnote 1.[1] For literary convenience, however, we will refer to all appellants as the State and all respondents as the County unless otherwise indicated.

APPEAL IN CASE NO. 2 CIVIL B011942

(County of Los Angeles Case)

FACTS AND PROCEDURAL HISTORY

County employs fire fighters for whom it purchased protective clothing and equipment, as required by title 8, California Administrative Code, sections 3401-3409, enacted in 1978 (executive orders). County argues that it is entitled to State reimbursement for these expenditures because they constitute a state-mandated "new program" or "higher level of service."

531 County relies on Revenue and Taxation Code section 2207[2] and former *531 section 2231,[3] and California Constitution, article XIII B, section 6[4] to support its claim.

County filed a test claim with the State Board of Control (Board) for these costs incurred during fiscal years 1978-1979 and 1979-1980.[5] After hearings were held on the matter, the Board determined on November 20, 1979, that there was a state mandate and that County should be reimbursed. State did not seek judicial review of this quasi-judicial decision of the Board.

Thereafter, a local government claims bill, Senate Bill Number 1261 (Stats. 1981, ch. 1090, p. 4191) (S.B. 1261) was introduced to provide appropriations to pay some of County's claims for these state-mandated costs. This bill was amended by the Legislature to delete all appropriations for the payment of these claims. Other claims of County not provided for in S.B. 1261 were contained in another local government claims bill, Assembly Bill Number 171 (Stats. 1982, ch. 28, p. 51) (A.B. 171). The appropriations in this bill were deleted by the Governor. Both pieces of legislation, sans appropriations, were enacted into law.[6]

On September 21, 1984, following these legislative rebuffs, County sought reimbursement by filing a petition for writ of mandate (Code Civ. Proc., § 1085) and complaint for declaratory relief. After appropriate responses were filed and a hearing was held, the court executed a judgment on February 6, 1985, granting a peremptory writ of mandate. A writ of
532 mandate was issued and other findings and orders made. It is from this judgment of *532 February 6, 1985, that State appeals. The relevant portions of the judgment are set forth verbatim below.[7]

533 *533 **CONTENTIONS**

State advances two basic contentions. It first asserts that the costs incurred by County are not state mandated because they are not the result of a "new program," and do not provide a "higher level of service." Either or both of these requirements are the sine qua non of reimbursement. Second, assuming a "new program" or "higher level of service" exists, portions of the trial court order aimed at assisting the reimbursement process were made in excess of the court's jurisdiction.

These contentions are without merit. We modify and affirm all three judgments.

DISCUSSION

I

ISSUE OF STATE MANDATE

The threshold question is whether County's expenditures are state mandated. The right to reimbursement is triggered when the local agency incurs "costs mandated by the state" in either complying with a "new program" or providing "an increased level of service of an existing program."[8] State advances many theories as to why the Board erred in concluding that these expenditures are state-mandated costs. One of these arguments is whether the executive orders are a "new program" as that phrase has been recently defined by our Supreme Court in *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46 [233 Cal. Rptr. 38, 729 P.2d 202].

534 *534 As we shall explain, State has waived its right to challenge the Board's findings and is also collaterally estopped from doing so. Additionally, although State is not similarly precluded from raising issues presented by the *State of California* case, we conclude that the executive orders are a "new program" within the meaning of article XIII B, section 6.

A. *Waiver*

(1a) We initially conclude that State has waived its right to contest the Board's findings. (2) Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so

inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived. (*Medico-Dental etc. Co.* v. *Horton & Converse* (1942) 21 Cal.2d 411, 432 [132 P.2d 457]; *Loughan* v. *Harger-Haldeman* (1960) 184 Cal. App.2d 495, 502-503 [7 Cal. Rptr. 581].) A right that is waived is lost forever. (*L.A. City Sch. Dist.* v. *Landier Inv. Co.* (1960) 177 Cal. App.2d 744, 752 [2 Cal. Rptr. 662].) The doctrine of waiver applies to rights and privileges afforded by statute. (*People* v. *Murphy* (1962) 207 Cal. App.2d 885, 888 [24 Cal. Rptr. 803].)

(1b) State now contends to be an aggrieved party and seeks to dispute the Board's findings. However, it failed to seek judicial review of that November 20, 1979 decision (Code Civ. Proc., § 1094.5) as authorized by former Revenue and Taxation Code section 2253.5. The three-year statute of limitations applicable to such review has long since passed. (*Green* v. *Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal. Rptr. 206, 624 P.2d 256]; Code Civ. Proc., § 338, subd. 1.)

In addition, State, through its agents, acquiesced in the Board's findings by seeking an appropriation to satisfy the validated claims. (Former Rev. & Tax. Code, § 2255, subd. (a).) On September 30, 1981, S.B. 1261 became law. On February 12, 1982, A.B. 171 was enacted. Appropriations had been stripped from each bill. State did not then seek review of the Board determinations even though time remained before the three-year statutory period expired. This inaction is clearly inconsistent with any intent to contest the validity of the Board's decision and results in a waiver.

B. *Administrative Collateral Estoppel*

(3a) We next conclude that State is collaterally estopped from attacking the Board's findings. (4) Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In order for the doctrine to
535 apply, the issues in the two proceedings must *535 be the same, the prior proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. (*People* v. *Sims* (1982) 32 Cal.3d 468, 484 [186 Cal. Rptr. 77, 651 P.2d 321].)

The doctrine was extended in *Sims* to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent criminal case. Our Supreme Court held that collateral estoppel applies to such prior adjudications where three requirements are met: (1) the administrative agency acted in a judicial capacity; (2) it resolved disputed issues properly before it; and (3) all parties were provided with the opportunity to fully and fairly litigate their claims. (*Id.* at p. 479.) All of the elements of administrative collateral estoppel are present here.

(3b) The Board was created by the state Legislature to exercise quasi-judicial powers in adjudging the validity of claims against the State. (*County of Sacramento* v. *Loeb* (1984) 160 Cal. App.3d 446, 452 [206 Cal. Rptr. 626].) At the time of the hearings, the Board proceedings were the sole administrative remedy available to local agencies seeking reimbursement for state-mandated costs. (Former Rev. & Tax. Code, § 2250.) Board examiners had the power to administer oaths, examine witnesses, issue subpoenas, and receive evidence. (Gov. Code, § 13911.) The hearings were adversarial in nature and allowed for the presentation of evidence by the claimant, the Department of Finance, and any other affected agency. (Former Rev. & Tax. Code, § 2252.)

The record indicates that the state mandate issues in this case were fully litigated before the Board. A representative of the state Division of Occupational Safety and Health and the Department of Industrial Relations testified as to why County's costs were not state mandated. Representatives of the various claimant fire districts in turn offered testimony contradicting that view. The proceedings culminated in a verbatim transcript and a written statement of the basis for the Board's decision.

State complains, however, that some of the traditional elements of the collateral estoppel doctrine are missing. In particular, State argues that it was not a party to the Board hearings and was not in privity with those state agencies which did participate.

(5) "[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]" (*Lerner* v. *Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398 [29 Cal. Rptr. 657, 380 P.2d 97].) (3c) As we stated in our introduction of the parties in this case, the party
536 *536 known as "State" is merely a shorthand reference to the various state agencies and officials named as defendants below. Each of these defendants is an agent of the State of California and had a mutual interest in the Board proceedings. They are thus in privity with those state agencies which did participate below (e.g., Occupational Safety and Health Division).

It is also clear that even though the question of whether a cost is state mandated is one of law (*City of Merced* v. *State of California* (1984) 153 Cal. App.3d 777, 781 [200 Cal. Rptr. 642]), subsequent litigation on that issue is foreclosed here. (6) A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice. (*City of Los Angeles* v. *City of San Fernando* (1975) 14 Cal.3d 199, 230 [123 Cal. Rptr. 1, 537 P.2d 1250]; *Beverly Hills Nat. Bank* v. *Glynn* (1971) 16 Cal. App.3d 274, 286-287 [93 Cal. Rptr. 907]; Rest.2d Judgments, § 28, p. 273.)[9]

(3d) Here, the basic issues of state mandate and the amount of reimbursement arose out of County's required compliance with the executive orders. In either forum — Board or court — the claims and the evidentiary and legal determination of their validity would be considered in similar fashion.

Furthermore, a determination of conclusiveness would not work an injustice. As we have noted, the Board was statutorily created to consider the validity of the various claims now being litigated. Processing of reimbursement claims in this manner was the only administrative remedy available to County. If we were to grant State's request and review the Board's determination de novo, we would, in any event, adhere to the well-settled principle of affording "great weight" to "the contemporaneous administrative construction of the enactment by those charged with its enforcement...." (*Coca-Cola Co.* v. *State Bd. of Equalization* (1945) 25 Cal.2d 918, 921 [156 P.2d 1].)

There is no policy reason to limit the application of the collateral estoppel doctrine to successive court proceedings. In *City and County of San Francisco* v. *Ang* (1979) 97 Cal. App.3d 673, 679 [159 Cal. Rptr. 56], the doctrine was applied to bar relitigation in a subsequent civil proceeding of a zoning issue previously decided by a city board of permit appeals. We similarly hold that the questions of law decided by the Board are binding in all of the subsequent civil proceedings presented
537 here. State therefore is collaterally *537 estopped to raise the issues of state mandate and amount of reimbursement in this appeal.

C. *Executive Orders — A "New Program" Under Article XIII B, Section 6*

(7) The recent decision by our Supreme Court in *County of Los Angeles* v. *State of California, supra,* 43 Cal.3d at p. 49 presents a new issue not previously considered by the Board or the trial court. That question is whether the executive orders constitute the type of "program" that is subject to the constitutional imperative of subvention under article XIII B, section 6.[10] We conclude that they are.

In *State of California,* the Court concluded that the term "program" has two alternative meanings: "programs that carry out the governmental function of providing services to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Id.* at p. 56, italics added.) Although only one of these findings is necessary to trigger reimbursement, both are present here.

(8) First, fire protection is a peculiarly governmental function. (*County of Sacramento* v. *Superior Court* (1972) 8 Cal.3d 479, 481 [105 Cal. Rptr. 374, 503 P.2d 1382].) "Police and fire protection are two of the most essential and basic functions of local government." (*Verreos* v. *City and County of San Francisco* (1976) 63 Cal. App.3d 86, 107 [133 Cal. Rptr. 649].) This classification is not weakened by State's assertion that there are private sector fire fighters who are also subject to the executive orders. Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function.[11]

538 *538 The second, and alternative, prong of the *State of California* definition is also satisfied. The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting.

These facts are distinguishable from those presented in *State of California.* There, the court held that a state-mandated increase in workers' compensation benefits did not require state subvention because the costs incurred by local agencies were only an incidental impact of laws that applied generally to all state residents and entities (i.e., to all workers and all

governmental and nongovernmental employers). Governmental employers in that setting were indistinguishable from private employers who were obligated through insurance or direct payment to pay the statutory increases.

State of California only defined the scope of the word "program" as used in California Constitution, article XIII B, section 6. We apply the same interpretation to former Revenue and Taxation Code section 2231 even though the statute was enacted much earlier. The pertinent language in the statute is identical to that found in the constitutional provision and no reason has been advanced to suggest that it should be construed differently. In any event, a different interpretation must fall before a constitutional provision of similar import. (*County of Los Angeles* v. *Payne* (1937) 8 Cal.2d 563, 574 [66 P.2d 658].)

II

ISSUE OF WHETHER COURT ORDERS EXCEEDED ITS JURISDICTION

A. *The Court Has Not Ordered an Appropriation in Violation of the Separation of Powers Doctrine*

(9) State begins its general attack on the judgment by citing the long-standing principle that a court order which directly compels the Legislature to appropriate funds or to pay funds not yet appropriated violates the separation of powers doctrine. (Cal. Const., art. III, § 3; art. XVI, § 7; *Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal. Rptr. 841, 629 P.2d 935].)[12]
539 State *539 observes (and correctly so) that the relevant constitutional (art. XIII B, § 6) and statutory (Rev. & Tax. Code, § 2207 & former § 2231) provisions are not appropriations measures. (See *City of Sacramento* v. *California State Legislature* (1986) 187 Cal. App.3d 393, 398 [231 Cal. Rptr. 686].) Since State otherwise discerns no manifest legislative intent to appropriate funds to pay County's claims (*City & County of S.F.* v. *Kuchel* (1948) 32 Cal.2d 364, 366 [196 P.2d 545]), it concludes that the judgment unconstitutionally compels performance of a legislative act.

State further argues that the judiciary's ability to reach an existing agency-support appropriation (State Department of Industrial Relations) (fn. 7, ¶ 1, *ante*) has been approved in only two contexts. First, the court can order payment from an existing appropriation, the expenditure of which has been legislatively prohibited by an unconstitutional or unlawful restriction. (*Committee to Defend Reproductive Rights* v. *Cory* (1982) 132 Cal. App.3d 852, 856 [183 Cal. Rptr. 475].) Second, once an adjudication has finally determined the rights of the parties, the court may compel satisfaction of the judgment from a current unexpended, unencumbered appropriation which administrative agencies routinely have used for the purpose in question. (*Mandel* v. *Myers, supra,* 29 Cal.3d at p. 544.) State insists that these facts are not present here.

County rejoins that a writ of traditional mandate (Code Civ. Proc., § 1085) is the correct method of compelling State to perform a clear and present ministerial legal obligation. (*County of Sacramento* v. *Loeb, supra,* 160 Cal. App.3d at pp. 451-452.) The ministerial obligation here is contained in California Constitution, article XIII B, section 6 and in Revenue and Taxation Code section 2207 and former section 2231. These provisions require State to reimburse local agencies for state-mandated costs.

We reject State's general characterization of the judgment by noting that it only affects an existing appropriation. It declares (fn. 7, ¶ 1, *ante*) that only funds already "*appropriated* by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund" shall be spent for reimbursement of County's state-mandated costs. (Italics added.) There is absolutely no language purporting to require the Legislature to enact appropriations or perform any other act that might violate separation of powers principles. (10) By simply ordering the State Controller to draw warrants and directing the State Treasurer to pay on already appropriated funds (fn. 7, ¶ 2, *ante*), the judgment permissibly compels performance of a ministerial duty: "[O]nce funds have already been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or
540 other similar official to make appropriate expenditures *540 from such funds. [Citations.]" (*Mandel* v. *Myers, supra,* 29 Cal.3d at p. 540.)

As we will discuss in further detail below, the subject funds (fn. 7, ¶ 1, *ante*) were saddled with an unconstitutional restriction (fn. 7, ¶ 7, *ante*). However, *Mandel* establishes that such a restriction does not necessarily infect the entire appropriation. There, the Legislature had improperly prohibited the use of budget funds to pay a court-ordered and administratively

approved attorney's fees award. The court reasoned that as long as appropriated funds were "reasonably available for the expenditures in question, the separation of powers doctrine poses no barrier to a judicial order directing the payment of such funds." (*Id.* at p. 542.) The court went on to find that money in a general "operating expenses and equipment" fund was, by both the Budget Act's terms and prior administrative practice, reasonably available to pay the attorney's fees award.

Contrary to State's argument, *Mandel* does not require that past administrative practice support a judgment for reimbursement from an otherwise available appropriation. Although there was evidence of a prior administrative practice of paying counsel fees from funds in the "operating expenses and equipment" budget, this fact was not the main predicate of the court's holding. Rather, the decisive factor was that the budget item in question functioned as a "catchall" appropriation in which funds were still reasonably available to satisfy the State's adjudicated debt. (*Id.* at pp. 543-544.)

Another illustration of this principle is found in *Serrano* v. *Priest* (1982) 131 Cal. App.3d 188 [182 Cal. Rptr. 387]. Plaintiffs in that case secured a judgment against the State of California for $800,000 in attorney's fees. The judgment was not paid, and subsequent proceedings were brought against State to satisfy the judgment. The trial court directed the State Controller to pay the $800,000 award, plus interest, from funds appropriated by the Legislature for "operating expenses and equipment" of the Department of Education, Superintendent of Public Instruction and State Board of Education. (*Id.* at p. 192.) This court affirmed that order even though there was no evidence that the agencies involved had ever paid court-ordered attorney's fees from that portion of the budget. Relying on *Mandel,* we concluded that funds were reasonably available from appropriations enacted in the Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent budget acts.

(11) State also incorrectly asserts that the appropriations affected by the court's order must specifically refer to the particular expenditure in question in order to be available. This notion was summarily dismissed in *Mandel* v. *Myers, supra,* 29 Cal.3d
541 at pp. 543-544. Likewise, in *Committee to Defend* *541 *Reproductive Rights* v. *Cory, supra,* 132 Cal. App.3d at pp. 857-858, the court decreed that payments for Medi-Cal abortions could properly be ordered from monies appropriated for other Medi-Cal services, even though this use had been specifically prohibited by the Legislature.

Applying these various principles here, we note that the judgment (fn. 7, ¶ 2, *ante*) identified funds in account numbers XXXX-XXX-XXX, XXXX-XXX-XXX, XXXX-XXX-XXX and XXXX-XXX-XXX as being available for reimbursement. Within these 1984-1985 account appropriations for the Department of Industrial Relations were monies for Program 40, the Prevention of Industrial Injuries and Deaths of California Workers. The evidence clearly showed that the remaining balances on hand would cover the cost of reimbursement. Since it is conceded that the fire fighting protective clothing and equipment in this case was purchased to prevent deaths and injuries to fire fighters, these funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of costs incurred by County and are therefore reasonably available for reimbursement.

B. *Legislative Disclaimers, Findings and Budget Control Language Are No Defense to Reimbursement*

As a general defense against the order to reimburse, State insists that the Legislature has itself concluded that the claimed costs are not reimbursable. This determination took the combined form of disclaimers, findings and budget control language. State interprets this self-serving legislation, as well as the legislative and gubernatorial deletions, as forever sweeping away State's obligation to reimburse the state-mandated costs at issue. Consequently, any order that ignores these restrictions on payment would amount to a court-ordered appropriation. As we shall conclude, these efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly.

The seminal legislation that gave rise to the 1978 executive orders was enacted by Statutes 1973, chapter 993, and is labeled the California Occupational Safety and Health Act (Cal/OSHA). It is modeled after federal law and is designed to assure safe working conditions for all California workers. A legislative disclaimer appearing in section 106 of that bill reads: "No appropriation is made by this act ... for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on...." The stated reason for this decision not to appropriate was that the cost of implementing the act was "minimal on a statewide basis in relation to the effect on local tax rates." (Stats. 1973, ch. 993, § 106, p. 1954.)

542 *542 Again, in 1974, the Legislature stated: "Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section, nor shall there be an appropriation made by this act, because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations." (Stats. 1974, ch. 1284, § 106, p. 2787.) This statute amended section 106 of Statutes 1973, chapter 993, and was a post facto change in the stated legislative rationale for not providing reimbursement.

Presumably because of the large number of reimbursement claims being filed, the Legislature subsequently used budget control language to confirm that compliance with the executive orders should not trigger reimbursement. Some of this legislation was effective September 30, 1981, as part of a local agency and school district reimbursement bill. The control language provided that "[t]he Board of Control shall not accept, or submit to the Legislature, any more claims pursuant to ... Sections 3401 to 3409, inclusive, of Title 8 of the California Administrative Code." (Stats. 1981, ch. 1090, § 3, p. 4193.)[13]

Further control language was inserted in the 1981, 1983 and 1984 Budget Acts. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This language prohibits encumbering appropriations to reimburse costs incurred under the executive orders, except under certain limited circumstances.

(12a) State first challenges the trial court's finding that expenditures mandated by the executive orders were not the result of a federally mandated program (fn. 7, ¶ 8, *ante*), despite the legislative finding in Statutes 1974, chapter 1284, section 106. We agree with the court's decision that there was no federal mandate.

The significance of this no-federal-mandate finding is revealed by examining past changes in the statutory definition of state-mandated costs. As thoroughly discussed in *City of Sacramento* v. *State of California* (1984) 156 Cal. App.3d 182, 196-197 [203 Cal. Rptr. 258] disapproved on other grounds in *County of Los Angeles* v. *State of California, supra,* 43 Cal.3d at p. 58, fn. 10, the concept of federally mandated costs has provided local agencies with a financial escape valve ever since passage of the "Property Tax Relief Act of 1972." (Stats. 1972, ch. 1406, § 1, p. 2931.) That act limited local governments' power to levy property taxes, while requiring that they be reimbursed by the State for providing compulsory
543 increased levels of service or *543 new programs. However, under Revenue and Taxation Code section 2271, "costs mandated by the federal government" were not subject to reimbursement and local governments were permitted to levy taxes in addition to the maximum property tax rate to pay such costs.

On November 6, 1979, the limitation on local government's ability to raise property taxes, and the duty of the State to reimburse for state-mandated costs, became a part of the California Constitution through the initiative process. Article XIII B, section 6, enacted at that time, directs state subvention similar in nature to that required by the preexisting provisions of Revenue and Taxation Code section 2207 and former section 2231. As a defense against this duty to reimburse local agencies, the Legislature began to insert disclaimers in bills which mandated costs on local agencies. It also amended Revenue and Taxation Code section 2206 to expand the definition of nonreimbursable "costs mandated by the federal government" to include the following: "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state."

In applying this definition here, State offers nothing more than the bare legislative finding contained in Statutes 1974, chapter 1284, section 106. State contends that a federally mandated cost cannot, by definition, be a state-mandated cost. Therefore, if the cost is federally mandated, local agency reimbursement is not required. (13) (See fn. 14.) Although State's argument is correct in the abstract, neither the facts nor federal law supports the underlying assumption that there is a federal mandate.[14]

(12b) Both the Board and the court had in evidence a letter from a responsible official of the federal Occupational Safety and Health Administration (OSHA). The letter emphasizes the independence of state and federal OSHA standards: "OSHA does not have jurisdiction over the fire departments of any political subdivision of a state whether the state has elected to have its own state plan under the OSHA act or not.... [¶] More specifically, in 1978, the State of California promulgated
544 standards applicable to fire departments in California. Therefore, California standards, rather than *544 federal OSHA standards, are applicable to fire departments in that state...." This theme is also reflected in a section of OSHA which expressly disclaims jurisdiction over local agencies such as County. (29 U.S.C. § 652(5).) Accordingly, as a matter of law, there are no federal standards for local government structural fire fighting clothing and equipment.

In short, while the Legislature's enactment of Cal/OSHA to comply with federal OSHA standards is commendable, it certainly was not compelled. Consequently, County's obedience to the 1978 executive orders is not federally mandated.

(14a) The trial court also properly invalidated the budget control language in Statutes 1981, chapter 1090, section 3 (fn. 7, ¶ 7, *ante*) because it violated the single subject rule.[15] This legislative restriction purported to make the reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231 unavailable to County.

(15) The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in the statute's title. The rule's primary purpose is to prevent "log-rolling" in the enactment of laws. This disfavored practice occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which otherwise might not have passed had the legislative mind been directed to them. (*Planned Parenthood Affiliates* v. *Swoap* (1985) 173 Cal. App.3d 1187, 1196 [219 Cal. Rptr. 664].) However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose. (*Metropolitan Water Dist.* v. *Marquardt* (1963) 59 Cal.2d 159, 172-173 [28 Cal. Rptr. 724, 379 P.2d 28].)

(14b) The stated purpose of chapter 1090 is to increase funds available for reimbursing certain claims. It describes itself as an "act making an appropriation to pay claims of local agencies and school districts for additional reimbursement for specified state-mandated local costs, awarded by the State Board of Control, and declaring the urgency thereof, to take
545 effect immediately." (Stats. 1981, ch. 1090, p. 4191.) There is nothing in this introduction *545 alerting the reader to the fact that the bill prohibits the Board from entertaining claims pursuant to the Cal/OSHA executive orders. The control language does not modify or repeal these orders, nor does it abrogate the necessity for County's continuing compliance therewith. It simply places County's claims reimbursement process in limbo.

This special appropriations bill is similar in kind to appropriations in an annual budget act. Observations that have been made in connection with the enactment of a budget bill are appropriate here. "[T]he annual budget bill is particularly susceptible to abuse of [the single subject] rule. `History tells us that the general appropriation bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage. If a rider can be attached to it, the rider can be adopted on the merits of the general appropriation bill without having to depend on its own merits for adoption.' [Citation.]" (*Planned Parenthood Affiliates* v. *Swoap, supra,* 173 Cal. App.3d at p. 1198.) Therefore, the annual budget bill must only concern the subject of appropriations to support the annual budget and may not constitutionally be used to substantively amend or change existing statutory law. (*Association for Retarded Citizens* v. *Department of Developmental Services* (1985) 38 Cal.3d 384, 394 [211 Cal. Rptr. 758, 696 P.2d 150].) We see no reason to apply a less stringent standard to a special appropriations bill. Because the language in chapter 1090 prohibiting the Board from processing claims does not reasonably relate to the bill's stated purpose, it is invalid.

(16) The budget control language in chapter 1090 is also invalid as a retroactive disclaimer of County's right to reimbursement for debts incurred in prior years. This legislative technique was condemned in *County of Sacramento* v. *Loeb, supra,* 160 Cal. App.3d at p. 446. There, the Legislature had enacted a Government Code section which prohibited using appropriations for any purpose which had been denied by any formal action of the Legislature. The State attempted to use this code section to uphold a special appropriations bill which had deleted County's Board-approved claims for costs which were incurred prior to the enactment of the code section. The court held that the code section did not apply retroactively to defeat County's claims: "A retroactive statute is one which relates back to a previous transaction and gives that transaction a legal effect different from that which it had under the law when it occurred.... `Absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively.'" (*Id.* at p. 459, quoting *Robinson* v. *Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal. App.3d 907, 912 [159 Cal. Rptr. 791].) Similarly, the control language in chapter 1090 does not apply retroactively to County's prior, Board-approved claims.

546 *546 (17) Finally, the control language in section 28.40 of the 1981 Budget Act and section 26.00[16] of the 1983 and 1984 Budget Acts does not work to defeat County's claims. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This section is comprised of both substantive and procedural provisions. We are concerned primarily with those portions that purport to exonerate State from its constitutionally and statutorily imposed obligation to reimburse County's state-mandated costs.

The writ of mandate directed compliance with the procedural provisions of these sections and is not a point of dispute on appeal. Subsection (a) affords the Legislature one last opportunity to appropriate funds which are to be encumbered for the purpose of paying state-mandated costs, an invitation repeatedly rejected. Subsection (b) directs that the Department of Finance notify the chairpersons of the appropriate committees in each house and chairperson of the Joint Legislative Budget Committee of the need to encumber funds. Presumably, the objective of this procedure is to give the Legislature another opportunity to amend or repeal substantive legislation requiring local agencies to incur state-mandated costs. Again, the Legislature declined to act. Legislative action pursuant to subsection (b) could arguably ameliorate the plight of local agencies prospectively, but would be of no practical assistance to a local agency creditor seeking reimbursement for costs already incurred.

The first portion of each section, however, imposes a budgetary restriction on encumbering appropriated funds to reimburse for state-mandated costs arising out of compliance with the executive orders, absent a specific appropriation pursuant to subparagraph (b). For the reasons stated above, this substantive language is invalid under the single subject rule. It attempts to amend existing statutory law and is unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget. (*Association for Retarded Citizens* v. *Department of Developmental Services, supra,* 38 Cal.3d at p. 394.) Now unfettered by invalid restrictions, the appropriations involved in this case are reasonably available for reimbursement.

547 *547 **C. *The Legislature's Plenary Power to Regulate Worker Safety Does Not Affect the Right to Reimbursement***

(18) State contends that article XIV, section 4 of the California Constitution vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system. It postulates that the Legislature may determine that the interest in worker safety and health is furthered by requiring local agencies to bear the costs of safety devices. This non sequitur is advanced without citation of authority.

Article XIV, section 4 concerns the power to enact workers' compensation statutes and regulations. It does not focus on the issue of reimbursement for state-mandated costs, which is covered by Revenue and Taxation Code section 2207 and former section 2231, and article XIII B, section 6. Since these latter provisions do not effect a pro tanto repeal of the Legislature's plenary power over workers' compensation law (see *County of Los Angeles* v. *State of California, supra,* 43 Cal.3d 46), they do not conflict with article XIV, section 4.

Moreover, even though the reimbursement issue has come before the Legislature repeatedly since 1972, no law has been enacted to exempt compliance with workers' compensation executive orders from the mandatory reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231. Likewise, article XIII B, section 6 does not provide an exception to the obligation to reimburse local agencies for compliance with these safety orders.

D. *Pre-1980 Claims Are Reimbursable Under Article XIII B, Section 6, Effective July 1, 1980*

(19) State further argues that to the extent County's claims for fiscal years 1978-1979 and 1979-1980 are predicated on the subvention provisions of article XIII B, section 6, they fall within a "window period" of nonreimbursement. This assertion emanates from section 6, subdivision (c), which states that the Legislature "[m]ay, but need not," provide reimbursement for mandates enacted before January 1, 1975. State reasons that because the constitutional amendment did not become effective until July 1, 1980, claims for costs incurred between January 1, 1975 and June 30, 1980, need not be reimbursed.

This notion was rejected in *City of Sacramento* v. *State of California, supra,* 156 Cal. App.3d at p. 182 on behalf of local agencies seeking reimbursement of unemployment insurance costs mandated by a 1978 statute. Basing its decision on
548 well-settled principles of constitutional interpretation *548 and upon a prior published opinion of the Attorney General, the court interpreted section 6, subdivision (c) as follows: "[T]he Legislature *may* reimburse mandates enacted prior to January 1, 1975, and *must* reimburse mandates passed after that date, but does not have to begin such reimbursement until the effective date of article XIII B (July 1, 1980)." (*Id.* at p. 191, italics in original.) In other words, the amendment operates on "window period" mandates even though the reimbursement process may not actually commence until later.

We agree with this reasoning and find costs incurred by County under the 1978 executive orders subject to reimbursement under the Constitution.

E. *Claims Under Revenue and Taxation Code Section 2207 and Former Section 2231 Are Not Time-barred*

(20) Sate collaterally asserts that to the extent County bases its claims on Revenue and Taxation Code section 2207 and former section 2231, they are barred by Code of Civil Procedure sections 335 and 338, subdivision 1. This omnibus challenge to the order directing payment has no merit.

Code of Civil Procedure section 335 is a general introductory section to the statute of limitations for all matters except recovery of real property. Code of Civil Procedure section 338, subdivision 1 requires "[a]n action upon a liability created by statute" to be commenced within three years.

A claimant does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete. (*County of Contra Costa* v. *State of California* (1986) 177 Cal. App.3d 62, 77 [222 Cal. Rptr. 750].) Here, County pursued its remedy before the Board and prevailed. Thereafter, as required by law, appropriate legislation was introduced. Both the Board hearings and the subsequent efforts to secure legislative appropriations were part of the legislative process. (Former Rev. & Tax. Code, § 2255, subd. (a).) It was not until the legislation was enacted sans appropriations on September 30, 1981 (S.B. 1261) and February 12, 1982 (A.B. 171) that it became unmistakably clear that this process had ended and State had breached its duty to reimburse. At these respective moments of breach, County's right of action in traditional mandamus accrued. County's petition was filed on September 21, 1984, within the three-year statutory period.[17] (*Lerner* v. *Los Angeles City Board of Education, supra*, 59 Cal.2d at p. 398.)

549 *549 ## F. *Government Code Section 17612's Remedy for Unfunded Mandates Does Not Supplant the Court's Order*

State continues its general attack on the order directing payment by arguing that the Legislature has "defined" the remedy available to a local agency if a mandate is unfunded. That remedy is found in Government Code section 17612, subdivision (b) and reads: "If the Legislature deletes from a local government claims bill funding for a mandate, the local agency ... *may* file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Italics added.) (See also former Rev. & Tax. Code, § 2255, subd. (c), eff. Oct. 1, 1982.)

State hints that this procedure is the only remedy available to a local agency if funding is not provided. At oral argument, State admitted that this declaration of enforceability and injunction against enforcement would be prospective only. This remedy would provide no relief to local agencies which have complied with the executive orders.

We conclude that Government Code section 17612, subdivision (b) is inapplicable here because it did not become operative until January 1, 1985. It was not in place when the Board rendered its decision on November 20, 1979; when funding was deleted from S.B. 1261 (Sept. 30, 1981) and A.B. 171 (Feb. 12, 1982); or when this litigation commenced on September 21, 1984. (21) A party is not required to exhaust a remedy that was not in existence at the time the action was filed. (*Ross* v. *Superior Court* (1977) 19 Cal.3d 899, 912, fn. 9 [141 Cal. Rptr. 133, 569 P.2d 727].) To abide by this post facto legislation now would condone legislative interference in a specific controversy already assigned to the judicial branch for resolution. (*Serrano* v. *Priest, supra,* 131 Cal. App.3d at p. 201.)

Also, this remedy is purely a discretionary course of action. By using the permissive word "may," the Legislature did not intend to override article XIII B, section 6 and Revenue and Taxation Code section 2207 and former section 2231. These constitutional and statutory imprimaturs each impose upon the State an obligation to reimburse for state-mandated costs. Once that determination is finally made, the State is under a clear and present ministerial duty to reimburse. In the absence of compliance, traditional mandamus lies. (Code Civ. Proc., § 1085.)[18]

550 *550 ## G. *The Court's Order Properly Allows County the Right of Offset*

(22a) As the first in a series of objections to portions of the judgment which assist in the reimbursement process, State argues that the court has improperly authorized County to satisfy its claims by offsetting fines and forfeitures due to State. (Fn. 7, ¶ 5, *ante.*) The fines and forfeitures are those found in Penal Code sections 1463.02, 1463.03, 1463.5a and 1464; Government Code sections 13967, 26822.3 and 72056; Fish and Game Code section 13100; Health and Safety Code section 11502; and Vehicle Code sections 1660.7, 42004 and 41103.5.[19]

Broadly speaking, these statutes require County to periodically transfer all or part of the fines and forfeitures collected by it for specified law violations to the State Treasury. They are to be held there "to the credit" of various state agencies, or for payment into specific funds. State contends that since these statutes require mandatory, regular transfers and do not expressly permit diversion for other purposes, the court had no power to allow County to offset. State cites no authority for this contention.

(23) The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike a balance, holding himself owing or entitled only to the net difference. (*Kruger* v. *Wells Fargo Bank* (1974) 11 Cal.3d 352, 362 [113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266].) Although this doctrine exists independent of statute, its governing principle has been partially codified (Code Civ. Proc., § 431.70) (limited to cross-demands for money).

The doctrine has been applied in favor of a local agency against the State. In *County of Sacramento* v. *Lackner* (1979) 97 Cal. App.3d 576 [159 Cal. Rptr. 1], for example, the court of appeal upheld a trial court's decision to grant a writ of mandate that ordered funds awarded the County under a favorable judgment to be offset against its current liabilities to the State under the Medi-Cal program. The court stated that such an order does not interfere with the "Legislature's control over the `submission, approval and enforcement of budgets....'" (*Id.* at p. 592, quoting Cal. Const., art. IV, § 12, subd. (e).)

(22b) The order herein likewise does not impinge upon the Legislature's exclusive power to appropriate funds or control
551 budget matters. The identified *551 fines and forfeitures are collected by the County for statutory law violations. Some of these funds remain with the County, while others are transferred to the State. State's portions are uncertain as to amount and date of transfer. State does not come into actual possession of these funds until they are transferred. State's holding of these funds "to the credit" of a particular agency, or for payment to a specific fund, does not commence until their receipt. Until that time, they are unencumbered, unrestricted and subject to offset.

H. *State's Use of its Statutory Offset Authority Was Properly Enjoined*

(24) State further contends that the trial court exceeded its jurisdiction by enjoining the exercise of State's statutory offset authority until County is fully reimbursed. (Fn. 7, ¶ 11, *ante.*)[20] This order complemented that portion of the order discussed, *infra,* which allowed County to temporarily offset fines and forfeitures as an aid in the reimbursement process.

State correctly observes that it has not unlawfully used its offset authority during the course of this dispute. However, State has not needed to do so because it has adopted other means of avoiding payment on County's claims. In view of State's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating County's collection efforts from occurring. (See *County of Los Angeles* v. *State of California* (1984) 153 Cal. App.3d 568 [200 Cal. Rptr. 394].)

I. *The Injunction Against Reversion or Dissipation of Undisbursed Appropriations Is Proper*

(25) State continues that the order (fn. 7, ¶ 4, *ante*) enjoining it from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy this court's judgment, violates Government Code section 16304.1.[21] This section reverts undisbursed
552 *552 balances in any appropriation to the fund from which the appropriation was made. No authority is cited for State's proposition. To the contrary, *County of Sacramento* v. *Loeb, supra,* 160 Cal. App.3d at pp. 456-457 expressly confirms this type of ancillary remedy as a legitimate exercise of the court's authority to assist in collecting on an adjudicated debt, the payment of which has been delayed all too long.

That portion of the order restraining reversion is particularly innocuous because it only affects undisbursed balances in an appropriation. At the time of reversion, it is crystal clear that these remaining funds are unneeded for the primary purpose for which appropriated; otherwise, they would not exist. Moreover, that portion of the order restraining dissipation of the reimbursement award sum in a manner that would make it unavailable to satisfy a court's judgment is similarly a proper exercise of the court's authority. By not reimbursing County for the state-mandated costs, State would be contravening its constitutional and statutory obligations to subvent. To the extent it is not reimbursed, County would be compelled, contrary to law, to bear the cost of complying with a state-imposed obligation.

J. *The Auditor Controller and the Specified Funds Are Not Indispensable Parties*

(26), (27) State next contends that the Auditor Controller of Los Angeles County and the "specified" fines and forfeitures County was allowed to offset are indispensable parties. Failure to join them in the action or to serve them with process purportedly renders the trial court's order void as in excess of its jurisdiction.[22] State cites only the general statutory definition of an indispensable party (Code Civ. Proc., § 389) to support this assertion.

553 The Auditor Controller is an officer of the County and is subject to the *553 direction and control of the County board of supervisors. (Gov. Code, §§ 24000, subds. (d), (e), 26880; L.A. County Code, § 2.10.010.) He is indirectly represented in these proceedings because his principal, the County, is the party litigant. Additionally, he claims no personal interest in the fines and forfeitures and his pro forma absence in no way impedes complete relief.

The funds created by the collected fines and forfeitures also are not indispensable parties. This is not an in rem proceeding, and the ownership of a particular stake is not in dispute. Rather, this is an action to compel a ministerial obligation imposed by law. Complete relief may be afforded without including the specified funds as a party.

K. *County is Entitled to Interest*

(28) State insists that an award of interest to County unfairly penalizes State for not paying claims which it was prohibited by law from paying under Statutes 1981, chapter 1090, section 3. This argument is unavailing.

Civil Code section 3287, subdivision (a) allows interest to any person "entitled to recover damages certain, or capable of being made certain by calculation...." Interest begins on the day that the right to recover vests in the claimant. By its own terms, this section applies to any judgment debtor, "including the state ... or any political subdivision of the state."

The judgment orders interest at the legal rate from September 30, 1981, for reimbursement funds originally contained in S.B. 1261, and from February 12, 1982, for the funds originally contained in A.B. 171. These are the respective dates that the bills were enacted without appropriations. As we concluded earlier, County's cause of action did not arise and its right to recover did not vest until this legislative process was complete. County offers no authority to suggest that any other vesting date is appropriate.

Furthermore, State cannot avoid its obligation to pay interest by relying on the invalid budget control language in Statutes 1981, chapter 1090, section 3. "An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a)." (*Olson* v. *Cory* (1983) 35 Cal.3d 390, 404 [197 Cal. Rptr. 843, 673 P.2d 720].)

APPEAL IN CASE NO. 2 CIVIL B011941

(Rincon et al. Case)

The procedural history and legal issues raised in the *Rincon et al.* appeal are essentially similar to those discussed in the County of Los Angeles matter.

554 *554 County, although not a party to this underlying trial court proceeding, filed a test claim with the Board. All parties agree that County represented the interests of the named respondents here.

The Board action resulted in a finding of state-mandated costs. It further found that Rincon et al. were entitled to reimbursement in the amount of $39,432. After the Legislature and the Governor, respectively, deleted the funding from the two appropriations bills, S.B. 1261 and A.B. 171, Rincon et al. filed a petition for writ of mandate and declaratory relief. This action was consolidated for hearing in the trial court with the action in B011942 (County of Los Angeles matter). The within judgment was also signed, filed and entered on February 6, 1985. The reimbursement order was directed against the 1984-1985 budget appropriations. State appeals from that judgment.

The court here included a judicial determination that the Board, or its successors, hear and approve the claims of certain other respondents for costs incurred in connection with the state-mandated program. (Fn. 7, ¶ 9, *ante.*) This special directive was necessary because the claims of these respondents (petitioners below) have not yet been determined.[23] Since we have ruled that State is barred by the doctrines of waiver and administrative collateral estoppel from raising the state mandate issue, the validity of these claims becomes a question of law susceptible to but one conclusion, and mandamus properly lies. (*County of Sacramento* v. *Loeb, supra,* 160 Cal. App.3d at p. 453.) This portion of the order also underscores, for the Board's edification, the determination that the statutory restriction on the Board authority to proceed is invalid.[24]

Once again, our determinations and conclusions in the County of Los Angeles matter are equally applicable here.

APPEAL IN CASE NO. 2 CIVIL B006078

(Carmel Valley et al.)

Again, the procedural history and legal issues raised in this appeal are essentially similar to those discussed in the County of Los Angeles matter.

County filed a test claim with the Board. All parties agree that the County represented the interests of the named respondents here.

555 *555 On December 17, 1980, the Board found that a state mandate existed and that specific amounts of reimbursement were due several respondents totaling $159,663.80. Following the refusal of the Legislature to appropriate funds for reimbursement, Carmel Valley et al. filed a petition for writ of mandate and declaratory relief on January 3, 1983. Judgment was entered on May 23, 1984. The reimbursement order was directed against 1983-1984 budget appropriations.

The judgment differs from the other two because it does not decree a specific reimbursement amount. The trial court determined that even though the Board had approved the claims, the State was not precluded from contesting that determination. The court's reasons were that the State, in its answer, had denied that the money claimed was actually spent, and that Board approval had not been implemented by subsequent legislation. The court concluded that the reimbursement process, of which the Board action was an intrinsic part, was "aborted."

We disagree with this portion of the court's analysis. The moment S.B. 1261 and A.B. 171 were enacted into law without appropriations, Carmel Valley et al. had exhausted their administrative remedies and were entitled to seek a writ of mandate. At the time of trial, State was barred by the doctrines of waiver and administrative collateral estoppel from contesting the state mandate issue or the amount of reimbursement. The trial court therefore should have rendered a judgment for the amount of reimbursement. Having failed to do so, this fact-finding responsibility falls upon this court. Although we ordinarily are not equipped to handle this function, the writ of mandate in this case identifies the amount of the approved claims as $159,663.80. We accordingly will amend the judgment to reflect that amount.

The trial court also predicated its judgment for Carmel Valley et al. solely on the basis of Revenue and Taxation Code section 2207 and former section 2231. In doing so, the court did not have the benefit of the decision in *City of Sacramento* v. *State of California, supra,* 156 Cal. App.3d at p. 182.[25] That case held that mandates passed after January 1, 1975, must be reimbursed pursuant to article XIII B, section 6 of the California Constitution, but that reimbursement need not

commence until July 1, 1980. In light of this rule, we conclude that the trial court's decision ordering reimbursement is also supported by article XIII B, section 6.

556 *556 State raises another point specific to this particular appeal. In its answer to the writ petition, State admitted that the local agency expenditures were state mandated. Consequently, the issue was not contested at the trial court level. However, State vigorously contends here that it is not bound by its trial court admissions because the state mandate issue is purely a question of law.

(29) State is correct in contending that an appellate court is not limited by the interpretation of statutes given by the trial court. (*City of Merced* v. *State of California, supra,* 153 Cal. App.3d at p. 781.) However, State's victory on this point is Pyrrhic. Regardless of how the issue is characterized, State is precluded from contesting the Board findings on appeal because of the independent application of the doctrines of waiver and administrative collateral estoppel. These doctrines would also have applied at the trial court level if State's answer had raised the issue of state mandate in the first instance.

We also reject State's argument, advanced for the first time on appeal, that the executive orders of 1978 initially implement legislation enacted prior to January 1, 1975, and that state reimbursement is therefore discretionary. (Cal. Const., art. XIII B, § 6, subd. (c).) Again, State is barred by the doctrines of waiver and administrative collateral estoppel from arguing that costs incurred under the executive orders are not subject to reimbursement.

State continues that the *Carmel Valley* judgment against the Department of Industrial Relations is erroneous. Since the department was never made a party in the suit, nor served with process, the resulting judgment reflects a denial of due process and is in excess of the court's jurisdiction. (See Code Civ. Proc., § 389; fn. 22, *ante.*)

This assertion is but a variant of the same argument advanced in the County of Los Angeles case, *supra,* which we rejected as meritless. The department is part of the State of California. (Lab. Code, § 50.) State extensively argued the department's position and even offered into evidence a declaration from the chief of fiscal accounting of the department. As stated earlier, agents of the same government are in privity with each other. (*People* v. *Sims, supra,* 32 Cal.3d at p. 487.)

Ross v. *Superior Court, supra,* 19 Cal.3d at p. 899 demonstrates how, through the notion of privity, a government agent can be held in contempt for knowingly violating a court order issued against another agent of the same government. There, a court in an earlier proceeding had decided that defendant Department of Health and Welfare must pay unlawfully withheld
557 welfare benefits to qualified recipients. The County Board of Supervisors, *557 who were not parties to this action, knew about the court's order but refused to comply. The Supreme Court affirmed a trial court decision holding the Board in contempt for violating the order directing payment. The court reasoned that, as an agent of the Department of Health and Welfare, the Board did not collectively or individually need to be named as a party in order to be bound by a court order of which they had actual knowledge.

The determinations and conclusions in the County of Los Angeles case are likewise applicable here.

MODIFICATION OF JUDGMENTS IN ALL THREE APPEALS

The trial court judgments ordering reimbursement from specific account appropriations were entered many months ago. We will affirm these judgments and thereby validate the trial courts' determination that funds already appropriated for the State Department of Industrial Relations were reasonably available for payment at the time of the courts' orders.

Due to the passage of time, we requested State at oral argument to confirm whether the appropriations designated in the respective judgments are still available for encumbrance. State's counsel responded by rearguing that the weight of the evidence did not support the trial courts' findings that specific funds were reasonably available for reimbursement. Counsel further hinted that the funds may not actually be available.

We hope that counsel for the State is mistaken. But in order to emphasize our strong and unequivocal determination that the local agency petitioners be promptly reimbursed, we will take judicial notice of the enactment of the 1985-1986 Budget Act (Stats. 1985, ch. 111) and the 1986-1987 Budget Act (Stats. 1986, ch. 186). (*Serrano* v. *Priest, supra,* 131 Cal. App.3d at p. 197.) Both acts appropriate money for the State Department of Industrial Relations and fund the identical account numbers referred to in the trial courts' judgments. They are:

Account Numbers	*1985-1986 Budget Act*	*1986-1987 Budget Act*
XXXX-XXX-XXX	$94,673,000	$106,153,000
XXXX-XXX-XXX	2,295,000	2,514,000
XXXX-XXX-XXX	2,859,000	2,935,000
XXXX-XXX-XXX	16,753,000	17,864,000

(30) An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. (*Serrano* v. *Priest*, *supra*, 131 Cal. App.3d at pp. 198, 201.) We do so here with respect to all three judgments.

558 *558 **DISPOSITION**

2d Civ. B011942 (*County of Los Angeles Case*)

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The words "Fish and Game Code Section 13100" are deleted from paragraph 5.

(3) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

2d Civ. B011941 (*Rincon et al. Case*)

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

2d Civ. B006078 (*Carmel Valley et al. Case*)

The judgment is modified as follows:

559 *559 (1) The following sentences are added to paragraph 2: "The reimbursement amounts total $159,663.80. If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

Ashby, Acting P.J., and Hastings, J., concurred.

A petition for a rehearing was denied March 17, 1987, and appellants petition for review by the Supreme Court was denied May 14, 1987. Eagleson, J., did not participate therein.

[1] *2d Civ. B006078:* The petitioners below and respondents on appeal are Carmel Valley Fire Protection District, City of Anaheim, Aptos Fire Protection District, Citrus Heights Fire Protection District, Fair Haven Fire Protection District, City of Glendale, City of San Luis Obispo, County of Santa Barbara and Ventura County Fire Protection District.

The respondents below and appellants here are State of California, Kenneth Cory and Jesse Marvin Unruh.

2d Civ. B011941: The petitioners below and respondents on appeal are Rincon Del Diablo Municipal Water District, Twenty-Nine Palms Water District, Alpine Fire Protection District, Bonita-Sunnyside Fire Protection District, Encinitas Fire Protection District, Fallbrook Fire Protection District, City of San Luis Obispo, Montgomery Fire Protection District, San Marcos Fire Protection District, Spring Valley Fire Protection District, Vista Fire Protection District and City of Coronado.

Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, State Board of Control, Kenneth Cory, State Controller, Jesse Marvin Unruh, State Treasurer, and Mark H. Bloodgood, Auditor-Controller, County of Los Angeles.

2d Civ. B011942: The County of Los Angeles is the petitioner below and respondent on appeal. Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, Kenneth Cory, and Jesse Marvin Unruh.

All respondents on appeal are conceded to be "local agencies," as defined in Revenue and Taxation Code section 2211.

[2] The pertinent parts of Revenue and Taxation Code section 2207 provide: "`Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program; [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program; [¶] (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973...."

[3] The pertinent parts of former Revenue and Taxation Code section 2231, subdivision (a) provide: "The state shall reimburse each local agency for all `costs mandated by the state', as defined in Section 2207." This section was repealed (Stats. 1986, ch. 879, § 23), and replaced by Government Code section 17561. We will refer to the earlier code section.

[4] The pertinent parts of section 6, article XIII B of the California Constitution, enacted by initiative measure, provide: "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: [¶]... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." This constitutional amendment became effective July 1, 1980.

[5] County filed its test claim pursuant to former Revenue and Taxation Code section 2218, which was repealed by Statutes 1986, chapter 879, section 19.

Additionally, the Board is no longer in existence. The Commission on State Mandates has succeeded to these functions. (Gov. Code, §§ 17525, 17630.)

[6] The final legislation did include appropriations for other local agencies on other types of approved claims.

[7] "1. The Court adjudges and declares that funds appropriated by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund may properly be and should be spent for the reimbursement of state-mandated costs incurred by Petitioner as established in this action.

"2. A peremptory writ of mandamus shall issue under the seal of this Court, commanding Respondent State of California, through its Department of Finance, to give notification in writing as specified in Section 26.00 of the Budget Act of 1984 (Chapter 258, Statutes of 1984) of the necessity to encumber funds in conformity [with] this order and, unless the Legislature approves a bill that would enact a general law, within 30 days of said notification that would obviate the necessity of such payment, Respondent Kenn[e]th Cory, the State Controller of the State of California, or his successors in office, if any, shall draw warrants on funds appropriated for the State Department of Industrial Relations for the 1984-85 Budget Year in account numbers XXXX-XXX-XXX, XXXX-XXX-XXX, XXXX-XXX-XXX, and XXXX-XXX-XXX as implemented in Chapter 258 Statutes of 1984, sufficient to satisfy the claims of Petitioner, plus interest, as set forth in the motion and accompanying writ of mandamus. Said writ shall also issue against Jessie [*sic*] Marvin Unruh, the State Treasurer of the State of California, and his successors in office, if any, commanding him to make payment on the warrants drawn by Respondent Kenneth Cory.

"3. Pending the final disposition of this proceeding, or the payment of the applicable reimbursement claims and interest as set forth herein, Respondents, and each of of [*sic*] them, their successors in office, agents, servants and employees and all persons acting in concert [or] participation with them, are hereby enjoined and restrained from directly or indirectly expending from the 1984-85 General Fund Budget of the State Department of Industrial Relations as is more particularly described in paragraph number 2 hereinabove, any sums greater than that which would leave in said budget at the conclusion of the 1984-85 fiscal year an amount less than the reimbursement amounts on the aggregate amount of $307,685 in this case, together with interest at the legal rate through payment of said reimbursement amounts. Said amounts are hereinafter referred to collectively as the `reimbursement award sum'.

"4. Pending the final disposition of this proceeding or the payment of the reimbursement award sum at issue herein, Respondents, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are

hereby enjoined and restrained from directly or indirectly reverting the reimbursement award sum from the General Fund line-item accounts of the Department of Industrial Relations to the General Funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"5. In addition to the foregoing relief, Petitioner is entitled to offset amounts sufficient to satisfy the claims of Petitioner, plus interest, against funds held by Petitioner as fines and forfeitures which are collected by the local Courts, transferred to the Petitioner and remitted to Respondents on a monthly basis. Those fines and forfeitures are levied, and their distribution provided, as set forth in Penal Code Sections 1463.02, 1463.03, 14[6]3.5[a], and 1464; Government Code Sections 13967, 26822.3 and 72056, Fish and Game Code Section 13100; Health and Safety Code Section 11502 and Vehicle Code Sections 1660.7, 42004, and 41103.5.

"6. The Court adjudges and declares that the State has a continuing obligation to reimburse Petitioner for costs incurred in fiscal years subsequent to its claim for expenditures in the 1978-79 and 1979-80 fiscal years as set forth in the petition and the accompanying motion for the issuance of a writ of mandate.

"7. The Court adjudges and declares that deletion of funding and prohibition against accepting claims for expenditures incurred as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 as contained in Section 3 of Chapter 109[0], Statutes of 1981 were invalid and unconstitutional.

"8. The Court adjudges and declares that the expenditures incurred by Petitioner as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 were not the result of any federally mandated program.

"9. A peremptory writ of mandamus shall issue under the seal of this Court commanding Respondent State Board of Control, or its successor-in-interest, to hear and approve the claims of Petitioner for costs incurred in complying with the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 subsequent to fiscal year 1979-80.

".... ....

"11. The Court adju[d]ges and declares that the State Respondents are prohibited from offsetting, or attempting to implement an offset against moneys due and owing Petitioner until Petitioner is completely reimbursed for all of its costs in complying with the state mandate of Title 8, California Administrative Code Sections 3401 through 3409."

[8] This language is taken from Revenue and Taxation Code section 2207 and former section 2231. Article XIII B, section 6 refers to "higher" level of service rather than "increased" level of service. We perceive the intent of the two provisions to be identical. The parties also use these words interchangeably.

[9] As it happened, the entire Board determination involved a question of law since the dollar amount of the claimed reimbursement was not disputed.

[10] State is not precluded from raising this new issue on appeal. Questions of law decided by an administrative agency invoke the collateral estoppel doctrine only when a determination of conclusiveness will not work an injustice. Likewise, the doctrine of waiver is inapplicable if a litigant has no actual or constructive knowledge of his rights. Since the *State of California* rule had not been announced at the time of the Board or trial court proceedings herein, the doctrines of waiver and collateral estoppel are inapplicable to State on this particular issue. Both parties have been afforded additional time to brief the matter.

[11] County suggests that to the extent private fire brigades exist, they are customarily part-time individuals who perform the function on a part-time basis. As such, they are excluded by the balance of the definitional term in title 8, California Administrative Code section 3402, which provides, in pertinent part: "... The term [fire fighter] does not apply to emergency pick-up labor or other persons who may perform first-aid fire extinguishment as collateral to their regular duties."

[12] Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Article XVI, section 7 of the California Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."

[13] When Governor Brown deleted the appropriations from A.B. 171, he stated that he was relying on the pronouncements in Statutes 1974, chapter 1284 and Statutes 1981, chapter 1090.

[14] We address this subject only because the trial court found that the costs were not federally mandated. Actually, State cannot raise this issue on appeal because of the waiver and administrative collateral estoppel doctrines. We note, however, where there is a quasi-judicial finding that a cost is state mandated, there is an implied finding that the cost is not federally mandated; the two concepts are mutually exclusive.

Moreover, our task is aided by the fact that interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility. (*City of Sacramento* v. *State of California*, *supra*, 156 Cal. App.3d at pp. 196-197.)

[15] Article IV, section 9 of the California Constitution reads: "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."

[16] Each of these sections contains the following language: "No funds appropriated by this act shall be encumbered for the purpose of funding any increased state costs or local governmental costs, or both such costs, arising from the issuance of an executive order as defined in section 2209 of the Revenue and Taxation Code or subject to the provisions of section 2231 of the Revenue and Taxation Code, unless (a) such funds to be encumbered are appropriated for such purpose, or (b) notification in writing of the necessity of the encumbrance of funds available to the state agency, department, board, bureau, office, or commission is given by the Department of Finance, at least 30 days before such encumbrance is made, to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee, or such lesser time as the chairperson of the committee, or his or her designee, determines."

[17] Technically, State has waived the statute of limitations defense because it was not raised in its answer. (*Ventura County Employees' Retirement Association* v. *Pope* (1978) 87 Cal. App.3d 938, 956 [151 Cal. Rptr. 695].)

[18] We leave undecided the question of whether this type of legislation could ever be held to override California Constitution, article XIII B, section 6. The Constitution of the State is supreme. Any statute in conflict therewith is invalid. (*County of Los Angeles* v. *Payne*, *supra*, 8 Cal.2d at p. 574.)

Similarly, former Revenue and Taxation Code section 2255, subdivision (c) cannot abrogate the constitutional directive to reimburse.

[19] At oral argument, County conceded that the order authorizing offset of Fish and Game Code section 13100 fines and forfeitures is inappropriate. These collected funds must be spent exclusively for protection, conservation, propagation or preservation of fish, game, mollusks, or crustaceans, and for administration and enforcement of laws relating thereto, or for any such purpose. (Cal. Const., art. XVI, § 9; 20 Ops. Cal. Atty. Gen. 110 (1952).)

[20] Government Code section 12419.5 provides: "The Controller may, in his discretion, offset any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The Controller may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant.... The amount due any person or entity from the state or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided." (See also *Tyler* v. *State of California* (1982) 134 Cal. App.3d 973, 975-976 [185 Cal. Rptr. 49].)

[21] Government Code section 16304.1 provides: "Disbursements in liquidation of encumbrances may be made before or during the two years following the last day an appropriation is available for encumbrance.... Whenever, during [such two-year period], the Director of Finance determines that the project for which the appropriation was made is completed and that a portion of the appropriation is not necessary for disbursements, such portion shall, upon order of the Director of Finance, revert to and become a part of the fund from which the appropriation was made. Upon the expiration of two years ... following the last day of the period of its availability, the undisbursed balance in any appropriation shall revert to and become a part of the fund from which the appropriation was made...."

[22] Code of Civil Procedure section 389, subdivision (a) provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

[23] Responding to the budget control language directing it to refuse to process these claims, the Board declined to hear these matters.

[24] Because certain claims have not yet been processed, we assume that the issue of the amount of reimbursement may still be at large. Our record is not clear on this point.

[25] The decision in *City of Sacramento, supra,* was filed just one day before the trial court signed the written order in this case. The Revenue and Taxation Code sections on which the court relied were operational before the costs claimed in this case were incurred.

CITATION 43 CAL.3D 46

County of Los Angeles v. State of California

County of Los Angeles v. State of California (1987) 43 Cal.3d 46 , 729 P.2d 202; 233 Cal.Rptr. 38

[L.A. No. 32106. Supreme Court of California. January 2, 1987.]

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents.

CITY OF SONOMA et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

(Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

COUNSEL

De Witt W. Clinton, County Counsel, Paula A. Snyder, Senior Deputy County Counsel, Edward G. Pozorski, Deputy County Counsel, John W. Witt, City Attorney, Kenneth K. Y. So, Deputy City Attorney, William D. Ross, Diana P. Scott, Ross & Scott and Rogers & Wells for Plaintiffs and Appellants.

James K. Hahn, City Attorney (Los Angeles), Thomas C. Bonaventura and Richard Dawson, Assistant City Attorneys, and Patricia V. Tubert, Deputy City Attorney, as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and Martin H. Milas, Deputy Attorneys General, for Defendants and Respondents.

Laurence Gold, Fred H. Altshuler, Marsha S. Berzon, Gay C. Danforth, Altshuler & Berzon, Charles P. Scully II, Donald C. Carroll, Peter Weiner, Heller, Ehrman, White & McAuliffe, Donald C. Green, Terrence S. Terauchi, Manatt, Phelps, Rothenberg & Tunney and Clare Bronowski as Amici Curiae on behalf of Defendants and Respondents.

OPINION

GRODIN, J.

We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. [1] We conclude that when the voters

adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or [43 Cal.3d 50] increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "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." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning. fn. 1

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which [43 Cal.3d 51] employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $231 per week to $262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from $55,000 to $75,000. No appropriation for increased state-mandated costs was made in this legislation. fn. 2

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207. fn. 3 They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to pay the increased benefits until the state provided reimbursement.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly [43 Cal.3d 52] excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost

of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $73.50 to $168, and the maximum from $262.50 to $336. For permanent partial disability the weekly wage was raised from a minimum of $45 to $105, and from a maximum of $105 to $210, in each case for injuries occurring on or after January 1, 1984. (Lab. Code, § 4453.) A $10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, § 4553), and the maximum death benefit was raised from $75,000 to $85,000 for deaths in 1983, and to $95,000 for deaths on or after January 1, 1984. (Lab. Code, § 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[n]otwithstanding section 6 of Article XIIIB of the California Constitution and section 2231 ... of the Revenue and Taxation Code." (Stats. 1982, ch. 922, § 17, p. 3372.) fn. 4

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or [43 Cal.3d 53] section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings (Lab. Code, § 3202.5); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (Lab. Code, §§ 3601-3602); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (Lab. Code, § 4551.)

The court also held: "[T]he changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" fn. 5 described in subdivision (a) of Revenue and Taxation Code section 2207. The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of section 2231 in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and

the failure of the Legislature by statute or the electorate in article XIII B to readopt the [43 Cal.3d 54] definition must be treated as reflecting an intent to change the law. (Eu v. Chacon (1976) 16 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289].) fn. 6 On that basis the court concluded that increased costs were no longer tantamount to an increased level of service.

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions. fn. 7

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law ... which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code § 2207.) As noted, however, the definition of that term which had been [43 Cal.3d 55] included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced section 2164.3 in 1973, was repealed and a new section 2231 enacted. (Stats. 1975. ch. 486, §§ 6 & 7, p. 999.) fn. 8 Prior to repeal, Revenue and Taxation Code section 2164.3, and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that ""Increased level of service' means any requirement mandated by state law or executive regulation ... which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

[2] Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (Lake Forest Community Assn. v. County of Orange (1978) 86 Cal.App.3d 394, 402 [150 Cal.Rptr. 286]; see also Eu v. Chacon, supra, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post–1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been [43 Cal.3d 56] aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

[3] In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. (ITT World Communications, Inc. v. City and County of San Francisco (1985) 37 Cal.3d 859, 866 [210 Cal.Rptr. 226, 693 P.2d 811].) In section 6, the electorate commands that the state reimburse local agencies for the cost of any "new

program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

[4] Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to force programs on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not [43 Cal.3d 57] for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]; Big Sur Properties v. Mott (1976) 63 Cal.App.3d 99, 105 [132 Cal.Rptr. 835].) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (Rev. & Tax. Code, §§ 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote. fn. 9 Certainly no such intent is reflected in the language or history of article XIII B or section 6.

[5] We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation [43 Cal.3d 58] benefits that employees of private individuals or organizations receive. fn. 10 Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from

private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See Lab. Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

[6] Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (Clean Air Constituency v. California State Air Resources Bd. (1974) 1 Cal.3d 801, 813-814 [114 Cal.Rptr. 577, 523 P.2d 617]; Serrano v. Priest (1971) 5 Cal.3d 584, 596 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (Legislature v. Deukmejian (1983) 34 Cal.3d 658, 676 [194 Cal.Rptr. 781, 669 P.2d 17].)

Our concern over potential conflict arises because article XIV, section 4, fn. 11 gives the Legislature "plenary power, unlimited by any provision of [43 Cal.3d 59] this Constitution" over workers' compensation. Although seemingly unrelated to workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural [43 Cal.3d 60] limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIII B would restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with and reflects the principle applied by this court in Hustedt v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 329 [178 Cal.Rptr. 801, 636 P.2d 1139]. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article XIV,

section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal pro tanto' of any state constitutional provisions which conflicted with that [43 Cal.3d 61] amendment. (Subsequent Etc. Fund. v. Ind. Acc. Com. (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686, 695, [151 P. 398].) A pro tanto repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization of the objectives of the new article. (Methodist Hosp. of Sacramento v. Saylor (1971) 5 Cal.3d 685, 691–692 [97 Cal.Rptr. 1, 488 P.2d 161]; cf. City and County of San Francisco v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 103, 115–117 [148 Cal.Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power -- the disciplining of attorneys -- that otherwise rests exclusively with this court?" (Hustedt v. Workers' Comp. Appeals Bd., supra, 30 Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

[7] A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (Huntington Park Redevelopment Agency v. Martin (1985) 38 Cal.3d 100, 109–110 [211 Cal.Rptr. 133, 695 P.2d 220].) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage -- costs which all employers must bear -- neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in [43 Cal.3d 62] benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal -- whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims

lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Bird, C. J., Broussard, J., Reynoso, J., Lucas, J., and Panelli, J., concurred.

MOSK, J.

I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither article XIII B, section 6, of the Constitution nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living [43 Cal.3d 63] adjustment. I agree with the Court of Appeal that this was permissible.

FN 1. The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[T]he initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates. ...

The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [¶] (1) will not allow the state government to force programs on local governments without the state paying for them."

FN 2. The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.

Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $510 on which to base benefits, an unspecified appropriation was included.

FN 3. The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

FN 4. The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

FN 5. The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

FN 6. The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, ante). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (Cf. California Employment Stabilization Co. v. Payne (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.

The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

FN 7. We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See Code Civ. Proc. § 1094.5, subd. (f).)

FN 8. Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218-2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[t]he state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (County of Orange v. Flournoy (1974) 42 Cal.App.3d 908, 913 [117 Cal.Rptr. 224].)

FN 9. Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 228 [149 Cal.Rptr. 239, 583 P.2d 1281].)

FN 10. The Court of Appeal reached a different conclusion in City of Sacramento v. State of California (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

FN 11. Section 4: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the

course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

15 Cal.4th 68, 931 P.2d 312, 61 Cal.Rptr.2d 134, Med & Med GD (CCH) P 45,112, 97 Cal. Daily Op. Serv. 1555, 97 Daily Journal D.A.R. 2296
Supreme Court of California

COUNTY OF SAN DIEGO, Cross-complainant and Respondent,
v.
THE STATE OF CALIFORNIA et al., Cross-defendants and Appellants.

No. S046843.
Mar 3, 1997.

SUMMARY

After a county's unsuccessful administrative attempts to obtain reimbursement from the state for expenses incurred through its County Medical Services (CMS) program, and after a class action was filed on behalf of CMS program beneficiaries seeking to enjoin termination of the program, the county filed a cross-complaint and petition for a writ of mandate (Code Civ. Proc., § 1085) against the state, the Commission on State Mandates, and various state officers, to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service). The county alleged that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The trial court found that the state had an obligation to fund the county's CMS program. (Superior Court of San Diego County, No. 634931, Michael I. Greer, * Harrison R. Hollywood, and Judith D. McConnell, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D018634, affirmed the judgment of the trial court insofar as it provided that Cal. Const., art. XIII B, § 6, required the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required the county to spend at least $41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. The Court of Appeal remanded to the commission to determine the reimbursement amount and appropriate statutory remedies.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it held that the exclusion of medically indigent adults from Medi-Cal imposed a mandate on the county within the meaning of Cal. Const., art. XIII B, § 6. The Supreme Court reversed the judgment insofar as it held that the state required the county to spend at least $41 million on the CMS ***69** program in fiscal years 1989-1990 and 1990-1991, and remanded the matter to the commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c), Welf. & Inst. Code, §§ 10000, 17000) forced the county to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which the county was entitled. The court held that the trial court had jurisdiction to adjudicate the county's mandate claim, notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The court also held that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. The court further held that there was a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide the medical care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000, or be struck down as void by the courts. The court also held that the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the commission to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its CMS program. (Opinion by Chin, J., with

George, C. J., Mosk, and Baxter, JJ., Anderson, J.,* and Aldrich, J.,† concurring. Dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program.
***70** Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), 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 Cal. Const., arts. XIII A and XIII B, impose. With certain exceptions, Cal. Const., art. XIII B, § 6, essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

(2a, 2b)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Jurisdiction--With Pending Test Claim.
The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under Cal. Const., art. XIII B, § 6 (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering the futility exception to the exhaustion requirement, given that the commission rejected the other county's claim.

(3)
Administrative Law § 99--Judicial Review and Relief--Administrative Mandamus--Jurisdiction--As Derived From Constitution.
The power of superior courts to perform mandamus review of administrative decisions derives in part from Cal. Const., art. VI, § 10. ***71** That section gives the Supreme Court, Courts of Appeal, and superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." The jurisdiction thus vested may not lightly be deemed to have been destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

(4)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided

prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe rules (Welf. & Inst. Code, § 14000.2), and Medi-Cal was administered by state departments and agencies.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

(5a, 5b)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards-- ***72** Eligibility.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000 (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although Welf. & Inst. Code, § 17000, does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under Welf. & Inst. Code, § 17000. The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. (Disapproving *Bay General Community Hospital v. County of San Diego* (1984) 156 Cal.App.3d 944 [203 Cal.Rptr. 184] insofar as it holds that a county's responsibility under Welf. & Inst. Code, § 17000, extends only to indigents as defined by the county's board of supervisors, and suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of Welf. & Inst. Code, § 17000, but do not qualify for Medi-Cal.)

(6)
Public Aid and Welfare § 4--County Assistance--Counties' Discretion.
Counties may exercise their discretion under Welf. & Inst. Code, § 17001 (county board of supervisors or authorized agency shall adopt standards of aid and care for indigent and dependent poor), only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose (Gov. Code, § 11374). Despite the counties' statutory discretion, courts have consistently invalidated county welfare regulations that fail to meet statutory requirements. ***73**

(7)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Service.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. Welf. & Inst. Code, § 17000, mandates that medical care be provided to indigents, and Welf. & Inst. Code, § 10000, requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing Welf. & Inst. Code, § 17000, have

held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, Health & Saf. Code, § 1442.5, former subd. (c), also spoke to the level of services that counties had to provide under Welf. & Inst. Code, § 17000, requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. (Disapproving *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706] to the extent it held that Health & Saf. Code, § 1442.5, former subd. (c), was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that services in the county were reduced.)

(8)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Minimum Required Expenditure.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), in which the trial court found that the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults mandated a reimbursable new program entitling the county to reimbursement, the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the Commission on State Mandates to determine the amount of any reimbursement due, erred in finding the county ***74** had a minimum required expenditure on its County Medical Services (CMS) program. The Court of Appeal relied on Welf. & Inst. Code, former § 16990, subd. (a), which set forth the financial maintenance-of-effort requirement for counties that received California Healthcare for the Indigent Program (CHIP) funding. However, counties that chose to seek CHIP funds did so voluntarily. Thus, Welf. & Inst. Code, former § 16990, subd. (a), did not mandate a minimum funding requirement. Nor did Welf. & Inst. Code, former § 16991, subd. (a)(5), establish a minimum financial obligation. That statute required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its allocation from various sources was less than the funding it received under Welf. & Inst. Code, § 16703, for 1988-1989. Nothing about this requirement imposed on the county a minimum funding requirement.

(9)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Proper Mandamus Proceeding:Mandamus and Prohibition § 23--Claim Against Commission on State Mandates.
In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under Code Civ. Proc., § 1085, was not an improper vehicle for challenging the commission's position. Mandamus under Code Civ. Proc., § 1094.5, commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under Code Civ. Proc., § 1085, as one brought under Code Civ. Proc., § 1094.5, and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, § 6, was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate. ***75**

COUNSEL
Daniel E. Lungren, Attorney General, Charlton G. Holland III, Assistant Attorney General, John H. Sanders and Richard T. Waldow, Deputy Attorneys General, for Cross-defendants and Appellants.
Lloyd M. Harmon, Jr., County Counsel, John J. Sansone, Acting County Counsel, Diane Bardsley, Chief Deputy County Counsel, Valerie Tehan and Ian Fan, Deputy County Counsel, for Cross-complainant and Respondent.

CHIN, J.

Section 6 of article XIII B of the California Constitution (section 6) requires the State of California (state), subject

to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henever the Legislature or any state agency mandates a new program or higher level of service ...." In this action, the County of San Diego (San Diego or the County) seeks reimbursement under section 6 from the state for the costs of providing health care services to certain adults who formerly received medical care under the California Medical Assistance Program (Medi-Cal) (see Welf. & Inst. Code, § 14063) [1] because they were medically indigent, i.e., they had insufficient financial resources to pay for their own medical care. In 1979, when the electorate adopted section 6, the state provided Medi-Cal coverage to these medically indigent adults without requiring financial contributions from counties. Effective January 1, 1983, the Legislature excluded this population from Medi-Cal. (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357.) Since that date, San Diego has provided medical care to these individuals with varying levels of state financial assistance.

To resolve San Diego's claim, we must determine whether the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" on San Diego within the meaning of section 6. The Commission on State Mandates (Commission), which the Legislature created to determine claims under section 6, has ruled that section 6 does not apply to the Legislature's action and has rejected reimbursement claims like San Diego's. (See *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 330, fn. 2 [285 Cal.Rptr. 66, 814 P.2d 1308] (*Kinlaw*).) The trial court and Court of Appeal in this case disagreed with the Commission, finding that San Diego was entitled to reimbursement. The state seeks ***76** reversal of this finding. It also argues that San Diego's failure to follow statutory procedures deprived the courts of jurisdiction to hear its claim. We reject the state's jurisdictional argument and affirm the finding that the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" within the meaning of section 6. Accordingly, we remand the matter to the Commission to determine the amount of reimbursement, if any, due San Diego under the governing statutes.

I. Funding of Indigent Medical Care

Before the start of Medi-Cal, "the indigent in California were provided health care services through a variety of different programs and institutions." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3 (Preliminary Report).) County hospitals "provided a wide range of inpatient and outpatient hospital services to all persons who met county indigency requirements whether or not they were public assistance recipients. The major responsibility for supporting county hospitals rested upon the counties, financed primarily through property taxes, with minor contributions from" other sources. (*Id.* at p. 4.)

Medi-Cal, which began operating March 1, 1966, established "a program of basic and extended health care services for recipients of public assistance and for medically indigent persons." (*Morris v. Williams* (1967) 67 Cal.2d 733, 738 [63 Cal.Rptr. 689, 433 P.2d 697] (*Morris*); *id.* at p. 740; see also Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 103.) It "represent[ed] California's implementation of the federal Medicaid program (42 U.S.C. §§ 1396-1396v), through which the federal government provide[d] financial assistance to states so that they [might] furnish medical care to qualified indigent persons. [Citation.]" (*Robert F. Kennedy Medical Center v. Belshé* (1996) 13 Cal.4th 748, 751 [55 Cal.Rptr.2d 107, 919 P.2d 721] (*Belshé*).) "[B]y meeting the requirements of federal law," Medi-Cal "qualif [ied] California for the receipt of federal funds made available under title XIX of the Social Security Act." (*Morris*, *supra*, 67 Cal.2d at p. 738.) "Title [XIX] permitted the combination of the major governmental health care systems which provided care for the indigent into a single system financed by the state and federal governments. By 1975, this system, at least as originally proposed, would provide a wide range of health care services for all those who [were] indigent regardless of whether they [were] public assistance recipients ...." (Preliminary Rep., *supra*, at p. 4; see also Act of July 30, 1965, Pub.L. No. 89-97, § 121(a), 79 Stat. 286, reprinted in 1965 U.S. Code ***77** Cong. & Admin. News, p. 378 [states must make effort to liberalize eligibility requirements "with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources"].) [2]

However, eligibility for Medi-Cal was initially limited only to persons linked to a federal categorical aid program by age (at least 65), blindness, disability, or membership in a family with dependent children within the meaning of the Aid to Families with Dependent Children program (AFDC). (See Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of

1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.) pp. 548, 550 (1971 Legislative Analyst's Report).) Individuals possessing one of these characteristics (categorically linked persons) received full benefits if they actually received public assistance payments. (*Id.* at p. 550.) Lesser benefits were available to categorically linked persons who were only medically indigent, i.e., their income and resources, although rendering them ineligible for cash aid, were "not sufficient to meet the cost of health care." (*Morris*, *supra*, 67 Cal.2d at p. 750; see also 1971 Legis. Analyst's Rep., *supra*, at pp. 548, 550; Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, pp. 105-106.)

Individuals not linked to a federal categorical aid program (non-categorically linked persons) were ineligible for Medi-Cal, regardless of their means. Thus, "a group of citizens, not covered by Medi-Cal and yet unable to afford medical care, remained the responsibility of" the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal.App.3d 1059, 1061 [100 Cal.Rptr. 629] (*Hall*).) In establishing Medi-Cal, the Legislature expressly recognized this fact by enacting former section 14108.5, which provided: "The Legislature hereby declares its concern with the problems which will be facing the counties with respect to the medical care of indigent persons who are not covered [by Medi-Cal] ... and ... whose medical care must be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116.) The Legislature directed the Health Review and Program Council "to study this problem and report its findings to the Legislature no later than March 1, 1967." (*Ibid.*)

Moreover, although it required counties to contribute to the costs of Medi-Cal, the Legislature established a method for determining the amount of their contributions that would "leave them with []sufficient funds to provide hospital care for those persons not eligible for Medi-Cal." (*Hall*, *supra*, 23 Cal.App.3d at p. 1061, fn. omitted.) Former section 14150.1, ***78** which was known as the "county option" or the "option plan," required a county "to pay the state a sum equal to 100 percent of the county's health care costs (which included both linked and nonlinked individuals) provided in the 1964-1965 fiscal year, with an adjustment for population increase; in return the state would pay the county's entire cost of medical care."[3] (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 581 [159 Cal.Rptr. 1] (*Lackner*).) Under the county option, "the state agreed to assume all county health care costs ... in excess of" the county's payment. (*Id.* at p. 586.) It "made no distinction between 'linked' and 'nonlinked' persons," and "simply guaranteed a medical cost ceiling to counties electing to come within the option plan." (*Ibid.*) "Any difference in actual operating costs and the limit set by the option provision [was] assumed entirely by the state." (Preliminary Rep., *supra*, at p. 10, fn. 2.) Thus, the county option "guarantee[d] state participation in the cost of care for medically indigent persons who [were] not otherwise covered by the basic Medi-Cal program or other repayment programs."[4] (1971 Legis. Analyst's Rep., *supra*, at p. 549.)

Primarily through the county option, Medi-Cal caused a "significant shift in financing of health care from the counties to the state and federal government.... During the first 28 months of the program the state ... paid approximately $76 million for care of non-Medi-Cal indigents in county hospitals." (Preliminary Rep., *supra*, at p. 31.) These state funds paid "costs that would otherwise have been borne by counties through increases in property taxes." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1974-1975 Budget Bill, Sen. Bill No. 1525 (1973-1974 Reg. Sess.) p. 626 (1974 Legislative Analyst's Report).) "[F]aced with escalating Medi-Cal costs, the Legislature in 1967 imposed strict guidelines on reimbursing counties electing to come under the 'option' plan. ([Former] § 14150.2.) Pursuant to subdivision (c) of [former] section 14150.2, the state imposed a limit on its obligation to pay for medical services to nonlinked persons ***79** served by a county within the 'option' plan." (*Lackner*, *supra*, 97 Cal.App.3d at p. 589; see also Stats. 1967, ch. 104, § 3, p. 1019; Stats. 1969, ch. 21, § 57, pp. 106-107; 1974 Legis. Analyst's Rep., *supra*, at p. 626.)

In 1971, the Legislature substantially revised Medi-Cal. It extended coverage to certain noncategorically linked minors and adults "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83; see Stats. 1971, ch. 577, §§ 12, 23, pp. 1110-1111, 1115.) These medically indigent individuals met "the income and resource requirements for aid under [AFDC] but [did] not otherwise qualify[] as a public assistance recipient." (56 Ops.Cal.Atty.Gen. 568, 569 (1973).) The Legislature anticipated that this eligibility expansion would bring "approximately 800,000 additional medically needy Californians" into Medi-Cal. (Stats. 1971, ch. 577, § 56, p. 1136.) The 1971 legislation referred to these individuals as " '[n]oncategorically related needy person [s].' " (Stats. 1971, ch. 577, § 23, p. 1115.) Subsequent legislation designated them as "medically indigent person[s]" (MIP's) and provided

them coverage under former section 14005.4. (Stats. 1976, ch. 126, § 7, p. 200; *id.* at § 20, p. 204.)

The 1971 legislation also established a new method for determining each county's financial contribution to Medi-Cal. The Legislature eliminated the county option by repealing former section 14150.1 and enacting former section 14150. That section specified (by amount) each county's share of Medi-Cal costs for the 1972-1973 fiscal year and set forth a formula for increasing the share in subsequent years based on the taxable assessed value of certain property. (Stats. 1971, ch. 577, §§ 41, 42, pp. 1131-1133.)

For the 1978-1979 fiscal year, the state assumed each county's share of Medi-Cal costs under former section 14150. (Stats. 1978, ch. 292, § 33, p. 610.) In July 1979, the Legislature repealed former section 14150 altogether, thereby eliminating the counties' responsibility to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 74, p. 1043.) Thus, in November 1979, when the electorate adopted section 6, "the state was funding Medi-Cal coverage for [MIP's] without requiring any county financial contribution." (*Kinlaw*, *supra*, 54 Cal.3d at p. 329.) The state continued to provide full funding for MIP medical care through 1982.

In 1982, the Legislature passed two Medi-Cal reform bills that, as of January 1, 1983, excluded from Medi-Cal most adults who had been eligible ***80** under the MIP category (adult MIP's or Medically Indigent Adults).[5] (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357; *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 411 [261 Cal.Rptr. 706] (*Cooke*).) As part of excluding this population from Medi-Cal, the Legislature created the Medically Indigent Services Account (MISA) as a mechanism for "transfer[ing] [state] funds to the counties for the provision of health care services." (Stats. 1982, ch. 1594, § 86, p. 6357.) Through MISA, the state annually allocated funds to counties based on "the average amount expended" during the previous three fiscal years on Medi-Cal services for county residents who had been eligible as MIP's. (Stats. 1982, ch. 1594, § 69, p. 6345.) The Legislature directed that MISA funds "be consolidated with existing county health services funds in order to provide health services to low-income persons and other persons not eligible for the Medi-Cal program." (Stats. 1982, ch. 1594, § 86, p. 6357.) It further provided: "Any person whose income and resources meet the income and resource criteria for certification for [Medi-Cal] services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.)

After passage of the 1982 legislation, San Diego established a county medical services (CMS) program to provide medical care to adult MIP's. According to San Diego, between 1983 and June 1989, the state fully funded San Diego's CMS program through MISA. However, for fiscal years 1989-1990 and 1990-1991, the state only partially funded San Diego's CMS program. For example, San Diego asserts that, in fiscal year 1990-1991, it exhausted state-provided MISA funds by December 24, 1990. Faced with this shortfall, San Diego's board of supervisors voted in February 1991 to terminate the CMS program unless the state agreed by March 8 to provide full funding for the 1990-1991 fiscal year. After the state refused to provide additional funding, San Diego notified affected individuals and medical service providers that it would terminate the CMS program at midnight on March 19, 1991. The response to the County's notification ultimately resulted in the unfunded mandate claim now before us.

II. Unfunded Mandates

Through adoption of Proposition 13 in 1978, the voters added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 [***81** 280 Cal.Rptr. 92, 808 P.2d 235] (*County of Fresno*).) The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574 [7 Cal.Rptr.2d 245, 828 P.2d 147].) (1) These two constitutional articles "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522].) Their goals are "to protect residents from excessive taxation and government spending. [Citation.]" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*).)

California Constitution, article XIII B includes section 6, which is the constitutional provision at issue here. It

provides in relevant part: "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: [¶] ... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Section 6 recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. (*County of Fresno*, *supra*, 53 Cal.3d at p. 487.) 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. (*County of Fresno*, *supra*, 53 Cal.3d at p. 487; *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) With certain exceptions, section 6 "[e]ssentially" requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577 [15 Cal.Rptr.2d 547].)

In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. (Gov. Code, § 17500 et seq.). The local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. (Gov. Code, §§ 17521, 17551, 17555.) If the Commission finds a claim to be reimbursable, it must determine the amount of reimbursement. (Gov. Code, § 17557.) The local agency must then follow certain statutory procedures to ***82** obtain reimbursement. (Gov. Code, § 17558 et seq.) If the Legislature refuses to appropriate money for a reimbursable mandate, the local agency may file "an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c).) If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under section 1094.5 of the Code of Civil Procedure. (Gov. Code, § 17559.) Government Code section 17552 declares that these provisions "provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6 ...."

III. Administrative and Judicial Proceedings

A. *The Los Angeles Action*

On November 23, 1987, the County of Los Angeles (Los Angeles) filed a claim (the Los Angeles action) with the Commission asserting that the exclusion of adult MIP's from Medi-Cal constituted a reimbursable mandate under section 6. (*Kinlaw*, *supra*, 54 Cal.3d at p. 330, fn. 2.) Alameda County subsequently filed a claim on November 30, 1987, but the Commission rejected it because of the pending Los Angeles action. (*Id.* at p. 331, fn. 4.) Los Angeles refused to permit Alameda County to join as a claimant, but permitted San Bernardino County to join. (*Ibid.*)

In April 1989, the Commission rejected the Los Angeles claim, finding no reimbursable mandate.[6] (*Kinlaw*, *supra*, 54 Cal.3d at p. 330, fn. 2.) It found that the 1982 legislation did not impose on counties a new program or a higher level of service for an existing program because counties had a "pre-existing duty" to provide medical care to the medically indigent under section 17000. That section provides in relevant part: "Every county ... shall relieve and support all incompetent, poor, indigent persons ... lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Section 17000 did not impose a reimbursable mandate under section 6, the Commission further reasoned, because it "was enacted prior to January 1, 1975 ...." Finally, the Commission found no mandate because the 1982 legislation "neither establish[ed] the level of care to be provided nor ... define[d] the class of persons determined to be eligible for medical care since these criteria were established by boards of supervisors" pursuant to section 17001.

On March 20, 1990, the Los Angeles Superior Court filed a judgment reversing the Commission's decision and directing issuance of a peremptory ***83** writ of mandate. On April 16, 1990, the Commission and the state filed an appeal in the Second District Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.)[7] In early 1992, the parties to the Los Angeles action agreed to settle their dispute and to seek dismissal. In April 1992, after learning of this agreement, San Diego sought to intervene. Explaining that

it had been waiting for resolution of the action, San Diego requested that the Court of Appeal deny the dismissal request and add (or substitute in) the County as a party. The Court of Appeal did not respond. On December 15, 1992, the parties to the Los Angeles action entered into a settlement agreement that provided for vacation of the superior court judgment and dismissal of the appeal and superior court action. Consistent with the settlement agreement, on December 29, 1992, the Court of Appeal filed an order vacating the superior court judgment, dismissing the appeal, and instructing the superior court to dismiss the action without prejudice on remand. [8]

B. *The San Diego Action*

1. *Administrative Attempts to Obtain Reimbursement*

On March 13, 1991, San Diego submitted an invoice to the State Controller seeking reimbursement of its uncompensated expenditures on the CMS program for fiscal year 1989-1990. The Controller is a member of the Commission. (Gov. Code, § 17525.) On April 12, the Controller returned the invoice "without action," stating that "[n]o appropriation has been given to this office to allow for reimbursement" of medical costs for adult MIP's and noting that litigation was pending regarding the state's reimbursement obligation. On December 18, 1991, San Diego submitted a similar invoice for the 1990-1991 fiscal year. The state has not acted regarding this second invoice. ***84**

2. *Court Proceedings*

Responding to San Diego's notice of intent to terminate the CMS program, on March 11, 1991, the Legal Aid Society of San Diego filed a class action on behalf of CMS program beneficiaries seeking to enjoin termination of the program. The trial court later issued a preliminary injunction prohibiting San Diego "from taking any action to reduce or terminate" the CMS program.

On March 15, 1991, San Diego filed a cross-complaint and petition for writ of mandate under Code of Civil Procedure section 1085 against the state, the Commission, and various state officers. [9] The cross-complaint alleged that, by excluding adult MIP's from Medi-Cal and transferring responsibility for their medical care to counties, the state had mandated a new program and higher level of service within the meaning of section 6. The cross-complaint further alleged that the state therefore had a duty under section 6 to reimburse San Diego for the entire cost of its CMS program, and that the state had failed to perform its duty.

Proceeding from these initial allegations, the cross-complaint alleged causes of action for indemnification, declaratory and injunctive relief, reimbursement and damages, and writ of mandate. In its first declaratory relief claim, San Diego alleged (on information and belief) that the state contended the CMS program was a nonreimbursable, county obligation. In its claim for reimbursement, San Diego alleged (again on information and belief) that the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement from the State for the costs of such programs." "Under these circumstances," San Diego asserted, "denial of the County's claim by the Commission ... is virtually certain and further administrative pursuit of this claim would be a futile act."

For relief, San Diego requested a judgment declaring the following: (1) that the state must fully reimburse San Diego if it "is compelled to provide any CMS Program services to plaintiffs ... after March 19, 1991"; (2) that section 6 requires the state "to fully fund the CMS Program" (or, alternatively, that the CMS program is discretionary); (3) that the state must pay San Diego for all of its unreimbursed costs for the CMS program during the ***85** 1989-1990 and 1990-1991 fiscal years; and (4) that the state shall assume responsibility for operating any court-ordered continuation of the CMS program. San Diego also requested that the court issue a writ of mandamus requiring the state to fulfill its reimbursement obligation. Finally, San Diego requested issuance of preliminary and permanent injunctions to ensure that the state fulfilled its obligations to the County.

In April 1991, San Diego determined that it could continue operating the CMS program using previously unavailable general fund revenues. Accordingly, San Diego and plaintiffs settled their dispute, and plaintiffs dismissed their complaint.

The matter proceeded solely on San Diego's cross-complaint. The court issued a preliminary injunction and alternative writ in May 1991. At a hearing on June 25, 1991, the court found that the state had an obligation to fund San Diego's CMS program, granted San Diego's request for a writ of mandate, and scheduled an evidentiary hearing to determine damages and remedies. On July 1, 1991, it issued an order reflecting this ruling and granting a peremptory writ of mandate. The writ did not issue, however, because of the pending hearing to determine damages. In December 1992, after an extensive evidentiary hearing and posthearing proceedings on the claim

for a peremptory writ of mandate, the court issued a judgment confirming its jurisdiction to determine San Diego's claim, finding that section 6 required the state to fund the entire cost of San Diego's CMS program, determining the amount that the state owed San Diego for fiscal years 1989-1990 and 1990-1991, identifying funds available to the state to satisfy the judgment, and ordering issuance of a peremptory writ of mandate. [10] The court also issued a peremptory writ of mandate directing the state and various state officers to comply with the judgment.

The Court of Appeal affirmed the judgment insofar as it provided that section 6 requires the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required San Diego to spend at least $41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. It remanded the matter to the Commission to determine the reimbursement amount and appropriate statutory remedies. We then granted the state's petition for review.

IV. Superior Court Jurisdiction

(2a) Before reaching the merits of the appeal, we must address the state's assertion that the superior court lacked jurisdiction to hear San ***86** Diego's mandate claim. According to the state, in *Kinlaw*, *supra*, 54 Cal.3d 326, we "unequivocally held that the orderly determination of [unfunded] mandate questions demands that only one claim on any particular alleged mandate be entertained by the courts at any given time." Thus, if a test claim is pending, "other potential claims must be held in abeyance ...." Applying this principle, the state asserts that, since "the test claim litigation was pending" in the Los Angeles action when San Diego filed its cross-complaint seeking mandamus relief, "the superior court lacked jurisdiction from the outset, and the resulting judgment is a nullity. That defect cannot be cured by the settlement of the test claim, which occurred after judgment was entered herein."

In *Kinlaw*, we held that individual taxpayers and recipients of government benefits lack standing to enforce section 6 because the applicable administrative procedures, which "are the exclusive means" for determining and enforcing the state's section 6 obligations, "are available only to local agencies and school districts directly affected by a state mandate ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 328.) In reaching this conclusion, we explained that the reimbursement right under section 6 "is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services." (*Id.* at p. 334.) We concluded that "[n]either public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues." (*Id.* at p. 335.)

In finding that individuals do not have standing to enforce the section 6 rights of local agencies, we made several observations in *Kinlaw* pertinent to operation of the statutory process as it applies to entities that do have standing. Citing Government Code section 17500, we explained that "the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6 ... because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." (*Kinlaw*, *supra*, 54 Cal.3d at p. 331.) Thus, the governing statutes "establish[] procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." (*Id.* at p. 333.) Specifically, "[t]he legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies ...." (*Id.* at p. 331.) Describing the Commission's application of the test-claim procedure to claims regarding exclusion of adult MIP's from Medi-Cal, we observed: "The test claim by the County of Los Angeles was filed prior to that ***87** proposed by Alameda County. The Alameda County claim was rejected for that reason. (See [Gov. Code,] § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the [adult MIP exclusion] issues .... Los Angeles County declined a request from Alameda County that it be included in the test claim ...." (*Id.* at p. 331, fn. 4.)

Consistent with our observations in *Kinlaw*, we here agree with the state that the trial court should not have proceeded to resolve San Diego's claim for reimbursement under section 6 while the Los Angeles action was pending. A contrary conclusion would undermine one of "the express purpose[s]" of the statutory procedure: to "avoid[] multiple proceedings ...

addressing the same claim that a reimbursable state mandate has been created." (*Kinlaw*, *supra*, 54 Cal.3d at p. 333.)

(3) However, we reject the state's assertion that the error was jurisdictional. The power of superior courts to perform mandamus review of administrative decisions derives in part from article VI, section 10 of the California Constitution. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 138 [93 Cal.Rptr. 234, 481 P.2d 242]; *Lipari v. Department of Motor Vehicles* (1993) 16 Cal.App.4th 667, 672 [20 Cal.Rptr.2d 246].) That section gives "[t]he Supreme Court, courts of appeal, [and] superior courts ... original jurisdiction in proceedings for extraordinary relief in the nature of mandamus ...." (Cal. Const., art. VI, § 10.) "The jurisdiction thus vested may not lightly be deemed to have been destroyed." (*Garrison v. Rourke* (1948) 32 Cal.2d 430, 435 [196 P.2d 884], overruled on another ground in *Keane v. Smith* (1971) 4 Cal.3d 932, 939 [95 Cal.Rptr. 197, 485 P.2d 261].) "While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*Garrison*, *supra*, at p. 436.) (2b) Here, we find no statutory provision that either "expressly provide[s]" (*id.* at p. 435) or otherwise "clearly intend[s]" (*id.* at p. 436) that the Legislature intended to divest all courts other than the court hearing the test claim of their mandamus jurisdiction.

Rather, following *Dowdall v. Superior Court* (1920) 183 Cal. 348 [191 P. 685] (*Dowdall*), we interpret the governing statutes as simply vesting primary jurisdiction in the court hearing the test claim. In *Dowdall*, we determined the jurisdictional effect of Code of Civil Procedure former section 1699 on actions to settle the account of trustees of a testamentary trust. Code of Civil Procedure former section 1699 provided in part: "Where any trust ***88** has been created by or under any will to continue after distribution, the Superior Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." (Stats. 1889, ch. 228, § 1, p. 337.) We explained that, under this section, "the superior court, sitting in probate upon the distribution of an estate wherein the will creates a trust, retain[ed] jurisdiction of the estate for the purpose of the settlement of the accounts under the trust." (*Dowdall*, *supra*, 183 Cal. at p. 353.) However, we further observed that "the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction thereof." (*Ibid.*)

Similarly, we conclude that, under the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction. Thus, if an action asserting the same unfunded mandate claim is filed in any other superior court, that court, upon being informed of the pending test claim, should postpone the proceeding before it and allow the court having primary jurisdiction to determine the test claim.

However, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction. As we explained in *Dowdall*, a court that refuses to defer to another court's primary jurisdiction "is not without jurisdiction." (*Dowdall*, *supra*, 183 Cal. at p. 353.) Accordingly, notwithstanding pendency of the Los Angeles action, the trial court here did not lack jurisdiction to determine San Diego's mandamus petition. (See *Collins v. Ramish* (1920) 182 Cal. 360, 366-369 [188 P. 550] [although trial court erred in refusing to abate action because of former action pending, new trial was not warranted on issues that the trial court correctly decided]; *People* ex rel. *Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 772 [25 Cal.Rptr.2d 192] (*Garamendi*) ["rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to comply renders subsequent proceedings void"]; *Stearns v. Los Angeles City School Dist.* (1966) 244 Cal.App.2d 696, 718 [53 Cal.Rptr. 482, 21 A.L.R.3d 164] [where trial court errs in failing to stay proceedings in ***89** deference to jurisdiction of another court, reversal would be frivolous absent errors regarding the merits].) [11]

The trial court's failure to defer to the primary jurisdiction of the court hearing the Los Angeles action did not prejudice the state. Contrary to the state's assertion, the trial court did not "usurp" the Commission's "authority to determine, in the first place, whether or not legislation creates a mandate." The Commission had already exercised that authority in the Los Angeles action. Moreover, given the settlement of the Los Angeles action, which included vacating the judgment in that action, the trial court's exercise of jurisdiction here did not result in one of the principal harms that the statutory procedure seeks to prevent: multiple decisions regarding an unfunded mandate question. Finally, the lack of an administrative record specifically relating to San Diego's claim did not prejudice the state because the threshold determination of whether a statute imposes a state mandate is an issue of law. (*County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340, 347 [280 Cal.Rptr. 310].) To the extent that an administrative record was necessary, the record developed in the Los Angeles action could have been submitted to the trial court. [12] (See *Los Angeles Unified School Dist. v. State of California* (1988) 199 Cal.App.3d 686, 689 [245 Cal.Rptr. 140].)

We also find that, on the facts of this case, San Diego's failure to submit a test claim to the Commission before seeking judicial relief did not affect the superior court's jurisdiction. Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 640 [21 Cal.Rptr.2d 453]; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73-77 [222 Cal.Rptr. 750] (*County of Contra Costa*).) However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they "can establish an exception to" the exhaustion requirement. (*County of Contra Costa*, *supra*, 177 Cal.App.3d at p. 77.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case. [Citations.]" (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 870 [226 Cal.Rptr. 119, 718 P.2d 106]; see also *County of Contra Costa*, *supra*, 177 Cal.App.3d at pp. 77-78.) ***90**

We agree with the trial court and the Court of Appeal that the futility exception applied in this case. As we have previously noted, San Diego invoked this exception by alleging in its cross-complaint that the Commission's denial of its claim was "virtually certain" because the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement ...." Given that the Commission rejected the Los Angeles claim (which alleged the same unfunded mandate claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile. Therefore, we reject the state's jurisdictional argument and proceed to the merits of the appeal.

V. Existence of a Mandate Under Section 6

(4) In determining whether there is a mandate under section 6, we turn to our decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318] (*Lucia Mar*). There, we discussed section 6's application to Education Code section 59300, which "requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped." (*Lucia Mar*, *supra*, at p. 832.) Before 1979, the Legislature had statutorily required school districts "to contribute to the education of pupils from the districts at the state schools [citations] ...." (*Id.* at pp. 832-833.) The Legislature repealed the statutory requirements in 1979 and, on July 12, 1979, the state assumed full-funding responsibility. (*Id.* at p. 833.) On July 1, 1980, when section 6 became effective, the state still had full-funding responsibility. On June 28, 1981, Education Code section 59300 took effect. (*Lucia Mar*, *supra*, at p. 833.)

Various school districts filed a claim seeking reimbursement under section 6 for the payments that Education Code section 59300 requires. The Commission denied the claim, finding that the statute did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, the latter "reasoning that a shift in the funding of an existing program is not a new program or a higher level of service" under section 6. (*Lucia Mar*, *supra*, 44 Cal.3d at p. 834.)

We reversed, finding that a contrary result would "violate the intent underlying section 6 ...." (*Lucia Mar*, *supra*, 44 Cal.3d at p. 835.) That section "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of the [] ***91** restrictions

on the taxing and spending power of the local entities" that articles XIII A and XIII B of the California Constitution imposed. (*Lucia Mar*, *supra*, at pp. 835-836.) "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 ... because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B*, the result seems equally violative of the fundamental purpose underlying section 6 ...." (*Id.* at p. 836, italics added, fn. omitted.) We thus concluded in *Lucia Mar* "that because [Education Code] section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts —an obligation the school districts did not have at the time article XIII B was adopted—it calls for [the school districts] to support a 'new program' within the meaning of section 6." (*Ibid.*, fn. omitted.)

The similarities between *Lucia Mar* and the case before us "are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-197[8] the state and county shared the cost of caring for [adult MIP's] under the Medi-Cal program.... [F]ollowing enactment of [article XIII A], the state took full responsibility for both programs." (*Kinlaw*, *supra*, 54 Cal.3d at p. 353 (dis. opn. of Broussard, J.).) As to both programs, the Legislature cited adoption of article XIII A of the California Constitution, and specifically its effect on tax revenues, as the basis for the state's assumption of full funding responsibility. (Stats. 1979, ch. 237, § 10, p. 493; Stats. 1979, ch. 282, § 106, p. 1059.) "Then in 1981 (for handicapped children) and 1982 (for [adult MIP's]), the state sought to shift some of the burden back to the counties." (*Kinlaw*, *supra*, 54 Cal.3d at p. 353 (dis. opn. of Broussard, J.).)

Adopting the Commission's analysis in the Los Angeles action, the state nevertheless argues that *Lucia Mar* "is inapposite." The school program at issue in *Lucia Mar* "had been wholly operated, administered and financed by the state" and "was unquestionably a 'state program.' " " 'In contrast,' " the state argues, " 'the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for' " it under section 17000 and its predecessors.[13] The courts have interpreted section 17000 as "impos[ing] upon counties a duty to ***92** provide hospital and medical services to indigent residents. [Citations.]" (*Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 557 [254 Cal.Rptr. 905].) Thus, the state argues, the source of San Diego's obligation to provide medical care to adult MIP's is section 17000, not the 1982 legislation. Moreover, because the Legislature enacted section 17000 in 1965, and section 6 does not apply to "mandates enacted prior to January 1, 1975," there is no reimbursable mandate. Finally, the state argues that, because section 17001 give counties "complete discretion" in setting eligibility and service standards under section 17000, there is no mandate. A contrary conclusion, the state asserts, "would erroneously expand the definition of what constitutes a 'new program' under" section 6. As we explain, we reject these arguments.

A. *The Source and Existence of San Diego's Obligation*

1. *The Residual Nature of the Counties' Duty Under Section 17000*

The state's argument that San Diego's obligation to provide medical care to adult MIP's predates the 1982 legislation contains numerous errors. First, the state misunderstands San Diego's obligation under section 17000. That section creates "the *residual* fund" to sustain indigents "who cannot qualify ... under any specialized aid programs." (*Mooney*, *supra*, 4 Cal.3d at p. 681, italics added; see also *Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 562; *Boehm v. Superior Court* (1986) 178 Cal.App.3d 494, 499 [223 Cal.Rptr. 716] [general assistance "is a program of last resort"].) By its express terms, the statute requires a county to relieve and support indigent persons *only* "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (§ 17000.)[14] "Consequently, to the extent that the state or federal governments provide[d] care for [adult MIP's], the [C]ounty's obligation to do so [was] reduced ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 354, fn. 14 (dis. opn. of Broussard, J.).)[15]

As we have explained, the state began providing adult MIP's with medical care under Medi-Cal in 1971. Although it

initially required counties to ***93** contribute generally to the costs of Medi-Cal, it did not set forth a specific amount for coverage of MIP's. The state was primarily responsible for the costs of the program, and the counties were simply required to contribute funds to defray the state's costs. Beginning with the 1978-1979 fiscal year, the state paid all costs of the Medi-Cal program, including the cost of medical care for adult MIP's. Thus, when section 6 was adopted in November 1979, to the extent that Medi-Cal provided medical care to adult MIP's, San Diego bore no financial responsibility for these health care costs. [16]

The California Attorney General has expressed a similar understanding of Medi-Cal's effect on the counties' medical care responsibility under section 17000. After the 1971 extension of Medi-Cal coverage to MIP's, Fresno County sought an opinion regarding the scope of its duty to provide medical care under section 17000. It asserted that the 1971 repeal of former section 14108.5, which declared the Legislature's concern with the counties' problems in caring for indigents not eligible for Medi-Cal, evidenced a legislative intent to preempt the field of providing health services. (56 Ops.Cal.Atty.Gen., *supra*, at p. 571.) The Attorney General disagreed, concluding that the 1971 change "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (*Id.* at p. 569.) The Attorney General explained: "The statement of concern acknowledged the obligation of counties to continue to provide medical assistance under section 17000; the removal of the statement of concern was not accompanied by elimination of such duty on the part of the counties, *except as the addition of* [*MIP's*] *to the Medi-Cal program would remove the burden on the counties to provide medical care for such persons*." (*Id.* at p. 571, italics added.) ***94**

Indeed, the Legislature's statement of intent in an uncodified section of the 1982 legislation excluding adult MIP's from Medi-Cal suggests that it also shared our understanding of section 17000. Section 8.3 of the 1982 Medi-Cal revisions expressly declared the Legislature's intent "[i]n eliminating [M]edically [I]ndigent [A]dults from the Medi-Cal program ...." (Stats. 1982, ch. 328, § 8.3, p. 1575; Stats. 1982, ch. 1594, § 86, p. 6357.) It stated in part: "It is further the intent of the Legislature to provide counties with as much flexibility as possible in organizing county health services to serve *the population being transferred*." (Stats. 1982, ch. 328, § 8.3, p. 1576; Stats. 1982, ch. 1594, § 86, p. 6357, italics added.) If, as the state contends, counties had always been responsible under section 17000 for the medical care of adult MIP's, the description of adult MIP's as "the population being transferred" would have been inaccurate. By so describing adult MIP's, the Legislature indicated its understanding that counties did not have this responsibility while adult MIP's were eligible for Medi-Cal. These sources fully support our rejection of the state's argument that the 1982 legislation did not impose a mandate because, under section 17000, counties had always borne the responsibility for providing medical care to adult MIP's.

2. *The State's Assumption of Full Funding Responsibility for Providing Medical Care to Adult MIP's Under Medi-Cal*

To support its argument that it never relieved counties of their obligation under section 17000 to provide medical care to adult MIP's, the state characterizes as "temporary" the Legislature's assumption of full-funding responsibility for adult MIP's. According to the state, "any ongoing responsibility of the county was, at best, only temporarily, partially, alleviated (and never supplanted)." The state asserts that the Court of Appeal thus "erred by focusing on one phase in th[e] shifting pattern of arrangements" for funding indigent health care, "a focus which led to a myopic conclusion that the state alone is forever responsible for funding the health care for" adult MIP's.

A comparison of the 1978 and 1979 statutes that eliminated the counties' share of Medi-Cal costs refutes the state's claim. The Legislature expressly limited the effect of the 1978 legislation to one fiscal year, providing that the state "shall pay" each county's Medi-Cal cost share "for the period from July 1, 1978, to June 30, 1979." (Stats. 1978, ch. 292, § 33, p. 610.) The Legislative Counsel's Digest explained that this section would require the state to pay "[a]ll county costs for Medi-Cal" for "the 1978-79 fiscal year only." (Legis. Counsel's Dig., Sen. Bill No. 154, 4 Stats. 1978 (Reg. Sess.), Summary Dig., p. 71.) The digest further explained that the purpose of the bill containing this section was "the *partial* relief of local government from the *temporary* difficulties brought about by the approval of Proposition 13." ***95** (*Id.* at p. 70, italics added.) Clearly, the Legislature knew how to include words of limitation when it intended the effects of its provisions to be temporary.

By contrast, the 1979 legislation contains no such limiting language. It simply provided: "Section 14150 of the Welfare and Institutions Code is repealed." (Stats. 1979, ch. 282, § 74, p. 1043.) In setting forth the need to enact the legislation as an urgency statute, the Legislature explained: "The adoption

of Article XIII A ... may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately." (Stats. 1979, ch. 282, § 106, p. 1059.) In describing the effect of this legislation, the Legislative Counsel first explained that, "[u]nder existing law, the counties pay a specified annual share of the cost of" Medi-Cal. (Legis. Counsel's Dig., Assem. Bill No. 8, 4 Stats. 1979 (Reg. Sess.), Summary Dig., p. 79.) Referring to the 1978 legislation, it further explained that "[f]or the 1978-79 fiscal year only, the state pays ... [¶] ... [a]ll county costs for Medi-Cal ...." (*Ibid.*) The 1979 legislation, the digest continued, "provid[ed] for state assumption of all county costs of Medi-Cal." (*Ibid.*) We find nothing in the 1979 legislation or the Legislative Counsel's summary indicating a legislative intent to eliminate the counties' cost share of Medi-Cal only temporarily.

The state budget process for the 1980-1981 fiscal year confirms that the Legislature's assumption of all Medi-Cal costs was not viewed as "temporary." In the summary of his proposed budget, then Governor Brown described Assembly Bill No. 8, 1981-1982 Regular Session, generally as "a long-term local financing measure" (Governor's Budget for 1980-1981 as submitted to Legislature (1979-1980 Reg. Sess.) Summary of Local Government Fiscal Relief, p. A-30) through which "[t]he total cost of [the Medi-Cal] program was *permanently* assumed by the State ...." (*Id.* at p. A-32, italics added.) Similarly, in describing to the Joint Legislative Budget Committee the Medi-Cal funding item in the proposed budget, the Legislative Analyst explained: "Item 287 includes the state cost of 'buying out' the county share of Medi-Cal expenditures. Following passage of Proposition 13, [Senate Bill No.] 154 appropriated $418 million to relieve counties of all fiscal responsibility for Medi-Cal program costs. Subsequently, [Assembly Bill No.] 8 was enacted, *which made permanent state assumption of county Medi-Cal costs*." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1980-1981 Budget Bill, Assem. Bill No. 2020 (1979-1980 Reg. Sess.) at p. 721, italics added.) Thus, the state errs in asserting that the 1979 legislation eliminated the counties' financial support of Medi-Cal "only temporarily." ***96**

3. *State Administration of Medical Care for Adult MIP's Under Medi-Cal*

The state argues that, unlike the school program before us in *Lucia Mar*, *supra*, 44 Cal.3d 830, which "had been wholly operated, administered and financed by the state," the program for providing medical care to adult MIP's " 'has never been operated or administered by' " the state. According to the state, Medi-Cal was simply a state "reimbursement program" for care that section 17000 required counties to provide. The state is incorrect.

One of the legislative goals of Medi-Cal was "to allow eligible persons to secure basic health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 104.) "In effect, this meant that poorer people could have access to a private practitioner of their choice, and not be relegated to a county hospital program." (*California Medical Assn. v. Brian* (1973) 30 Cal.App.3d 637, 642 [106 Cal.Rptr. 555].) Medi-Cal "provided for reimbursement to both public and private health care providers for medical services rendered." (*Lackner*, *supra*, 97 Cal.App.3d at p. 581.) It further directed that, "[i]nsofar as practical," public assistance recipients be afforded "free choice of arrangements under which they shall receive basic health care." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 115.) Finally, since its inception, Medi-Cal has permitted county boards of supervisors to "prescribe rules which authorize the county hospital to integrate its services with those of other hospitals into a system of community service which offers free choice of hospitals to those requiring hospital care. The intent of this section is to eliminate discrimination or segregation based on economic disability so that the county hospital and other hospitals in the community share in providing services to paying patients and to those who qualify for care in public medical care programs." (§ 14000.2.) Thus, "Medi-Cal eligibles were to be able to secure health care in the same manner employed by the general public (i.e., in the private sector or at a county facility)." (1974 Legis. Analyst's Rep., *supra*, at p. 625; see also Preliminary Rep., *supra*, at p. 17.) By allowing eligible persons "a choice of medical facilities for treatment," Medi-Cal placed county health care providers "in competition with private hospitals." (*Hall*, *supra*, 23 Cal.App.3d at p. 1061.)

Moreover, administration of Medi-Cal over the years has been the responsibility of various state departments and agencies. (§§ 10720-10721, 14061-14062, 14105, 14203;

Belshé, *supra*, 13 Cal.4th at p. 751; *Morris*, *supra*, 67 Cal.2d at p. 741; Summary of Major Events, *supra*, at pp. 2-3, 15.) Thus, "[i]n adopting the Medi-Cal program the state Legislature, for the most part, shifted indigent medical care from being a county responsibility to a State ***97** responsibility under the Medi-Cal program. [Citation.]" (*Bay General Community Hospital v. County of San Diego* (1984) 156 Cal.App.3d 944, 959 [203 Cal.Rptr. 184] (*Bay General*); see also Preliminary Rep., *supra*, at p. 18 [with certain exceptions, Medi-Cal "shifted to the state" the responsibility for administration of the medical care provided to eligible persons].) We therefore reject the state's assertion that, while Medi-Cal covered adult MIP's, county facilities were the sole providers of their medical care, and counties both operated and administered the program that provided that care.

The circumstances we have discussed readily distinguish this case from *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 [38 Cal.Rptr.2d 304], on which the state relies. There, the court rejected the claim that Penal Code section 987.9, which required counties to provide criminal defendants with certain defense funds, imposed an unfunded state mandate. Los Angeles filed the claim after the state, which had enacted appropriations between 1977 and 1990 "to reimburse counties for their costs under" the statute, made no appropriation for the 1990-1991 fiscal year. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 812.) In rejecting the claim, the court first held that there was no state mandate because Penal Code section 987.9 merely implemented the requirements of federal law. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at pp. 814-816.) Thus, the court stated, "[a]ssuming, arguendo, the provisions of [Penal Code] section 987.9 [constituted] a new program" under section 6, there was no state mandate. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 818.) Here, of course, it is unquestionably the state that has required San Diego to provide medical care to indigent persons.

In dictum, the court also rejected the argument that, under *Lucia Mar*, *supra*, 44 Cal.3d 830, the state's "decision not to reimburse the counties for their programs under [Penal Code] section 987.9" imposed a new program by shifting financial responsibility for the program to counties. (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th at p. 817.) The court explained: "In contrast [to *Lucia Mar*], the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under [Penal Code] section 987.9. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility." (*Ibid.*) Here, as we have explained, between 1971 and 1983, the state administered and bore financial responsibility for the medical care that adult MIP's received under Medi-Cal. The Medi-Cal program was not simply a ***98** method of reimbursement for county costs. Thus, the state's reliance on this dictum is misplaced. [17]

In summary, our discussion demonstrates the Legislature excluded adult MIP's from Medi-Cal *knowing* and *intending* that the 1982 legislation would trigger the counties' responsibility to provide medical care as providers of last resort under section 17000. Thus, through the 1982 legislation, the Legislature attempted to do precisely that which the voters enacted section 6 to prevent: "transfer[] to [counties] the fiscal responsibility for providing services which the state believed should be extended to the public." [18] (*County of Los Angeles*, *supra*, 43 Cal.3d at p. 56; see also *City of Sacramento v. State of California*, *supra*, 50 Cal.3d at p. 68 [A "central purpose" of section 6 was "to prevent the state's transfer of the *cost of government* from *itself* to the local level."].) Accordingly, we view the 1982 legislation as having mandated a " 'new program' " on counties by "compelling them to accept financial responsibility in whole or in part for a program," i.e., medical care for adult MIP's, "which was funded entirely by the state before the advent of article XIII B." [19] (*Lucia Mar*, *supra*, 44 Cal.3d at p. 836.)

A contrary conclusion would defeat the purpose of section 6. Under the state's interpretation of that section, because section 17000 was enacted before 1975, the Legislature could eliminate the *entire* Medi-Cal program and shift to the counties under section 17000 complete financial responsibility for medical care that the state has been providing since 1966. However, the taxing and spending limitations imposed by articles XIII A and XIII B would greatly limit the ability of counties to meet their expanded section 17000 obligation. "County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 351 (dis. opn. of Broussard, J.).) As we have previously explained,

the voters, recognizing that articles XIII A and XIII B left counties "ill equipped" to assume such increased financial responsibilities, adopted section 6 precisely to avoid this result. (***99** *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) Thus, it was the voters who decreed that we must, as the state puts it, "focus[] on one phase in th[e] shifting pattern of [financial] arrangements" between the state and the counties. Under section 6, the state simply cannot "compel[] [counties] to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B ...."[20] (*Lucia Mar*, *supra*, 44 Cal.3d at p. 836.)

B. *County Discretion to Set Eligibility and Service Standards*

(5a) The state next argues that, because San Diego had statutory discretion to set eligibility and service standards, there was no reimbursable mandate. Citing section 16704, the state asserts that the 1982 legislation required San Diego to spend MISA funds "only on those whom the *county* deems eligible *under § 17000*," "gave the county exclusive authority to determine the level and type of benefits it would provide," and required counties "to include [adult MIP's] in their § 17000 eligibility **only to the extent state funds were available and then only for 3 years.**"[21] (Original emphasis.) According to the state, under section 17001, "[t]he counties have ***100** complete discretion over the determination of eligibility, scope of benefits and how the services will be provided."[22]

The state exaggerates the extent of a county's discretion under section 17001. It is true "case law ... has recognized that section 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents. [Citations.]" (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 211 [211 Cal.Rptr. 398, 695 P.2d 695] (*Robbins*).) However, there are "clear-cut limits" to this discretion. (*Ibid.*) (6) The counties may exercise their discretion "only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. [Citation.] When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. (Gov. Code, § 11374.)" (*Mooney*, *supra*, 4 Cal.3d at p. 679.) Thus, the counties' eligibility and service standards must "carry out" the objectives of section 17000. (*Mooney*, *supra*, 4 Cal.3d at p. 679; see also *Poverty Resistance Center v. Hart* (1989) 213 Cal.App.3d 295, 304-305 [261 Cal.Rptr. 545]; § 11000 ["provisions of law relating to a public assistance program shall be fairly and equitably construed to effect the stated objects and purposes of the program"].) County standards that fail to carry out section 17000's objectives "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris*, *supra*, 67 Cal.2d at p. 737.) Courts, which have " 'final responsibility for the interpretation of the law,' " must strike them down. (*Id.* at p. 748.) Indeed, despite the counties' statutory discretion, "courts have consistently invalidated ... county welfare regulations that fail to meet statutory requirements. [Citations.]" (*Robbins*, *supra*, 38 Cal.3d at p. 212.)

1. *Eligibility*

(5b) Regarding eligibility, we conclude that counties must provide medical care to all adult MIP's. As we emphasized in *Mooney*, section 17000 requires counties to relieve and support " '*all indigent persons* lawfully resident therein, "when such persons are not supported and relieved by their relatives" or by some other means.' " (*Mooney*, *supra*, 4 Cal.3d at p. 678; see also *Bernhardt v. Board of Supervisors* (1976) 58 Cal.App.3d 806, 811 [130 Cal.Rptr. 189].) Moreover, section 10000 declares that the statutory "purpose" of division 9 of the Welfare and Institutions Code, which includes ***101** section 17000, "is to provide for protection, care, and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to *all* of its needy and distressed." (Italics added.) Thus, counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of section 17000 who do not receive it from other sources.[23] (See *Bell v. Board of Supervisors* (1994) 23 Cal.App.4th 1695, 1706 [28 Cal.Rptr.2d 919] [eligibility standards may not "defeat the purpose of the statutory scheme by depriving qualified recipients of mandated support"]; *Washington v. Board of Supervisors* (1993) 18 Cal.App.4th 981, 985 [22 Cal.Rptr.2d 852] [courts have repeatedly "voided county ordinances which have attempted to redefine eligibility standards set by state statute"].)

Although section 17000 does not define the term "indigent persons," the 1982 legislation made clear that all adult MIP's fall within this category for purposes of defining a county's obligation to provide medical care.[24] As part of its exclusion of adult MIP's, that legislation required counties to participate in the MISA program. (Stats. 1982, ch. 1594, §§ 68, 70, 86, pp. 6343-6347, 6357.) Regarding that program, the 1982 legislation amended section 16704, subdivision (c)(1), to require that a county board of supervisors, in applying for MISA funds, "assure that it will expend such funds only for [specified] health services ... provided to persons certified as eligible for such services pursuant to Section 17000 ...." (Stats. 1982, ch. 1594, § 70, p. 6346.) At the same time, the 1982 legislation amended section 16704, subdivision (c)(3), to provide that "[a]ny person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.) As the state correctly explains, under this provision, "counties had to include [Medically Indigent Adults] in their [section] 17000 eligibility" standards. By requiring counties to make all adult MIP's eligible for services paid for with MISA funds, while at the same time requiring counties to promise to spend such funds *only* on those certified as eligible under section 17000, the Legislature established that all adult MIP's are "indigent persons" for purposes of the counties' duty to provide medical care under section 17000. Otherwise, the counties could not comply with their promise. ***102**

Our conclusion is not affected by language in section 16704, subdivision (c)(3), making it "operative only until June 30, 1985, unless a later enacted statute extends or deletes that date."[25] As we have explained, the subdivision established that adult MIP's are "indigent persons" within the meaning of section 17000 for medical care purposes. As we have also explained, section 17000 requires counties to relieve and support *all* "indigent persons." Thus, even if the state is correct in asserting that section 16704, subdivision (c)(3), is now inoperative and no longer prohibits counties from excluding adult MIP's from eligibility for medical services, section 17000 has that effect.[26]

Additionally, the coverage history of Medi-Cal demonstrates that the Legislature has always viewed all adult MIP's as "indigent persons" within the meaning of section 17000 for medical care purposes. As we have previously explained, when the Legislature created the original Medi-Cal program, which covered only categorically linked persons, it "declar[ed] its concern with the problems which [would] be facing the counties with respect to the medical care of indigent persons who [were] not covered" by Medi-Cal, "whose medical care [had to] be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116 [enacting former § 14108.5].) Moreover, to ensure that the counties' Medi-Cal cost share would not leave counties "with insufficient funds to provide hospital care for those persons not eligible for Medi-Cal," the Legislature also created the county option. (*Hall*, *supra*, 23 Cal.App.3d at p. 1061.) Through the county option, "the state agreed to assume all county health care costs ... in excess of county costs incurred during the 1964-1965 fiscal year, adjusted for population increases." (*Lackner*, *supra*, 97 Cal.App.3d at p. 586.) Thus, the Legislature expressly recognized that the categorically linked persons initially eligible for Medi-Cal did not constitute all "indigent persons" entitled to medical care under section 17000, and required the state to share in the financial responsibility for providing that care.

In adding adult MIP's to Medi-Cal in 1971, the Legislature extended Medi-Cal coverage to noncategorically linked persons "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83.) This ***103** description was consistent with prior judicial decisions that, for purposes of a county's duty to provide "indigent persons" with hospitalization, had defined the term to include a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." (*Goodall v. Brite* (1936) 11 Cal.App.2d 540, 550 [54 P.2d 510].)

Moreover, the fate of amendments to section 17000 proposed at the same time suggests that, in the Legislature's view, the category of "indigent persons" entitled to medical care under section 17000 extended even *beyond* those eligible for Medi-Cal as MIP's. The June 17, 1971, version of Assembly Bill No. 949 amended section 17000 by adding the following: "however, the health needs of such persons shall be met under [Medi-Cal]." (Assem. Bill No. 949 (1971 Reg. Sess.) § 53.3, as amended June 17, 1971.) The Assembly deleted this amendment on July 20, 1971. (Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971, p. 37.) Regarding this change, the Assembly Committee on Health explained: "The proposed amendment to Section 17000, ... which would

have removed the counties' responsibilities as health care provider of last resort, is deleted. This change was originally proposed to clarify the guarantee to hold counties harmless from additional Medi-Cal costs. It is deleted since it cannot remove the fact that counties are, by definition, a 'last resort' for any person, with or without the means to pay, who does not qualify for federal or state aid." (Assem. Com. on Health, Analysis of Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971 (July 21, 1971), p. 4.)

The Legislature's failure to amend section 17000 in 1971 figured prominently in the Attorney General's interpretation of that section only two years later. In a 1973 published opinion, the Attorney General stated that the 1971 inclusion of MIP's in Medi-Cal "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (56 Ops.Cal.Atty.Gen., *supra*, at p. 569.) He based this conclusion on the 1971 legislation, relevant legislative history, and "the history of state medical care programs." (*Id.* at p. 570.) The opinion concluded: "The definition of medically indigent in [the chapter establishing Medi-Cal] is applicable only to that chapter and *does not include all those enumerated in section 17000*. If the former medical care program, by providing care only for a specific group, public assistance recipients, did not affect the responsibility of the counties to provide such service under section 17000, we believe the most recent expansion of the medical assistance program does not affect, *absent an express legislative intent to the contrary*, the duty of the counties under section 17000 to continue to provide services to those eligible under section 17000 but not under [Medi-Cal]." (*Ibid.*, italics added.) The Attorney General's opinion, although not binding, is entitled to considerable weight. ***104** (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829 [25 Cal.Rptr.2d 148, 863 P.2d 218].) Absent controlling authority, it is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of section 17000 and would have taken corrective action if it disagreed with that construction. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [270 Cal.Rptr. 796, 793 P.2d 2].)

In this case, of course, we need not (and do not) decide whether San Diego's obligation under section 17000 to provide medical care extended beyond adult MIP's. Our discussion establishes, however, that the obligation extended *at least* that far. The Legislature has made it clear that all adult MIP's are "indigent persons" under section 17000 for purposes of San Diego's obligation to provide medical care. Therefore, the state errs in arguing that San Diego had discretion to refuse to provide medical care to this population. [27]

2. *Service Standards*

(7) A number of statutes are relevant to the state's argument that San Diego had discretion in setting service standards. Section 17000 requires in general terms that counties "relieve and support" indigent persons. Section 10000, which sets forth the purpose of the division containing section 17000, declares the "legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life," so "as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." (§ 10000.) "Section 17000, as authoritatively interpreted, mandates that medical care be provided to indigents and section 10000 requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care ...." (*Tailfeather v. Board of Supervisors* (1996) 48 Cal.App.4th 1223, 1245 [56 Cal.Rptr.2d 255] (*Tailfeather*).)

Courts construing section 17000 have held that it "imposes a mandatory duty upon all counties to provide 'medically necessary care,' not just ***105** emergency care. [Citation.]" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1108 [18 Cal.Rptr.2d 487]; see also *Gardner v. County of Los Angeles* (1995) 34 Cal.App.4th 200, 216 [40 Cal.Rptr.2d 271]; § 16704.1 [prohibiting a county from requiring payment of a fee or charge "before [it] renders medically necessary services to ... persons entitled to services under Section 17000"].) It further "ha[s] been interpreted ... to impose a minimum standard of care below which the provision of medical services may not fall." (*Tailfeather*, *supra*, 48 Cal.App.4th at p. 1239.) In *Tailfeather*, the court stated that "section 17000 requires provision of medical services to the poor at a level which does not lead to unnecessary suffering or endanger life and health ...." (*Id.* at p. 1240.) In reaching this conclusion, it cited *Cooke*, *supra*, 213 Cal.App.3d at page 404, which held that section 17000 requires counties to provide "dental care sufficient to remedy substantial pain and infection." (See also § 14059.5 [defining "[a] service [as] 'medically necessary' ... when it is reasonable and necessary to protect life, to prevent

significant illness or significant disability, or to alleviate severe pain"].)

During the years for which San Diego sought reimbursement, Health and Safety Code section 1442.5, former subdivision (c) (former subdivision (c)), also spoke to the level of services that counties had to provide under Welfare and Institutions Code section 17000.[28] As enacted in September 1974, former subdivision (c) provided that, whether a county's duty to provide care to all indigent people "is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment received by people who cannot afford to pay for their health care shall be the same as that available to nonindigent people receiving health care services in private facilities in that county." (Stats. 1974, ch. 810, § 3, p. 1765.) The express "purpose and intent" of the act that contained former subdivision (c) was "to insure that the duty of counties to provide health care to indigents [was] properly and continuously fulfilled." (Stats. 1974, ch. 810, § 1, p. 1764.) Thus, until its repeal in September 1992,[29] former subdivision (c) "[r]equire[d] that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county." (Legis. Counsel's Dig., Sen. Bill No. 2369, 2 Stats. 1974 (Reg. Sess.) Summary Dig., p. 130; see also *Gardner v. County of Los Angeles*, *supra*, 34 Cal.App.4th at p. 216; ***106** *Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 564 [former subdivision (c) required that care provided "be *comparable* to that enjoyed by the nonindigent"].)[30] "For the 1990-91 fiscal year," the Legislature qualified this obligation by providing: "nothing in [former] subdivision (c) ... shall require any county to exceed the standard of care provided by the state Medi-Cal program. Notwithstanding any other provision of law, counties shall not be required to increase eligibility or expand the scope of services in the 1990-91 fiscal year for their programs." (Stats. 1990, ch. 457, § 23, p. 2013.)

Although we have identified statutes relevant to service standards, we need not here define the precise contours of San Diego's statutory health care obligation. The state argues generally that San Diego had discretion regarding the services it provided. However, the state fails to identify either the specific services that San Diego provided under its CMS program or which of those services, if any, were not required under the governing statutes. Nor does the state argue that San Diego could have eliminated all services and complied with statutory requirements. Accordingly, we reject the state's argument that, because San Diego had some discretion in providing services, the 1982 legislation did not impose a reimbursable mandate.[31]

VI. Minimum Required Expenditure

(8) The Court of Appeal held that, under the governing statutes, the Commission must initially determine the precise amount of any reimbursement due San Diego. It therefore reversed the damages portion of the trial court's judgment and remanded the matter to the Commission for this determination. Nevertheless, the Court of Appeal affirmed the trial court's finding that the Legislature required San Diego to spend at least $41 million on its CMS program for fiscal years 1989-1990 and 1990-1991. In affirming this finding, the Court of Appeal relied primarily on Welfare and Institutions Code section 16990, subdivision (a), as it read at all relevant times. The state contends this provision did not mandate that San Diego spend any minimum amount on the CMS program. It further asserts that the Court of Appeal's "ruling in effect sets a damages baseline, in contradiction to [its] ostensible reversal of the damage award." ***107**

Former section 16990, subdivision (a), set forth the financial maintenance-of-effort requirement for counties that received funding under the California Healthcare for the Indigent Program (CHIP). The Legislature enacted CHIP in 1989 to implement Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (codified at Rev. & Tax. Code, § 30121 et seq.). Proposition 99, which the voters approved on November 8, 1988, increased the tax on tobacco products and allocated the resulting revenue in part to medical and hospital care for certain persons who could not afford those services. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 248, 254 [279 Cal.Rptr. 325, 806 P.2d 1360].) During the 1989-1990 and 1990-1991 fiscal years, former section 16990, subdivision (a), required counties receiving CHIP funds, "at a minimum," to "maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year," adjusted annually as provided. (Stats. 1989, ch. 1331, § 9, p. 5427.) Applying this provision, the Court of Appeal affirmed the trial court's finding that the state had required San Diego to spend in fiscal years 1989-1990 and 1990-1991 at least $41 million on the CMS program.

We agree with the state that this finding is erroneous. Unlike participation in MISA, which was mandatory, participation in CHIP was voluntary. In establishing CHIP, the Legislature appropriated funds "for allocation to counties *participating* in" the program. (Stats. 1989, ch. 1331, § 10, p. 5436, italics added.) Section 16980, subdivision (a), directed the State Department of Health Services to make CHIP payments "upon application of the county assuring that it will comply with" applicable provisions. Among the governing provisions were former sections 16990, subdivision (a), and 16995, subdivision (a), which provided: "To be eligible for receipt of funds under this chapter, a county may not impose more stringent eligibility standards for the receipt of benefits under Section 17000 or reduce the scope of benefits compared to those which were in effect on November 8, 1988." (Stats. 1989, ch. 1331, § 9, p. 5431.)

However, San Diego has cited no provision, and we have found none, that *required* eligible counties to participate in the program or apply for CHIP funds. Through Revenue and Taxation Code section 30125, which was part of Proposition 99, the electorate directed that funds raised through Proposition 99 "shall be used to supplement existing levels of service and not to fund existing levels of service." (See also Stats. 1989, ch. 1331, §§ 1, 19, pp. 5382, 5438.) Counties not wanting to supplement their existing levels of service, and who therefore did not want CHIP funds, were not bound by the program's requirements. Those counties, including San Diego, that chose to ***108** seek CHIP funds did so voluntarily.[32] Thus, the Court of Appeal erred in concluding that former section 16990, subdivision (a), mandated a minimum funding requirement for San Diego's CMS program.

Nor did former section 16991, subdivision (a)(5), which the trial court and Court of Appeal also cited, establish a minimum financial obligation for San Diego's CMS program. Former section 16991 generally "establish[ed] a procedure for the allocation of funds to each county receiving funds from the [MISA] ... for the provision of services to persons meeting certain Medi-Cal eligibility requirements, based on the percentage of newly legalized individuals under the federal Immigration Reform and Control Act (IRCA)." (Legis. Counsel's Dig., Assem. Bill No. 75, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 548.) Former section 16991, subdivision (a)(5) required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its combined allocation from various sources was less than the funding it received under section 16703 for fiscal year 1988-1989.[33] Nothing about this state reimbursement requirement imposed on San Diego a minimum funding requirement for its CMS program.

Thus, we must reverse the judgment insofar as it finds that former sections 16990, subdivision (a), and 16991, subdivision (a)(5), established a $41 million spending floor for San Diego's CMS program. Instead, the various statutes that we have previously discussed (e.g., §§ 10000, 17000, and Health & Saf. Code, § 1442.5, former subd. (c)), the cases construing those statutes, and any other relevant authorities must guide the Commission's determination of the level of services that San Diego had to provide and any reimbursement to which it is entitled. ***109**

VII. Remaining Issues

(9) The state raises a number of additional issues. It first complains that a mandamus proceeding under Code of Civil Procedure section 1085 was an improper vehicle for challenging the Commission's position. It asserts that, under Government Code section 17559, review by administrative mandamus under Code of Civil Procedure section 1094.5 is the exclusive method for challenging a Commission decision denying a mandate claim. The Court of Appeal rejected this argument, reasoning that the trial court had jurisdiction under Code of Civil Procedure section 1085 because, under section 6, the state has a ministerial duty of reimbursement when it imposes a mandate.

Like the Court of Appeal, but for different reasons, we reject the state's argument. "[M]andamus pursuant to [Code of Civil Procedure] section 1094.5, commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of 'a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' [Citations.] The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except where modified by statute. [Citations.]" (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 673-674 [170 Cal.Rptr. 484, 620 P.2d 1032].) Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under Code of Civil Procedure section 1085 as one brought under Code of Civil Procedure section 1094.5 and should deny a demurrer asserting that the wrong mandamus statute has been invoked. (*Woods*, *supra*, 28 Cal.3d at

pp. 673-674; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 813-814 [140 Cal.Rptr. 442, 567 P.2d 1162].) Thus, even if San Diego identified the wrong mandamus statute, the error did not affect the trial court's ability to grant mandamus relief.

"In any event, distinctions between traditional and administrative mandate have little impact on this appeal ...." (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1584 [18 Cal.Rptr.2d 680].) The determination whether the statutes here at issue established a mandate under section 6 is a question of law. (*County of Fresno v. Lehman*, *supra*, 229 Cal.App.3d at p. 347.) In reaching our conclusion, we have relied on no facts that are in dispute. Where, as here, a "purely legal question" is at issue, courts "exercise independent judgment ... , no matter whether the issue arises by traditional or administrative mandate. [Citations.]" (*McIntosh*, *supra*, 14 Cal.App.4th at p. 1584.) As the state concedes, even under Code of Civil Procedure section 1094.5, a judgment must "be reversed if based on erroneous conclusions of law." Thus, any differences between the two mandamus statutes have had no impact on our analysis. ***110**

The state next contends that the trial court prejudicially erred in denying the "peremptory disqualification" motion that the Director of the Department of Finance filed under Code of Civil Procedure section 170.6. We will not review this ruling, however, because it is reviewable only by writ of mandate under Code of Civil Procedure section 170.3, subdivision (d). (*People v. Webb* (1993) 6 Cal.4th 494, 522-523 [24 Cal.Rptr.2d 779, 862 P.2d 779]; *People v. Hull* (1991) 1 Cal.4th 266 [2 Cal.Rptr.2d 526, 820 P.2d 1036].)

Nor can we address the state's argument that the trial court erred in granting a preliminary injunction. The May 1991 order granting the preliminary injunction was "immediately and separately appealable" under Code of Civil Procedure section 904.1, subdivision (a)(6). (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645 [4 Cal.Rptr.2d 689].) Thus, the state's attempt to challenge the order in an appeal filed after entry of final judgment in December 1992 was untimely.[34] (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 251 [256 Cal.Rptr. 194].) Moreover, the state's attempt to appeal the order granting the preliminary injunction is moot because of (1) the trial court's July 1 order granting a peremptory writ of mandate, which expressly "supersede[d] and replace[d]" the preliminary injunction order and (2) entry of final judgment. (*Sheward v. Citizens' Water Co.* (1891) 90 Cal. 635, 638-639 [27 P. 439]; *People v. Morse* (1993) 21 Cal.App.4th 259, 264-265 [25 Cal.Rptr.2d 816]; *Art Movers, Inc.*, *supra*, 3 Cal.App.4th at p. 647.)

Finally, the state requests that we reverse the trial court's reservation of jurisdiction regarding an award of attorney fees. This request is premature. In the judgment, the trial court "retain[ed] jurisdiction to determine any right to and amount of attorneys' fees ...." This provision does not declare that San Diego in fact has a right to an award of attorney fees. Nor has San Diego asserted such a right. As San Diego states, at this point, "[t]here is nothing for this Court to review." We will not give an advisory ruling on this issue.

VIII. Disposition

The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least $41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is ***111** remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c); Welf. & Inst. Code, §§ 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

C. J., Mosk, J., Baxter, J., Anderson, J.,* and Aldrich, J.,†]]]] concurred.

KENNARD, J.

I dissent.

As part of an initiative measure placing spending limits on state and local government, the voters in 1979 added article XIII B to the California Constitution. Section 6 of this article provides that when the state "mandates a new

program or higher level of service on any local government," the state must reimburse the local government for the cost of such program or service. Under subdivision (c) of this constitutional provision, however, the state "may, but need not," provide such reimbursement *if the state mandate was enacted before January 1, 1975*. (Cal. Const., art. XIII B, § 6, subd. (c).) Subdivision (c) is the critical provision here.

Because the counties have for many decades been under a state mandate to provide for the poor, a mandate that existed before the voters added article XIII B to the state Constitution, the express language of subdivision (c) of section 6 of article XIII B exempts the state from any *legal obligation* to reimburse the counties for the cost of medical care to the needy. The fact that for a certain period after 1975 the state directly paid under the state Medi-Cal program for these costs did not lead to the creation of a new mandate once the state stopped doing so. To hold to the contrary, as the majority does, is to render subdivision (c) a nullity.

The issue here is not whether the poor are entitled to medical care. They are. The issue is whether the state or the counties must pay for this care. The majority places this obligation on the state. The counties' win, however, may be a pyrrhic victory. For, in anticipation of today's decision, the Legislature has enacted legislation that will drastically reduce the counties' share of other state revenue, as discussed in part III below.

I

Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor. (*Mooney* v. *Pickett* (1971) 4 Cal.3d 669, 677-678 ***112** [94 Cal.Rptr. 279, 483 P.2d 1231].) Since 1965, this obligation has been codified in Welfare and Institutions Code section 17000. (Stats. 1965, ch. 1784, § 5, p. 4090.) That statute states in full: "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (Welf. & Inst. Code, § 17000.) Included in this is a duty to provide medical care to indigents. (*Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 557 [254 Cal.Rptr. 905].)

A brief overview of the efforts by federal, state, and local governments to furnish medical services to the poor may be helpful.

Before March 1, 1966, the date on which California began its Medi-Cal program, medical services for the poor "were provided in different ways and were funded by the state, county, and federal governments in varying amounts." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3.) The Medi-Cal program, which California adopted to implement the federal Medicaid program (42 U.S.C. § 1396 et seq.; see *Morris v. Williams* (1967) 67 Cal.2d 733, 738 [63 Cal.Rptr. 689, 433 P.2d 697]), at first limited eligibility to those persons "linked" to a federal categorical aid program by being over age 65, blind, disabled, or a member of a family with dependent children. (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.), pp. 548, 550.) Persons not linked to federal programs were ineligible for Medi-Cal; they could obtain medical care from the counties. (*County of Santa Clara* v. *Hall* (1972) 23 Cal.App.3d 1059, 1061 [100 Cal.Rptr. 629].)

In 1971, the Legislature revised Medi-Cal by extending coverage to certain so-called "noncategorically linked" persons, or "medically indigent persons." (Stats. 1971, ch. 577, §§ 12, 13, 22.5, 23, pp. 1110-1111, 1115.) The revisions included a formula for determining each county's share of Medi-Cal costs for the 1972-1973 fiscal year, with increases in later years based on the assessed value of property. (*Id.* at §§ 41, 42, pp. 1131-1133.)

In 1978, California voters added to the state Constitution article XIII A (Proposition 13), which severely limited property taxes. In that same year, to help the counties deal with the drastic drop in local tax revenue, the Legislature assumed the counties' share of Medi-Cal costs. (Stats. 1978, ch. 292, § 33, p. 610.) In 1979, the Legislature relieved the counties of their obligation to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 106, p. 1059.) ***113** Also in 1979, the voters added to the state Constitution article XIII B, which placed spending limits on state and local governments and added the mandate/reimbursement provisions at issue here.

In 1982, the Legislature removed from Medi-Cal eligibility the category of "medically indigent persons" that had been added in 1971. The Legislature also transferred funds for indigent health care services from the state to the counties

through the Medically Indigent Services Account. (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357.) Medically Indigent Services Account funds were then combined with county health service funds to provide health care to persons not eligible for Medi-Cal (Stats. 1982, ch. 1594, § 86, p. 6357), and counties were to provide health services to persons in this category "to the extent that state funds are provided" (*id.*, § 70, p. 6346).

From 1983 through June 1989, the state fully funded San Diego County's program for furnishing medical care to the poor. Thereafter, in fiscal years 1989-1990 and 1990-1991, the state partially funded San Diego County's program. In early 1991, however, the state refused to provide San Diego County full funding for the 1990-1991 fiscal year, prompting a threat by the county to terminate its indigent medical care program. This in turn led the Legal Aid Society of San Diego to file an action against the County of San Diego, asserting that Welfare and Institutions Code section 17000 imposed a legal obligation on the county to provide medical care to the poor. The county cross-complained against the state. The county argued that the state's 1982 removal of the category of "medically indigent persons" from Medi-Cal eligibility mandated a "new program or higher level of service" within the meaning of section 6 of article XIII B of the California Constitution, because it transferred the cost of caring for these persons to the county. Accordingly, the county contended, section 6 required the state to reimburse the county for its cost of providing such care, and prohibited the state from terminating reimbursement as it did in 1991. The county eventually reached a settlement with the Legal Aid Society of San Diego, leading to a dismissal of the latter's complaint.

While the County of San Diego's case against the state was pending, litigation was proceeding in a similar action against the state by the County of Los Angeles and the County of San Bernardino. In that action, the Superior Court for the County of Los Angeles entered a judgment in favor of Los Angeles and San Bernardino Counties. The state sought review in the Second District Court of Appeal in Los Angeles. In December 1992, the parties to the Los Angeles case entered into a settlement agreement providing for dismissal of the appeal and vacating of the superior court judgment. ***114** The Court of Appeal thereafter ordered that the superior court judgment be vacated and that the appeal be dismissed.

The County of San Diego's action against the state, however, was not settled. It proceeded on the county's claim against the state for reimbursement of the county's expenditures for medical care to the indigent. [1] The majority holds that the county is entitled to such reimbursement. I disagree.

II

Article XIII B, section 6 of the California Constitution 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:* [¶] ... [¶] *(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.*" (Italics added.) [2]

Of importance here is Welfare and Institutions Code section 17000 (hereafter sometimes section 17000). It imposes a legal obligation on the counties to provide, among other things, medical services to the poor. (*Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 557; *County of San Diego v. Viloria* (1969) 276 Cal.App.2d 350, 352 [80 Cal.Rptr. 869].) Section 17000 was enacted long before and has existed continuously since January 1, 1975, the date set forth in subdivision (c) of section 6 of article XIII B of the California Constitution. Thus, section 17000 falls within subdivision (c)'s language of "[l]egislative mandates enacted prior to January 1, 1975," rendering it exempt from the reimbursement provision of section 6.

Contrary to the majority's conclusion, the Legislature's 1982 legislation removing the category of "medically indigent persons" from Medi-Cal did not meet California Constitution, article XIII B, section 6 's requirement of imposing on local government "a new program or higher level of service," and therefore did not entitle the counties to reimbursement from the state under section 6 of article XIII B. The counties' legal obligation to provide medical care arises from section 17000, not from the subsequently enacted ***115** 1982 legislation. The majority itself concedes that the 1982 legislation merely "trigger[ed] the counties' responsibility to provide medical care as providers of last resort under section 17000." (Maj. opn., *ante,* at p. 98.) Although certain actions by the state and the federal government during the 1970's and 1980's may have alleviated the counties' financial burden of providing medical care for the indigent, those actions did not supplant or remove the counties' existing legal obligation under section

17000 to furnish such care. (*Cooke* v. *Superior Court* (1989) 213 Cal.App.3d 401, 411 [261 Cal.Rptr. 706]; *Madera Community Hospital* v. *County of Madera* (1984) 155 Cal.App.3d 136, 151 [201 Cal.Rptr. 768].)

The state's reimbursement obligation under section 6 of article XIII B of the California Constitution arises only if, after January 1, 1975, the date mentioned in subdivision (c) of section 6, the state imposes on the counties "a new program or higher level of service." That did not occur here. As I pointed out above, the counties' legal obligation to provide for the poor arises from section 17000, enacted long before the January 1, 1975, cutoff date set forth in subdivision (c) of section 6. That statutory obligation remained in effect when during a certain period after 1975 the state assumed the financial burden of providing medical care to the poor, in an effort to help the counties deal with a drastic drop in local revenue as a result of the voters' passage of Proposition 13, which severely limited property taxes. Because the counties' statutory obligation to provide health care to the poor was created before 1975 and has existed unchanged since that time, the state's 1982 termination of Medi-Cal eligibility for "medically indigent persons" did not create a "new program or higher level of service" within the meaning of section 6 of article XIII B, and therefore did not obligate the state to reimburse the counties for their expenditures in health care for the poor.

III

In imposing on the state a legal obligation to reimburse the counties for their cost of furnishing medical services to the poor, the majority's holding appears to bail out financially strapped counties. Not so.

Today's decision will immediately result in a reduction of state funds available to the counties. Here is why. In 1991, the Legislature added section 11001.5 to the Revenue and Taxation Code, providing that 24.33 percent of the moneys collected by the Department of Motor Vehicles as motor vehicle license fees must be deposited in the State Treasury to the credit of the Local Revenue Fund. In anticipation of today's decision, the Legislature stated in subdivision (d) of this statute: "This section shall cease to be operative on ***116** the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal [that]: [¶] ... [¶] (2) The state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, § 11001.5, subd. (d); see also *id*., § 10753.8, subd. (b).)

The loss of such revenue, which the Attorney General estimates at "hundreds of millions of dollars," may put the counties in a serious financial bind. Indeed, realization of the scope of this revenue loss appears to explain why the County of Los Angeles, after a superior court victory in its action seeking state reimbursement for the cost of furnishing medical care to "medically indigent persons," entered into a settlement with the state under which the superior court judgment was effectively obliterated by a stipulated reversal. (See *Neary v. Regents of University of California* (1992) 3 Cal.4th 273 [10 Cal.Rptr.2d 859, 834 P.2d 119].) In a letter addressed to the Second District Court of Appeal, sent while the County of Los Angeles was engaged in settlement negotiations with the state, the county's attorney referred to the legislation mentioned above in these terms: "This legislation was quite clearly written with this case in mind. Consequently, to pursue this matter, *the County of Los Angeles risks losing a funding source it must have to maintain its health services programs at current levels.* The additional funding that might flow to the County from a final judgment in its favor in this matter, is several years away *and is most likely of a lesser amount than this County's share of the vehicle license fees*." (Italics added.) Thus, the County of Los Angeles had apparently determined that a legal victory entitling it to reimbursement from the state for the cost of providing medical care to the category of "medically indigent persons" would not in fact serve its economic interests.

I have an additional concern. According to the majority, whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state. This means that so long as section 17000 continues to exist, an increase in state funding to a particular county for the care of the poor, once undertaken, may be irreversible, thus locking the state into perpetual financial assistance to that county for health care to the needy. This would, understandably, be a major disincentive for the Legislature to ever increase the state's funding of a county's medical care for the poor.

The rigidity imposed by today's holding will have unfortunate consequences should the state's limited financial resources

prove insufficient to ***117** reimburse the counties under section 6 of article XIII B of the California Constitution for the "new program or higher level of service" of providing medical care to the poor under section 17000. In that event, the state may be required to modify this "new program or higher level of service" in order to reconcile the state's reimbursement obligation with its finite resources and its other financial commitments. Such modifications are likely to take the form of limitations on eligibility for medical care or on the amount or kinds of medical care that the counties must provide to the poor under section 17000. A more flexible system—one that actively encouraged shared state and county responsibility for indigent medical care, using a variety of innovative funding mechanisms—would be less likely to result in a curtailment of medical services to the poor.

And if the Legislature is unable or unwilling to appropriate funds to comply with the majority's reimbursement order, the law allows the county to file "in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c); see maj. opn., *ante,* at p. 82.) Such a declaration would do nothing to alleviate the plight of the poor.

Conclusion

The dispute in this case ultimately arises from a collision between the taxing limitations on the counties imposed by article XIII A of the state Constitution and the preexisting, open-ended mandate imposed on them under Welfare and Institutions Code section 17000 to provide medical care for the poor. As I have explained, the Legislature's assumption thereafter of some of the resulting financial burden to the counties did not repeal section 17000' s mandate, nor did the Legislature's later termination of its financial support create a new mandate. In holding to the contrary, the majority imposes on the Legislature an obligation that the Legislature does not have under the law.

I recognize that my resolution of this issue—that under existing law the state has *no legal obligation* to reimburse the counties for health expenditures for the poor—would leave the counties in the same difficult position in which they find themselves now: providing funding for indigent medical care while maintaining other essential public services in a time of fiscal austerity. But complex policy questions such as the structuring and funding of indigent medical care are best left to the counties, the Legislature, and ultimately the electorate, rather than to the courts. It is the counties that must figure out how to allocate the limited budgets imposed on them by the electorate's adoption of articles XIII A and XIII B of the California Constitution among indigent medical care programs and a host of other pressing ***118** and essential needs. It is the Legislature that must decide whether to furnish financial assistance to the counties so they can meet their section 17000 obligations to provide for the poor, and whether to continue to impose the obligations of section 17000 on the counties. It is the electorate that must decide whether, given the ever-increasing costs of meeting the needs of indigents under section 17000, counties should be afforded some relief from the taxing and spending limits of articles XIII A and XIII B, both enacted by voters' initiative. These are hard choices, but for the reasons just given they are better made by the representative branches of government and the electorate than by the courts. ***119**

Footnotes

* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

2 Congress later repealed the requirement that states work towards expanding eligibility. (See Cal. Health and Welfare Agency, The Medi-Cal Program: A Brief Summary of Major Events (Mar. 1990) p. 1 (Summary of Major Events).)

3 Former section 14150.1 provided in relevant part: "[A] county may elect to pay as its share [of Medi-Cal costs] one hundred percent ... of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county .... If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county ...." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 121.)

4 Former section 14150 provided the standard method for determining the counties' share of Medi-Cal costs. Under it, "a county was required to pay the state a specific sum, in return for which the state would pay for the medical care of all [categorically linked] individuals .... Financial responsibility for nonlinked individuals ... remained with the counties." (*Lackner*, *supra*, 97 Cal.App.3d at p. 581.)

5 In this opinion, the terms "adult MIP's" and "Medically Indigent Adults" refer only to those persons who were excluded from the Medi-Cal program by the 1982 legislation.

6 San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles action.

7 In setting forth the facts relating to the Los Angeles action, we rely in part on the appellate record from that action, of which we take judicial notice. (Evid. Code, §§ 452, subd. (d), 459.)

8 The settlement resulted from 1991 legislation that changed the system of health care funding as of June 30, 1991. (See § 17600 et seq.; Stats. 1991, chs. 87, 89, pp. 231-235, 243-341.) That legislation provided counties with new revenue sources, including a portion of state vehicle license fees, to fund health care programs. However, the legislation declared that the statutes providing counties with vehicle license fees would "cease to be operative on the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal" that "[t]he state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, §§ 10753.8, subd. (b)(2), 11001.5, subd. (d)(2); see also Stats. 1991, ch. 89, § 210, p. 340.) Los Angeles and San Bernardino Counties settled their action to avoid triggering these provisions. Unlike the dissent, we do not believe that consideration of these recently enacted provisions is appropriate in analyzing the 1982 legislation. Nor do we assume, as the dissent does, that our decision necessarily triggers these provisions. That issue is not before us.

9 The cross-complaint named the following state officers: (1) Kenneth W. Kizer, Director of the Department of Health Services; (2) Kim Belshé, Acting Secretary of the Health and Welfare Agency; (3) Gray Davis, the State Controller; (4) Kathleen Brown, the State Treasurer; and (5) Thomas Hayes, the Director of the Department of Finance. Where the context suggests, subsequent references in this opinion to "the state" include these officers.

10 The judgment dismissed all of San Diego's other claims.

11 In *Garamendi*, *supra*, 20 Cal.App.4th at pages 771-775, the court discussed procedural requirements for raising a claim that another court has already exercised its concurrent jurisdiction. Given our conclusion that the trial court's error here was not jurisdictional, we express no opinion about this discussion in *Garamendi* or the sufficiency of the state's efforts to raise the issue in this case.

12 Notably, in discussing the options still available to San Diego, the state asserts that San Diego "might have been able to go to superior court and file a [mandamus] petition based on the record of the prior test claim."

13 "County General Assistance in California dates from 1855, and for many years afforded the only form of relief to indigents." (*Mooney* v . *Pickett* (1971) 4 Cal.3d 669, 677 [94 Cal.Rptr. 279, 483 P.2d 1231] (*Mooney*).) Section 17000 is substantively identical to former section 2500, which was enacted in 1937. (Stats. 1937, chs. 369, 464, pp. 1097, 1406.)

14 See also *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 639 [122 P.2d 526] (construing former section 2500); *Jennings v. Jones* (1985) 165 Cal.App.3d 1083, 1091 [212 Cal.Rptr. 134] (counties must support all indigent persons "having no other means of support"); *Union of American Physicians & Dentists v. County of Santa Clara* (1983) 149 Cal.App.3d 45, 51, fn. 10 [196 Cal.Rptr. 602]; *Rogers v. Detrich* (1976) 58 Cal.App.3d 90, 95 [128 Cal.Rptr. 261] (counties have duty of support "where such support is not otherwise furnished").

15 In asserting that Medi-Cal coverage did not supplant San Diego's obligation under section 17000, the dissent incorrectly relies on *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768] (*Madera*) and *Cooke*, *supra*, 213 Cal.App.3d 401. (Dis. opn., *post*, at p. 115.) In *Madera*, the court voided a county ordinance that extended county benefits under section 17000 only to persons " 'meeting all eligibility standards for the Medi-Cal program.' " (*Madera*, *supra*, 155 Cal.App.3d at p. 150.) The court explained: "Because all funding for the Medi-Cal program comes from either the federal or the state government ..., [c]ounty has denied any financial obligation whatsoever from county funds for the medical care of its indigent and poor residents." (*Ibid.*) Thus, properly understood, *Madera* held only that Medi-Cal does not relieve counties of their obligation to provide medical care to persons who are "indigent" within the meaning of section 17000 but who are ineligible for Medi-Cal. The limit of *Madera*'s holding is apparent from the court's reliance on a 1979 opinion of the Attorney General discussing the scope of a county's authority under section 17000. (*Madera*, *supra*, 155 Cal.App.3d at pp. 151-152.) The Attorney General explained that "[t]he county obligation [under section 17000] to provide general relief extends to those indigents who do not qualify under specialized aid programs, ... including Medi-Cal." (62 Ops.Cal.Atty.Gen. 70, 71, fn. 1 (1979).) Moreover, the *Madera* court expressly recognized that state and federal programs "alleviate, to a greater or lesser extent, [a] [c]ounty's burden." (*Madera*, *supra*, 155 Cal.App.3d at p. 151.) In *Cooke*, the court simply made a passing reference to *Madera* in dictum describing the coverage history of Medi-Cal. (*Cooke*, *supra*, 213 Cal.App.3d at p. 411.) It neither analyzed the issue before us nor explained the meaning of the dictum that the dissent cites.

16 As we have previously explained, even before 1971 the state, through the county option, assumed much of the financial responsibility for providing medical care to adult MIP's.

17 Because *County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th 805, is distinguishable, we need not (and do not) express an opinion regarding the court's analysis in that decision or its conclusions.

18 The state properly does not contend that the provision of medical care to adult MIP's is not a "program" within the meaning of section 6. (See *County of Los Angeles*, *supra*, 43 Cal.3d at p. 56 [section 6 applies to "programs that carry out the governmental function of providing services to the public"].)

19 Alternatively, the 1982 legislation can be viewed as having mandated an increase in the services that counties were providing through existing section 17000 programs, by adding adult MIP's to the indigent population that counties already had to serve under that section. (See *County of Los Angeles*, *supra*, 43 Cal.3d at p. 56 ["subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs' "].)

20 In reaching a contrary conclusion, the dissent ignores the electorate's purpose in adopting section 6. The dissent also mischaracterizes our decision. We do not hold that "whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state." (Dis. opn., *post*, at p. 116.) Rather, we hold that section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility

before adoption of section 6. Whether the state may discontinue assistance that it initiated after section 6's adoption is a question that is not before us.

21 As amended in 1982, section 16704, subdivision (c)(1), provided in relevant part: "The [county board of supervisors] shall assure that it will expend [MISA] funds only for the health services specified in Sections 14132 and 14021 provided to persons certified as eligible for such services pursuant to Section 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount required to obtain the maximum allocation under Section 16702." (Stats. 1982, ch. 1594, § 70, p. 6346.) Section 16704, subdivision (c)(3), provided in relevant part: "Any person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which would deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service .... The provisions of this paragraph shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandates [*sic*] that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date." (Stats. 1982, ch. 1594, § 70, pp. 6346-6347.)

22 Section 17001 provides: "The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county."

23 We disapprove *Bay General*, *supra*, 156 Cal.App.3d at pages 959-960, insofar as it (1) states that a county's responsibility under section 17000 extends only to indigents as defined by the county's board of supervisors, and (2) suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of section 17000 but do not qualify for Medi-Cal.

24 Our conclusion is limited to this aspect of a county's duty under section 17000. We express no opinion regarding the scope of a county's duty to provide other forms of relief and support under section 17000.

25 The 1982 legislation made the subdivision operative until June 30, 1983. (Stats. 1982, ch. 1594, § 70, p. 6347.) In 1983, the Legislature repealed and reenacted section 16704, and extended the operative date of subdivision (c)(3) to June 30, 1985. (Stats. 1983, ch. 323, §§ 131.1, 131.2, pp. 1079-1080.)

26 Given our analysis, we express no opinion about the statement in *Cooke*, *supra*, 213 Cal.App.3d at page 412, footnote 9, that the "life" of section 16704, subdivision (c)(3), "was implicitly extended" by the fact that the "paragraph remains in the statute despite three subsequent amendments to the statute ...."

27 Although asserting that nothing required San Diego to provide "all" adult MIP's with medical care, the state never precisely identifies which adult MIP's were legally entitled to medical care and which ones were not. Nor does the state ever directly assert that some adult MIP's were not "indigent persons" under section 17000. On the contrary, despite its argument, the state seems to suggest that San Diego's medical care obligation under section 17000 extended even beyond adult MIP's. It asserts: "At no time prior to or following 1983 did Medi-Cal ever provide medical services to, or pay for medical services provided to, all persons who could not afford such services and therefore might be deemed 'medically indigent.' ... For some period prior to 1983, Medi-Cal paid for services for *some* indigent adults under its 'medically indigent adults' category.... [A]t *no time* did the state ever assume financial responsibility for all adults who are too indigent to afford health care." (Original italics.)

28 The state argues that former subdivision (c) is irrelevant to our determination because, like section 17000, it "predate[d] 1975." Our previous analysis rejecting this argument in connection with section 17000 applies here as well.

29 Statutes 1992, chapter 719, section 2, page 2882, repealed former subdivision (c) and enacted a new subdivision (c) in its place. This urgency measure was approved by the Governor on September 14, 1992, and filed with the Secretary of State on September 15, 1992.

30 We disapprove *Cooke*, *supra*, 213 Cal.App.3d at page 410, to the extent it held that Health and Safety Code section 1442.5, former subdivision (c), was merely "a limitation on a county's ability to close facilities or reduce services provided in those facilities," and was irrelevant absent a claim that a "county facility was closed [or] that any services in [the] county ... were reduced." Although former subdivision (c) was contained in a section that dealt in part with closures and service reductions, nothing limited its reach to that context.

31 During further proceedings before the Commission to determine the amount of reimbursement due San Diego, the state may argue that particular services available under San Diego's CMS program exceeded statutory requirements.

32 Consistent with the electorate's direction, in its application for CHIP funds, San Diego assured the state that it would "[e]xpend [CHIP] funds only to supplement existing levels of services provided and not to fund existing levels of service ...." Because San Diego's initial decision to seek CHIP funds was voluntary, the evidence it cites of state threats to withhold CHIP funds if it eliminated the CMS program is irrelevant.

33 Former section 16991, subdivision (a)(5), provided in full: "If the sum of funding that a county received from its allocation pursuant to Section 16703, the amount of reimbursement it received from federal State Legalization Impact Assistance Grant [(SLIAG)] funding for indigent care, and its share of funding provided in this section is less than the amount of funding the county received pursuant to Section 16703 in fiscal year 1988-89 the state shall reimburse the county for the amount of the difference. For the 1990-91 fiscal year, if the sum of funding received from its allocation, pursuant to Section 16703 and the amount of reimbursement it received from [SLIAG] Funding for indigent care that year is less than the amount of funding the county received pursuant to Section 16703 in the 1988-89 fiscal year, the state shall reimburse the amount of the difference. If the department determines that the county has not made reasonable efforts to document and claim federal SLIAG funding for indigent care, the department shall deny the reimbursement." (Stats. 1989, ch. 1331, § 9, p. 5428.)

34 Despite its argument here, when it initially appealed, the state apparently recognized that it could no longer challenge the May 1991 order. In its March 1993 notice of appeal, it appealed only from the judgment entered December 18, 1992, and did not mention the May 1991 order.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 I agree with the majority that the superior court had jurisdiction to decide this case. (Maj. opn., *ante,* at pp. 86-90.)

2 Section 6 of article XIII B pertains to two types of mandates: new programs and higher levels of service. The words "such subvention" in the first paragraph of this constitutional provision makes the subdivision (c) exemption applicable to both types of mandates.

53 Cal.3d 482, 808 P.2d 235, 280 Cal.Rptr. 92
Supreme Court of California

COUNTY OF FRESNO, Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S015637.
Apr 22, 1991.

SUMMARY

A county filed a test claim with the Commission on State Mandates seeking, under Cal. Const., art. XIII B, § 6 (state must provide subvention of funds to reimburse local governments for costs of state- mandated programs or increased levels of service), reimbursement from the state for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.). The commission found the county had the authority to charge fees to pay for the program, and the program was thus not a reimbursable state-mandated program under Gov. Code, § 17556, subd. (d), which provides that costs are not state-mandated if the agency has authority to levy a charge or fee sufficient to pay for the program. The county filed a petition for writ of mandate and a complaint for declaratory relief against the state. The trial court denied relief. (Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.) The Court of Appeal, Fifth Dist., No. F011925, affirmed.

The Supreme Court affirmed the decision of the Court of Appeal. The court held, as to the single issue on review, that Gov. Code, § 17556, subd. (d), was facially constitutional under Cal. Const., art. XIII B, § 6. It held art. XIII B was not intended to reach beyond taxation, and § 6 was included in art. XIII B in recognition that Cal. Const., art. XIII A, severely restricted the taxing powers of local governments. It held that art. XIII B, § 6 was designed to protect the tax revenues of local governments from state mandates that would require an expenditure of such revenues and, when read in textual and historical context, requires subvention only when the costs in question can be recovered solely from tax revenues. Accordingly, the court held that Gov. Code, § 17556, subd. (d), effectively construed the term "cost" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that such a construction is altogether sound. (Opinion by Mosk, J., with Lucas, C. J., Broussard, ***483** Panelli, Kennard, JJ., and Best (Hollis G.), J.,* concurring. Separate concurring opinion by Arabian, J.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
State of California § 11--Reimbursement to Local Governments for State-mandated Costs--Costs for Which Fees May Be Levied--Validity of Exclusion.
In a proceeding by a county seeking reversal of a decision by the Commission on State Mandates that the state was not required by Cal. Const., art. XIII B, § 6, to reimburse the county for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.), the trial court properly found that Gov. Code, § 17556, subd. (d) (costs are not state-mandated if agency has authority to levy charge or fee sufficient to pay for program), was facially constitutional. Cal. Const., art. XIII B, was intended to apply to taxation and was not intended to reach beyond taxation, as is apparent from its language and confirmed by its history. It was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues; read in its textual and historical contexts, requires subvention only when the costs in question can be recovered solely from tax revenues. Gov. Code, § 17556, subd. (d), effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that construction is altogether sound. Accordingly, Gov. Code, § 17556, subd. (d), is facially constitutional under Cal. Const., art. XIII B, § 6.

[See **Cal.Jur.3d (Rev),** Municipalities, § 361; 9 **Witkin,** Summary of Cal. Law (9th ed. 1988) Taxation, § 124.]

COUNSEL
Max E. Robinson, County Counsel, and Pamela A. Stone, Deputy County Counsel, for Plaintiff and Appellant.
B. C. Barnum, County Counsel (Kern), and Patricia J. Randolph, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant. ***484**
John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, and Richard M. Frank, Deputy Attorney General, for Defendants and Respondents.

MOSK, J.

We granted review in this proceeding to decide whether section 17556, subdivision (d), of the Government Code (section 17556(d)) is facially valid under article XIII B, section 6, of the California Constitution (article XIII B, section 6).

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."

The Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, § 17500.) It created a "quasi-judicial body" (*ibid.*) called the Commission on State Mandates (commission) (*id.*, § 17525) to "hear and decide upon [any] claim" by a local government that the local government "is entitled to be reimbursed by the state for costs" as required by article XIII B, section 6. (Gov. Code, § 17551, subd. (a).) It defined "costs" as "costs mandated by the state"—"any increased costs" that the local government "is required to incur ... as a result of any statute ..., or any executive order implementing any statute ..., which mandates a new program or higher level of service of any existing program" within the meaning of article XIII B, section 6. (Gov. Code, § 17514.) Finally, in section 17556(d) it declared that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

For the reasons discussed below, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6. ***485**

I. Facts and Procedural History

The present proceeding arose after the Legislature enacted the Hazardous Materials Release Response Plans and Inventory Act (Act). (Health & Saf. Code, § 25500 et seq.) The Act establishes minimum statewide standards for business and area plans relating to the handling and release or threatened release of hazardous materials. (*Id.*, § 25500.) It requires local governments to implement its provisions. (*Id.*, § 25502.) To cover the costs they may incur, it authorizes them to collect fees from those who handle hazardous materials. (*Id.*, § 25513.)

The County of Fresno (County) implemented the Act but chose not to impose the authorized fees. Instead, it filed a so-called "test" or initial claim with the commission (Gov. Code, § 17521) seeking reimbursement from the State of California (State) under article XIII B, section 6. After a hearing, the commission rejected the claim. In its statement of decision, the commission made the following findings, among others: the Act constituted a "new program"; the County did indeed incur increased costs; but because it had authority under the Act to levy fees sufficient to cover such costs, section 17556(d) prohibited a finding of reimbursable costs.

The County then filed a petition for writ of mandate and complaint for declaratory relief against the State, the commission, and others, seeking vacation of the commission's decision and a declaration that section 17556(d) is unconstitutional under article XIII B, section 6. While the matter was pending, the commission amended its statement of decision to include another basis for denial of the test claim: the Act did not constitute a "program" under the rationale of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*), because it did not impose unique requirements on local governments.

After a hearing, the trial court denied the petition and effectively dismissed the complaint. It determined, inter alia, that mandate under Code of Civil Procedure section 1094.5 was the County's sole remedy, and that the commission was the sole properly named respondent. It also determined that section 17556(d) is constitutional under article XIII B, section 6. It did not address the

question whether the Act constituted a "program" under *County of Los Angeles.* Judgment was entered accordingly.

The Court of Appeal affirmed. It held the Act did indeed constitute a "program" under *County of Los Angeles, supra,* 43 Cal.3d 46. It also held section 17556(d) is constitutional under article XIII B, section 6. ***486**

([1]) We granted review to decide a single issue, i.e., whether section 17556(d) is facially constitutional under article XIII B, section 6.

II. Discussion

We begin our analysis with the California Constitution. At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new "special taxes." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes." (*City of Sacramento, supra,* 50 Cal.3d at p. 59, fn. 1.)

Article XIII B of the Constitution was intended to apply to taxation—specifically, to provide "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an "appropriations limit" for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no "appropriations subject to limitation" in excess thereof (*id.,* § 2). (See *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 446.) It defines the relevant "appropriations subject to limitation" as "any authorization to expend during a fiscal year the proceeds of taxes ...." (Cal. Const., art. XIII B, § 8, subd. (b).) It defines "proceeds of taxes" as including "all tax revenues and the proceeds to ... government from," inter alia, "regulatory licenses, user charges, and user fees *to the extent that such proceeds exceed the costs reasonably borne by* [*government*] *in providing the regulation, product, or service* ...." (Cal. Const., art. XIII B, § 8, subd. (c), italics added.) Such "excess" proceeds from "licenses," "charges," and "fees" "are but ***487** *taxes*" for purposes here. (*County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 451, italics in original.)

Article XIII B of the Constitution, however, was not intended to reach beyond taxation. That fact is apparent from the language of the measure. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, p. 16.)

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*

In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the

statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.

The County argues to the contrary. It maintains that section 17556(d) in essence creates a new exception to the reimbursement requirement of article ***488** XIII B, section 6, for self-financing programs and that the Legislature cannot create exceptions to the reimbursement requirement beyond those enumerated in the Constitution.

We do not agree that in enacting section 17556(d) the Legislature created a new exception to the reimbursement requirement of article XIII B, section 6. As explained, the Legislature effectively—and properly—construed the term "costs" as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the requirement. Therefore, they need not be explicitly excepted from its reach.

The County nevertheless argues that no matter how characterized, section 17556(d) is indeed inconsistent with article XIII B, section 6. Its contention is in substance as follows: the source of section 17556(d) is former Revenue and Taxation Code section 2253.2; at the time of Proposition 4, subdivision (b)(4) of that former section stated that the State Board of Control shall not allow a claim for reimbursement of costs mandated by the state if the legislation contains a self-financing authority; the drafters of Proposition 4 incorporated some of the provisions of former Revenue and Taxation Code section 2253.2 into article XIII B, section 6, but did not incorporate former subdivision (b)(4); their failure to do so reveals an intent to treat as immaterial the presence or absence of a "self-financing" provision; and such an intent is confirmed by the "legislative history" set out at page 55 in Spirit of 13, Inc., Summary of Proposed Implementing Legislation and Drafters' Intent: "the state may not arbitrarily declare that it is not going to comply with Section 6 ... if the state provides new compensating revenues."

In our view, the County's argument is unpersuasive. Even if we assume arguendo that the intent of those who drafted Proposition 4 is as claimed, what is crucial here is the intent of those who voted for the measure. (See *County of Los Angeles, supra,* 43 Cal.3d 46, 56.) There is no substantial evidence that the voters sought what the County assumes the drafters desired. Moreover, the "legislative history" cited above cannot be considered relevant; it was written and circulated after the passage of Proposition 4. As such, it could not have affected the voters in any way.

To avoid this result, the County advances one final argument: "Based on the authority of [section 17556(d)], the Commission on State Mandates refuses to hear mandates on the merits once it finds that the authority to charge fees is given by the Legislature. This position is taken whether or not fees can actually or legally be charged to recover the entire costs of the program." ***489**

The County appears to be making one or both of the following arguments: (1) the commission applies section 17556(d) in an unconstitutional manner; or (2) the Act's self-financing authority is somehow lacking. Such contentions, however, miss the designated mark. They raise questions bearing on the constitutionality of section 17556(d) as applied and the legal efficacy of the authority conferred by the Act. The sole issue on review, however, is the facial constitutionality of section 17556(d).

III. Conclusion

For the reasons set forth above, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Broussard, J., Panelli, J., Kennard, J., and Best (Hollis G.), J.,[*] concurred.

ARABIAN, J.,

Concurring.

I concur in the determination that Government Code section 17556, subdivision (d)[1] (section 17556(d)), does not offend article XIII B, section 6, of the California

Constitution (article XIII B, section 6). In my estimation, however, the constitutional measure of the issue before us warrants fuller examination than the majority allow. A literalistic analysis begs the question of whether the Legislature had the authority to act statutorily upon a subject matter the electorate has spoken to constitutionally through the initiative process.

Article XIII B, section 6, unequivocally commands that "the state shall provide a subvention of funds to reimburse ... local government for the costs of [a new] program or increased level of service" except as specified therein. Article XIII B does not define this reference to "costs." (See Cal. Const., art. XIII B, § 8.) Rather, the Legislature assumed the task of explicating the related concept of "costs mandated by the state" when it created the Commission on State Mandates and enacted procedures intended to implement article XIII B, section 6, more effectively. (See § 17500 et seq.) As part of this statutory scheme, it exempted the state from its constitutionally imposed subvention obligation under certain enumerated circumstances. Some of these exemptions the electorate expressly contemplated in approving article XIII B, section 6 (§ 17556, subds. (a), (c), & (g); see § 17514), while others are strictly of legislative formulation and derive from ***490** former Revenue and Taxation Code section 2253.2. (§ 17556, subds. (b), (d), (e), & (f).)

The majority find section 17556 valid notwithstanding the mandatory language of article XIII B, section 6, based on the circular and conclusory rationale that "the Legislature effectively—and properly—construed the term 'costs' as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the [subvention] requirement. Therefore, they need not be explicitly excepted from its reach." (Maj. opn., *ante*, at p. 488.) In my view, excluding or otherwise removing something from the purview of a law is tantamount to creating an exception thereto. When an exclusionary implication is clear from the import or effect of the statutory language, use of the word "except" should not be necessary to construe the result for what it clearly is. In this circumstance, "I would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 [177 Cal.Rptr. 852, 635 P.2d 446] (conc. opn. by Mosk, J.).)

Of at least equal importance, section 17500 et seq. constitutes a legislative implementation of article XIII B, section 6. As such, the overall statutory scheme must comport with the express constitutional language it was designed to effectuate as well as the implicit electoral intent. Eschewing semantics, I would squarely and forthrightly address the fundamental and substantial question of whether the Legislature could lawfully enlarge upon the scope of article XIII B, section 6, to include exceptions not originally designated in the initiative.

I do not hereby seek to undermine the majority holding but rather to set it on a firmer constitutional footing. "[S]tatutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative rather than defeat them. In so doing, sections of the Constitution, as well as the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose v. State of California* (1942) 19 Cal.2d 713, 723 [123 P.2d 505]; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202].) To this end, it is a fundamental premise of our form of government that "the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and ... it is competent for the Legislature to exercise all powers not forbidden ...." (*People v. Coleman* (1854) 4 Cal. 46, 49.) "Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the ***491** Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] *In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited.'* [Citation.] [¶] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' [Citations.]" (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], italics added.) "Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. [Citations.]" (*Dean v. Kuchel* (1951) 37 Cal.2d 97, 100 [230 P.2d 811].)

As the majority opinion impliedly recognizes, neither the language nor the intent of article XIII B conflicts with the exercise of legislative prerogative we review today. Of paramount significance, neither section 6 nor any other provision of article XIII B prohibits statutory delineation of additional circumstances obviating reimbursement for state mandated programs. (See *Dean v. Kuchel, supra,* 37

Cal.2d at p. 101; *Roth Drugs, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 729 [57 P.2d 1022]; see also *Kehrlein v. City of Oakland* (1981) 116 Cal.App.3d 332, 338 [172 Cal.Rptr. 111].)

Furthermore, the initiative was "[b]illed as a flexible way to provide discipline in government spending" by creating appropriations limits to restrict the amount of such expenditures. (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 447 [170 Cal.Rptr. 232]; see Cal. Const., art. XIII B, § 1.) By their nature, user fees do not affect the equation of local government spending: While they facilitate implementation of newly mandated state programs or increased levels of service, they are excluded from the "appropriations subject to limitations" calculation and its attendant budgetary constraints. (See Cal. Const., art. XIII B, § 8; see also *City Council v. South* (1983) 146 Cal.App.3d 320, 334 [194 Cal.Rptr. 110]; *County of Placer v. Corin, supra,* 113 Cal.App.3d at pp. 448-449; Cal. Const., art. XIII B, § 3, subd. (b); cf. *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1505 [246 Cal.Rptr. 21] [" 'fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of "special taxes" [limited by California Constitution, article XIII A]' "]; *Terminal Plaza Corp. v. City* ***492** *and County of San Francisco* (1986) 177 Cal.App.3d 892, 906 [223 Cal.Rptr. 379] [same].)

This conclusion fully accommodates the intent of the voters in adopting article XIII B, as reflected in the ballot materials accompanying the proposition. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) In general, these materials convey that "[t]he goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61; *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 109- 110 [211 Cal.Rptr. 133, 695 P.2d 220].) To the extent user fees are not borne by the general public or applied to the general revenues, they do not bear upon this purpose. Moreover, by imputation, voter approval contemplated the continued imposition of reasonable user fees outside the scope of article XIII B. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Limitation of Government Appropriations, Special Statewide Elec. (Nov. 6, 1979), arguments in favor of and against Prop. 4, p. 18 [initiative "Will curb excessive user fees imposed by local government" but "will Not eliminate user fees ..."]; see *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 452.)

"The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 56; see *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66 [266 Cal.Rptr. 139, 785 P.2d 522].) "Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61.) An exemption from reimbursement for state mandated programs for which local governments are authorized to charge offsetting user fees does not frustrate or compromise these goals or otherwise disturb the balance of local government financing and expenditure.[2] (See ***493** *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 452, fn. 7.) Article XIII B, section 8, subdivision (c), specifically includes regulatory licenses, user charges, and user fees in the appropriations limitation equation only "to the extent that those proceeds exceed the costs reasonably borne by [the governmental] entity in providing the regulation, product, or service ...."

The self-executing nature of article XIII B does not alter this analysis. "It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. [Citations.]" (*Chesney v. Byram* (1940) 15 Cal.2d 460, 465 [101 P.2d 1106].) " ' "Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." [Citations.]' " (*Id.,* at pp. 463-464; see also *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].) Section 17556(d) is not "merely [a] transparent attempt[] to do indirectly that which cannot lawfully be done directly." (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541 [234 Cal.Rptr. 795].) On the contrary, it creates no conflict with the constitutional

directive it subserves. Hence, rather than pursue an interpretive expedient, this court should expressly declare that it operates as a valid legislative implementation thereof.

"[Initiative] provisions of the Constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. [Citations.] As opposed to that principle, however, 'in examining and ascertaining the intention of the people with respect to the scope and nature of those ... powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it 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 and, perhaps, ... indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers and that they do not so apply.' [Citation.]" (*Hunt v. Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628-629 [191 P.2d 426].) ***494**

This court is not infrequently called upon to resolve the tension of apparent or actual conflicts in the express will of the people.[3] Whether that expression emanates directly from the ballot or indirectly through legislative implementation, each deserves our fullest estimation and effectuation. Given the historical and abiding role of government by initiative, I decline to circumvent that responsibility and accept uncritically the Legislature's self-validating statutory scheme as the basis for approving the exercise of its prerogative. It is not enough to say a broader constitutional analysis yields the same result and therefore is unnecessary. We provide a higher quality of justice harmonizing rather than ignoring the divers voices of the people, for such is the nature of our office. ***495**

Footnotes

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

1 Unless otherwise indicated, all further statutory references are to the Government Code.

2 This conclusion also accords with the traditional and historical role of user fees in promoting the multifarious functions of local government by imposing on those receiving a service the cost of providing it. (Cf. *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 454 ["Special assessments, being levied only for improvements that benefit particular parcels of land, and not to raise general revenues, are simply not the type of exaction that can be used as a mechanism for circumventing these tax relief provisions. [Citation.]"].)

3 See, e.g., *Zumwalt v. Superior Court* (1989) 49 Cal.3d 167 [260 Cal.Rptr. 545, 776 P.2d 247]; *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]; *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171 [148 Cal.Rptr. 875, 583 P.2d 729]; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575 [131 Cal.Rptr. 361, 551 P.2d 1193]; *Blotter v. Farrell* (1954) 42 Cal.2d 804 [270 P.2d 481]; *Dean v. Kuchel, supra,* 37 Cal.2d 97; *Hunt v. Mayor & Council of Riverside, supra,* 31 Cal.2d 619.

54 Cal.3d 326, 814 P.2d 1308, 285 Cal.Rptr. 66
Supreme Court of California

FRANCES KINLAW et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S014349.
Aug 30, 1991.

SUMMARY

Medically indigent adults and taxpayers brought an action pursuant to Code Civ. Proc., § 526a, against the state, alleging that it had violated Cal. Const., art. XIII B, § 6 (reimbursement of local governments for state-mandated new programs), by shifting its financial responsibility for the funding of health care for the poor onto the county without providing the necessary funding, and that as a result the state had evaded its constitutionally mandated spending limits. The trial court granted summary judgment for the State after concluding plaintiffs lacked standing to prosecute the action. (Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A041426 and A043500, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding the administrative procedures established by the Legislature (Gov. Code, § 17500 et seq.), which are available only to local agencies and school districts directly affected by a state mandate, were the exclusive means by which the state's obligations under Cal. Const., art. XIII B, § 6, were to be determined and enforced. Accordingly, the court held plaintiffs lacked standing to prosecute the action. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 7--Actions--State-mandated Costs--Reimbursement-- Exclusive Statutory Remedy.
Gov. Code, § 17500 et seq., creates an administrative forum for resolution of state mandate claims arising under Cal. Const., art. XIII B, § 6, and establishes ***327** procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid. It also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (Gov. Code, § 17612). In view of the comprehensive nature of the legislative scheme, and from the expressed intent, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce Cal. Const., art. XIII B, § 6.

(2)
State of California § 7--Actions--State-mandated Costs--Reimbursement-- Private Action to Enforce--Standing.
In an action by medically indigent adults and taxpayers seeking to enforce Cal. Const., art. XIII B, § 6, for declaratory and injunctive relief requiring the state to reimburse the county for the cost of providing health care services to medically indigent adults who, prior to 1983, had been included in the state Medi-Cal program, the Court of Appeal erred in holding that the existence of an administrative remedy (Gov. Code, § 17500 et seq.) by which affected local agencies could enforce their constitutional right under art. XIII B, § 6 to reimbursement for the cost of state mandates di not bar the action. Because the right involved was given by the Constitution to local agencies and school districts, not individuals either as taxpayers or recipients of government benefits and services, the administrative remedy was adequate fully to implement the constitutional provision. The Legislature has the authority to establish procedures for the implementation of local agency rights under art. XIII B, § 6; unless the exercise of a constitutional right is unduly restricted, a court must limit enforcement to the procedures established by the Legislature. Plaintiffs' interest, although pressing, was indirect and did not differ from the interest of the public at large in the financial plight of local government. Relief by way of reinstatement to Medi-Cal pending further

action by the state was not a remedy available under the statute, and thus was not one which a court may award.

[See **Cal.Jur.3d,** State of California, § 78; 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1127 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 112.]

COUNSEL

Stephen D. Schear, Stephen E. Ronfeldt, Armando M. Menocal III, Lois Salisbury, Laura Schulkind and Kirk McInnis for Plaintiffs and Appellants. ***328**

Catherine I. Hanson, Astrid G. Meghrigian, Alice P. Mead, Alan K. Marks, County Counsel (San Bernardino), Paul F. Mordy, Deputy County Counsel, De Witt W. Clinton, County Counsel (Los Angeles), Robert M. Fesler, Assistant County Counsel, Frank J. DaVanzo, Deputy County Counsel, Weissburg & Aronson, Mark S. Windisch, Carl Weissburg and Howard W. Cohen as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

BAXTER, J.

Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of article XIII B (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to Code of Civil Procedure section 526a and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I State Mandates

Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides: ***329**

"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."

A complementary provision, section 3 of article XIII B, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

"The appropriations limit for any fiscal year ... shall be adjusted as follows: [¶] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II Plaintiffs' Action

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services

to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981-1982 Reg. Sess.) (AB 799) (Stats. 1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly ***330** situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi- Cal program to the counties without adequate reimbursement violated the California Constitution. [1]

At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission). [2]

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6. [3] ***331**

III Enforcement of Article XIII B, Section 6

In 1984, almost five years after the adoption of article XIII B, the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (§ 17500.) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in section 17500:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state- mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.*" (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Costs," which commences with section 17500, the Legislature created the Commission (§ 17525), to adjudicate disputes over the existence of a state-mandated program (§§ 17551, 17557) and to adopt procedures for submission and adjudication of reimbursement claims (§ 17553). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member experienced in public finance. (§ 17525.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (§ 17554), [4] establishes the method of ***332** payment of claims (§§ 17558, 17561), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state mandates (§§ 17562, 17600, 17612, subd. (a).)

Pursuant to procedures which the Commission was authorized to establish (§ 17553), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (§§ 17551, 17560), and reimbursement is to be provided only through this statutory procedure. (§§ 17550, 17552.)

The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (§ 17521.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (§ 17553.) Any interested organization or individual may participate in the hearing. (§ 17555.)

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (§ 17555.) The Commission must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (§ 17557.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (§ 17620 et seq.) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to Code of Civil Procedure section 1094.5. (§ 17559.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. The parameters and guidelines adopted by the Commission must be submitted to the Controller, who is to pay subsequent claims arising out of the mandate. (§ 17558.) Executive orders mandating costs are to be accompanied by an appropriations ***333** bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. (§ 17561, subds. (a) & (b).) Regular review of the costs is to be made by the Legislative Analyst, who must report to the Legislature and recommend whether the mandate should be continued. (§ 17562.) The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (§ 17600.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, and an injunction against enforcement. (§ 17612.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (§ 17615 et seq.)

(1) It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (§ 17612).

The legislative intent is clearly stated in section 17500: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. ..." And section 17550 states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, section 17552 provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6. ***334**

IV Exclusivity

(2) Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge.

(*Dunn v. Long Beach L. & W. Co.* (1896) 114 Cal. 605, 609, 610-611 [46 P. 607]; *Silver v. Watson* (1972) 26 Cal.App.3d 905, 909 [103 Cal.Rptr. 576]; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 506 [19 Cal.Rptr. 668]; *Elliott v. Superior Court* (1960) 180 Cal.App.2d 894, 897 [5 Cal.Rptr. 116].) The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse ... local governments* ...." (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6. Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723]; *Chesney v. Byram* (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost ***335** of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIII B or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, section 17563 gives the local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (§ 17555) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person.*" (§ 17553. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive. [7]

The alternative relief plaintiffs seek—reinstatement to Medi-Cal pending further action by the state—is not a remedy available under the statute, and thus is not one which this court may award. The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists ***336** and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (§ 17612.) [8]

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the

question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by section 17555. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard. [9]

Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

Lucas, C. J., Panelli, J., Kennard, J., and Arabian, J., concurred.

BROUSSARD, J.

I dissent. For nine years the Legislature has defied the mandate of article XIII B of the California Constitution (hereafter article XIII B). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the ***337** Legislature computes its own appropriations limit as if it fully funded the program. The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation—the medically indigent who are denied adequate health care—have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIII B; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIII B does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063] permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIII B. To prevent the state from avoiding the spending limits imposed by article XIII B, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIII B was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. Facts and Procedural History

Plaintiffs—citizens, taxpayers, and persons in need of medical care—allege that the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that as a result the state is violating article XIII B. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned ***338** itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds. [1]

At hearings below, plaintiffs presented uncontradicted evidence regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIII B became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $20 million per year. The county has inadequate funds to discharge its new obligation

for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated ...." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need ...." "The system is clogged to the breaking point. ... All community clinics ... are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people ...."

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIII B, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIII B, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda ***339** County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment for defendants were reversed. We granted review.

II. Standing

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIII B.*

Plaintiffs first claim standing as taxpayers under Code of Civil Procedure section 526a, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county ..., may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. ..." As in *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610], however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under Code of Civil Procedure section 526a, because there is an independent basis for permitting them to proceed." Plaintiffs here seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIII B. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9 [270 Cal.Rptr. 796, 793 P.2d 2], which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIII B. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIII B.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty.[2] Such an action may be brought by any person "beneficially interested" in the issuance of the writ. (Code Civ. Proc., § 1086.) In *Carsten* ***340** *v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276], we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796-797, quoting 3 Davis, Administrative Law Treatise (1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520

[170 Cal.Rptr. 724], which held that low- income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner v. City Council, supra,* 31 Cal.App.3d 48, which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop* (1924) 193 Cal. 498 [225 P. 862], which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com., supra,* 27 Cal.3d 793, held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron* (1953) 40 Cal.2d 344 [254 P.2d 6] held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board* (1969) 275 Cal.App.2d 14 [79 Cal.Rptr. 662] held that a member of a student organization had standing to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, ***341** plaintiff Kinlaw, a 60-year-old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under Government Code section 17563 "[a]ny funds received by a local agency ... pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention. [3]

This argument would be sound if the county were already meeting its obligations to MIA's under Welfare and Institutions Code section 17000. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by Welfare and Institutions Code section 17000, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under section 17000 of the Welfare and Institutions Code. If it refused, an action in mandamus would lie to compel performance. (See *Mooney v. Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIII B ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule that a plaintiff must be beneficially interested. "Where the question is one of public right ***342** and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Bd. of Soc. Welfare v. County of L. A.* (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627].) We explained in *Green v. Obledo* (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256], that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. ... It has often been invoked by California courts. [Citations.]"

Green v. Obledo presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (29 Cal.3d at p. 145.)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause v. Board of Supervisors, supra,* 49 Cal.3d 432. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green v. Obledo, supra,* 29 Cal.3d 126, 144, and concluded that "[t]he question in this case involves a public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." (49 Cal.3d at p. 439.) We should reach the same conclusion here.

B. *Government Code sections 17500-17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIII B.*

Four years after the enactment of article XIII B, the Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, state Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIII B. (***343** Gov. Code, § 17551, subd. (a).) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See Gov. Code, § 17559.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means for enforcement of article XIII B, and since that remedy is expressly limited to claims by local agencies or school districts (Gov. Code, § 17552), plaintiffs lack standing to enforce the constitutional provision.[4] I disagree, for two reasons.

First, Government Code section 17552 expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which *a local agency or school district* may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in Government Code section 17555 it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words—"the sole and exclusive procedure by which a local agency or school district may claim reimbursement"—limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius*—"the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

The case is similar in this respect to *Common Cause v. Board of Supervisors, supra,* 49 Cal.3d 432. Here defendants contend that the counties' right of action under Government Code sections 17551-17552 impliedly excludes ***344** any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under Elections Code section 304 impliedly excluded any citizen's remedy. We replied that "the plain language of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (49 Cal.3d at p. 440, fn. omitted.) Likewise in this case the plain language of Government Code sections 17551-17552 contain no limitation on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado v. Wyman* (1970) 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207]. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420 [25 L.Ed.2d at p. 460].) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

Second, article XIII B was enacted to protect taxpayers, not governments. Sections 1 and 2 of article XIII B establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIII B prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIII B, and the taxpayer-citizen can appear only if a government has first instituted proceedings, is inconsistent with the ethos that led to article XIII B. The drafters of article XIII B and the voters who enacted it would not accept that the state Legislature—the principal body regulated by the article—could establish a procedure ***345** under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into foregoing their rights to enforce article XIII B. An example is the Brown-Presley Trial Court Funding Act (Gov. Code, § 77000 et seq.), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation.[5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIII B.

The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to ***346** determine the amount of the mandate—which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIII B requires that standing to enforce that measure be given to those harmed by its violation—in this case, the medically indigent—and not be vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. *Even if plaintiffs lack standing this court should nevertheless address and resolve the merits of the appeal.*

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90 [181 Cal.Rptr. 549, 642 P.2d 460]), we recognized an exception to this rule in our recent decision in *Dix v. Superior Court, supra,* 53 Cal.3d 442 (hereafter *Dix*). In *Dix,* the victim of a crime sought to challenge the trial court's decision to recall a sentence under Penal Code section 1170. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under Penal Code section 1170, subdivision (d). We explained that the

sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (53 Cal.3d at p. 454.) In footnote we added that "Under article VI, section 12, subdivision (b) of the California Constitution ..., we have jurisdiction to 'review the *decision of a Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues—standing and merits. Nothing in article VI, section 12(b) suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review [ing]' the second subject addressed and resolved in its decision." (Pp. 454-455, fn. 8.)

I see no grounds on which to distinguish *Dix.* The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante,* p. 330, fn. 2*ante,* p. 330, fn. 2) shows that it is not opposed to an appellate decision on the merits. ***347**

The majority, however, notes that various state officials—the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research—did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (Maj. opn., *ante,* p. 336, fn. 9*ante,* p. 336, fn. 9.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae. [6]

The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great significance, far more significant than any raised in *Dix.* Judges rarely recall sentencing under Penal Code section 1170, subdivision (d); when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIII B. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing.*

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude ***348** that plaintiffs have standing both as persons "beneficially interested" under Code of Civil Procedure section 1086 and under the doctrine of *Green v. Obledo, supra,* 29 Cal.3d 126, to bring an action to determine whether the state has violated its duties under article XIII B. The remedy given local agencies and school districts by Government Code sections 17500- 17630 is, as Government Code section 17552 states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

III. Merits of the Appeal

A. *State funding of care for MIA's.*

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources. [7] From 1971 until 1982, and thus at the time article XIII B became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under Welfare and Institutions Code section 17000 to meet those

needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIII B became effective in 1980 the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIII B became effective. The state funded all such needs of MIA's.

In 1982, the Legislature passed Assembly Bill No. 799 (1981-1982 Reg. Sess.; Stats. 1982, ch. 328, pp. 1568-1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was ***349** initially relatively constant, generally more than $400 million per year. By 1990, however, state funding had decreased to less than $250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIII B "appropriations limit," i.e., as part of the base amount of appropriations on which subsequent annual adjustments for cost-of-living and population changes would be calculated. About $1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979-1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIII B.*

Our recent decision in *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487 [280 Cal.Rptr. 92, 808 P.2d 235] (hereafter *County of Fresno*), explained the function of article XIII B and its relationship to article XIII A, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.' (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

" 'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.' (*City of Sacramento, supra,* 50 Cal.3d at p. 59, fn. 1.)

"Article XIII B of the Constitution was intended ... to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument ***350** in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no 'appropriations subject to limitation' in excess thereof (*id.,* § 2). [8] (See *County of Placer v. Corin, supra,* 113 Cal.App.3d at p. 446.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes ....' (Cal. Const., art. XIII B, § 8, subd. (b).)" (*County of Fresno, supra,* 53 Cal.3d at p. 486.)

Under section 3 of article XIII B the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount. [9] Absent such an agreement, however,

section 6 of article XIII B generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIII B. It does so by requiring that "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 cost of such program or increased level of service ...." [10]

"Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles* [v. *State of California* (1987)] 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax ***351** revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra,* 53 Cal.3d at p. 487.)

C. *Applicability of article XIII B to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIII B. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIII B took effect. The purpose of article XIII B supports the plaintiffs' position.

As we have noted, article XIII A of the Constitution (Proposition 13) and article XIII B are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIII B, enacted one year later, froze both state and county appropriations at the level of the 1978-1979 budgets—a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIII B further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear that article XIII B was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIII B, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIII B was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIII B.

Our decisions interpreting article XIII B demonstrate that the state's subvention requirement under section 6 is not vitiated simply because the ***352** "program" existed before the effective date of article XIII B. The alternate phrase of section 6 of article XIII B, " 'higher level of service[,]' ... must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.*' " (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202], italics added.)

Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility

continued until June 28, 1981, when Education Code section 59300 (hereafter section 59300), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIII B. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by section 59300 imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that section 59300 called for only an " 'adjustment of costs' " of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIII B. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at p. 834, italics added.)

We reversed, rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [¶] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing ***353** power of local governments. ... [¶] The intent of the section would plainly be violated if the state could, while retaining administrative control [11] of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article.*" (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835- 836, fn. omitted, italics added.)

The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar,* prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830: "[B]ecause section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—*an obligation the school districts did not have at the time article XIII B was adopted*—it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of ***354** article XIII B. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIII B became effective. I fail to see the distinction between a case—*Lucia Mar*—in which no existing statute as of 1979 imposed an obligation on the local government and one—this case—in which the statute existing in 1979 imposed no obligation on local government.

The state's argument misses the salient point. As I have explained, the application of section 6 of article XIII B does not depend upon when the program was created, but upon who had the burden of funding it when article XIII B went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor.

Lucia Mar determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIII B became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768] and *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706], which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide precisely the same level of services as the state provided under Medi-Cal. [13] Both are correct, but irrelevant to this case. [14] The county's obligation to MIA's is defined by Welfare and Institutions Code section 17000, not by the former Medi-Cal program. [15] If the ***355** state, in transferring an obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

The state's arguments are also undercut by the fact that it continues to use the approximately $1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIII B. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. Conclusion

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIII A of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIII B which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIII B both to those persons whom it was designed to protect—the citizens and taxpayers—and to those harmed by its violation—the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIII B and postpones the day when the medically indigent will receive adequate health care.

Mosk, J., concurred. ***356**

Footnotes

1 The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

2 On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (Code Civ. Proc., § 1094.5), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles v. State of California,* No. B049625.)

3 Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of

their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (Gov. Code, § 17612.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

4 The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (§ 17555.)

5 " 'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (§ 17518.)

6 " 'School district' means any school district, community college district, or county superintendant of schools." (§ 17519.)

7 Plaintiffs' argument that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions, is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

8 Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action. (See, e.g., *Mooney v. Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].)

9 For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063].) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

1 The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care .... They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action." (Maj. opn., *ante,* p. 336, fn. 8*ante,* p. 336, fn. 8)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

2 It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 56 [107 Cal.Rptr. 214] (overruled on other grounds in *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by

the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 127-128 [109 Cal.Rptr. 724].)

3 The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

4 The majority emphasizes the statement of purpose of Government Code section 17500: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under section 6 of article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."
The "existing system" to which Government Code section 17500 referred was the Property Tax Relief Act of 1972 (Rev. & Tax. Code, §§ 2201-2327), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750].) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

5 "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate*; provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988-89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [¶] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (Gov. Code, § 77203.5, italics added.)
"As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIII B of the California Constitution,* or Section 17561 of the Government Code, or both." (Gov. Code, § 77005, italics added.)

6 It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318], in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the state Superintendent of Public Instruction, the Department of

Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

7 Welfare and Institutions Code section 17000 provides that "[e]very county ... shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

8 Article XIII B, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

9 Section 3 of article XIII B reads in relevant part: "The appropriations limit for any fiscal year ... shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriation limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. ..."

10 Section 6 of article XIII B further provides 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." None of these exceptions apply in the present case.

11 The state notes that, in contrast to the program at issue in *Lucia Mar,* it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar,* while appropriate to the facts of that case, was not intended to establish a rule limiting article XIII B, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

12 The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIII B was enacted, the voters did not know which programs would be temporary and which permanent.

13 It must, however, provide a *comparable* level of services. (See *Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 564 [254 Cal.Rptr. 905].)

14 Certain language in *Madera Community Hospital v. County of Madera, supra,* 155 Cal.App.3d 136, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds,* notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151.) Welfare and Institutions Code section 17000 by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

15 The county's right to subvention funds under article XIII B arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program " 'mandated' " by the state; i.e., that Alameda County has any option other than to pay these costs. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 836-837.)

814 P.2d 1308, 285 Cal.Rptr. 66

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Superseded by Statute as Stated in U.S. v. Dickerson, 4th Cir.(Va.), February 8, 1999

86 S.Ct. 1602
Supreme Court of the United States

Ernesto A. MIRANDA, Petitioner,
v.
STATE OF ARIZONA.
Michael VIGNERA, Petitioner,
v.
STATE OF NEW YORK.
Carl Calvin WESTOVER, Petitioner,
v.
UNITED STATES.
STATE OF CALIFORNIA, Petitioner,
v.
Roy Allen STEWART.

Nos. 759—761, 584.
|
Argued Feb. 28, March 1 and 2, 1966.
|
Decided June 13, 1966.
|
Rehearing Denied No. 584 Oct. 10, 1966.

See 87 S.Ct. 11.

Synopsis

Criminal prosecutions. The Superior Court, Maricopa County, Arizona, rendered judgment, and the Supreme Court of Arizona, 98 Ariz. 18, 401 P.2d 721, affirmed. The Supreme Court, Kings County, New York, rendered judgment, and the Supreme Court, Appellate Division, Second Department, 21 A.D.2d 752, 252 N.Y.S.2d 19, affirmed, as did the Court of Appeals of the State of New York at 15 N.Y.2d 970, 259 N.Y.S.2d 857, 207 N.E.2d 527. The United States District Court for the Northern District of California, Northern Division, rendered judgment, and the United States Court of Appeals for the Ninth Circuit, 342 F.2d 684, affirmed. The Superior Court, Los Angeles County, California, rendered judgment and the Supreme Court of California, 62 Cal.2d 571, 43 Cal.Rptr. 201, 400 P.2d 97, reversed. In the first three cases, defendants obtained certiorari, and the State of California obtained certiorari in the fourth case. The Supreme Court, Mr. Chief Justice Warren, held that statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination.

Judgments in first three cases reversed and judgment in fourth case affirmed.

Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice White dissented; Mr. Justice Clark dissented in part.

West Headnotes (82)

[1] **Federal Courts** Criminal matters

Certiorari was granted in cases involving admissibility of defendants' statements to police to explore some facets of problems of applying privilege against self-incrimination to in-custody interrogation and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.

261 Cases that cite this headnote

[2] **Criminal Law** Compelling Self-Incrimination

Criminal Law Right of Defendant to Counsel

Constitutional rights to assistance of counsel and protection against self-incrimination were secured for ages to come and designed to approach immortality as nearly as human institutions can approach it. U.S.C.A.Const. Amends. 5, 6.

24 Cases that cite this headnote

[3] **Criminal Law** Custodial interrogation in general

Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless

it demonstrates use of procedural safeguards effective to secure privilege against self-incrimination. U.S.C.A.Const. Amend. 5.

4377 Cases that cite this headnote

[4] **Criminal Law** What Constitutes Custody

Criminal Law What Constitutes Interrogation

"Custodial interrogation", within rule limiting admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way. U.S.C.A.Const. Amend. 5.

5459 Cases that cite this headnote

[5] **Criminal Law** Right to remain silent

Criminal Law Right to counsel

Criminal Law Use of statement

Unless other fully effective means are devised to inform accused person of the right to silence and to assure continuous opportunity to exercise it, person must, before any questioning, be warned that he has right to remain silent, that any statement he does make may be used as evidence against him, and that he has right to presence of attorney, retained or appointed. U.S.C.A.Const. Amend. 5.

1577 Cases that cite this headnote

[6] **Criminal Law** Right to remain silent

Criminal Law Counsel

Criminal Law In general; right to appear pro se

Defendant may waive effectuation of right to counsel and to remain silent, provided that waiver is made voluntarily, knowingly and intelligently. U.S.C.A.Const. Amends. 5, 6.

1523 Cases that cite this headnote

[7] **Criminal Law** Counsel

There can be no questioning if defendant indicates in any manner and at any stage of interrogation process that he wishes to consult with attorney before speaking. U.S.C.A.Const. Amend. 6.

427 Cases that cite this headnote

[8] **Criminal Law** Right to remain silent

Police may not question individual if he is alone and indicates in any manner that he does not wish to be interrogated.

161 Cases that cite this headnote

[9] **Criminal Law** Counsel

Mere fact that accused may have answered some questions or volunteered some statements on his own does not deprive him of right to refrain from answering any further inquiries until he has consulted with attorney and thereafter consents to be questioned. U.S.C.A.Const. Amends. 5, 6.

264 Cases that cite this headnote

[10] **Criminal Law** Coercion

Criminal Law Force; physical abuse

Coercion can be mental as well as physical and blood of accused is not the only hallmark of unconstitutional inquisition. U.S.C.A.Const. Amend. 5.

35 Cases that cite this headnote

[11] **Criminal Law** Coercion

Incommunicado interrogation of individuals in police-dominated atmosphere, while not physical intimidation, is equally destructive of human dignity, and current practice is at odds with principle that individual may not be compelled to incriminate himself. U.S.C.A.Const. Amend. 5.

341 Cases that cite this headnote

[12] **Criminal Law** Compelling Self-Incrimination

Privilege against self-incrimination is in part individual's substantive right to private enclave where he may lead private life. U.S.C.A.Const. Amend. 5.

7 Cases that cite this headnote

[13] **Criminal Law** Compelling Self-Incrimination

Constitutional foundation underlying privilege against self-incrimination is the respect a government, state or federal, must accord to dignity and integrity of its citizens.

29 Cases that cite this headnote

[14] **Criminal Law** Compelling Self-Incrimination

Government seeking to punish individual must produce evidence against him by its own independent labors, rather than by cruel, simple expedient of compelling it from his own mouth. U.S.C.A.Const. Amend. 5.

49 Cases that cite this headnote

[15] **Criminal Law** Compelling Self-Incrimination

Privilege against self-incrimination is fulfilled only when person is guaranteed right to remain silent unless he chooses to speak in unfettered exercise of his own will. U.S.C.A.Const. Amend. 5.

105 Cases that cite this headnote

[16] **Criminal Law** Compelling Self-Incrimination

Individual swept from familiar surroundings into police custody, surrounded by antagonistic forces and subjected to techniques of persuasion employed by police, cannot be otherwise than under compulsion to speak. U.S.C.A.Const. Amend. 5.

44 Cases that cite this headnote

[17] **Arrest** Mode of Making Arrest

When federal officials arrest individuals they must always comply with dictates of congressional legislation and cases thereunder. Fed.Rules Crim.Proc. rule 5(a), 18 U.S.C.A.

12 Cases that cite this headnote

[18] **Criminal Law** Necessity of showing voluntary character

Defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on involuntary confession, regardless of its truth or falsity, even if there is ample evidence aside from confession to support conviction.

44 Cases that cite this headnote

[19] **Criminal Law** Voluntariness

Whether conviction was in federal or state court, defendant may secure post-conviction hearing based on alleged involuntary character of his confession, provided that he meets procedural requirements.

171 Cases that cite this headnote

[20] **Criminal Law** Coercion

Voluntariness doctrine in state cases encompasses all interrogation practices which are likely to exert such pressure upon individual as to disable him from making free and rational choice. U.S.C.A.Const. Amend. 5.

66 Cases that cite this headnote

[21] **Criminal Law** Absence or denial of counsel

Criminal Law Consultation with counsel; privacy

Independent of any other constitutional proscription, preventing attorney from consulting with client is violation of Sixth Amendment right to assistance of counsel and excludes any statement obtained in its wake. U.S.C.A.Const. Amend. 6.

121 Cases that cite this headnote

[22] **Criminal Law** Absence or denial of counsel

Presence of counsel in cases presented would have been adequate protective device necessary to make process of police interrogation conform to dictates of privilege; his presence would have insured that statements made in government-established atmosphere were not product of compulsion. U.S.C.A.Const. Amends. 5, 6.

60 Cases that cite this headnote

[23] **Criminal Law** Compelling Self-Incrimination

Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. U.S.C.A.Const. Amend. 5.

80 Cases that cite this headnote

[24] **Criminal Law** Compelling Self-Incrimination

Criminal Law Form and sufficiency

Criminal Law Effect of Invocation

To combat pressures in in-custody interrogation and to permit full opportunity to exercise privilege against self-incrimination, accused must be adequately and effectively apprised of his rights and exercise of these rights must be fully honored. U.S.C.A.Const. Amend. 5.

156 Cases that cite this headnote

[25] **Criminal Law** Right to remain silent

If person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has right to remain silent, as threshold requirement for intelligent decision as to its exercise, as absolute prerequisite in overcoming inherent pressures of interrogation atmosphere, and to show that interrogators are prepared to recognize privilege should accused choose to exercise it. U.S.C.A.Const. Amend. 5.

446 Cases that cite this headnote

[26] **Criminal Law** Right to remain silent

Awareness of right to remain silent is threshold requirement for intelligent decision as to its exercise. U.S.C.A.Const. Amend. 5.

108 Cases that cite this headnote

[27] **Criminal Law** Compelling Self-Incrimination

It is impermissible to penalize individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. U.S.C.A.Const. Amend. 5.

316 Cases that cite this headnote

[28] **Criminal Law** Silence

Criminal Law Statements asserting constitutional rights

Prosecution may not use at trial fact that defendant stood mute or claimed his privilege in face of accusation.

520 Cases that cite this headnote

[29] **Criminal Law** Right to remain silent

Whatever background of person interrogated, warning at time of interrogation as to availability of right to remain silent is indispensable to overcome pressures of in-custody interrogation and to insure that individual knows that he is free to exercise privilege at that point and time. U.S.C.A.Const. Amend. 5.

511 Cases that cite this headnote

[30] **Criminal Law** Right to remain silent

Criminal Law Use of statement

Warning of right to remain silent, as prerequisite to in-custody interrogation, must be accompanied by explanation that anything said

can and will be used against individual; warning is needed to make accused aware not only of privilege but of consequences of foregoing it and also serves to make him more acutely aware that he is faced with phase of adversary system. U.S.C.A.Const. Amend. 5.

682 Cases that cite this headnote

[31] **Criminal Law** Counsel in General

Right to have counsel present at interrogation is indispensable to protection of Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

223 Cases that cite this headnote

[32] **Criminal Law** Counsel in General

Need for counsel to protect Fifth Amendment privilege comprehends not merely right to consult with counsel prior to questioning but also to have counsel present during any questioning if defendant so desires. U.S.C.A.Const. Amends. 5, 6.

158 Cases that cite this headnote

[33] **Criminal Law** Counsel

Criminal Law Counsel

Preinterrogation request for lawyer affirmatively secures accused's right to have one, but his failure to ask for lawyer does not constitute waiver. U.S.C.A.Const. Amend. 5.

109 Cases that cite this headnote

[34] **Criminal Law** Counsel

No effective waiver of right to counsel during interrogation can be recognized unless specifically made after warnings as to rights have been given. U.S.C.A.Const. Amend. 5.

160 Cases that cite this headnote

[35] **Criminal Law** Counsel in General

Proposition that right to be furnished counsel does not depend upon request applies with equal force in context of providing counsel to protect accused's Fifth Amendment privilege in face of interrogation. U.S.C.A.Const. Amend. 5.

8 Cases that cite this headnote

[36] **Criminal Law** Right to counsel

Individual held for interrogation must be clearly informed that he has right to consult with lawyer and to have lawyer with him during interrogation, to protect Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

195 Cases that cite this headnote

[37] **Criminal Law** Right to counsel

Warning as to right to consult lawyer and have lawyer present during interrogation is absolute prerequisite to interrogation, and no amount of circumstantial evidence that person may have been aware of this right will suffice to stand in its stead. U.S.C.A.Const. Amend. 5.

138 Cases that cite this headnote

[38] **Criminal Law** Counsel

If individual indicates that he wishes assistance of counsel before interrogation occurs, authorities cannot rationally ignore or deny request on basis that individual does not have or cannot afford retained attorney.

152 Cases that cite this headnote

[39] **Criminal Law** Compelling Self-Incrimination

Privilege against self-incrimination applies to all individuals. U.S.C.A.Const. Amend. 5.

96 Cases that cite this headnote

[40] **Criminal Law** Indigence

With respect to affording assistance of counsel, while authorities are not required to relieve accused of his poverty, they have obligation not to take advantage of indigence in administration of justice. U.S.C.A.Const. Amend. 6.

10 Cases that cite this headnote

[41] **Criminal Law** Right to counsel

In order fully to apprise person interrogated of extent of his rights, it is necessary to warn him not only that he has right to consult with attorney, but also that if he is indigent lawyer will be appointed to represent him. U.S.C.A.Const. Amend. 6.

66 Cases that cite this headnote

[42] **Criminal Law** Duty of Inquiry, Warning, and Advice

Expedient of giving warning as to right to appointed counsel is too simple and rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score, but warning that indigent may have counsel appointed need not be given to person who is known to have attorney or is known to have ample funds to secure one. U.S.C.A.Const. Amend. 6.

150 Cases that cite this headnote

[43] **Criminal Law** Right to remain silent

Once warnings have been given, if individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, interrogation must cease. U.S.C.A.Const. Amend. 5.

1652 Cases that cite this headnote

[44] **Criminal Law** Right to remain silent

Criminal Law Right to remain silent

If individual indicates desire to remain silent, but has attorney present, there may be some circumstances in which further questioning would be permissible; in absence of evidence of overbearing, statements then made in presence of counsel might be free of compelling influence of interrogation process and might fairly be construed as waiver of privilege for purposes of these statements. U.S.C.A.Const. Amend. 5.

252 Cases that cite this headnote

[45] **Criminal Law** Right to remain silent

Any statement taken after person invokes Fifth Amendment privilege cannot be other than product of compulsion. U.S.C.A.Const. Amend. 5.

87 Cases that cite this headnote

[46] **Criminal Law** Counsel

If individual states that he wants attorney, interrogation must cease until attorney is present; at that time, individual must have opportunity to confer with attorney and to have him present during any subsequent questioning. U.S.C.A.Const. Amends. 5, 6.

444 Cases that cite this headnote

[47] **Criminal Law** Right to counsel

Criminal Law Counsel in General

While each police station need not have "station house lawyer" present at all times to advise prisoners, if police propose to interrogate person they must make known to him that he is entitled to lawyer and that if he cannot afford one, lawyer will be provided for him prior to any interrogation. U.S.C.A.Const. Amend. 5.

823 Cases that cite this headnote

[48] **Criminal Law** Compelling Self-Incrimination

If authorities conclude that they will not provide counsel during reasonable period of time in which investigation in field is carried out, they may refrain from doing so without violating person's Fifth Amendment privilege so long as they do not question him during that time. U.S.C.A.Const. Amend. 5.

147 Cases that cite this headnote

[49] **Criminal Law** Waiver of rights

If interrogation continues without presence of attorney and statement is taken, government has heavy burden to demonstrate that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. U.S.C.A.Const. Amend. 5.

3038 Cases that cite this headnote

[50] **Criminal Law** Waiver of rights

High standards of proof for waiver of constitutional rights apply to in-custody interrogation.

162 Cases that cite this headnote

[51] **Criminal Law** Waiver of rights

State properly has burden to demonstrate knowing and intelligent waiver of privilege against self-incrimination and right to counsel, with respect to incommunicado interrogation, since state is responsible for establishing isolated circumstances under which interrogation takes place and has only means of making available corroborated evidence of warnings given.

1448 Cases that cite this headnote

[52] **Criminal Law** Right to remain silent

Criminal Law Counsel

Criminal Law Waiver of rights

Express statement that defendant is willing to make statement and does not want attorney, followed closely by statement, could constitute waiver, but valid waiver will not be presumed simply from silence of accused after warnings are given or simply from fact that confession was in fact eventually obtained.

1163 Cases that cite this headnote

[53] **Criminal Law** Capacity and requisites in general

Criminal Law Presumptions as to waiver, burden of proof

Presuming waiver from silent record is impermissible, and record must show, or there must be allegations and evidence, that accused was offered counsel but intelligently and understandingly rejected offer.

83 Cases that cite this headnote

[54] **Criminal Law** Right to remain silent

Where in-custody interrogation is involved, there is no room for contention that privilege is waived if individual answers some questions or gives some information on his own before invoking right to remain silent when interrogated. U.S.C.A.Const. Amend. 5.

2064 Cases that cite this headnote

[55] **Criminal Law** Form and sufficiency in general

Fact of lengthy interrogation or incommunicado incarceration before statement is made is strong evidence that accused did not validly waive rights. U.S.C.A.Const. Amend. 5.

147 Cases that cite this headnote

[56] **Criminal Law** Compelling Self-Incrimination

Any evidence that accused was threatened, tricked, or cajoled into waiver will show that he did not voluntarily waive privilege to remain silent. U.S.C.A.Const. Amend. 5.

103 Cases that cite this headnote

[57] **Criminal Law** Necessity in general

Criminal Law Necessity

Requirement of warnings and waiver of right is fundamental with respect to Fifth Amendment privilege and not simply preliminary ritual to existing methods of interrogation.

60 Cases that cite this headnote

[58] **Criminal Law** Necessity in general

Criminal Law Necessity

Warnings or waiver with respect to Fifth Amendment rights are, in absence of wholly effective equivalent, prerequisites to admissibility of any statement made by a defendant, regardless of whether statements are direct confessions, admissions of part or all of offense, or merely "exculpatory". U.S.C.A.Const. Amend. 5.

2564 Cases that cite this headnote

[59] **Criminal Law** Compelling Self-Incrimination

Privilege against self-incrimination protects individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

61 Cases that cite this headnote

[60] **Criminal Law** Necessity in general

Criminal Law Necessity

Statements merely intended to be exculpatory by defendant, but used to impeach trial testimony or to demonstrate untruth in statements given under interrogation, are incriminating and may not be used without full warnings and effective waiver required for any other statement. U.S.C.A.Const. Amend. 5.

1726 Cases that cite this headnote

[61] **Criminal Law** Intervention of Public Officers

When individual is in custody on probable cause, police may seek out evidence in field to be used at trial against him, and may make inquiry of persons not under restraint.

95 Cases that cite this headnote

[62] **Criminal Law** Warnings

Criminal Law Necessity

Rules relating to warnings and waiver in connection with statements taken in police interrogation do not govern general on-the-scene questioning as to facts surrounding crime or other general questioning of citizens in fact-finding process. U.S.C.A.Const. Amend. 5.

6354 Cases that cite this headnote

[63] **Criminal Law** Statements, Confessions, and Admissions by or on Behalf of Accused

Confessions remain a proper element in law enforcement.

42 Cases that cite this headnote

[64] **Criminal Law** Necessity of showing voluntary character

Any statement given freely and voluntarily without compelling influences is admissible.

472 Cases that cite this headnote

[65] **Criminal Law** Necessity of showing voluntary character

Criminal Law What constitutes voluntary statement, admission, or confession

Volunteered statements of any kind are not barred by Fifth Amendment; there is no requirement that police stop person who enters police station and states that he wishes to confess a crime or a person who calls police to offer confession or any other statements he desires to make. U.S.C.A.Const. Amend. 5.

580 Cases that cite this headnote

[66] **Criminal Law** Compelling Self-Incrimination

When individual is taken into custody or otherwise deprived of his freedom by authorities in any significant way and is subjected to questioning, privilege against self-incrimination is jeopardized, and procedural safeguards must be employed to protect privilege. U.S.C.A.Const. Amend. 5.

1389 Cases that cite this headnote

[67] **Criminal Law** Right to remain silent

Criminal Law Right to counsel

Criminal Law Use of statement

Criminal Law Invocation of Rights

Criminal Law Form and sufficiency in general

Unless other fully effective means are adopted to notify accused in custody or otherwise deprived of freedom of his right of silence and to assure that exercise of right will be scrupulously honored, he must be warned before questioning that he has right to remain silent, that anything he says can be used against him in court, and that he has right to presence of attorney and to have attorney appointed before questioning if he cannot afford one; opportunity to exercise these rights must be afforded to him throughout interrogation; after such warnings have been given and opportunity afforded, accused may knowingly and intelligently waive rights and agree to answer questions or make statements, but unless and until such warnings and waiver are demonstrated by prosecution at trial, no evidence obtained as a result of interrogation can be used against him. U.S.C.A.Const. Amends. 5, 6.

6076 Cases that cite this headnote

[68] **Criminal Law** Compelling Self-Incrimination

Fifth Amendment provision that individual cannot be compelled to be witness against himself cannot be abridged. U.S.C.A.Const. Amend. 5.

233 Cases that cite this headnote

[69] **Criminal Law** Right of Defendant to Counsel

In fulfilling responsibility to protect rights of client, attorney plays vital role in administration of criminal justice. U.S.C.A.Const. Amend. 6.

17 Cases that cite this headnote

[70] **Criminal Law** Counsel

Interviewing agent must exercise his judgment in determining whether individual waives right to counsel, but standard for waiver is high and ultimate responsibility for resolving constitutional question lies with courts.

242 Cases that cite this headnote

[71] **Criminal Law** Custodial interrogation in general

Constitution does not require any specific code of procedures for protecting privilege against self-incrimination during custodial interrogation, and Congress and states are free to develop their own safeguards for privilege, so long as they are fully as effective as those required by court. U.S.C.A.Const. Amend. 5.

1761 Cases that cite this headnote

[72] **Constitutional Law** Necessity of Determination

Issues of admissibility of statements taken during custodial interrogation were of constitutional dimension and must be determined by courts.

326 Cases that cite this headnote

[73] **Administrative Law and Procedure** Compliance with constitution or law in general

Constitutional Law Statutory abrogation of constitutional right

Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them.

71 Cases that cite this headnote

[74] **Constitutional Law** Particular cases

Criminal Law Right to counsel

Statements taken by police in incommunicado interrogation were inadmissible in state prosecution, where defendant had not been in any way apprised of his right to consult with attorney or to have one present during interrogation, and his Fifth Amendment right not to be compelled to incriminate himself was not effectively protected in any other manner, even though he signed statement which contained typed in clause that

he had full knowledge of his legal rights. U.S.C.A.Const. Amends. 5, 6.

2798 Cases that cite this headnote

[75] **Criminal Law** Right to remain silent
Criminal Law Counsel

Mere fact that interrogated defendant signed statement which contained typed in clause stating that he had full knowledge of his legal rights did not approach knowing and intelligent waiver required to relinquish constitutional rights to counsel and privilege against self-incrimination.

1059 Cases that cite this headnote

[76] **Constitutional Law** Particular cases
Criminal Law Right to remain silent
Criminal Law Right to counsel

State defendant's oral confession obtained during incommunicado interrogation was inadmissible where he had not been warned of any of his rights before questioning, and thus was not effectively apprised of Fifth Amendment privilege or right to have counsel present. U.S.C.A.Const. Amends. 5, 6.

2142 Cases that cite this headnote

[77] **Criminal Law** Effect of Prior Illegality

Confessions obtained by federal agents in incommunicado interrogation were not admissible in federal prosecution, although federal agents gave warning of defendant's right to counsel and to remain silent, where defendant had been arrested by state authorities who detained and interrogated him for lengthy period, both at night and the following morning, without giving warning, and confessions were obtained after some two hours of questioning by federal agents in same police station. U.S.C.A.Const. Amends. 5, 6.

2622 Cases that cite this headnote

[78] **Criminal Law** Confessions, declarations, and admissions

Defendant's failure to object to introduction of his confession at trial was not a waiver of claim of constitutional inadmissibility, and did not preclude Supreme Court's consideration of issue, where trial was held prior to decision in Escobedo v. Illinois.

908 Cases that cite this headnote

[79] **Criminal Law** Effect of Prior Illegality

Federal agents' giving of warning alone was not sufficient to protect defendant's Fifth Amendment privilege where federal interrogation was conducted immediately following state interrogation in same police station and in same compelling circumstances, after state interrogation in which no warnings were given, so that federal agents were beneficiaries of pressure applied by local in-custody interrogation; however, law enforcement authorities are not necessarily precluded from questioning any individual who has been held for period of time by other authorities and interrogated by them without appropriate warning.

3119 Cases that cite this headnote

[80] **Federal Courts** Review of state courts

California Supreme Court decision directing that state defendant be retried was final judgment, from which state could appeal to federal Supreme Court, since in event defendant were successful in obtaining acquittal on retrial state would have no appeal. 28 U.S.C.A. § 1257(3).

74 Cases that cite this headnote

[81] **Criminal Law** Reception of evidence

In dealing with custodial interrogation, court will not presume that defendant has been effectively apprised of rights and that his privilege against self-incrimination has been adequately safeguarded on record that does not show that any warnings have been given or that any

effective alternative has been employed, nor can knowing and intelligent waiver of those rights be assumed on silent record. U.S.C.A.Const. Amend. 5.

758 Cases that cite this headnote

[82] **Constitutional Law** Particular cases
Criminal Law Necessity in general
Criminal Law Particular cases
Criminal Law Necessity

State defendant's inculpatory statement obtained in incommunicado interrogation was inadmissible as obtained in violation of Fifth Amendment privilege where record did not specifically disclose whether defendant had been advised of his rights, he was interrogated on nine separate occasions over five days' detention, and record was silent as to waiver. U.S.C.A.Const. Amend. 5.

11167 Cases that cite this headnote

Attorneys and Law Firms

****1609** No. 759:

***438** John J. Flynn, Phoenix, Ariz., for petitioner.

Gary K. Nelson, Phoenix, Ariz., for respondent.

Telford Taylor, New York City, for State of New York, as amicus curiae, by special leave of Court. (Also in Nos. 584, 760, 761 and 762)

Duane R. Nedrud, for National District Attorneys Ass'n, as amicus curiae, by special leave of Court. (Also in Nos. 760, 762 and 584)

No. 760:

Victor M. Earle, III, New York City, for petitioner.

William I. Siegel, Brooklyn, for respondent.

No. 761:

F. Conger Fawcett, San Francisco, Cal., for petitioner.

Sol. Gen. Thurgood Marshall, for respondent.

No. 584:

Gorden Ringer, Los Angeles, Cal., for petitioner.

William A. Norris, Los Angeles, Cal., for respondent.

Opinion

***439** Mr. Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

***440** We dealt with certain phases of this problem recently in ****1610** Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said 'I didn't shoot Manuel, you did it,' they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

[1] This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. [1] A wealth of scholarly material has been written tracing its ramifications and underpinnings. [2] Police and prosecutor ***441** have

speculated on its range and desirability.[3] We granted **1611 certiorari in these cases, 382 U.S. 924, 925, 937, 86 S.Ct. 318, 320, 395, 15 L.Ed.2d 338, 339, 348, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give *442 concrete constitutional guidelines for law enforcement agencies and courts to follow.

[2] We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that 'No person * * * shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall * * * have the Assistance of Counsel'—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come, and * * * designed to approach immortality as nearly as human institutions can approach it,' Cohens v. Commonwealth of Virginia, 6 Wheat. 264, 387, 5 L.Ed. 257 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

'The maxim 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which (have) long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, (were) not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the *443 questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.' Brown v. Walker, 161 U.S. 591, 596—597, 16 S.Ct. 644, 646, 40 L.Ed. 819 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in Weems v. United States, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910):

> '* * * our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted **1612 by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The *444 meaning and vitality of the Constitution have developed against narrow and restrictive construction.'

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in Escobedo, as here, to insure that what was proclaimed in the Constitution had not become but a 'form of words,' Silverthorn Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of Escobedo today.

[3] [4] [5] [6] [7] [8] [9] Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the ***445** process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

1.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact ****1613** that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the 'third degree' flourished at that time.[5] ***446** In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The Commission on Civil Rights in 1961 found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions,' 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. People v. Portelli, 15 N.Y.2d 235, 257 N.Y.S.2d 931, 205 N.E.2d 857 (1965).[7]

***447** The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham ****1614** Commission Report, made over 30 years ago, is still pertinent:

'To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. * * * It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you ***448** are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the

prisoner against society, and lowers the esteem in which the administration of justice is held by the public.“ IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).

[10] Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, ‘Since Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.’ Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These ***449** texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other ****1615** data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the ‘principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation.'[10] The efficacy of this tactic has been explained as follows:

‘If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and ***450** more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.'[11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. ***451** One writer describes the efficacy of these characteristics in this manner:

‘In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of ****1616** the subject appears highly probable.’[14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

‘Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he

was, no good. Then when you met him he probably started using foul, abusive language and he gave some indication ***452** that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?' [15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that 'Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial.' [16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the 'friendly-unfriendly' or the 'Mutt and Jeff' act:
'* * * In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room.' [17]

***453** The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. 'The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party.' [18] Then the questioning resumes 'as though there were now no doubt about the guilt ****1617** of the subject.' A variation on this technique is called the 'reverse line-up':
'The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with diferent offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations.' [19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. 'This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses ***454** the subject with the apparent fairness of his interrogator.' [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:
'Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over.' [21]

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> '(T)he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling

the truth, that's it. You can handle this by yourself.“ [22]

***455** From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.' [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the 'third degree' or the specific stratagems ****1618** described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. [24]

***456** This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our Escobedo decision. In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the defendant was a 19-year-old heroin addict, described as a 'near mental defective,' id., at 307—310, 83 S.Ct. at 754—755. The defendant in Lynumn v. State of Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), was a woman who confessed to the arresting officer after being importuned to 'cooperate' in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), whose persistent request during his interrogation was to phone his wife or attorney. [25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this backgound, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, Miranda v. Arizona, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, Vignera v. New York, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, Westover v. United States, the defendant was handed over to the Federal Bureau of Investigation by ***457** local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, California v. Stewart, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual ****1619** fantasies, and in Stewart, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

[11] It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [26] The current practice of incommunicado interrogation is at odds with one of our ***458** Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Perhaps ***459** the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How.St.Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:
'Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so.' Haller & Davies, The Leveller Tracts 1647—1653, p. 454 (1944).

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed ***1620** during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886). The privilege was elevated to constitutional status and has always been 'as broad ad the mischief ***460** against which it seeks to guard.' Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892). We cannot depart from this noble heritage.

[12] **[13]** **[14]** **[15]** Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a 'noble principle often transcends its origins,' the privilege has come right-fully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.' United States v. Grunewald, 233 F.2d 556, 579, 581—582 (Frank, J., dissenting), rev'd, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, Murphy v. Waterfront Comm. of New York Harbor, 378 U.S. 52, 55—57, n. 5, 84 S.Ct. 1594, 1596—1597, 12 L.Ed.2d 678 (1964); Tehan v. United States ex rel. Shott, 382 U.S. 406, 414—415, n. 12, 86 S.Ct. 459, 464, 15 L.Ed.2d 453 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. Chambers v. State of Florida, 309 U.S. 227, 235—238, 60 S.Ct. 472, 476—477, 84 L.Ed. 716 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

[16] The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. ***461** In this Court, the privilege has consistently been accorded a liberal construction. Albertson v. Subversive Activities Control Board, 382 U.S. 70, 81, 86 S.Ct. 194, 200, 15 L.Ed.2d 165 (1965); Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed.2d 1118 (1951); Arnstein v. McCarthy, 254 U.S. 71, 72—73, 41 S.Ct. 26, 65 L.Ed. 138 (1920); Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 197, 35 L.Ed. 1110 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by ***1621** law-enforcement

officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery. [30]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in Bram v. United States, 168 U.S. 532, 542, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897), this Court held:

'In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment * * * commanding that no person 'shall be compelled in any criminal case to be a witness against himself.''

In Bram, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

'Much of the confusion which has resulted from the effort to deduce from the adjudged cases what ***462** would be a sufficient quantum of proof to show that a confession was or was not voluntary has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from the causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent. * * *' 168 U.S., at 549, 18 S.Ct. at 189. And see, id., at 542, 18 S.Ct. at 186.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, Ziang Sung Wan v. United States, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131. He stated:

'In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568.'

266 U.S., at 14—15, 45 S.Ct. at 3.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured ***463** its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, Westover v. United States, stating: 'We have no doubt * * * that it is possible for a suspect's Fifth ****1622** Amendment right to be violated during in-custody questioning by a law-enforcement officer.' [31]

[17] Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that Rule in McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In McNabb, 318 U.S., at 343—344, 63 S.Ct. at 614, and in Mallory, 354 U.S., at 455—456, 77 S.Ct. at 1359—1360, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself. [32]

[18] **[19]** **[20]** Our decision in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), necessitates

an examination of the scope of the privilege in state cases as well. In Malloy, we squarely held the ***464** privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in Murphy v. Waterfront Comm. of New York Harbor, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), and Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in Malloy made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U.S., at 7—8, 84 S.Ct. at 1493.[33] The voluntariness ****1623** doctrine in the state cases, as Malloy indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from ***465** making a free and rational choice.[34] The implications of this proposition were elaborated in our decision in Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, decided one week after Malloy applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S., at 483, 485, 491, 84 S.Ct. at 1761, 1762, 1765. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

[21] **[22]** A different phase of the Escobedo decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In Escobedo, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U.S., at 481, 488, 491, 84 S.Ct. at 1760, 1763, 1765.[35] This heightened his dilemma, and ***466** made his later statements the product of this compulsion. Cf. Haynes v. State of Washington, 373 U.S. 503, 514, 83 S.Ct. 1336, 1343 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that Escobedo explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.[36] That counsel is present when ****1624** statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warning and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.' Mapp v. Ohio, 367 U.S. 643, 685, 81 S.Ct. 1684, 1707, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). Cf. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

***467** III.

[23] **[24]** Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work

to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

[25] **[26]** **[27]** **[28]** At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and ***468** unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, ****1625** the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

[29] The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information ***469** as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation;[38] a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

[30] The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

[31] **[32]** The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere ***470** warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional.' Brief for the National District Attorneys Association as amicus curiae, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. Escobedo v. State of Illinois, 378 U.S. 478, 485, n. 5, 84 S.Ct. 1758, 1762. Thus, the need for counsel to protect ****1626** the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See Crooker v. State of California, 357 U.S. 433, 443—448, 78 S.Ct. 1287, 1293—1296, 2 L.Ed.2d 1448 (1958) (Douglas, J., dissenting).

[33] **[34]** **[35]** An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request ***471** may be the person who most needs counsel. As the California Supreme Court has aptly put it:

'Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.' People v. Dorado, 62 Cal.2d 338, 351, 42 Cal.Rptr. 169, 177—178, 398 P.2d 361, 369—370, (1965) (Tobriner, J.).

In Carnley v. Cochran, 369 U.S. 506, 513, 82 S.Ct. 884, 889, 8 L.Ed.2d 70 (1962), we stated: '(I)t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

[36] **[37]** Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of ***472** circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

[38] **[39]** **[40]** If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability ****1627** of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial ***473** of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

[41] **[42]** In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too

has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

[43] [44] [45] [46] Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, ***474** at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[44] At this ****1628** point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

[47] [48] This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

[49] [50] [51] ***475** If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. State of Illinois, 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and we reassert these standards as applied to incustody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

[52] [53] [54] An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70 (1962), is applicable here:

> 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'

See also Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives ***476** some information on his own prior to invoking his right to remain silent when interrogated.[45]

****1629 [55] [56] [57]** Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

[58] **[59]** **[60]** The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, ***477** for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In Escobedo itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

[61] **[62]** Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. State of Illinois, 378 U.S. 478, 492, 84 S.Ct. 1758, 1765. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of ***478** responsible citizenship for individuals to give whatever information they may have to aid in ****1630** law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. [46]

[63] **[64]** **[65]** In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, [47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

[66] **[67]** To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to ***479** protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. [48]

IV.

[68] A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e.g., Chambers v. State of Florida, 309 U.S. 227, 240—241, 60 S.Ct. 472, 478—479, 84 L.Ed. 716 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

'Decency, security, and liberty alike demand that government officials shall ****1631** be subjected to the same ***480** rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.' Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) (dissenting opinion). [49]

In this connection, one of our country's distinguished jurists has pointed out: 'The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.' [50]

[69] If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his ***481** client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the 'need' for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant. [51] Further examples are chronicled in our prior cases. See, e.g., Haynes v. State of Washington, 373 U.S. 503, 518—519, 83 S.Ct. 1336, 1345, 1346, 10 L.Ed.2d 513 (1963); Rogers v. Richmond, 365 U.S. 534, 541, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961); Malinski v. People of State of New York, 324 U.S. 401, 402, 65 S.Ct. 781, 782 (1945). [52]

****1632** ***482** It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests 'for investigation' subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, California v. Stewart, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was 'no evidence to connect them with any crime.' Available

statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause. [53]

***483** Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay. [54] A ****1633** letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the ***484** rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

'At the oral argument of the above cause, Mr. Justice Fortas asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.

"(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?

"The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the Westover case at 342 F.2d 684 (1965), and Jackson v. U.S., (119 U.S.App.D.C. 100) 337 F.2d 136 (1964), cert. den. 380 U.S. 935, 85 S.Ct. 1353,

"After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warning ***485** to read counsel of his own choice, or anyone else with whom he might wish to speak.

"(2) When is the warning given?

"The FBI warning is given to a suspect at the very outset of the interview, as shown in the Westover case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the Jackson case, also cited above, and in U.S. v. Konigsberg, 336 F.2d 844 (1964), cert. den. (Celso v. United States) 379 U.S. 933 (85 S.Ct. 327, 13 L.Ed.2d 342) but in any event it must precede the interview with the person for a confession or admission of his own guilt.

"(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

"When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, Shultz v. U.S., 351 F.2d 287 ((10 Cir.) 1965). It may be continued, however, as to all matters other than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in Hiram v. U.S., 354 F.2d 4 ((9 Cir.) 1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

"A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in Caldwell v. U.S., 351 F.2d 459 ((1 Cir.) 1965). When counsel ****1634** appears in person, he is permitted to confer with his client in private.

***486** "(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

"If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge." [55]

[70] The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the

FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience. [56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912 under the Judges' Rules is significant. As recently ***487** strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police. [57] ***488** The right of the individual to ****1635** consult with an attorney during this period is expressly recognized. [58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation. [59] In India, confessions made to police not in the presence of a magistrate have been excluded ***489** by rule of evidence since 1872, at a time when it operated under British law. [60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895. [61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. [62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals. [63] ****1636** There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, ***490** whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined. [64]

[71] **[72]** **[73]** It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making. [65] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See Hopt v. People of Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when Escobedo was before us and it is our ***491** responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. Miranda v. Arizona.

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to 'Interrogation Room No. 2' of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was ****1637** not advised that he had a right to have an attorney present. [66] Two hours later, the ***492** officers emerged from the interrogation room with a written confession signed by

Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.' [67]

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P.2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

[74] **[75]** We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. Haynes v. State of Washington, 373 U.S. 503, 512—513, 83 S.Ct. 1336, 1342, 10 L.Ed.2d 513 (1963); ***493** Haley v. State of Ohio, 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1948) (opinion of Mr. Justice Douglas).

No. 760. Vignera v. New York.

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3 p.m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, 'for detention.' At 11 p.m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings ****1638** contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

> 'The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what ***494** I said? I am telling you what the law of the State of New York is.'

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment. [68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 A.D.2d 752, 252 N.Y.S.2d 19, and by the Court of Appeals, also without opinion, 15 N.Y.2d 970, 259 N.Y.S.2d 857, 207 N.E.2d 527, remittitur amended, 16 N.y.2d 614, 261 N.Y.S.2d 65, 209 N.E.2d 110. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

[76] We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. Westover v. United States.

At approximately 9:45 p.m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas

City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p.m. he was booked. Kansas City police interrogated Westover ***495** on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

[77] **[78]** Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F.2d 684.

****1639** We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[69] At the ***496** time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

[79] We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station —in the same compelling surroundings. Thus, in obtaining a confession from Westover ***497** the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. California v. Stewart.

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, respondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p.m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, ‘Go ahead.’ The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

****1640** During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances, *498 however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

[80] Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal.2d 571, 43 Cal.Rptr. 201, 400 P.2d 97. It held that under this Court's decision in Escobedo, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights. [70]

[81] [82] We affirm. [71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of *499 these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed. It is so ordered.

Judgments of Supreme Court of Arizona in No. 759, of New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 reversed.

Judgment of Supreme Court of California in No. 584 affirmed.

Mr. Justice CLARK, dissenting in Nos. 759, 760, and 761, and concurring in the result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my **1641 dissenting brethren do not go quite far enough. Nor can I join in the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as 'police manuals' [1] are, as I read them, merely writings in this filed by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover the examples of police brutality mentioned by the Court [2] are rare exceptions to the thousands of cases *500 that appear every year in the law reports. The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The ipse dixit of the majority has no support in our cases. Indeed, the Court admits that 'we might not find the defendants' statements (here) to have been involuntary in traditional terms.' Ante, p. 1618. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. Escobedo v. State of Illinois, 378 U.S. 478, 490—491, 84 S.Ct. 1758, 1764—1765, 12 L.Ed.2d 977 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient. [3] *501 Since there is at **1642 this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as 'undoubtedly an essential tool in effective law enforcement.' Haynes v. State of Washington, 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that 'the Constitution has prescribed' its holding and where the light of our past cases, from Hopt v. People of Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), down to Haynes v. State of Washington, supra, is to ***502** the contrary. Indeed, even in Escobedo the Court never hinted that an affirmative 'waiver' was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are 'confessions.' To require all those things at one gulp should cause the Court to choke over more cases than Crooker v. State of California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), and Cicenia v. La Gay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in Escobedo, stated it in Haynes v. Washington—depended upon 'a totality of circumstances evidencing an involuntary * * * adminission of guilt.' 373 U.S., at 514, 83 S.Ct. at 1343. And he concluded:
'Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential took in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. * * * We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded.' Id., at 514—515, 83 S.Ct. at 1344.

***503** III.

I would continue to follow that rule. Under the 'totality of circumstances' rule of which my Brother Goldberg spoke in Haynes, I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give ****1643** the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule [4] which the Court lays down I would follow the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in Miranda v. Arizona, No. 759; Vignera v. New York, No. 760; and Westover v. United States, No. 761. In each of those cases I find from the circumstances no warrant for reversal. In ***504** California v. Stewart, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U.S.C. s 1257(3) (1964 ed.); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

Mr. Justice HARLAN, whom Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

I. INTRODUCTION

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel ***505** brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth. [1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new ****1644** rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward 'voluntariness' in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

***506** II. CONSTITUTIONAL PREMISES.

It is most fitting to begin an inquiry into the constitutional precedents by surverying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. Hopt v. People, of Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262; Pierce v. United States, 160 U.S. 355, 16 S.Ct. 321, 40 L.Ed. 454. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions. [2] The Court did, however, heighten the test of admissibility in federal trials to one of voluntariness 'in fact,' Ziang Sung Wan v. United States, 266 U.S. 1, 14, 45 S.Ct. 1, 3, 69 L.Ed. 131 ***507** (quoted, ante, p. 1621), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, and must now embrace somewhat more than 30 full opinions of ****1645** the Court. [3] While the voluntariness rubric was repeated in many instances, e.g., Lyons v. State of Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, e.g., Ward v. State of Texas, 316

U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663, supplemented by concern over the legality and fairness of the police practices, e.g., Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192, in an 'accusatorial' system of law enforcement, Watts v. State of Indiana, 338 U.S. 49, 54, 69 S.Ct. 1347, 1350, 93 L.Ed. 1801, and eventually by close attention to the individual's state of mind and capacity for effective choice, e.g., Gallegos v. State of Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325. The outcome was a continuing re-evaluation on the facts of each case of how much pressure on the suspect was permissible. [4]

***508** Among the criteria often taken into account were threats or imminent danger, e.g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975, physical deprivations such as lack of sleep or food, e.g., Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948, repeated or extended interrogation, e.g., Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, limits on access to counsel or friends, Crooker v. State of California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448; Cicenia v. La. Gay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523, length and illegality of detention under state law, e.g., Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513, and individual weakness or incapacities, Lynumn v. State of Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922. Apart from direct physical coercion, however, no single default or fixed combination of defaults guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, it is worth capsulizing the then-recent case of Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and rejecting some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is 'judicial' in its treatment of one case at a time, see ****1646** Culombe v. Connecticut, 367 U.S. 568, 635, 81 S.Ct. 1860, 1896, 6 L.Ed.2d 1037 (concurring opinion of The Chief Justice), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. ***509** Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty, [5] and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. Powers v. United States, 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448; Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090. As recently as Haynes v. State of Washington, 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, the Court openly acknowledged that questioning of witnesses and suspects 'is undoubtedly an essential tool in effective law enforcement.' Accord, Crooker v. State of California, 357 U.S. 433, 441, 78 S.Ct. 1287, 1292.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect 'in the unfettered exercise of his own will,' Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653, and that 'a prisoner is not 'to be made the deluded instrument of his own coniviction,'' Culombe v. Connecticut, 367 U.S. 568, 581, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word 'voluntary' may be deemed somewhat ***510** misleading, especially when one considers many of the confessions that

have been brought under its umbrella. See, e.g., supra, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in any event one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a trompe l'oeil. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, 'the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate **1647 lines of precedents. * * *' 8 Wigmore, Evidence s 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6] *511 Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person 'in any criminal case to be a witness against himself.' Cf. Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 25—26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for, as the Court reiterates, the privilege embodies basic principles always capable of expansion.[7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present 'the kinship of the two rules (governing confessions and self-incrimination) is too apparent for denial.' McCormick, Evidence 155 (1954). Since extension of the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8] *512 It then emerges from a discussion of Escobedo that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from 'the compelling atmosphere' of interrogation. See ante, pp. 1623—1624. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid all pressure to incriminate one's self in the situations **1648 covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial of removal of one's case from state to federal court, State of Maryland v. Soper, 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449; in refusal of a military commission, Orloff v. Willoughby, 345 U.S 83, 73 S.Ct. 534, 97 L.Ed. 842; in denial of a discharge in bankruptcy, Kaufman v. Hurwitz, 4 Cir., 176 F.2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence s 2272, at 441—444, n. 18 (McNaughton rev. 1961); Maguire, Evidence of Guilt s 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, e.g., *513 Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. However, the Court's unspoken assumption that any pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, e.g., United States v. Scully, 2 Cir., 225 F.2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore,

Evidence s 2269 (McNaughton rev. 1961). Cf. Henry v. State of Mississippi, 379 U.S. 443, 451—452, 85 S.Ct. 564, 569, 13 L.Ed.2d 408 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See infra, pp. 1649—1650.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a knowing and intelligent waiver, the Court cites Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, ante, p. 1628; appointment of counsel for the indigent suspect is tied to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811, ante, p. 1627; the silent-record doctrine is borrowed from Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70, ante, p. 1628, as is the right to an express offer of counsel, ante, p. 1626. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no petinent difference between judicial proceedings and police interrogation, I believe ***514** the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases. [10]

The only attempt in this Court to carry the right to counsel into the station house occurred in Escobedo, the Court repeating several times that that stage was no less 'critical' than trial itself. See 378 U.S. 485—488, 84 S.Ct. 1762—1763. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally 'critical' yet provision of counsel and advice on the score have never been ****1649** thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding. See infra, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as 'the domino method of constitutional adjudication * * * wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.' Friendly, supra, n. 10, at 950.

III. POLICY CONSIDERATIONS.

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due ***515** compensation for its weakness in constitutional law. The foregoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. Ante, p. 1630. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light '(t)o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser.' Ashcraft v. State of Tennessee, 322 U.S. 143, 161, 64 S.Ct. 921, 929, 88 L.Ed. 1192 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions. [11]

***516** The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in

preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all. [12] **1650 In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. Ante, pp. 1614—1618.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. [13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs *517 must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. See, supra, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see Developments, supra, n. 2, at 941—944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See infra, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, [14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seems to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into *518 the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. Miranda v. Arizona serves best, being neither the hardest nor easiest of the four under the Court's standards. [15]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years **1651 old, indigent, and educated to the extent of completing half the ninth grade. He had ‘an emotional illness' of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was ‘alert and oriented as to time, place, and person,’ intelligent within normal limits, competent to stand trial, and sane within the legal definitoin. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him, starting about 11:30 a.m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and —I will assume this though the record is uncertain, ante, 1636 —1637 and nn. 66—67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained *519 during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country. [16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although Escobedo has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions in point have sought

quite narrow interpretations. [17] Of *520 the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all **1652 has gone as far as this Court goes today. [18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. In Johnson, which established that appointed counsel must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beaney, Right to Counsel 29—30, 36—42 (1955). In Mapp, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U.S., at 651, 81 S.Ct., at 1689. In Gideon, which extended Johnson v. Zerbst to the States, an amicus brief was filed by 22 States and Commonwealths urging that course; only two States besides that of the respondent came forward to protest. See 372 U.S., at 345, 83 S.Ct., at 797. By contrast, in this case new restrictions on police *521 questioning have been opposed by the United States and in an amicus brief signed by 27 States and Commonwealths, not including the three other States which are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief re sume will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy, [19] but in any event the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative 'waiver' before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See ante, pp. 1633—1634. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, supra, n. 2, at 1084—1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of *522 the accused as against those of society when other data are considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the 'Judges' Rules,' which also place other somewhat imprecise limits on police cross-examination o suspects. However, in the courts discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of **1653 the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify. [20]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments, supra, n. 2, at 1106—1110; Reg. v. Ramasamy (1965) A.C. 1 (P.C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country. [21] The Court ends its survey by imputing *523 added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There

is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

***524** It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's ****1654** disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. CONCLUSIONS.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, Miranda v. Arizona (No. 759) and Vignera v. New York (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners. ***525** I would affirm in these two cases. The other state case is California v. Stewart (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U.S.C. s 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in Stewart be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, Westover v. United States (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the McNabb-Mallory rule into play under Anderson v. United States, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in pettioner's arrest and detention by the State too slight to invoke Anderson. I agree with the Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously ***526** taken by the Court in the name of fulfulling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in Douglas v. City of Jeannette, 319 U.S. 157, 181, 63 S.Ct. 877, 889, 87 L.Ed. 1324 (separate opinion): 'This Court is forever adding new stories to the temples of ****1655** constitutional law, and the temples have a way of collapsing when one story too many is added.'

Mr. Justice WHITE, with whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids incustody interrogation without the warnings

specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, '(b)ut there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates.' Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 18 (1949).

Our own constitutional provision provides that no person 'shall be compelled in any criminal case to be a witness against himself.' These words, when '(c) onsidered in the light to be shed by grammar and the dictionary * * * appear to signify simply that nobody shall be ***527** compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant.' Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich.L.Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning. Mayers, The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common-Law? 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, and Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: 'In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'' Bram v. United States, 168 U.S. 532, 542, 18 S.Ct. 183, 187, 42 L.Ed. 568. Although this view has found approval in other cases, Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048; Powers v. United States, 223 U.S. 303, 313, 32 S.Ct. 281, 283, 56 L.Ed. 448; Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed.2d 357, it has also been questioned, see Brown v. State of Mississippi, 297 U.S. 278, 285, 56 S.Ct. 461, 464, 80 L.Ed. 682; United States v. Carignan, 342 U.S. 36, 41, 72 S.Ct. 97, 100, 96 L.Ed. 48; Stein v. People of State of New York, 346 U.S. 156, 191, n. 35, 73 S.Ct. 1077, 1095, 97 L.Ed. 1522, ***528** and finds scant support in either the English or American authorities, see generally Regina v. Scott, Dears. & Bell 47; 3 ****1656** Wigmore, Evidence s 823 (3d ed. 1940), at 249 ('a confession is not rejected because of any connection with the privilege against self-crimination'), and 250, n. 5 (particularly criticizing Bram); 8 Wigmore, Evidence s 2266, at 400—401 (McNaughton rev. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. Id., at 6—7, 10, 84 S.Ct., at 1492—1493, 1494.

Bram, however, itself rejected the proposition which the Court now espouses. The question in Bram was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

'In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary.' 168 U.S., at 558, 18 S.Ct., at 192.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to Bram the Court, in Hopt v. People of Territory of Utah, 110 U.S. 574, 583—587, 4 S.Ct. 202, 206, 28 L.Ed. 262, had upheld the admissibility of a ***529** confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on Hopt, the Court ruled squarely on the issue in Sparf and Hansen v. United States, 156 U.S. 51, 55, 15 S.Ct. 273, 275, 39 L.Ed. 343:

> 'Counsel for the accused insist that there cannot be a voluntary statement, a free, open confession, while a defendant is confined and in irons, under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made, or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary and was not obtained by putting the prisoner in fear or by promises. Whart(on's) Cr.Ev. (9th Ed.) ss 661, 663, and authorities cited.'

Accord, Pierce v. United States, 160 U.S. 355, 357, 16 S.Ct. 321, 322, 40 L.Ed. 454.

And in Wilson v. United States, 162 U.S. 613, 623, 16 S.Ct. 895, 899, 40 L.Ed. 1090, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had filed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. 'The fact that (a defendant) is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. * * * And it is laid down ***530** that it is not essential to the admissibility of a confession ****1657** that it should appear that the person was warned that what he said would be used against him; but, on the contrary, if the confession was voluntary, it is sufficient, though it appear that he was not so warned.'

Since Bram, the admissibility of statements made during custodial interrogation has been frequently reiterated. Powers v. United States, 223 U.S. 303, 32 S.Ct. 281, cited Wilson approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that '(t) he mere fact that a confession was made while in the custody of the police does not render it inadmissible,' McNabb v. United States, 318 U.S. 332, 346, 63 S.Ct. 608, 615, 87 L.Ed. 819; accord, United States v. Mitchell, 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140, despite its having been elicited by police examination. Ziang Sung Wan v. United States, 266 U.S. 1, 14, 45 S.Ct. 3; United States v. Carignan, 342 U.S. 36, 39, 72 S.Ct. 97, 99. Likewise, in Crooker v. State of California, 357 U.S. 433, 437, 78 S.Ct. 1287, 1290, 2 L.Ed.2d 1448, the Court said that '(t)he bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained.' And finally, in Cicenia v. La Gay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally Culombe v. Connecticut, 367 U.S. 568, 587—602, 81 S.Ct. 1860, 1870, 6 L.Ed.2d 1037 (opinion of Frankfurter, J.); 3 Wigmore, Evidence s 851, at 313 (3d ed. 1940); see also Joy, Admissibility of Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered incustody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as ***531** every member knows, has left standing literally thousands of criminal

convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinter-pretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in **1658 terms of the long-range interest of the country. At the very least, the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions *532 like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if compelled. Hence the core of the Court's opinion is that because of the 'compulsion inherent in custodial surroundings, no statement obtained from (a) defendant (in custody) can truly be the product of his free choice,' ante, at 1619, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years' experience. Nor does it assert that its novel conclusion reflects a changing consensus among state courts, see Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may *533 have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that **1659 he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as 'Do you have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled, even if the accused has *534 been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was 'involuntary' in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and

not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See Ashcraft v. State of Tennessee, 322 U.S. 143, 161, 64 S.Ct. 921, 929, 88 L.Ed. 1192 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a 'free choice to admit, to deny, or to refuse to answer,' Lisenba v. People of State of California, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166, and whether physical or psychological coercion was of such a degree that 'the defendant's will was overborne at the time he confessed,' Haynes v. State of Washington, 373 U.S. 503, 513, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513; Lynumn v. State of Illinois, 372 U.S. 528, 534, 83 S.Ct. 917, 920, 9 L.Ed.2d 922. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, e.g., Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921; Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336. [3] ***535** But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare Tot v. United States, 319 U.S. 463, 466, 63 S.Ct. 1241, 1244, 87 L.Ed. 1519; United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210. A fortiori that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See Wilson v. United States, 162 U.S. 613, 624, 16 S.Ct. 895, 900, 40 L.Ed. 1090. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions that are coerced ****1660** and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by ***536** the Court will still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The Court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that the accused will not often waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled ***537** self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a 'need for counsel to protect the Fifth Amendment privilege * * *.' Ante, at 1625. The focus then is

not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop with a demonstration that the factual and textual bases for the rule it proponds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is 'to respect the inviolability of the human personality' and to require government to produce the evidence against the accused by its own independent labors. Ante, at 1620. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. **1661 Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to *538 advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see Escobedo v. State of Illinois, 378 U.S. 478, 499, 84 S.Ct. 1758, 1769, 12 L.Ed.2d 977 (dissenting opinion). Until today, 'the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence.' Brown v. Walker, 161 U.S. 591, 596, 16 S.Ct. 644, 646, 40 L.Ed. 819, see also Hopt v. People of Territory of Utah, 110 U.S. 574, 584—585, 4 S.Ct. 202, 207. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the *539 task of sorting out inadmissible evidence and must be replaced by the per se rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. Lanzetta v. State of New Jersey, 306 U.S. 451, 455, 59 S.Ct. 618, 619, 83 L.Ed. 888. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this country [4] and of the number of instances **1662 *540 in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws, ***541** or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have been to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penology, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he left. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.[5] Criminal trials, ****1663** no ***542** matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, supra, note 4, at 6 (Table 4), 59 (Table 1); Federal Offenders; 1963, supra, note 4, at 5 (Table 3); District of Columbia Offenders: 1963, supra, note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of ***543** course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal laws as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in ****1664** each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, compare Johnson v. State, 238 Md. 140, 207 A.2d 643 (1965), cert. denied, 382 U.S. 1013, 86 S.Ct. 623, 15 L.Ed.2d 528, it will often ***544** be true that a suspect may be cleared only through the results of interrogation of

other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping, see Brinegar v. United States, 338 U.S. 160, 183, 69 S.Ct. 1302, 1314, 93 L.Ed. 1879 (Jackson, J., dissenting); People v. Modesto, 62 Cal.2d 436, 446, 42 Cal.Rptr. 417, 423, 398 P.2d 753, 759 (1965), those involving the national security, see United States v. Drummond, 354 F.2d 132, 147 (C.A.2d Cir. 1965) (en banc) (espionage case), pet. for cert. pending, No. 1203, Misc., O.T. 1965; cf. Gessner v. United States, 354 F.2d 726, 730, n. 10 (C.A.10th Cir. 1965) (upholding, in espionage case, trial ruling that Government need not submit classified portions of interrogation transcript), and some of those involving organized crime. In the latter context the lawyer who arrives may also be the lawyer for the defendant's colleagues and can be relied upon to insure that no breach of the organization's security takes place even though the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's per se approach may not be justified on the ground that it provides a 'bright line' permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration, ***545** will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

****1665** Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761, and reverse in No. 584.

All Citations

384 U.S. 436, 10 Ohio Misc. 9, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974, 36 O.O.2d 237, 39 O.O.2d 63

Footnotes

1 Compare United States v. Childress, 347 F.2d 448 (C.A.7th Cir. 1965), with Collins v. Beto, 348 F.2d 823 (C.A.5th Cir. 1965). Compare People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1964) with People v. Hartgraves, 31 Ill.2d 375, 202 N.E.2d 33 (1964).

2 See, e.g., Enker & Elsen, Counsel for the Suspect: Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 and Escobedo v. State of Illinois, 49 Minn.L.Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1 (1965); Dowling, Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J.Crim.L., C. & P.S. 143, 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality, and Civil Liberties, 12 U.C.L.A.L.Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929 (1965).

3 For example, the Los Angeles Police Chief stated that 'If the police are required * * * to * * * establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees * * * a whole Pandora's box is opened as to under what circumstances * * * can a defendant intelligently waive these rights. * * * Allegations that modern criminal investigation can compensate for the lack of a confession of admission in every criminal case is totally absurd!' Parker, 40 L.A.Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that '(I)t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement.' L.A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of Escobedo: 'What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite.' N.Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that 'Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain.' Quoted in Herman, supra, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J.Crim.L., C. & P.S. 21 (1961).

4 This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused.

5 See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931) (Wickersham Report); Booth, Confessions and Methods Employed in Procuring Them, 4 So.Calif.L.Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich.L.Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U.Chi.L.Rev. 345, 357 (1936). See also Foote, Law and Polio Practice: Safeguards in the Law of Arrest, 52 Nw.U.L.Rev. 16 (1957).

6 Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); Canty v. State of Alabama, 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988 (1940); White v. State of Texas, 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342 (1940); Vernon v. State of Alabama, 313 U.S. 547, 61 S.Ct. 1092, 85 L.Ed. 1513 (1941); Ward v. State of Texas, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942); Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); Malinski v. People of State of New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954). See also Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951).

7 In addition, see People v. Wakat, 415 Ill. 610, 114 N.E.2d 706 (1953); Wakat v. Harlib, 253 F.2d 59 (C.A.7th Cir.1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); Kier v. State, 213 Md. 556, 132 A.2d 494 (1957) (police doctor told accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); Bruner v. People, 113 Colo. 194, 156 P.2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the

toilet); People v. Matlock, 51 Cal.2d 682, 336 P.2d 505, 71 A.L.R.2d 605 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and 'The Third Degree,' 2 Baylor L.Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J.Pub.L. 25 (1965).

8 The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appeals in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97—115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244—437, 490—521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash.U.L.Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif.L.Rev. 11 (1962); Sterling, supra, n. 7, at 47—65.

9 The methods described in Inbau & Reid Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

10 Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

11 O'Hara, supra, at 99.

12 Inbau & Reid, supra, at 34—43, 87. For example, in Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954), the interrogator-psychiatrist told the accused, 'We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for,' id., at 562, 74 S.Ct. at 719, and again, 'We know that morally you were just in anger. Morally, you are not to be condemned,' id., at 582, 74 S.Ct. at 729.

13 Inbau & Reid, supra, at 43—55.

14 O'Hara, supra, at 112.

15 Inbau & Reid, supra, at 40.

16 Ibid.

17 O'Hara, supra, at 104, Inbau & Reid, supra, at 58—59. See Spano v. People of State of New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). A variant on the technique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in Malinski v. People of State of New York, 324 U.S. 401, 407, 65 S.Ct. 781, 784, 89 L.Ed. 1029 (1945): 'Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.'

18 O'Hara, supra, at 105—106.

19 Id., at 106.

20 Inbau & Reid, supra, at 111.

21 Ibid.

22 Inbau & Reid, supra, at 112.

23 Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1953).

24 Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: 'Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten.' N.Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N.Y. Times, Oct. 20, 1964, p. 22, col. 1; N.Y. Times, Aug. 25, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).

25 In the fourth confession case decided by the Court in the 1962 Term, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See United States ex rel. Caminito v. Murphy, 222 F.2d 698 (C.A.2d Cir. 1955) (Frank, J.); People v. Bonino, 1 N.Y.2d 752, 152 N.Y.S.2d 298, 135 N.E.2d 51 (1956).

26 The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Professor Sutherland's recent article, Crime and Confession, 79 Harv.L.Rev. 21, 37 (1965):

'Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'withnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?'

27 Thirteenth century commentators found an analogue to the privilege grounded in the Bible. 'To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.' Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, 6, III Yale Judaica Series 52—53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakhan, 5 Judaism 53 (Winter 1956).

28 See Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 9—11 (1949); 8 Wigmore, Evidence 285—295 (McNaughton rev. 1961). See also Lowell, The Judicial Use of Torture, Parts I and II, 11 Harv.L.Rev. 220, 290 (1897).

29 See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va.L.Rev. 763 (1935); Ullmann v. United States, 350 U.S. 422, 445—449, 76 S.Ct. 497, 510—512, 100 L.Ed. 511 (1956) (Douglas, J., dissenting).

30 Compare Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); Quinn v. United States, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 (1955).

31 Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40—49, n. 44, Anderson v. United States, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829 (1943); Brief for the United States, pp. 17—18, McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943).

32 Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J. 1 (1958).

33 The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless

of its truth or falsity. Rogers v. Richmond, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961); Siang Sung Wan v. United States, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, e.g., Malinski v. People of State of New York, 324 U.S. 401, 404, 65 S.Ct. 781, 783, 89 L.Ed. 1029 (1945); Bram v. United States, 168 U.S. 532, 540—542, 18 S.Ct. 183, 185—186 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 904 (1964); United States v. Carignan, 342 U.S. 36, 38, 72 S.Ct. 97, 98, 96 L.Ed. 48 (1951); see also Wilson v. United States, 162 U.S. 613, 624, 16 S.Ct. 895, 900, 40 L.Ed. 1090 (1896). Appellate review is exacting, see Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Blackburn v. State of Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In addition, see Murphy v. Waterfront Comm. of New York Harbor, 378 U.S. 52, 84 S.Ct. 1594 (1964).

34 See Lisenba v. People of State of California, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166 (1941); Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); Malinski v. People of State of New York, 324 U.S. 401, 65 S.Ct. 781 (1945); Spano v. People of State of New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Lynumn v. State of Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

35 The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) (Fuld, J.).

36 In re Groban, 352 U.S. 330, 340—352, 77 S.Ct. 510, 517—523, 1 L.Ed.2d 376 (1957) (Black, J., dissenting); Note, 73 Yale L.J. 1000, 1048—1051 (1964); Comment, 31 U.Chi.L.Rev. 313, 320 (1964) and authorities cited.

37 See p. 1617, supra. Lord Devlin has commented:
'It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.' Devlin, The Criminal Prosecution in England 32 (1958).
In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964); Comment, 31 U.Chi.L.Rev. 556 (1964); Developments in the Law —Confessions, 79 Harv.L.Rev. 935, 1041—1044 (1966). See also Bram v. United States, 168 U.S. 532, 562, 18 S.Ct. 183, 194, 42 L.Ed. 568 (1897).

38 Cf. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich.L.Rev. 219 (1962).

39 See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449, 480 (1964).

40 Estimates of 50—90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn.L.Rev. 737, 738—739 (1961); Birzon, Kasanof & Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buffalo L.Rev. 428, 433 (1965).

41 See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 64—81 (1965). As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963):
'When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his proverty, it may properly be required to minimize the influence of poverty on its administration of justice.'

42 Cf. United States ex rel. Brown v. Fay, 242 F.Supp. 273, 277 (D.C.S.D.N.Y.1965); People v. Witenski, 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358 (1965).

43 While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score.

44 If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements them made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

45 Although this Court held in Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstanes decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

46 The distinction and its significance has been aptly described in the opinion of a Scottish court:
'In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect.' Chalmers v. H. M. Advocate, (1954) Sess.Cas. 66, 78 (J.C.).

47 See People v. Dorado, 62 Cal.2d 338, 354, 42 Cal.Rptr. 169, 179, 398 P.2d 361, 371 (1965).

48 In accordance with our holdings today and in Escobedo v. State of Illinois, 378 U.S. 478, 492, 84 S.Ct. 1758, 1765; Crooker v. State of California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958) and Cicenia v. La Gay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958) are not to be followed.

49 In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the Olmstead case.

50 Schaefer, Federalism and State Criminal Procedure, 70 Harv.L.Rev. 1, 26 (1956).

51 Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

52 Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. Haynes v. State of Washington, 373 U.S. 503, 518—519, 83 S.Ct. 1336, 1345—1346 (1963); Lynumn v. State of

Illinois, 372 U.S. 528, 537—538, 83 S.Ct. 917, 922, 9 L.Ed.2d 922 (1963); Rogers v. Richmond, 365 U.S. 534, 541, 81 S.Ct. 735, 739 (1961); Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960).

53 See, e.g., Report and Recommendations of the (District of Columbia) Commissioners' Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three 'stocky' young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixth-three were held overnight before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 11477, S. 2970, S. 3325, and S. 3355, 85th Cong., 2d Sess. (July 1958), pp. 40, 78.

54 In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

'Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

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'We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end be violated. * * * The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

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'* * * Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice.' Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L.Rev. 175, 177—182 (1952).

55 We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver iis necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

56 Among the crimes within the enforcement jurisdiction of the FBI are kidnapping, 18 U.S.C. s 1201 (1964 ed.), white slavery, 18 U.S.C. ss 2421—2423 (1964 ed.), bank robbery, 18 U.S.C. s 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U.S.C. ss 2311—2317 (1964 ed.), all manner of conspiracies, 18 U.S.C. s 371 (1964 ed.), and violations of civil rights, 18 U.S.C. ss 241—242 (1964 ed.). See also 18 U.S.C. s 1114 (1964 ed.) (murder of officer or employee of the United States).

57 (1964) Crim.L.Rev., at 166—170. These Rules provide in part:

'II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

'The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

'When after being cantioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

'III. * * *

'(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.
'IV. All written statements made after caution shall be taken in the following manner:
'(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.
'He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. * * *
'(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.
'(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.'
The prior Rules appear in Devlin, The Criminal Prosecution in England 137—141 (1958).
Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, e.g., (1964) Crim.L.Rev., at 182; and articles collected in (1960) Crim.L.Rev., at 298—356.

58 The introduction to the Judges' Rules states in part:
These Rules do not affect the principles
'(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so. * * *' (1964) Crim.L.Rev., at 166—167.

59 As stated by the Lord Justice General in Chalmers v. H. M. Advocate, (1954) Sess.Cas. 66, 78 (J.C.):
'The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice.'

60 'No confession made to a police officer shall be provided as against a person accused of any offense.' Indian Evidence Act s 25.
'No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.' Indian Evidence Act s 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India 553—569 (1962). To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: '(I)t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession.' Sarwan Singh v. State of Punjab, 44 All India Rep. 1957, Sup.Ct. 637, 644.

61 I Legislative Enactments of Ceylon 211 (1958).

62 10 U.S.C. s 831(b) (1964 ed.).

63 United States v. Rose, 24 CMR 251 (1957); United States v. Gunnels, 23 CMR 354 (1957).

64 Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that 'No person accused of any offence shall be

compelled to be a witness against himself.' Constitution of India, Article 20(3). See Tope, The Constitution of India 63—67 (1960).

65 Brief for United States in No. 761, Westover v. United States, pp. 44—47; Brief for the State of New York as amicus curiae, pp. 35—39. See also Brief for the National District Attorneys Association as amicus curiae, pp. 23—26.

66 Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

67 One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

68 Vignera thereafter successfully attacked the validity of one of the prior convictions, Vignera v. Wilkins, Civ. 9901 (D.C.W.D.N.Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31—33.

69 The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in Escobedo and, of course, prior to our decision today making the objection available, the failure to object at trial does not constitute a waiver of the claim. See, e.g., United States ex rel. Angelet v. Fay, 333 F.2d 12, 16 (C.A.2d Cir. 1964), aff'd, 381 U.S. 654, 85 S.Ct. 1750, 14 L.Ed.2d 623 (1965). Cf. Ziffrin, Inc. v. United States, 318 U.S. 73, 78, 63 S.Ct. 465, 87 L.Ed. 621 (1943).

70 Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in People v. Morse, 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33 (1964).

71 After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. s 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903, 86 S.Ct. 885.

1 E.g., Inbau & Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Investigation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

2 As developed by my Brother HARLAN, post, pp. 1644—1649, such cases, with the exception of the long-discredited decision in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), were adequately treated in terms of due process.

3 The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother Harlan points out, post, pp. 1652—1653, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's latter, ante, pp. 1633—1634, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as 'a right to counsel'; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, Westover v. United States, 342 F.2d 684, 685 (9 Cir., 1965) ('right to consult counsel'); Jackson v. United States, 119 U.S.App.D.C. 100, 337 F.2d 136, 138 (1964) (accused 'entitled to an attorney').) Indeed, the practice is that whenever the suspect 'decides that he wishes to consult with counsel before making a

statement, the interview is terminated at that point. * * * When counsel appears in person, he is permitted to confer with his client in private.' This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: '(T)hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, (are advised) of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge.' So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

4 In my view there is 'no significant support' in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother WHITE, post, pp. 1655—1657.

1 My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

2 The case was Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (quoted, ante, p. 1621). Its historical premises were afterwards disproved by Wigmore, who concluded 'that no assertions could be more unfounded.' 3 Wigmore, Evidence s 823, at 250, n. 5 (3d ed. 1940). The Court in United States v. Carignan, 342 U.S. 36, 41, 72 S.Ct. 97, 100, 96 L.Ed. 48, declined to choose between Bram and Wigmore, and Stein v. People of State of New York, 346 U.S. 156, 191, n. 35, 73 S.Ct. 1077, 1095, 97 L.Ed. 1522, cast further doubt on Bram. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048; see Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed.2d 357. On Bram and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv.L.Rev. 935, 959—961 (1966).

3 Comment, 31 U.Chi.L.Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced-confession cases had been decided by this Court, apart from per curiams. Spano v. People of State of New York, 360 U.S. 315, 321, n. 2, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265, collects 28 cases.

4 Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col.L.Rev. 62, 73 (1966): 'In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice.' See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449, 452—458 (1964); Developments, supra, n. 2, at 964—984.

5 See the cases synopsized in Herman, supra, n. 4, at 456, nn. 36—39. One not too distant example is Stroble v. State of California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

6 Among the examples given in 8 Wigmore, Evidence s 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

7 Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt s 2.03 at 15—16 (1959).

8 This, of course, is implicit in the Court's introductory announcement that '(o)ur decision in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (extending the Fifth Amendment privilege to the States)

necessitates an examination of the scope of the privilege in state cases as well.' Ante, p. 1622. It is also inconsistent with Malloy itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been 'the same standard' as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U.S., at 7, 84 S.Ct., at 1493.

9 I lay aside Escobedo itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of Escobedo's primary reliance on the Sixth Amendment.

10 Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929, 943—948 (1965).

11 See supra, n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See Collins v. Beto, 5 Cir., 348 F.2d 823, 832 (concurring opinion); Bator & Vorenberg, supra, n. 4, at 72—73.

12 The Court's vision of a lawyer 'mitigat(ing) the dangers of untrustworthiness' ante, p. 1626) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. Watts v. State of Indiana, 338 U.S. 49, 59, 69 S.Ct. 1347, 1358, 93 L.Ed. 1801 (separate opinion of Jackson, J.): '(A)ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' See Enker & Elsen, Counsel for the Suspect, 49 Minn.L.Rev. 47, 66—68 (1964).

13 This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. Ante, p. 1619, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

14 See, e.g., the voluminous citations to congressional committee testimony and other sources collected in Culombe v. Connecticut, 367 U.S. 568, 578—579, 81 S.Ct. 1860, 1865, 1866, 6 L.Ed.2d 1037, (Frankfurter, J., announcing the Court's judgment and an opinion).

15 In Westover, a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The Stewart case, on the other hand, involves long detention and successive questioning. In Vignera, the facts are complicated and the record somewhat incomplete.

16 '(J)ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (Cardozo, J.).

17 A narrow reading is given in: United States v. Robinson, 354 F.2d 109 (C.A.2d Cir.); Davis v. State of North Carolina, 339 F.2d 770 (C.A.4th Cir.); Edwards v. Holman, 342 F.2d 679 (C.A.5th Cir.); United States ex rel. Townsend v. Ogilvie, 334 F.2d 837 (C.A.7th Cir.); People v. Hartgraves, 31 Ill.2d 375, 202 N.E.2d 33; State v. Fox, 131 N.W.2d 684 (Iowa); Rowe v. Commonwealth, 394 S.W.2d 751 (Ky.); Parker v. Warden, 236 Md. 236, 203 A.2d 418; State v. Howard, 383 S.W.2d 701 (Mo.); Bean v. State, 398 P.2d 251 (Nev.); State of New Jersey v. Hodgson, 44 N.J. 151, 207 A.2d 542; People v. Gunner, 15 N.Y.2d 226, 257 N.Y.S.2d 924, 205 N.E.2d 852; Commonwealth ex rel. Linde v. Maroney, 416 Pa. 331, 206 A.2d 288; Browne v. State, 24 Wis.2d 491, 129 N.W.2d 175, 131 N.W.2d 169.

An ample reading is given in: United States ex rel. Russo v. State of New Jersey, 351 F.2d 429 (C.A.3d Cir.); Wright v. Dickson, 336 F.2d 878 (C.A.9th Cir.); People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr.

169, 398 P.2d 361; State v. Dufour, 206 A.2d 82 (R.I.); State v. Neely, 239 Or. 487, 395 P.2d 557, modified 398 P.2d 482.
The cases in both categories are those readily available; there are certainly many others.

18 For instance, compare the requirements of the catalytic case of People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657, 670.

19 The Court's obiter dictum notwithstanding ante, p. 1634, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

20 For citations and discussion covering each of these points, see Developments, supra, n. 2, at 1091—1097, and Enker & Elsen, supra, n. 12, at 80 & n. 94.

21 On Comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U.Pa.L.Rev. 165, 181 and nn. 96—97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, id., at 167—169; guilt based on majority jury verdicts, id., at 185; and pre-trial discovery of evidence on both sides, id., at 175.

22 Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

23 See Brief for the United States in Westover, p. 45. The N.Y. Times, June 3, 1966, p. 41 (late city ed.) reported that the Ford Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

24 The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N.Y. Times, May 24, 1966, p. 35 (late city ed.).

25 The Court waited 12 years after Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

1 Of course the Court does not deny that it is departing from prior precedent; it expressly overrules Crooker and Cicenia, ante, at 1630, n. 48, and it acknowledges that in the instant ‘cases we might not find the defendants' statements to have been involuntary in traditional terms,’ ante, at 1618.

2 In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif.L.Rev. 11, 41—45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, A Model Code of Pre-Arraignment Procedure, Commentary s 5.01, at 170, n. 4 (Tent.Draft No. 1, 1966).

3 By contrast, the Court indicates that in applying this new rule it ‘will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.’ Ante, at 1625. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See United States v. Bolden, 355 F.2d 453 (C.A.7th Cir.1965), petition for cert. pending No. 1146, O.T. 1965 (Secret Service agent); People v. Du Bont, 235 Cal.App.2d 844, 45 Cal.Rptr. 717, pet. for cert. pending No. 1053, Misc., O.T. 1965 (former police officer).

4 Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on 'Careers in Crime,' which it publishes in its Uniform Crime Reports. Of 92,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27—28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25—27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. Crim.L., C. & P.S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

5 Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of 33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, supra, note 4, 3—6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. Id., at 58—59. No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388,946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. FBI, Uniform Crime Reports—1964, 20—22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

State of California

BUSINESS AND PROFESSIONS CODE

Section 17500

17500. It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

(Amended by Stats. 1998, Ch. 599, Sec. 2.5. Effective January 1, 1999.)

California Statutes Annotated - 2019

West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 7. General Business Regulations (Refs & Annos)
Part 3. Representations to the Public (Refs & Annos)
Chapter 1. Advertising (Refs & Annos)
Article 3. Motel and Motor Court Rate Signs (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 17564

§ 17564. Posting rates; number of units offered at each rate; number of persons accommodated

Currentness

It shall be unlawful for any owner or operator of any establishment within the scope of this article, located within the State of California, to post or maintain posted on any outdoor or outside advertising sign pertaining to such establishment, any rates for accommodations in such establishment unless the sign shall have posted thereon the rates charged for all rooms, or other rental units or accommodations offered for rental, the number of rooms or other rental units offered for rental at each rate, and the number of persons accommodated at the rate posted. All posted rates and descriptive data required by this article shall be in type and material of the same size and prominence as the aforesaid data. This section shall not be held to be complied with by signs stating the rate per person or bearing the legend "and up."

Credits
(Added by Stats.1953, c. 975, § 1. Amended by Stats.1961, c. 1733, § 1.)

VALIDITY

This section was held unconstitutional as a denial of equal protection to motel owners or operators in the decision of Gawzner Corp. v. Minier (App. 2. Dist. 1975), 120 Cal.Rptr. 344, 46 Cal.App.3d 777.

HISTORICAL AND STATUTORY NOTES

2017 Main Volume
The 1961 amendment substituted "the rates charged for all rooms, or other rental units or accommodations offered for rental, the number of rooms or other rental units offered for rental at each rate, and the number of persons accommodated at the rate posted" for "both the minimum and maximum room, or other rental unit rates for accommodations offered for rental" in the first sentence.

CROSS REFERENCES

False or misleading statements in general, see Business and Professions Code § 17500.
Injunctive relief, see Business and Professions Code § 17535.
Person defined for purposes of this Chapter, see Business and Professions Code § 17506.

LIBRARY REFERENCES

2017 Main Volume

Innkeepers 6, 12.
Westlaw Topic No. 213.
C.J.S. Inns, Hotels, and Eating Places §§ 19 to 22, 26 to 27.

RESEARCH REFERENCES

Encyclopedias
37 Cal. Jur. 3d Hotels and Motels § 19, Hotel Rates or Charges.
California Civil Practice Business Litigation § 61:29, Motel and Motor Court Rates.

Treatises and Practice Aids
California Business Law Deskbook § 33:8, California False Advertising Law ("Fal").
2 Witkin, California Criminal Law 4th Crimes Against Property § 242 (2012), Miscellaneous Topics.
8 Witkin, California Summary 10th Constitutional Law § 784 (2017), Invalid Classifications.

NOTES OF DECISIONS

Construction and application 2

Validity 1

1 Validity

Statutory discrimination in outdoor rate signs provision of this section, which provided that it was unlawful to post or maintain any outdoor or outside advertising sign pertaining to rates for accommodations unless sign also stated rates charged for all rooms, number of rooms offered at each rate, and number of persons accommodated at rate posted, and which applied to owners and operators of motels but not hotels, denied motels equal protection and thus such outdoor rate signs provision was unconstitutional in its application to owners and operators of motels. Gawzner Corp. v. Minier (App. 2 Dist. 1975) 120 Cal.Rptr. 344, 46 Cal.App.3d 777. Constitutional Law 3693; Innkeepers 2

2 Construction and application

When outdoor rate advertising is used by a motel owner or operator, this section requires full rate disclaimer be made, including every rate at all possible normal levels of occupancy for each room. 56 Op.Atty.Gen. 345, 8-16-73.

West's Ann. Cal. Bus. & Prof. Code § 17564, CA BUS & PROF § 17564

Current with all laws through Ch. 1016 of 2018 Reg.Sess., and all propositions on 2018 ballot.

End of Document

State of California

WELFARE AND INSTITUTIONS CODE

Section 625.6

625.6. (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

(b) The court shall, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a) and, additionally, shall consider any willful violation of subdivision (a) in determining the credibility of a law enforcement officer under Section 780 of the Evidence Code.

(c) This section does not apply to the admissibility of statements of a youth 17 years of age or younger if both of the following criteria are met:

(1) The officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat.

(2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

(d) This section does not require a probation officer to comply with subdivision (a) in the normal performance of the probation officer's duties under Section 625, 627.5, or 628.

(Amended by Stats. 2020, Ch. 335, Sec. 2. (SB 203) Effective January 1, 2021.)

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On February 3, 2022, I served the:

- **Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued February 3, 2022**
- **Test Claim filed by the County of Los Angeles on December 22, 2021**

  Juveniles: Custodial Interrogation, 21-TC-01
  Welfare and Institutions Code Section 625.6; Statutes 2020, Chapter 335, Section 2 (SB 203)
  County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 February 3, 2022 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 2/1/22

Claim Number: 21-TC-01

Matter: Juveniles: Custodial Interrogation

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

Arlene Barrera, Auditor-Controller, *County of Los Angeles*
Claimant Contact
Auditor-Controller's Office, 500 West Temple Street, Room 525, Los Angeles, CA 90012
Phone: (213) 974-8302
abarrera@auditor.lacounty.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Jason Jennings, Director, *Maximus Consulting*

Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Claimant Representative
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 628-6028
Marilyn.Munoz@dof.ca.gov

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Heather Parrish-Salinas, Office Coordinator, *County of Solano*
Registrar of Voters, 675 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
HYParrishSalinas@SolanoCounty.com

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: 916-445-8717
NSidarous@sco.ca.gov

Christina Snider, Senior Deputy County Counsel, *County of San Diego*
1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-6229
Christina.Snider@sdcounty.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Joe.Stephenshaw@sen.ca.gov

Brittany Thompson, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Brittany.Thompson@dof.ca.gov

Jolene Tollenaar, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov

RECEIVED
March 07, 2022
Commission on
State Mandates

DEPARTMENT OF FINANCE

Gavin Newsom ▪ Governor
915 L Street ▪ Sacramento CA ▪ 95814-3706 ▪ www.dof.ca.gov

March 7, 2022

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Response to Test Claim 21-TC-01, Juveniles: Custodial Interrogation

Dear Ms. Halsey:

The Department of Finance has reviewed Test Claim 21-TC-01 submitted to the Commission on State Mandates (Commission) by the County of Los Angeles (Claimant). The Claimant alleges there are state-mandated, reimbursable costs associated with Chapter 335, Statutes of 2020 (SB 203).

SB 203 amended Welfare and Institutions Code section 625.6 to require that youths aged 17 years or younger must consult with legal counsel by specified means before custodial interrogation and before the waiver of Miranda rights. Prior to enactment of SB 203, statute (as added by Chapter 681, Statutes of 2017) required these services only be provided to youths aged 15 years or younger. SB 203 requires this service to also be provided to youths aged 16 or 17 years old. The bill also specifies the consultation cannot be waived.

As a result of complying with SB 203, the Claimant is seeking reimbursement for the increased cost incurred to provide legal counsel to youth aged 17 years old and younger. The Claimant estimates its Office of the Public Defender (Public Defender) incurred a cost of $5,821.45 to comply with SB 203 in fiscal year 2020-21 and will incur a cost of $13,000 for compliance in fiscal year 2021-22. Additionally, the Claimant estimates the annual statewide cost for local agencies to comply with SB 203 to be $6,427,500.

Finance recommends the Commission examine the estimated costs cited by the Claimant to ensure they only include the increased cost of providing legal counsel to youth ages 16 and 17 years old. Per Government Code section 17551(c), a local agency must file a test claim no later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later. The legislation (SB 395) that created the requirement to provide legal counsel to youth aged 15 years old and younger was, as noted above, enacted in 2017. The statutory timeline for seeking reimbursement for costs incurred due to SB 395 has passed; therefore, local agencies are no longer legally

allowed to claim reimbursement for the costs incurred to provide legal counsel to youth aged 15 years and younger. Finance notes the Claimant's statewide cost estimate is based on ***all*** juvenile arrests in the state, as reported by the California Department of Justice in 2020. As mentioned above, the costs for this test claim should be narrowly focused on the increase in the maximum age from 15 years old to 17 years old.

Finance also recommends the Commission review this test claim while considering the requirements of Chapter 92, Statutes of 2020 (AB 1869). AB 1869 repealed various criminal administrative fines and fees, including the public defender fee. To backfill counties for the lost fee revenue, $65 million General Fund is appropriated annually through 2025-26. The revenue provided to the Claimant by the state pursuant to AB 1869 may serve as an offset to any state-mandated costs incurred by the Claimant, if the Commission should determine SB 203 does impose reimbursable, state-mandated costs on the Claimant.

If you have any questions regarding this letter, please contact Chris Hill, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

Teresa Calvert

TERESA CALVERT
Program Budget Manager

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 7, 2022, I served the:

- **Finance's Comments on the Test Claim filed March 7, 2022**

  Juveniles: Custodial Interrogation, 21-TC-01
  Welfare and Institutions Code Section 625.6; Statutes 2020, Chapter 335, Section 2 (SB 203)
  County of Los Angeles, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 March 7, 2022 at Sacramento, California.

Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 2/1/22

Claim Number: 21-TC-01

Matter: Juveniles: Custodial Interrogation

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

Arlene Barrera, Auditor-Controller, *County of Los Angeles*
Claimant Contact
Auditor-Controller's Office, 500 West Temple Street, Room 525, Los Angeles, CA 90012
Phone: (213) 974-8302
abarrera@auditor.lacounty.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Jason Jennings, Director, *Maximus Consulting*

Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
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Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Claimant Representative
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 628-6028
Marilyn.Munoz@dof.ca.gov

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Heather Parrish-Salinas, Office Coordinator, *County of Solano*
Registrar of Voters, 675 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
HYParrishSalinas@SolanoCounty.com

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
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Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: 916-445-8717
NSidarous@sco.ca.gov

Christina Snider, Senior Deputy County Counsel, *County of San Diego*
1600 Pacific Highway, Room 355, San Diego, CA 92101
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Christina.Snider@sdcounty.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
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Phone: (916) 243-8913
jolenetollenaar@gmail.com

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100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-3873
PHONE: (213) 974-8301 FAX: (213) 626-5427

RECEIVED
April 06, 2022
Commission on State Mandates

Exhibit C

ARLENE BARRERA
AUDITOR-CONTROLLER

OSCAR VALDEZ
CHIEF DEPUTY AUDITOR-CONTROLLER

ASSISTANT AUDITOR-CONTROLLERS

KAREN LOQUET
CONNIE YEE

April 6, 2022

Via Drop Box

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

Dear Ms. Halsey:

RESPONSE TO THE DEPARTMENT OF FINANCE COMMENTS ON THE COUNTY'S JUVENILES: CUSTODIAL INTERROGATION TEST CLAIM

The County of Los Angeles ("Claimant") submits the attached Comments in response to the Department of Finance's comments on our *Juveniles: Custodial Interrogation, 21-TC-01* Test Claim.

If you have any questions please call me, or your staff may contact Fernando Lemus at (213) 974-0324 or via e-mail at flemus@auditor.lacounty.gov.

Very truly yours,

Arlene Barrera
Auditor-Controller

AB:OV:CY:EW:FL

Attachment

RESPONSE TO THE DEPARTMENT OF FINANCE COMMENTS ON THE COUNTY'S JUVENILES: CUSTODIAL INTERROGATION TEST CLAM

The County of Los Angeles (County) has reviewed the comments from the Department of Finance (Finance) related to Test Claim 21-TC-01.

The County agrees that the mandated program stated in Senate Bill (SB) 203 should be narrowly focused to capture the costs incurred in providing services to juveniles with a maximum age 15 years to 17 years of age. The County is aware that the deadline for filing a test claim on SB 395 has passed; however, the program was extended by the Legislature in SB 203 to include older juveniles. The County urges the Commission to grant the test claim as it relates to those older juveniles with a maximum age 15 years to 17 years of age.

Finance's recommendation that the Commission review this test claim while considering the requirements in Assembly Bill (AB) 1869 is misplaced. The public defender fees that were eliminated in AB 1869 relate to the registration and cost of a court-appointed lawyer. The costs of providing legal counsel prior to a custodial interrogation are unrelated to the fees in AB 1869 since a public defender has not been appointed by the court to represent an individual. In passing SB 395 and later SB 203, the Legislature requires that juveniles be provided counsel *prior* to a custodial interrogation, which occurs well before any charges are filed and any court proceedings are calendared.

The County respectfully requests that the Commission find that Test Claim 21-TC-01 is a reimbursable State mandate.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On April 7, 2022, I served the:

- **Claimant's Rebuttal Comments filed April 6, 2022**

  Juveniles: Custodial Interrogation, 21-TC-01
  Welfare and Institutions Code Section 625.6; Statutes 2020, Chapter 335, Section 2 (SB 203)
  County of Los Angeles, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 April 7, 2022 at Sacramento, California.

Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/29/22

Claim Number: 21-TC-01

Matter: Juveniles: Custodial Interrogation

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

Arlene Barrera, Auditor-Controller, *County of Los Angeles*
Claimant Contact
Auditor-Controller's Office, 500 West Temple Street, Room 525, Los Angeles, CA 90012
Phone: (213) 974-8302
abarrera@auditor.lacounty.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Tim Flanagan, Office Coordinator, *Solano County*
Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
Elections@solanocounty.com

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,

Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Claimant Representative
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403

Phone: (949) 440-0845
michellemendoza@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 628-6028
Marilyn.Munoz@dof.ca.gov

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@sbcountyatc.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: 916-445-8717
NSidarous@sco.ca.gov

Christina Snider, Senior Deputy County Counsel, *County of San Diego*
1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-6229
Christina.Snider@sdcounty.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Joe.Stephenshaw@sen.ca.gov

Brittany Thompson, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Brittany.Thompson@dof.ca.gov

Jolene Tollenaar, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

Exhibit D

September 13, 2022

Mr. Kris Cook
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

Mr. Fernando Lemus
County of Los Angeles
500 West Temple Street,
Room 603
Los Angeles, CA 90012

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Juveniles: Custodial Interrogation, 21-TC-01
Welfare and Institutions Code Section 625.6 as Amended by Statutes 2020, Chapter 335, Section 2 (SB 203)
County of Los Angeles, Claimant

Dear Mr. Cook and Mr. Lemus:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision no later than **5:00 pm on October 4, 2022**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.[1]

You are advised that comments filed with the Commission are required to be electronically filed (e-filed) in an unlocked legible and searchable PDF file, using the Commission's Dropbox. (Cal. Code Regs., tit. 2, § 1181.3(c)(1).) Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. If e-filing would cause the filer undue hardship or significant prejudice, filing may occur by first class mail, overnight delivery or personal service only upon approval of a written request to the executive director. (Cal. Code Regs., tit. 2, § 1181.3(c)(2).)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

[1] Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Hearing

This matter is set for hearing on **Friday, December 2, 2022** at 10:00 a.m., via Zoom. The Proposed Decision will be issued on or about November 18, 2022.

Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names and email addresses of the people who will be speaking for inclusion on the witness list and so that detailed instructions regarding how to participate as a witness in this meeting on Zoom can be provided to them. When calling or emailing, please identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

Heather Halsey
Executive Director

ITEM ___

TEST CLAIM

DRAFT PROPOSED DECISION

Welfare and Institutions Code Section 625.6

As Amended by Statutes 2020, Chapter 335 (SB 203)

Juveniles: Custodial Interrogation

21-TC-01

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim addresses Statutes 2020, chapter 335 (SB 203), which amended Welfare and Institutions Code section 625.6, effective January 1, 2021, to provide that "a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference" "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights."[1] The statute prohibits the waiver of this consultation.[2]

Staff finds that Welfare and Institutions Code section 625.6, as amended by Statutes 2020, chapter 335, imposes a reimbursable state-mandated program on counties and cities as stated herein.

Procedural History

The claimant filed the Test Claim on December 22, 2021.[3] The Department of Finance (Finance) filed comments on the Test Claim on March 7, 2022.[4] The claimant filed rebuttal comments on April 6, 2022.[5] Commission staff issued the Draft Proposed Decision on September 13, 2022.[6]

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (hereafter *Miranda*).

[2] Welfare and Institutions Code section 625.6(a).

[3] Exhibit A, Test Claim, filed December 22, 2021, page 1.

[4] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 1.

[5] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 1.

[6] Exhibit D, Draft Proposed Decision, issued September 13, 2022.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statue or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[7]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

Issue	Description	Staff Recommendation
Was the Test Claim timely filed, and if so, when does the potential reimbursement period begin?	Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[8] Government Code section 17557(e) requires a test claim to be "submitted on or before	*Timely filed with a Potential Period of Reimbursement Beginning January 1, 2021.* Both the effective date of the test claim statute (Stats. 2020, ch. 335) and the date the claimant alleges that it first incurred costs under the statute is January 1, 2021.[9] The Test Claim was filed on December 22, 2021,[10] which is within 12 months of that date. Because this Test Claim was filed on December 22, 2021, the potential period of reimbursement under

[7] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[8] California Code of Regulations, title 2, section 1183.1(c).

[9] Exhibit A, Test Claim, filed December 22, 2021, page 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, para. 4).

[10] Exhibit A, Test Claim, filed December 22, 2021, page 1.

Issue	Description	Staff Recommendation
	June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year."	Government Code section 17557 would typically begin on July 1, 2020. However, since the test claim statute has a later effective date, the potential period of reimbursement for this Test Claim begins on the statute's effective date, January 1, 2021.
Does the test claim statute impose a state-mandated program under article XIII B, section 6 of the California Constitution?	The test claim statute requires that "a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference" "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights," and prohibits the youth from waiving this consultation.[11] The test claim statute also carves out two exceptions from this requirement: (1) for an officer whose interrogation of the minor is limited to questions that were reasonably	*The test claim statute imposes a state-mandated program only on counties and cities*. While section 625.6(a) could arguably be viewed as requiring minors themselves to procure and consult with legal counsel before they allow themselves to be interrogated by local law enforcement, the other provisions of section 625.6,[13] the legislative history of that section,[14] and the section's statutory context[15] all indicate that section 625.6(a) imposes its requirement on law enforcement, not minors.[16]

[11] Welfare and Institutions Code section 625.6(a).

[13] See Welfare and Institutions Code section 625.6(b) (penalizing law enforcement for violations of section 625.6(a)), (c) (excepting an interrogating officer from section 625.6(a) under specific circumstances, and (d) (excepting a probation officer from section 625.6(a) when in the normal performance of their duties under section 625, 627.5, or 628).

[14] See e.g. Assembly Committee on Appropriations, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 1 (stating that the test claim statute "*requires law enforcement to provide* a person 17 years of age or younger access to legal counsel before the person waives their Miranda rights" (emphasis added)).

[15] See e.g. Welfare and Institutions Code section 627.5 (requiring a *probation officer* to advise a minor in temporary custody, as specified, to advise the minor of their *Miranda* rights and notify the judge of the juvenile court if the minor or the minor's parent or guardian requests counsel).

[16] See *In re Anthony L.* (2019) 43 Cal.App.5th 438, 450 (interpreting section 625.6(a) as imposing its requirement on law enforcement without discussion); *Y.C. v. Superior Court* (2021)

Issue	Description	Staff Recommendation
	necessary to obtain information that the officer reasonably believed was necessary to protect life or property from an imminent threat, and (2) for a probation officer "in the normal performance of the probation officer's duties under [Welfare and Institutions Code] [s]ection 625, 627.5, or 628."[12]	In addition, the requirements are state-mandated with respect to counties and cities, and not state-mandated with respect to school districts and community college districts. School districts and community college districts are statutorily authorized, not required, to hire peace officers and, unlike counties and cities, do not provide policing services as a core function or duty.[17] And there is no evidence in the record showing that the districts are compelled to provide policing services as a practical matter to carry out their core educational functions.[18]
Does the test claim statute impose a new program or higher level of service?	In order for a test claim statute to impose a new program or higher level of service, its requirements must be new when compared with the legal requirements in effect immediately before its enactment and increase the level of service provided to the public.[19] In addition, the	*Yes, the statute imposes a new program or higher level of service.* The test claim statute's requirement that law enforcement ensure that minors consult with legal counsel prior to a custodial interrogation and the waiver of any *Miranda* rights is new only with respect

71 Cal.App.5th 410, 252, *as modified on denial of reh'g* (Dec. 6, 2021), review denied (Feb. 16, 2022) (same).)

[12] Welfare and Institutions Code section 625.6(d).

[17] Education Code sections 38000, 72330; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1368.

[18] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744, 754; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1368.

[19] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

Issue	Description	Staff Recommendation
	requirements must either carry out the governmental function of providing a service to the public, or impose unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state.[20] Prior to the test claim statute, federal and state law required state and local law enforcement to provide a minor with legal counsel, and prohibited interrogation or further interrogation of that minor until counsel has been provided or the individual has validly waived their right thereto, when the minor affirmatively requested counsel.[21] And Welfare and Institutions Code section 625.6, as added by Statutes 2017, chapter 681, further required law enforcement to ensure that minors 15 years or younger consult with legal counsel before custodial interrogation	to minors 16 or 17 years of age who do not affirmatively request counsel. This requirement is uniquely imposed on local agencies because it only applies in the context of custodial interrogations,[22] which are uniquely governmental actions defined as "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[23] The test claim statute carries out the governmental function of providing a service to the public by seeking to minimize false confessions extracted from minors in custodial interrogations[24] and protect minors from "psychologically coercive interrogations and other

[20] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[21] See *Malloy v. Hogan* (1964) 378 U.S. 1, 11 (Fifth Amendment right against self-incrimination applies against both state and federal authorities); see e.g. *Miranda v. Arizona* (1966) 384 U.S. 436, 494-498 (applying the Fifth Amendment right against self-incrimination to interrogations conducted by local police officers). If an individual has a private attorney, they may of course consult with that attorney instead of relying on government-appointed counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436, 471-473; Welfare and Institutions Code sections 625 and 627.5.)

[22] Welfare and Institutions Code section 625.6(a).

[23] *Miranda v. Arizona* (1966) 38 U.S. 436, 444, emphasis added.

[24] See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4.

Issue	Description	Staff Recommendation
	and the waiver of any *Miranda* rights, with certain exceptions, even when the minors did not request counsel.	psychologically coercive dealings with the police."[25]
Does the test claim statute impose increased costs mandated by the state?	Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000.	*Yes, the test claim statute imposes increased costs mandated by the state.* There is substantial evidence that the claimant has incurred increased costs mandated by the state to comply with the test claim statute.[26] Moreover, although Statutes 2020, chapter 92 and Penal Code section 987.6 provide potential sources of offsetting revenue to counties for public defender and appointed counsel costs, that revenue is not "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" such that Government Code section 17556(e) would preclude reimbursement. Moreover, none of the other exceptions to reimbursement in Government Code section 17556 apply.

[25] Statutes 2020, chapter 335, section 1.

[26] Exhibit A, Test Claim, filed December 22, 2021, pages 11, 18-20 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15 and Attachment A), and 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, paras. 3 and 5); See also Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4; Exhibit X (12), U.S. Department of Justice, Office of Justice Programs, Juvenile Justice Statistics National Report Series Bulletin (May 2021), page 3, https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf (accessed on July 7, 2022).

Staff Analysis

A. The Test Claim was Timely Filed with a Potential Period of Reimbursement Beginning January 1, 2021.

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[27]

Here, the test claim statute went into effect on January 1, 2021,[28] and the claimant alleges that it first incurred costs related to implementing that statute on that date.[29] The Test Claim was filed on December 22, 2021.[30] Thus, the Test Claim was timely filed within 365 days of both the effective date of the test claim statute and first incurring costs pursuant to that statute.[31]

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because this Test Claim was filed on December 22, 2021, the potential period of reimbursement under Government Code section 17557 would typically begin on July 1, 2020. However, since the test claim statute has a later effective date, the potential period of reimbursement for this Test Claim begins on that effective date, which is January 1, 2021.

B. Welfare and Institutions Code Section 625.6, as Amended by Statutes 2020, Chapter 335, Imposes a Reimbursable State-Mandated Program on Counties and Cities to Ensure that Youths, 16 or 17 Years of Age, Who Do Not Affirmatively Request an Attorney, Consult with Legal Counsel Prior to Custodial Interrogation and Before Waiving Any *Miranda* Rights.

Statutes 2020, chapter 335 amended Welfare and Institutions Code section 625.6, effective January 1, 2021, to provide that "a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference" "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights." The section prohibits the youth from waiving this consultation.[32] The statute exempts from this requirement an officer whose interrogation of the minor is limited to questions that were reasonably necessary to obtain information that the officer reasonably believed was necessary to protect life or property from an imminent threat.[33] The

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[27] California Code of Regulations, title 2, section 1183.1(c).

[28] Statutes 2020, chapter 335; see California Constitution article IV, section 8.

[29] Exhibit A, Test Claim, filed December 22, 2021, page 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, paragraph 4).

[30] Exhibit A, Test Claim, filed December 22, 2021, page 1.

[31] Government Code section 17551; California Code of Regulations, title 2, section 1183.1(c).

[32] Welfare and Institutions Code section 625.6(a).

[33] Welfare and Institutions Code section 625.6(c).

section also exempts a probation officer "in the normal performance of the probation officer's duties under [Welfare and Institutions Code] [s]ection 625, 627.5, or 628."[34]

Staff finds that the test claim statute imposes a reimbursable state-mandated program on counties and cities as described below.

C. The Test Claim Statute Imposes a State-Mandated Program, Only on Counties and Cities, to Ensure that Youths 17 Years of Age or Younger Consult with Legal Counsel Prior to Custodial Interrogation and Before Waiving Any *Miranda* Rights.

While section 625.6(a) could arguably be viewed as requiring minors themselves to procure and consult with legal counsel before they allow themselves to be interrogated by local law enforcement, the other provisions of section 625.6,[35] the legislative history of that section,[36] and the section's statutory context[37] all indicate that section 625.6(a) imposes its requirement on law enforcement, not minors.[38] Thus, staff finds that the statute requires law enforcement to ensure that youth, 17 years old or younger, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to provide the consultation in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

Staff further finds that counties and cities are mandated to comply with the test claim statute. The requirement imposed by the test claim statute is triggered by law enforcement's decision to interrogate a minor. Case law suggests that a local decision is not truly voluntary if it is, as a practical matter, constrained by duty.[39] Because a law enforcement officer's decision to

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[34] Welfare and Institutions Code section 625.6(d).

[35] See Welfare and Institutions Code section 625.6(b) (penalizing law enforcement for violations of section 625.6(a)), (c) (excepting an interrogating officer from section 625.6(a) under specific circumstances, and (d) (excepting a probation officer from section 625.6(a) when in the normal performance of their duties under section 625, 627.5, or 628).

[36] See e.g. Assembly Committee on Appropriations, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 1 (stating that the test claim statute "*requires law enforcement to provide* a person 17 years of age or younger access to legal counsel before the person waives their Miranda rights" (emphasis added)).

[37] See e.g. Welfare and Institutions Code section 627.5 (requiring a *probation officer* to advise a minor in temporary custody, as specified, to advise the minor of their *Miranda* rights and notify the judge of the juvenile court if the minor or the minor's parent or guardian requests counsel).

[38] See *In re Anthony L.* (2019) 43 Cal.App.5th 438, 450 (interpreting section 625.6(a) as imposing its requirement on law enforcement without discussion); *Y.C. v. Superior Court* (2021) 71 Cal.App.5th 410, 252, *as modified on denial of reh'g* (Dec. 6, 2021), review denied (Feb. 16, 2022) (same).

[39] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; *Department of Finance v. Commission on State Mandates (POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

interrogate a minor is constrained by the officer's sworn duty to investigate apparent criminal activity[40] and to protect the citizenry,[41] staff finds that law enforcement's decision to interrogate a minor is not a truly voluntary decision that would preclude reimbursement for downstream costs.

However, the requirements are not state-mandated with respect to school districts and community college districts since they are statutorily authorized, but not required, to hire peace officers and, unlike counties and cities, do not provide policing services as a core function or duty.[42] And there is no evidence in the record showing that the districts are compelled to provide policing services as a practical matter to carry out their core educational functions.[43]

D. The Test Claim Statute Imposes a New Program or Higher Level of Service Only With Respect to 16 and 17 Year Olds Who Do Not Affirmatively Request Counsel.

The test claim statute's requirements are new with respect to 16 and 17 year olds who do not affirmatively request counsel. Prior to the test claim statute, federal and state law required state and local law enforcement to provide a minor with legal counsel, and prohibited interrogation or further interrogation of that minor until counsel has been provided or the individual has validly waived their right thereto, when the minor affirmatively requested counsel.[44] And Welfare and Institutions Code section 625.6, as added by Statutes 2017, chapter 681, further required law enforcement to ensure that minors 15 years or younger consult with legal counsel before custodial interrogation and the waiver of any *Miranda* rights, with certain exceptions, even when the minors did not request counsel. Thus, the test claim statute's requirement that law enforcement ensure that minors consult with legal counsel prior to a custodial interrogation and the waiver of any *Miranda* rights is new only with respect to minors 16 or 17 years of age who do not affirmatively request counsel.

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[40] See *People v. Coston* (1990) 221 Cal.App.3d 898, 903; *McCain v. Sheridan* (1958) 160 Cal.App.2d 174, 177-178.

[41] *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 799; *Pasos v. Los Angeles County Civil Service Commission* (2020) 52 Cal.App.5th 690, 702, *as modified on denial of reh'g* (Aug. 18, 2020).

[42] Education Code sections 38000, 72330; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1368.

[43] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744, 754; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1368.

[44] See *Malloy v. Hogan* (1964) 378 U.S. 1, 11 (Fifth Amendment right against self-incrimination applies against both state and federal authorities); see e.g. *Miranda v. Arizona* (1966) 384 U.S. 436, 494-498 (applying the Fifth Amendment right against self-incrimination to interrogations conducted by local police officers). If an individual has a private attorney, they may of course consult with that attorney instead of relying on government-appointed counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436, 471-473; Welfare and Institutions Code sections 625 and 627.5.)

Moreover, the test claim statute imposes a new program or higher level of service in an existing program because it both imposes unique requirements on local agencies that do not generally apply to all residents and entities in the state and carries out the governmental function of providing a service to the public, either of which is sufficient for a requirement to constitute a "program" within the meaning of article XIII B, section 6.[45] The test claim statute imposes unique requirements on local agencies because it only applies in the context of custodial interrogations,[46] which are uniquely governmental actions defined as "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[47] The test claim statute carries out the governmental function of providing a service to the public by seeking to minimize false confessions extracted from minors in custodial interrogations[48] and protect minors from "psychologically coercive interrogations and other psychologically coercive dealings with the police."[49]

E. The Test Claim Statute Results in Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.

Finally, there is substantial evidence in the record that the claimant has incurred increased costs mandated by the state to comply with the test claim statute.[50] Moreover, although Statutes 2020, chapter 92 and Penal Code section 987.6 provide potential sources of offsetting revenue to counties for public defender and appointed counsel costs, that revenue is not "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" such that Government Code section 17556(e) would preclude reimbursement. And none of the other exceptions to reimbursement in Government Code section 17556 apply. Consequently, staff finds that the test claim statute imposes increased costs mandated by the state.

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[45] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[46] Welfare and Institutions Code section 625.6(a).

[47] *Miranda v. Arizona* (1966) 38 U.S. 436, 444, emphasis added.

[48] See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4.

[49] Statutes 2020, chapter 335, section 1.

[50] Exhibit A, Test Claim, filed December 22, 2021, pages 11, 18-20 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15 and Attachment A), and 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, paras. 3 and 5); See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4; Exhibit X (12), U.S. Department of Justice, Office of Justice Programs, Juvenile Justice Statistics National Report Series Bulletin (May 2021), page 3, https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf (accessed on July 7, 2022).

Conclusion

Based on the forgoing analysis, staff finds that Welfare and Institutions Code section 625.6, as amended by Statutes 2020, chapter 335, imposes a reimbursable state-mandated program on counties and cities only, beginning January 1, 2021, to perform the following activity:

- Ensure that youth, ages 16 and 17, *who do not affirmatively request an attorney*, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to consult with the youth in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

The following state funds will be identified in the Parameters and Guidelines as potential offsetting revenues:

- Funding appropriated from the General Fund by Statutes 2020, chapter 92 (AB 1869) to backfill a county for the revenue lost due to the repeal of former Penal Code section 987.4 and former Government Code section 27712, which provided funding for the costs of defense counsel and legal assistance in criminal proceedings, to the extent that the funds are used to offset a county's costs to comply with this program.
- Funding made available to counties pursuant to Penal Code section 987.6 for providing legal assistance for persons charged with violations of state criminal law or involuntarily detained under the Lanterman-Petris-Short Act and used to offset a county's costs to comply with this program.

Reimbursement is not required in the following situations:

- When the 16 or 17 year old affirmatively requests an attorney prior to interrogation and before waiver of any *Miranda* rights, which is required by existing state and federal law.[51]
- For school districts or community college districts, who are authorized but not required by state law to employ peace officers.[52]
- When the officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat and the officer's questions were limited to those questions that were reasonably necessary to obtain that information.[53]

[51] Welfare and Institutions Code sections 625, 627.5; *Miranda v. Arizona* (1966) 384 U.S. 436, 470-473.

[52] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

[53] Welfare and Institutions Code section 625.6(c)(2).

- In the normal performance of a probation officer's duties under Welfare and Institutions Code section 625, 627.5, or 628.[54]

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to approve the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

[54] Welfare and Institutions Code section 625.6(d).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Welfare and Institutions Code Section 625.6, As Amended by Statutes 2020, Chapter 335 (SB 203) Filed on December 22, 2021 County of Los Angeles, Claimant	Case No.: 21-TC-01 *Juveniles: Custodial Interrogation* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 2, 2022*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 2, 2022. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

Member	**Vote**
Lee Adams, County Supervisor	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Renee Nash, School District Board Member	
Sarah Olsen, Public Member	
Shawn Silva, Representative of the State Controller	
Spencer Walker, Representative of the State Treasurer, Vice Chairperson	

Summary of the Findings

This Test Claim addresses Statutes 2020, chapter 335, which amended Welfare and Institutions Code section 625.6, effective January 1, 2021, to provide that "a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference" "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights." The section prohibits the youth from waiving this consultation.[55] Additionally, section 625.6 exempts from this requirement an interrogation of the minor limited to questions reasonably necessary to obtain information that the officer reasonably believes are necessary to protect life or property from an imminent threat.[56] The section also exempts an interrogation by a probation officer "in the normal performance of the probation officer's duties under [Welfare and Institutions Code] [s]ection 625, 627.5, or 628."[57]

The Commission finds that the Test Claim was timely filed within 365 days of both the effective date of the test claim statute and the date of first incurring costs pursuant to that statute.[58]

The Commission also finds that the test claim statute imposes a reimbursable state-mandated program on counties and cities as described below.

First, while section 625.6(a) could arguably be viewed as requiring minors themselves to procure and consult with legal counsel before they allow themselves to be interrogated by local law enforcement, the other provisions of section 625.6,[59] the legislative history of that section,[60] and the section's statutory context[61] all indicate that section 625.6(a) imposes its requirement on law enforcement, not minors.[62] Thus, the Commission finds that the statute requires law

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[55] Welfare and Institutions Code section 625.6(a).

[56] Welfare and Institutions Code section 625.6(c).

[57] Welfare and Institutions Code section 625.6(d).

[58] Government Code section 17551; California Code of Regulations, title 2, section 1183.1(c).

[59] See Welfare and Institutions Code section 625.6(b) (penalizing law enforcement for violations of section 625.6(a)), (c) (excepting an interrogating officer from section 625.6(a) under specific circumstances, and (d) (excepting a probation officer from section 625.6(a) when in the normal performance of their duties under section 625, 627.5, or 628).

[60] See e.g. Assembly Committee on Appropriations, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 1 (stating that the test claim statute "*requires law enforcement to provide* a person 17 years of age or younger access to legal counsel before the person waives their Miranda rights" (emphasis added)).

[61] See e.g. Welfare and Institutions Code section 627.5 (requiring a *probation officer* to advise a minor in temporary custody, as specified, to advise the minor of their *Miranda* rights and notify the judge of the juvenile court if the minor or the minor's parent or guardian requests counsel).

[62] See *In re Anthony L.* (2019) 43 Cal.App.5th 438, 450 (interpreting section 625.6(a) as imposing its requirement on law enforcement without discussion); *Y.C. v. Superior Court* (2021) 71 Cal.App.5th 410, 252, *as modified on denial of reh'g* (Dec. 6, 2021), review denied (Feb. 16, 2022) (same).

enforcement to ensure that youth, 17 years old or younger, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to provide the consultation in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

The Commission further finds that counties and cities are mandated to comply with the test claim statute. The requirement imposed by the test claim statute is triggered by law enforcement's decision to interrogate a minor. However, case law suggests that a local decision is not truly voluntary if it is, as a practical matter, constrained by duty.[63] Because a law enforcement officer's decision to interrogate a minor is constrained by the officer's sworn duty to investigate apparent criminal activity[64] and to protect the citizenry,[65] the Commission finds that law enforcement's decision to interrogate a minor is not a truly voluntary decision that would preclude reimbursement for downstream costs.

However, the requirements are not state-mandated with respect to school districts and community college districts since they are statutorily authorized, but not required, to hire peace officers and, unlike counties and cities, do not provide policing services as a core function or duty.[66] And there is no evidence in the record showing that the districts are compelled to provide policing services as a practical matter to carry out their core educational functions.[67]

The Commission finds that the test claim statute's requirements are new only with respect to 16 and 17 year olds who do not affirmatively request counsel. Prior to the test claim statute, federal and state law required state and local law enforcement to provide a minor with legal counsel, and prohibited interrogation or further interrogation of that minor until counsel has been provided or the individual has validly waived their right thereto, when the minor affirmatively requested counsel.[68] And Welfare and Institutions Code section 625.6, as added by Statutes 2017, chapter

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[63] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; *Department of Finance v. Commission on State Mandates (POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

[64] See *People v. Coston* (1990) 221 Cal.App.3d 898, 903; *McCain v. Sheridan* (1958) 160 Cal.App.2d 174, 177-178.

[65] *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 799; *Pasos v. Los Angeles County Civil Service Commission* (2020) 52 Cal.App.5th 690, 702, *as modified on denial of reh'g* (Aug. 18, 2020).

[66] Education Code sections 38000, 72330; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1368.

[67] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744, 754; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1368.

[68] See *Malloy v. Hogan* (1964) 378 U.S. 1, 11 (Fifth Amendment right against self-incrimination applies against both state and federal authorities); see e.g. *Miranda v. Arizona* (1966) 384 U.S. 436, 494-498 (applying the Fifth Amendment right against self-incrimination to interrogations

681, further required law enforcement to ensure that minors 15 years or younger consult with legal counsel before custodial interrogation and the waiver of any *Miranda* rights, with certain exceptions, even when the minors did not request counsel. Thus, the test claim statute's requirement that law enforcement ensure that minors consult with legal counsel prior to a custodial interrogation or the waiver of any *Miranda* rights is new only with respect to minors 16 or 17 years of age who do not affirmatively request counsel.

The Commission finds the test claim statute imposes a new program or higher level of service in an existing program because it both imposes unique requirements on local agencies that do not generally apply to all residents and entities in the state and carries out the governmental function of providing a service to the public, either of which is sufficient for a requirement to constitute a "program" within the meaning of article XIII B, section 6.[69] The test claim statute imposes unique requirements on local agencies because it only applies in the context of custodial interrogations,[70] which are uniquely governmental actions defined as "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[71] The test claim statute carries out the governmental function of providing a service to the public by seeking to minimize false confessions extracted from minors in custodial interrogations[72] and protect minors from "psychologically coercive interrogations and other psychologically coercive dealings with the police."[73]

Finally, the Commission finds there is substantial evidence that the claimant has incurred increased costs mandated by the state to comply with the test claim statute.[74] Moreover, although Statutes 2020, chapter 92 and Penal Code section 987.6 provide potential sources of offsetting revenue to counties for public defender and appointed counsel costs, that revenue is not "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" such that Government Code section 17556(e) would preclude

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conducted by local police officers). If an individual has a private attorney, they may of course consult with that attorney instead of relying on government-appointed counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436, 471-473; Welfare and Institutions Code sections 625 and 627.5.)

[69] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[70] Welfare and Institutions Code section 625.6(a).

[71] *Miranda v. Arizona* (1966) 38 U.S. 436, 444, emphasis added.

[72] See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4.

[73] Statutes 2020, chapter 335, section 1.

[74] Exhibit A, Test Claim, filed December 22, 2021, pages 11, 18-20 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15 and Attachment A), and 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, paras. 3 and 5); See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4; Exhibit X (12), U.S. Department of Justice, Office of Justice Programs, Juvenile Justice Statistics National Report Series Bulletin (May 2021), page 3, https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf (accessed on July 7, 2022).

reimbursement. And none of the other exceptions to reimbursement in Government Code section 17556 apply. Consequently, the Commission finds that the test claim statute imposes increased costs mandated by the state.

Accordingly, the Commission approves this Test Claim and finds that Welfare and Institutions Code section 625.6, as amended by Statutes 2020, chapter 335, imposes a reimbursable state-mandated program on counties and cities, beginning January 1, 2021, to perform the following activity:

- Ensure that youth, ages 16 and 17, *who do not affirmatively request an attorney*, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to consult with the youth in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

The following state funds will be identified in the Parameters and Guidelines as potential offsetting revenues:

- Funding appropriated from the General Fund by Statutes 2020, chapter 92 (AB 1869) to backfill a county for the revenue lost due to the repeal of former Penal Code section 987.4 and former Government Code section 27712, which provided funding for the costs of defense counsel and legal assistance in criminal proceedings, to the extent that the funds are used to offset a county's costs to comply with this program.
- Funding made available to counties pursuant to Penal Code section 987.6 for providing legal assistance for persons charged with violations of state criminal law or involuntarily detained under the Lanterman-Petris-Short Act and used to offset a county's costs to comply with this program.

Reimbursement is not required in the following situations:

- When the 16 or 17 year old affirmatively requests an attorney prior to interrogation and before waiver of any *Miranda* rights, which is required by existing state and federal law.[75]
- For school districts or community college districts, who are authorized but not required by state law to employ peace officers.[76]
- When the officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat and the

[75] Welfare and Institutions Code sections 625, 627.5; *Miranda v. Arizona* (1966) 384 U.S. 436, 470-473.

[76] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

officer's questions were limited to those questions that were reasonably necessary to obtain that information.[77]

- In the normal performance of a probation officer's duties under Welfare and Institutions Code section 625, 627.5, or 628.[78]

COMMISSION FINDINGS

I. Chronology

01/01/2021 Welfare and Institutions Code section 625.6 was amended by Statutes 2020, chapter 335.

12/22/2021 The claimant filed the Test Claim.[79]

03/07/2022 The Department of Finance (Finance) filed comments on the Test Claim.[80]

04/06/2022 The claimant filed rebuttal comments.[81]

09/13/2022 Commission staff issued the Draft Proposed Decision.[82]

II. Background

A. The Fifth Amendment to the United States Constitution and Custodial Interrogations under Federal and State Law.

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment,[83] provides that "No person shall … be compelled in any criminal case to be a witness against himself …"

In *Miranda v. Arizona*, the United States Supreme Court held that this privilege against self-incrimination applies to custodial interrogations.[84] A custodial interrogation occurs when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[85] Such interrogations, the court concluded, "contain[] inherently compelling

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[77] Welfare and Institutions Code section 625.6(c)(2).

[78] Welfare and Institutions Code section 625.6(d).

[79] Exhibit A, Test Claim, filed December 22, 2021, page 1.

[80] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 1.

[81] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 1.

[82] Exhibit D, Draft Proposed Decision, issued September 13, 2022.

[83] *Malloy v. Hogan* (1964) 378 U.S. 1, 6.

[84] *Miranda v. Arizona* (1966) 384 U.S. 436, 461.

[85] *People v. Ochoa* (1998) 19 Cal.4th 353, 401; see also *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 270 (Both "custody" and "interrogation" are terms of art. A suspect is "in custody" if a reasonable person in the same circumstances would not have felt at liberty to terminate the interrogation and leave.); *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601 (A suspect is under interrogation if they are subject to "express questioning or words or actions that, given the

pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[86] "In order to combat these pressures" and "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process," the court held that individuals facing custodial interrogation must be afforded several rights.[87]

First, the individual must be afforded the "right to consult with counsel prior to questioning [and] also to have counsel present during any questioning if [they] so desire[]."[88] If the individual desires counsel but cannot afford a retained attorney, a lawyer must be appointed to represent them.[89]

Second, the individual must be advised of their Fifth Amendment right to remain silent,[90] provided with an explanation that anything they say can and will be used against them,[91] clearly informed of their right to counsel,[92] and advised that a lawyer will be appointed to represent them if they cannot afford one.[93] These advisements are often referred to as *Miranda* warnings.[94]

And third, law enforcement must respect these rights by ceasing interrogation once the individual "indicates in any manner, at any time prior to or during questioning, that [they] wish[] to remain

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officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have ... the force of a question on the accused," (Citation), and therefore be reasonably likely to elicit an incriminating response.").

[86] *Miranda v. Arizona* (1966) 384 U.S. 436, 467.

[87] *Miranda v. Arizona* (1966) 384 U.S. 436, 467 & 469.

[88] *Miranda v. Arizona* (1966) 384 U.S. 436, 470.

[89] *Miranda v. Arizona* (1966) 384 U.S. 436, 472-473, and page 474 (explaining that "[t]his does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners … If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.").

[90] *Miranda v. Arizona* (1966) 384 U.S. 436, 467-468.

[91] *Miranda v. Arizona* (1966) 384 U.S. 436, 469.

[92] *Miranda v. Arizona* (1966) 384 U.S. 436, 471.

[93] *Miranda v. Arizona* (1966) 384 U.S. 436, 473.

[94] See e.g. *Missouri v. Seibert* (2004) 542 U.S. 600, 604. "The right to counsel for purposes of custodial interrogation implicates the Fifth Amendment privilege against self-incrimination, and must be distinguished from the Sixth Amendment right to counsel, which attaches upon the initiation of formal criminal proceedings." (*People v. Nelson* (2012) 53 Cal.4th 367, 371 (citing to U.S. Const., 5th & 6th Amends.; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1123 [discussing *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177–178].)

silent."[95] If law enforcement fails to do so, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[96]

If an individual wishes to forgo these rights, they may validly waive them by doing so "voluntarily, knowingly and intelligently."[97]

These protections have long been enshrined in state law.[98] In 1968, a year after *Miranda* was handed down, the Legislature codified these rights specifically for minors who are taken into temporary custody at Welfare and Institutions Code section 625:

> In any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor is a person described in Section 601 or 602, or that he has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer shall advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel.[99]

That same year, the Legislature enacted Welfare and Institutions Code section 627.5, which provides the same right to counsel when a minor is taken into temporary custody before a probation officer:

> In any case where a minor is taken before a probation officer pursuant to the provisions of Section 626 [temporary custody] and it is alleged that such minor is a person described in Section 601 or 602, the probation officer shall immediately advise the minor and his parent or guardian that anything the minor says can be used against him and shall advise them of the minor's constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. If the minor or his parent or guardian requests counsel, the probation

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[95] *Miranda v. Arizona* (1966) 384 U.S. 436, 473-474.

[96] *Miranda v. Arizona* (1966) 384 U.S. 436, 475.

[97] *Miranda v. Arizona* (1966) 384 U.S. 436, 444.

[98] California Constitution article I, section 15. See *People v. May* (1988) 44 Cal.3d 309, 316 ("The question is not whether the [defendant] had a constitutional right [under *Miranda*] to refuse to disclose any information during the police interrogation [ ]. He clearly had such rights under both the state and federal Constitutions."); see also Evidence Code section 940 ("To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.").

[99] Welfare and Institutions Code section 625. This language was amended into the section by Statutes 1967, chapter 1355, and has remained in that section unchanged ever since. (See Stats.1971, ch. 1730 § 1, Stats. 1971, ch. 1748, § 69; Stats.1976, ch. 1068, § 24.)

> officer shall notify the judge of the juvenile court of such request and counsel for the minor shall be appointed pursuant to Section 634.[100]

A few years later, in 1971, the Legislature also amended Welfare and Institutions Code section 627 to provide that immediately after a minor has been taken "to a place of confinement" and "no later than one hour after [the minor] has been taken into custody," the minor shall be advised that they have the right to make at least two phone calls; one to their parent or guardian, and the other to an attorney. As further amended in 1980, Welfare and Institutions Code section 627 now states the following:

> Immediately after being taken to a place of confinement pursuant to this article and, except where physically impossible, no later than one hour after he has been taken into custody, the minor shall be advised and has the right to make at least two telephone calls from the place where he is being held, one call completed to his parent or guardian, a responsible relative, or his employer, and another call completed to an attorney. The calls shall be at public expense, if the calls are completed to telephone numbers within the local calling area, and in the presence of a public officer or employee. Any public officer or employee who willfully deprives a minor taken into custody of his right to make such telephone calls is guilty of a misdemeanor.[101]

Although minors, like adults, may legally effectuate a valid waiver of their *Miranda* rights,[102] jurists have increasingly questioned whether minors – particularly young children – are truly capable of voluntarily, knowingly, and intelligently waiving their rights and understanding the consequences of not invoking them.[103] "A growing body of research indicates that adolescents are less capable of understanding their constitutional rights than their adult counterparts, and are also more prone to falsely confessing to a crime they did not commit."[104]

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[100] Welfare and Institutions Code section 627.5, added by Statutes 1967, chapter 1355. The section has not been amended since.

[101] Welfare and Institutions Code section 627. This language was amended into the section by Statutes 1971, chapter 1030, with one difference. As originally enacted by that statute, the minor had to place the calls "at his own expense." As amended by Statutes 1980, chapter 1092, the section now provides that "[t]he calls shall be at public expense, if the calls are completed to telephone numbers within the local calling area…"

[102] *Fare v. Michael C.* (1979) 442 U.S. 707, 724-725.

[103] See e.g. *In re Joseph H.* (2015) 200 Cal.Rptr.3d 1, 1-5 (statement by Liu, J., dissenting from denial of review).

[104] Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4; see also *In re Elias V.* (2015) 237 Cal.App.4th 568, 577-578, 588-589, as modified (June 24, 2015) ("The developing consensus about the dangers of interrogation has resulted from the growing number of studies showing that the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases.").

Such concerns have led courts to recognize the propriety – and often need – of taking a juvenile suspect's minor status into account when determining whether the child is in "custody"[105] or has made a legally valid waiver of their *Miranda* rights.[106] For example, the court in *In re IF*, explained how these custody determinations are made in juvenile cases:

> Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] The totality of the circumstances surrounding an incident must be considered as a whole." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, 42 Cal.Rptr.3d 301, fn. omitted.) Courts have identified a variety of circumstances to be considered as part of the custody determination. . . .
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> In juvenile cases, the same factors still apply, but with an added consideration. In *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (*J.D.B.*), the U.S. Supreme Court concluded that a child's age may be considered in the *Miranda* analysis, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer." (*Id.* at p. 277, 131 S.Ct. 2394.) The court recognized that, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." (*Id.* at p. 272, 131 S.Ct. 2394; see also *Haley v. Ohio* (1948) 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 [in the context of police interrogation, events "[t]hat would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"].) Although age may not be a significant factor in every case, the court observed, common sense dictates that "children cannot be viewed simply as miniature adults." (*J.D.B., supra,* at pp. 262 & 274, 131 S.Ct. 2394.) Accordingly, the court concluded that "a child's age properly informs the *Miranda* custody analysis." (*Id.* at p. 265, 131 S.Ct. 2394.)[107]

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[105] *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 277.

[106] *Fare v. Michael C.* (1979) 442 U.S. 707, 725.

[107] *In re IF* (2018) 20 Cal.App.5th 735, 760. See also *Fare v. Michael C.* (1979) 442 U.S. 707, 724-725 ("[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. [Citation.] [¶] This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved.").

However, neither the United States Supreme Court nor the California Supreme Court has yet interpreted the Fifth Amendment as requiring additional protections for minors facing custodial interrogations.[108]

In order to address this perceived shortcoming,[109] the California Legislature has, in recent years, passed two bills requiring minors to consult with legal counsel before undergoing custodial interrogations: Statutes 2017, chapter 681 and the test claim statute, Statutes 2020, chapter 335.

B. Statutes 2017, Chapter 681

Statutes 2017, chapter 681 added Welfare and Institutions Code section 625.6. As enacted, that section generally required "a youth 15 years of age or younger [to] consult with legal counsel in person, by telephone, or by video conference" prior to a custodial interrogation and before waiving their *Miranda* rights. That section also prohibited the youth from waiving this consultation.[110]

To discourage violations, the section required courts to "consider the effect of a failure to comply with"[111] the requirement when deciding whether a child properly waived their *Miranda* rights and determining whether the statements were voluntary.[112]

The section exempted an officer from its requirement if the officer both (1) reasonably believed the information sought was necessary to protect life or property from an imminent threat and (2) limited their questions to those reasonably necessary to obtain that information.[113] The section also exempted probation officers from this requirement when taking a minor into temporary

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[108] See *In re Joseph H.* (2015) 200 Cal.Rptr.3d 1, 1-5 (statement by Liu, J., dissenting from denial of review).

[109] See Exhibit X (1), Senate Committee on Public Safety, Analysis of SB 395 (2017-2018 Regular Session), as introduced, pages 2-3; Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, pages 4-7.

[110] Former Welfare and Institutions Code section 625.6(a), as added by Statutes 2017, chapter 681, section 2.

[111] Former Welfare and Institutions Code section 625.6(b), as added by Statutes 2017, chapter 681, section 2. This is not the same as requiring the statements to be excluded. The Truth-in-Evidence provision of the California Constitution prohibits exclusion of evidence in a criminal proceeding except pursuant to the United States Constitution or a state statute enacted by a two-thirds vote of the membership in each house of the Legislature. Because Statutes 2017, chapter 681 did not receive a two-thirds vote in at least one house, that statute could not require the exclusion of statements obtained in violation of its provisions. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 449-450.)

[112] *In re Anthony L.* (2019) 43 Cal.App.5th 438, 450.

[113] Former Welfare and Institutions Code section 625.6(c), as added by Statutes 2017, chapter 681, section 2.

custody, advising the minor of their constitutional rights, or investigating the circumstances for which the minor was taken into custody, as specified.[114]

All of these provisions were to sunset on January 1, 2025.[115]

The Legislature's stated motivation for enacting these provisions was the increased vulnerability of children and adolescents "to psychologically coercive interrogations and in other dealings with the police [as compared with] resilient adults experienced with the criminal justice system."[116] Because of these vulnerabilities, it was the Legislature's view that youths under 18 years of age facing custodial interrogations "should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights."[117]

C. The Test Claim Statute – Statutes 2020, Chapter 335

Statutes 2020, chapter 335 amended Welfare and Institutions Code section 625.6 to expand the provisions enacted by Statutes 2017, chapter 681 in several ways. First, it permanently expanded these requirements to also apply to 16- and 17-year olds. As amended by the test claim statute, Welfare and Institutions Code section 625.6(a) now also requires youths of 16 or 17 years of age to "consult with legal counsel in person, by telephone, or by video conference" "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights."[118] As under the original version of section 625.6, the legal consultation may not be waived.

Second, the test claim statute removed the January 1, 2025, sunset date, thereby also permanently requiring youths of 15 years of age or younger to consult with legal counsel prior to a custodial interrogation or waiving their *Miranda* rights.[119]

And third, the test claim statute additionally requires a court to consider any willful violation of either of these requirements in determining the credibility of a law enforcement officer under Evidence Code section 780.[120]

With these amendments, Welfare and Institutions Code section 625.6 now states the following:

> (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

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[114] Former Welfare and Institutions Code section 625.6(d), as added by Statutes 2017, chapter 681, section 2; see also Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 395 (2017-2018 Regular Session), as amended September 7, 2017, page 1.

[115] Former Welfare and Institutions Code section 625.6(f), as added by Statutes 2017, chapter 681, section 2.

[116] Statutes 2017, chapter 681, section 1.

[117] Statutes 2017, chapter 681, section 1.

[118] Welfare and Institutions Code section 625.6(a).

[119] Statutes 2020, chapter 335, section 2.

[120] Welfare and Institutions Code section 625.6(b).

(b) The court shall, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a) and, additionally, shall consider any willful violation of subdivision (a) in determining the credibility of a law enforcement officer under Section 780 of the Evidence Code.

(c) This section does not apply to the admissibility of statements of a youth 17 years of age or younger if both of the following criteria are met:

(1) The officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat.

(2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

(d) This section does not require a probation officer to comply with subdivision (a) in the normal performance of the probation officer's duties under Section 625, 627.5, or 628.[121]

The legislative findings accompanying these provisions echoed those contained in Statutes 2017, chapter 681.[122] They describe the vulnerability of minors to "psychologically coercive interrogations and other psychologically coercive dealings with the police,"[123] which committee analyses of the bill note also make minors more prone to falsely confessing to crimes they do not commit.[124] The legislative findings also declare the Legislature's view that "[i]n situations of custodial interrogation and prior to making a waiver of rights under Miranda v. Arizona (1966) 384 U.S. 436, a youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights."[125]

Although the test claim statute does not explicitly state who must pay for the legal consultations that it requires, committee analyses of both the test claim statute and its predecessor display a

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[121] Welfare and Institutions Code sections 625, 627.5, and 628 describe the "normal course of duties" of a probation officer with respect to minors in temporary custody. (See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 2). Section 625 describes the situations in which a peace officer may take a minor into temporary custody without a warrant. If the minor is then taken before the probation officer of the relevant county, section 627.5 requires that probation officer to advise the minor and their guardian of the minor's *Miranda* rights and, if those rights are invoked, requires appointment of that counsel, while section 628 further requires that probation officer to immediately investigate the circumstances for which the minor was taken into custody, as specified.

[122] See Statutes 2017, chapter 681, section 1; Statutes 2020, chapter 335, section 1.

[123] Statutes 2020, chapter 335, section 1.

[124] Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4.

[125] Statutes 2020, chapter 335, section 1.

legislative expectation that counties and cities would be responsible for these expenses.[126] In addition, the Senate Floor Analysis of the test claim statute explained the fiscal effect of the bill based on county public defender costs as follows:

> According to the Assembly Appropriations Committee, cost pressures (Local Funds/General Fund (GF) - Proposition 30) in the low millions of dollars annually for 482 cities and 58 counties to provide legal counsel to minors ages 16 and 17 prior to custodial interrogations. The Department of Justice reported approximately 43,000 juvenile arrests in 2019. The average hourly rate for attorneys in California is approximately $250. If 10%, or 4,300 of those arrested as juveniles are 16 or 17 years of age, annual costs across the state for legal services will be approximately $2.2 million dollars. Public defender costs vary across the state but, in most cases, suspects are not required to pay any fee for public defender services. These costs may be reimbursable by the state pursuant to requirements of Proposition 30. Costs to the GF will depend on whether the Commission on State Mandates determines these costs to be reimbursable.[127]

III. Positions of the Parties

A. County of Los Angeles

The claimant, County of Los Angeles, alleges that the test claim statute imposes a reimbursable state mandated program under article XIII B, section 6 of the California Constitution. According to the claimant, the test claim statute's requirement that 16- and 17-year olds consult with legal counsel prior to a custodial interrogation, and before the waiver of any *Miranda* rights,[128] constitutes a reimbursable state mandated program because the required activities are only provided by local governmental agencies and also because providing these activities constitutes a higher level of service.[129]

The claimant states that it complied with Welfare and Institutions Code section 625.6 as follows:

> To comply with WIC § 625.6, law enforcement agencies in the County contact the Public Defender to arrange Miranda consultations (consultations) for juveniles prior to custodial interrogations. These contacts by law enforcement agencies are

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[126] See e.g. Exhibit X (2), Senate Committee on Appropriations, Analysis of SB 395 (2017-2018 Regular Session), as introduced, page 1; Exhibit X (4), Assembly Committee on Appropriations, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 1.

[127] Exhibit X (5), Senate Rules Committee, Office of Senate Floor Analyses, Analysis of SB 203, (2019-2020 Regular Session), as amended July 27, 2020, pages 6-7.

[128] See Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2 ("The County agrees that the mandated program stated in Senate Bill (SB) 203 should be narrowly focused to capture the costs incurred in providing services to juveniles with a maximum age 15 years to 17 years of age. The County is aware that the deadline for filing a test claim on SB 395 has passed; however, the program was extended by the Legislature in SB 203 to include older juveniles. The County urges the Commission to grant the test claim as it relates to those older juveniles with a maximum age 15 years to 17 years of age.").

[129] Exhibit A, Test Claim, filed December 22, 2021, page 13.

> referred to by the Public Defender as Miranda Calls. [Fn. Omitted.] The Public Defender created the Juvenile Miranda Duty program to perform these consultations. [Fn. Omitted.] The Public Defender is the primary agency that provides indigent defense services to those accused of crimes and is the only agency providing consultations in the County.
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> The Juvenile Miranda Duty program is staffed by Public Defender attorneys who are available 24 hours a day, every day of the year. [Fn. Omitted.] The attorneys are assigned shifts that are referred to by the Public Defender as Miranda Duty. Consultations are conducted over the telephone or in person. An attorney will interview the youth and discuss with the youth his or her Miranda rights. The duration of the consultation may vary depending on various factors, including the youth's level of education, experience, maturity, and sophistication.
>
> Pursuant to SB 203, a law enforcement agency contacts the Public Defender's Juvenile Headquarters or County Operator to arrange for a legal consultation prior to a custodial interrogation. [Fn. Omitted.] The supervising attorney then arranges the consultation or designates another attorney to handle the Miranda Call. The supervising attorneys are assigned Miranda Duty on a weekly rotating basis.
>
> Prior to the passage of these laws, the Public Defender was not obligated to provide any representation before appointment at the arraignment stage of a criminal proceeding. Now, the Public Defender is required to provide consultations for juvenile arrestees prior to their appointment at the arraignment stage.[130]

The claimant alleges that it incurred increased costs of $5,821.45 in the 2020-2021 fiscal year to comply with the test claim statute.[131] Specifically, the claimant alleges that it incurred these costs in providing consultations to minors as part of its Juvenile Miranda Duty program, described above.[132]

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[130] Exhibit A, Test Claim, filed December 22, 2021, page 10.

[131] Exhibit A, Test Claim, filed December 22, 2021, pages 11, 18-20 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15 and Attachment A), and 21 (Declaration of Sung Lee, Departmental Finance Manager II in the County of Los Angeles Public Defender's Office, paras. 3 and 5).

[132] Exhibit A, Test Claim, filed December 22, 2021, pages 10-11, 18-19 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15), and 21 (Declaration of Sung Lee, Departmental Finance Manager II in the County of Los Angeles Public Defender's Office, para. 3).

The claimant further estimates that it will incur $13,000 in increased costs for complying with Welfare and Institutions Code section 625.6 in the 2021-2022 fiscal year[133] and that annual costs across the state for legal services will be approximately $6,427,500.[134]

The claimant also states that it has not received any funding to offset its costs incurred pursuant to the test claim statute.[135] This includes any funding received pursuant to Statutes 2020, chapter 92 (AB 1869). According to the claimant, all of the public defender fees that were eliminated by that bill related to the registration and cost of court-appointed lawyers, and therefore could not have been used to offset costs incurred pursuant to the test claim statute, which the claimant maintains requires legal consultations prior to the appointment of counsel.[136] Thus, any funding received to backfill revenues lost from the repeal of those fees would similarly not be provided to offset those costs.[137]

B. Department of Finance

Finance points out that the claimant's alleged costs may include costs not required by the test claim statute.[138] Finance observes that although preexisting law already required local agencies to provide legal consultations to youth ages 15 years of age or younger, the claimant does not exclude those minors in calculating its statewide cost estimate.[139] Accordingly, "Finance recommends the Commission examine the estimated costs cited by the Claimant to ensure they only include the increased cost of providing legal counsel to youth ages 16 and 17 years old."[140]

Finance also suggests that state funding provided to the claimant pursuant to Statutes 2020, chapter 92 (AB 1869) may serve as an offset to any state-mandated costs incurred by the claimant pursuant to the test claim statute.[141] Finance notes that Statutes 2020, chapter 92 repealed various criminal administrative fines and fees, including the public defender fee, and annually appropriated $65 million from the State's General Fund through the 2025-26 fiscal year

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[133] Exhibit A, Test Claim, filed December 22, 2021, pages 11 and 21 (Declaration of Sung Lee, Departmental Finance Manager II in the County of Los Angeles Public Defender's Office, paras. 5 and 6).

[134] Exhibit A, Test Claim, filed December 22, 2021, pages 11 and 22 (Declaration of Sung Lee, Departmental Finance Manager II in the County of Los Angeles Public Defender's Office, para. 7).

[135] Exhibit A, Test Claim, filed December 22, 2021, pages 12, 15, and 21 (Declaration of Sung Lee, Departmental Finance Manager II in the County of Los Angeles Public Defender's Office, para. 6).

[136] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2.

[137] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2.

[138] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 1.

[139] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, pages 1-2.

[140] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 1.

[141] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 2.

to backfill counties for the lost fee revenue.[142] Accordingly, Finance also recommends the Commission consider this funding while reviewing this Test Claim.[143]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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 programs or increased level of service…

The purpose of article XIII B, section 6 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."[144] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[145]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[146]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[147]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[148]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however,

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[142] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 2.

[143] Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, page 2.

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

[145] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[146] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[147] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[148] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[149]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[150] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[151] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[152]

A. The Test Claim Was Timely Filed with a Potential Period of Reimbursement Beginning January 1, 2021.

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[153]

Here, the test claim statute went into effect on January 1, 2021,[154] and the claimant asserts that it first incurred costs related to implementing that statute on that date.[155] The Test Claim was filed on December 22, 2021.[156] Thus, the Test Claim was timely filed within 365 days of both the effective date of the test claim statute and the date that claimant first incurred costs pursuant to that statute.[157]

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year."

Because the Test Claim was filed on December 22, 2021, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2020. However, since the test claim

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[149] *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.

[150] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[151] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[152] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[153] California Code of Regulations, title 2, section 1183.1(c).

[154] Statutes 2020, chapter 335; see California Constitution article IV, section 8.

[155] Exhibit A, Test Claim, filed December 22, 2021, page 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, paragraph 4).

[156] Exhibit A, Test Claim, filed December 22, 2021, page 1.

[157] Government Code section 17551; California Code of Regulations, title 2, section 1183.1(c).

statute has a later effective date, the potential period of reimbursement for this Test Claim begins on the statute's effective date, January 1, 2021.

B. Welfare and Institutions Code Section 625.6, as Amended by Statutes 2020, Chapter 335, Imposes a Reimbursable State-Mandated Program on Cities and Counties to Ensure that 16 or 17 Year Olds, Who Do Not Affirmatively Request an Attorney, Consult with Legal Counsel Prior to Custodial Interrogation and Before Waiving Any *Miranda* Rights.

As described below, the Commission finds that Welfare and Institutions section 625.6, as amended by the test claim statute (Stats. 2020, ch. 335), imposes a reimbursable state-mandated program on cities and counties within the meaning of article XIII B, section 6 of the California Constitution as specified herein.

1. The Test Claim Statute Imposes a State-Mandated Program, Only on Cities and Counties to Ensure that Youths 17 Years of Age or Younger Consult with Legal Counsel Prior to Custodial Interrogation and Before Waiving Any *Miranda* Rights.

As amended by the test claim statute, Welfare and Institutions Code section 625.6(a) states the following:

> (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

By the plain language of the statute, subdivision (a) does not apply in the following situations:

- When the officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat and that officer's questions were limited to those questions that were reasonably necessary to obtain that information.[158]
- In the normal performance of a probation officer's duties under Welfare and Institutions Code section 625, 627.5, or 628.[159]

[158] Welfare and Institutions Code section 625.6(c)(2).

[159] Welfare and Institutions Code section 625.6(d).

The claimant asserts that section 625.6(a) imposes new requirements on itself and other local governments to provide 16- and 17-year olds with legal consultations prior to custodial interrogations or the waiver of any *Miranda* rights.[160] Finance does not contest this assertion.[161]

As explained below, the Commission agrees that the test claim statute imposes state-mandated requirements on cities and counties. While the statutory language could arguably be viewed as requiring minors *themselves* to procure and consult with legal counsel before they allow themselves to be interrogated by local law enforcement, the much stronger reading of the language is that it places that onus on *local law enforcement*.

a. The test claim statute imposes a requirement on local government to ensure that youth, 17 years or younger, consult with legal counsel prior to custodial interrogation and before the waiver of any Miranda rights.

The rules of statutory construction require the Commission to construe statutory language in the context of its legislative purpose.[162] In order to determine that purpose, the Commission, like the courts, "must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence … The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible [Citations.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent."[163]

Here, Welfare and Institutions Code section 625.6(a), as amended by the test claim statute, provides that "a youth 17 years of age or younger shall consult with legal counsel" prior to

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[160] Exhibit A, Test Claim, filed December 22, 2021, Pages 10-11; see Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2, where the claimant states that "The County agrees that the mandated program stated in Senate Bill (SB) 203 should be narrowly focused to capture the costs incurred in providing services to juveniles with a maximum age 15 years to 17 years of age. The County is aware that the deadline for filing a test claim on SB 395 has passed; however, the program was extended by the Legislature in SB 203 to include older juveniles. The County urges the Commission to grant the test claim as it relates to those older juveniles with a maximum age 15 years to 17 years of age." Since SB 203, the test claim statute, only expanded the alleged program to include 16 and 17 year olds, the Commission understands the claimant's request that "the Commission [] grant the test claim as it relates to those older juveniles" as a request for costs associated with juveniles who are 16 or 17 years of age. Regardless, as explained in the Discussion, *post*, costs associated with ensuring that 15 year-olds consult with legal counsel prior to a custodial interrogation and the waiver of any *Miranda* rights are not reimbursable in this action because those costs were already imposed by preexisting law (specifically, Statutes 2017, chapter 681) at the time the test claim statute was enacted.

[161] See Exhibit B, Finance's Comments on the Test Claim, filed March 7, 2022, pages 2-3.

[162] *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.

[163] *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.

custodial interrogation and before the waiver of any *Miranda* rights. If viewed in isolation, this language could be interpreted as requiring the minors themselves to procure and consult with legal counsel before waiving their *Miranda* rights or being interrogated by local law enforcement. "But our courts have recognized that the meaning of isolated statutory language can be informed by and indeed must be consistent with the provisions of the relevant statute as whole."[164] And in the present matter, those provisions, the legislative history, and the statutory context all point to a different reading of subdivision (a).

First, both the codified and uncodified provisions of the test claim statute indicate that subdivision (a) is a requirement on the interrogating officer, not the minor.

Subdivision (b) indicates that subdivision (a) is a requirement on the interrogating officer by essentially penalizing that officer – not the minor – for noncompliance. If responsibility for complying with subdivision (a) lay with the minor, one would expect the penalty for violating that subdivision to also lie with the minor. However, under subdivision (b), that penalty lies with the interrogating officer. Subdivision (b) devalues evidence that an interrogating officer may obtain if subdivision (a) is violated by requiring a court to consider the effect of that violation in adjudicating the admissibility of statements procured thereby.[165] Subdivision (b) also requires the court to "consider any willful violation of subdivision (a) in determining the *credibility of a law enforcement officer*."[166] Both of these consequences weaken the case against the minor and therefore make much more sense if the onus for compliance with subdivision (a) rests with the interrogating officer. If the onus lay with the minor, these consequences would nonsensically disincentivize compliance with that subdivision.

Subdivisions (c) and (d) similarly indicate that the onus for compliance with subdivision (a) rests with the interrogating officer, not the minor. Subdivision (c) provides that section 625.6 does not apply to the admissibility of a minor's statements if "[t]he *officer* who questioned the youth reasonably believed the information the officer sought was necessary…" and "[t]he *officer's* questions were limited to those questions that were reasonably necessary to obtain that information."[167] And subdivision (d) provides that the section "does not require a *probation officer* to comply with subdivision (a) in the normal performance of the *probation officer's* duties

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[164] *People v. Valencia* (2017) 3 Cal.5th 347, 356.

[165] See *In re Anthony L.* (2019) 43 Cal.App.5th 438, 449-450. In that case, the court also concluded that the former version of Welfare and Institutions Code section 625.6 could not render a minor's inculpatory statements inadmissible because the statute that added that former section, Statutes 2017, chapter 681, had not been passed by a two-thirds vote in each house. (*Ibid.*) However, since the test claim statute *was* passed by a two-thirds vote in each house (see California Legislative Information website, https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200SB203 (accessed on August 18, 2022) (showing that Statutes 2020, chapter 335, passed with 32 votes in the Senate and 54 votes in the Assembly)), it is unclear whether courts will continue to interpret current section 625.6 in this manner.

[166] Emphasis added.

[167] Emphasis added.

under Section 625, 627.5, or 628."[168] Both of the provisions situate control over compliance with subdivision (a) with the interrogating officer, not the minor.

The test claim statute's uncodified provisions reinforce this reading of subdivision (a). The legislative findings in section one of the test claim statute describe minors as vulnerable and less capable than adults and declares that the purpose of the test claim statute is to protect minors facing custodial interrogations.[169] And, as these findings implicitly recognize, it is law enforcement, not the minor, who controls the situation in a custodial interrogation.[170] It would be contrary to these declarations to read section 625.6(a) as requiring these vulnerable, less capable minors to *themselves* obtain and consult with legal counsel in such an overwhelming situation.[171]

Second, the legislative history of section 625.6 similarly indicates that the section imposes its requirement on law enforcement, not the minor. The legislative history of a section includes committee analyses of the bills that enacted and amended it,[172] and here, those analyses display a clear legislative intent to impose a duty on law enforcement, not minors. The Assembly Committee on Appropriations' analysis of the test claim statute explicitly states that the bill "*requires law enforcement to provide* a person 17 years of age or younger access to legal counsel

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[168] Emphasis added.

[169] Statutes 2020, chapter 335, section 1 ("The United States Supreme Court has recognized [that] [¶] … Children are generally less mature and responsible than adults, … [¶] characteristically lack the capacity to exercise mature judgment and…[¶] are generally more vulnerable to outside influences than adults…" "The law enforcement community now widely accepts what science and the courts have recognized: that children and adolescents are much more vulnerable to psychologically coercive interrogations and other psychologically coercive dealings with the police than resilient adults experienced with the criminal justice system." "For these reasons, in situations of custodial interrogation and prior to making a waiver of rights under *Miranda v. Arizona* (1966) 384 U.S. 436, a youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights.").

[170] See Statutes 2020, chapter 335, section 1. This power imbalance is inherent in a custodial setting. (See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 270 (A suspect is only "in custody" if a reasonable person in the same circumstances would not have felt at liberty to terminate the interrogation and leave.).)

[171] See Statutes 2020, chapter 335, section 1 ("Addressing the specific context of police interrogation, the United States Supreme Court observed that events that would have a minimal impact on an adult can overwhelm an early teen child, noting that no matter how sophisticated the child may be, the interrogation of a child cannot be compared to the interrogation of an adult.").

[172] *People v. Taylor* (2007) 157 Cal.App.4th 433, 438 (quoting *People v. Ledesma* (1997) 16 Cal.4th 90, 95).

before the person waives their Miranda rights."[173] Consistent with this description, committee analyses of both bills also describe those bills as imposing costs on *local governments*, not private persons facing interrogation.[174]

Third, the statutory context surrounding Welfare and Institutions Code section 625.6 also indicates that the section imposes its requirement on law enforcement, not minors. Welfare and Institutions Code section 625 provides that if a minor is taken into temporary custody, the *officer* shall advise the minor of their constitutional rights, including the right to have counsel present during interrogation and the right to have counsel appointed if the minor is unable to afford counsel. Welfare and Institutions Code section 627.5 similarly provides that if a minor is taken into custody by a probation officer, the *probation officer* shall immediately advise the minor and their parent or guardian of the minor's constitutional rights, including the right to have counsel present during any interrogation, and the right to have counsel appointed if the minor is unable to afford counsel. Section 627.5 further states that "[i]f the minor or his parent or guardian requests counsel, *the probation officer* shall notify the judge of the juvenile court of such request and counsel for the minor shall be appointed pursuant to Section 634." Welfare and Institutions Code section 627 also requires *law enforcement* to allow the minor to make a phone call to the parent and an attorney immediately after "confinement" and no later than one hour after being taken into custody. And if the minor or their parent or guardian desires but cannot afford counsel, Welfare and Institutions Code section 634 authorizes *the court* to appoint counsel at the county's expense. All of these provisions strongly suggest that responsibility for ensuring that a minor without a private attorney has counsel lies with a governmental entity and not the minor themself.

The claimant also requests reimbursement for other components of its Juvenile Miranda Duty program, which is staffed by Public Defender attorneys who are available 24 hours a day.[175] Providing 24 hour services is not required by the test claim statute, but may be proposed for inclusion in the Parameters and Guidelines, and may be approved by the Commission *if* the activity is supported by evidence in the record showing it is "reasonably necessary for the performance of the state-mandated program" in accordance with Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and1187.5.

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[173] Assembly Committee on Appropriations, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 1, emphasis added.

[174] Senate Committee on Appropriations, Analysis of SB 395 (2017-2018 Regular Session), as introduced, page 1 ("**Fiscal Impact**: [¶] Local government: Major non-reimbursable local costs, potentially in the millions of dollars (local funds) annually to provide legal counsel to minors prior to custodial interrogations, to the extent local agencies (482 cities and 58 counties) incur additional costs to provide counsel and/or incur operational delays."); Assembly Committee on Appropriations, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 1 ("**FISCAL EFFECT:** [¶] Cost pressures (Local Funds/General Fund (GF) - Proposition 30) in the low millions of dollars annually for 482 cities and 58 counties to provide legal counsel to minors ages 16 and 17 prior to custodial interrogations.").

[175] Exhibit A, Test Claim, filed December 22, 2021, page 10.

In sum, the provisions of the test claim statute, the legislative history of section 625.6, and the statutory context of that section all indicate that the legislative purpose of section 625.6(a) was to require law enforcement, not the minor, to ensure that the minor consults with legal counsel prior to a custodial interrogation and before the waiver of any *Miranda* rights. If the minor does not have private counsel,[176] counsel will be provided at the county's expense, consistent with Welfare and Institutions Code section 634. Thus, when read in the context of that legislative purpose, section 625.6(a)[177] imposes the following requirement on law enforcement, not on minors:

- Ensuring that youth, 17 years old or younger, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to consult with the youth in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

b. Counties and cities are mandated by the state to comply with the test claim statute, but school districts and community college districts are not.

To be reimbursable under article XIII B, section 6 of the California Constitution, the requirements must be mandated by the state; or ordered, commanded, or legally compelled by state law.[178] Generally, a requirement is not mandated by the state if it is triggered by a local voluntary decision.[179] However, the courts have recognized the possibility that a state-mandated

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[176] Nothing in the language of section 625.6 limits the "legal counsel" with whom a minor must consult to a public defender or other government-provided counsel. Accordingly, the Commission finds that the statutory language permits a minor to consult with a private attorney if they have one. (Accord *Miranda v. Arizona* (1966) 384 U.S. 436, 472-473 (The Fifth Amendment only requires the government to provide counsel if the person being interrogated cannot afford one.)).

[177] Perhaps because this conclusion is self-evident, courts interpreting section 625.6(a) have read it as imposing its requirement on law enforcement without discussion. (See e.g. *In re Anthony L.* (2019) 43 Cal.App.5th 438, 450 (interpreting section 625.6(a) as imposing its requirement on law enforcement without discussion); *Y.C. v. Superior Court* (2021) 71 Cal.App.5th 410, 252, *as modified on denial of reh'g* (Dec. 6, 2021), review denied (Feb. 16, 2022) (same).)

[178] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 741.

[179] *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800 [514 P.3d 854, 863]; see e.g. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107; see also *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743 ("In *City of Merced,* the city was under no legal compulsion to resort to eminent domain—but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying voluntary

program may exist when that decision is not truly voluntary, i.e., when local government is compelled as a practical matter to perform the requirements.[180]

The test claim statute's requirements on law enforcement to ensure that a youth, 17 years old or younger, consults with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights is triggered by a law enforcement officer's decision to interrogate the youth. As explained below, although this decision is made at the local level and the triggered requirement therefore not legally compelled by state law, the decision is not truly voluntary within the meaning of article XIII B, section 6.

Case law suggests that a local decision is not truly voluntary for the purposes of article XIII B, section 6 if it is, as a practical matter, constrained by duty. In *San Diego Unified School Dist.*, the California Supreme Court suggested that a local discretionary action should not be considered voluntary if, as a practical matter, it must inevitably occur.[181] In that case, the Court was faced with statutory hearing requirements triggered by two types of school expulsions: "mandatory" expulsions, which state law required school principals to recommend whenever a student was found to be in possession of a firearm at school or at a school activity off school grounds, and "discretionary" expulsions, which state law granted school principals the authority to recommend for other conduct.[182] Although the Court confidently concluded that costs for the hearing requirements triggered by "mandatory" expulsions were reimbursable state mandated costs,[183] it hesitated to apply that same logic to deny reimbursement for the "discretionary" expulsions.[184] Instead, it cautioned that denying reimbursement whenever a requirement was triggered by a technically discretionary local action may well contravene both the intent underlying article XIII B, section 6 and past holdings,[185] stating:

> Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude

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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.").

[180] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744, 754. This form of compulsion is also referred to as "nonlegal compulsion." (See e.g. *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800 [514 P.3d 854, 867-868].)

[181] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; see *Department of Finance v. Commission on State Mandates (POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

[182] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 869-870.

[183] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 881-882.

[184] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

[185] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

> reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra,* 190 Cal.App.3d 521, 234 Cal.Rptr. 795, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.,* at pp. 537–538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. *Yet, under a strict application of the rule gleaned from City of Merced, supra, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of City of Merced that might lead to such a result.*[186]

In *Department of Finance v. Commission on State Mandates* (*POBRA)*, the Third District Court of Appeal suggested that duty is the dividing line between truly voluntary and technically discretionary decisions.[187] In that case, the court was tasked with determining whether the Public Safety Officers Procedural Bill of Rights Act (POBRA), which granted procedural protections to state and local peace officers subject to investigation, interrogation, or discipline, imposed a reimbursable state mandated program on school districts and community college districts that employ peace officers.[188] The court held that because those protections were triggered by a local discretionary decision, that statute did not impose a reimbursable state mandated program on those districts.[189] However, the court also clarified that this discretionary

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[186] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888, footnote omitted and emphasis added.

[187] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[188] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1358.

[189] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

decision was *not* the district's decision to investigate, interrogate, or discipline its peace officers, but rather the district's decision to employ peace officers in the first place.[190] It explained that since counties and cities had a basic and mandatory duty to provide policing services,[191] their administration of this duty, as a practical matter, necessarily included actions such as investigating, interrogating, or disciplining its peace officers. Thus, like the "discretionary" expulsions discussed in *San Diego Unified School Dist.*, those actions and the downstream requirements imposed by the POBRA statutes could not reasonably be considered "truly voluntary" when performed by counties and cities.[192]

The same logic applies here. As the court stated in *POBRA,* counties and cities have an ordinary, principal, and mandatory duty to provide policing services within their jurisdiction. They are required by the California Constitution and state statute to employ peace officers.[193] County sheriffs are required by Government Code sections 26600 et seq. to preserve the peace, investigate public offenses, and to make arrests of persons who commit public offenses. City chiefs of police are conferred these same powers by Government Code sections 41601. And the courts have also recognized that "[l]aw enforcement officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties

[190] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[191] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[192] See *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[193] Article XI of the California Constitution provides for the formation of counties and cities. Section 1 states that the Legislature shall provide for an elected county sheriff. Section 5 specifies that city charters are to provide for the "government of the city police force." Government Code sections 36505 and 41601 et seq. require the city council of a general law city to appoint the chief of police, imbue that officer with "the powers conferred upon sheriffs by general law," and require deputies, police officers, and watchpersons in the city to promptly execute that officer's lawful orders.

and are faithful to the trust reposed in them"[194] and that "[p]olice and fire protection are two of the most essential and basic functions of local government."[195]

Moreover, like the student expulsions discussed in *San Diego Unified School Dist.* and the procedural protections discussed in *POBRA*, custodial interrogations must *necessarily* occur as part of a city or county's duty to provide policing services because a law enforcement officer's decision to interrogate *is constrained by that duty*. School expulsions necessarily occur as part of a school district's administration of its duty to educate students because that duty includes providing students with a safe learning environment.[196] Thus, whenever expelling a student is the best means of providing students with that safe learning environment, a school principal is duty-bound to recommend that expulsion.[197] The same goes for law enforcement. When an officer is faced with the decision of whether or not to interrogate a suspect, their discretion is similarly constrained by their sworn duty to investigate apparent criminal activity[198] and to protect the citizenry.[199]

Consequently, under the logic of *POBRA* and *San Diego Unified School Dist.,* the decision to interrogate a youth is not a truly "voluntary" local action within the meaning of article XIII B, section 6 that would preclude reimbursement for downstream statutory requirements triggered by those actions.

Although the Commission's decisions are not precedential, the Commission notes that this conclusion is consistent with its past decisions. In *Post-Conviction: DNA Court Proceedings,* 00-TC-21, the Commission similarly determined that a statute that required the court to "appoint

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[194] *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 799 (internal quotations omitted); see also *Pasos v. Los Angeles County Civil Service Commission* (2020) 52 Cal.App.5th 690, 702, *as modified on denial of reh'g* (Aug. 18, 2020); *Allen v. Payne* (1934) 1 Cal.2d 607, 608 ("From the time of the adoption of our Constitution to the present, the accepted practice has been to leave the detection of crime in the hands of sheriffs and district attorneys, and in our opinion the departure from that practice finds no support in authority or legislative policy. The ferreting out of evidence of crime is a statutory duty expressly imposed upon certain officers, having the equipment and qualified personnel to perform it."); *Christal v. Police Commission of City and County of San Francisco* (1939) 33 Cal.App.2d 564, 567.

[195] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

[196] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887 footnote 22.

[197] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887 footnote 22.

[198] See *People v. Coston* (1990) 221 Cal.App.3d 898, 903; *McCain v. Sheridan* (1958) 160 Cal.App.2d 174, 177-178.

[199] *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 799; *Pasos v. Los Angeles County Civil Service Commission* (2020) 52 Cal.App.5th 690, 702, *as modified on denial of reh'g* (Aug. 18, 2020).

counsel to investigate and, *if appropriate*, to file a motion for DNA testing" mandated the filing of that motion.[200] In reaching that conclusion, the Commission reasoned that "an attorney's duty is "to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit"" and that "[b]ecause whether or not to file the DNA testing motion is a matter of professional judgment, the indigent defense counsel's duty to file it, if appropriate, *is not truly discretionary. Rather, it is an activity mandated by the state.*"[201]

Similarly, in its decision on reconsideration of the test claim that was at issue in *POBRA*, the Commission held that a local entity does not decide who to investigate or discipline based on the costs incurred to the entity. Instead, a local entity makes this decision, like the expulsion decisions discussed by the Supreme Court in *San Diego Unified School Dist*., to maintain the public's confidence in its police force and to protect the health, safety, and welfare of its citizens.[202]

Accordingly, the Commission finds that the test claim statute's requirement on county and city law enforcement to ensure that youths, 17 years old or younger, consult with legal counsel prior to custodial interrogation and before waiving any *Miranda* rights is not triggered by a local discretionary decision within the meaning of article XIII B, section 6, but is instead a requirement mandated by the state on counties and cities.

The same conclusion, however, does not apply to school districts or community college districts. Unlike counties and cities, school districts and community college districts are permitted, but not required, by statute to employ peace officers who supplement the general law enforcement agencies of counties and cities, and are not mandated by the state to comply with the test claim statute.[203] As noted above, the court in POBRA held that the statutes in that case did not impose a state-mandated program on school districts or community college districts because their protections were triggered by the districts' voluntary, discretionary decisions to employ peace officers.[204] The court reasoned that unlike counties and cities, which "have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction," "the districts in issue [we]re authorized, but not required, to provide their own peace officers and d[id] not have provision of police protection as an essential and basic

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[200] Exhibit X (8), Commission on State Mandates, Decision on *Post-Conviction: DNA Court Proceedings*, 00-TC-21 and 01-TC-08, https://csm.ca.gov/decisions/00tc21,01tc08sod.pdf (accessed on September 1, 2022), adopted July 28, 2006, page 13, emphasis added.

[201] Exhibit X (8), Commission on State Mandates, Decision on *Post-Conviction: DNA Court Proceedings*, 00-TC-21, https://csm.ca.gov/decisions/00tc21,01tc08sod.pdf (accessed on September 1, 2022), adopted July 28, 2006, page 13, emphasis added.

[202] Exhibit X (7), Commission on State Mandates, Decision on Reconsideration of *Peace Officer Procedural Bill of Rights,* 05-RL-4499-01, https://csm.ca.gov/decisions/4499sod.pdf (accessed on August 19, 2022), page 21.

[203] Education Code sections 38000, 72330.

[204] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1357-1367.

function. It [was] not essential unless there [wa]s a showing that, as a practical matter, exercising the authority to hire peace officers [wa]s the only reasonable means to carry out their core mandatory functions.[205] And here, it is not alleged and there is no evidence in the record that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means for school districts and community college districts to carry out their core mandatory function to provide educational services.

Accordingly, the Commission finds that the test claim statute imposes state-mandated duties only on counties and cities.

2. The Test Claim Statute Imposes a New Program or Higher Level of Service Only With Respect to 16 and 17 Year Olds Who Do Not Affirmatively Request Counsel.

In order for the state-mandated activity to constitute a new program or higher level of service, it must be new when compared with the legal requirements in effect immediately before the enactment of the test claim statute and increase the level of service provided to the public.[206] In addition, the requirement must either carry out the governmental function of providing a service to the public, or impose unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state.[207]

As discussed below, the Commission finds that the requirement is new and constitutes a new program or higher level of service with respect to 16 and 17 year olds who do not affirmatively request counsel. The requirement is new, except to the extent that it (1) requires law enforcement to provide minors with legal counsel upon request or (2) requires law enforcement to ensure that youths 15 years or younger consult with legal counsel prior to a custodial interrogation even when the youth does not request counsel.

For decades, the Fifth Amendment to the U.S. Constitution has required state and local law enforcement to provide an individual in custody with legal counsel upon that individual's affirmative request and prohibited interrogation or further interrogation of that individual until counsel has been provided or the individual has validly waived their right thereto.[208] As described in the Background, Welfare and Institutions Code sections 625 and 627.5 have long

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[205] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

[206] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[207] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[208] See *Malloy v. Hogan* (1964) 378 U.S. 1, 11 (Fifth Amendment right against self-incrimination applies against both state and federal authorities); see e.g. *Miranda v. Arizona* (1966) 384 U.S. 436, 494-498 (applying the Fifth Amendment right against self-incrimination to interrogations conducted by local police officers). If an individual has a private attorney, they may of course consult with that attorney instead of relying on government-appointed counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436, 471-473.)

imposed the same requirements on local law enforcement agencies with respect to minors in temporary custody, as well.[209] Thus, the requirement of the test claim statute is *not* new to the extent that it requires law enforcement to provide minors with legal counsel upon request.

Prior to the test claim statute, Welfare and Institutions Code section 625.6, as added by Statutes 2017, chapter 681, required law enforcement to ensure that "youth[s] 15 years or younger" consult with legal counsel before custodial interrogation and the waiver of any *Miranda* rights, with certain exceptions, even when the youths did not request counsel.[210] By the plain language of the statute, this includes youths up to and including those with a maximum age of 15 years. Thus, the requirement imposed by the test claim statute for youths 15 years or younger, who do not affirmatively request counsel, is *not* new.[211]

In sum, the requirement imposed by the test claim statute is only new with respect to youths, 16 or 17 years of age, who do not affirmatively request counsel.

State requirements that build upon existing requirements are "new," and go beyond just increasing the costs of existing services, when they increase the actual level or quality of governmental services provided.[212] And in *County of San Diego v. Commission on State Mandates*, the California Supreme Court suggested that such increases may include the expansion of existing state programs to serve additional populations.[213]

Here, the test claim statute increases the actual level or quality of governmental services provided by expanding the population which law enforcement is required to ensure actually consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights to include 16 and 17 year olds. Prior to the test claim statute, youths of 16 or 17 years of age had to either affirmatively request, or have their parent or legal guardian affirmatively request, legal counsel in order to consult with counsel prior to a custodial interrogation or the

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[209] Statutes 1967, chapter 1355.

[210] As discussed above, section 625.6, as amended by the test claim statute, required law enforcement, not the youths themselves, to ensure that youths consulted with legal counsel prior to a custodial interrogation and the waiver of any *Miranda* rights. As the relevant statutory language, statutory context, and legislative history of the version of the section originally added by Statutes 2017, chapter 681, is generally the same as that discussed above, it is the Commission's view that this prior version of the section also imposed its requirement on law enforcement, not the youths themselves. See also Welfare and Institutions Code section 627.5 (If a minor in temporary custody or their parent or guardian requests counsel after a probation officer advises the minor of their *Miranda* rights, the probation officer must notify the judge of the juvenile court of the request and counsel for the minor must be appointed pursuant to Welfare and Institutions Code section 634.).

[211] Accordingly, any costs associated with ensuring that 15 year-olds consult with legal counsel prior to a custodial interrogation and waiver of any *Miranda* rights are not reimbursable under this test claim.

[212] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[213] See *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

waiver of any *Miranda* rights.[214] But as committee analyses of the test claim statute explain, this opt-in system was insufficient to fully protect those minors' Fifth Amendment rights.[215] Because minors are less capable than adults at understanding their constitutional rights, more impulsive, more easily influenced by others (especially by figures of authority), more sensitive to rewards (especially immediate rewards), and less able to weigh in on the long-term consequences of their actions, they are much more likely to waive their Fifth Amendment rights without fully understanding them and, in the ensuing custodial interrogation, to also falsely confess to crimes that they did not commit.[216] The test claim statute sought to remedy this situation by *increasing* the level of governmental protections afforded to minors facing custodial interrogations, specifically, by ensuring that 16 and 17 year olds understand their *Miranda* rights before waiving them and thereby minimizing false confessions extracted from those minors in custodial interrogations[217] and protecting them from "psychologically coercive interrogations and other psychologically coercive dealings with the police."[218] Thus, the Commission finds that replacing consultations available only upon request with mandatory, unwaivable legal consultations is new and represents an increase in the actual level or quality of governmental services provided to 16- and 17- year olds, and is not merely an increase in costs.

Although the Commission's decisions are not precedential, the Commission notes that this conclusion is consistent with its past decisions. In its Decision on *Domestic Violence Arrests and Victim Assistance*, 98-TC-14, the Commission determined that providing an existing victim card to victims of additional crimes constituted a new program or higher level of service.[219] And in its Decision on *Permanent Absent Voters II (As Amended),* 03-TC-11, the Commission similarly determined that expanding eligibility for permanent absent voter status to all voters went "beyond creating a higher level of service in an existing program. . . ."[220]

The Commission's conclusion in this Test Claim is also not inconsistent with its Decision in *Extended Conditional Voter Registration*, 20-TC-02. In that Test Claim, the Commission

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[214] Welfare and Institutions Code sections 625, 627.5; *Miranda v. Arizona* (1966) 384 U.S. 436, 470-474.

[215] Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, pages 2-4.

[216] Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, page 4.

[217] See Exhibit X (3), Assembly Committee on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, pages 2-4.

[218] Statutes 2020, chapter 335, section 1.

[219] Exhibit X (6), Commission on State Mandates, Decision on *Domestic Violence Arrests and Victim Assistance*, 98-TC-14, https://csm.ca.gov/decisions/doc44.pdf (accessed on September 1, 2022), adopted December 9, 2004, pages 17-18.

[220] Exhibit X (9), Commission on State Mandates, Decision on *Permanent Absent Voter II (As Amended)*, 03-TC-11, https://csm.ca.gov/decisions/03tc11sod.pdf (accessed on September 1, 2022), adopted July 28, 2006, page 9.

concluded that a statute that required counties to provide existing voter services to people requesting those services at additional locations, but did not expand the times for which these services are provided by the counties or require the counties to create new locations for voters to access those services, did not impose a reimbursable state-mandated program because county elections officials already had a preexisting duty to provide those services to any voter requesting them.[221] That statute is distinguishable from the test claim statute in that it did not increase the population entitled to existing services, but rather made it more convenient for all voters to access the same services by making the services available at additional locations. Here, in contrast, the test claim statute requires county and city law enforcement to affirmatively ensure a new population of youth that do not request counsel actually consults with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights, which as indicated above, is an increase in the level of service provided to the public.

In addition, the test claim statute imposes unique requirements on local agencies that do not generally apply to all residents and entities in the state[222] The plain language of the test claim statute indicates that its reach is limited to governmental entities. As amended by the test claim statute, Welfare and Institutions Code section 625.6 only requires consultations to be provided to minors prior to a "custodial interrogation" or "the waiver of any Miranda rights." A "custodial interrogation" is a uniquely governmental action defined as "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[223] "Miranda rights" are similarly uniquely governmental in that they are rights constitutionally guaranteed against the government.[224] Thus, the test claim statute's requirement, which applies only in this uniquely governmental context, is also unique to government.

Consequently, the test claim statute imposes a new program or higher level of service within the meaning of article XIII B, section 6 on counties and cities to perform the following activity:

- Ensure that youth, ages 16 and 17, *who do not affirmatively request an attorney*, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda* rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to consult with the youth in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

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[221] Exhibit X (10), Commission on State Mandates, Decision on *Extended Conditional Voter Registration,* 20-TC-02, https://csm.ca.gov/decisions/20tc02-120621.pdf (accessed on September 1, 2022), adopted December 3, 2021, pages 42-54.

[222] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[223] *Miranda v. Arizona* (1966) 38 U.S. 436, 444, emphasis added.

[224] See *Miranda v. Arizona* (1966) 38 U.S. 436, 440-444; see also Assembly Com. on Public Safety, Analysis of SB 203 (2019-2020 Regular Session), as amended July 27, 2020, pages 3-4.

3. The Test Claim Statute Results in Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 and Government Code Section 17514.

The final criteria that must be met in order for the mandated new requirement to constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution is that the mandated activity must result in a local agency incurring increased costs within the meaning of Government Code section 17514. That section defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Government Code section 17564 also provides that "[n]o claim shall be made pursuant to Sections 17551, . . ., nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, . . . , unless these claims exceed one thousand dollars ($1,000)." Even if the claims exceed $1,000, however, the claimed costs are not reimbursable if an exception identified in Government Code section 17556 applies.

Here, as explained below, there is substantial evidence that the claimant incurred over $1,000 in complying with the test claim statute, as required by Government Code section 17564. Moreover, although Statutes 2020, chapter 92 (AB 1869) and Penal Code section 987.6 provide potential sources of offsetting revenue to counties, that revenue is not "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" such that Government Code section 17556(e) would preclude reimbursement. Moreover, none of the other exceptions to reimbursement in Government Code section 17556 applies. Consequently, the Commission finds that the test claim statute imposes increased costs mandated by the state.

a. <u>There is substantial evidence that the claimant incurred over $1,000 in costs to perform the mandated activities.</u>

The claimant asserts that its total increased costs to comply with the test claim statute in the 2020-2021 fiscal year were $5,821.45.[225] These costs are "for the Miranda consultations" that the claimant's Public Defender's Office provides pursuant to its Juvenile Miranda Duty program.[226]

[225] Exhibit A, Test Claim, filed December 22, 2021, pages 11, 18-20 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15 and Attachment A), and 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, paras. 3 and 5).

[226] Exhibit A, Test Claim, filed December 22, 2021, pages 11, 18-20 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 15 and Attachment A), and 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, para. 3).

Although Finance observes,[227] and the claimant concedes,[228] that these costs include the provision of legal consultations to youth ages 15 years of age or younger, which had already been required under preexisting law, the claimant has not indicated what part of the initially claimed costs were incurred with respect to juveniles 16 or 17 years of age. The claimant has also not indicated whether any part of the initially claimed costs were incurred with respect to juveniles who affirmatively requested a consultation with an attorney before custodial interrogation, as required by existing state and federal law.

However, even without a precise figure, the claimant's evidence, along with information that is officially noticed,[229] is sufficient to support a finding that the county's costs with respect to such juveniles did exceed $1,000 in the 2020-2021 fiscal year. Juveniles waive their *Miranda* rights at much higher rates than adults.[230] Also, just over two-thirds of juvenile arrests in 2019 were of juveniles 15 to 17 years of age.[231] Thus, a substantial portion of the claimant's $5,821.45 cost of providing legal consultations to minors 17 years of age or younger were for consultations provided to minors 16 or 17 years of age. Thus, substantial evidence supports the claimant's allegation that its costs of ensuring that youth, ages 16 and 17 years old who do not affirmatively request an attorney, consult with legal counsel prior to a custodial interrogation or the waiver of any *Miranda* rights exceed $1,000.

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[227] Exhibit B, Finance's Comments, filed March 7, 2022, pages 1-2.

[228] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2.

[229] California Code of Regulations, title 2, section 1187.5(c) ("Official notice may be taken in the manner and of the information described in Government Code Section 11515."); see Government Code section 11515 and Evidence Code section 452(g) and (h).

[230] Exhibit X (11), Scott, Duell and Steinberg, *Brain Development, Social Context and Justice Policy*, 57 Washington University Journal of Law & Policy (2018), page 36. The Commission notes that it need not take separate judicial notice of this study because it is already cited and discussed in the legislative history of Statutes 2020, chapter 335. (See *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1147 fn. 5; Gov. Code, § 11515; Cal. Code. Regs. tit. 2, § 1187.5(c).)

[231] Exhibit X (12), U.S. Department of Justice, Office of Justice Programs, Juvenile Justice Statistics National Report Series Bulletin (May 2021), page 3, https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf (accessed on July 7, 2022). Pursuant to California Code of Regulations, title 2, section 1187.5(c), Government Code section 11515, and Evidence Code section 452(g) and (h), the Commission takes notice of statistical data released by the U.S. Department of Justice. (See *Powell v. Superior Court* (1991) 232 Cal.App.3d 785, 795 fn. 7, modified (July 30, 1991).)

b. Although Government Code section 17556(e) does not apply to deny the Test Claim, Statutes 2020, chapter 92 (AB 1869) and Penal Code section 987.6 may provide potential offsetting revenues to counties if received and used for this program. No other exception to reimbursement in Government Code section 17556 applies to deny this Test Claim.

Under Government Code section 17556(e), the Commission is prohibited from finding costs mandated by the state if "… an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that 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."

As explained below, Statutes 2020, chapter 92 and Penal Code section 987.6 may provide potential offsetting revenues to counties if received and used to cover the costs of the state-mandated program. However, as neither of these funding sources are sufficient to fully fund the costs of the state-mandated program, Government Code section 17556(e) does not apply to deny this claim.

In its comments on this Test Claim, Finance argues that Statutes 2020, chapter 92 (AB 1869), which repealed various fees, including public defender fees, and annually appropriates $65 million to backfill counties for the lost revenue, "may serve as an offset to any state-mandated costs incurred by the Claimant."[232]

In response, the claimant asserts that the public defender fees that were eliminated by Statutes 2020, chapter 92 would not have covered its costs in providing legal counsel to juveniles prior to custodial interrogation, as the eliminated fees related to court-appointed lawyers and therefore would not have covered legal consultations, such as those required by the test claim statute, which are provided prior to the appointment of counsel at the arraignment stage of a criminal proceeding.[233] Accordingly, any backfill provided pursuant to that bill would not "provide[] for additional revenue specifically intended to fund the costs of the state mandate" within the meaning of Government Code section 17556(e).

The relevant fees that Statutes 2020, chapter 92 repealed were provided in Penal Code section 987.4 and Government Code section 27712. Prior to Statutes 2020, chapter 92, Penal Code section 987.4 authorized a court to order the parent or guardian of a minor represented by the public defender or assigned counsel in a criminal proceeding to reimburse the county for its expenses in providing that counsel if the court determines that the parent or guardian has the ability to pay.[234] And Government Code section 27712 similarly authorized a court to order a

[232] Exhibit B, Finance's Comments, filed March 7, 2022, page 2.

[233] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2; see also Exhibit A, Test Claim, filed December 22, 2021, pages 10 and 17 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 7).

[234] Prior to Statutes 2020, chapter 92, Penal Code section 987.4, as added by Statutes 1970, chapter 723, provided, in full:

person provided legal assistance by the public defender or assigned counsel "in any case in which a party is provided legal assistance" to reimburse the county its expenses in providing that counsel if the court determines, upon conclusion of the proceedings or upon withdrawal of the public defender or counsel, that the person has the ability to pay.[235]

Statutes 2020, chapter 92, repealed these and other fees effective July 1, 2021. To backfill county revenues lost from that repeal, the bill annually appropriated $65 million from the General Fund to the Controller for the 2021–2022 to 2025–2026 fiscal years.[236] Under a subsequent bill, Statutes 2021, chapter 79 (AB 143), these moneys must be allocated to counties based on their average adult populations, average felony and misdemeanor arrests, and average traffic and nontraffic felony and misdemeanor filings, as specified.

The Commission finds that a portion of the costs mandated by the state in this case on counties could have been offset by those former fees and therefore, the state funds appropriated by Statutes 2020, chapter 92 and Statutes 2021, chapter 79, to backfill the fees may provide potential offsetting revenues to counties. As stated above, the claimant's argument as to why those fees are inapplicable is that custodial interrogations occur before the Public Defender is appointed at the arraignment stage of a criminal proceeding.[237] But while this may be the order

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> When the public defender or an assigned counsel represents a person who is a minor in a criminal proceeding, at the expense of a county, the court may order the parent or guardian of such minor to reimburse the county for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense.

[235] Prior to Statutes 2020, chapter 92, Government Code section 27712, as added by Statutes 1985, chapter 1485, provided, in relevant part:

> In any case in which a party is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the proceedings, or upon the withdrawal of the public defender or private counsel, after a hearing on the matter, the court may make a determination of the ability of the party to pay all or a portion of the cost of such legal assistance. … If the court determines, or upon petition by the county financial evaluation officer is satisfied, that the party has the ability to pay all or part of the cost, it shall order the party to pay the sum to the county in any installments and manner which it believes reasonable and compatible with the party's ability to pay. …

[236] Statutes 2020, chapter 92, section 67 ("…The sum of sixty-five million dollars ($65,000,000) is hereby annually appropriated from the General Fund to the Controller beginning in the 2021–22 fiscal year to the 2025–26 fiscal year, inclusive, to backfill revenues lost from the repeal of those fees specified in this act, unless future legislation extends the provisions of this act. These funds are appropriated to the Controller for allocation to counties according to a schedule provided by the Department of Finance….").

[237] Exhibit C, Claimant's Rebuttal Comments, filed April 6, 2022, page 2; see also Exhibit A, Test Claim, filed December 22, 2021, pages 10 and 17 (Declaration of Cris Mercurio, Head Deputy of the Juvenile Division of the County of Los Angeles Public Defender's Office, para. 7).

of events in a typical situation, it is not necessarily true for all situations. In *McNeil v. Wisconsin,* for example, the U.S. Supreme Court addressed a situation where a person was interrogated in custody multiple times after criminal proceedings against him had already commenced.[238] In such situations, if a minor's appointed counsel provides them with a consultation pursuant to the test claim statute, and the minor or the minor's parent or guardian has the ability to pay for all or a part of that consultation, then former Penal Code section 987.4, which authorized a court to order the minor's parent or guardian with the ability to pay to provide reimbursement "[w]hen the public defender or an assigned counsel represents a person who is a minor in a criminal proceeding, at the expense of a county," and former Government Code section 27712, which required a court to order a party who is provided legal assistance through a public defender or appointed counsel in any case to reimburse the county for the cost of that assistance to the extent the party has the ability to pay, would have authorized the county to recoup at least some of its costs of providing that consultation.

Consequently, the Commission finds that the $65,000,000 appropriated by Statutes 2020, chapter 92 may provide potential offsetting revenues to the extent that the funding is provided to backfill a county for fees that it could have collected under former Penal Code section 987.4 or former Government Code section 27712 and used by a county to partially offset its costs of ensuring that a youth, 16 or 17 years of age, who has been arraigned, is subject to a subsequent custodial interrogation, and does not request counsel,[239] consults with legal counsel prior to that subsequent custodial interrogation or the wavier of any *Miranda* rights.

However, the costs of providing consultations to minors who do not have criminal proceedings against them or whose parents or guardians cannot afford to pay for the consultations, are not covered by those prior fees. In addition, even if the funds can be used, there is no requirement that a county use the funds to pay for the state-mandated program here. Accordingly, funding that the claimant receives pursuant to Statutes 2020, chapter 92, to backfill revenues lost due to the repeal of those fees is not "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" such that Government Code section 17556(e) would apply to deny the claim.

In addition, Penal Code section 987.6 requires the Director of Finance, from funds made available, to reimburse counties for costs up to ten percent of the amounts actually expended in providing counsel for persons charged with violations of state criminal law or detained under the

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[238] *McNeil v. Wisconsin* (1991) 501 U.S. 171, 173-174.

[239] As the U.S. Supreme Court explains in *McNeil v. Wisconsin*, a person who invokes their Sixth Amendment right to criminal defense counsel does not thereby automatically invoke their Fifth Amendment right to counsel with respect to all subsequent custodial interrogations. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 ("To invoke the Sixth Amendment interest is, as a matter of fact, not to invoke the *Miranda–Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution. It can be said, perhaps, that it is likely that one who has asked for counsel's assistance in defending against a prosecution would want counsel present for all custodial interrogation, even interrogation unrelated to the charge. [But t]hat is not necessarily true…").)

Lanterman-Petris-Short Act.[240] This funding could be used by a claimant when the test claim statute requires county law enforcement to ensure that a juvenile who has already been charged with a violation of state criminal law consults with legal counsel prior to a custodial interrogation or the wavier of any *Miranda* rights.[241]

However, Penal Code section 987.6 was not specifically intended to fund the costs of the state-mandated program in an amount sufficient to fund the cost of the mandate. Any funding received under that section is necessarily insufficient to fund the full cost of the state-mandated program because (1) not all 16 and 17 years olds that undergo custodial interrogations are charged with crimes or detained under the Lanterman-Petris-Short Act, (2) not all crimes are state law violations, and (3) regardless, reimbursement under this provision is limited to 10% of the county's actual costs. Furthermore, there is no guarantee that funding will always be available to Finance for these purposes. As the Declaration of Sung Lee (Departmental Finance Manager II with the County of Los Angeles Public Defender's Office) states, "The County has not received any local, State, or federal funding to offset the increased direct and indirect costs associated with the mandatory provision of legal counsel to arrested or in-custody youths under 17 years of age or younger pursuant to SB 203."[242] This would presumably include any funding received under Penal Code section 987.6. And Finance has not filed evidenced rebutting that allegation.[243]

Consequently, although funding pursuant to Penal Code section 987.6 may provide potential offsetting revenues to counties if received and used for the mandate, it is not "specifically

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[240] Penal Code section 987.6, as last amended by Statutes 1970, chapter 723, states the following:

(a) From any state moneys made available to it for such purpose, the Department of Finance shall, pursuant to this section, pay to the counties an amount not to exceed 10 percent of the amounts actually expended by the counties in providing counsel in accordance with the law whether by public defender, assigned counsel, or both, for persons charged with violations of state criminal law or involuntarily detained under the Lanterman-Petris-Short Act, Division 5 (commencing with Section 5000) of the Welfare and Institutions Code, who desire, but are unable to afford, counsel.

(b) Application for payment shall be made in such manner and at such times as prescribed by the Department of Finance and the department may adopt rules necessary or appropriate to carry out the purposes of this section.

[241] See e.g. *McNeil v. Wisconsin* (1991) 501 U.S. 171, 173-174 and 176-179 (addressing a situation in which a suspect was interrogated in custody after a public defender was appointed to represent him and discussing the interaction of the rights to counsel under the Fifth and Sixth Amendments under such circumstances).

[242] Exhibit A, Test Claim, filed December 22, 2021, page 21 (Declaration of Sung Lee, Departmental Finance Manager II with the County of Los Angeles Public Defender's Office, para. 6).

[243] See *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769, *as modified on denial of reh'g* (Nov. 16, 2016).

intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" such that Government Code section 17556(e) would apply to deny the claim. These sources of potential offsetting revenue, however, will be identified in the Parameters and Guidelines.

c. None of the other exceptions to reimbursement in Government Code section 17556 apply.

The other provisions of Government Code section 17556 prohibit the Commission from finding costs mandated by the state if the Commission finds (1) the claimant requested legislative authority for the program, (2) the test claim statute affirmed a mandate that has been declared existing law, (3) the local agency has fee authority sufficient to pay for the mandated program or increased level of service, (4) the test claim statute imposes duties that are necessary to implement a ballot measure, or (5) the test claim statue created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, as specified.[244]

Here there are no facts or law to suggest that any of these exceptions are applicable. There is no evidence that the claimant requested legislative authority for the program and no law suggesting that the test claim statute affirmed a mandate that has been declared existing law, that the claimant has fee authority sufficient to pay for costs imposed by the test claim statute, or that the test claim statute imposes a duty necessary to implement a ballot measure. And the plain language of the test claim statute does not create or eliminate a crime or infraction or change the penalty therefor. The plain language of the test claim statute merely requires law enforcement to ensure that minors consult with legal counsel prior to a custodial interrogation and the waiver of any *Miranda* rights. While the consequences for noncompliance with this requirement may make it less *likely* that the minor will be convicted of a crime or infraction,[245] this is not the same as creating, eliminating, or changing the penalty for any crime or infraction.

Accordingly, the Commission finds that the test claim statute imposes increased costs mandated by the state.

V. Conclusion

Based on the foregoing analysis, the Commission approves this Test Claim and finds that Welfare and Institutions Code section 625.6, as amended by Statutes 2020, chapter 335, imposes a reimbursable state-mandated program only on counties and cities, beginning January 1, 2021, to perform the following activity:

- Ensure that youth, ages 16 and 17, *who do not affirmatively request an attorney*, consult with legal counsel prior to custodial interrogation and before the waiver of any *Miranda*

[244] See also California Constitution article XIII B, section 6(a)(2) ("the Legislature may, but need not, provide a subvention of funds for … [¶][l]egislation defining a new crime or changing an existing definition of a crime.").

[245] Under Welfare and Institutions Code section 625.6(b), "The court shall, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a) and, additionally, shall consider any willful violation of subdivision (a) in determining the credibility of a law enforcement officer under Section 780 of the Evidence Code."

rights. In instances where the youth does not have a private attorney, this includes providing legal counsel to consult with the youth in person, by telephone, or by video conference prior to a custodial interrogation, and before the waiver of any *Miranda* rights.

The following state funds will be identified in the Parameters and Guidelines as potential offsetting revenues:

- Funding appropriated from the General Fund by Statutes 2020, chapter 92 (AB 1869) to backfill a county for the revenue lost due to the repeal of former Penal Code section 987.4 and former Government Code section 27712, which provided funding for the costs of defense counsel and legal assistance in criminal proceedings, to the extent that the funds are used to offset a county's costs to comply with this program.
- Funding made available to counties pursuant to Penal Code section 987.6 for providing legal assistance for persons charged with violations of state criminal law or involuntarily detained under the Lanterman-Petris-Short Act and used to offset a county's costs to comply with this program.

Reimbursement is not required in the following situations:

- When the 16 or 17 year old affirmatively requests an attorney prior to interrogation and before waiver of any *Miranda* rights, which is required by existing state and federal law.[246]
- For school districts or community college districts, who are authorized but not required by state law to employ peace officers.[247]
- When the officer who questioned the youth reasonably believed the information the officer sought was necessary to protect life or property from an imminent threat and the officer's questions were limited to those questions that were reasonably necessary to obtain that information.[248]
- In the normal performance of a probation officer's duties under Welfare and Institutions Code section 625, 627.5, or 628.[249]

[246] Welfare and Institutions Code sections 625, 627.5; *Miranda v. Arizona* (1966) 384 U.S. 436, 470-473.

[247] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367-1368.

[248] Welfare and Institutions Code section 625.6(c)(2).

[249] Welfare and Institutions Code section 625.6(d).

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 13, 2022, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued September 13, 2022**

  Juveniles: Custodial Interrogation, 21-TC-01
  Welfare and Institutions Code Section 625.6 as Amended by Statutes 2020, Chapter 335, Section 2 (SB 203)
  County of Los Angeles, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 September 13, 2022 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/13/22

Claim Number: 21-TC-01

Matter: Juveniles: Custodial Interrogation

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

Arlene Barrera, Auditor-Controller, *County of Los Angeles*
Claimant Contact
Auditor-Controller's Office, 500 West Temple Street, Room 525, Los Angeles, CA 90012
Phone: (213) 974-8302
abarrera@auditor.lacounty.gov

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-8918
donna.ferebee@dof.ca.gov

Tim Flanagan, Office Coordinator, *Solano County*
Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
Elections@solanocounty.com

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*

Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Mariko Kotani, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Email: N/A

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Claimant Representative
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-8918
Marilyn.Munoz@dof.ca.gov

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@sbcountyatc.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Cindy Sconce, Director, *MGT*
Performance Solutions Group, 3600 American River Drive, Suite 150, Sacramento, CA 95864
Phone: (916) 276-8807
csconce@mgtconsulting.com

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: 916-445-8717
NSidarous@sco.ca.gov

Christina Snider, Senior Deputy County Counsel, *County of San Diego*
1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-6229
Christina.Snider@sdcounty.ca.gov

Brittany Thompson, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Brittany.Thompson@dof.ca.gov

Jolene Tollenaar, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Elisa Wynne, Staff Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
elisa.wynne@sen.ca.gov

SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	SB 395	**Hearing Date:**	March 21, 2017
Author:	Lara		
Version:	February 15, 2017		
Urgency:	No	**Fiscal:**	No
Consultant:	SJ		

Subject: ***Custodial Interrogation: Juveniles***

HISTORY

Source: California Attorneys for Criminal Justice
Human Rights Watch
National Center for Youth Law
Silicon Valley De-Bug
Youth Justice Coalition

Prior Legislation: SB 1052 (Lara) – 2015-2016, vetoed

Support: Alliance for Boys and Men of Color; Anti-Recidivism Coalition; Asian Law Alliance; California Alliance for Youth and Community Justice; California Catholic Conference; California Public Defenders Association; Center on Juvenile and Criminal Justice; Children's Defense Fund; Children's Law Center of California; Coalition for Justice and Accountability; Community Development Technologies Center; Felony Murder Elimination Project; Healing Dialogue and Action; John Burton Advocates for Youth; Pacific Juvenile Defender Center; Prison Law Office; Root & Rebound; TGI Justice Project; USC Post-Conviction Justice Project of the USC Gould School of Law; W. Haywood Burns Institute; several individuals

Opposition: California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association

PURPOSE

The purpose of this bill is to require that a youth under the age of 18 consult with counsel prior to a custodial interrogation and before waiving any specified rights.

Existing law provides that a peace officer may, without a warrant, take into temporary custody a minor. (Welfare and Institutions Code § 625)

Existing law provides that in any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor will be adjudged a ward of the court or charged with a criminal action, or that he has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer is required to advise such minor that anything he says can be used against him and advise him of his constitutional rights, including his right to remain silent, his right to counsel present during any interrogation,

and his right to have counsel appointed if he is unable to afford counsel. (Welfare and Institutions Code § 625 (c))

Existing law provides that when a minor is taken into a place of confinement the minor shall be advised that he has the right to make at least two telephone calls, one completed to a parent or guardian, responsible adult or employer and one to an attorney. (Welfare and Institutions Code § 627)

This bill requires that prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth under 18 years of age shall consult with counsel.

This bill requires that the consultation with counsel cannot be waived.

This bill provides that consultation with counsel may be in person, or by telephone or video conference.

This bill requires that the court, in adjudicating the admissibility of statements of youth under 18 years of age made during or after a custodial interrogation, consider the effect of failure to comply with the consultation to counsel requirement.

This bill does not apply to the admissibility of statements of a youth under 18 years of age if both of the following criteria are met:

a) The officer who questioned the suspect reasonably believed the information he or she sought was necessary to protect life or property from a substantial threat.
b) The officer's questions were limited to those questions that were reasonably necessary to obtain this information.

This bill does not require a probation officer to comply with the consultation with counsel requirement in the normal performance of his or her duties.

This bill makes a number of uncodified legislative declarations and findings regarding developmental and neurological sciences as it pertains to the interrogation of a minor.

COMMENTS

1. Need for This Bill

According to the author:

> Currently in California, children—no matter how young— can waive their *Miranda* rights. When law enforcement conducts a custodial interrogation, they are required to recite basic constitutional rights to the individual, known as *Miranda* rights, and secure a waiver of those rights before proceeding. The waiver must be voluntarily, knowingly, and intelligently made. *Miranda* waivers by juveniles present distinct issues. Recent advances in cognitive science research have shown that the capacity of youth to grasp legal rights is less than that of an adult.
> Although existing law assures counsel for youth accused of crimes, the law does not require law enforcement and the courts to recognize that youth are different from adults. It is critical to ensure a youth understands their rights before waiving them and courts should have clear criteria for evaluating the validity of waivers.

Recently an appellate court held that a 10-year-old boy made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. When the police asked if he understood the right to remain silent, he replied, "Yes, that means that I have the right to stay calm." The California Supreme Court declined to review the lower court's decision. Several justices disagreed, and in his dissenting statement Justice Liu suggested that the Legislature should address the issue, stating that California law on juvenile waivers is a half-century old and, "predates by several decades the growing body of scientific research that the [U.S. Supreme Court] has repeatedly found relevant in assessing differences in mental capabilities between children and adults."

SB 395 will require youth under the age of 18 to consult with legal counsel before they waive their constitutional rights. The bill also provides guidance for courts in determining whether a youth's *Miranda* waiver was made in a voluntary, knowing, and intelligent manner as required under existing law.

2. *Miranda v. Arizona* and Its Application to Minors

In *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the Court (5-4) decided four cases (*Miranda v. Arizona, Vignera v. New York, Westover v. United States,* and *California v. Stewart*) and imposed new constitutional requirements for custodial police interrogation, beyond those laid down [previously].

***

The Court's decision may be "briefly stated" as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (86 S.Ct. 1612, 16 L.Ed.2d 706.) (5 Witkin *Cal. Crim. Law Crim Trial* § 107**)**

Under this bill, a youth under 18 years of age would be required to consult with counsel prior to waiving his or her rights under *Miranda*. The right to counsel cannot be waived.

If the requirement that the minor consult with counsel before waiving his or her rights is not met, the court must consider the effect of the failure to comply with the consultation of counsel requirement in determining the admissibility of the statements of the minor made during or after a custodial interrogation.

4. American Academy of Child and Adolescent Psychiatry

In a Policy Statement dated March 7, 2013 the American Academy of Child and Adolescent Psychiatry expressed its beliefs that juveniles should have counsel present when interrogated by law enforcement:

> Research has demonstrated that brain development continues throughout adolescence and into early adulthood. The frontal lobes, responsible for mature thought, reasoning and judgment, develop last. Adolescents use their brains in a fundamentally different manner than adults. They are more likely to act on impulse, without fully considering the consequences of their decisions or actions.
>
> The Supreme Court has recognized these biological and developmental differences in their recent decisions on the juvenile death penalty, juvenile life without parole and the interrogations of juvenile suspects. In particular, the Supreme Court has recognized that there is a heightened risk that juvenile suspects will falsely confess when pressured by police during the interrogation process. Research also demonstrates that when in police custody, many juveniles do not fully understand or appreciate their rights, options or alternatives.
>
> Accordingly, the American Academy of Child and Adolescent Psychiatry believes that juveniles should have an attorney present during questioning by police or other law enforcement agencies. While the Academy believes that juveniles should have a right to consult with parents prior to and during questioning, parental presence alone may not be sufficient to protect juvenile suspects. Moreover, many parents may not be competent to advise their children on whether to speak to the police and may also be persuaded that cooperation with the police will bring leniency. There are numerous cases of juveniles who have falsely confessed with their parents present during questioning.… [citations omitted] (https://www.aacap.org/aacap/policy_statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx)

5. SB 1052 Governor's Veto Message

Last year the Legislature approved SB 1052 (Lara), which also addressed the custodial interrogation of juveniles. Governor Brown vetoed SB 1052 stating:

> This bill would require – in almost all cases – that a youth under 18 must consult an attorney before a custodial interrogation begins.
>
> This bill presents profoundly important questions involving the constitutional right not to incriminate oneself and the ability of the police to interrogate juveniles. Ever since 1966,

the rule has been that interrogations of criminal suspects be preceded by the *Miranda* warning of the right to remain silent and the right to have an attorney.

In more cases than not, both adult and juvenile suspects waive these rights and go on to answer an investigator's questions. Courts uphold these "waivers" of rights as long as the waiver is knowing and voluntary. It is rare for a court to invalidate such a waiver.

Recent studies, however, argue that juveniles are more vulnerable than adults and easily succumb to police pressure to talk instead of remaining silent. Other studies show a much higher percentage of false confessions in the case of juveniles.

On the other hand, in countless cases, police investigators solve very serious crimes through questioning and the resulting admissions or statements that follow.

These competing realities raise difficult and troubling issues and that is why I have consulted widely to gain a better understanding of what is at stake. I have spoken to juvenile judges, police investigators, public defenders, prosecutors and the proponents of this bill. I have also read several research studies cited by the proponents and the most recent cases dealing with juvenile confessions.

After carefully considering all the above, I am not prepared to put into law SB 1052's categorical requirement that juveniles consult an attorney before waiving their *Miranda* rights. Frankly, we need a much fuller understanding of the ramifications of this measure.

In the coming year, I will work with proponents, law enforcement and other interested parties to fashion reforms that protect public safety and constitutional rights. There is much to be done.

6. Support

The National Center for Youth Law supports this bill stating:

> Currently, youth in California can waive their Miranda rights on their own, as long as the waiver is made in a voluntary, knowing, and intelligent manner. Yet research demonstrates that young people often fail to comprehend the meaning of *Miranda* rights. Even more troubling is the fact that young people are unlikely to appreciate the consequences of giving up those rights. They are also more likely than adults to waive their rights and confess to crimes they did not commit.
> Widely accepted research concludes that young people have less capacity to exercise mature judgment and are more likely than adults to disregard the long-term consequences of their behavior. Over the last 10 years, the United States and California Supreme Courts, recognizing that developmental abilities of youth are relevant to criminal culpability and the capacity to understand procedures of the criminal justice system, have enunciated a new jurisprudence grounded in this research. Moreover, courts have noted that young people are more vulnerable than adults to interrogation and have a limited understanding of the criminal justice system. These problems are amplified for youth who are very young, or who have developmental disabilities, cognitive delays or mental health challenges. A recent study of exonerations found that 42 percent of juveniles had falsely confessed as

> compared to just 13 percent of adults. The ramifications for both the individual and society of soliciting unreliable evidence and false confessions are far-reaching….
>
> People who work closely with youth and help them navigate legal decision-making know that a young person can understand the literal meanings of *Miranda* rights, but fail to appreciate the implications of giving up those rights. Some youth are persuaded to give statements because they believe doing so will reduce the likelihood of "getting into trouble." They are left feeling betrayed by interrogation tactics permitted and perhaps appropriate for adult suspects, but overwhelming for youth. These experiences can leave youth traumatized for years and harm trust in law enforcement and the justice system.

7. Opposition

According to the California State Sheriffs' Association:

> Our overarching concern with this bill is that it goes far beyond what existing case law requires as it relates to juveniles and their *Miranda* rights. For nearly 40 years, U.S. Supreme Court case law has held that "a court must take into account the special concerns that are present when a young person is involved, including a child or youth's limited experience, education and immature judgment." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725)
>
> SB 395 exceeds that standard, however, and requires minors to consult with counsel prior to a custodial interrogation and before waiving Miranda rights, and provides that this consultation cannot be waived. The bill raises questions including who will serve as this counsel, what entity will pay for it, and why is being mandated even in cases before a person is arrested? Law enforcement may simply want to talk to a minor, and even if the parent or guardian is notified in advance, this discussion would have to wait until counsel could consult with the minor if there was a chance that the interaction would fall under the bill's undefined umbrella of a custodial interrogation.
>
> SB 395 will cast doubt on an otherwise truthful statement that is called into question simply because a minor had not consulted with counsel before choosing to waive *Miranda* rights.

-- END –

SENATE COMMITTEE ON APPROPRIATIONS
Senator Ricardo Lara, Chair
2017 - 2018 Regular Session

SB 395 (Lara) - Custodial interrogation: juveniles

Version: February 15, 2017
Urgency: No
Hearing Date: April 17, 2017
Policy Vote: PUB. S. 5 - 2
Mandate: No
Consultant: Shaun Naidu

This bill meets the criteria for referral to the Suspense File.

Bill Summary: SB 395 would require a youth under 18 years of age to consult with counsel prior to a custodial interrogation and before the waiver of any *Miranda* rights, as specified. This bill provides that the consultation may not be waived.

Fiscal Impact:

- Local government: Major non-reimbursable local costs, potentially in the millions of dollars (local funds) annually to provide legal counsel to minors prior to custodial interrogations, to the extent local agencies (482 cities and 58 counties) incur additional costs to provide counsel and/or incur operational delays. The Department of Justice indicates nearly 87,000 juvenile arrests reported in 2014 (the last year of available data). A portion of these costs could potentially be subject to Proposition 30 funding requirements (General Fund*).

- Division of Juvenile Justice: One-time costs in the $50,000 range to revise policies and regulations. Annual costs in the $50,000 range for staff training.

- Other state law enforcement: Minor costs to several state agencies with law enforcement responsibilities (other than CDCR), such as the California Highway Patrol**, Department of Justice, and Department of Fish and Wildlife, who may interact with juvenile offenders, to update their regulations and procedures.

*Proposition 30 exempts the state from mandate reimbursements for realigned responsibilities for "public safety services" including the provision of services for, and supervision of, juvenile offenders. Legislation enacted after September 30, 2012, however, that has an overall effect of increasing the costs already borne by a local agency for public safety services applies to local agencies only to the extent that the state provides annual funding for the cost increase. The provisions of Proposition 30 have not been interpreted through the formal court process to date; however, to the extent local agency costs to county probation and sheriff departments resulting from this measure are determined to be applicable under the provisions of Proposition 30, SB 395 could potentially result in additional costs to the state.
**Motor Vehicle Account

Background: Existing law allows a peace officer to take a minor into temporary custody when that officer has reasonable cause to believe that the minor has committed a crime or violated an order of the juvenile court. Moreover, in any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor will be adjudged a ward of the court or charged with a criminal action, or that he has violated an order of the juvenile court or escaped from any

commitment ordered by the juvenile court, the officer is required to advise the minor that anything he says can be used against him and is required to advise him of his constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. Additionally, when a minor is taken into a place of confinement, the minor be advised that he has the right to make at least two telephone calls, one completed to a parent or guardian, responsible adult, or employer and one to an attorney.

In the case of *In re Joseph H* (2015) 200 Cal.Rptr.3d 1, Justice Goodwin Liu protested the Court's vote against hearing a case in which a 10-year-old child was deemed capable of waiving his right to remain silent. His dissenting statement, in part, stated that the Legislature may wish to take up the issue of the proper application of *Miranda* to young children.

Proposed Law: This bill would:

- Require that, prior to a custodial interrogation and before the waiver of any *Miranda* rights, a youth under 18 years of age consults with counsel.
- Provide that the consultation with counsel cannot be waived.
- Allow the consultation with counsel to be in person, or by telephone or video conference.
- Require that the court, in adjudicating the admissibility of statements of youth under 18 years of age made during or after a custodial interrogation, consider the effect of failure to comply with the consultation to counsel requirement.
- Provide that the consultation requirement does not apply to the admissibility of statements of a youth under 18 years of age if both of the following criteria are met:
    - The officer who questioned the suspect reasonably believed the information he or she sought was necessary to protect life or property from a substantial threat.
    - The officer's questions were limited to those questions that were reasonably necessary to obtain this information.
- Provide that the consultation is not applicable to a probation officer when in the normal performance of specified duties.

Prior Legislation: SB 1052 (Lara, 2016) was identical to this bill. It was vetoed by the Governor with the following message:

> This bill presents profoundly important questions involving the constitutional right not to incriminate oneself and the ability of the police to interrogate juveniles. Ever since 1966, the rule has been that interrogations of criminal suspects be preceded by the *Miranda* warning of the right to remain silent and the right to have an attorney.
>
> In more cases than not, both adult and juvenile suspects waive these rights and go on to answer an investigator's questions. Courts uphold these "waivers" of rights as long as the waiver is knowing and voluntary. It is rare for a court to invalidate such a waiver.
>
> Recent studies, however, argue that juveniles are more vulnerable than adults and easily succumb to police pressure to talk instead of remaining

silent. Other studies show a much higher percentage of false confessions in the case of juveniles.

On the other hand, in countless cases, police investigators solve very serious crimes through questioning and the resulting admissions or statements that follow.

These competing realities raise difficult and troubling issues and that is why I have consulted widely to gain a better understanding of what is at stake. I have spoken to juvenile judges, police investigators, public defenders, prosecutors and the proponents of this bill. I have also read several research studies cited by the proponents and the most recent cases dealing with juvenile confessions.

After carefully considering all the above, I am not prepared to put into law SB 1052's categorical requirement that juveniles consult an attorney before waiving their *Miranda* rights. Frankly, we need a much fuller understanding of the ramifications of this measure.

In the coming year, I will work with proponents, law enforcement and other interested parties to fashion reforms that protect public safety and constitutional rights. There is much to be done.

-- END --

Date of Hearing: August 5, 2020
Counsel: Matthew Fleming

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 203 (Bradford) – As Amended July 27, 2020

SUMMARY: Expands and extends protections for minors prior to custodial interrogation by law enforcement. Specifically, **this bill**:

1) Requires that prior to any custodial interrogation and before the waiver of any Miranda rights, a youth of 17 years or younger must consult with legal counsel in person, by telephone, or by video conference.

2) Prohibits the waiver of such consultation with legal counsel.

3) Requires the court to consider a lack of consultation with legal counsel for the purposes of determining the admissibility of any statements made to law enforcement, as well as in determining the credibility of any officer who willfully failed to comply with the consult requirement.

4) Eliminates the sunset date of January 1, 2025 for similar protections that applied only to minors under the age of 16, making them permanent.

5) Eliminates the requirement that the Governor convene a panel of experts to examine the effects and outcomes of requiring minors under the age of 16 to consult with counsel prior to any interrogation or Miranda waiver.

6) Makes legislative findings and declarations.

EXISTING FEDERAL LAW: States that no person shall "be compelled in any criminal case to be a witness against himself." (U.S. Const. Amend. V.)

EXISTING LAW:

1) States that persons may not be compelled in a criminal cause to be a witness against themselves. (Cal. Const., Art. I, Sec. 15.)

2) Requires, prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. Prohibits waiver of the consultation. (Welf. and Inst. Code, § 625.6, subd. (a).)

3) Requires the court, in adjudicating the admissibility of statements of a youth 15 years of age or younger made during or after a custodial interrogation, to consider the effect of failure to

comply with the consultation requirement. (Welf. and Inst. Code, § 625.6, subd. (b).)

4) Specifies that the consultation requirement does not apply to the admissibility of statements of a youth 15 years of age or younger if both of the following criteria are met:

   a) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat; and

   b) The officer's questions were limited to those questions that were reasonably necessary to obtain that information. (Welf. and Inst. Code, § 625.6, subd. (c).)

5) Exempts probation officers from complying with the consultation requirement in their normal course of duties, as specified. (Welf. and Inst. Code, § 625.6, subd. (d).)

6) Requires the Governor to convene a panel of experts to study the effects and outcomes related to the implementation of the consultation requirement and produce a report by January 1, 2024. (Welf. and Inst. Code, § 625.6, subd. (e).)

7) Sunsets the consultation requirement on January 1, 2025. (Welf. and Inst. Code, § 625.6, subd. (f).)

8) Provides that a peace officer may, without a warrant, take into temporary custody a minor. (Welf. & Inst. Code, § 625)

9) Provides that in any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor will be adjudged a ward of the court or charged with a criminal action, or that he has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer shall advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, including his right to remain silent, his right to counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. (Welf. & Inst. Code, § 625, subd. (c).)

10) Provides that when a minor is taken into a place of confinement the minor shall be advised that he has the right to make at least two telephone calls, one completed to a parent or guardian, or a responsible relative, or employer and one to an attorney. (Welf. & Inst. Code, § 627.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "People can decide to give up their rights, but for that to be meaningful, they have to understand their rights. What we know now is children and youth have less capacity than adults to quickly grasp complicated concepts and understand the consequences of their actions especially in stressful circumstances like a custodial interrogation. If we ignore that fact, we undermine the justice system and ultimately the constitution.

"In practice, the system is flawed and can result in serious disproportionate consequences for youth. Most youth can understand their rights and what a waiver means, but what is needed to help them understand is different than what most adults need. SB 203 would ensure young people understand their rights."

2) **Miranda Warnings**: "Miranda warnings" are a series of admonitions that are typically given by police prior to interrogating a suspect of a crime. The purpose of Miranda warnings is to advise people that have been arrested of their constitutional right against self-incrimination. They are the product of the landmark Supreme Court decision *Miranda v. Arizona* (1966) 384 U.S. 436. In deciding that case, the Supreme Court imposed specific, constitutional requirements for the advice an officer must provide prior to engaging in custodial interrogation and held that statements taken without these warnings are inadmissible against the defendant in a criminal case.

   The Court summarized its decision as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (*Id.* at 444-45.)

   Put more simply, "Miranda warnings" are meant to inform people who are arrested of their constitutional right not to be a witness against themselves. Police are not required to speak a specific set of words but generally must convey that the person has the right not to answer any questions, that anything the person does say can be used against them as evidence in a court of law, that the person has the right to an attorney, that if the person cannot afford an attorney one will be appointed at no cost, and that the person has the right to invoke these rights at any point in time during questioning.

3) **Custodial Interrogation**: In order for Miranda warnings to apply, an individual must be subjected to "custodial interrogation." Custodial interrogation is a legal term of art that has been discussed in a prolific body of case law. Briefly stated, the term "custodial" refers to the suspect being in the custody of law enforcement. It does not require that the subject be in handcuffs or the back of a police car, but rather that the police have deprived the suspect of his or her freedom of action in some significant way. (*R.I. v. Innis* (1980) 446 U.S. 291, 298.) "Interrogation" relates to questioning by officers. Such questioning can be in the form

of an officer asking the suspect direct questions, or it can be indirect in the form of comments or actions by the officer that the officer should know are likely to produce an incriminating reply. (*Id.* at 300-01.)

It is worth noting that there are several situations in which Miranda warnings, and therefore protections envisioned by this bill, would not apply. For example, spontaneous statements by a suspect are not considered to be the product of interrogation and therefore do not require Miranda warnings. (*Id.*) There also exceptions to Miranda rule. One important exception is known as the "public safety" exception and allows police to ask questions of a suspect even in the absence of a Miranda waiver so long as they are "reasonably prompted by a concern for the public safety." (*N.Y. v. Quarles* (1984) 467 U.S. 649, 656.) Under this exception, police could question a subject about a firearm that was left near a playground or the whereabouts of a missing person without having to first "mirandize" the suspect. (*Id.*)

4) **Special Considerations for Youth**: A growing body of research indicates that adolescents are less capable of understanding their constitutional rights than their adult counterparts, and also that they are more prone to falsely confessing to a crime they did not commit. (*See* Luna, *Juvenile False Confessions*: *Juvenile Psychology, Police Interrogation Tactics, And Prosecutorial Discretion* (2018) 18 Nev. L.J. 291, available at: https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1733&context=nlj, [as of Jul. 16, 2020].) The research suggests that "[b]ecause adolescents are more impulsive, are easily influenced by others (especially by figures of authority), are more sensitive to rewards (especially immediate rewards), and are less able to weigh in on the long-term consequences of their actions, they become more receptive to coercion." (*Id.* at 297, *citing* various scientific journals.) The context of custodial interrogation is believed to exacerbate these risks. In fact, prior research has shown that 35 percent of proven false confessions were obtained from suspects under the age of 18. (Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004), 82 N. C. L. Rev. 891, 906–907, available at: https://scholarship.law.unc.edu/nclr/vol82/iss3/3/, [as of Jul. 16, 2020].) As explained below, these considerations have caused this Legislature to approve measures in the past that would have required a minor to consult with an attorney prior to any waiver of Miranda rights.

   a) *SB 1052 and Governor Brown's Veto Message*: SB 1052 (Lara) of the 2015-2016 Legislative Session was similar to this bill in that it would have required minors under the age of 18 to consult with an attorney prior to any custodial interrogation by a police officer. SB 1052 was passed by both houses, but was ultimately vetoed by Governor Brown. In his veto message Governor Brown stated:

      > "This bill presents profoundly important questions involving the constitutional right not to incriminate oneself and the ability of the police to interrogate juveniles. Ever since 1966, the rule has been that interrogations of criminal suspects be preceded by the *Miranda* warning of the right to remain silent and the right to have an attorney.
      >
      > "In more cases than not, both adult and juvenile suspects waive these rights and go on to answer an investigator's questions. Courts uphold these 'waivers' of rights as long as the waiver is knowing and voluntary. It is rare for a court to invalidate such a waiver.

> "Recent studies, however, argue that juveniles are more vulnerable than adults and easily succumb to police pressure to talk instead of remaining silent. Other studies show a much higher percentage of false confessions in the case of juveniles.
>
> "On the other hand, in countless cases, police investigators solve very serious crimes through questioning and the resulting admissions or statements that follow.
>
> "These competing realities raise difficult and troubling issues and that is why I have consulted widely to gain a better understanding of what is at stake. I have spoken to juvenile judges, police investigators, public defenders, prosecutors and the proponents of this bill. I have also read several research studies cited by the proponents and the most recent cases dealing with juvenile confessions.
>
> "After carefully considering all the above, I am not prepared to put into law SB 1052's categorical requirement that juveniles consult an attorney before waiving their *Miranda* rights. Frankly, we need a much fuller understanding of the ramifications of this measure.
>
> "In the coming year, I will work with proponents, law enforcement and other interested parties to fashion reforms that protect public safety and constitutional rights. There is much to be done."

In the year immediately after SB 1052 was vetoed, the legislature passed, and Governor Brown signed, SB 395.

b) *SB 395 (Lara) Chapter 681, Statutes of 2017***:** SB 395, in its final version, provided that a youth who is age 15 or younger is required to consult with counsel prior to waiving his or her Miranda rights. This consultation cannot be waived. In passing SB 395, the Legislature made findings and decelerations that "[p]eople under 18 years of age have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver" and that "a large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions." As introduced, SB 395 was nearly identical to this bill and included 16 and 17 year olds. SB 395 was amended on the Assembly floor on September 17, 2017. With those amendments, SB 395 excluded 16 and 17 year olds and imposed a requirement that the Governor convene an unpaid panel of experts to review the implementation of SB 395, examine its outcomes and effects, and generate a report for the Governor and the Legislature. This bill would effectively undo the final set of amendments to SB 395 by including 16 and 17 year olds in the protections from custodial interrogation and eliminating the governor-appointed panel of experts.

5) **San Francisco Ordinance**: In 2018, the City and County of San Francisco enacted an ordinance that required its police department to abide by a policy that is substantially similar to this bill. (San Francisco City and County Ordinance No. 41-19, available at: https://sfbos.org/sites/default/files/o0041-19.pdf, [as of Jul. 16, 2020].) The background and

findings for adopting the ordinance contain citations to various publications that indicate there is a significant concern that youth may be unable to properly understand their rights, and may also falsely confess more often than adults. (*Id.* at pp. 1-3.)

6) **Officer Credibility Determination**: In addition to the expansion of Miranda waiver protections for minors age 16 and 17, this bill would also require a court to consider an officer's willful failure to comply with those protections in determining credibility of the officer. Even without this explicit provision in the bill, a court would likely consider any officer's willful non-compliance with state law when judging the officer's credibility.

7) **Argument in Support**: According to the bill's co-sponsor, the *Pacific Juvenile Defender Center*, "In our experience, youth who are 16 or 17 years of age are similarly in need of legal advice before they can meaningfully decide whether to waive their constitutional rights and talk to the police. The adolescent brain continues to develop slowly into the mid-twenties, and until then, youth can be overwhelmed by emotional and social responses, contributing to short-sighted choices. (Scott, Duell and Steinberg, Brain Development, Social Context and Justice Policy, 57 Wash. U. J. of Law & Pol'y (2018), p. 11.) Because police are allowed to lie and use trickery, fundamental fairness requires that youth up to the age of majority receive the advice of counsel before deciding whether to speak to the police - to assure that any statements are given voluntarily, with an understanding of the rights at stake.

"The United States Supreme Court recognized the 'incompetencies of youth' in their dealings with the police in *J.D.B. v. North Carolina* (2011) 564 U.S. 261. In recognizing the need for special rules for juveniles in deciding when Miranda warnings must be given, the Court spoke of the inherently coercive character of juveniles' interactions with the police. It noted that, 'children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.' Not surprisingly, a huge proportion of statements later found involuntary by the appellate courts involve juvenile confessions.

"Even youth who can recite the Miranda warnings by heart, often do not understand the words or legal concepts. A review of Miranda studies found that:

- Even among adults, one-third fail to meaningfully understand their 'right' as it applies to their right to silence.

- About 27 percent of juveniles wrongly believe that unsigned waivers afford them complete protection from incriminating evidence.

- Forty-two percent of juveniles falsely believe that interrogating officers are prevented from using "off-the-record" disclosures as incriminating evidence.

- About 19 percent of juvenile offenders inaccurately believe that the judge is entitled to a defense attorney's disclosures regarding his or her client's guilt; this percentage increases dramatically to 56 percent with regard to court-appointed counsel.

- Nearly 31 percent of juvenile detainees believe that their parents have a legal responsibility to assist the police in prosecuting them. (Drogin and Rogers, Criminal Justice: Juveniles and Miranda, 32 GPSolo (2015), pp. 70–71.)

"San Francisco County has already enacted an ordinance requiring that youth up to age 18 be advised by an attorney before a police interrogation may proceed. One of the motivations for the ordinance was the County Supervisors' recognition that states and cities nationwide are rethinking the way minors are questioned by police, following high-profile incidents in which suspects have falsely confessed to crimes. (Sernoffsky, Proposed SF ordinance would require juveniles to have lawyers when interrogated, San Francisco Chronicle (Dec. 18, 2019).) The Supervisors unanimously passed the ordinance. (St. Clair, SF Board of Supervisors unanimously passes Jeff Adachi Youth Rights ordinance, San Francisco Chronicle (Mar. 1, 2019).)

"Aside from the tremendous harm caused to young people by wrongful conviction based on involuntary statements, the cost to the system may be enormous. An analysis of the cost of wrongful conviction in California found that improper police practices in relation to violations of rights in confessions carry an average cost of $620,832 per error. (Silbert, Hollway, and Larizadeh, Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System, Chief Justice Earl Warren Institute on Law and Social Policy, Berkeley School of Law (2015), p. 52.) And sadly, the rate of juvenile appellate challenges is extremely low, so many involuntary statements go unchallenged.

"As lawyers representing children, we so often meet young people who have no idea about the impact of what they have said to the police. The vast majority are youth of color whose families lack the resources to immediately hire a lawyer to go to the police station. When these youth realize what has happened, they lose faith that the system will treat them fairly. In providing 16 and 17-year-olds with the advice of counsel, some will still decide to waive their Miranda rights if this bill becomes law, but the decision will be made with a clear understanding of the rights they are giving up.

"As was the case with S.B. 395, this legislation will not impede legitimate law enforcement activities. It does not change longstanding exceptions to Miranda requirements for emergency situations. It leaves the determination of whether a confession is voluntary and therefore admissible at trial to the discretion of the judge. Advice may be given over the telephone or by video conference, as well as in person, so there should be no delay in law enforcement activities. We are not aware of any undue expense having been experienced in implementing S.B. 395. The law already requires that youth receive appointed counsel at the time of their initial detention hearing, so requiring the advice of counsel at the interrogation stage simply requires that counsel be involved at an earlier point."

8) **Argument in Opposition**: According to the *California State Sheriffs' Association*: "Existing law provides, until January 1, 2025, prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. Under current law, this consultation may not be waived. In opposing SB 395 (Chapter 681, Statutes of 2017), which created this provision, we argued that the bill exceeded what the United States Supreme Court had required on the matter. Law enforcement may simply want to talk to a minor, and even if the parent or guardian is notified in advance, this discussion would have to wait until counsel could consult with the minor if there was a chance that the interaction could fall under the

bill's undefined umbrella of a custodial interrogation. By expanding the bill's reach to minors 17 years of age or younger, this problem is exacerbated.

"We must also object to the bill because it seeks to make these provisions permanent without the full benefit of the temporary 'trial' period included in SB 395. Further, SB 203 eliminates the requirement that a panel be convened to examine the impacts of this law. We see no reason to expand this problematic program indefinitely while removing any notion that the program's outcomes will be the subject of appropriate review."

9) **Prior Legislation**:

a) SB 395 (Lara) Chapter 681, Statutes of 2017 was similar to this bill and required that a youth 15 years of age or younger consult with legal counsel in person, by telephone, or by video conference prior to a custodial interrogation and before waiving any of the above-specified rights.

b) SB 1052 (Lara), of the 2015-2016 Legislative Session, was similar to this bill in that it would have required that a youth under the age of 18 consult with counsel prior to a custodial interrogation and before waiving any specified rights. SB 1052 was vetoed by Governor Brown.

REGISTERED SUPPORT / OPPOSITION:

Support

#cut50
Alameda; City of
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Anti Recidivism Coalition
California Attorneys for Criminal Justice
California Department of Insurance
California Public Defenders Association
Californians for Safety and Justice
Center on Juvenile and Criminal Justice
Ceres Policy Research
Children Now
Children's Defense Fund-california
Coalition for Engaged Education
Communities United for Restorative Youth Justice (CURYJ)
Drug Policy Alliance
Ella Baker Center for Human Rights
Everychild Foundation
F.u.e.l.- Families United to End Lwop
Human Rights Watch
Immigrant Legal Resource Center
Initiate Justice
John Burton Advocates for Youth
Los Angeles County Chief Executive Office

National Association of Social Workers, California Chapter
National Center for Youth Law
Pacific Juvenile Defender Center
Re:store Justice
San Francisco District Attorney's Office
Silicon Valley De-bug
The Greenlining Institute
The Unusual Suspects Theatre Company
The W. Haywood Burns Institute
Tides Advocacy
Unapologetically Hers
Underground Grit
Youth Law Center

Oppose

California District Attorneys Association
California State Sheriffs' Association
Orange County District Attorney

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: August 18, 2020

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Lorena Gonzalez, Chair
SB 203 (Bradford) – As Amended July 27, 2020

Policy Committee: Public Safety Vote: 6 - 1

Urgency: No State Mandated Local Program: No Reimbursable: No

SUMMARY:

This bill requires law enforcement to provide a person 17 years of age or younger access to legal counsel before the person waives their Miranda rights. Specifically, this bill:

1) Requires a court to consider a lack of consultation with legal counsel for the purposes of determining the admissibility of any statements made to law enforcement.

2) Eliminates the sunset date of January 1, 2025 for similar protections that applied only to minors under the age of 16, making them permanent.

3) Eliminates the requirement that the Governor convene a panel of experts to examine the effects and outcomes of requiring minors under the age of 16 to consult with counsel prior to any interrogation or Miranda waiver.

FISCAL EFFECT:

Cost pressures (Local Funds/General Fund (GF) - Proposition 30) in the low millions of dollars annually for 482 cities and 58 counties to provide legal counsel to minors ages 16 and 17 prior to custodial interrogations. The Department of Justice (DOJ) reported approximately 43,000 juvenile arrests in 2019. The average hourly rate for attorneys in California is approximately $250. If 10%, or 4,300 of those arrested as juveniles are 16 or 17 years of age, annual costs across the state for legal services will be approximately $2.2 million dollars. Public defender costs vary across the state but, in most cases, suspects are not required to pay any fee for public defender services. These costs may be reimbursable by the state pursuant to requirements of Proposition 30. Costs to the GF will depend on whether the Commission on State Mandates determines these costs to be reimbursable.

COMMENTS:

1) P**urpose**. According to the author:

> People can decide to give up their rights, but for that to be meaningful, they have to understand their rights. What we know now is children and youth have less capacity than adults to quickly grasp complicated concepts and understand the consequences of their actions especially in stressful circumstances like a custodial interrogation. If we ignore that fact, we undermine the justice system and ultimately the Constitution.

2) **Juvenile Interrogations.** Existing law requires that, prior to any custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger must consult with legal counsel in person, by telephone or by video conference. This right cannot be waived. A custodial interrogation occurs when a suspect is questioned by police and is not free to leave. A growing body of research indicates that adolescents are less capable of understanding their constitutional rights than their adult counterparts, and also that they are more prone to falsely confessing to a crime they did not commit. The Legislature enacted SB 395 (Lara), Chapter 681, Statutes of 2017, which provided mandatory counsel to juveniles 15 years of age or under before they could waive their Miranda rights. Part of that statute also convened a taskforce of experts to consider the impact of providing counsel to juveniles under the age of 16. That panel has not yet reported back to the Legislature regarding its findings.

3) Prior Legislation. SB 1052 (Lara), of the 2015-2016 Legislative Session, was similar to this bill in that it would have required that a youth under the age of 18 consult with counsel prior to a custodial interrogation and before waiving any specified rights. SB 1052 was vetoed by Governor Brown.

Analysis Prepared by: Kimberly Horiuchi / APPR. / (916) 319-2081

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 203
Author: Bradford (D), et al.
Amended: 7/27/20
Vote: 21

PRIOR VOTES NOT RELEVANT

ASSEMBLY FLOOR: 54-13, 8/30/20 - See last page for vote

SUBJECT: Juveniles: custodial interrogation

SOURCE: Anti-Recidivism Coalition
Human Rights Watch
National Center for Youth Law
Pacific Juvenile Defender Center

DIGEST: This bill expands and extends protections for minors prior to a custodial interrogation by a law enforcement officer.

Assembly Amendments delete the prior content of this bill and replace it with new provisions detailed below.

ANALYSIS: Existing federal law provides that no person shall "be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.)

Existing state law:

1) Provides that persons may not be compelled in a criminal cause to be a witness against themselves. (Cal. Const., art. I, § 15.)

2) Provides that a peace officer may, without a warrant, take into temporary custody a minor. Requires in any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor will be adjudged a ward of the court or charged with a criminal action, or that he has violated an order of the juvenile court or escaped from any

commitment ordered by the juvenile court, the officer to advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, including his right to remain silent, his right to counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. (Welf. & Inst. Code, § 625.)

3) Requires, prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger consult with legal counsel in person, by telephone, or by video conference. Prohibits waiver of the consultation. (Welf. & Inst. Code, § 625.6, subd. (a).)

4) Requires the court, in adjudicating the admissibility of statements of a youth 15 years of age or younger made during or after a custodial interrogation, to consider the effect of failure to comply with the consultation requirement. (Welf. & Inst. Code, § 625.6, subd. (b).)

5) Specifies that the consultation requirement does not apply to the admissibility of statements of a youth 15 years of age or younger if both of the following criteria are met:

   a) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat; and
   b) The officer's questions were limited to those questions that were reasonably necessary to obtain that information. (Welf. & Inst. Code, § 625.6, subd. (c).)

6) Exempts probation officers from complying with the consultation requirement in the normal course of their duties, as specified. (Welf. & Inst. Code, § 625.6, subd. (d).)

7) Requires the Governor to convene a panel of experts to study the effects and outcomes related to the implementation of the consultation requirement and requires the panel to produce a report by April 1, 2024. (Welf. & Inst. Code, § 625.6, subd. (e).)

8) Provides that the consultation requirement sunsets on January 1, 2025. (Welf. & Inst. Code, § 625.6, subd. (f).)

9) Requires, when a minor is taken into a place of confinement, the minor be advised that the minor has the right to make at least two telephone calls, one completed to a parent or guardian, or a responsible relative, or employer and one to an attorney. (Welf. & Inst. Code, § 627.)

This bill:

1) Requires that prior to any custodial interrogation and before the waiver of any Miranda rights, a youth of 17 years or younger must consult with legal counsel in person, by telephone, or by video conference.

2) Prohibits the waiver of such consultation with legal counsel.

3) Requires the court to consider a lack of consultation with legal counsel for the purposes of determining the admissibility of any statements made to law enforcement, as well as in determining the credibility of any officer who willfully failed to comply with the consult requirement.

4) Eliminates the sunset date of January 1, 2025, for similar protections that applied only to minors under the age of 16, making them permanent.

5) Eliminates the requirement that the Governor convene a panel of experts to examine the effects and outcomes of requiring minors under the age of 16 to consult with counsel prior to any interrogation or Miranda waiver.

6) Makes various legislative findings and declarations.

Background

Miranda Warnings. "Miranda warnings" are a series of admonitions that are typically given by police prior to interrogating a suspect of a crime. The purpose of Miranda warnings is to advise people that have been arrested of their constitutional right against self-incrimination. They are the product of the landmark Supreme Court decision *Miranda v. Arizona* (1966) 384 U.S. 436. In deciding that case, the Supreme Court imposed specific, constitutional requirements for the advice an officer must provide prior to engaging in custodial interrogation and held that statements taken without these warnings are inadmissible against the defendant in a criminal case. The Court summarized its decision as follows:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (*Id*. at 444-45.)

Put more simply, "Miranda warnings" are meant to inform people who are arrested of their constitutional right not to be a witness against themselves. Police are not required to speak a specific set of words but generally must convey that the person has the right not to answer any questions, that anything the person does say can be used against them as evidence in a court of law, that the person has the right to an attorney, that if the person cannot afford an attorney one will be appointed at no cost, and that the person has the right to invoke these rights at any point in time during questioning.

Custodial Interrogation. In order for Miranda warnings to apply, an individual must be subjected to "custodial interrogation." Custodial interrogation is a legal term of art that has been discussed in a prolific body of case law. Briefly stated, the term "custodial" refers to the suspect being in the custody of law enforcement. It does not require that the subject be in handcuffs or the back of a police car, but

rather that the police have deprived the suspect of his or her freedom of action in some significant way. (*R.I. v. Innis* (1980) 446 U.S. 291, 298.) "Interrogation" relates to questioning by officers. Such questioning can be in the form of an officer asking the suspect direct questions, or it can be indirect in the form of comments or actions by the officer that the officer should know are likely to produce an incriminating reply. (*Id*. at 300-01.)

It is worth noting that there are several situations in which Miranda warnings, and therefore protections envisioned by this bill, would not apply. For example, spontaneous statements by a suspect are not considered to be the product of interrogation and therefore do not require Miranda warnings. (*Id*.) There are also exceptions to Miranda rule. One important exception is known as the "public safety" exception and allows police to ask questions of a suspect even in the absence of a Miranda waiver so long as they are "reasonably prompted by a concern for the public safety." (*N.Y. v. Quarles* (1984) 467 U.S. 649, 656.) Under this exception, police could question a subject about a firearm that was left near a playground or the whereabouts of a missing person without having to first "mirandize" the suspect. (*Id*.)

Special Considerations for Youth. A growing body of research indicates that adolescents are less capable of understanding their constitutional rights than their adult counterparts, and also that they are more prone to falsely confessing to a crime they did not commit. (*See* Luna, *Juvenile False Confessions*: *Juvenile Psychology, Police Interrogation Tactics, And Prosecutorial Discretion* (2018) 18 Nev. L.J. 291, <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1733&context=nlj [as of Jul. 16, 2020].) The research suggests that "[b]ecause adolescents are more impulsive, are easily influenced by others (especially by figures of authority), are more sensitive to rewards (especially immediate rewards), and are less able to weigh in on the long-term consequences of their actions, they become more receptive to coercion." (*Id*. at p. 297, *citing* various scientific journals.) The context of custodial interrogation is believed to exacerbate these risks. In fact, prior research has shown that 35 percent of proven false confessions were obtained from suspects under the age of 18. (Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N. C. L. Rev. 891, pp. 906–907, <https://scholarship.law.unc.edu/nclr/vol82/iss3/3/ [as of Jul. 16, 2020].) As explained below, these considerations have caused this Legislature to approve measures in the past that would have required a minor to consult with an attorney prior to any waiver of Miranda rights.

In 2016, the Legislature passed SB 1052 (Lara), which would have required minors under the age of 18 to consult with an attorney prior to any custodial interrogation by a police officer. Governor Brown vetoed the bill. A similar measure that was ultimately enacted, SB 395 (Lara, Chapter 681, Statutes of 2017), was introduced the following year. As introduced, SB 395 was nearly identical to this bill and included 16 and 17 year olds. However, Assembly Floor amendments excluded 16 and 17 year olds and imposed a requirement that the Governor convene a panel of experts to review the implementation of SB 395, examine its outcomes and effects, and submit a report to the Governor and the Legislature. This bill will undo some provisions of the statute enacted by SB 395 by including 16 and 17 year olds in the protections from custodial interrogation and eliminating the Governor-appointed panel of experts.

San Francisco Ordinance. In 2018, the City and County of San Francisco enacted an ordinance that required its police department to abide by a policy that is substantially similar to this bill. (San Francisco City and County Ordinance No. 41-19 <https://sfbos.org/sites/default/files/o0041-19.pdf [as of Jul. 16, 2020].) The background and findings for adopting the ordinance contain citations to various publications that indicate there is a significant concern that youth may be unable to properly understand their rights, and may also falsely confess more often than adults. (*Id*. at pp. 1-3.)

Officer Credibility Determination. In addition to the expansion of Miranda waiver protections for minors who are 16 and 17 years old, this bill also requires a court to consider an officer's willful failure to comply with those protections in determining credibility of the officer.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, cost pressures (Local Funds/General Fund (GF) - Proposition 30) in the low millions of dollars annually for 482 cities and 58 counties to provide legal counsel to minors ages 16 and 17 prior to custodial interrogations. The Department of Justice reported approximately 43,000 juvenile arrests in 2019. The average hourly rate for attorneys in California is approximately $250. If 10%, or 4,300 of those arrested as juveniles are 16 or 17 years of age, annual costs across the state for legal services will be approximately $2.2 million dollars. Public defender costs vary across the state but, in most cases, suspects are not required to pay any fee for public defender services. These costs may be reimbursable by the state pursuant to requirements of Proposition 30. Costs

to the GF will depend on whether the Commission on State Mandates determines these costs to be reimbursable.

SUPPORT: (Verified 8/29/20)

Anti-Recidivism Coalition (co-source)
Human Rights Watch (co-source)
National Center for Youth Law (co-source)
Pacific Juvenile Defender Center (co-source)
#cut50
ACLU of California
California Attorneys for Criminal Justice
California Department of Insurance
California Public Defenders Association
Californians for Safety and Justice
Center on Juvenile and Criminal Justice
Ceres Policy Research
Children Now
Children's Defense Fund-California
City of Alameda
Coalition for Engaged Education
Communities United for Restorative Youth Justice
Drug Policy Alliance
Ella Baker Center for Human Rights
Everychild Foundation
Families United to End LWOP
Immigrant Legal Resource Center
Initiate Justice
John Burton Advocates for Youth
Los Angeles County Chief Executive Office
National Association of Social Workers, California Chapter
Re:Store Justice
San Francisco District Attorney's Office
Silicon Valley De-Bug
Tides Advocacy
Unapologetically H.E.R.S.
Underground Grit
Unusual Suspects Theatre Company
W. Haywood Burns Institute
Youth Law Center

OPPOSITION: (Verified 8/29/20)

California District Attorneys Association
California State Sheriffs' Association
Los Angeles County District Attorney's Office
Orange County District Attorney's Office

ASSEMBLY FLOOR: 54-13, 8/30/20
AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bloom, Boerner Horvath, Bonta, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Chu, Cooley, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Grayson, Holden, Jones-Sawyer, Kalra, Kamlager, Levine, Limón, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Reyes, Luz Rivas, Robert Rivas, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Waldron, Weber, Wood, Rendon
NOES: Bigelow, Brough, Chen, Choi, Cunningham, Flora, Gallagher, Kiley, Lackey, Mathis, Mayes, Obernolte, Patterson
NO VOTE RECORDED: Cooper, Megan Dahle, Daly, Diep, Eggman, Fong, Frazier, Irwin, Ramos, Rodriguez, Voepel, Wicks

Prepared by: Stephanie Jordan / PUB. S. /
8/31/20 0:45:10

****** END ******

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 264.2, 13519 and 13701; Statutes 1998, Chapters 698, 701 and 702 Filed on May 21, 1999 By County of Los Angeles, Claimant	No. 98-TC-14 ***Domestic Violence Arrests and Victim Assistance*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on December 9, 2004)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

_____ _____

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 264.2, 13519 and 13701; Statutes 1998, Chapters 698, 701 and 702 Filed on May 21, 1999 By County of Los Angeles, Claimant	No. 98-TC-14 ***Domestic Violence Arrests and Victim Assistance*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on December 9, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 9, 2004. Leonard Kaye appeared on behalf of the claimant, County of Los Angeles. Susan Geanacou and Brendan Murphy appeared on behalf of the Department of Finance (DOF).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

A. Test Claim Legislation

In 1998, the Legislature enacted the test claim legislation to amend three Penal Code sections[1] that address domestic violence. Section 264.2[2] requires law enforcement officers who investigate and assist victims of specified sex crimes to, among other things, give the victim a victim of domestic violence card. The test claim statute adds two crimes for which a victim card is given. The new groups to receive a card are victims of spousal battery, and victims of corporal injury on a spouse or other specified victim.

Section 13519[3] requires the Commission on Peace Officer Standards and Training (POST) to implement a domestic violence basic training course and response guidelines with content as specified.[4] The test claim statute adds subdivision (c)(5), "[t]he signs of domestic violence" to the

[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] Section 264.2 was amended by Statutes 1998, chapter 698 (see §§ 1.5 & 4 of ch. 698).

[3] Section 13519 was amended by Statutes 1998, chapter 701.

[4] See <http://www.post.ca.gov/training/tps_bureau/domestic_violence/domestic-violence-manual_wv.pdf> (as of September 24, 2004).

course content and response guidelines. Section 13519, subdivision (e), also requires supplementary training as prescribed and certified by POST. Subdivision (g) requires nonsupervisory officers who are "assigned to patrol duties and would normally respond to domestic violence calls"[5] to complete, every two years, an updated domestic violence course that includes the specified content of the response guidelines and basic training course.

Section 13701,[6] which contains the policies and standards for officers' responses to domestic violence calls, was amended by Statutes 1998, chapter 702.[7] Chapter 702 amends the policies and standards for assisting domestic violence victims at the scene and the information given to the victim. Specifically, it adds to law enforcement's domestic violence policy: (1) transportation to a hospital and safe passage out of the victim's residence, and (2) contact information for the California victims' compensation program. It also adds two provisions to the content of the victim card: (1) phone numbers or county hotlines for local battered-women shelters, and (2) a statement that domestic violence or assault by a person known to the victim, including domestic violence or assault by the victim's spouse, is a crime. Further, the test claim statute amends subdivision (b) of section 13701 by adding orders issued by other states, tribes or territories to the list of enforceable protective orders in the domestic violence arrest policy.

B. Prior Related Commission Decisions

The Commission has issued five decisions on prior versions of these test claim statutes within the past 17 years, as follows.

1. Penal Code section 13519 – Domestic Violence Training

Domestic Violence Training test claim: In 1991, the Commission denied a test claim filed by the City of Pasadena requiring new and veteran peace officers to complete a course in how to handle domestic violence complaints as part of their basic training and continuing education courses (*Domestic Violence Training*, CSM-4376).[8] The Commission found that the test claim legislation: (1) does not require local agencies to implement a domestic violence training program and to pay the cost of the training; (2) does not increase the minimum number of basic training hours, nor the minimum number of advanced officer training hours, so no additional costs are incurred by local agencies; and (3) does not require local agencies to provide domestic violence training.

Domestic Violence Training and Incident Reporting test claim: In 1998, the Commission decided the *Domestic Violence Training and Incident Reporting* test claim (96-362-01), finding that Penal Code section 13519, subdivision (e)[9] (amended by Stats. 1995, ch. 965) is not a reimbursable state-mandated program. This statute requires local law enforcement officers below the rank of supervisor who normally respond to domestic violence calls to complete an updated domestic violence course every two years. The Commission found that because law enforcement officers are

[5] Penal Code section 13519, subdivision (g).

[6] Section 13701 was amended by Statutes 1998, chapter 702 (§§ 3.3 & 6, subd. (c)).

[7] Claimant originally pled Statutes 1998, chapters 698 and 701, but amended the test claim to add Statutes 1998, chapter 702.

[8] Penal Code section 13519, subdivisions (b) and (c) (Stats. 1984, ch. 1609).

[9] This is currently section 13519, subdivision (g) as amended by Statutes 1998, chapter 701.

already required to take 24 hours of continuing education every two years, requiring the two-hour course as part of the 24-hour requirement does not impose increased costs mandated by the state.

The Commission's decision was upheld by the Second District Court of Appeal in *County of Los Angeles v. California Department of Finance,* holding that the statute did not impose a reimbursable state-mandated program because it merely "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[10]

2. Penal Code section 13701 – Domestic Violence Response and Arrest Policies

Domestic Violence test claim [response policies]: In 1987, the Commission adopted the *Domestic Violence* Statement of Decision (CSM-4222), finding that the test claim statutes[11] are state-mandated programs that require local law enforcement agencies to: "develop, adopt and implement policies and standards for officer's responses to domestic violence calls; … [maintain] records and recording systems, and … [provide] specific written information … to victims of domestic violence." The Commission's parameters and guidelines allowed reimbursement for, among other things: (1) development, adoption and implementation of a domestic violence policy; (2) preparing a statement of information for incidents of domestic violence and giving it to victims (not including the victim card[12]); and (3) reporting to the Attorney General. Furnishing the victim with written information when responding to domestic violence incidents is also reimbursable.

Except for the 2003-2004 fiscal year, however, the Legislature has suspended these activities (the *Domestic Violence* mandate, Stats. 1984, ch. 1609) every year since the current test claim statute's operative date (January 1, 1999) based on authority in Government Code section 17581.[13]

Domestic Violence Arrest Policies and Standards test claim: In 1997, the Commission adopted the *Domestic Violence Arrest Policies and Standards* Statement of Decision (96-362-02), finding that Penal Code section 13701, (as amended by Stats. 1995, ch. 246) constitutes a reimbursable state-mandated program for development, adoption, and implementation of domestic violence arrest

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[10] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.

[11] Statutes 1984, chapter 1609 and Statutes 1985, chapter 668 (Pen. Code, §§ 13700-13731).

[12] The victim card provision was added in 1991, which the Commission found reimbursable in the *Rape Victims Counseling Center Notice* test claim, CSM-4426 (1993).

[13] Except for the 2003-2004 budget (Stats. 2003, ch. 157), Statutes 1984, chapter 1609 and Statutes 1985, chapter 668 have been suspended by the Legislature pursuant to Government Code section 17581 every year since the operative date of the current test claim statutes (January 1, 1999) as follows: Statutes 1998, chapter 282, Item 9210-295-001, Schedule (8), Provision 2; Statutes 1999, chapter 50, Item 9210-295-0001, Schedule (8), Provision 2; Statutes 2000, chapter 52, Item 9210-295-0001, Schedule (8), Provision 3; Statutes 2001, chapter 106, Item 9210-295-0001, Schedule (8), Provision 3; and Statutes 2002, chapter 379, Item 9210-295,0001, Schedule (8), Provision 3. The Legislature did not suspend in 2003-2004, as of August 2, 2003, the date the 2003-2004 budget was enacted. It was suspended again in the 2004-2005 budget: Statutes 2004, chapter 208, Item 9210-295-0001, Schedule (3), Provision 5.

procedures.[14] The Commission distinguished between the domestic violence *response* procedures in the suspended statute discussed above, and domestic violence *arrest* procedures in the amended test claim statute (now § 13701, subd. (b)), and concluded that the arrest procedures are not part of the legislative suspension of the response policy.

3. Penal Code section 264.2 – Victim Card Distribution

Rape Victims Counseling Center Notice test claim: In 1993, the Commission adopted the *Rape Victims Counseling Center Notice* Statement of Decision (CSM-4426), finding that Statutes 1991, chapter 999 and Statutes 1992, chapter 224 (Pen. Code, § 264.2, subds. (b)(1) & (b)(2), & Pen. Code, § 13701) is a state-mandated program. The parameters and guidelines list the following reimbursable activities:

> [R]equiring local law enforcement agencies to notify the local rape victim counseling center when the victim is transported to a hospital for examination and the victim approves of that notification; subject to the approval of the victim and upon request from the treating hospital, to verify whether the local rape victim counseling center has been notified; to revise the "Victims of Domestic Violence" card by adding information to assist rape victims, and to furnish a rape victim with a "Victims of Domestic Violence" card.

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant requests reimbursement for the costs of providing victim cards to new groups of victims, giving additional written information to victims, giving victims additional emergency assistance, training officers, updating policies and procedures and modifying record-keeping systems.

Claimant amended the test claim in December 2003 to add Statutes 1998, chapter 702, but pled the same activities as in the original test claim. The Commission accepted the amendment as filed in a timely manner. Claimant concurred with the draft staff analysis, as noted below.

State Agency Position

The Department of Finance (DOF) comments regarding Statutes 1998, chapter 698, that "these provisions would appear to result in a reimbursable state-mandated local program …." (Chapter 698 added two new groups of victims to those who receive a victim card). But DOF notes that the Legislature has suspended the mandates imposed by Statutes 1984, chapter 1609 relating to law enforcement responses to domestic violence, and argues that this includes the provisions of section

[14] This mandate (Stats. 1995, ch. 246) currently has $1000 in the 2004-05 budget: Statutes 2004, chapter 208, Item 8120-102-0268, Schedule (1). The parameters and guidelines for this claim identify a uniform cost allowance as follows: A standard time of twenty-nine (29) minutes may be claimed to identify the primary aggressor in any domestic violence incident. The standard time of twenty-nine (29) minutes is broken down as follows: Seventeen (17) Minutes – Interview of both parties. Twelve (12) Minutes – Consideration of the factors listed [in the reimbursable activities]. The total cost will be determined by multiplying the number of reported responses x the average productive hourly rate, including applicable indirect costs as specified in section V., paragraph B, herein, x .48 (29 minutes divided by 60 minutes).

13701 requiring distribution of a victim card. According to DOF, "until such time as the Legislature may opt to remove its suspension of this mandate, we believe any reimbursable provisions of Chapter 698/98 at issue in the present matter would similarly not be reimbursable."

Regarding Statutes 1998, chapter 701, DOF states that requiring the domestic violence training course for law enforcement officers to include techniques for recognizing the signs of domestic violence would be satisfied by POST. As to the rest of chapter 701 (responding to domestic violence calls to include emergency assistance to the victim's children, transportation of the domestic violence victim and children to a hospital for treatment if necessary, and police assistance in safe passage out of the victim's residence), DOF believes "that these provisions may result in a reimbursable state-mandated local program." However, based on the Legislature's suspension of Statutes 1984, chapter 1609, DOF believes "any provision of Chapter 701/98 at issue … would not be reimbursable."

No other state agencies commented on the test claim, nor on the amendment.

COMMISSION FINDINGS

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

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[15] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides:

> (a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

[18] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[19] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

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.[20] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[21] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[22] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[23]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?
- Does the Commission have jurisdiction over activities decided in a prior test claim?
- If the Commission finds a reimbursable state-mandate in the test claim statute(s), does article XIII B, section 6, subdivision (b)(5), apply to this test claim?

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

A. Do the test claim statutes impose state-mandated activities on local agencies?

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[20] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[22] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

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

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

Domestic violence arrest policy (§ 13701, subd. (b)): Statutes 1998, chapter 702 amended section 13701, subdivision (b),[26] by adding orders issued by other states, tribes or territories to the list of enforceable protective orders in the domestic violence arrest policy. The test claim statute amended the preexisting law as follows:

> These [domestic violence arrest] policies also shall require the arrest of an offender, absent exigent circumstances, if there is probable cause that a protective order issued under Chapter 4 (commencing with Section 2040) of Part 1 of Division 6, Division 10 (commencing with Section 6200), or Chapter 6 (commencing with Section 7700) of part 3 of Division 12, of the Family Code, or Section 136.2 of this code, or any other state, tribe, or territory, has been violated.

Local law enforcement agencies must now amend their domestic violence arrest policies to include these orders issued by other jurisdictions. The Commission finds that this amendment is not a state mandate because it is incidental to a requirement of federal law.

The legislative history of this amendment clearly indicates that it was enacted to bring California into compliance with the federal Violence Against Women Act (18 U.S.C. § 2265), which requires any protective order issued by a court of one state or Indian tribe to be accorded full faith and credit by the court of another state or Indian tribe and enforced as if it were the order of the enforcing state or Indian tribe.[27]

In *San Diego Unified School District v. Commission on State Mandates,*[28] the California Supreme Court considered whether the pupil expulsion hearing procedures of Education Code section 48918 are reimbursable. The court held that this Education Code provision was adopted to implement a federal due process mandate, so the hearing costs were not reimbursable.[29] In doing so, the court espoused the following rule.

> [F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures [i.e., test claim statutes] that are intended to implement an applicable federal law -- and whose costs are, in context, de minimis -- should be treated as part and parcel of the underlying federal mandate.[30]

The reasoning of the *San Diego Unified* case applies to this claim because the amendment in the test claim statute was intended to implement a federal law (the Violence Against Women Act) and contains a de minimis, one-time cost (inserting a phrase in the domestic violence arrest policy).

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[26] This subdivision was added by Statutes 1995, chapter 246, which the Commission found is reimbursable in the *Domestic Violence Arrest Policies and Standards,* 96-362-02 (1996) test claim.

[27] Senate Judiciary Committee analysis, Assembly Bill No. 2177 (1997-1998 Reg. Sess.) as amended March 26, 1998, page 1.

[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

[29] *Id.* at page 888.

[30] *Id.* at page 890.

Thus, the Commission finds that the amendment to section 13701, subdivision (b), in Statutes 1998, chapter 702 does not impose a state-mandated activity on local agencies because it is "part and parcel of the underlying federal mandate."[31]

Excluding the support person (Pen. Code, § 264.2, subd. (b)(4)): Section 1.5 of Statutes 1998, chapter 698 adds subdivision (b)(4) to section 264.2 regarding sex-crime victims:

> A support person may be excluded from a medical evidentiary or physical examination if the law enforcement officer or medical provider determines that the presence of that individual would be detrimental to the purpose of the examination.

Preexisting law gives the victim of specified sex crimes[32] the right to have a support person present during any medical evidentiary or physical examination.

The Commission finds that subdivision (b)(4) does not impose a state-mandated activity on local agencies. The statute's use of the word "may" makes this activity at the officer's discretion.[33] Therefore, Penal Code section 264.2, subdivision (b)(4), is not subject to article XIII B, section 6.[34]

Basic training (§ 13519, subd. (c)(5)): Section 13519 requires POST to implement a course for training law enforcement officers in handling domestic violence complaints and developing guidelines for response to domestic violence. Section 1 of the test claim statute (Stats. 1998, ch. 701) amended subdivision (c)(5), to add "signs of domestic violence" to the list of basic training procedures and techniques.

In 1991, the Commission, in the *Domestic Violence Training* decision, CSM-4376 (1991), found that the basic training procedures and techniques of section 13519, subdivision (c), are not mandatory because the test claim legislation: (1) does not require local agencies to implement a domestic violence training program and to pay the cost of the training; (2) does not increase the minimum number of basic training hours, nor the minimum number of advanced officer training hours, so no additional costs are incurred by local agencies; and (3) does not require local agencies to provide domestic violence training.[35] The same analysis applies to this test claim.

The Commission finds that the statutory amendment pled by claimant does not mandate basic training activities on local law enforcement agencies because the requirement to implement the domestic violence course is on POST, a state agency. Moreover, the requirement to complete the basic training course on domestic violence is mandated only on the individual seeking peace officer status.

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[31] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 890.

[32] These include rape (§ 261) statutory rape (§ 261.5), spousal rape (§ 262), sodomy (§ 286), oral copulation (§ 288a), and forcible acts of sexual penetration (§ 289).

[33] *Kern High School Dist., supra,* 30 Cal.4th 727, 742; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

[34] Alternatively, because claimant pled no activities related to subdivision (b)(4), there is no evidence in the record that excluding the support person imposes costs mandated by the state.

[35] This finding is consistent with the Commission's decision in *Law Enforcement Racial and Cultural Diversity Training* 97-TC-06 (2000).

Subdivision (c) of section 13519 states that "the course of basic training for law enforcement officers shall, no later than January 1, 1986, include adequate instruction in the [domestic violence] procedures and techniques described below: …." The test claim statute does not mandate local agencies to provide the course of basic training, nor does it specify who is required to provide it.

In addition, there are no provisions in other statutes or regulations issued by POST that require local agencies to provide basic training to recruits. Since 1959, section 13510 and following have required POST to adopt rules establishing minimum standards relating to the physical, mental and moral fitness governing recruitment of new local law enforcement officers.[36] Recruits may obtain the required training at any institution approved by POST.[37] Moreover, "each *applicant* for admission to a basic course of training certified by [POST] who is *not* sponsored by a local or other law enforcement agency . . . shall be required to submit written certification from the Department of Justice . . . that the applicant has no criminal history background. . . . "[38]

Since 1971, section 832 has required "every person described in this chapter as a peace officer" to satisfactorily complete an introductory course of training prescribed by POST before they can exercise the powers of a peace officer.[39] Subdivision (e)(1) requires any person completing the basic training course "who does not become employed as a peace officer" within three years to pass the basic training examination. POST may charge a fee for the basic training examination to each "applicant" who is not sponsored or employed by a local law enforcement agency.[40]

Because the test claim statute does not mandate local agencies to incur costs to provide basic training, including the domestic violence course, the Commission finds that section 13519 (as amended by Stats. 1998, ch. 701), as it applies to basic training, does not impose a state-mandated activity on local agencies.

Continuing training (§ 13519, subd. (c)(5)): As discussed above, the test claim statute (Stats. 1998, ch. 701) amended subdivision (c)(5), to add "signs of domestic violence" to the list of basic training procedures and techniques. Subdivision (g), the continuing training provision, requires specified peace officers to take the domestic violence course every two years "that is developed according to the standards and guidelines developed pursuant to subdivision (d)." Subdivision (d) states: "The guidelines developed by the commission [POST] shall also incorporate the foregoing factors." These foregoing factors are listed in subdivision (c), the subdivision that was amended by the test claim statute to include the "signs of domestic violence" to the course content. Thus, the test claim amendment to subdivision (c) also affects continuing training.

The Commission found that the domestic violence continuing education requirement of section 13519 is not a reimbursable mandate in the *Domestic Violence Training and Incident Reporting* decision, 96-362-01 (1996). This test claim was litigated and the decision upheld by the court in *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176. But the

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[36] These standards are found in Title 11 of the California Code of Regulations.

[37] Penal Code section 13511, subdivision (a).

[38] Penal Code section 13511.5.

[39] See also POST's regulation, California Code of Regulations, title 11, section 1005, subdivision (a)(9).

[40] Penal Code section 832, subdivision (g).

court stated that POST certification for continuing education "is, for all practical purposes, not a 'voluntary' program and therefore the County must, in order to comply with section 13519, add domestic violence training to its curriculum." (*Id.* at 1194).

For this reason, the Commission finds that the amendment to section 13519, subdivision (c)(5), as applied to continuing training, is mandated by the state. It is therefore further analyzed under Issue 2 below.

Response policy, victim assistance & information (§ 13701, subd. (c)(7) & (c)(9)(D)): The test claim statute added the following underlined provisions to section 13701's domestic violence response policy:

- (subd. (c)(7)): Include standards for "Emergency assistance to victims, such as medical care, transportation to a shelter, or a hospital for treatment when necessary, and police standbys for removing personal property and assistance in safe passage out of the victim's residence."
- (subd. (c)(9)(D)): Include in written information given to the victim "A statement that, "For information about the California victims' compensation program, you may contact 1-800-777-9229."

Before the test claim statute, the domestic violence response policy was not required to include the underlined provisions above.

Therefore, adding these statements to the domestic violence response policy is required based on the plain language of section 13701, subdivision (a), which states: "Every law enforcement agency in this state **shall** develop, adopt, and implement written policies and standards for officers' responses to domestic violence calls … ."[41] [Emphasis added.]

The Legislature, however, has suspended the underlying requirement to develop, adopt, and implement policies and standards for officers' responses to domestic violence calls. As discussed in the Background, the Commission approved the *Domestic Violence* test claim (CSM-4222) in 1987. As stated in the parameters and guidelines, local agencies are eligible for reimbursement for the following activities: (1) developing, adopting and implementing a Domestic Violence Policy; (2) preparing a statement of information for victims of incidents of domestic violence; (3) preparing a statement of information for victims of domestic violence; and (4) reporting to the Attorney General. The Commission also found that furnishing the victim with written information when responding to domestic violence incidents, as well as report writing and other specified costs are reimbursable. Except for one year, the Legislature has suspended Statutes 1984, chapter 1609[42] in each budget act

[41] This finding is consistent with the Commission's decision in the *Domestic Violence* decision (CSM-4222).

[42] Except for the 2003-2004 budget, Statutes 1984, chapter 1609 has been suspended by the Legislature since the operative date of the current test claim statutes (January 1, 1999), as follows: Statutes 1998, chapter 282, Item 9210-295-001, Schedule (8), Provision 2; Statutes 1999, chapter 50, Item 9210-295-0001, Schedule (8), Provision 2; Statutes 2000, chapter 52, Item 9210-295-0001, Schedule (8), Provision 3; Statutes 2001, chapter 106, Item 9210-295-0001, Schedule (8), Provision 3; and Statutes 2002, chapter 379, Item 9210-295,0001, Schedule (8), Provision 3.

in fiscal years 1992-1993 through 2004-2005.[43] Although the budget acts do not mention Statutes 1985, chapter 668, (part of the *Domestic Violence* decision, CSM-4222), the Commission finds that the Legislature suspended it also. As specified in the State Controller's Office Claiming Instructions for CSM-4222, the entire domestic violence program as outlined in the parameters and guidelines was suspended.[44]

Thus, the issue here is what effect the suspension of *Domestic Violence* CSM-4222 (§ 13701, Stats. 1984, ch. 1609, Stats. 1985, ch. 668) has on the analysis of the test claim amendments to Penal Code section 13701.

DOF comments that the Legislature has suspended the mandates imposed by Statutes 1984, chapter 1609 relating to law enforcement responses to domestic violence. According to DOF, "until such time as the Legislature may opt to remove its suspension of this mandate, we believe any reimbursable provisions of Chapter 698/98 at issue in the present matter would similarly not be reimbursable."

Claimant disagrees, arguing that the suspension of Statutes 1984, chapter 1609 does not include the victim card provisions.[45] According to claimant, because chapter 1609's 'optional' requirements are different from the mandated requirements in the test claim legislation, chapter 1609 is not relevant as to whether the test claim is reimbursable.

For reasons stated below, the Commission finds that for years in which the Legislature suspends the mandate to develop, adopt, and implement a domestic violence response policy, adding the provisions in (c)(7) and (c)(9)(D) to the response policy is voluntary and not mandated by the state. But for years when the Legislature does not suspend the mandate to develop, adopt, and implement a domestic violence response policy, the activity of adding the provisions in (c)(7) and (c)(9)(D) to the response policy is mandated by the state.

Government Code section 17581, subdivision (a), governs mandate suspension. It makes complying with test claim statutes optional for local agencies on two conditions. First, the Commission (or the Legislature or any court) must find that the test claim statute, or any portion thereof, is a reimbursable state mandate. Second, the Legislature must specify in the budget that the test claim statute is not reimbursable for the fiscal year (by appropriating zero dollars for the program). Government Code section 17581, subdivision (a), states the following:

> No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period

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[43] The Legislature did not suspend the mandate in 2003-2004. However, chapter 1609 was suspended again in the 2004-2005 budget act (Stats. 2004, ch. 208): Item 9210-295-0001, Schedule (3), Provision 5.

[44] State Controller's Office, County Mandated Cost Manual, Revised 9/94, page 1.

[45] Claimant cited the victim card provisions of Penal Code section 13701, but the arguments also apply to the victim card provisions of Penal Code 264.2. It appears claimant's comments implicitly refer to the following prior Commission decisions: (1) *Domestic Violence,* CSM-4222 (1987) [Stats. 1984, ch. 1609 & Stats. 1985, ch. 668]; and (2) *Rape Victims Counseling Center Notice,* CSM-4426 (1993) [Stats. 1991, ch. 999 & Stats. 1992, ch. 224].

immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:

(1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIII B of the California Constitution.

(2) The statute or executive order, or portion thereof, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursement.

The activity required by the test claim statute to amend the original domestic violence response policy is included within the suspended program. The test claim statute requires adding transportation to "a hospital for treatment when necessary," and "assistance in safe passage out of the victim's residence" to the emergency assistance provision of the domestic violence response policy. It also requires adding victim's compensation program contact information to the domestic violence response policy. The underlying suspended program encompasses these emergency assistance and victim information test claim amendments.

Since the underlying domestic violence response policy is voluntary in years that it is suspended by the Legislature, the local agencies' obligation to amend the response policy is also voluntary in years the suspension is in effect. The California Supreme Court, in *Kern High School District*, found that "if a school district elects to participate in or continue participation in any *underlying voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[46] The court further stated, on page 731 of the decision, that:

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

The Commission is required to follow the holding of the California Supreme Court in interpreting state mandate issues.

Therefore, for fiscal years when the *Domestic Violence,* CSM-4222 (1987) program is suspended, the Commission finds that adding the emergency assistance and victim information to the domestic violence response policy, as required by Penal Code section 13701, subdivision (c)(7) and (c)(9)(D), is part of the suspended mandate, CSM-4222, and is optional. For fiscal years when the Legislature

[46] *Kern High School Dist., supra,* 30 Cal.4th at page 743.

does not suspend the program, the Commission finds that adding the emergency assistance and victim information to the response policy is mandated by the state. Thus, the analysis continues under Issue 2 as to whether the activities in Penal Code section 13701, subdivision (c)(7) and (c)(9)(D), constitute a new program or higher level of service in years that the Legislature does not suspend the underlying domestic violence response policy program (CSM-4222).

Response policy, victim card (§ 13701 subd. (c)(9)(H)): The test claim statute requires local agencies to add the following to the victim card provision in the domestic violence response policy: "(i) The names and phone number of or local county hotlines for, or both the phone numbers of and local county hotlines for, local shelters for battered women and rape victim counseling centers within the county, including those centers specified in Section 13837 … [¶]…[¶] (iv) A statement that domestic violence or assault by a person who is known to the victim, including domestic violence or assault by a person who is the spouse of the victim, is a crime."

The victim card provision was not part of the suspended domestic violence response policy mandate because it was added to section 13701 in 1991, and was the subject of a prior test claim: *Rape Victims Counseling Center Notice* (CSM-4426) that was approved by the Commission. In it, the Commission found that revising the victim card, and furnishing it to victims, is reimbursable. The Commission's decision in *Rape Victims Counseling Center Notice* has not been suspended by the Legislature.

Therefore, the Commission finds that adding the following to the domestic violence response policy is mandated by the state: (1) phone numbers of or county hotlines for local battered women shelters and (2) a statement that domestic violence or assault by a person who is known to the victim, including domestic violence or assault by a person who is the spouse of the victim, is a crime.

Providing the victim card (§ 264.2, subd. (a)): Section 1.5 of Statutes 1998, chapter 698 amended subdivision (a) of section 264.2 to require law enforcement officers to give victims of specified sex crimes a Victim of Domestic Violence Card, or victim card. The test claim statute adds victims of two crimes--alleged battery or corporal injury on a spouse or other specified victim--to the list of those for which a victim card is provided. Statutes 1998, chapter 698 amended section 264.2, subdivision (a) as follows (added text underlined):

> (a) Whenever there is an alleged violation or violations of subdivision (e) of Section 243, or Section 261, 261.5, 262, 273.5, 286, 288a, or 289, the law enforcement officer assigned to the case shall immediately provide the victim of the crime with the "Victims of Domestic Violence" card, as specified in subparagraph (G)[47] of paragraph (9) of subdivision (c) of Section 13701 of the Penal Code.

Penal Code section 243, subdivision (e), involves battery against "a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or

[47] The reference to subparagraph (G) of paragraph 9 of subdivision (c) of Penal Code section 13701 is in error, as (G) does not refer to the victim card. The correct reference to victim cards is subparagraph (H). Subparagraph (G) requires providing victims with a statement about the right to file civil suit for certain losses and expenses. This subparagraph predates the test claim statutes and is not analyzed herein.

engagement relationship." Penal Code section 273.5 involves willful infliction of corporal injury on a "spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child."

The Commission finds that Penal Code section 264.2, subdivision (a), as amended by the test claim statute imposes a state-mandated activity on local agencies to provide two new groups of victims of specified crimes with a victim card.

Summary: On the issue of whether or not the test claim statutes impose a state-mandate activity on local agencies, the Commission finds the following.

• 13701 (d): DV arrest policy	• No. A de minimis activity intended to implement a federal law.
• 264.2 (b)(4): Excluding the support person	• No. A discretionary activity.
• 13519 (c)(5): Basic training	• No. Requirement is on POST and on person seeking peace officer status.
• 13519 (c)(5): Continuing training	• Yes, for all practical purposes not voluntary. *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.
• 13701 (c)(7) & (c)(9)(D): response policy, victim assistance and information	• Yes, adding statements to the response policy is mandatory in years in which the Legislature has not suspended the *Domestic Violence* mandate.
• 13701 (c)(9)(H): Response policy, victim card	• Yes, amending the victim card provision in the response policy is mandatory.
• 264.2 (a): Providing the victim card	• Yes, providing victim cards is mandatory.

B. Does the test claim legislation qualify as a program under article XIII B, section 6?

For the remaining test claim statutes (§§ 13519, subd. (c)(5), & 13701, subd. (c), & 264.2, subd. (a), as amended by the test claim statutes) to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[48] Only one of these findings is necessary to trigger article XIII B, section 6.[49]

The test claim statutes pertain to assisting and distributing information to domestic violence victims and domestic violence training for law enforcement. These activities are peculiarly governmental public safety functions administered by local law enforcement agencies as a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies that do not apply

[48] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[49] *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

generally to all residents and entities of the state. Therefore, the Commission finds the test claim statutes constitute a "program" within the meaning of article XIII B, section 6.

Issue 2: Does the test claim legislation impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before enacting the test claim legislation.[50]

Continuing training (§ 13519, subd. (c)(5)): The Commission found, under issue 1 above, that local agencies are required to include the "signs of domestic violence" in the course content for the domestic violence continuing education training course for "each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence."

In the *Domestic Violence Training and Incident Reporting* Statement of Decision (96-362-01), the Commission found that the domestic violence continuing education course required by Penal Code section 13519, subdivision (e)[51] (amended by Stats. 1995, ch. 965) is not a reimbursable state-mandated program. The Commission determined that because non-supervisory patrol officers are already required to take 24 hours of continuing training every two years,[52] requiring the two-hour domestic violence course[53] within the existing 24-hour requirement does not impose increased costs mandated by the state.

The California Court of Appeal upheld the Commission's decision in *County of Los Angeles v. Commission on State Mandates.*[54] Since the court's holding was based on the 1995 version of section 13519, the issue is whether the test claim amendment could alter that conclusion.

The *County of Los Angeles* court stated,

> [L]ocal law enforcement agencies may choose from a menu of course offerings to fulfill the 24-hour requirement. …Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. …However, merely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources …by mandating the inclusion of domestic violence training. …[T]he state is requiring certain courses to be placed within an already existing

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[50] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[51] This is currently section 13519, subdivision (g) as amended by Statutes 1998, chapter 701.

[52] California Code of Regulations, title 11, section 1005, subdivision (d)(1).

[53] California Code of Regulations, title 11, section 1081, subdivision (a)(25).

[54] *County of Los Angeles v. Commission State Mandates, supra,* 110 Cal. App. 4th 1176.

framework of training. This loss of "flexibility" does not… require the County to expend funds that previously had been expended on the POST program by the State.[55]

Thus, the court concluded that the statute did not mandate a higher level of service.[56]

In adding "the signs of domestic violence" to the domestic violence continuing training content, the amendment to section 13519 is not a higher level of service because it does not alter the factors upon which the court relied, nor does it increase the existing framework of training. Local law enforcement's requirement to take the two-hour domestic violence course, and to take 24-hours of training every two years, remain the same. The test claim statute does not increase the hourly requirement for continuing training. Therefore, the Commission finds that the test claim amendment to section 13519, subdivision (c)(5), as it relates to continuing training (amended by Stats. 1998, ch. 701) does not constitute a new program or higher level of service.

Response policy, victim assistance (§ 13701 subd. (c)(7)): Statutes 1998, chapter 702 amended section 13701, subdivision (c)(7), to add the one-time activity of amending law enforcement's policies and standards for officers' responses to domestic violence calls. Specifically, chapter 702 added to the policy, "transportation to a hospital for treatment when necessary," and "assistance in safe passage out of the victim's residence."[57] Although this activity is currently voluntary because it is part of the legislatively suspended program, as discussed above, further analysis is necessary for years when the underlying program is not suspended.

Preexisting law did not require law enforcement's domestic violence response policy to include "transportation to a hospital for treatment when necessary," and "assistance in safe passage out of the victim's residence." Therefore, the Commission finds that adding these provisions to the domestic violence response policy is a new program or higher level of service only in years when the Legislature does not suspend the underlying domestic violence response policy program (CSM 4222).

Response policy, victim information (§ 13701 subd. (c)(9)(D)): The test claim statute (Stats. 1998, ch. 702, § 3.3) amended the domestic violence response policy by requiring local agencies to include in the response policy the following:

- Include in written information given to the victim "A statement that, "For information about the California victims' compensation program, you may contact 1-800-777-9229."

Although this activity is currently voluntary because it is part of the legislatively suspended program, as discussed above, further analysis is necessary for years when the underlying program is not suspended.

Preexisting law required the policy to include giving victims other assorted information, including information about shelters, community services, restraint of the alleged perpetrator, and legal information. Under prior law, however, the policy was not required to include giving the victim information about the California victims' compensation program.

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[55] *Id.* at page 1194.

[56] *Id.* at page 1193.

[57] Penal Code section 13701, subdivision (c)(7).

Therefore, the Commission finds that the one-time activity of inserting this contact information for the victims' compensation program, as specified in the test claim statute, into the domestic violence response policy, is a new program or higher level of service only in years when the Legislature does not suspend the underlying program.

Response policy, victim card (§ 13701 subd. (c)(9)(H)): The test claim statute amended subdivision (c)(9)(H) of section 13701, which contains the policy's description of the victim card's contents. It was amended to add information to the card, as follows:

> (i) The names and phone number of or local county hotlines for, or both the phone numbers of and local county hotlines for, local shelters for battered women and rape victim counseling centers within the county, including those centers specified in Section 13837 … [¶]…[¶]
>
> (iv) A statement that domestic violence or assault by a person who is known to the victim, including domestic violence or assault by a person who is the spouse of the victim, is a crime."

Preexisting law required the victim card to include the following specified information:

> (i) The names and locations of rape victim counseling centers within the county, including those centers specified in Section 13837, and their 24-hour counseling service telephone numbers.
> (ii) A simple statement on the proper procedures for a victim to follow after a sexual assault.
> (iii) A statement that sexual assault by a person who is known to the victim, including sexual assault by a person who is the spouse of the victim, is a crime.

Prior law did not require the domestic violence response policy's description of the victim card to include information about battered women shelters or a statement regarding the criminality of domestic violence or assault by a spouse. Since the test claim statute altered the victim card to add this information, new printing would be required.

Therefore, the Commission finds that the one-time activities of inserting information about battered women shelters and a statement regarding the criminality of domestic violence or assault by a person known to the victim or a spouse, as specified in the test claim statute, into the domestic violence response policy, and printing victim cards to include the new information, is a new program or higher level of service.[58]

Providing the victim card (§ 264.2, subd. (a)): Section 1.5 of Statutes 1998, chapter 698 amended subdivision (a) of section 264.2, which specifies the types of victims who must be provided with a victim card.

The test claim statute adds victims of two crimes--alleged battery or corporal injury on a spouse or other specified victim--to the list of those for which a victim card is provided. Statutes 1998, chapter 698 amended section 264.2, subdivision (a) as follows (added text underlined):

> (a) Whenever there is an alleged violation or violations of subdivision (e) of Section 243, or Section 261, 261.5, 262, 273.5, 286, 288a, or 289, the law enforcement officer

[58] Because the Legislature has not suspended the Commission's *Rape Victims Counseling Center Notice* decision, CSM-4426 (1993), suspension is not an issue for victim cards.

assigned to the case shall immediately provide the victim of the crime with the "Victims of Domestic Violence" card, as specified in subparagraph (G)[59] of paragraph (9) of subdivision (c) of Section 13701 of the Penal Code.

Penal Code section 243, subdivision (e), involves battery against "a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship." Penal Code section 273.5 involves willful infliction of corporal injury on a "spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child."

Prior law required law enforcement agencies to provide a victim card to victims of the following crimes: rape, sex with a minor, spousal rape, sodomy, oral copulation, and penetration by a foreign object. The amendment to section 264.2, subdivision (a), requires law enforcement to provide victim cards to victims of an alleged battery or corporal injury on a spouse or other specified victim. Because this amendment expands the universe of victim card recipients to include victims of two new crimes -- spousal battery and willful infliction of corporal injury – the Commission finds that section 264.2, subdivision (a), as amended by Statutes 1998, chapter 698 constitutes a new program or higher level of service.

Summary: As to whether or not the test claim statutes are a new program or higher level of service subject to article XIII B, section 6, the Commission finds the following:

• 13519 (c)(5): Continuing training	• No, not a new program or higher level of service. *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.
• 13701 (c)(7): Response policy, victim assistance	• Yes, the one-time activity of adding statements to the response policy is a new program or higher level of service if the Legislature has not suspended the *Domestic Violence* mandate.
• 13701 (c)(9)(D): Response policy, victim information	• Yes, the one-time activity of adding contact information to the response policy is a new program or higher level of service if the Legislature has not suspended the *Domestic Violence* mandate.
• 13701 (c)(9)(H): Response policy, victim card	• Yes, the one-time activities of amending the victim card provision in the response policy and reprinting cards is a new program or higher level of service.
• 264.2 (a): Providing the victim card	• Yes, giving out victim cards is a new program or higher level of service.

[59] As stated in footnote 48 above, the reference to subparagraph (G) of paragraph 9 of subdivision (c) of Penal Code section 13701 is in error, as (G) does not refer to the victim card. The correct reference to victim cards is subparagraph (H).

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose increased costs mandated by the state.[60] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Response policy, victim information (§ 13701, subds. (c)(7) & (c)(9)(D)): As discussed above, for years in which "Statutes 1984, chapter 1609"[61] is not suspended in the budget act, the one-time activity of adding the following information to the domestic violence response policy is a mandated new program or higher level of service:

- Victim assistance provisions: "transportation to a hospital for treatment when necessary," and "assistance in safe passage out of the victim's residence." (§ 13701, subd. (c)(7).)
- Victim notice: "A statement that, "For information about the California victims' compensation program, you may contact 1-800-777-9229." (§ 13701, subd. (c)(9)(D).)

Except for fiscal year 2003-2004, the underlying program has been suspended by the Legislature since the effective date of the test claim statute. According to a declaration provided by the claimant, the claimant incurred costs for this one-time activity between January 1, 1999, and June 30, 1999, when the suspension was in effect and the state did not mandate the activities.[62] Therefore, there is no evidence in the record that the activity of adding victim assistance information and information about the victims compensation program, as required by Penal Code section 13701, subdivisions (c)(7) & (c)(9)(D), to the domestic violence response policy resulted in "costs mandated by the state," within the meaning of Government Code section 17514, to the claimant or any other local agency. Therefore, reimbursement is not required for Penal Code section 13701, subdivisions (c)(7) & (c)(9)(D).

Response policy, victim card, and providing the victim card (§§ 13701, subd. (c)(9)(H), 264.2, subd. (a)): As indicated above, the Commission finds the following activities constitute mandated new programs or higher levels of service:

- The one-time activities of amending the victim card provision of the domestic violence response policy to include information about battered women shelters and a statement

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[60] *Kern High School Dist., supra,* 30 Cal. 4th 727, 736; *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835; Government Code section 17514.

[61] The suspended budget provision states "Statutes 1984, chapter 1609." As discussed above, this refers to the Commission's decision in the *Domestic Violence* test claim CSM-4222 (1991).

[62] Declaration of Martha Zavala, May 7, 1999, page 4, Schedule A.

regarding the criminality of domestic violence or assault by a spouse, and printing victim cards to include the new information, as specified in Penal Code section 13701, subdivision (c)(9)(H);

- Providing victim cards to victims of an alleged spousal battery and willful infliction of corporal injury, as required by Penal Code section 264.2, subdivision (a).

In the test claim, the claimant states that it would incur increased costs in excess of $200 per annum,[63] which was the standard under Government Code section 17564, subdivision (a), at the time the claim was filed. For the costs of printing the new cards, claimant estimated costs of $8,000.[64] There is no evidence in the record to dispute these costs.

Furthermore, none of the exceptions in Government Code section 17556 apply to this claim.

Therefore, the Commission finds there are costs mandated by the state within the meaning of Government Code sections 17514 for these activities.

Issue 4: Does the Commission have jurisdiction over activities decided in a prior test claim?

Providing victim assistance & information (§ 13701, subd. (c)(7)): Claimant requests reimbursement to implement portions of the domestic violence response policy. For example, the claimant requests reimbursement for transporting victims to a hospital for treatment and assisting victims out of the residence. The Commission finds that the Commission already decided these "emergency assistance" activities in the ***Domestic Violence*** parameters and guidelines, CSM-4222 (1987), and therefore has no jurisdiction over this activity for purposes of this claim.[65]

The statutory scheme for mandate determinations under article XIII B, section 6 establishes finality for decisions adopted by the Commission. The Commission has no continuing jurisdiction over its decisions, including the *Domestic Violence* decision (CSM-4222). Until 1999, the Commission did not have any statutory authority to reconsider test claim decisions. In 1999, Government Code section 17559 was amended to authorize the Commission to order reconsideration, on petition of a party, within 30 days after the statement of decision is issued. (Stats. 1999, ch. 643.)

This finality also applies to parameters and guidelines. Once the parameters and guidelines are adopted, the State Controller's Office has 60 days to issue claiming instructions to assist local agencies in claiming costs,[66] who then have 120 days from the date of the claiming instructions to file their reimbursement claims with the State Controller's Office for initial fiscal year costs.[67] Although the parties may request amendments to the parameters and guidelines, the request must be filed with the Commission before the deadline for initial claims to apply the proposed amendment

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[63] The current standard is $1000, amended by Statutes 2002, chapter 1124, effective September 30, 2002.

[64] Test Claim 98-TC-14, page 3.

[65] The decision of the quasi-judicial administrative agency, if not challenged within the applicable statute of limitations, binds the parties on the issues litigated. *Hollywood Circle, Inc. v. Department of Alcoholic Beverage* (1961) 55 Cal.2d 728, 731-733.

[66] Government Code, section 17558, subdivision (b).

[67] Government Code, section 17561, subdivision (d)(1).

retroactively back to all years eligible for reimbursement.[68] Requests to amend parameters and guidelines filed after the deadline for initial claims must be submitted on or before January 15 following a fiscal year in order to establish eligibility for that fiscal year.[69] Thus, Commission adopted amendments may apply to the prior fiscal year if filed before January 15 following a fiscal year. A request to amend the parameters and guidelines for *Domestic Violence* could not be retroactive to the initial reimbursement period of the original decision unless it were filed before the due date for the initial reimbursement claims.

The test claim statute in this case, Penal Code section 13701, subdivision (c)(7), added the following underlined provisions to section 13701's domestic violence response policy:

> Include standards for "Emergency assistance to victims, such as medical care, transportation to a shelter, or a hospital for treatment when necessary, and police standbys for removing personal property and assistance in safe passage out of the victim's residence."

In years when the underlying *Domestic Violence* program is not suspended, claimants are eligible to receive reimbursement for, among other things: '(1) development, adoption and implementation of a Domestic Violence Policy.' The emergency assistance to victims, medical care, and transportation to a shelter were all included in the original test claim statute's response policy. Penal Code section 13701 originally included "[e]mergency assistance to victims, **such as** …." [Emphasis added.] The phrase, "such as" means, "for example" or "of a kind specified."[70] Thus, the test claim statute in this case merely adds further examples of assistance after the "such as." These amendments were called "clarifying" by the Assembly Public Safety Committee.[71] Since the amendments are clarifying only, they do not increase the level of service required of local agencies.[72]

Thus, because the activities of emergency assistance, medical care, and transportation were already decided in the original *Domestic Violence* statement of decision and parameters and guidelines, the Commission has no jurisdiction over these activities in this claim.

Claimant's comments on the revised draft staff analysis state that claimant concurs with staff's analysis, and concurs that the program "may, in 2005-06 and subsequent fiscal years, impose additional reimbursable costs in providing emergency assistance to domestic violence victims as noted … [in] staff's analysis." To clarify, the Commission does not find reimbursable costs for

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[68] Government Code, section 17557; California Code of Regulations, title 2, section 1183.2, subdivision (b).

[69] Government Code, section 17557; California Code of Regulations, title 2, section 1183.2, subdivision (c).

[70] See <http://dictionary.reference.com/search?q=such%20as> as of October 6, 2004.

[71] Assembly Public Safety Committee, Analysis of Assembly Bill No. 2172 (1997-98 Reg. Sess.) as introduced. Originally, the bill referred to "guaranteeing" safe passage away from the residence, but was later changed to "assisting." This bill was later double joined to Assembly Bill No. 2177 (Stats. 1998, ch. 702), which was enacted as to section 13701.

[72] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 877.

emergency assistance in future fiscal years. Rather, should the Legislature not suspend[73] the *Domestic Violence* mandate (CSM-4222), the activities in the parameters and guidelines, as mentioned on pages 3 and 10 of this analysis, would be reimbursable.

Claimant also requested reimbursement for assisting children out of the residence, but this activity is not in the enacted version of the test claim statute that amended section 13701 (Stats. 1998, ch. 702, §§ 3.3 & 6). The last chaptered bill is assigned the higher chapter number,[74] which becomes law when legislative bills are double or triple-joined, as they were in this case.[75] Neither chapters 698 nor 701, which include the provision regarding assisting children, amended or became law as to Penal Code section 13701.[76] So the Commission finds that the test claim statute does not mandate assisting children out of the residence.

Issue 5 – If the Commission finds a reimbursable state mandate in the test claim statute(s), does article XIII B, section 6, subdivision (b)(5), apply to this test claim?

On November 2, 2004, the voters enacted Proposition 1A, which among other changes, adds subdivision (b) to article XIII B, section 6. Subdivision (b) states in relevant part:

> (1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

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[73] Proposition 1A, enacted in November 2004, among other changes, adds subdivision (b) to article XIII B, section 6 of the California Constitution, as follows:

> [F]or the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

[74] See Government Code sections 9510 and 9605.

[75] Double-joined bills are two bills that propose to amend the same code section, drafted so that the amended bill does not override the provisions of the bill that affects the same section. In this case, section 6, subdivision (c) of Statutes 1998, chapter 702 states:

> (c) Section 3.3 of this bill incorporates amendments to Section 13701 of the Penal Code proposed by this bill, AB 1201, and AB 2172. It shall only become operative if (1) all three bills are enacted and become effective on or before January 1, 1999, (2) all three bills amend Section 13701 of the Penal Code, and (3) this bill is enacted after AB 1201, **[chapter 698]** and AB 2172, **[chapter 701]** in which case Sections 3, 3.1, and 3.2 of this bill shall not become operative. [Emphasis added.]

[76] Statutes 1998, chapter 698, sections 2.1, 2.3 and 5. Statutes 1998, chapter 701, sections 2, 2.1, 2.2, 2.3 & 3.

(2) Payable claims for costs incurred prior to the 2005-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law. [¶] … [¶].

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment **and that constitutes a mandate subject to this section.** [Emphasis added.]

Subdivision (b)(5) excludes specified types of mandates from the operation of subdivision (b). The portions of this test claim that the Commission finds to be reimbursable mandates, as listed below, do not apply to the "employment status of any local government employee or retiree, or any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment." Rather, they are merely new local government duties. Therefore, the Commission finds that subdivision (b)(5) does not apply to this test claim.

CONCLUSION

Therefore, the Commission finds that section 13701, subdivision (c)(9)(D) and (H) (as amended by Stats. 1998, ch. 702), and section 264.2, subdivision (a) (as amended by Stats. 1998, ch. 698), impose a reimbursable state-mandated program on local agencies within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514.

The Commission finds that the following activities are reimbursable.

- Providing victim cards to victims of the following crimes: (1) Penal Code section 243, subdivision (e), battery against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship;[77] and (2) Penal Code section 273.5, willful infliction of corporal injury on a spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child.[78] (§ 264.2, subd. (a)).
- The one-time cost of printing victim cards to add the following new information: (1) phone numbers and/or local county hotlines of battered-women shelters; (2) a statement that domestic violence or assault by a person who is known to the victim, including domestic violence or assault by a person who is the spouse of the victim, is a crime. (§ 13701, subd. (c)(9)(H)(i) & (iv)).
- The one-time cost of adding to the domestic violence response policy two new crimes (§§ 243, subd. (e), & 273.5) to those for which a victim card is given out (§ 13701, subd. (c)(9)(H)).

[77] Penal Code section 243, subdivision (e).

[78] Penal Code section 273.5.

- The one-time cost of adding the following to the description of the victim card in the domestic violence response policy: (1) phone numbers and/or local county hotlines of battered-women shelters; (2) a statement that domestic violence or assault by a person who is known to the victim, including domestic violence or assault by a person who is the spouse of the victim, is a crime. (§ 13701, subd. (c)(9)(H)(i) & (iv)).

The Commission also finds that all other amendments to the test claim statutes, as discussed above, do not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, Chapter 72, Section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	Case No.: 05-RL-4499-01 *Peace Officer Procedural Bill of Rights* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on April 26, 2006*) SET ASIDE AND AMENDED IN PART PURSUANT TO *DEPARTMENT OF FINANCE V. COMMISSION ON STATE MANDATES* (2009) 170 CAL.APP.4TH 1355; JUDGMENT AND WRIT ISSUED MAY 8, 2009, BY THE SACRAMENTO COUNTY SUPERIOR COURT, CASE NO. 07CS00079 (*Amended on July 31, 2009*)

STATEMENT OF DECISION

The attached Amended Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

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PAULA HIGASHI, Executive Director Dated: August 4, 2009

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, Chapter 72, Section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	Case No.: 05-RL-4499-01 *Peace Officer Procedural Bill of Rights* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on April 26, 2006*) SET ASIDE AND AMENDED IN PART PURSUANT TO *DEPARTMENT OF FINANCE V. COMMISSION ON STATE MANDATES* (2009) 170 CAL.APP.4TH 1355; JUDGMENT AND WRIT ISSUED MAY 8, 2009, BY THE SACRAMENTO COUNTY SUPERIOR COURT, CASE NO. 07CS00079 (*Amended on July 31, 2009*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 26, 2006. Pam Stone, Dee Contreras, and Ed Takach appeared for the City of Sacramento. Lt. Dave McGill appeared for the Los Angeles Police Department. Susan Geanacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

On April 26, 2006, the Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 5 to 1.

On July 31, 2009, the Commission set aside and amended the Statement of Decision on reconsideration in part as directed by the court in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355; Judgment and Writ issued May 8, 2009, by the Sacramento County Superior Court, Case No. 07CS00079, on consent by a vote of 6 to 0.

Summary of Findings

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as "POBOR") to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

In 1999, the Commission approved the test claim and adopted the original Statement of Decision. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.

- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

On April 26, 2006, the Commission found on reconsideration that the *San Diego Unified School Dist*. case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers, except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[1] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

In January 2007, the Department of Finance filed a petition for writ of mandate challenging the Commission's Statement of Decision on Reconsideration, arguing that POBOR does not constitute a state-mandated program for school districts and special districts and, thus, school districts and special districts are not eligible claimants (Sacramento County Superior Court, Case No. 07CS00079). The Department of Finance agreed, however, that the test claim statutes are state-mandated with respect to the police protection districts named in Government Code section 53060.7 that wholly supplant the law enforcement functions of the county within their jurisdiction.

On February 6, 2009, the Third District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1357, determined that POBOR is not a reimbursable mandate as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties.

[1] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

On May 8, 2009, the Sacramento County Superior Court issued a judgment and writ in Case No. 07CS00079, pursuant to the Third District Court of Appeal's decision in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, requiring the Commission to:

a. Set aside the portion of its reconsideration decision in "Case No. 05-RL-4499-01 Peace Officer Procedural Bill of Rights" (reconsideration decision) that found that the Peace Officer Procedural Bill of Rights program constitutes a reimbursable state-mandated program for school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties;

b. Issue a new decision denying the portion of the reconsideration decision approving reimbursement for school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties; and

c. Amend the parameters and guidelines consistent with this judgment.

This judgment does not affect cities, counties, or special police protection districts named in Government Code section 53060.7, which wholly supplant the law enforcement functions of the County within their jurisdiction.

Accordingly, on July 31, 2009, the Commission amended the decision to deny reimbursement to school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties.

BACKGROUND

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim. Government Code section 3313 states the following:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions. If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted.

Commission's Decision on *Peace Officer Procedural Bill of Rights* (CSM 4499)

The Legislature enacted the Peace Officers Procedural Bill of Rights Act (commonly abbreviated as "POBOR"), by adding Government Code sections 3300 through 3310, in 1976. POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Generally, POBOR prescribes certain protections that must be afforded officers during interrogations that could lead to punitive action against them; gives officers the right to review and respond in writing to adverse comments entered in their personnel files; and gives officers the right to an administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit.[2]

Legislative intent for POBOR is expressly provided in Government Code section 3301 as follows:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California.

POBOR applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[3]

In 1995, the City of Sacramento filed a test claim alleging that POBOR, as it existed from 1976 until 1990, constituted a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[4] In 1999, the Commission

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[2] See California Supreme Court's summary of the legislation in *Baggett v. Gates* (1982) 32 Cal.3d 128, 135.

[3] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[4] The POBOR Act has been subsequently amended by the Legislature. (See Stats. 1994, ch. 1259; Stats. 1997, ch. 148; Stats. 1998, ch. 263; Stats. 1998, ch. 786; Stats. 1999, ch. 338; Stats. 2000, ch. 209; Stats. 2002, ch. 1156; Stats. 2003, ch. 876; Stats. 2004, ch. 405; and Stats. 2005, ch. 22.) These subsequent amendments are outside the scope of the Commission's decision in POBOR (CSM 4499), and therefore are *not* analyzed to determine whether they impose reimbursable state-mandated activities within the meaning of article XIII B, section 6.

approved the test claim and adopted a Statement of Decision.[5] The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.[6]

On March 29, 2001, the Commission adopted a statewide cost estimate covering fiscal years 1994-1995 through 2001-2002 in the amount of $152,506,000.[7]

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[5] Administrative Record, page 859.

[6] Administrative Record, page 1273.

Audit by the Bureau of State Audits

The Legislative Analyst's Office (LAO), in its Analysis of the 2002-2003 Budget Bill, reviewed a sample of POBOR reimbursement claims and found that the annual state costs associated with the program was likely to be two to three times higher than the amount projected in the statewide cost estimate and significantly higher than what the Legislature initially expected. LAO projected costs in the range of $50 to $75 million annually. LAO also found a wide variation in the costs claimed by local governments. Thus, LAO recommended that the Legislature refer the POBOR program to the Joint Legislative Audit Committee for review, possible state audit, and possible revisions to the parameters and guidelines.

In March 2003, the Joint Legislative Audit Committee authorized the Bureau of State Audits to conduct an audit of the process used by the Commission to develop statewide cost estimates and to establish parameters and guidelines for the claims related to POBOR.

On October 15, 2003, the Bureau of State Audits issued its audit report, finding that reimbursement claims were significantly higher than anticipated and that some agencies claimed reimbursement for questionable activities.[8] While the Bureau of State Audits recommended the Commission make changes to the overall mandates process, it did not recommend the Commission make any changes to the parameters and guidelines for the POBOR program. The Commission implemented all of the Bureau's recommendations.

On July 19, 2005, the Legislature enacted Government Code section 3313 (Stats. 2005, ch. 72, § 6 (AB 138)) and directed the Commission to "review" the Statement of Decision in POBOR.

Comments Filed Before the Issuance of the Draft Staff Analysis by the City and County of Los Angeles

On October 19, 2005, Commission staff requested comments from interested parties, affected state agencies, and interested persons on the Legislature's directive to "review" the POBOR program. Comments were received from the City of Los Angeles and the County of Los Angeles. The City and County both contend that the Commission properly found that POBOR constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The County further argues that, under the California Supreme Court decision in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, reimbursement must be expanded to include all activities required under the test claim statutes including those procedures required by the federal due process clause. The County of Los Angeles also proposes that the Commission adopt a reasonable reimbursement methodology in the parameters and guidelines to reimburse these claims.

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[7] Administrative Record, page 1309.

[8] Administrative Record, page 1407 et seq.

Comments Filed on the Draft Staff Analysis

On February 24, 2006, Commission staff issued the draft staff analysis and requested comments on the draft. The Commission received responses from the following parties:

City of Sacramento

The City of Sacramento argues the following:

- Prior law does not require due process protections for employees receiving short-term suspensions, reclassifications, or reprimands. Therefore, the administrative appeal required by the test claim legislation constitutes a new program or higher level of service when an officer receives a short-term suspension, reclassification, or reprimand.
- Not every termination of a police chief warrants a liberty interest hearing required under prior law. The decision of the Commission should distinguish between those situations where there is a valid right to a liberty interest hearing under principles of due process, from the remaining situations where a police chief is terminated.
- The decision of the Commission should reflect "the onerous requirements imposed when interrogations are handled under POBOR."
- All activities required when an officer receives an adverse comment are reimbursable.

County of Alameda

The County of Alameda states that interrogation of a sworn officer under POBOR is difficult and requires preparation. The County alleges that ten hours of investigation must be conducted before an interview that might take thirty minutes.

County of Los Angeles

The County of Los Angeles contends that investigation is a reimbursable state-mandated activity. The County also argues that, pursuant to the *San Diego Unified School Dist.* case, all due process activities are reimbursable.

County of Orange

The County of Orange believes the staff analysis "does not fully comprehend or account for the [investigation] requirements of interrogation governed by Government Code section 3303." The County contends that the requirements of law enforcement agencies to investigate complaints have correspondingly increased under POBOR. When a complaint is received, the County argues that "every department is called upon to conduct very detailed investigations when allegations of serious misconduct occur. These investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force where injuries may be significant, serious property damage, and criminal behavior." The County also contends that the investigation involves the subject officer and other officer witnesses.

Department of Finance

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> . . . there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "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

[9] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "(a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

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

increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[11] 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.[12] 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.[13]

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.[14] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

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.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6

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

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[17] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

I. Commission Jurisdiction and Period of Reimbursement for Decision on Reconsideration

It is a well-settled issue of law that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. The Commission's jurisdiction in this case is based solely on Government Code section 3313. Absent Government Code section 3313, the Commission would have no jurisdiction to review and reconsider its decision on POBOR since the decision was adopted and issued well over 30 days ago.[20]

Thus, the Commission must act within the jurisdiction granted by Government Code section 3313, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[21] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of Government Code section 3313.

Government Code section 3313 provides:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision *to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions*. If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted. (Emphasis added.)

The Commission's jurisdiction on review is limited by Government Code section 3313, to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist*. … and other applicable court decisions."

In addition, Government Code section 3313 states that "the revised decision shall apply to local government Peace Officer Procedural Bill of Rights activities *occurring after the date the revised decision is adopted*." Thus, the Commission finds that the decision

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

[20] Government Code section 17559.

[21] *Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

adopted by the Commission on this reconsideration or "review" of POBOR applies to costs incurred and claimed for the 2006-2007 fiscal year.

II. Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In 1999, the Commission found that the test claim legislation mandates law enforcement agencies to take specified procedural steps when investigating or disciplining a peace officer employee.[22] The Commission found that Government Code section 3304 mandates, under specified circumstances, that "no punitive action ['any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment'], nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

The Commission also found that the following activities are mandated by Government Code section 3303 when the employer wants to interrogate an officer:

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Providing the peace officer employee with access to a tape recording of his or her interrogation prior to any further interrogation at a subsequent time, as specified. (Gov. Code, § 3303, subd. (g).)
- Under specified circumstances, producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons when requested by the officer. (Gov. Code, § 3303, subd. (g).)

Finally, Government Code sections 3305 and 3306 provide that no peace officer shall have any adverse comment entered into the officer's personnel file without having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact shall be noted on the document and signed or initialed by the peace officer. In addition, the peace officer shall have 30 days to file a written response to any adverse comment entered into the personnel file. The Commission found that Government Code sections 3305 and 3306 impose the following requirements on employers before an adverse comment is placed in an officer's personnel file:

- To provide notice of the adverse comment to the officer.
- To provide an opportunity to review and sign the adverse comment.

[22] Original Statement of Decision (AR, p. 862).

- To provide an opportunity to respond to the adverse comment within 30 days.
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

POBOR, by the terms set forth in Government Code section 3301, expressly applies to counties, cities, school districts, and special districts and the Commission approved the test claim for these local entities. Government Code section 3301 states the following: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5 of the Penal Code." The legislation, however, does not apply to reserve or recruit officers,[23] coroners, or railroad police officers commissioned by the Governor.

Government Code section 3313 requires the Commission to review these findings to clarify whether the subject legislation imposes a mandate consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.

Generally, in order for test claim legislation to impose a reimbursable state-mandated program, the statutory language must mandate an activity or task on local governmental entities. If the statutory language does not impose a mandate, then article XIII B, section 6 of the California Constitution is not triggered and reimbursement is not required.

In the present case, although the procedural rights and protections afforded a peace officer under POBOR are expressly required by statute, the required activities are not triggered until the employing agency makes certain local decisions. For example, in the case of a city or county, agencies that are required by the Constitution to employ peace officers,[24] the POBOR activities are not triggered until the city or county decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file. These initial decisions are not expressly mandated by state law, but are governed by local policy, ordinance, city charter, or memorandum of understanding.[25]

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[23] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569.

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

[25] See *Baggett v. Gates* (1982) 32 Cal.3d 128, 137-140, where the California Supreme Court determined that POBOR *does not* (1) interfere with the setting of peace officers' compensation, (2) regulate qualifications for employment, (3) regulate the manner, method, times, or terms for which a peace officer shall be elected or appointed, nor does it (4) affect the tenure of office or purpose to regulate or specify the causes for which a

In the case of a school district or special district, the POBOR requirements are not triggered until the school district or special district (1) decides to exercise the statutory authority to employ peace officers, and (2) decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

After the Commission issued its decision in this case, two California Supreme Court decisions were decided that address the "mandate" issue; *Kern High School Dist.* and *San Diego Unified School Dist.*[26] Thus, based on the court's ruling in these cases, the issue is whether the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 in light of the local decisions that trigger the POBOR requirements.

A. POBOR constitutes a state-mandated program even though a local decision is first made to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

The procedural rights and protections afforded a peace officer under POBOR are required by statute. The rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist*., the Commission finds that the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

After the Commission issued its Statement of Decision in this case, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[27] In *Kern High School Dist.*, school districts requested reimbursement for notice and agenda costs for meetings of their school site councils and advisory bodies. These bodies were established as a condition of various education-related programs that were funded by the state and federal government.

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local

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peace officer can be removed. These are local decisions. But the court found that POBOR impinges on the city's implied power to determine the *manner* in which an employee can be disciplined.

[26] *Kern High School Dist., supra,* 30 Cal.4th 727; *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

[27] *Kern High School Dist., supra,* 30 Cal.4th 727.

government entity is required or forced to do."[28] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders." [29]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled. [30] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[31]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][32]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled to participate in eight of the nine underlying programs.[33]

The school districts in *Kern High School Dist*., however, urged the court to define "state mandate" broadly to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance. The court previously applied such a broad construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the state's failure to

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[28] *Id.* at page 737.

[29] *Ibid*.

[30] *Id.* at page 743.

[31] *Ibid.*

[32] *Id.* at page 731.

[33] *Id*. at pages 744-745.

comply with federal legislation that extended mandatory coverage under the state's unemployment insurance law would result in California businesses facing "a new and serious penalty – full, double unemployment taxation by both state and federal governments."[34] Although the court in *Kern High School Dist*. declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion on the facts before it in *Kern*, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies that have limited tax revenue– the court stated:

> In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.[35]

Thus, the court in *Kern* recognized that there could be a case, based on its facts, where reimbursement would be required under article XIII B, section 6 in circumstances where the local entity was not legally compelled to participate in a program.

One year later, the Supreme Court revisited the "mandate" issue in *San Diego Unified School Dist*., a case that addressed a challenge to a Commission decision involving a school district's expulsion of a student. The school district acknowledged that under specified circumstances, the statutory scheme at issue in the case gave school districts discretion to expel a student. The district nevertheless argued that it was mandated to incur the costs associated with the due process hearing required by the test claim legislation when a student is expelled. The district argued that "although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program" and, thus, the ruling in *City of Merced* should not apply.[36]

In *San Diego Unified School Dist*., the Supreme Court did not overrule the *Kern* or *City of Merced* cases, but stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[37] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code

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[34] *City of Sacramento, supra,* 50 Cal.3d 51, 74.

[35] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

[36] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887.

[37] *Id*. at page 887.

> section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] the court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[38]

Ultimately, however, the court did not resolve the issue regarding the application of the *City of Merced* case to the discretionary expulsions, and resolved the case on alternative grounds.[39]

In the present case, the purpose of POBOR, as stated in Government Code section 3301, is to assure that stable employment relations are continued throughout the state and to further assure that effective law enforcement services are provided to all people of the state. The Legislature declared POBOR a matter of statewide concern.

In 1982, the California Supreme Court addressed the POBOR legislation in *Baggett v. Gates*.[40] In *Baggett*, the City of Los Angeles received information that certain peace officer employees were engaging in misconduct during work hours. The city interrogated the officers and reassigned them to lower paying positions (a punitive action under POBOR). The employees requested an administrative appeal pursuant to the POBOR legislation and the city denied the request, arguing that charter cities cannot be constitutionally bound by POBOR. The court acknowledged that the home rule provision of the Constitution gives charter cities the power to make and enforce all ordinances and regulations, subject only to the restrictions and limitations provided in the city charter. Nevertheless, the court found that the City of Los Angeles was required by the POBOR legislation to provide the opportunity for an administrative appeal to the officers.[41] In

[38] *Id.* at pages 887-888.

[39] *Id*. at page 888.

[40] *Baggett v. Gates* (1982) 32 Cal.3d 128.

[41] *Id.* at page 141.

reaching its conclusion, the court relied, in part, on the express language of legislative intent in Government Code section 3301 that the POBOR legislation is a "matter of statewide concern."[42]

The court in *Baggett* also concluded that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the city, which would extend far beyond local boundaries.

> Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety, and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.[43]

Thus, the court found that "the total effect of the POBOR legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves."[44]

In 1990, the Supreme Court revisited the POBOR legislation in *Pasadena Police Officers Assn. v. City of Pasadena (Pasadena)*.[45] The *Pasadena* case addressed the POBOR requirement in Government Code section 3303 to require the employer to provide an officer subject to an interrogation with any reports or complaints made by investigators. In the language quoted below, the court described the POBOR legislation and recognized that the public has a high expectation that peace officers are to be held above suspicion of violation of the laws they are sworn to enforce. Thus, in order to maintain the public's confidence, "a law enforcement agency *must* promptly, thoroughly, and fairly investigate allegations of officer misconduct … [and] institute disciplinary proceedings." (Emphasis added.)

> Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws they are

[42] *Id*. at page 136.

[43] *Id*. at page 139-140.

[44] *Id*. at page 140.

[45] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.

> sworn … to enforce." [Citations omitted.] Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." [Citation omitted.] To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.[46]

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 "for the simple reason" that the local entity's ability to decide who to discipline and when "could control or perhaps even avoid the extra costs" of the POBOR legislation.[47] But a local entity does not decide who to investigate or discipline based on the costs incurred to the entity. The decision is made, as indicated by the Supreme Court, to maintain the public's confidence in its police force and to protect the health, safety, and welfare of its citizens. Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a mandated program would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[48] Moreover, the POBOR legislation implements a state policy to maintain stable employment relations between police officers and their employers to "assure that effective services are provided to all people of the state." POBOR, therefore, carries out the governmental function of providing a service to the public, and imposes unique requirements on local agencies to implement the state policy.[49] Thus, a finding that the test claim legislation does not impose a state-mandated program contravenes the purpose of article XIII B, section 6 "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" due to the tax and spend provisions of articles XIII A and XIII B.[50]

Accordingly, even though local decisions are first made to interrogate an officer, take punitive action against the officer, or to place an adverse comment in an officer's personnel file, the Commission finds, based on *San Diego Unified School Dist*. and the

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[46] *Id.* at page 571-572.

[47] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887-888.

[48] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

[49] *San Diego Unified School, supra,* 33 Cal.4th at page 874.

[50] *Id.* at page 888, fn. 23.

facts presented in this case, that POBOR constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. POBOR does not constitute a state-mandated program for school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties.

Government Code section 3301, the statute that identifies the peace officers afforded the rights and protections granted in the POBOR legislation, expressly includes peace officers employed by school districts and community college districts pursuant to Penal Code section 830.32. Penal Code section 830.32 provides that members of a school district and community college district police department appointed pursuant to Education Code sections 39670 and 72330 are peace officers if the primary duty of the officer is the enforcement of law as prescribed by Education Code sections 39670 (renumbered section 38000) and 72330, and the officers have completed an approved course of training prescribed by the Commission on Peace Officer Standards and Training (POST) before exercising the powers of a peace officer.

POBOR also applies to special districts authorized by statute to maintain a police department, including police protection districts, harbor or port police, transit police, peace officers employed by the San Francisco Bay Area Rapid Transit District (BART), peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.[51]

While counties and cities are mandated by the California Constitution to employ peace officers,[52] school districts and special districts are not expressly required by the state to

[51] Government Code section 3301; Penal Code section 830.1, subdivision (a) ["police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized by statute to maintain a police department"]; Penal Code section 830.31, subdivision (d) ["A housing authority patrol officer employed by the housing authority of a … district …"]; Penal Code section 830.33 ["(a) A member of the San Francisco Bay Area Rapid Transit District Police Department appointed pursuant to Section 28767.5 of the Public Utilities Code … (b) Harbor or port police regularly employed and paid … by a … district … (c) Transit police officers or peace officers of a … district … (d) Any person regularly employed as an airport law enforcement officer by a … district …"; and Penal Code section 830.37 ["(a) Members of an arson-investigating unit … of a fire department or fire protection agency of a … district … if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud …(b) Members … regularly paid and employed in that capacity, of a fire department or fire protection agency of a … district … if the primary duty of these peace officers … is the enforcement of law relating to fire prevention or fire suppression."

[52] See ante, footnote 21.

employ peace officers. School districts and special districts have statutory authority to employ peace officers.

On February 6, 2009, the Third District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1357, determined that POBOR is not a reimbursable mandate as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties. The court held, on pages 1365 though 1368, as follows:

> The result of the cases discussed above is that, if a local government participates "voluntarily," i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement. The Commission concedes there is no legal compulsion for the school and special districts in issue to hire peace officers. As related, *Kern High School Dist.* suggests "involuntarily" can extend beyond "legal compulsion" to " compelled as a practical matter to participate." (*Kern High School Dist., supra*, 30 Cal.4th at p. 748, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) However, the latter term means facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences" and not merely having to "adjust to the withdrawal of grant money along with the lifting of program obligations." (*Id.* at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) There is nothing in this record to show that the school and special districts in issue are practically compelled to hire peace officers.
>
> The Commission points to two considerations to overcome the rule that participation in a voluntary program means additional costs are not mandates. The first is that the Legislature has declared that application of POBRA procedures to all public safety officers is a matter of statewide concern. The second consideration is that the Legislature has promulgated various rights to public safety [FN5] and rights and duties of peace officers,[FN6] which it is claimed, recognize "the need for local government entities to employ peace officers when necessary to carry out their basic functions." Neither consideration persuasively supports the claim of practical compulsion.
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> FN5. E.g., article I, section 28, subdivision (c) (announcing a right to attend grade school campuses which are safe); Education Code section 38000, subdivision (a) (authorizing school boards to hire peace officers to ensure safety of pupils and personnel); and Education Code section 72330, subdivision (a) (authorizing a community college district to employ peace officers as necessary to enforce the law on or near campus).
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> FN6. E.g., Penal Code sections 830.31-830.35, 830.37 (powers of arrest extend statewide), and 12025 (permitting peace officers to carry concealed weapons).

The consideration that the Legislature has determined that all public safety officers should be entitled to POBRA protections is immaterial. It is almost always the case that a rule prescribed by the Legislature that applies to a voluntary program will, nonetheless, be a matter of statewide concern and application. For example, the rule in *Kern High School Dist.* was that any district in the state that participated in the underlying funded educational programs was required to abide by the notice of meetings and agenda posting requirements. When the Legislature makes such a rule, it only says that if you participate you must follow the rule. This is not a rule that bears on compulsion to participate. (Cf. *Kern High School Dist., supra*, 30 Cal.4th at p. 743, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [the proper focus of a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs, not that costs incurred in complying with program conditions have been legally compelled].)

Similarly, we do not see the bearing on a necessity or practical compulsion of the districts to hire peace officers, of any or all the various rights to public safety and duties of peace officers to which the Commission points. If affording those rights or complying with those duties as a practical matter could be accomplished only by exercising the authority given to hire peace officers, the Commission's argument would be forceful. However, it is not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply.

The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts "employ peace officers when necessary to carry out the essential obligations and functions established by law." However, the "necessity" that is required is facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences." (*Kern High School Dist., supra,* 30 Cal.4th at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74, 266 Cal.Rptr. 139, 785 P.2d 522.) That cannot be established in this case without a concrete showing that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences.

The Commission notes that *Carmel Valley Fire Protection Dist. v. State* characterizes police protection as one of " 'the most essential and basic functions of local government.' " (*Carmel Valley Fire Protection Dist. v. State, supra*, 190 Cal.App.3d at p. 537, 234 Cal.Rptr. 795, quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107, 133 Cal.Rptr. 649.) However, that characterization is in the context of cities, counties, and districts that have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction. A fire protection district perforce must hire firefighters to supply that protection.

Thus, as to cities, counties, and such districts, new statutory duties that increase the costs of such services are prima facie reimbursable. This is true,

> notwithstanding a potential argument that such a local government's decision is voluntary in part, as to the number of personnel it hires. (See *San Diego Unified School Dist., supra,* 33 Cal.4th at p. 888, 16 Cal.Rptr.3d 466, 94 P.3d 589.) A school district, for example, has an analogous basic and mandatory duty to educate students. In the course of carrying out that duty, some "discretionary" expulsions will necessarily occur. (*Id.* at p. 887, fn. 22, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Accordingly, *San Diego Unified School Dist.* suggests additional costs of "discretionary" expulsions should not be considered voluntary. Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs attendant to those actions cannot fairly and reasonably be characterized as voluntary under the rationale of *City of Merced.* (See *San Diego Unified School Dist., supra,* 33 Cal.4th at pp. 887-888, 16 Cal.Rptr.3d 466, 94 P.3d 589.)
>
> However, the districts in issue are authorized, but not required, to provide their own peace officers and do not have provision of police protection as an essential and basic function. It is not essential unless there is a showing that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions. As there is no such showing in the record, the Commission erred in finding that POBRA constitutes a state-mandated program for school districts and the special districts identified in Government Code section 3301. Similarly, the superior court erred in concluding as a matter of law that, "[a]s a practical matter," the employment of peace officers by the local agencies is "not an optional program" and "they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement."

Therefore, POBOR does not constitute a reimbursable state-mandated program as to school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties. These entities are not eligible to claim reimbursement for this program.

The test claim statutes do impose a state-mandated program on counties, cities, and special police protection districts named in Government Code section 53060.7 that wholly supplant the law enforcement functions of the county within their jurisdiction.[53] These entities are eligible to claim reimbursement for this program.

[53] The special districts identified in Government Code section 53060.7 (Bear Valley Community Services District, Broadmoor Police Protection District, Kensington Police Protection and Community Services District, Lake Shastina Community Services District, and Stallion Springs Community Services District) "wholly supplant the law enforcement functions of the county within the jurisdiction of that district."

III. Does the test claim legislation constitute a new program or higher level of service and impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Government Code section 3313 requires the Commission to review its previous findings to clarify whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme Court Decision in *San Diego Unified School Dist*. and other applicable court decisions. The test claim legislation will impose a new program or higher level of service, and costs mandated by the state when it compels a local entity to perform activities not previously required, and results in actual increased costs mandated by the state.[54] In addition, none of the exceptions to reimbursement found in Government Code section 17556 can apply. The activities found by the Commission to be mandated are analyzed below.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary,[55] written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[56] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[57]

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[54] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835.

[55] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[56] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[57] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[58] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[59]

Thus, under Government Code section 3304, as it existed when the Statement of Decision was adopted, the employer is required to provide the opportunity for an administrative appeal to permanent, at-will or probationary peace officers for any action leading to the following actions:

- Dismissal.
- Demotion.
- Suspension.
- Reduction in salary.
- Written reprimand.
- Transfer for purposes of punishment.
- Denial of promotion on grounds other than merit.
- Other actions against the employee that results in disadvantage, harm, loss or hardship and impacts the career opportunities of the employee.

The test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local entity.[60] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with due process standards.[61, 62]

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[58] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

[59] *Id* at p. 353-354.

[60] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806.

[61] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304.

[62] At least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure

Finally, the courts have been clear that the administrative hearing required by Government Code section 3304 does *not* mandate an investigatory process. "It is an adjudicative process by which the [peace officers] hope to restore their reputations" and where "the reexamination [of the employer's decision] must be conducted by someone who has not been involved in the initial determination."[63]

In 1999, the Commission concluded that under certain circumstances, the administrative appeal required by the POBOR legislation was already required to be provided by the due process clause of the United States and California Constitutions when an action by the employer affects an employee's property interest or liberty interest. A permanent employee with civil service protection, for example, has a property interest in the employment position if the employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Under these circumstances, the permanent employee is entitled to a due process hearing.[64]

In addition, the due process clause applies when the charges supporting a dismissal of a probationary or at-will employee harms the employee's reputation and ability to find future employment. [65] For example, an at-will employee, such as the chief of police, is entitled to a liberty interest hearing (or name-clearing hearing) under the state and federal constitutions when the dismissal is supported by charges of misconduct, mismanagement, and misjudgment – all of which "stigmatize [the employee's] reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration."[66] In *Williams v. Department of Water and Power*, a case cited by the City of Sacramento, the court explained that the right to a liberty interest hearing arises in cases involving moral turpitude. There is no constitutional right to a liberty interest hearing when an at-will employee is removed for incompetence, inability to get along with others, or for political reasons due to a change of administration.

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section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250. In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.) A hearing before the Chief of Police was found to be appropriate within the meaning of Government Code section 3304 in a case involving a written reprimand since the Chief of Police was not in any way involved in the investigation and the employee and his attorney had an opportunity to present evidence and set forth arguments on the employee's behalf. (*Stanton, supra*, 226 Cal.App,3d 1438, 1443.)

[63] *Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-444 and 447-448.

[64] See original Statement of Decision (AR, p. 864).

[65] See original Statement of Decision (AR, pp. 863-866, 870).

[66] *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.

> The mere fact of discharge from public employment does not deprive one of a liberty interest hearing. [Citations omitted.] Appellant must show her dismissal was based on charges of misconduct which "stigmatize" her reputation or "seriously impair" her opportunity to earn a living. [Citations omitted.] … "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament, or character. [Citation omitted.] But not every dismissal assumes a constitutional magnitude." [Citation omitted.]
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> The leading case of *Board of Regents v. Roth* (1972) 408 U.S. 564, 574 [unofficial cite omitted] distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and other charges such as incompetence or inability to get along with coworkers which does not. The Supreme Court recognized that where "a person's good name, reputation, honor or integrity is at stake" his right to liberty under the Fourteenth Amendment is implicated and deserves constitutional protection. [Citation omitted.] "In the context of *Roth*-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy." [Citation omitted.][67]

Thus, the Commission found that, when a hearing was required by the due process clause of the state and federal constitutions, the activity of providing the administrative appeal did not constitute new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Commission found that the administrative appeal constitutes a new program or higher level of service, and imposes costs mandated by the state, in those situations where the due process clause of the United States and California Constitutions did not apply. These include the following:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by *probationary and at-will employees* whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment).
- Transfer of permanent, probationary and at-will employees for purposes of punishment.
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit.

[67] *Williams v. Department of Water and Power* (1982) 130 Cal.App.3d 677, 684-685.

- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

As noted by the Commission in the Statement of Decision and parameters and guidelines, the Legislature amended Government Code section 3304 in 1998 by limiting the right to an administrative appeal to only those peace officers "who [have] successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.) Thus, as of January 1, 1999, providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) is no longer a reimbursable state-mandated activity.

Thus, the issue is whether the activity of providing the opportunity for an administrative appeal is reimbursable under current law when (1) permanent peace officer employees are subject to punitive actions, as defined in Government Code section 3303, or denials of promotion on grounds other than merit; and when (2) a chief of police is subject to removal.

As indicated above, under prior law, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process liberty interest hearing under prior law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment. The County of Los Angeles argues, however, that under the California Supreme Court decision in *San Diego Unified School District*, reimbursement must be expanded to include all activities required under the test claim statute, including those procedures previously required by the due process clause. A close reading of the *San Diego Unified School District* case, however, shows that it does not support the County's position.

The County relies on the Supreme Court's analysis on pages 879 (beginning under the header "2. Are the hearing costs state-mandated?") through page 882 of the *San Diego Unified School District* case. There, the court addressed two test claim statutes: Education Code section 48915, which *mandated* the school principal to immediately suspend and recommend the expulsion of a student carrying a firearm or committing another specified offense; and Education Code section 48918, which lays out the due process hearing requirements once the mandated recommendation is made to expel the student. The court recognized that the expulsion recommendation required by Education Code section 48915 was mandated "in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.[68] The Commission and the state, relying on Government Code section 17556, subdivision (c), argued, however, that the district's costs are reimbursable only if, and to the extent that, hearing procedures set forth in Education

[68] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 880.

Code section 48918 exceed the requirements of federal due process.[69] The court disagreed. The court based its conclusion on the fact that the expulsion decision mandated by Education Code 48915, which triggers the district's costs incurred to comply with due process hearing procedures, did not implement a federal law. Thus, the court concluded that all costs incurred that are triggered by the state-mandated expulsion, including those that satisfy the due process clause, are fully reimbursable. The court's holding is as follows:

> [W]e cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case (state legislation in effect through mid-1994), all such hearing costs – those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements – are, with respect to the mandatory expulsion provision of section 48915, state mandated costs, fully reimbursable by the state.[70]

The POBOR legislation is different. The costs incurred to comply with the administrative appeal are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to take punitive action, or deny a promotion on grounds other than merit against a peace officer employee. Therefore, the Commission finds that the court's holding, authorizing reimbursement for *all* due process hearing costs triggered by a state-mandated event, does not apply to this case.

Rather, what applies from the *San Diego Unified School Dist*. decision to the administrative appeal activity mandated by Government Code section 3304 is the court's holding regarding discretionary expulsions. In the *San Diego* case, the court analyzed the portion of Education Code section 48915 that provided the school principal with the discretion to recommend that a student be expelled for specified conduct. If the recommendation was made and the district accepted the recommendation, then the district was required to comply with the mandatory due process hearing procedures of Education Code section 48918.[71] In this situation, the court held that reimbursement for the procedural hearing costs triggered by a local discretionary decision to seek an expulsion was not reimbursable because the hearing procedures were adopted to implement a federal due process mandate.[72] The court found that the analysis by the Second District Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (*County of Los Angeles II*) was instructive.[73] In the *County of Los Angeles II*

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[69] *Ibid*.

[70] *Id*. at pages 881-882.

[71] *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 884-890.

[72] *Id*. at page 888.

[73] *Id*. at page 888-889; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805. The test claim statute in *County of Los Angeles* required counties to

case, the court determined that even in the absence of the test claim statute, counties would be still be responsible for providing services under the constitutional guarantees of federal due process.[74]

This analysis applies here. As indicated above, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process hearing under prior state and federal law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment. Thus, even in the absence of Government Code section 3304, local government would still be required to provide a due process hearing under these situations.

The City of Sacramento, however, contends in comments to the draft staff analysis that prior law does not require due process protections outlined by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, for employees receiving short-term suspensions, reclassifications, or reprimands. The City states that five-day suspensions, written reprimands and other lesser forms of punishment are covered by POBOR, but not *Skelly* and, thus, the administrative appeal required by POBOR is reimbursable for the lesser forms of punishment.

The City raised the same argument when the Commission originally considered the test claim, and the Commission disagreed with the arguments.[75] The Commission finds that the Commission's original conclusion on this issue is correct.

As discussed below, the City is correct that the *pre-disciplinary* protections outlined in *Skelly* do not apply to a short-term suspension or written reprimand. But prior law still requires due process protection, including an administrative hearing, when a permanent employee receives a short-term suspension, reprimand, or other lesser form of punishment. Thus, the administrative hearing required by the test claim legislation under these circumstances does not constitute a new program or higher level of service or impose costs mandated by the state.

Skelly involved the discharge of a permanent civil service employee. The court held that such employees have a property interest in the permanent position and the employee may not be dismissed or subjected to other forms of punitive action without due process of law. Based on the facts of the case (that a discharged employee faced the bleak prospect

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provide indigent criminal defendants with defense funds for ancillary investigation services for capital murder cases. The court determined that even in the absence of the test claim statute, indigent defendants in capital cases were entitled to such funds under the Sixth Amendment of the federal Constitution. (*Id*. at p. 815.)

[74] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

[75] See original Statement of Decision (AR, pp. 865-866).

of being without a job and the need to seek other employment hindered by the charges against him), the court held that the employee was entitled to receive notice of the discharge, the reasons for the action, a copy of the charges and materials upon which the action is based, and the right to a hearing to respond to the authority imposing the discipline *before* the discharge became effective.[76] The Supreme Court in *Skelly* recognized, however, that due process requirements are not so inflexible as to require an evidentiary trial at the *preliminary* stage in every situation involving the taking or property. Although some form of notice and hearing must preclude a final deprivation of property, the timing and content of the notice, as well as the nature of the hearing will depend on the competing interests involved.[77]

Three years after *Skelly*, the Supreme Court decided *Civil Service Association v. the City and County of San Francisco*, a case involving the short-term suspensions of eight civil service employees.[78] The court held that the punitive action involved with a short-term suspension is minor and does not require pre-disciplinary action procedures of the kind required by *Skelly*.[79] But the employees were still entitled to due process protection, including the right to a hearing, since the temporary right of enjoyment to the position amounted to a taking for due process purposes.[80] The court held as follows:

> However, while the principles underlying *Skelly* do not here compel the granting of predisciplinary procedures there mentioned, it does not follow that the employees are totally without right to hearing. *While due process does not guarantee to these appellants any Skelly-type predisciplinary hearing procedure, minimal concepts of fair play and justice embodied in the concept of due process require that there be a 'hearing,' of the type hereinafter explained.* The interest to be protected, i.e., the right to continuous employment, is accorded due process protection. While appellants may not in fact have been deprived of a salary earned but only of the opportunity to earn it, they had the expectancy of earning it free from arbitrary administrative action. [Citation omitted.] This expectancy is entitled to some modicum of due process protection. [Citation and footnote omitted.]
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> For the reasons state above, however, we believe that such protection will be adequately provided in circumstances such as these by procedures of the character outlined in *Skelly*, (i.e., one that will apprise the employee of the proposed action, the reasons therefore, provide for a copy of the charges including materials upon which the action is based, and the right

[76] *Skelly, supra*, 15 Cal.3d 194, 213-215.

[77] *Id*. at page 209.

[78] *Civil Service Association v. City and County of San Francisco* (1978) 22 Cal.3d 552.

[79] *Id.* at page 560.

[80] *Ibid*.

> to respond either orally or in writing, to the authority imposing the discipline) *if provided either during the suspension or within reasonable time thereafter*.[81] (Emphasis added.)

Thus, the court held that the employees that did not receive a hearing at all were entitled to one under principles of due process.[82] As indicated in the Commission's original Statement of Decision, the Third District Court of Appeal in the *Stanton* case also found that due process principles apply when an employee receives a written reprimand without a corresponding loss of pay.[83]

Therefore, in the following situations, the Commission finds that the Commission's original decision in this case was correct in that Government Code section 3304 does not constitute a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c), since the administrative appeal merely implements the due process requirements of the state and federal Constitutions:

- When a permanent employee is subject to a dismissal, demotion, suspension, reduction in salary, or a written reprimand.
- When the charges supporting the dismissal of a chief of police constitute moral turpitude, which harms the employee's reputation and ability to find future employment, thus imposing the requirement for a liberty interest hearing.

The due process clause, however, does not apply when a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee. In addition, the due process clause does not apply when local officials want to remove the chief of police under circumstances that do not create a liberty interest since the chief of police is an at-will employee and does not have a property interest in the position. Providing the opportunity for an administrative appeal under these circumstances is new and not required under prior law. In addition, none of the exceptions in Government Code section 17556 to the finding of costs mandated by the state apply to these situations.

Accordingly, the Commission finds that Government Code section 3304 constitutes a new program or higher level of service and imposes costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for providing the opportunity for an administrative appeal in the following circumstances only:

- When a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in

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[81] *Id*. at page 564.

[82] *Id.* at page 565.

[83] *Stanton, supra,* 226 Cal.App.3d 1438, 1442.

disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee.

- When local officials want to remove the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment).

Interrogations

Government Code section 3303 prescribes protections that apply when "any" peace officer is interrogated in the course of an administrative investigation that might subject the officer to the punitive actions listed in the section (dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment). The procedures and rights given to peace officers under section 3303 do not apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by, or other routine or unplanned contact with, a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[84]

The Commission found that the following activities constitute a new program or higher level of service and impose costs mandated by the state:

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

Government Code section 3313 directs the Commission to review these findings in order "to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions." The Commission finds that neither the *San Diego Unified School Dist.* case, nor any other court decision published since 1999, changes the Commission's conclusion that these activities constitute a new program or higher level of service and impose costs mandated by the state. Thus, these activities remain eligible for reimbursement when interrogating "any" peace officer, including probationary, at-will, and permanent officers that might subject the officer to punitive action.

The Commission also found that Government Code section 3303, subdivision (g), requires that:

[84] Government Code section 3303, subdivision (i).

- The peace officer employee shall have access to the tape recording of the interrogation if (1) any further proceedings are contemplated or, (2) prior to any further interrogation at a subsequent time.
- The peace officer shall be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed confidential.

The Commission found that providing the employee with access to the tape prior to a further interrogation at a subsequent time constitutes a new program or higher level of service and imposes costs mandated by the state. However, the due process clause of the United States and California Constitutions already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the punitive, disciplinary action is based. Thus, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation, and produce the transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed confidential, to the peace officer employee when:

- a permanent employee is dismissed, demoted, suspended, receives a reduction in pay, or written reprimand; or
- a probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by charges of moral turpitude, which support the dismissal.

Under these circumstances, the Commission concluded that the requirement to provide these materials under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing these materials merely implements the requirements of the United States Constitution.

The Commission finds that the conclusion denying reimbursement to provide these materials following the interrogation when the activity is already required by the due process clause of the United States and California Constitutions is consistent with the Supreme Court's ruling in *San Diego Unified School Dist*. The costs incurred to comply with these interrogation activities are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to interrogate an officer. Under these circumstances, the court determined that even in the absence of the test claim statute, counties would still be responsible for providing services under the constitutional guarantees of due process under the federal Constitution.[85]

[85] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

Thus, the Commission finds that the Commission's decision, that Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes costs mandated by the state for the following activities, is legally correct:

- Provide the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) the further proceeding is not a disciplinary punitive action;

  (b) the further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);

  (c) the further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

  (d) the further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

  (e) the further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

- Produce transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer following the interrogation, in the following circumstances:

  (a) when the investigation *does not* result in disciplinary punitive action; and

  (b) when the investigation results in:

    - a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
    - a transfer of a permanent, probationary or at-will employee for purposes of punishment;
    - a denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
    - other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

In comments to the draft staff analysis, the Counties of Orange, Los Angeles, and Alameda, and the City of Sacramento contend that the interrogation of an officer pursuant to the test claim legislation is complicated and requires the employer to fully investigate

in order to prepare for the interrogation. The County of Orange further states that "[t]hese investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force when injuries may be significant, serious property damage, and criminal behavior." These local agencies are requesting reimbursement for the time to investigate.

The Commission disagrees and finds that investigation services are not reimbursable. First, investigation of criminal behavior is specifically excluded from the requirements of Government Code section 3303. Government Code section 3303, subdivision (i), states that the interrogation requirements do not apply to an investigation concerned solely and directly with alleged criminal activities. Moreover, article XIII B, section 6, subdivision (a)(2), and Government Code section 17556, subdivision (g), state that no reimbursement is required for the enforcement of a crime.

The County of Los Angeles supports the argument that reimbursement for investigative services is required by citing Penal Code section 832.5, which states that each department that employs peace officers shall establish a procedure to investigate complaints. Penal Code section 832.5, however, was not included in this test claim, and the Commission makes no findings on that statute. The County of Los Angeles also cites to the phrase in Government Code section 3303, subdivision (a), which states that "[t]he interrogation shall be conducted …" to argue that investigation is required. The County takes the phrase out of context. Government Code section 3303, subdivision (a), states the following:

> The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate complaints. When adopting parameters and guidelines for this program, the Commission recognized that Government Code section 3303 does not impose new mandated requirements to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review responses given by officers and/or witnesses to an investigation.[86]

[86] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 (AR, p. 912).

Thus, investigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations.[87] It does not interfere with the employer's right to manage and control its own police department.[88]

Finally, the County of Orange contends that "[s]erious cases also tend to involve lengthy appeals processes that require delicate handling due to the increased rights under POBOR." For purposes of clarification, at the parameters and guidelines phase of this claim, the Commission denied reimbursement for the cost of defending lawsuits appealing the employer action under POBOR, determining that the test claim did not allege that the defense of lawsuits constitutes a reimbursable state-mandated program.[89] Government Code section 3313 does not give the Commission jurisdiction to change this finding.

Nevertheless, when adopting parameters and guidelines for this program, the Commission recognized the complexity of the procedures required to interrogate an officer, and approved several activities that the Commission found to be reasonable methods to comply with the mandated activities pursuant to the authority in section 1183.1, subdivision (a)(4), of the Commission's regulations. For example, the Commission authorized reimbursement, when preparing the notice regarding the nature of the interrogation, for reviewing the complaints and other documents in order to properly prepare the notice. The Commission also approved reimbursement for the mandated interrogation procedures when a peace officer witness was interrogated since the interrogation could lead to punitive action for that officer. Unlike other reconsideration statutes that directed the Commission to revise the parameters and guidelines, the Commission does not have jurisdiction here to change any discretionary findings or add any new activities to the parameters and guidelines that may be considered reasonable methods to comply with the program. The jurisdiction in this case is very narrow and limited to reviewing the Statement of Decision to clarify, as a matter of law, whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme Court Decision in *San Diego Unified School Dist*. and other applicable court decisions.[90]

Adverse Comments

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by

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[87] *Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 26.

[88] *Baggett, supra*, 32 Cal.3d 128, 135.

[89] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 Commission hearing (AR, pp. 904-906).

[90] However, any party may file a request to amend the parameters and guidelines pursuant to the authority in Government Code section 17557.

the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, Government Code sections 3305 and 3306 impose the following requirements on employers:

- to provide notice of the adverse comment;[91]
- to provide an opportunity to review and sign the adverse comment;
- to provide an opportunity to respond to the adverse comment within 30 days; and
- to note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

As noted in the 1999 Statement of Decision, the Commission recognized that the adverse comment could be considered a written reprimand or could lead to other punitive actions taken by the employer. If the adverse comment results in a dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or the comment harms an officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause of the state and federal constitutions.[92] Under such circumstances, the Commission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state". The Commission finds that this finding is consistent with *San Diego Unified School Dist*. since the local entity would be required, in the absence of the test claim legislation, to perform these activities to comply with federal due process procedures.[93]

However, the Commission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* specifically required by the case law interpreting the due process clause:

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[91] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

[92] *Hopson, supra,* 139 Cal.App.3d 347.

[93] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 888-889.

- obtaining the signature of the peace officer on the adverse comment, or
- noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Commission approved these two procedural activities since they were not expressly articulated in case law interpreting the due process clause and, thus, exceed federal law. The City of Sacramento contends that these activities remain reimbursable.

The Commission finds, however, that the decision in *San Diego Unified School Dist*. requires that these notice activities be denied pursuant to Government Code section 17556, subdivision (c), since they are "part and parcel" to the federal due process mandate, and result in "de minimis" costs to local government.

In *San Diego Unified School Dist*., the Supreme Court held that in situations when a local discretionary decision triggers a federal constitutional mandate such as the procedural due process clause, "the challenged state rules or procedures that are intended to implement an applicable federal law -- and whose costs are, in context, de minimis -- should be treated as part and parcel of the underlying federal mandate."[94] Adopting the reasoning of *County of Los Angeles II*, the court reasoned as follows:

> In *County of Los Angeles II*, supra 32 Cal.App.4th 805 [unofficial cite omitted], the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they do not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[95]

The Commission finds that obtaining the officer's signature on the adverse comment or indicating the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause, are designed to prove that the officer was on notice about the adverse comment. Since providing notice is already

[94] *Id.* at page 890.

[95] *Id.* at page 889.

guaranteed by the due process clause of the state and federal constitutions under these circumstances, the Commission finds that the obtaining the signature of the officer or noting the officer's refusal to sign the adverse comment is part and parcel of the federal notice mandate and results in "de minimis" costs to local government.

Therefore, the Commission finds that, under current law, the Commission's conclusion that obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause is not a new program or higher level of service and does not impose costs mandated by the state. Thus, the Commission denies reimbursement for these activities.

Finally, the courts have been clear that an officer's rights under Government Code sections 3305 and 3306 are not limited to situations where the adverse comment results in a punitive action where the due process clause may apply. Rather, an officer's rights are triggered by the entry of "any" adverse comment in a personnel file, "or any other file used for personnel purposes," that may serve as a basis for affecting the status of the employee's employment.[96] In explaining the point, the Third District Court of Appeal stated: "[E]ven though an adverse comment does not directly result in punitive action, it has the potential for creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action."[97] Thus, the rights under sections 3305 and 3306 also apply to uninvestigated complaints. Under these circumstances (where the due process clause does not apply), the Commission determined that the Legislature, in statutes enacted before the test claim legislation, established procedures for different local public employees similar to the protections required by Government Code sections 3305 and 3306. Thus, the Commission found no new program or higher level of service to the extent the requirements existed in prior statutory law. The Commission approved the test claim for the activities required by the test claim legislation that were not previously required under statutory law.[98] Neither *San Diego Unified School Dist*., nor any other

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[96] *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 925.

[97] *Id.* at page 926.

[98] For example, for counties, the Commission approved the following activities that were not required under prior statutory law:

> If an adverse comment is related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:
>
> - Providing notice of the adverse comment;
> - Providing an opportunity to review and sign the adverse comment;
> - Providing an opportunity to respond to the adverse comment within 30 days; and

case, conflicts with the Commission's findings in this regard. Therefore, the Commission finds that the denial of activities following the receipt of an adverse comment that were required under prior statutory law, and the approval of activities following the receipt of an adverse comment that were *not* required under prior statutory law, was legally correct.

CONCLUSION

The Commission ~~further~~ finds that the *San Diego Unified School Dist*. case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[99] does not constitute a new

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  - Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

  If an adverse comment is not related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for:

  - Providing notice of the adverse comment; and
  - Obtaining the signature of the peace officer on the adverse comment; or
  - Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

[99] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

These activities impose a state-mandated program on counties, cities, and special police protection districts named in Government Code section 53060.7 that wholly supplant the law enforcement functions of the county within their jurisdiction.[100] These entities are eligible to claim reimbursement for this program.

However, these activities do not constitute a reimbursable state-mandated program as to school districts, community college districts, and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties.

[100] The special districts identified in Government Code section 53060.7 (Bear Valley Community Services District, Broadmoor Police Protection District, Kensington Police Protection and Community Services District, Lake Shastina Community Services District, and Stallion Springs Community Services District) "wholly supplant the law enforcement functions of the county within the jurisdiction of that district."

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 1405 and 1417.9 Statutes 2000, Chapter 821; Statutes 2001, Chapter 943; Filed on June 29, 2001 By County of Los Angeles, Claimant.	No. 00-TC-21, 01-TC-08 *Post Conviction: DNA Court Proceedings* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on July 28, 2006)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi
PAULA HIGASHI, Executive Director

August 7, 2006
Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 1405 and 1417.9 Statutes 2000, Chapter 821; Statutes 2001, Chapter 943; Filed on June 29, 2001 By County of Los Angeles, Claimant.	Case No.: 00-TC-21, 01-TC-08 *Post-Conviction: DNA Court Proceedings* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on July 28, 2006)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 28, 2006. Leonard Kaye appeared for the County of Los Angeles. Susan Geanacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 7 to 0.

Summary of Findings

The Commission finds that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- **Representation and investigation**: For indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation**: If the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, for counsel to prepare and file a motion for DNA testing, if appropriate, effective January 1, 2002 (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).

- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission finds that all other statutes in the test claim, including holding a hearing on the DNA- testing motion, are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

Background

Test Claim Statutes

In 2000, the Legislature enacted the test claim statutes as a post-conviction remedy for convicted felons to obtain deoxyribonucleic acid (DNA) testing of biological evidence. The DNA-testing motion is a separate civil action[1] and not part of the original criminal action.[2] The statutes also establish procedures and timelines for the retention of biological evidence.

The post-conviction remedy applies to cases where biological evidence is available and is previously untested or tested by a less reliable test, and where identity of the perpetrator was an issue. The test claim statutes specify how a defendant files a motion to obtain DNA testing and what conditions must be met before the court grants the testing motion.

In 2001, the original test claim statute was amended (Stats. 2001, ch. 943) to clarify that the defendant's right to file a motion for post-conviction DNA testing cannot be waived, nor can the

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[1] As defined by Code of Civil Procedure section 30, a civil action is "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

[2] As defined by Penal Code section 683, a criminal action is "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment..."

right be waived to receive notice of a governmental entity's intention to dispose of biological material before expiration of the period of imprisonment.[3]

Appointment of counsel for indigent defendants: The original statute required the court to appoint counsel for the convicted person who brings a motion under this section if that person is indigent.[4] In 2001, the Legislature added a new subdivision (b) to section 1405[5] to clarify this right to counsel. The amendment specifies how an indigent convicted person requests appointment of counsel and establishes appointment criteria for the court. The amendment also specifies that counsel investigates and, if appropriate, files a motion for DNA testing, and clarifies that representation is solely for the purpose of obtaining DNA testing and not for any post-conviction collateral proceeding.[6]

Motion for DNA testing: The original statute established a procedure for the defendant to obtain DNA testing of biological evidence. As a result of the 2001 amendment, an indigent defendant can request counsel to investigate and prepare this motion. Section 1405, former subdivision (b), now subdivision (c), establishes the following requirements for the motion:

1. A written motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:
   A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
   B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
   C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.
   D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.[7]
   E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.
2. Notice of the motion shall be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested.[8]

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[3] Penal Code section 1405 was technically amended by Statutes 2004, chapter 405. Staff makes no finding on this amendment.

[4] Penal Code section 1405, subdivision (b), formerly subdivision (c).

[5] All references herein are to the Penal Code unless otherwise indicated.

[6] Penal Code section 1405, subdivision (b)(4), as added by Statutes 2001, chapter 943.

[7] Former Penal Code section 1405, subdivision (a)(3).

[8] Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

Responses to DNA-testing motion: Once a motion is filed, the statute provides that responses, if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause.[9]

Access to lab reports and data: If the court finds that the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing.[10]

Hearing: The court, "in its discretion," may order a hearing on the motion. The statute originally stated, "the judge who conducted the trial shall hear the motion, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion." The 2001 statute amends the first sentence regarding hearing the motion as follows: "The motion shall be heard by the judge who conducted the trial, *or accepted the convicted person's plea of guilty or nolo contendre,* unless ...."[11]

Criteria for granting DNA-testing motion: Subdivision (f) of section 1405, (formerly subd. (d)) states that "[t]he court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

A. It was not tested previously.

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[9] Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

[10] Penal Code section 1405 subdivision (d), formerly subdivision (a)(3).

[11] Penal Code section 1405, subdivision (e), formerly subdivision (b).

B. It was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.[12]

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

DNA testing & results: Subdivision (g) of section 1405 (formerly subd. (e)) states:

> (1) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. (2) The testing shall be conducted by a laboratory mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. If the parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

Subdivision (k) of section 1405 (formerly subd. (i)) provides that the testing be done as soon as practicable, but authorizes the court to expedite testing 'in the interests of justice.'

Subdivision (h) of section 1405 (formerly subd. (f)) requires test results to "be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes."

Cost of DNA test: Subdivision (i) of section 1405 (formerly subd. (g)) requires the cost of the DNA testing to be borne by the state or the applicant, "as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person."

Judicial Review: Subdivision (j) of section 1405 (formerly subd. (h)) provides as follows:

> An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. Any such petition shall be filed within 20 days after the court's order granting or denying a motion for DNA testing. In a non-capital case, the petition for writ of mandate or prohibition petition shall be filed in the court of appeals. In a capital case, the petition shall be filed in the Supreme Court.

Exempt from public disclosure: Subdivision (l) of section 1405 (formerly subd. (j)) provides: "DNA profile information from biological samples taken from a convicted person pursuant to a motion for post-conviction DNA testing is exempt from any law requiring disclosure of information to the public."

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[12] Statutes 2001, chapter 943 substituted "It" with "The evidence" and renumbered the subdivision.

Severability: According to subdivision (n) (formerly subd. (k)), section 1405 is severable, and if any provision of it or its application is held invalid, "that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application."

Retain biological evidence: Penal Code section 1417.9 states that the "appropriate" governmental entity shall retain any biological evidence secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The Attorney General's Office has stated that this retention is limited to felony cases.[13]

Subdivision (a) of section 1417.9 further states that "[t]he governmental entity shall have the discretion to determine how the evidence is retained ... provided that the evidence is retained in a condition suitable for DNA testing."

Subdivision (b) authorizes the governmental entity to dispose of biological material before the expiration of the period of time if the following notification conditions are met.

(1) The governmental entity has notified all of the following persons of the provisions of this section and of their intention to dispose of the material: any person who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to section 1405 that is followed within 180 days by a motion for DNA testing pursuant to section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

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[13] 88 Opinions of the California Attorney General 77 (2005).

The 2001 amendment added subdivision (c) to section 1417.9 to state, "the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre."

A sunset clause in the original version of section 1417.9 would have repealed it on January 1, 2003, but the sunset clause was removed by Statutes 2002, chapter 1105.

Preexisting Law

Preexisting state law provides procedures whereby a defendant may appeal a conviction.[14] Preexisting state law also specifies the conditions under which a new trial is granted, as follows:

> When a verdict has been rendered or a finding made against a defendant, the court may, upon his application, grant a new trial, in the case of when new evidence is discovered, material to the defendant and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.[15]

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable mandate under section 6 of article XIII B of the California Constitution. After describing the test claim statutes, claimant enumerates new duties for various county departments as a result of the test claim statute.

For the District Attorney and Public Defender (for indigent defendants), claimant alleges activities related to the following:[16]

- **Initial Contact** – Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code section 1405 and 1417.9.
- **Investigating Claims** - Reading letters from inmates or others writing on behalf of inmates, retrieving and reviewing court files, trial attorney files, appellate counsel files, researching legal, technical and scientific issues, interviewing witnesses, subpoenaing records and preparing to write a motion pursuant to Penal Code section 1405. Meeting with inmates in person or on the telephone as well as written consultation.
- **Preparing Motions** - Includes preparing motions pursuant to Penal Code section 1405 and responding to notices sent pursuant to Penal Code section 1417.9.
- **Meet and Confer** - Consultation and meetings with the trial attorney, appellate counsel, representatives of the Public Defender's Innocence Unit, the Post-Conviction Center, the

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[14] Penal Code section 1236 et seq..

[15] Penal Code section 1181, subdivision (8), as amended by Statutes 1973, chapter 167.

[16] The test claim includes detail for each of the bulleted activities.

District Attorney's Office, the Attorney General, and individuals from other Innocence Projects.

- **DNA Source Identification and Tracking** - Meeting with judges, clerks, law enforcement personnel regarding preservation of evidence and locating evidence, touring law enforcement labs and storage facilities.
- **Development and Procedure** - Preparing protocols, administrative forms, meeting with SB 90 adviser and one-time activities associated with setting up the Post-Conviction DNA unit within the District Attorney's Office [for Public Defender services, the activity claimed is "one-time activities associated with setting up the unit."]
- **Court** - Time spent in court including but not limited to appointment of counsel, filing of motions and litigation associated with motions pursuant to Penal Code section 1405 and 1417.9.
- **Travel** - Travel-related expenses associated with meeting with inmate in connection with preparation of 1405 motion.
- **DNA testing modality selection** - Travel, lodging and related expenses associated with research and becoming conversant in newly developed technological advances in the field of DNA analysis.

For the Sheriff's Department Crime Laboratory, claimant alleges activities related to the following:

- Develop policies and procedures (one time activity).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).
- Distribute the State Attorney General's Office recommendations for compliance with the law[17] including the evidence retention conditions (one time activity).
- Train investigative personnel and the staff of other law enforcement that use the crime lab.
- Initial contacts for permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Respond to requests for the analysis of evidence held.
- Meet and confer with parties to determine the suitability of DNA testing on retained evidence.
- Prepare and track biological evidence sent to lab for DNA testing.
- Court testimony on chain of custody and disposition of biological evidence.
- DNA testing required of the Sheriff's Department not reimbursed by the Court.

For the Sheriff's Department Central Property and Evidence Unit, claimant alleges activities related to the following:

- Develop policies and procedures (one time activity).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).

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[17] This document is attached to the Final Staff Analysis as Exhibit J.

- Distribute the State Attorney General's Office recommendations for compliance with the law[18] including the evidence retention conditions (one time activity).
- Train evidence and property custodians on storage and notification methods and procedures (one-time activity).
- Design, develop, and test computer software and equipment necessary to identify and retrieve biological materials (one-time activity).
- Initial contacts to specified parties to seek permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Maintain biological evidence in refrigerated facilities and add and maintain refrigerated facilities.
- Court testimony on chain of custody and disposition of biological evidence.

The claimant stated that it is incurring costs well in excess of $200 annually, the standard at the time the test claim was filed.[19] The claimant estimated that costs for the public defender would be $521,234 for fiscal year 2001-2002.

In its October 2001 response to Department of Finance comments, claimant states that the program is a new program or higher level of service, and not merely extensions of the original duties of trial counsel or extensions of the original case. Claimant supports this contention as specified in the analysis below.

In November 2001, claimant amended the test claim to add Statutes 2001, chapter 943. This statute amended Section 1405 to establish a procedure for appointing counsel to investigate and prepare the DNA-testing motion so that counsel is appointed before a motion is filed (unlike the prior version of 1405, in which, according to claimant, counsel was appointed after filing the motion). Claimant also alleges activities from amended section 1417.9, subdivisions (c) and (m) as follows:

> Section 1417.9 is also included in this amendment as Chapter 943, Statutes of 2001, further expands the duties of local government to include those persons who may have waived certain rights. … Therefore, as amended herein, the County is now required to provide more service – to provide notice to those with waivers as well as those without such waivers. In addition, as amended herein, the County must provide services in investigating and filing motions for post-conviction DNA testing to more indigents – now including those waiving rights as set forth in new Section 1405(m) … ."[20]

In response to a request for further information from Commission staff, claimant stated in September 2003 that the Public Defender's Office received a one-time grant from the Office of

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[18] This document is attached to the Final Staff Analysis as Exhibit J.

[19] The current minimum amount is $1000 (Gov. Code, § 17564).

[20] County of Los Angeles, test claim amendment (01-TC-08) submitted November 9, 2001, page 5.

Criminal Justice Planning for $160,000 to represent former clients who request counsel pursuant to Penal Code section 1405.

In comments submitted June 16, 2006 on the draft staff analysis, claimant agrees with the activities that were found to be reimbursable. Claimant disagrees, however, with the conclusions regarding activities found not reimbursable: holding a hearing and appointing counsel when counsel has previously been appointed.

State Agency Position

In comments submitted in August 2001 on the original test claim, the Department of Finance (Finance) states that while the test claim may have resulted in a state mandate, "the activities described in the test claim do not constitute a new program or activity or a reimbursable cost."

Finance states that the test claim activities are "a procedure extension of the original trial" and goes on to state: "The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict." Finance concludes, therefore, that the activities are existing responsibilities of local government.

The Department of Corrections also submitted a letter in August 2001, stating, "CDC takes no position on the merits of the County's test claim."

In December 2001, Finance commented on the test claim amendment, stating that it concurs that Statutes 2001, chapter 943 create a reimbursable state-mandated local program for the following activities pled by claimant:

- Appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons.
- Providing notices to indigent convicted persons, who may have waived their rights as part of a plea agreement or plea of nolo contendre, that their right to file a motion for post-conviction DNA testing cannot be waived.

No other state agencies submitted comments on the claim, nor did any comment on the draft staff analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[21] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[22] "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."[23] 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.[24]

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.[25]

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.[26] 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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[21] Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

> (a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

[24] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[25] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[26] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

legislation.[27] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[28]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[29]

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.[30] 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."[31]

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

A. Activities in section 1405 mandated by the state

As enacted by Statutes 2000, chapter 821, section 1405 read, in part, as follows:

> (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic ... (DNA) testing. [¶]...[¶]
>
> (c) The court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent.

Subdivisions (a)(1) and (a)(3) of section 1405 (currently subd. (c)(1)) specifies the content of the motion, stating it must:

A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

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[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[29] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

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

D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.
E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

The court grants the motion if it makes eight findings, as specified above (pp. 5-6).

Claimant seeks reimbursement for the activities of writing or responding to initial correspondence from inmates, attorneys, or others seeking information; investigating claims, preparing motions and meeting and conferring with counsel. As indicated by claimant, the indigent defense counsel appointed to investigate or file the DNA-testing motion is a public defender or otherwise provided by the local government.

This issue is whether subdivisions (a) and (c) of section 1405, as originally enacted in 2000, mandate an activity on the local entity. The Commission finds that subdivision (c) does, based on the plain language in subdivision (c) that "the court shall appoint counsel."[32]

As to preparing, filing, and giving notice of the motion, subdivision (a) originally stated that it is the person convicted of the felony who does this rather than the indigent defense counsel. Therefore, drafting the DNA-testing motion is not a requirement on local entity in the original version of section 1405 (this was changed by the 2001 amendment, as discussed below).

Additionally, although this original statute did not expressly articulate the requirement for counsel to 'investigate' the claim (prior to the Stats. 2001, ch. 943 amendment), the eight findings the court must make to grant the motion were stated in subdivision (d), (now in § 1405, subd. (f) -- see pp. 5-6 above). In order to represent the convicted person and advocate these findings to the court, counsel would need to investigate the case, since he or she has a duty to "present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit."[33]

The Commission finds, therefore, that indigent counsel representation and investigation of the DNA-testing (except for drafting and filing the DNA-testing motion) is a mandated activity in the original test claim statute: Statutes 2000, chapter 821, effective January 1, 2001.

As amended by Statutes 2001, chapter 943, subdivision (a) of section 1405 states, "A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion ... for performance of forensic ... (DNA) testing." Subdivision (b)(3)(A) of section 1405 was added as follows:

> Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, **the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing** under this section and to represent

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[32] Cf. *San Diego Unified School Dist,, supra,* 33 Cal.4th at page 880 states: "Accordingly, in its mandatory aspect, [the test claim statute] ... appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing."

[33] *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.

the person solely for the purpose of obtaining DNA testing under this section. [Emphasis added.]

According to the 2001 amendment in subdivision (m) of section 1405, the "right to file a motion for post-conviction DNA testing is absolute and shall not be waived ...[including] a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre." Moreover, the Second District Court of Appeal has held that a trial court does not have discretion to deny a motion for the appointment of counsel under section 1405 where the petitioner's request meets the statutory criteria.[34]

Even though the indigent defense counsel files the DNA-testing motion "if appropriate," the Commission finds that preparing and filing the motion is mandatory. As stated above, an attorney's duty is "to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit."[35] Because whether or not to file the DNA testing motion is a matter of professional judgment, the indigent defense counsel's duty to file it, if appropriate, is not truly discretionary. Rather, it is an activity mandated by the state.

Therefore, if the person is indigent and has met the other statutory requirements, the Commission finds that preparing and filing the motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing are mandated activities that are subject to article XIII B, section 6 effective January 1, 2002.

Section 1405, subdivision (c)(2) requires the person making the motion for DNA testing to provide notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested." Although this activity is a requirement of the person filing the motion, if the person is indigent, it will fall on the indigent defense counsel. Therefore, the Commission finds that effective January 1, 2002, notice of the motion as specified is also a mandated activity that is subject to article XIII B, section 6.

Subdivision (c)(2) of section 1405 (former subd. (a)(2)) also states that a response to the motion "if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause." Claimant alleged the following activity: "investigate whether such a [DNA-testing] motion is meritorious, and, if necessary litigate the motion ...."[36]

Here, by using the words "if any," the statute appears to merely authorize filing a response to the DNA-testing motion. Thus, the issue is whether filing a response to this motion is a state mandate on the district attorney. For the reasons below, the Commission finds that it is.

The district attorney's duties are specified in Government Code section 26500, et seq.. Section 26500 states: "The district attorney is the public prosecutor, except as otherwise provided by law.

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[34] *In re. Kinnamon* (2005) 133 Cal. App. 4th 316, 323.

[35] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[36] See attached to the original test claim the Declaration of Lisa Kahn, June 18, 2001, page 1. Claimant also alleges the public defender and district attorney activity of responding to notices sent pursuant to Penal Code section 1417.9.

The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." The California Supreme Court has held that the prosecuting district attorney has the exclusive authority to prosecute individuals on behalf of the public.[37] The decision whether or not to prosecute, however, is left to the discretion of the prosecuting district attorney.[38] As to this discretion, in *People v. Eubanks,* the court stated that "the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large ..." and this includes "the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."[39] Furthermore, the Fourth District Court of Appeal has stated that if a district attorney elected not to appear at a serious felony trial, he or she "would be in gross dereliction of his [or her] duty to the people of the state under Government Code section 26500...."[40]

In addition to the role of public prosecutor, the district attorney's civil law duties are stated in Government Code sections 26520-26528,[41] including the duty to "defend all suits brought against the state in his or her county or against his or her county wherever brought ..."[42]

The issue of discretionary local activities in the context of state mandates was discussed in the recent California Supreme Court case of *San Diego Unified School District v. Commission on State Mandates,*[43] which involved legislation requiring a due process hearing prior to student expulsion. There, the court stated its reluctance to preclude reimbursement "whenever an entity makes an initial discretionary decision that in turn triggers mandated costs"[44] because, under such a strict application of the rule, "public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it

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[37] *People v. Eubanks* (1996) 14 Cal.4th 580, 588-590 (*Eubanks*).

[38] *Ibid.*

[39] *Ibid.*

[40] *People ex rel. Kottmeier v. Municipal Court* (1990) 220 Cal.App.3d 602, 609 (*Kottmeier*). Staff notes that the court's statements in *Eubanks* and *Kottmeier* are in the context of criminal prosecutions. However, the DNA testing procedure authorizes the prosecuting district attorney to comment on the appropriateness of DNA testing for convicted criminals, which is similar to criminal prosecutions in that the prosecuting district attorney is carrying out his or her role of protecting the public from those convicted of crimes. Therefore, the use of case law surrounding criminal prosecutions is analogous and appropriate.

[41] These duties include legal services for the county, prosecution of actions for recovery of debts, fines, penalties and forfeitures, actions to recover illegal payments, and abatement of public nuisances.

[42] Government Code section 26521.

[43] *San Diego Unified School Dist v. Commission on State Mandates., supra*, 33 Cal.4th 859, 887-888.

[44] *Ibid.*

has been established that reimbursement was in fact proper."[45] Citing *Carmel Valley Fire Protection District v. State of California,*[46] where an executive order requiring that local firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate, the court pointed out that reimbursement was not foreclosed "merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected."[47] The court expressed doubt that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended such a result.[48]

In the claim at issue, the prosecuting district attorney's decision to respond to a petition for a DNA-testing motion must be driven by the serious public interest in public protection, as well as by saving the taxpayers the expense of unnecessary DNA testing (as the prosecutor may dispute any of the findings required for a successful DNA-testing motion). Any response to a DNA motion is very closely related to the district attorney's public prosecutor role, and also analogous to the duty to "defend all suits brought against ... his or her county ...."[49] In short, the district attorney has no choice to respond to the motion when the facts of the case so dictate.

For these reasons, the Commission finds that the district attorney's preparation and filing of a response to the DNA-testing motion is a state mandate within the meaning of article XIII B, section 6, effective January 1, 2001.

Section 1405, subdivision (d) (former subd. (a)(3)) states as follows:

> If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, **it shall order the party** at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing. [Emphasis added.]

Claimant requests reimbursement for responding to requests for the analysis of evidence held.

Based on its mandatory language that the court 'shall' order access to the specified information, subdivision (d) leaves the court with no discretion in ordering the parties access to previous DNA-testing information.[50] As indicated in the analysis below, when the court is left without discretion, the provision is a state mandate rather than a mandate by the court. Therefore, the Commission finds that the following activity is subject to article XIII B, section 6, effective January 1, 2001: when the evidence was subjected to DNA or other forensic testing previously

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[45] *Ibid.*

[46] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

[47] Cf. *San Diego Unified School Dist v. Commission on State Mandates, supra,* 33 Cal.4th 859, 888.

[48] *Ibid.*

[49] Government Code section 26521.

[50] Cf. *San Diego Unified School Dist., supra,* 33 Cal.4th at page 880. The Supreme Court did not resolve the discretionary mandate issue, however, as it decided the case on other grounds.

by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing.

Section 1405, subdivision (g)(2) (former subd. (e)) states:

> The testing shall be conducted by a laboratory mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. If the parties cannot agree, the court shall designate the laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

Claimant requests reimbursement for meeting and conferring with the trial attorney, appellate counsel, representatives of the Public Defender's Innocence Unit, etc., but it is unclear whether claimant's alleged purpose for these meetings is to agree on a DNA-testing laboratory.

The issue, nonetheless, is whether agreeing on a laboratory is a mandatory activity for the indigent defense counsel and the district attorney.

As stated above, the duty of indigent defense counsel is "to present his case vigorously in a manner as favorable to the client [or convicted person] as the rules of law and professional ethics will permit."[51] Deciding on a DNA-testing lab falls within this professional duty because of the perception that the choice of lab might affect the test's outcome. Therefore, the Commission finds that agreeing to a DNA-testing laboratory is a state mandate on a public defender subject to article XIII B, section 6.

As applied to the district attorney, deciding on a DNA-testing laboratory after the person has been convicted is in furtherance of enforcing criminal laws, or is closely related to it. For the same reasons stated above regarding responding to the DNA-testing motion, agreeing on a DNA-testing laboratory is within the district attorney's professional duties. Therefore, the Commission finds that agreeing to a DNA-testing laboratory is also a state mandate on the district attorney within the meaning of article XIII B, section 6 effective January 1, 2001.

Section 1405, subdivision (j) (former subd. (h)) states: "An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General." Claimant alleged the activity of "if necessary litigate the [DNA-testing] motion including seeking appellate relief through a writ petition if the motion is denied."[52]

Although subdivision (j) appears to merely authorize the indigent defense counsel or the district attorney to request writ review of the superior court ruling on the DNA-testing motion, the issue is whether filing or responding to writ review is a state mandate. The Commission finds that it is.

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[51] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[52] See attached to the original test claim the Declaration of Lisa Kahn, June 18, 2001, page 1, and the Declaration of Jennifer Friedman, June 6, 2001, page 1.

As stated above, the state mandates the program that allows convicted persons to seek DNA testing, and mandates the appointment of indigent defense counsel under specified conditions. The indigent defense counsel's duty is "to present his case vigorously in a manner as favorable to the client [or defendant] as the rules of law and professional ethics will permit."[53] Filing or responding to writ review for denial of a DNA-testing motion falls within this professional duty because, based on the public defender's professional judgment, the superior court judge may have wrongfully denied the petition. Therefore, the Commission finds that indigent defense counsel's filing or responding to writ review is a state mandate that is subject to article XIII B, section 6 effective January 1, 2001.

Filing writ review is also a state mandate on the district attorney. As with the discussion above regarding responding to the motion, the prosecuting district attorney's decision to file a writ review of the trial court's decision to grant the DNA-testing motion is driven by a serious interest in public protection. Filing or responding to writ review in such a case is closely related to the district attorney's public prosecutor role, and also analogous to the duty to "defend all suits brought against the state in his or her county or against his or her county ...."[54] Therefore, the Commission finds that filing or responding to writ review of the trial court's decision is a state-mandated activity subject to article XIII B, section 6 for the district attorney effective January 1, 2001.

B. Activities in section 1405 mandated by the court

Subdivision (b)(3)(B) of section 1405, as amended by Statutes 2001, chapter 943, states that if the court finds that the person is indigent and *that counsel has previously been appointed under this section*, "the court may, in its discretion, appoint counsel to investigate and if appropriate, to file a motion for DNA testing..."

Thus, the issue is whether, when counsel was previously appointed, it is a state mandate to appoint counsel to investigate and, if appropriate, file the DNA-testing motion.

Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates *of the courts* or the federal government which, without discretion,[55] require an expenditure for additional services or which unavoidably make the providing of existing services

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[53] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[54] Government Code section 26521.

[55] In *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, which interpreted section XIII B, section 9, the court held that "without discretion" as used in section 9 (b) is not the same as legal compulsion. Rather it means that the alternatives are so far beyond the realm of practical reality that they leave the state without discretion to depart from the federal standards. Thus, the court held that the state enacted the test claim statute in response to a federal mandate for purposes of article XIII B, so the state statute was not reimbursable. (*Id.* at p. 74). Although the context in *City of Sacramento* was federal mandates analyzed under article XIII B, section 9, subdivision (b), the analysis is instructive in this case.

more costly." [Emphasis added.] Article XIII B places spending limits on both the state and local governments. "Costs mandated by the courts" are expressly excluded from these ceilings.[56]

The California Supreme Court has explained article XIII B as follows:

> Article XIII B - the so-called "Gann limit" - restricts the amounts state and local governments may appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)-(c).) ... In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government, ..." (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of *the courts* or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly." (§ 9, subd. (b) ... .) [Emphasis added.][57]

In other words, for activities undertaken to comply with a court mandate, article XIII B section 9, subdivision (b) excludes their costs from the constitutional spending cap of the affected state or local entity.[58] By contrast, expenditures for state-mandated programs under section 6 of article XIII B are exempt from a local agency's spending limit, but are not exempt from the state's constitutional spending cap.[59] Since court mandates are excluded from the constitutional spending limit, reimbursement under article XIII B, section 6 is not invoked.

As stated above, the issue is whether the appointment of counsel to investigate and if appropriate, file the DNA-testing motion, when counsel was previously appointed under section 1405, subdivision (b)(3)(B), is a mandate of the court or the state. In determining whether this provision is a court mandate, we consider whether the court has discretion in granting the request. If the court has no discretion, then the requirement is more in the nature of a state mandate rather than a court-ordered mandate. Conversely, the more discretion the court has in requiring the activity, the more likely the activity will be a court mandate.[60]

Based on the statutory language ("the court may, in its discretion, appoint counsel..."), appointment of counsel when counsel has previously been appointed is an activity wholly within the discretion of the court. Thus, the Commission finds this activity is a mandate of the court

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[56] *Id.* at page 57.

[57] *Id.* at pages 58-59.

[58] *Id.* at page 71.

[59] California Constitution, article XIII B, section 8, subdivision (a).

[60] Cf. *San Diego Unified School Dist,, supra,* 33 Cal.4th at page 880 states: "[I]n its mandatory aspect, [the test claim statute] ... appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing."

and not of the state. As a court mandate, it is therefore excluded from the constitutional definition of 'appropriations subject to limitation' in article XIII B, section 9 (b) of the California Constitution, making it not subject to article XIII B, section 6.

Similarly, section 1405, subdivision (e) states, "The court, in its discretion, may order a hearing on the motion [for DNA testing]." Claimant requests reimbursement for the following hearing-related activities of the district attorney and indigent defense counsel: time spent in court for appointment of counsel, filing of motions and litigation associated with motions, as well as travel-related expenses associated with meeting with inmates in connection with preparing the motion.[61] Claimant also alleges the Sheriff's activities of court testimony on the chain of custody and disposition of biological evidence.

The plain language of section 1405, subdivision (e) indicates that this activity is discretionary with the court, i.e., is triggered by a discretionary court order. Moreover, reading section 1405 in its entirety indicates that the court could grant or deny the motion for DNA testing without a hearing on the motion.

Claimant disagrees. In comments on the draft staff analysis, claimant argues "activities, such as the limited judicial discretion in appointment of counsel, 'triggers' State mandated activities in carrying out the post conviction rights of the indigent to DNA court proceedings." Claimant quotes part of the analysis above regarding the *San Diego Unified School Dist.* case and its discussion of discretionary decisions that trigger mandated costs (see pp. 16-17 above). Claimant states that the "appointment of counsel, while 'triggered' by a discretionary event, is deemed to be a state mandated event." Claimant goes on to cite the declaration of Jennifer Friedman originally submitted with the test claim, and then concludes with: "reimbursement is required for hearings, appointment of counsel and other activities reasonably necessary in implementing the test claim legislation, as claimed by the County in its Commission filings."

Claimant attempts to use the analysis above regarding discretionary activities of prosecutors and indigent defense counsel and apply it to discretionary activities of the court. Claimant does so without addressing the constitutional basis in article XIII B, section 9 (b) for finding this activity is not subject to Article XIII B, section 6. Thus, claimant ignores the constitutional difference, as explained above, between activities triggered by the discretion of local government actors, and those triggered by the court's discretion. Additionally, claimant asserts that judicial discretion in appointment of counsel when counsel has already been appointed, and in holding a hearing, is "limited." This assertion, however, is not supported by evidence or analysis of the statutes. Finally, the Friedman declaration quoted by claimant addresses post conviction DNA testing generally and characterizes section 1405, subdivision (c) as requiring "that a court appoint counsel for all convicted persons serving a term of imprisonment who file a motion under the section." Although this was true of subdivision (c) when section 1405 was originally enacted, Statutes 2001, chapter 943 amended this provision to create a difference between the required appointment of counsel in section 1403, subdivision (b)(3)(A), and the discretionary appointment of counsel in subdivision (b)(3)(B). Thus, the provisions are treated separately in this analysis.

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[61] Staff makes no finding on whether transporting inmates to or from state prison would be reimbursable under Penal Code section 4750 et seq.

As discussed above, an activity that is wholly within the discretion of the court is not a state-mandated activity, but is a court mandate within the meaning of article XIII B, section 9 (b). As to subdivision (e), the plain language indicates that whether or not a hearing is held is wholly within the discretion of the court.

Therefore, the Commission finds that a hearing on the DNA motion, as well as appointment of counsel when counsel was previously appointed, are court mandates on the district attorney and indigent defense counsel, and are therefore not subject to article XIII B, section 6.[62]

C. Activities in section 1417.9 mandated by the state

Subdivision (a) of section 1417.9 of the Penal Code states:

> (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

Subdivision (b), as discussed below, specifies the conditions upon which the local entity may dispose of the biological evidence. Neither subdivision (a) nor (b) was substantively amended by Statutes 2001, chapter 943. Claimant requests reimbursement for identifying and tracking evidence to maintain proper retention and storage, preparing and tracking biological evidence sent to the lab for DNA testing, and maintaining biological evidence in refrigerated facilities and adding and maintaining such facilities. Claimant also alleges related activities, such as policies and procedures, training, distribution of a State Attorney General's Office publication on the test claim statute, and designing and developing computer software and equipment necessary to identify and retrieve the biological material.[63]

Because the plain language of section 1417.9, subdivision (a), requires the local entity to retain biological material secured in connection with a felony case,[64] the Commission finds that this activity is mandated by the state, and is therefore subject to article XIII B, section 6 effective January 1, 2001.

Subdivision (b) of section 1417.9 of the Penal Code states that "A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set for below are met ... ." The statute then lists the notice provisions

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[62] This finding includes denial of the activity claimant alleged for the sheriff to transport convicted persons and provide oral testimony at hearings.

[63] These related activities are not expressly required by the statute, so they may be considered during the parameters and guidelines phase to determine the "...most reasonable methods of complying with the mandate ... ." (Cal. Code Regs, tit. 2, § 1183.12, subd. (b)(2)).

[64] The State Attorney General has opined that this retention is required only in felony cases. 88 Opinions of the California Attorney General 77 (2005).

which, if accompanied by a lack of a timely response as specified, would authorize the local entity to dispose of the biological material collected.

Claimant requests reimbursement for making initial contacts for permission to dispose of the biological evidence.

Thus, the issue is whether notifying persons convicted of felonies of the disposal of biological material in connection with their criminal case before their release from prison is a state-mandated activity. The Commission finds that it is not.

In the *Kern High School Dist.* case,[65] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "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 requirement related to that program does not constitute a reimbursable mandate."[66]

Here, as in *Kern,* the initial decision to dispose of the biological material is voluntary or discretionary. This decision, in turn, triggers a mandatory duty to notify those incarcerated. Thus, because this statute authorizes but does not require the local entity to dispose of the biological material before the convicted person's release from prison, the Commission finds that doing so is not subject to article XIII B, section 6.

D. Do the test claim statutes constitute a "program" within the meaning of article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [67] Only one of these findings is necessary to trigger article XIII B, section 6.[68]

Of the activities discussed above,[69] only the following activities and statutes that are subject to article XIII B, section 6 are now under consideration. Thus, future reference to the test claim statutes or legislation is limited to the following:

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[65] *Kern High School Dist., supra,* 30 Cal.4th 727.

[66] *Id.* at page 743. Emphasis in original.

[67] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[68] *Carmel Valley Fire Protection District v. State of California, surpa,* 190 Cal.App.3d 521, 537.

[69] Claimant also requests reimbursement for preparing and tracking biological evidence sent to the lab for DNA testing, and for DNA testing required of the sheriff's department that is not reimbursed by the court. Since these activities are not expressly in statute as local government

- **Representation and investigation**: For indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation**: if the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, for counsel to prepare and file a motion for DNA testing, if appropriate, effective January 1, 2002 (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission finds that these test claim statutes constitute a program within the meaning of article XIII B, section 6. DNA testing and retention of biological material carry out a governmental function of providing a service to the public by allowing incarcerated persons to contest their criminal convictions, thereby fostering justice for those wrongly convicted. Moreover, the activities impose unique requirements on local government that do not apply generally to all residents and entities in the state. Therefore, the test claim statutes constitute a program within the meaning of article XIII B, section 6.

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requirements, the Commission may consider them during the parameters and guidelines phase to determine whether they are "the most reasonable methods of complying with the mandate" (Cal.Code Regs, tit. 2, § 1183.12, subd. (b)(2)).

Issue 2: Does the test claim legislation impose a new program or higher level of service on local entities within the meaning of article XIII B, section 6?

To determine whether the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before enacting the test claim legislation.[70] And the test claim legislation must increase the level of governmental service provided to the public.[71] Each activity is discussed separately.

Prepare and file motion for DNA testing & representation: As discussed above, this activity requires court-appointed counsel, if not previously appointed by the court, to investigate and represent the person for the purpose of obtaining DNA testing, and as amended by Statutes 2001, chapter 943, to file a motion, if appropriate, for DNA testing and to represent the person solely for the purpose of obtaining DNA testing (Pen. Code, § 1405, subds. (a) & (b)(3)), and to provide notice of the motion as specified (§ 1405, subd. (c)(2)).[72]

Finance, in its August 2001 comments, states the following:

> [T]he activities described in the test claim do not constitute a new program or activity or a reimbursable cost. We believe that the activities ... is a procedure extension of the original trial. The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict. ... the defense and prosecutorial activity and related investigations of this test claim are existing responsibilities of local government.

In its October 2001 response to Department of Finance comments, claimant argues that the program is not merely extensions of the original duties of trial counsel or extensions of the original case. Claimant cites a legislative analysis of SB 1342 that convicted individuals had no right to post-conviction DNA testing before the test claim statute.[73] Claimant also states that preexisting law (Pen. Code, § 1182) that authorizes a motion for a new trial is to be made prior to the imposition of judgment, unlike the test claim statute that authorizes the motion after the judgment. Claimant points out that the counsel appointed to represent the convict is often new to the case and must conduct an investigation in order to determine whether the motion is warranted, and if so, to prepare and file it. Claimant also argues that there was no prior mechanism for obtaining a DNA test to use as the basis for habeas corpus relief, and that there is no absolute right to counsel for habeas corpus relief (citing *Pennsylvania v. Finley* (1987) 481

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[70] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[71] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[72] The discussion as to whether this activity is a new program or higher level of service includes the original test claim statute (Stats. 2000, ch. 821) as well as the amendments of Statutes 2001, chapter 943.

[73] Assembly Committee on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended June 13, 2000, pages 4-5.

U.S. 551). Claimant concludes that the test claim statute is new and not an extension of a preexisting duty of trial or habeas counsel.

In its December 2001 comments, Finance states that appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons is a reimbursable state-mandated program.

The Commission finds that the activities of investigating and, if appropriate, filing a motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing under Penal Code section 1405, constitute a new program or higher level of service. The DNA-testing motion is a separate civil action,[74] not part of the original criminal action, since the action is not to bring someone "to trial and punishment."[75] As such, the motion for DNA testing is not an extension of the original criminal trial.

Under preexisting law, a convicted person can file a petition for writ of habeas corpus or by coram nobis[76] based on newly discovered evidence.[77] However, a public defender is not required to do so.

Another preexisting statute, Government Code section 68662, requires the court to offer to appoint counsel to represent state prisoners subject to a capital sentence for purposes of state post-conviction proceedings, meaning state proceedings in which the prisoner seeks collateral relief from a capital sentence, i.e., relief other than by automatic appeal."[78] The Habeas Corpus Resource Center, an agency in the Judicial Branch of state government, provides for this counsel.[79]

These provisions, however, are distinct from the requirements of the test claim statute. Thus, investigating, filing the motion for DNA testing, and representing the person for the purposes of obtaining DNA testing are not preexisting duties of local entities, but are a new program and higher level of service.

Inasmuch as the test claim statute imposes new requirements, the Commission finds that the activities of investigating and, if appropriate, filing a motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing under Penal Code section 1405, constitute a new program or higher level of service.

The test claim statutes, as discussed above, also require local entities to do the following:

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[74] As defined by Code of Civil Procedure section 30, a civil action is "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

[75] As defined by Penal Code section 683, a criminal action is "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment…"

[76] A writ of coram nobis permits the court that rendered judgment to reconsider it and give relief from errors of fact.

[77] *In re Clark* (1993) 5 Cal. 4th 750, 766.

[78] *In re Barnett* (2003)31 Cal.4th 466, 476, fn. 6.

[79] See <http://www.hcrc.ca.gov> as of April 28, 2006.

- **Prepare and file response to the motion:** Effective January 1, 2001, to file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).

Because preexisting law did not require local entities to perform the four activities listed above, the Commission finds that they constitute a new program or higher level of service within the meaning of article XIII B, section 6.

Retain biological material: The test claim statute requires 'the appropriate government entity' to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)). The California Attorney General has opined that this does not require retention of biological material in connection with a misdemeanor conviction, but only applies to felony cases.[80]

Although preexisting law includes a law enforcement duty to preserve evidence that might be expected to play a significant role in the suspect's defense,[81] that duty is limited. The California Supreme Court outlined the limitation as follows:

> The state's responsibility [to preserve evidence] is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." [Citations omitted.] In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." [Citations omitted.][82]

Thus, the preexisting duty to retain biological evidence is limited when the material, like DNA and other biological material, 'could have been subject to tests, the results of which might have

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[80] 88 Opinions of the California Attorney General 77 (2005).

[81] *People v. Farnam* (2002) 28 Cal. 4th 107, 166.

[82] *Ibid.*

exonerated the defendant." Moreover, before the test claim statute, there was no duty to retain biological evidence past the date of conviction or when the time for appeal had expired.

Therefore, the Commission finds that effective January 1, 2001, it is a new program or higher level of service to retain DNA or other biological evidence secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim legislation must impose costs mandated by the state.[83] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

With the test claim, claimant files a declaration that it "is incurring costs, well in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code section 17564(a)."[84]

Government Code section 17556, subdivision (e), precludes reimbursement for a local agency if:

> [t]he 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. [Emphasis added.]

The issue, therefore, is whether there is sufficient additional revenue to fund the program. The Commission finds that there is not.

Penal Code section 1405, subdivision (i) states:

> (1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and posses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.
> (2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present it bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

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[83] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[84] The current requirement is $1000 in costs (Gov. Code, § 17564, as amended by Stats. 2004, ch. 890).

As to the DNA testing, there is no local entity expenditure for this testing because the statute calls for the state or applicant to pay for it. However, there is no similar promise of funding for the other activities mandated by the test claim statute. Therefore, the Commission finds that subdivision (i) of section 1405 does not preclude reimbursement for the test claim.

In addition, the claimant indicated receipt of a $160,000 grant from the Office of Criminal Justice Planning (State of California) for providing representation to former public defender clients who request counsel for DNA-testing motions.[85]

There is no evidence in the record that this grant constitutes "additional revenue ... specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." The grant was only for indigent counsel or public defender expenses, and was not intended to fund evidence retention or other activities required by the test claim statutes. Therefore, while this grant would be considered an offset of expenses incurred under the statute,[86] it does not preclude reimbursement for the state-mandated program.

Therefore, the Commission finds that the test claim statutes impose costs mandated by the state within the meaning of Government Code section 17514, and that the preclusions in Government Code section 17556 do not apply.

CONCLUSION

The Commission finds that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- **Representation and investigation**: For indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation**: If the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, for counsel to prepare and file a motion for DNA testing, if appropriate, effective January 1, 2002 (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense,

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[85] Letter from J. Tyler McCauley, County of Los Angeles, September 19, 2003, page 5.

[86] California Code of Regulations, title 2, section 1183.1, subdivision (a)(7).

whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).

- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission finds that all other statutes in the test claim, including holding a hearing on the DNA- testing motion, are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

DRAFT PARAMETERS AND GUIDELINES

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

Post Conviction: DNA Court Proceedings (00-TC-21, 01-TC-08)

County of Los Angeles, Claimant

I. SUMMARY OF THE MANDATE

On July 28, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- **Representation and investigation**: For indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation**: If the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, for counsel to prepare and file a motion for DNA testing, if appropriate, effective January 1, 2002 (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).

- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission found that all other statutes in the test claim, including holding a hearing on the DNA- testing motion, are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (c), as amended by Statutes 1998, chapter 681, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of Los Angeles filed the test claim on June 29, 2001, establishing eligibility for fiscal year 1999-2000. However, the operative date of the test claim statutes, as enacted by Statutes 2000, chapter 821, is January 1, 2001. Additionally, Penal Code section 1405, as amended by Statutes 2001, chapter 943, is operative January 1, 2002. Therefore, costs incurred pursuant to Statutes 2000, chapter 821, are reimbursable on or after January 1, 2001, and costs incurred pursuant to Statutes 2001, chapter 943, are reimbursable on or after January 1, 2002.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

A. Representation and investigation. *Reimbursement period begins January 1, 2001.*

1. For indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821).

B. Prepare and file motion for DNA testing & representation. *Reimbursement period begins January 1, 2002.*

1. If the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, for counsel to prepare and file a motion for DNA testing, if appropriate (Pen. Code, § 1405, subds. (a) & (b)(3)(A)).
2. Providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated (Pen. Code, § 1405, subd. (c)(2)).

C. Prepare and file response to the motion. *Reimbursement period begins January 1, 2001.*

1. Prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).

D. Provide prior test lab reports and data. *Reimbursement period begins January 1, 2001.*

1. When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing (Pen. Code, § 1405, subd. (d)).

E. Agree on a DNA lab. *Reimbursement period begins January 1, 2001.*

1. For the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

F. Writ review. *Reimbursement period begins January 1, 2001.*

1. Prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).

G. Retain biological material. *Reimbursement period begins January 1, 2001.*

1. Retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Elections Code Sections 3100, 3101, 3103, 3104, 3106, 3108, 3110, 3200, 3201, 3202, 3203, 3204, 3205, and 3206; Statutes 1994, Chapter 920; Statutes 1996, Chapter 724; Statutes 2001, Chapter 918; Statutes 2001, Chapter 922; Statutes 2002, Chapter 664; Statutes 2003, Chapter 347; Filed on September 26, 2003, and amended on January 27, 2004, by County of Sacramento, Claimant.	No. 03-TC-11 *Permanent Absent Voter II* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on July 28, 2006)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi
PAULA HIGASHI, Executive Director

August 7, 2006
Date

Hearing Date: July 28, 2006
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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Elections Code Sections 3100, 3101, 3103, 3104, 3106, 3108, 3110, 3200, 3201, 3202, 3203, 3204, 3205, and 3206;

Statutes 1994, Chapter 920; Statutes 1996, Chapter 724; Statutes 2001, Chapter 918; Statutes 2001, Chapter 922; Statutes 2002, Chapter 664; Statutes 2003, Chapter 347;

Filed on September 26, 2003, and amended on January 27, 2004, by County of Sacramento, Claimant.

Case No.: 03-TC-11

Permanent Absent Voters II

PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on July 28, 2006)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 28, 2006. Pamela Stone of Maximus, and Alice Jarboe, Assistant Registrar of Voters, appeared on behalf of claimant, County of Sacramento. Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve this test claim at the hearing by a vote of 7-0.

Summary of Findings

Claimant, County of Sacramento, filed this test claim on September 26, 2003, and an amendment on January 27, 2004, "to reflect changes in the election law pertaining to Permanent Absent Voters since the first test claim was filed." The Commission previously determined Elections Code sections 1450 through 1456 imposed a reimbursable state-mandated program in an earlier test claim *Permanent Absent Voters* (CSM-4358) decision, effective September 21, 1989. Prior to the enactment of the current test claim legislation, Elections Code sections 1450 through 1456 provided that only voters with specified disabilities could apply for permanent absent voter status.

Statutes 1994, chapter 920 reorganized the entire Elections Code, including the repeal of Elections Code sections 1450 through 1456, and reenactment of those provisions as Elections Code sections 3200 through 3206. The other statutes claimed in *Permanent Absent Voters II*, further amended the Elections Code, including substantive changes in 2001 allowing *all* registered voters to apply for permanent absent voter status, rather than limiting eligibility to those voters with specific disabilities or conditions, as was the case under prior law.

The Commission concludes that Elections Code sections 3201 and 3203, subdivision (b)(2) mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- County elections officials shall make an application for permanent absent voter status available to any voter. (Elec. Code, § 3201, as amended by Stats. 2001, ch. 922, Stats. 2002, ch. 664, and Stats. 2003, ch. 347.)

The above activity replaces the activity in *Permanent Absent Voters I* which was limited to those voters who provided evidence of certain physical disabilities.

- Include in all absentee ballot mailings to the voter an explanation of the absentee voting procedure and an explanation of Elections Code section 3206. (Elec. Code, § 3203, subd. (b)(2), as amended by Stats. 2001, ch. 922.)

The Commission concludes that Elections Code sections 3200, 3202, 3203, subdivisions (a) and (b)(1) and (b)(3), 3204, 3205, subdivision (a) and 3206, as renumbered and reenacted by Statutes 1994, chapter 920 do not mandate *new* reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514, but remain a part of the *Permanent Absent Voter* program, as it now exists. Any references to former Elections Code sections 1450, 1452, 1454, 1455 and 1456 in the *Permanent Absent Voters I* parameters and guidelines should be designated by their new numbers when the parameters and guidelines are amended.

In addition, the Commission concludes that Statutes 2003, chapter 347, as it amended Elections Code sections 3100, 3101 and 3103, does not mandate a new program or higher level of service.

BACKGROUND

Prior to the enactment of the test claim legislation, Elections Code sections 1450 through 1456 provided that only voters with specified disabilities could apply for permanent absent voter status. The Commission previously determined these sections to constitute a reimbursable state-mandated program in the test claim *Permanent Absent Voters* (CSM-4358) [hereafter *Permanent Absent Voters I*].

In the *Permanent Absent Voters I* Statement of Decision, effective September 21, 1989, the Commission concluded

> that sections 1450 through 1456, as added by Chapter 1422/82, require counties to implement a new program because the county clerk must now: (1) establish and maintain a list of permanent absent voters who provide evidence of physical disability, (2) mail absent voter ballots to such voters for each election in which they are eligible to vote, and (3) delete from the permanent absent voter list any

person who fails to return an executed absent voter ballot for any statewide direct primary or general election.

Furthermore, the Commission directs staff and the involved parties to consider any offsetting savings during the development of the parameters and guidelines.

Thus, the Commission determined that prior to the operation of Statutes 1982, chapter 1422, there was no permanent absent voters program. Statutes 1994, chapter 920 reorganized the entire Elections Code, including the repeal of Elections Code sections 1450 through 1456, and reenactment of those provisions as Elections Code sections 3200 through 3206. The other statutes claimed in *Permanent Absent Voters II*, further amended the Elections Code, making both technical changes in wording, as well as substantive changes. The substantive changes made in 2001 allow *all* registered voters to apply for permanent absent voter status, rather than limiting eligibility to those voters with specific disabilities or conditions, as was the case under prior law.

Claimant's Position

Claimant, County of Sacramento, filed this test claim on September 26, 2003, and an amendment on January 27, 2004,[1] "to reflect changes in the election law pertaining to Permanent Absent Voters since the first test claim was filed." Claimant contends that Elections Code sections 3100, 3101,[2] 3103, 3104, 3106, 3108, 3110, and 3200 through 3206 constitutes a reimbursable state-mandated program. Following are some of the reimbursable activities asserted by the claimant:

- Providing permanent absent ballot applications.
- Receiving and processing permanent absent ballot applications.
- Sending a copy of the list of all voters who qualify as permanent absent voters to city or district elections officials.
- Preparing, printing, and sending sample ballots.
- Providing the permanent absent voter roll to city and district election officials.
- Making the roll available for public inspection.
- Maintaining the roll, including purging voters from the permanent absent voter list, when the voter fails to vote in any statewide direct primary or general election, and reinstating a voter's name on the roll upon the voter's request.
- Paying for increased postage of mailing out ballots to a larger permanent absent voter roll.

Claimant also requests that the parameters and guidelines for *Permanent Absent Voters I* be amended to include the findings for the present test claim.

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[1] Potential reimbursement period for this claim begins no earlier than July 1, 2002. (Gov. Code, § 17557, subd. (c).)

[2] Page 5 of the Amended Test Claim Filing actually names section "3191," but as the rest of the numbers are in sequence, this is presumed to be a typographical error.

In a response to Department of Finance's December 2003 comments on the test claim filing, claimant further alleges activities for: dealing with additional provisional voters "who have permanent absent voter status, … but appear to vote in person;" answering additional phone calls at election time from voters who "forget they are on the permanent absentee voter roll;" and comparing the signature on absentee ballots with those on file, "to make sure that it was the voter who completed and signed the absentee ballot."

No comments were received on the draft staff analysis from the claimant or interested parties.

Department of Finance's Position

DOF filed comments on December 4, 2003, and May 27, 2004, addressing the allegations stated in the test claim and subsequent amendment. DOF ultimately concluded that the test claim statutes "expanded the scope of the permanent absent voter program to include all voters," which "could represent a higher level of service..."

No comments were received on the draft staff analysis from DOF or any other state agencies.

COMMISSION FINDINGS

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

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[3] Article XIII B, section 6, subdivision (a), provides: (a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) 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 (Kern High School Dist.)* (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.

[7] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, *(San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

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 legislation.[9] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[10]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[11]

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.[12] 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."[13]

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

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[14] The court has held that only one of these findings is necessary.[15]

The Commission finds that requiring a permanent absent voter process imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. County

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[8] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[11] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

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

[14] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[15] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

elections officials provide a service to the members of the public who want to become permanent absent voters. The test claim legislation also requires local elections officials to engage in administrative activities solely applicable to local government, thereby imposing unique requirements upon counties that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution if the legislation also mandates a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the test claim legislation mandate a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution?

In order to be subject to article XIII B, section 6, of the California Constitution, test claim legislation must mandate a state-mandated activity on a local agency or school district.[16] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[17] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[18] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[19] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[20] The California Supreme Court has noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[21]

Test claim legislation mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[22] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[23] A statute or executive order mandates a reimbursable "higher level of

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[16] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 740.

[17] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816-17.

[18] *Long Beach Unified School Dist.*, *supra*, 225 Cal.App.3d 155, 174.

[19] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[20] *Whitcomb Hotel, Inc. v. California Employment Commission* (1944) 24 Cal.App.2d 753, 757.

[21] *City of San Jose*, *supra*, 45 Cal.App.4th 1802, 1816.

[22] *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 836.

[23] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[24]

Reenactment and Renumbering by Statutes 1994, Chapter 920:

Elections Code Sections 3200, 3202 and 3204:

As reenacted and renumbered by Statutes 1994, chapter 920, Elections Code section 3200 states:

> A voter who qualifies under this chapter shall be entitled to become a permanent absent voter.

As reenacted and renumbered by Statutes 1994, chapter 920, Elections Code section 3202 states:

> In lieu of executing the application set forth in Section 3201, any voter may execute a request for permanent absent voter status by making a written request to the county elections official requesting the status. If a written request is received by the county elections official and it contains the information set forth in Section 3201, the elections official shall process that application in the manner provided in Section 3203.

As reenacted and renumbered by Statutes 1994, chapter 920, Elections Code section 3204 states:

> The county elections official shall send a copy of the list of all voters who qualify as permanent absent voters to each city elections official or district elections official charged with the duty of conducting an election within the county. The list shall be sent by the sixth day before an election.

These sections are identical to prior law, which was already determined in *Permanent Absent Voters I.* An uncodified portion of Statutes 1994, chapter 920 states the following legislative intent:

> SEC. 3. It is the intent of the Legislature in enacting this act to reorganize and clarify the Elections Code and thereby facilitate its administration. The Legislature intends that the changes made to the Elections Code, as reorganized by this act, have only technical and nonsubstantive effect. Hence, no change made by this act shall be construed to create any new right, duty, or other obligation that did not exist on the effective date of this act, or result in the limitation or termination of any right, duty, or other obligation that existed on the effective date of this act.
>
> SEC. 4. The Legislature finds that the reorganization of the Elections Code pursuant to this act, in view of the nonsubstantive statutory changes made, will not result in new or additional costs to local agencies responsible for the conduct of elections or charged with any duties or responsibilities in connection therewith.

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[24] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

The Commission makes a general finding, in accordance with the legislative intent stated in the uncodified portion of Statutes 1994, chapter 920, that a renumbered or restated statute is not a newly enacted provision. In addition, Elections Code section 2 provides:

> The provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments.

The rationale behind Elections Code section 2 is in accordance with the holding of *In re Martin's Estate* (1908) 153 Cal. 225, 229, which explains the general rule of statutory construction for repeal, replacement and renumbering, as follows:

> Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.[25]

The Commission finds that when a statute is renumbered or reenacted, only substantive changes to the law creating new duties or activities meets the criteria for finding a reimbursable state mandate. Thus, the Commission finds that Elections Code sections 3200, 3202, and 3204, as reenacted and renumbered by Statutes 1994, chapter 920, do not mandate a new program or higher level of service. However, any references to former Elections Code sections 1450, 1452, and 1454 in the *Permanent Absent Voters I* parameters and guidelines should be designated by the new numbers when the parameters and guidelines are amended.

Further Changes to *Permanent Absent Voters I* Test Claim Legislation:

Elections Code Section 3201:

As reenacted and renumbered by Statutes 1994, chapter 920, and subsequently amended by Statutes 2001, chapter 918,[26] Statutes 2001, chapter 922, Statutes 2002, chapter 664,[27] and Statutes 2003, chapter 347,[28] Elections Code section 3201 provides:

> Any voter may apply for permanent absent voter status. Application for permanent absent voter status shall be made in accordance with Section 3001, 3100, or 3304. The voter shall complete an application, which shall be available from the county elections official, and which shall contain all of the following:
>
> (a) The applicant's name at length.
> (b) The applicant's residence address.
> (c) The address where ballot is to be mailed, if different from the place of

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[25] *In re Martin's Estate* (1908) 153 Cal. 225, 229. See also 15 Ops.Cal.Atty.Gen. 49 (1950).

[26] This amendment was never operative upon the subsequent adoption of Statutes 2001, chapter 922. (Affected by two or more acts at the same session of the legislature, see Gov. Code, § 9605.)

[27] Code maintenance bill, non-substantive changes.

[28] Added references to Elections Code sections 3100 and 3304.

residence.
(d) The signature of the applicant.

Prior to Statutes 1982, chapter 1422, no permanent absent voter program existed. Statutes 1982, chapter 1422, approved as a reimbursable state-mandated program in *Permanent Absent Voters I* provided a list of specific conditions or disabilities required to qualify for permanent absent voter status. The 2001 amendment substantively changed the law to expand eligibility to all voters. This amendment goes beyond creating a higher level of service in an existing program, but rather creates an entirely different program. Instead of a permanent absent voter program created for a select group of voters who provide proof of certain disabling conditions, the Legislature now allows any registered voter to file with county elections officials for permanent absent voter status. Operative January 1, 2002 a new permanent absent voter program was substituted for the previous reimbursable state mandate.

Therefore, the Commission finds that Elections Code section 3201, mandates a new program or higher level of service on counties for the following activity:

- County elections officials shall make an application for permanent absent voter status available to any voter.

The above activity replaces the activity in *Permanent Absent Voters I* which was limited to those voters who provided evidence of certain physical disabilities.

Elections Code Section 3203:

As reenacted and renumbered by Statutes 1994, chapter 920, and subsequently amended by Statutes 1996, chapter 724,[29] Statutes 2001, chapter 922, and Statutes 2003, chapter 347, Elections Code section 3203 provides:

> (a) Upon receipt of an application for permanent absent voter status, the county elections official shall process the application in the same manner as an application for a regular absent voter's ballot, or, in the case of an application made pursuant to Section 3100 or 3304, in the same manner as an application for a special absent voter ballot or overseas ballot.
>
> (b) In addition to processing applications in accordance with Chapter 1 (commencing with Section 3000), if it is determined that the applicant is a registered voter, the county elections official shall do the following:
>
> (1) Place the voter's name upon a list of those to whom an absentee ballot is sent each time there is an election within their precinct.
>
> (2) Include in all absentee ballot mailings to the voter an explanation of the absentee voting procedure and an explanation of Section 3206.
>
> (3) Maintain a copy of the absentee ballot voter list on file open to the public inspection for election and governmental purposes.

Statutes 2001, chapter 922 added subdivision (b)(2) requiring the inclusion of an explanation of absentee voting procedures and of Elections Code section 3206 in all absentee ballot mailings.

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[29] Made non-substantive changes.

Statutes 2003, chapter 347 added the clause in subdivision (a) referencing Elections Code sections 3100 and 3304.

Prior to the amendment by Statutes 2001, chapter 922, county elections officials did not have a statutory duty to "Include in all absentee ballot mailings to the voter an explanation of the absentee voting procedure and an explanation of Section 3206." Elections Code section 3206 is the provision that requires counties to purge names from the permanent absent voter rolls when a voter fails to return an absentee ballot for specified elections. Providing this information to voters mandates a new program or higher level of service upon counties for the following activity:

- Include in all absentee ballot mailings to the voter an explanation of the absentee voting procedure and an explanation of Elections Code section 3206.

The remainder of Elections Code section 3203 is substantively identical to prior law, which was already decided by the Commission in *Permanent Absent Voters I*, and remains a reimbursable state-mandated program.

Elections Code Section 3205:

As reenacted and renumbered by Statutes 1994, chapter 920, and subsequently amended by Statutes 2001, chapter 925, Elections Code section 3205 provides:

> (a) Absent voter ballots mailed to, and received from, voters on the permanent absent voter list are subject to the same deadlines and shall be processed and counted in the same manner as all other absent voter ballots.
>
> (b) Prior to each primary election, county elections officials shall mail to every voter not affiliated with a political party whose name appears on the permanent absent voter list a notice and application regarding voting in the primary election. The notice shall inform the voter that he or she may request an absentee ballot for a particular political party for the primary election, if that political party adopted a party rule, duly noticed to the Secretary of State, authorizing these voters to vote in their primary. The notice shall also contain a toll-free telephone number, established by the Secretary of State, that the voter may call to access information regarding which political parties have adopted such a rule. The application shall contain a check-off box with a conspicuously printed statement that reads as follows: "I am not presently affiliated with any political party. However, for this primary election only, I request an absentee ballot for the ____ Party." The name of the political party shall be personally affixed by the voter.

Subdivision (a) is substantively identical to prior law, which was already determined in *Permanent Absent Voters I.* The Commission finds that when a statute is renumbered or reenacted, only substantive changes to the law creating new duties or activities meets the criteria for finding a reimbursable state mandate. Thus, the Commission finds that Elections Code section 3205, subdivision (a), as reenacted and renumbered by Statutes 1994, chapter 920, does not mandate a new program or higher level of service. However, any references to former Elections Code section 1455 in the *Permanent Absent Voters I* parameters and guidelines should be designated by the new numbers when the parameters and guidelines are amended.

Subdivision (b) was added by Statutes 2001, chapter 925, however this statute was not pled as part of this test claim. Claimant instead states on page 3, footnote 3, of the test claim filing: "Please note that a test claim has been filed regarding this provision, which is commonly referred to as Modified Primary. That test claim, and all filings pertaining thereto, is incorporated herein by reference as though set forth in its entirety." Statutes 2001, chapter 925 was not included in the *Permanent Absent Voters II* test claim filing, and another test claim cannot be incorporated by reference due to requirements that all test claims be pled with specificity (former Cal. Code Regs., tit. 2, section 1183, subd. (d)(1), now codified as Gov. Code, § 17553.) Therefore the Commission cannot reach the merits on Elections Code section 3205, subdivision (b) as part of the present test claim decision.

Elections Code Section 3206:

Elections Code section 3206 was reenacted and renumbered by Statutes 1994, chapter 920, as discussed above. The *Permanent Absent Voters I* parameters and guidelines already includes an activity for deleting from the permanent absent voter list any person who fails to return an executed absent voter ballot for any statewide primary or general election. The section was later amended to remove the reference to "primary," and then again to require that a person be removed only after failing to vote in two consecutive general elections. However, those statutes have not been pled by the claimant, therefore the Commission does not have jurisdiction to make any findings on any this section.[30] However, the basic activity of deleting permanent absent voters from the list when they do not vote in an election remains a reimbursable activity.

Thus, the Commission finds that Elections Code section 3206, as reenacted and renumbered by Statutes 1994, chapter 920, does not mandate a new program or higher level of service. However, any references to former Elections Code sections 1456 in the *Permanent Absent Voters I* parameters and guidelines should be designated by the new number when the parameters and guidelines are amended.

Special Absentee Voters: New Program Alleged Mandated by Statutes 2003, Chapter 347:

In the test claim amendment filed on January 27, 2004, claimant contends that Election Code sections 3100, 3101,[31] and 3103, as amended by Statutes 2003, chapter 347,[32] constitute a

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[30] The claimant pled Statutes 2003, chapter 347, but the section was amended by the later-enacted Statutes 2003, chapter 819 (see Gov. Code, § 9605), and then again by Statutes 2005, chapter 113.

[31] Page 5 of the Amended Test Claim Filing actually lists section "3191," but as the rest of the numbers are in sequence, this is presumed to be a typographical error.

[32] Although on page 5 of the Amended Test Claim Filing, claimant states: "The mandated activities are contained in Elections Code, Sections ... 3104, 3106, 3108, 3110,..." claimant does not make any allegations regarding these sections in the narrative. The Commission's process requires that all test claims be pled with specificity (former Cal. Code Regs., tit. 2, section 1183, subd. (d)(1), now codified as Gov. Code, § 17553. Gov. Code, § 17553, subd. (b)(2)(C) requires: "Declarations *describing new activities performed to implement specified provisions of the new statute* or executive order alleged to impose a reimbursable state-mandated program. Specific references shall be made to chapters, articles, sections, or page numbers alleged to

reimbursable state-mandated program. These code sections are not directly related to the *Permanent Absent Voters I* test claim. Claimant's allegations regarding this statute follow:

> Additionally, with the passage of AB 188, Chapter 347, Statutes of 2003, there is a new absent voter, the "special absentee voter" under Section 3100. Pursuant to section 3103(e), [sic, reference is to subd. *(f)*] said person may register to vote by fax, and elections materials may be sent via e-mail, fax or other electronic transmission. However, if the person requests permanent absentee status, the application is to be transmitted pursuant to Section 3101.

For background, a "special absentee voter" is defined in Elections Code section 300, as "an elector who is any of the following: (1) A member of the armed forces of the United States or any auxiliary branch thereof. (2) A citizen of the United States temporarily living outside of the territorial limits of the United States or the District of Columbia. (3) Serving on a merchant vessel documented under the laws of the United States. (4) A spouse or dependent of a member of the armed forces or any auxiliary branch thereof."

Elections Code Section 3100:

Prior to amendment by Statutes 2003, chapter 347, Elections Code section 3100 provided:

> When a special absentee voter applies for an absent voter's ballot and the elections official determines that he or she is not registered to vote, the elections official shall send the affidavit of registration card with the ballot. The affidavit of registration must be completed by the voter and returned with the voted ballot or the ballot shall not be counted.
>
> If the application has been made upon a federal form for absentee ballots the form shall be deemed an affidavit of registration and the applicant shall be considered registered for that election only. If the special absentee voter requests an absentee ballot for the ensuing primary election, the elections official shall also consider the request valid for the ensuing general election.
>
> If the applicant is not a resident of the county to which he or she has applied, the elections official receiving the application shall forward it immediately to the proper county.

Elections Code section 3100, as amended, removes the second paragraph, but leaves the third paragraph unchanged. The first paragraph now reads:

> When a voter who qualifies as a special absentee voter pursuant to subdivision (b) of Section 300 applies for an absent voter's ballot, the application shall be deemed to be an affidavit of registration and an application for permanent absentee voter status, pursuant to Chapter 3 (commencing with Section 3200). The application must be completed by the voter and must contain the voter's name, residence

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impose a reimbursable state-mandated program.") Therefore, the Commission will not address Elections Code sections 3104, 3106, 3108, and 3110 in this decision.

address for voting purposes, the address to which the ballot is to be sent, the voter's political party for a primary election, and the voter's signature.

Thus, there is no *new* type of absent voter established by Statutes 2003, chapter 347 – the law has long established a category of "special absentee voter." The amended section allows an application for an absentee ballot to be considered both a permanent absentee ballot request and a registration to vote, eliminating the requirement to send a registration card with the absent voter's ballot if the requestor was not properly registered. In addition, since the request for an absent voter's ballot under this section is "deemed to be ... an application for permanent absentee voter status, pursuant to Chapter 3 (commencing with Section 3200)" any activities associated with new permanent absent voters are reimbursable under Elections Code section 3200 through 3206, as discussed above. Thus, the Commission finds that amendment to Elections Code section 3100 by Statutes 2003, chapter 347, does not in and of itself mandate a new program or higher level of service.

Elections Code Section 3101:

Amendment by Statutes 2003, chapter 347 to Elections Code section 3101, is indicated by underline and strikethrough:

> Upon timely receipt of the ~~affidavit of registration and the voted~~ application for an absentee ballot, the elections official shall examine the ~~affidavit~~ application to ascertain that it is properly executed in accordance with this code ~~and that the applicant is a qualified elector of the county.~~ If the elections official is satisfied of ~~these~~ this fact~~s~~, the applicant shall be deemed a duly registered voter as of the date appearing on the ~~affidavit~~ application to the same extent and with the same effect as though he or she had registered in proper time prior to the election.

These amendments reflect the fact that section 3100, as discussed above, no longer requires elections officials to send a registration card with the special absent voter's ballot if the requestor was not properly registered, but rather may consider the absent ballot request alone to be an executed voter registration. The Commission finds that the changes to Elections Code section 3101 by Statutes 2003, chapter 347 does not mandate a new program or higher level of service; in fact, it may reduce the burden on elections officials.

Elections Code Section 3103, Subdivision (f):

Amendment by Statutes 2003, chapter 347 to Elections Code section 3103, subdivision (f), is indicated by underline and strikethrough:

> (f) Notwithstanding any other provision of law, a special absentee voter who qualifies pursuant to this section may, by facsimile transmission, register to vote and apply for an absent voter's ballot. Upon request, the elections official ~~shall~~ may send to the qualified special absentee voter either by mail, ~~or~~ facsimile, or electronic transmission the special absentee ballot or, if available, an absent~~'s~~ voter's ballot pursuant to Chapter 1 (commencing with Section 3000).

The primary amendment by Statutes 2003, chapter 347 changes the word "shall" to "may" regarding available formats for transmitting the absent ballot. The Commission finds that such changes to Elections Code section 3103 by Statutes 2003, chapter 347 does not mandate a new program or higher level of service; but again may reduce the burden on elections officials.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant estimated costs of $1000 or more for the test claim allegations. The claimant also stated that none of the Government Code section 17556 exceptions apply. For the activities listed in the conclusion below, the Commission agrees and finds accordingly that they impose costs mandated by the state upon counties within the meaning of Government Code section 17514.

CONCLUSION

The Commission concludes that Elections Code sections 3201 and 3203, subdivision (b)(2) mandates a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- County elections officials shall make an application for permanent absent voter status available to any voter. (Elec. Code, § 3201.)[33]

The above activity replaces the activity in *Permanent Absent Voters I* which was limited to those voters who provided evidence of certain physical disabilities.

- Include in all absentee ballot mailings to the voter an explanation of the absentee voting procedure and an explanation of Elections Code section 3206. (Elec. Code, § 3203, subd. (b)(2).)[34]

The Commission concludes that Elections Code sections 3200, 3202, 3203, subdivisions (a) and (b)(1) and (b)(3), 3204, 3205, subdivision (a) and 3206, as renumbered and reenacted by Statutes 1994, chapter 920 do not mandate *new* reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514, but remain a part of the *Permanent Absent Voter* program, as it now exists. Any references to former Elections Code sections 1450, 1452, 1454, 1455 and 1456 in the *Permanent Absent Voters I* parameters and guidelines should be designated by their new numbers when the parameters and guidelines are amended as described above.

In addition, the Commission concludes that Statutes 2003, chapter 347, as it amended Elections Code sections 3100, 3101 and 3103, does not mandate a new program or higher level of service.[35]

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[33] As amended by Statutes 2001, chapter 922, Statutes 2002, chapter 664, and Statutes 2003, chapter 347. The reimbursement period for this claim begins no earlier than July 1, 2002, based on the initial test claim filing date of September 26, 2003. (Gov. Code, § 17557, subd. (c).)

[34] As amended by Statutes 2001, chapter 922. The reimbursement period for this claim begins no earlier than July 1, 2002, based on the initial test claim filing date of September 26, 2003. (Gov. Code, § 17557, subd. (c).)

[35] Allegations regarding Elections Code sections 3104, 3106, 3108, and 3110 were not pled with specificity and thus were not addressed in this decision.

BEFORE THE

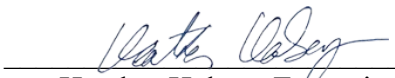
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Elections Code Section 2170 as Amended by Statutes 2019, Chapter 565 (SB 72) Filed on December 23, 2020 County of San Diego, Claimant	Case No.: 20-TC-02 *Extended Conditional Voter Registration* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 3, 2021*) (*Served December 6, 2021*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 3, 2021.



Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Elections Code Section 2170 as Amended by Statutes 2019, Chapter 565 (SB 72) Filed on December 23, 2020 County of San Diego, Claimant	Case No.: 20-TC-02 *Extended Conditional Voter Registration* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 3, 2021*) (*Served December 6, 2021*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 3, 2021. Christina Snider and Cynthia Paes appeared on behalf of the County of San Diego (claimant). Chris Hill appeared on behalf of the Department of Finance (Finance).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 5-2, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Natalie Kuffel, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Renee Nash, School District Board Member	Yes
Sarah Olsen, Public Member	No
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim filed by the County of San Diego (claimant) alleges that reimbursement is required for state-mandated activities arising from Statutes 2019, chapter 565 (SB 72), which amended Elections Code section 2170 by expanding the locations at which county elections officials provide conditional voter registration and related provisional voting (CVR and CVR provisional voting).

The Commission finds that the Test Claim was timely filed within one year of the effective date of the test claim statute.

The Commission further finds that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Prior to the test claim statute, the county elections official was required by state law to provide CVR and CVR provisional voting to any voter requesting them at its permanent offices during the 14-day period prior to election day and on election day.[1] In addition, pursuant to Elections Code section 4005, all vote centers for counties that chose to operate under the Voter's Choice Act were required to provide CVR and CVR provisional voting pursuant to Elections Code section 2170.[2] Under prior law, counties were permitted, but not required, to provide CVR and CVR provisional voting at satellite offices of the county elections official during the 14-day period prior to election day and on election day.[3]

The test claim statute amended Elections Code section 2170(d) and (e) to extend the requirement for elections officials to provide CVR and CVR provisional voting at all satellite offices and polling places in the county, and polling places are defined in the Elections Code to include vote centers.[4] Providing CVR and CVR provisional ballots requires county elections officials to provide a voter registration affidavit pursuant to Elections Code section 2170(d)(1) and perform the activities specified in Elections Code section 2170(d)(2) through (d)(5) to process conditional voter registrations and include CVR provisional ballots in the official canvass, and requires county elections officials in non-Voter's Choice Act counties to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing a CVR voter with a provisional ballot.

However, the Commission finds that Elections Code section 2170, as amended by the test claim statute, does not mandate a new program or higher level of service on county elections officials

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[1] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); California Code of Regulations, title 2, section 20023(b).

[2] Elections Code sections 4005(a)(2)(A)(ii), 4007 (Stats. 2016, ch. 832); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[3] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); Statutes 2015, chapter 734, section 2.

[4] Elections Code sections 338.5, 357.5 (which defines "vote center" as "a location established for holding elections that offers the services described in Sections 2170, 4005, and 4007 [the Voter's Choice Act].").

and, thus, does not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution because:

- The requirement to provide CVR and CVR provisional voting at vote centers and satellite offices of the county elections official is not mandated by the state because county elections officials are not required by state law to participate in the Voter's Choice Act and have vote centers, or to establish satellite offices;[5] and
- The test claim statute does not impose a new program or higher level of service. Elections have always been conducted by local elections officials, not the state; the cost of which is borne by the counties.[6] Thus, no costs have been shifted from the state to local government. Furthermore, county elections officials have a preexisting duty to provide CVR and CVR provisional voting to any voter requesting them, regardless of cost. The test claim statute expands the locations where CVR and CVR voting are required to be provided by the counties to existing polling places and satellite offices, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting. Nor does the test claim statute impose any new or additional activities on county elections officials. Even without the test claim statute, counties are required to provide and process CVRs and CVR provisional ballots, and that has not changed.[7] Under the test claim statute, county elections officials are simply performing the same activities during the same time period as required under preexisting law, except now at additional, existing locations. Thus, the activities of providing CVR and CVR provisional voting at satellite offices and polling places do not constitute a new program or higher level of service.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2020 Effective date of Statutes 2019, chapter 565, amending Elections Code section 2170.

[5] Elections Code sections 3018(b), 4005, 4007; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 743 and 754 (agreeing with the court's analysis in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777); *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[6] Elections Code section 13001 (Stats. 2008, ch. 179) provides that "[a]ll expenses authorized and necessarily incurred in the preparation for, and conduct of, elections as provided in this code shall be paid from the county treasuries, except that when an election is called by the governing body of a city the expenses shall be paid from the treasury of the city."

[7] Elections Code sections 2170(d) (Stats. 2012, ch. 497, § 2, eff. Jan. 1, 2017), 14310.

12/23/2020 The claimant, County of San Diego, filed the Test Claim.[8]

04/02/2021 The Department of Finance (Finance) filed comments on the Test Claim.[9]

05/05/2021 The claimant filed rebuttal comments.[10]

09/29/2021 Commission staff issued the Draft Proposed Decision.[11]

10/20/2021 The claimant filed comments on the Draft Proposed Decision.[12]

II. Background

This Test Claim alleges reimbursable state-mandated activities and costs arising from Elections Code section 2170, as amended by Statutes 2019, chapter 565 (SB 72), effective January 1, 2020. Elections Code section 2170 was amended by the test claim statute to expand the locations at which county elections officials must provide conditional voter registration and provisional voting to conditional voter registrants from permanent offices of the county elections official and vote centers to also include all satellite locations of the county elections office and all polling places in the county.

A. Conditional Voter Registration

To register to vote in California, an eligible person must properly execute an affidavit of voter registration to be postmarked or received by the county elections official on or before the fifteenth day prior to an election.[13] An affidavit of registration may also be submitted to the Department of Motor Vehicles or any other public agency designated as a voter registration agency under the federal National Voter Registration Act of 1993, provided the affidavit is submitted at least 15 days before the election.[14] Affidavits of registration may be completed in paper form or online through the Secretary of State's website.[15]

In 2012, the Legislature enacted Elections Code 2170 et seq., establishing conditional voter registration and related provisional voting (CVR and CVR provisional voting).[16] CVR gives eligible persons, who missed the traditional registration deadline, another opportunity to register or reregister to vote. Under Elections Code section 2170(a), a person who is otherwise qualified to vote, but who did not register or reregister by the 15-day registration deadline, is able to

[8] Exhibit A, Test Claim, filed December 23, 2020.

[9] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021.

[10] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021.

[11] Exhibit D, Draft Proposed Decision, issued September 29, 2021.

[12] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021.

[13] Elections Code section 2102(a).

[14] Elections Code section 2102(a)(2).

[15] Elections Code section 2102(a).

[16] Statutes 2012, chapter 497 (AB 1436).

conditionally register to vote and provisionally vote during the 14 days prior to and on election day, if certain requirements are met.[17]

> "Conditional voter registration" means a properly executed affidavit of registration that is delivered by the registrant to the county elections official during the 14 days immediately preceding an election or on election day and which may be deemed effective pursuant to this article after the elections official processes the affidavit, determines the registrant's eligibility to register, and validates the registrant's information, as specified in subdivision (c).[18]

While enacted in 2012, CVR and CVR provisional voting did not become operative until January 1, 2017, following the Secretary of State's certification of a statewide voter registration database (VoteCal).[19]

CVR and CVR provisional voting were added in order to increase voter participation by providing a mechanism for eligible voters to retain the opportunity to register to vote and to vote, despite missing the 15-day registration deadline, as was seen in other states that adopted a similar process.

> Citizen participation in elections is the bedrock of our representative democracy. Yet, in California, voter participation has fallen to troubling levels. In the November 2010 general election just 44.1% of eligible voters cast a vote. Fortunately there is more that we can do to promote increased participation, thus ensuring that election results reflect the will of the people to the greatest extent possible. Currently, individuals who are eligible to vote must submit a voter affidavit at least 15 days prior to an election. Unfortunately, the registration deadline hinders voter participation. This is illustrated by the ten states that allow some form of same-day registration and voting. All but one have higher voter participation rates than California—where only 44.1% of eligible voters participated in the 2010 general election. In comparison, Iowa, Wisconsin and Minnesota had respective rates of 50.0%, 52.1%, and 55.4% in the 2010 general election. Research also shows that same-day registration and voting lead to increased participation. North Carolina implemented same-day voter registration in 2007 and saw an 8% increase in voter turnout during the 2008 presidential election compared to the 2004 presidential election.[20]

The statute as originally enacted required county elections officials to provide CVR and CVR voting at all permanent offices of the county elections official during the 14-day period prior to election day and on election day, and permitted county elections officials to provide CVR and

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[17] Elections Code section 2170(a).

[18] Elections Code section 2170(a).

[19] Statutes 2012, chapter 497; Exhibit A, Test Claim, filed December 23, 2020, page 75.

[20] Exhibit F(1), Assembly Committee on Elections and Redistricting, Analysis of AB 1436 (2011-2012 Reg. Sess.), as amended March 20, 2012, page 3.

CVR voting at satellite offices of the county elections office on election day only.[21] In 2015, Elections Code section 2170 was amended to also permit CVR and CVR voting at satellite offices of the county elections office during the 14-day period prior to election day.[22] In addition to the test claim statute, Elections Code section 2170 was separately amended in 2019 to permit an elections official to provide a nonprovisional ballot to a conditional voter registrant, if certain requirements are satisfied.[23] The statute was also amended in 2020 to make non-substantive changes.[24]

Conditional voter registrants use the same affidavit of registration to register to vote as other voters – either a paper form or online through the Secretary of State's website.[25] The elections official must advise conditional voter registrants that a conditional voter registration is effective only if the registrant is determined to be eligible to register to vote and the information on the registration affidavit is verified.[26]

A conditional voter registration is processed in the same manner as a "regular" registration:[27] The county elections official must determine the registrant's eligibility and attempt to validate the registrant's information.[28] For conditional voter registration to be deemed effective, the registrant must be found eligible to register and the information provided by the registrant on the affidavit of registration verified before or during the canvass period for the election.[29] If a voter is otherwise eligible to vote, but the information provided on the affidavit cannot be verified using a Department of Motor Vehicles or federal Social Security Administration database, the registrant is issued a unique identification number for voter registration identification purposes and the conditional voter registration is deemed effective.[30] Upon finding a conditional

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[21] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2).

[22] Statutes 2015, chapter 734, section 2.

[23] Statutes 2019, chapter 99. As a result of this separate 2019 amendment, the language of subdivision (d)(1) was changed as follows:

> (d)(1) The elections official shall provide conditional voter registration and ~~provisional~~ voting pursuant to this article at all permanent offices of the county elections official in the county.[23]

[24] Statutes 2020, chapter 370.

[25] California Code of Regulations, title 2, section 20022; see Elections Code sections 2102, 2150, 2170(a).

[26] Elections Code section 2170(d)(2).

[27] Elections Code section 2171(b).

[28] Elections Code section 2170(d)(4).

[29] Elections Code section 2170(a), (c).

[30] Elections Code section 2170(c)(2); see Elections Code section 2150(a)(7)(C).

registration effective, the corresponding provisional ballot is included in the official canvass for the election.[31]

B. Provisional Voting

Provisional voting has been in effect in California since 1984 and is meant to ensure that "no properly registered voter is denied their right to cast a ballot if that voter's name is not on the polling place roster due to a clerical, processing, computer, or other error" and "that no voter votes twice, either intentionally or inadvertently, in a given election."[32] Any voter who claims to be properly registered but whose qualifications cannot be immediately determined is entitled to cast a provisional ballot.[33] Common circumstances when an elections official will require a voter to cast a provisional ballot include: when a person is voting for the first time in a federal election and cannot provide the required proof of identification;[34] when a voter has moved within the same county but has not reregistered to vote;[35] a vote-by-mail voter voting in person;[36] and when a voter is not on the polling place roster for an unknown reason.[37]

An elections official must advise any voter who falls into any of these categories or otherwise claims to be properly registered, but whose voter eligibility cannot be determined, of the voter's right to cast a provisional ballot, and must provide the voter with a provisional ballot, written instructions regarding the process and procedures for casting the ballot, and a written affirmation regarding the voter's registration and eligibility to vote.[38] The written instructions provided to a provisional voter must include the following information from Elections Code section 14310(c) and (d):

- During the official canvass, the elections official shall examine the records with respect to all provisional ballots cast. Using the procedures that apply to the comparison of signatures on vote by mail ballots pursuant to Section 3019, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration or other signature in the voter's registration record. If the signatures do not compare or the provisional ballot envelope is not signed, the ballot shall be rejected.

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[31] Elections Code section 2170(d)(5).

[32] Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 2.

[33] Elections Code sections 2300, 14310.

[34] California Code of Regulations, title 2, sections 19075, 20107.

[35] Elections Code section 14311.

[36] Elections Code section 3016.

[37] Elections Code section 14310(a); see also Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 3.

[38] Elections Code section 14310(a)(1), (a)(2).

- Provisional ballots shall not be included in any semiofficial or official canvass unless one or more of the following conditions are met: (1) the elections official establishes prior to the completion of the official canvass, from the records in his or her office, the claimant's right to vote; (2) the provisional ballot has been cast and included in the canvass pursuant to Elections Code section 2170 et seq. (with CVR and CVR provisional voting); or (3) upon order of a superior court in the county of the voter's residence.
- A voter may seek the court order regarding his or her own ballot at any time prior to completion of the official canvass.
- The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.

  If the ballot cast by the voter contains the same candidates and measures on which the voter would have been entitled to vote in his or her assigned precinct, the elections official shall count the votes for the entire ballot.

  If the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in the voter's assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in the voter's assigned precinct.
- Any voter who casts a provisional ballot may access a free access system established by the Secretary of State to discover whether the voter's provisional ballot was counted and, if not, the reason why it was not counted.[39]

The voter must then execute the written affirmation in the presence of an elections official, stating that the voter is eligible to vote and is registered in the county.[40]

A provisional ballot is simply a regular ballot that is sealed in an envelope that demarcates it as provisional prior to being placed in the ballot box.[41] Provisional ballot envelopes must be of a different color than the envelopes used for vote-by-mail ballots, but printed substantially similar to and completed in the same manner.[42]

No provisional ballot is counted or rejected until the elections official goes through a detailed process to determine whether the ballot should be counted.[43] As explained in the written information provided to the voter, provisional ballots are processed and counted in the same

[39] Elections Code section 14310(a)(2).

[40] Elections Code section 14310(a)(3).

[41] Elections Code section 14310.

[42] Elections Code section 14310(b).

[43] Elections Code sections 14310, 15350, and 15100-15112; see also Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 3.

manner as vote-by-mail ballots.[44] During the official canvass period, the elections official compares the signature on the provisional ballot envelope with the signature in the voter's registration record using the procedures applicable to comparing signatures for vote-by-mail ballots.[45]

If the signatures do not compare or the provisional ballot envelope is not signed, the ballot is rejected.[46] Provisional ballots are only included in any semiofficial or official canvass if at least one of the following is true: (1) the provisional voter's right to vote is established; (2) the provisional ballot is cast and included in the canvass under the rules governing CVR and CVR provisional voting; or (3) by order of a superior court in the voter's county of residence.[47]

A provisional ballot cast by an eligible voter shall not be rejected because it is cast at a location other than the voter's assigned precinct.[48] The voter is entitled to have only the votes counted that are cast on the candidates and measures that the voter would have been entitled to vote on at the voter's assigned precinct.[49] Additionally, any voter who casts a provisional ballot is entitled to find out whether their ballot was counted and, if not, the reason why it was not counted.[50] This information is made available on the Secretary of State's "My Voter Status" page, along with the voter's participation history.[51]

Provisional ballots cast by conditional voter registrants[52] are subject to the same requirements as provisional ballots generally.[53] Thus, a "CVR provisional ballot" is a provisional ballot that is issued to a conditional voter registrant.[54] The ballot envelope in which the CVR provisional ballot is placed prior to being cast in the ballot box must look visibly different from all other

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[44] Elections Code sections 14310(c)(1), 15350, 15100-15112.

[45] Elections Code sections 14310(c)(1). The procedures for comparing signatures for vote-by-mail ballots are specified in Elections Code section 3019.

[46] Elections Code section 14310(c)(1).

[47] Elections Code section 14310(c)(2)(A).

[48] Elections Code section 14310(c)(3).

[49] Elections Code section 14310(c)(3)(A), (c)(3)(B).

[50] Elections Code section 14310(d); California Code of Regulations, title 2, sections 19093 (provisional ballots generally), 20025(f) (CVR provisional ballots).

[51] California Code of Regulations, title 2, sections 19093 (provisional ballots generally), 20025(f) (CVR provisional ballots).

[52] The Secretary of State's regulations governing the conditional voter registration provisions of the Elections Code use the term "CVR voter" to mean a conditional voter registrant who requests a CVR provisional ballot. (California Code of Regulations, title 2, section 20021(b).)

[53] Elections Code sections 2171(c), 14310-14314.

[54] California Code of Regulations, title 2, section 20021(c).

ballot envelopes, which may include a different envelope color or placing a stamp or mark using a marking mechanism on the ballot envelope.[55]

If a conditional voter registration is deemed effective under Elections Code section 2170, the corresponding CVR provisional ballot must be processed in accordance with sections 20025 and 20026 of the Secretary of State's regulations.[56]

C. Voter's Choice Act

In 2016, the Legislature enacted the Voter's Choice Act, which authorized the counties of Calaveras, Inyo, Madera, Napa, Nevada, Orange, Sacramento, San Luis Obispo, San Mateo, Santa Clara, Shasta, Sierra, Sutter, and Tuolumne to conduct any election as an all-mailed ballot election beginning January 1, 2018, if certain conditions are satisfied, including requirements for ballot drop-off locations, vote centers, and election administration plans.[57] Beginning January 1, 2020, any county may choose to conduct an election under the Voter's Choice Act if specified requirements are met.[58] By the 2018 elections, five counties had implemented the Voter's Choice Act: Madera, Napa, Nevada, Sacramento, and San Mateo. By December 2020, 15 of 58 counties had implemented the Voter's Choice Act.[59]

Under the Voter's Choice Act, counties conduct elections in which all registered voters receive a ballot by mail.[60] Voters may then choose to mail in their ballot, drop off the ballot at a secure drop-off location, or vote in person at a vote center.[61] Beginning 10 days before the election and continuing through the Friday before election day, at least one vote center is required for every

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[55] California Code of Regulations, title 2, section 20024.

[56] California Code of Regulations, title 2, section 19095.

[57] Statutes 2016, chapter 832 (SB 450).

[58] Elections Code sections 4005, 4007. Los Angeles County is subject to the same general requirements specified in Elections Code section 4005, with certain exceptions as specified in Elections Code section 4007.

[59] Exhibit F(5), California Secretary of State, Voter's Choice Act Participating Counties, https://www.sos.ca.gov/elections/voters-choice-act/vca-counties (accessed on June 2, 2021). Voter's Choice Act counties include: Amador, Butte, Calaveras, El Dorado, Fresno, Los Angeles, Madera, Mariposa, Napa, Nevada, Orange, Sacramento, San Mateo, Santa Clara, and Tuolumne.

[60] Exhibit A, Test Claim, filed December 23, 2020, page 160 (California Secretary of State, About California's Voter's Choice Act).

[61] Exhibit A, Test Claim, filed December 23, 2020, page 160 (California Secretary of State, About California's Voter's Choice Act).

50,000 registered voters.[62] On election day and the Saturday, Sunday, and Monday prior, one vote center is required for every 10,000 registered voters.[63]

Under the Voter's Choice Act, vote centers replace traditional polling places and provide the following expanded voter services:

- Vote in-person;
- Secure ballot drop off;
- Get a replacement ballot;
- Vote using an accessible voting machine;
- Get help and voting material in multiple languages; and
- *Register to vote or update voter registration, pursuant to Elections Code section 2170.*[64]

Thus, under the Voter's Choice Act, participating counties must offer CVR and CVR provisional voting at all vote centers pursuant to Elections Code 2170.[65]

D. Test Claim Statute

As indicated above, before the test claim statute was enacted, Elections Code 2170 required county elections officials to provide CVR and CVR provisional voting to any voter that requested them at all permanent offices of the county elections official during the 14-day period prior to election day and on election day, and permitted county elections officials to provide CVR and CVR provisional voting at satellite locations of the county elections office during the 14-day period prior to election day and on election day.[66] In addition, Elections Code section 4005 required vote centers to provide CVR and CVR provisional voting pursuant to section 2170.[67]

The test claim statute, Statutes 2019, chapter 565 (SB 72), became effective on January 1, 2020, amending Elections Code section 2170(d) and (e) to *require* county elections officials to provide CVR and CVR provisional voting at all satellite offices of the county elections official and all

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[62] Elections Code section 4005(a)(4)(A); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[63] Elections Code section 4005(a)(3)(A); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[64] Exhibit A, Test Claim, filed December 23, 2020, pages 160-161 (California Secretary of State, About California's Voter's Choice Act); Elections Code section 4005(a)(2)(A). Emphasis added.

[65] Elections Code section 4005(a)(2)(A)(ii), 4007 (Stats. 2016, ch. 832); California Code of Regulations, title 2, section 20023(b).

[66] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); Statutes 2015, chapter 734, section 2.

[67] Elections Code section 4005(a)(2)(A)(ii).

polling places in the county, and to specify the procedures that county elections officials in non-Voter's Choice Act counties must follow in providing a provisional ballot to a conditional voter registrant. Elections Code section 2170 was amended as follows:

> (d) The county elections official shall offer conditional voter registration and provisional voting pursuant to this article, in accordance with all of the following procedures:
>
> > (1) The elections official shall provide conditional voter registration and provisional voting pursuant to this article at all permanent and satellite offices of the county elections official and all polling places in the county.
> >
> > (2) The elections official shall advise registrants that a conditional voter registration will be effective only if the registrant is determined to be eligible to register to vote for the election and the information provided by the registrant on the registration affidavit is verified pursuant to subdivision (c).
> >
> > (3) The elections official shall conduct the receipt and handling of each conditional voter registration and offer and receive a corresponding provisional ballot in a manner that protects the secrecy of the ballot and allows the elections official to process the registration, determine the registrant's eligibility to register, and validate the registrant's information before counting or rejecting the corresponding provisional ballot.
> >
> > (4) After receiving a conditional voter registration, the elections official shall process the registration, determine the registrant's eligibility to register, and attempt to validate the registrant's information.
> >
> > (5) If a conditional registration is deemed effective, the elections official shall include the corresponding provisional ballot in the official canvass.
>
> (e) ~~The count elections official may offer~~After receiving a conditional voter registration ~~and provisional voting pursuant to this article at satellite offices of the county elections office~~, the elections official shall provide the voter a provisional ballot in accordance with the following procedures: ~~specified in paragraphs (2) to (5), inclusive, of lsubdivision (d).~~
>
> > (1) If the elections office, satellite office, or polling place is equipped with an electronic poll book, or other means to determine the voter's precinct, the elections official shall provide the voter with a ballot for the voter's precinct if the ballot is available. The ballot may be cast by any means available at the elections office, satellite office, or polling place.
> >
> > (2) If the elections official is unable to determine the voter's precinct, or a ballot for the voter's precinct is unavailable, the elections official shall provide the voter with a ballot and inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to paragraph (3) of subdivision (c) of Section 14310. The ballot may be cast by any means available at the elections office, satellite office, or polling place.

(3) Notwithstanding paragraph (2), if the elections official is able to determine the voter's precinct, but a ballot for the voter's precinct is unavailable, the elections official may inform the voter of the location of the voter's polling place. A voter described in this paragraph shall not be required to vote at the voter's polling place and may instead, at the voter's choosing, cast a ballot pursuant to paragraph (2).

(4) This subdivision does not apply to elections conducted pursuant to Section 4005 or 4007 [under the Voter's Choice Act].[68]

1. Secretary of State's Interpretation of the Test Claim Statute.

The Secretary of State is the chief elections officer of the state and is responsible for administering the provisions of the Elections Code.[69] According to a Secretary of State memorandum issued to county elections officials statewide, the test claim statute "amends Elections Code section 2170 to require county elections officials to offer CVR and CVR provisional voting at all permanent and satellite offices and all polling places in the county."[70]

The Secretary of State's guidance for providing CVR and CVR provisional voting at all permanent and satellite county elections offices is as follows:

- Provide the individual a voter registration application.
- Once the voter completes the application, the county elections official determines the CVR voter's precinct.
- Provide the CVR voter a ballot for the voter's precinct.
- Voter places the voted ballot in a CVR provisional ballot envelope.[71]

The Secretary of State's guidance for providing CVR and CVR provisional voting at polling locations tracks Elections Code section 2170(e)(1) through (e)(3), which address the various circumstances that may arise at polling places depending on whether the polling place has technology to determine the CVR voter's precinct and whether the ballot for the CVR voter's assigned precinct is available.[72]

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[68] Statutes 2019, chapter 565.

[69] Government Code section 12172.5(a).

[70] Exhibit A, Test Claim, filed December 23, 2020, page 107 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019). The courts will give weight and appropriate deference to the interpretation of a statute by the agency charged with its implementation. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

[71] Exhibit A, Test Claim, filed December 23, 2020, page 108 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[72] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

If the polling location has technology to determine the CVR voter's precinct and:

Ballot for that precinct is available:

- Provide the individual a voter registration application.
- Once the voter completes the application, the county elections official determines the CVR voter's precinct.
    - The Secretary of State recommends having a minimum of two workers at the polling place who have credentials to access the technology that can determine a CVR voter's precinct in order to ensure adequate coverage.
- Provide the CVR voter a ballot for the voter's precinct.
    - The Secretary of State recommends having a minimum of two workers at the polling place who have access to the ballots for all the precincts in the county to ensure adequate coverage.
    - If access to all precinct ballots within the county is through the use of an electronic ballot marking device, poll workers should be made aware that a voter might refuse to use that voting option. If so, the CVR voter should be:
        - informed of the location of their correct polling place where the ballot for their precinct is available, or
        - given a ballot that is available at the precinct with information that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
- Voter places the voted ballot in a CVR provisional ballot envelope.

Ballot for that precinct is NOT available:

- Inform the voter of the location of their correct polling place and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place, provide the individual a voter registration application.
    - Once the voter completes the application, the county elections official determines the CVR voter's precinct.
        - The Secretary of State recommends having a minimum of two workers at the polling place who have credentials to access the technology that can determine a CVR voter's precinct.
    - Give the CVR voter:
        - a ballot that is available at the precinct, and

- inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.

- Voter places the voted ballot in a CVR provisional ballot envelope.

If polling location does NOT have technology to determine the CVR voter's precinct -OR- the ballot for the voter's precinct is NOT available:

- If possible, inform the individual of the location of their correct polling place where the ballot for their precinct is available, and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place (or if the polling location does not have the technology to determine the CVR's precinct), provide the individual a voter registration application.
    - Give the CVR voter:
        - a ballot that is available at the precinct, and
        - information that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.[73]

2. Legislative History of the Test Claim Statute.

According to the legislative history, the purpose of the test claim statute was "to expand access to same day voter registration and voting" by "requir[ing] all counties to permit eligible voters to register and vote on Election Day at every polling site."[74]

Additionally, the legislative history indicates that because voters who wish to change their political party preference in order to vote in a particular party's presidential primary may do so either prior to the registration deadline or through the conditional voter registration process, providing CVR and CVR provisional voting at more locations may reduce some of the related voter confusion and frustration that reportedly occurred in California during the 2016 presidential primary election.[75]

[73] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019), emphasis in original.

[74] Exhibit A, Test Claim, filed December 23, 2020, pages 134-135 (Senate Committee on Elections and Constitutional Amendments, Analysis of SB 72 (2019-2020 Reg. Sess.), as amended March 25, 2019, pages 7-8).

[75] Exhibit A, Test Claim, filed December 23, 2020, page 133 (Senate Committee on Elections and Constitutional Amendments, Analysis of SB 72 (2019-2020 Reg. Sess.), as amended March 25, 2019, page 6).

E. Past Commission Decisions on Elections Law

The Commission has not received a prior test claim on Elections Code 2170, but has heard and decided a number of test claims on elections law, the following of which are relevant to this Test Claim.

Voter Identification Procedures, 03-TC-23

On October 4, 2006, the Commission approved the *Voter Identification Procedures*, 03-TC-23 Test Claim, finding that Elections Code section 14310(c)(1), as amended by Statutes 2000, chapter 260, imposed a reimbursable state-mandated program on city and county elections officials to compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration, and to reject any ballot when the signatures do not compare, for statutorily required elections.

Fifteen Day Close of Voter Registration, 01-TC-15

On October 31, 2006, the Commission partially approved the *Fifteen Day Close of Voter Registration*, 01-TC-15 Test Claim.[76] At issue were changes to the voter registration deadline prior to an election. The test claim statute amended, repealed, and reenacted several Elections Code sections to allow new registrations or changes to voter registrations through the 15th day prior to an election. Under prior law, the registration period closed 29 days before an election. The claimant sought mandate reimbursement for costs incurred to register voters during the 28-day through 15-day period prior to an election, including implementation, planning, revising training programs, conducting an informational medial campaign, answering questions about the new law, and hiring additional staff.

In finding that most of the statutory amendments by Statutes 2000, chapter 899, did not impose a new program or higher level of service on county elections officials with the meaning of article XIII B, section 6, the Commission determined that processing and accepting voter registration affidavits and changes of address were not newly required activities because county elections officials had been required to perform those activities since long before the enactment of the test claim statute.[77] Therefore, because processing and accepting new voter registrations and changes of address constitute an existing program, increases in the cost of that program that result from the changed timeframes do not impose a state-mandated program or higher level of service within the meaning of article XIII B, section 6.[78]

Vote by Mail Ballots: Prepaid Postage, 19-TC-01

On July 24, 2020, the Commission partially approved the *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01 Test Claim, finding that Elections Code Section 3010, as amended by Statutes 2018, chapter 120, imposes a reimbursable state-mandated program on city and county

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[76] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, page 1.

[77] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, pages 1-2.

[78] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, pages 1-2.

elections officials to provide prepaid postage on identification envelopes delivered with vote-by-mail ballots for all state and local elections, except for those held at the discretion of the local governing body, or elections for which counties or cities have fee authority within the meaning of Government Code section 17556(d).[79]

III. Positions of the Parties

A. County of San Diego

The claimant alleges that the test claim statute imposes a reimbursable state-mandated program on counties under article XIII B, section 6 and Government Code section 17514, by requiring county elections officials to offer conditional voter registration (CVR) at satellite offices of the county elections official and polling places in the county during the 14-day period prior to the election and on election day.[80] The claimant interprets the mandate as applying to all elections conducted by the county elections official only in counties that have *not* implemented the Voter's Choice Act (Elections Code section 4005 et seq.).[81]

These requirements are new because under prior law, CVR and CVR provisional voting was only required at the county elections office during the 14-day period prior to the election and on election day, was optional at satellite offices, and was neither optional nor required at polling places.[82] The claimant states that because polling places in San Diego County are only open on election day, the claimant must now offer CVR and CVR provisional voting at all satellite offices of the county elections official during the 14-day period prior to the election, and at all satellite offices and polling places on election day.[83]

The claimant argues that the test claim statute constitutes a new program or higher level of service.[84] The new requirements under Elections Code section 2170(d)(1) carry out "the governmental function of providing services to the public – i.e., allowing voters to register to vote for the first time or re-register to vote just before (or on) election day so that they can vote in that election."[85] Furthermore, the new requirements are unique to local government: only the county elections official is required to provide conditional voter registration.[86] Alternatively, the claimant argues, the test claim statute imposes a "higher level of service" on local governments

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[79] Exhibit F(7), Excerpt from Commission on State Mandates, Decision for *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01, adopted July 24, 2020, pages 1-5.

[80] Exhibit A, Test Claim, filed December 23, 2020, page 10.

[81] Exhibit A, Test Claim, filed December 23, 2020, page 11.

[82] Exhibit A, Test Claim, filed December 23, 2020, page 11.

[83] Exhibit A, Test Claim, filed December 23, 2020, page 12. The claimant notes that the "November 2020 election was unusual because polling places were open for 4 days total due to changes in the election due to the COVID-19 pandemic" and "therefore CVR had to be offered at polling places on all four of those days."

[84] Exhibit A, Test Claim, filed December 23, 2020, page 12.

[85] Exhibit A, Test Claim, filed December 23, 2020, page 13.

[86] Exhibit A, Test Claim, filed December 23, 2020, page 13.

because in addition to offering CVR and CVR provisional voting at the permanent office of the county elections official, counties must extend CVR and CVR provisional voting to satellite offices and polling places.[87]

The claimant states that its Registrar of Voters implemented CVR during the June 2018 gubernatorial primary election, when voter turnout was only 39.8 percent.[88] CVR was first widely utilized by voters in the county during the November 2018 gubernatorial general election, when voter turnout reached 66.42 percent.[89] 2,353 individuals utilized CVR during the November 2018 election, with 1,555 individuals (66 percent) using CVR on election day.[90]

The claimant alleges that as a result of the test claim statute, it incurred increased costs during the 2019-2020 fiscal year as follows:[91]

Activity	Date(s) Performed	Description	Total Cost	Fee Authority	Reimbursable Cost Claimed
1) Staffing costs	FY 2019-2020	Plan, prepare and design envelopes	$29,019	N/A	$29,019
2) Staffing costs	FY 2019-2020	Conduct additional data entry and process CVR ballots	$123,965	$27,648	$96,317
3) Training	FY 2019-2020	Create new training materials for poll workers and train poll workers	$32,166	$7,174	$24,992
4) Election staffing	FY 2019-2020	Recruit and hire temporary staff and poll workers	$96,608	$21,546	$75,062
5) Ballot processing	FY 2019-2020	Additional CVR ballot processing	$10,773	$2,403	$8,370
6) Supplies	FY 2019-2020	CVR envelopes for satellite offices and polling places	$91,476	$20,402	$71,074
7) Satellite locations	FY 2019-2020	Open and operate four new satellite locations	$236,287	$52,698	$183,589
TOTAL			$620,294	$131,871	**$488,423**

[87] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[88] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[89] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[90] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[91] Exhibit A, Test Claim, filed December 23, 2020, pages 5-7.

The claimant alleges that the activities listed above were performed as part of the March 2020 presidential primary election.[92] The claimant asserts that because of the large CVR voter turnout during the November 2018 election, there was concern that polling places would be overwhelmed during the March 2020 election.[93] As of February 2019, there were over 480,000 eligible electors in San Diego County who could potentially register to vote through the CVR process, not including voters reregistering to vote through CVR.[94] The claimant asserts that an added complication during the March 2020 election was that it was required to make a total of 40 different variations of ballots available, which, when coupled with the requirements under the test claim statute, "made the March 2020 election administratively complex."[95]

While the claimant concedes that the test claim statute did not directly require it to open additional satellite offices for the March 2020 election, the claimant argues that it was necessary to create four satellite offices so that traditional polling places would not be overwhelmed by large numbers of CVR voters, and potential voters would not have to endure long wait times.[96] These satellite offices were open February 29, 2020 through March 2, 2020 (Saturday through Monday before election day), and on March 3, 2020 (election day).[97] The claimant reports that 13,452 individuals used CVR during the March 2020 election.[98]

Offering CVR and CVR provisional voting at satellite offices during the 14-day period before election day and at satellite offices and polling places on elections day required the claimant, through its Registrar of Voters, to incur planning and preparation costs to "design and develop the necessary envelopes and training and create the necessary workflows" and to hire additional temporary staff to complete data entry and to process the additional CVRs and CVR provisional ballots.[99] The claimant also alleges that because of the test claim statute, the Registrar of Voters must train poll workers on the new processes for CVR and CVR provisional voting and update the poll worker training handbook to reflect these new processes.[100] Because of the anticipated increased voter turnout generated by CVR and CVR provisional voting, the claimant states that it was forced to recruit and hire additional temporary staff and poll workers.[101]

Because the test claim statute directly resulted in an increased number of CVR provisional ballots, the claimant alleges that it was required to process and sort CVR provisional ballot

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[92] Exhibit A, Test Claim, filed December 23, 2020, pages 16-22.

[93] Exhibit A, Test Claim, filed December 23, 2020, page 15.

[94] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[95] Exhibit A, Test Claim, filed December 23, 2020, page 15.

[96] Exhibit A, Test Claim, filed December 23, 2020, pages 15-16, 21-22; Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6.

[97] Exhibit A, Test Claim, filed December 23, 2020, page 16.

[98] Exhibit A, Test Claim, filed December 23, 2020, page 16.

[99] Exhibit A, Test Claim, filed December 23, 2020, page 17.

[100] Exhibit A, Test Claim, filed December 23, 2020, pages 17-18.

[101] Exhibit A, Test Claim, filed December 23, 2020, page 18.

envelopes using automated processing equipment, for which it incurred additional costs.[102] The claimant also argues that the test claim statute directly resulted in the need to purchase new CVR provisional ballot envelopes for satellite locations and polling places.[103] According to the claimant, the new CVR provisional ballot envelope served as the affidavit of registration for CVR voters at all locations.[104]

The claimant cites to the Commission's recent Decision in *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01, for the proposition that it can recover some of the costs of administering elections from the jurisdictions whose elections are consolidated with the primary and general elections.[105] However, the claimant maintains that it cannot recover the additional internal planning and preparation costs it is forced to incur as a result of the test claim statute.[106]

The claimant states that for the November 2020 election, it incurred $191,154 in total additional costs, but anticipates receiving reimbursement from other jurisdictions for additional staffing and training costs, such that the estimated total additional costs after reimbursement are $123,800.[107] The claimant may also receive federal Help America Vote Act funds to defray some of these costs. [108] The claimant notes that there were large-scale changes to the conduct of elections during the November 2020 elections as a result of the COVID-19 pandemic but that they did not affect the counties' obligations under the test claim statute.[109] The claimant conducted the November 2020 elections using the "consolidated polling place" method, wherein in-person voting was offered for 29 days at one location (the permanent county elections office) and at 235 consolidated polling places for 4 days.[110] The claimant did not use satellite offices during the November 2020 election.[111]

The claimant anticipates incurring $30,177 in additional costs to conduct a special primary election in April 2021 to fill a vacancy in Assembly District 79.[112] Because this special election is not consolidated with other local elections, the claimant cannot receive reimbursement to

[102] Exhibit A, Test Claim, filed December 23, 2020, page 19.

[103] Exhibit A, Test Claim, filed December 23, 2020, pages 19-20.

[104] Exhibit A, Test Claim, filed December 23, 2020, page 20.

[105] Exhibit A, Test Claim, filed December 23, 2020, page 17.

[106] Exhibit A, Test Claim, filed December 23, 2020, page 17.

[107] Exhibit A, Test Claim, filed December 23, 2020, page 24.

[108] Exhibit A, Test Claim, filed December 23, 2020, page 24.

[109] Exhibit A, Test Claim, filed December 23, 2020, pages 22-23.

[110] Exhibit A, Test Claim, filed December 23, 2020, page 23.

[111] Exhibit A, Test Claim, filed December 23, 2020, page 23.

[112] Exhibit A, Test Claim, filed December 23, 2020, pages 24-25; Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 7.

offset costs.[113] The claimant will not use satellite offices for the April 2021 election and anticipates having 51 polling places open on election day.[114]

The claimant estimates the statewide cost of implementing the test claim statute for fiscal year 2020-2021 at $331,154 – 722,934.[115]

In rebuttal comments, the claimant asserts that Finance concedes that the test claim statute creates an unfunded mandate and that training and supply costs were necessarily incurred.[116] The claimant disputes Finance's challenge to the following four categories of costs: (1) Registrar of Voters staffing; (2) election staffing; (3) CVR ballot processing; and (4) creation of new satellite locations.[117] The claimant argues that while the Commission first determines in a test claim decision whether a statute imposes reimbursable state-mandated activities, and then, at the parameters and guidelines phase, separately determines whether certain costs are "reasonably necessary" to carry out the mandate, these inquiries overlap and intertwine and should therefore be considered in tandem.[118]

The claimant argues that because the test claim statute required for the first time that poll workers offer CVR at polling places, the Registrar of Voters was required to incur additional staffing costs to plan new workflows and develop new CVR envelopes.[119] Thus, these planning activities were not only reasonably necessary, but were required.[120] Similarly, the expected increase in CVR voters caused the Registrar to hire additional election workers.[121] Because the legislative history of the test claim statute expressly anticipated an increase in voter turnout, increased staffing costs were required as a result of the test claim statute.[122] The claimant maintains that using automated equipment to sort CVR ballots was a required labor cost, and not discretionary as Finance alleges.[123] The claimant was required to use automated equipment to reduce labor costs for CVR ballot processing.[124] While the claimant concedes that the test claim statute does not directly require satellite offices, satellite offices were necessary "to mitigate long

[113] Exhibit A, Test Claim, filed December 23, 2020, page 25.

[114] Exhibit A, Test Claim, filed December 23, 2020, page 24.

[115] Exhibit A, Test Claim, filed December 23, 2020, page 26.

[116] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 1.

[117] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 1-2.

[118] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 3.

[119] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 4-5.

[120] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 4-5.

[121] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 5.

[122] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 5.

[123] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 5.

[124] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 5-6.

lines and wait times at the polling places," a reasonably anticipated result of expanding CVR services to all polling places.[125]

In comments on the Draft Proposed Decision, the claimant frames the requirements imposed by the test claim statute as an expansion of the existing CVR program.[126] The claimant challenges what it describes as the conclusion of the Draft Proposed Decision that "because elections officials were already required to conduct the 'actual activities' of providing CVR services prior to SB 72, the fact that elections officials now have to do so in new locations for longer periods of time is not a new program or higher level of service" but rather solely an increase in the cost of providing the same services that were required under prior law.[127]

The claimant argues that case law demonstrates that a "statute imposes a new program or higher level of service when it requires counties to offer 'expanded' services."[128] In contrast, the claimant argues, a statute imposes increased costs alone when there is no government program or specific public service provided.[129] To support this point, the claimant distinguishes the test claim statute from the statutes at issue in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196, *City of Anaheim v. State* (1987) 189 Cal.App.3d 1478, and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, arguing that those cases "involved mandates that (1) applied to the private and public sector alike and only incidentally impacted local government, or (2) had the effect of governments paying additional compensation to their government employees" and "did *not* require that governments provide expanded services to the public."[130] Conversely, the claimant asserts:

> SB 72 [the test claim statute] expressly requires local governments to provide additional services to the public. That was expressly not true in the cases above. *City of Anaheim*, 189 Cal. App. 3d at 1484; *County of Los Angeles*, 43 Cal. 3d at 58 ("Workers' compensation is not a program administered by local agencies to provide service to the public"); *City of Richmond*, 64 Cal. App. 4th at 1196 (paying employees more benefits is not a "peculiarly local government function";

[125] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6.

[126] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 1.

[127] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 1.

[128] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 4.

[129] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 2.

[130] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 2, emphasis in original.

> "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.")[131]

The claimant asserts that, "in contrast to merely imposing a 'higher costs,' [sic] when a statute requires that local government must provide an 'expanded' version of a service it is already providing to the public (as is true here), this is a reimbursable mandate."[132] To highlight the distinction between "higher costs" and "higher level of service," the claimant cites to *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 (requirement to update fire safety equipment to firefighters was a "new program"), *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877-879 (new duties constitute a "higher level of service" because they impose an "increase in the actual level or quality of services provided"), and *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546 (despite county already providing stormwater drainage and flood control services, new requirements imposed a "higher level of service" because they reduced pollution and increased compliance and a "new program" because they provided a government service that was not previously mandated).[133]

The claimant argues the county elections officials' "expanded" duties under the test claim statute constitute a "higher level of service" because they are new in comparison to the prior level of service and were intended to provide an enhanced service to the public.[134] To support this position, the claimant cites to the test claim statute's legislative history, which the claimant alleges shows that the test claim statute was intended to expand voter services and voting, a traditional governmental function and service.[135]

Additionally, the claimant argues that "by expanding the dates and locations on which these [CVR] services must be offered," the test claim statute increased the "actual level or quality" of counties' preexisting CVR duties, which "constitutes a 'new program' because the requirements to offer CVR in polling places and at satellite locations during the 14-day period prior to the election and on election day were new and provided a uniquely governmental service."[136]

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[131] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 3.

[132] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 4.

[133] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 4-5.

[134] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 5.

[135] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 6.

[136] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 5.

B. Department of Finance

Finance does not dispute the claimant's position that as a result of the test claim statute, claimant's county elections official was required to update its training handbook, train poll workers on the CVR process, and purchase new CVR envelopes for both polling and satellite locations.[137] However, Finance challenges the claimant's assertion that it was required to incur staffing, equipment, and satellite office expenses, arguing that those activities are not required by the amended statute.[138] Specifically, Finance asserts that the test claim statute does not require the claimant to recruit and hire additional temporary staff and poll workers, use automated processing equipment to process and sort ballots, or create additional satellite offices, and therefore, the claimant exercised discretion in choosing to perform these activities.[139] As such, costs relating to the non-required activities of staffing, ballot processing equipment, and satellite offices are not reimbursable.[140] Finance did not file comments on the Draft Proposed Decision.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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 programs or increased level of service…

The purpose of article XIII B, section 6 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."[141] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[142]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

- A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[143]
- The mandated activity constitutes a "program" that either:
  a. Carries out the governmental function of providing a service to the public; or

[137] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 1.

[138] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 2.

[139] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 2.

[140] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 2.

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

[142] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[143] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[144]

- The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[145]
- The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[146]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[147] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[148] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[149]

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) requires that a test claim be filed "not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[150] Government Code section 17557(e) requires a test claim to be submitted by June 30 following a fiscal year in order to establish reimbursement eligibility for that fiscal year.

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[144] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[145] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

[146] *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.

[147] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[148] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[149] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 (citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817).

[150] California Code of Regulations, title 2, section 1183.1(c).

The test claim statute became effective on January 1, 2020.[151] The Test Claim was filed on December 23, 2020, within 365 days of the test claim statute's effective date. Accordingly, the Test Claim was timely filed.

B. Elections Code Section 2170, as Amended by the Test Claim Statute, Does Not Mandate a New Program or Higher Level of Service on Counties and, Therefore, Does Not Constitute a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

The Commission finds that Elections Code section 2170, as amended by the test claim statute (Stats. 2019, ch. 565), does not impose a reimbursable state-mandated program on county elections officials. County elections officials have a preexisting duty to provide CVR and CVR provisional voting. The test claim statute simply expands the locations where these preexisting services must be provided to include satellite offices and polling places (defined to include vote centers), but does not otherwise change the actual activities that must be performed by a county elections official when offering CVR and CVR provisional voting. Thus, there are no new required activities. In addition, providing CVR and CVR provisional voting at vote centers and satellite offices is not mandated by the state because the decision to have a vote center or satellite office is a local discretionary decision.[152] Thus, the activities of providing CVR and CVR provisional voting at the new locations do not mandate a new program or higher level of service.

1. The Test Claim Statute Requires County Elections Officials to Provide Conditional Voter Registration and Provisional Voting at More Locations (Satellite Election Offices and Polling Places) and Identifies the Required Activities to Provide These Services.

Prior to the test claim statute, the county elections official was required to provide CVR and CVR provisional voting at its permanent offices during the 14-day period prior to election day and on election day.[153] In addition, pursuant to Elections Code section 4005, all vote centers for counties that chose to operate under the Voter's Choice Act were required to provide CVR and CVR provisional voting pursuant to Elections Code section 2170.[154] Under prior law, counties were permitted to provide CVR and CVR provisional voting at satellite offices of the county elections official during the 14-day period prior to election day and on election day, but were not required to do so.[155]

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[151] Statutes 2019, chapter 565.

[152] Elections Code sections 3018(b), 4005, 4007.

[153] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); California Code of Regulations, title 2, section 20023(b).

[154] Elections Code section 4005(a)(2)(A), 4007 (Stats. 2016, ch. 832); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[155] Elections Code section 2170(e) (Stats. 2015, ch. 734, § 2).

a. The test claim statute expands the locations where CVR and CVR voting are required to be provided by the counties to existing polling places (defined to include vote centers) and satellite offices, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting.

The test claim statute amended Elections Code section 2170(d) and (e) to extend the requirement for county elections officials to provide CVR and CVR provisional voting to all satellite offices of the county elections official and all polling places in the county, as follows in underline and strikeout:

> (a) "Conditional voter registration" means a properly executed affidavit of registration that is delivered by the registrant to the county elections official during the 14 days immediately preceding an election or on election day and which may be deemed effective pursuant to this article after the elections official processes the affidavit, determines the registrant's eligibility to register, and validates the registrant's information, as specified in subdivision (c).
>
> (b) In addition to other methods of voter registration provided by this code, an elector who is otherwise qualified to register to vote under this code and Section 2 of Article II of the California Constitution may complete a conditional voter registration and cast a provisional ballot, or nonprovisional ballot under subdivision (f), during the 14 days immediately preceding an election or on election day pursuant to this article.
>
> (c)(1) A conditional voter registration shall be deemed effective if the county elections official is able to determine before or during the canvass period for the election that the registrant is eligible to register to vote and that the information provided by the registrant on the registration affidavit matches information contained in a database maintained by the Department of Motor Vehicles or the federal Social Security Administration.
>
> (2) If the information provided by the registrant on the registration affidavit cannot be verified pursuant to paragraph (1) but the registrant is otherwise eligible to vote, the registrant shall be issued a unique identification number pursuant to Section 2150 and the conditional voter registration shall be deemed effective.
>
> (d) The county elections official shall offer conditional voter registration and provisional voting pursuant to this article, in accordance with all of the following procedures:
>
> > (1) The elections official shall provide conditional voter registration and provisional voting pursuant to this article at all permanent and satellite offices of the county elections official and all polling places in the county.
> >
> > (2) The elections official shall advise registrants that a conditional voter registration will be effective only if the registrant is determined to be eligible to register to vote for the election and the information provided by the registrant on the registration affidavit is verified pursuant to subdivision (c).
> >
> > (3) The elections official shall conduct the receipt and handling of each conditional voter registration and offer and receive a corresponding

provisional ballot in a manner that protects the secrecy of the ballot and allows the elections official to process the registration, determine the registrant's eligibility to register, and validate the registrant's information before counting or rejecting the corresponding provisional ballot.

(4) After receiving a conditional voter registration, the elections official shall process the registration, determine the registrant's eligibility to register, and attempt to validate the registrant's information.

(5) If a conditional registration is deemed effective, the elections official shall include the corresponding provisional ballot in the official canvass.

(e) ~~The count elections official may offer~~After receiving a conditional voter registration ~~and provisional voting pursuant to this article at satellite offices of the county elections office~~, the elections official shall provide the voter a provisional ballot in accordance with the following procedures: ~~specified in paragraphs (2) to (5), inclusive, of subdivision (d).~~

(1) If the elections office, satellite office, or polling place is equipped with an electronic poll book, or other means to determine the voter's precinct, the elections official shall provide the voter with a ballot for the voter's precinct if the ballot is available. The ballot may be cast by any means available at the elections office, satellite office, or polling place.

(2) If the elections official is unable to determine the voter's precinct, or a ballot for the voter's precinct is unavailable, the elections official shall provide the voter with a ballot and inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to paragraph (3) of subdivision (c) of Section 14310. The ballot may be cast by any means available at the elections office, satellite office, or polling place.

(3) Notwithstanding paragraph (2), if the elections official is able to determine the voter's precinct, but a ballot for the voter's precinct is unavailable, the elections official may inform the voter of the location of the voter's polling place. A voter described in this paragraph shall not be required to vote at the voter's polling place and may instead, at the voter's choosing, cast a ballot pursuant to paragraph (2).

(4) This subdivision does not apply to elections conducted pursuant to Section 4005 or 4007 [under the Voter's Choice Act].[156]

Polling places are typically open on election day, and not during the 14 days prior to the election.[157] However, the Elections Code broadly defines "polling place" as "a location where a

[156] Statutes 2019, chapter 565.

[157] Elections Code section 14212 provides: "The polls shall be open at 7 a.m. of the day of any election, and shall be kept open until 8 p.m. of the same day, when the polls shall be closed, except as provided in Sections 4005, 4007, and 14401." Elections Code section 14401 provides that "if at the hour of closing there are any other voters in the polling place, or in line at the door,

voter casts a ballot, including a vote center."[158] "Vote center" is defined as "a location established for holding elections that offers the services described in Sections 2170, 4005, and 4007."[159] As indicated above, sections 4005 and 4007 address the Voter's Choice Act, where counties that choose to participate in the Voter's Choice Act conduct elections using vote centers that are open before election day and on election day, and are required to provide CVR and CVR provisional voting pursuant to section 2170.[160] Thus, Elections Code section 2170(d)(1), as amended by the test claim statute, requires counties to provide CVR and CVR provisional voting at all polling places (defined to include vote centers), and at all satellite offices, beginning January 1, 2020.

The claimant also contends the test claim statute requires counties to provide CVR "at expanded times."[161] However, the plain language of the test claim statute does not change the time periods during which CVR and CVR provisional voting are offered by a county (14 days prior to election day and on election day at all permanent election offices), or require counties to create new polling places, vote centers, or satellite offices. In addition, according to the Secretary of State's memorandum issued to county elections officials statewide, the test claim statute requires polling places to offer CVR on election day only.[162] Thus, there is no requirement under the test claim statute that polling places provide CVR during the 14 days prior to election day.[163] The

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who are qualified to vote and have not been able to do so since appearing, the polls shall be kept open a sufficient time to enable them to vote."

[158] Elections Code section 338.5.

[159] Elections Code section 357.5.

[160] Elections Code sections 4005 and 4007. Section 4005 provides that counties participating in the Voter's Choice Act must allow voters residing in the county to "[r]egister to vote, update the voter's voter registration, and vote pursuant to Section 2170 [CVR and CVR provisional voting]." (Elec. Code, § 4005(a)(2)(A)(ii) (Stats. 2016, ch. 832).) See also, Exhibit A, Test Claim, filed December 23, 2020, pages 160-161 (California Secretary of State, About California's Voter's Choice Act).

[161] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 6.

[162] Exhibit A, Test Claim, filed December 23, 2020, pages 108-109 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019) ("During this time period [E-14 through E-1], CVR must be offered at all permanent and satellite county elections offices and all vote centers."…"In addition to CVR being offered at all permanent and satellite county elections offices and all vote centers, CVR must be offered at all polling locations on Election Day.").

[163] Statutes 2021, chapter 34, added sections 1600 to 1606 to the Elections Code beginning June 28, 2021, for elections conducted in non-Voter's Choice Act counties prior to January 1, 2022. (Elec. Code, § 1600.) For these elections, counties may choose to consolidate polling locations to be open from the Saturday prior to the day of the election through the Monday prior to the day of the election and on election day. (Elec. Code, § 1602(b).) The Test Claim states: "The November 2020 election was unusual because polling places were open for 4 days total due to changes in the election due to the COVID-19 pandemic, as discussed below,

Secretary of State's memorandum further provides that vote centers and satellite offices are required to provide CVR and CVR provisional voting "during" the 14-day period before election day and on election day.[164] However, pursuant to the Voter's Choice Act, counties that choose to operate vote centers are only required to provide CVR and CVR provisional voting services *ten* days before election day and on election day (a time "during" the 14-day period identified in section 2170).[165] The test claim statute did not expand the time for vote centers to provide these services. Similarly, counties that have satellite offices are required to provide CVR and CVR provisional voting "during" the 14-day period before election day, on the days that those locations are open, and on election day. The claimant concedes that it provided those services for just four days before election day and on election day for the March 2020 election as follows:

> [T]he County created four satellite offices for the March 2020 election. These locations were open from February 29, 2020 through March 2, 2020 from 8:00

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and therefore CVR had to be offered at polling places on all four of those days." (Exhibit A, Test Claim, filed December 23, 2020, page 12.) Elections Code sections 1600-1606, as added by Statutes 2021, chapter 34 have not been pled in a test claim.

[164] Exhibit A, Test Claim, filed December 23, 2020, pages 108-109 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019) ("During this time period [E-14 through E-1], CVR must be offered at all permanent and satellite county elections offices and all vote centers").

[165] Elections Code section 4005(a)(2)(A), 4007 (Stats. 2016, ch. 832). Elections Code section 4005(a)(2)(A)(ii) provides that the county elections official at a vote center is required to permit a voter residing in the county to "register to vote, update his or her voter registration, and vote pursuant to Section 2170." Section 4005, however, only requires counties operating under the Voter's Choice Act to have one vote center for every 50,000 registered voters open ten days before election day and have one vote center for every 10,000 registered voters open on election day. (Elec. Code, § 4005(a)(3)(A) and (4)(A).)

Under the rules of statutory construction, the statute that is more specific to the subject matter (the Voter's Choice Act) controls over the more general provisions of conditional voter registration in section 2170, and thus, vote centers under the Voter's Choice Act are required to provide CVR and CVR voting ten days before election day and on election day. (*Arbuckle-College City Fire Protection Dist. v. County of Colusa* (2003) 105 Cal.App.4th 1155, 1166 ("It is a general rule of statutory interpretation that, in the event of statutory conflict, a specific provision will control over a general provision. . . . Generally, it can be presumed that when the Legislature has enacted a specific statute to deal with a particular matter, it would intend the specific statute to control over more general provisions of law that might otherwise apply.").) This interpretation is consistent with the interpretation of the Secretary of State's Office. (Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).)

a.m. through 5:00 p.m., and on March 3, 2020 from 7:00 a.m. through 8:00 p.m.[166]

Thus, the test claim statute only expands the locations where CVR and CVR voting are required to be provided by the counties to existing satellite offices and polling places, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting.

b. Elections Code section 2170(d) and (e) identify the activities required to provide CVR and CVR provisional voting.

Elections Code section 2170(d) and (e) identify the procedures for providing CVR and CVR provisional ballots at all existing satellite offices and polling places. The plain language of section 2170(d) states that it is "the county elections official" that shall offer CVR and CVR provisional voting under the procedures set forth in subparts (d)(1) through (d)(5). However, subdivision(d)(1), which contains the specific requirement that CVR and CVR provisional voting be provided at satellite offices and polling places, uses the more general term "elections official," as do the other four subparts of subdivision (d). Subdivision (e) also uses "elections official" when describing the process for providing the CVR provisional ballot to a voter that conditionally registered.

The Elections Code broadly defines "elections official" as "any of the following: (a) A clerk or any person who is charged with the duty of conducting an election. (b) A county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or district within the state."[167] However, under the Elections Code, county elections officials are the only local elections officials authorized to receive and process affidavits of registration.[168]

This limitation as applied to CVR is reflected in the language of Elections Code section 2170(a), which first uses the specific term "*county* elections official" to refer to whom a conditional voter registration must be returned and then uses the more general term "elections official" to refer back to the county elections official. Given that subdivision (d) similarly uses *county* elections official to specify "who shall offer conditional voter registration and provisional voting pursuant to this article," the use of the more general "elections official" in subdivisions (d)(1) and (e) also refers back to the *county* elections official.[169] This interpretation is consistent with guidance from the Secretary of State, which expressly states that the test claim statute applies to county elections officials only.[170] Therefore, the requirements under subdivisions (d)(1) and (e) to

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[166] Exhibit A, Test Claim, filed December 23, 2020, page 33 (Declaration of L. Michael Vu, Registrar of Voters for the County of San Diego from December 2012 to January 7, 2021).

[167] Elections Code section 320.

[168] Elections Code section 2102.

[169] Elections Code section 2170(d)(1), emphasis added.

[170] Exhibit A, Test Claim, filed December 23, 2020, page 107 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

provide CVR and CVR provisional voting at all satellite offices and polling places in the county applies to county elections officials only.

While the plain language of Elections Code section 2170(d)(1) makes clear that county elections officials must now "provide" CVR and CVR provisional voting at all existing satellite offices of the county elections official and at all existing polling places in the county, further interpretation is required to determine what activities a county elections official is required to perform when "providing" CVR and CVR provisional voting at satellite offices and polling places.

i. Providing CVR and CVR provisional voting at satellite offices and polling places requires county elections officials to provide a voter registration affidavit pursuant to Elections Code section 2170(d)(1).

Elections Code section 2170(d)(1) states that that the elections official must provide "conditional voter registration." Subdivision (a) defines a "conditional voter registration" as "a properly executed affidavit of registration that is delivered by the registrant to the county elections official during the 14 days immediately preceding an election or on election day."[171] The Secretary of State's existing regulations specify that conditional voter registrants "shall use the same affidavit of registration as other voters–either a paper form or online through the Internet Web site of the Secretary of State."[172]

Therefore, because a "conditional voter registration" means a properly executed affidavit of registration that is delivered by the CVR registrant to the county elections official during the 14-day period before an election or on election day, providing "conditional voter registration" at all satellite offices and polling places must include providing an affidavit of registration. This interpretation is supported by the Secretary of State's guidance to county elections officials, which states that in providing CVR, county elections officials must "[p]rovide the individual a voter registration application."[173]

ii. Providing CVR and CVR provisional voting at existing satellite offices and polling places and processing the registrations and ballots requires county elections officials to perform the activities specified in Elections Code section 2170(d)(2) through (d)(5).

There are specific activities that county elections officials are required to perform as part of offering CVR and CVR provisional voting at satellite offices and polling places. When providing a CVR and CVR provisional ballot at a satellite office or polling place, county elections officials are required to: advise CVR registrants regarding the requirements for a CVR to be deemed effective (section 2170(d)(2)); conduct the receipt and handling of the conditional voter registration (section 2170(d)(3)); and offer and receive a corresponding provisional ballot (section 2170(d)(3)).[174]

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[171] Elections Code section 2170(a).

[172] California Code of Regulations, title 2, section 20022 (Register 2018, No. 10).

[173] Exhibit A, Test Claim, filed December 23, 2020, pages 109-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[174] Elections Code section 2170(d)(2) through (d)(3).

Elections Code section 2170(d)(4) and (d)(5) then requires the county elections official to:

- process the CVR registration, determine the CVR registrant's eligibility to register, and validate the registrant's information before counting or rejecting the CVR voter's ballot (Elections Code section 2170(d)(4)); and
- if the CVR is deemed effective, include the CVR voter's ballot in the official canvass. (Elections Code section 2170(d)(5).

iii. County elections officials in non-Voter's Choice Act counties are required to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing the CVR voter with a provisional ballot.

The plain language of Elections Code section 2170(e), as amended by Statutes 2019, chapter 565 (the test claim statute), specifies the manner in which county elections officials must provide a CVR voter with a provisional ballot after receiving a conditional voter registration.

After receiving a conditional voter registration, an elections official must provide the CVR voter with a provisional ballot in the following manner:

(1) If the permanent or satellite office of the county elections official is equipped with an electronic poll book or other means to determine the CVR voter's precinct, the elections official must provide the voter with a ballot for the voter's precinct, if available.[175]

(2) If the elections official is unable to determine the CVR voter's precinct, or a ballot for the voter's precinct is unavailable, the elections official must provide the voter with a ballot and inform the voter that pursuant to Elections Code section 14310(c)(3), only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.[176]

(3) Notwithstanding paragraph (2), if the elections official is able to determine the voter's precinct, but a ballot for the voter's precinct is unavailable, the elections official may inform the voter of the location of the voter's polling place.[177]

Subdivision (e)(4) specifies that the procedures in subdivision (e) do *not* apply to elections conducted under the Voter's Choice Act.[178]

Prior law required county elections officials at satellite offices to have the means to determine a CVR voter's precinct and access to all of the precinct ballots in the county, but not at polling

[175] Elections Code section 2170(e)(1).

[176] Elections Code section 2170(e)(2).

[177] Elections Code section 2170(e)(3).

[178] Elections Code section 2170(e)(4).

places, unless the county elections official specifically designated a polling place as a satellite county elections office.[179] This is still the case under the test claim statute.

The legislative history indicates that the procedures outlined in subdivision (e) are intended to address the various situations that may uniquely arise when county elections officials provide CVR provisional voting at polling places.

> While this bill requires CVR to be available at every polling place, it does not mandate that each CVR location be able to provide the correct ballot for every voter. Instead, this bill anticipates and provides for situations in which a CVR location is unable to provide the correct ballot for a voter.[180]

The distinction between the activities county elections officials must perform when providing CVR provisional voting at satellite county elections offices versus at polling places is readily apparent from the Secretary of State's guidance to county elections officials regarding the changes in law following the test claim statute. According to the Secretary of State, providing CVR and CVR provisional voting at satellite county elections offices requires county elections officials to perform the following activities:

- Provide the individual a voter registration application.
- Once the voter completes the application, the county elections official determines the CVR voter's precinct.
- Provide the CVR voter a ballot for the voter's precinct.
- Voter places the voted ballot in a CVR provisional ballot envelope.[181]

In comparison, the Secretary of State's guidance for the activities to be performed by county elections officials when providing CVR and CVR provisional voting at polling places depends on whether the polling place has the means to determine the CVR voter's precinct and whether the ballot for the CVR voter's assigned precinct is available.[182] If the polling place has the means to determine the CVR voter's precinct and the ballot for that precinct is available, the Secretary of State advises that the county elections official must adhere to the following process:

- Provide the individual a voter registration application.
- Once the CVR voter completes the application, determine the voter's precinct.

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[179] California Code of Regulations, title 2, section 20023.

[180] Exhibit F(2), Assembly Committee on Elections and Redistricting, Analysis of SB 72 (2019-2020 Reg. Sess.), as amended May 17, 2019, page 5.

[181] Exhibit A, Test Claim, filed December 23, 2020, page 108 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019). These procedures also apply to vote centers under the Voter's Choice Act. Pursuant to California Code of Regulations, title 2, section 20023, vote centers are also required to have the means to determine a CVR voter's precinct and access to all of the precinct ballots in the county.

[182] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

- Provide the voter a ballot for the voter's precinct.
- Voter places the voted ballot in a CVR provisional ballot envelope.[183]

If the polling place has the means to determine the CVR voter's precinct, but the ballot for that precinct is not available, then the county elections official is required to:

- Inform the voter of the location of their correct polling place and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place, provide the individual a voter registration application.
    - Once the CVR voter completes the application, determine the voter's precinct.
    - Give the voter:
        - a ballot that is available at the precinct, and
        - inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.[184]

Finally, if the polling place does not have the means to determine the CVR voter's precinct, or the ballot for the voter's precinct is not available:

- If possible, inform the individual of the location of their correct polling place where the ballot for their precinct is available, and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place or if the polling place does not have the means to determine the individual's precinct, provide a voter registration application.
    - Give the voter:
        - a ballot that is available at the precinct, and
        - information that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.[185]

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[183] Exhibit A, Test Claim, filed December 23, 2020, page 110 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[184] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[185] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019), emphasis in original.

The Secretary of State guidance tracks the requirements under Elections Code section 2170(e)(1) through (e)(3) and is consistent with the plain language of the statute.

Therefore, county elections officials in non-Voter's Choice Act counties are required to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing the CVR voter with a provisional ballot at satellite election offices and polling places.

2. The Requirement to Provide CVR and CVR Provisional Voting at Vote Centers and Satellite Offices of the County Elections Official Is Not Mandated by the State Because County Elections Officials Are Not Required by State Law to Create Vote Centers and Satellite Offices.

The test claim statute requires that all county polling places, defined to include vote centers, and satellite offices provide CVR and CVR provisional voting. The claimant has not participated in the Voter's Choice Act and has not created vote centers.[186] However, the claimant seeks reimbursement for the cost of creating four satellite county elections offices for the March 2020 election.[187] The claimant concedes that while the test claim statute does not directly require a county elections official to establish satellite locations, it was necessary to do so "to mitigate long lines and wait times at the polling places, when such long lines and wait times were a reasonably-anticipated result" of the test claim statute.[188]

Based on the analysis below, the requirement to provide CVR and CVR provisional voting at vote centers and satellite offices stems from an *initial discretionary decision* by the county elections official to participate in the Voter's Choice Act and establish vote centers, and establish satellite offices, and therefore, the requirements are not mandated by the state for county vote centers and satellite election offices.

As discussed above, sections 4005 and 4007 address the Voter's Choice Act, which authorizes counties to conduct any election as an all-mailed ballot election, provided certain conditions are met.[189] Elections Code section 4005 states in relevant part:

> Notwithstanding Section 4000 or any other law, on or after January 1, 2018, the Counties of Calaveras, Inyo, Madera, Napa, Nevada, Orange, Sacramento, San

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[186] At the time the Test Claim was filed, the claimant did not participate in the Voter's Choice Act. On October 19, 2021, the County of San Diego Board of Supervisors directed the Registrar of Voters to transition to the Voter's Choice Act model beginning with the June 2022 gubernatorial primary election cycle. (Exhibit F(8), Excerpt from County of San Diego Board of Supervisors, Statement of Proceedings for October 19, 2021 Regular Meeting, https://www.sandiegocounty.gov/content/dam/sdc/bos/agenda/sop/10192021sop.pdf (accessed on November 2, 2021), pages 2-4.)

[187] Exhibit A, Test Claim, filed December 23, 2020, pages 15-16.

[188] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6. See also Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 6-7.

[189] Elections Code sections 4005, 4007 (Stats. 2016, ch. 832). Los Angeles County is subject to the same general requirements specified in Elections Code section 4005, with certain exceptions as specified in Elections Code section 4007.

> Luis Obispo, San Mateo, Santa Clara, Shasta, Sierra, Sutter, and Tuolumne, and, except as provided in Section 4007, on or after January 1, 2020, any county *may* conduct any election as an all-mailed ballot election if all of the following apply…[190]

Elections Code section 4007, which applies exclusively to Los Angeles County, states in pertinent part as follows:

> On or after January 1, 2020, the County of Los Angeles *may* conduct any election as a vote center election if all of the following apply:
>
> (1) The county elections official complies with all the provisions of subdivision (a) of Section 4005 that are not inconsistent with this section.[191]

Amongst the provisions enumerated in Elections Code section 4005(a) is the requirement that the county elections officials conduct elections using vote centers, that are open before election day and on election day, and which must provide voters with a number of voter services, including the opportunity to "[r]egister to vote, update the voter's voter registration, and vote pursuant to Section 2170 [CVR and CVR provisional voting]."[192]

> (2) The county elections official permits a voter residing in the county to do any of the following at a *vote center*:
>
> (i) Return, or vote and return, the voter's vote by mail ballot.
>
> (ii) *Register to vote, update the voter's voter registration, and vote pursuant to Section 2170.*
>
> (iii) Receive and vote a provisional ballot pursuant to Section 3016 or Article 5 (commencing with Section 14310) of Chapter 3 of Division 14.
>
> (iv) Receive a replacement ballot upon verification that a ballot for the same election has not been received from the voter by the county elections official. If the county elections official is unable to determine if a ballot for the same election has been received from the voter, the county elections official may issue a provisional ballot.

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[190] Elections Code section 4005(a) (Stats. 2016, ch. 832), emphasis added.

[191] Elections Code section 4007(a)(1) (Stats. 2016, ch. 832), emphasis added.

[192] Elections Code sections 4005 and 4007 address Voter Choice Act counties, where counties agree to open one vote center per 50,000 registered voters ten days before the election and continuing through the Friday before election day, and one voter center per 10,000 registered voters beginning the Saturday before the election and continuing through election day. (Elec. Code, § 4005(a)(3)(A), (a)(4)(A)); Exhibit A, Test Claim, filed December 23, 2020, pages 160-161 (California Secretary of State, About California's Voter's Choice Act).

> (v) Vote a regular, provisional, or replacement ballot using accessible voting equipment that provides for a private and independent voting experience.[193]

Thus, while counties that conduct elections under the Voter's Choice Act are required to have vote centers under the plain language of section 4005 and 4007, participation is optional ("any county *may* conduct any election as an all-mailed ballot election if all of the following apply…").[194] Elections Code section 354 states that "'Shall' is mandatory and 'may' is permissive." Therefore, counties are permitted, but not required, to have vote centers.

Government Code section 12172.5(d) authorizes the Secretary of State to adopt regulations "to assure the uniform application and administration of state election laws."[195] Section 20021 of the Secretary of State's regulations, which provides definitions pertaining to conditional voter registration, defines "satellite office" as follows:

> (d) "Satellite office" has the same meaning as "satellite location," as used in subdivision (b) of Elections Code section 3018.[196]

Elections Code section 3018, which governs the procedures for vote by mail applications and voting, states in pertinent part: "(b) For purposes of this section, the office of an elections official *may* include satellite locations."[197] Therefore, a county elections official is permitted, but not required, to have satellite offices.

In *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.), the California Supreme Court held "that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves."[198] The court left open the possibility that where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute.[199]

In *Department of Finance v. Commission on State Mandates* (*POBRA*), the court emphasized that practical compulsion requires a *concrete* showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences,

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[193] Elections Code section 4005(a)(2)(A) (Stats. 2016, ch. 832), emphasis added.

[194] Elections Code section 4005(a) (Stats. 2016, ch. 832), emphasis added; Elections Code section 4007(a) (Stats. 2016, ch. 832) ("the County of Los Angeles may conduct any election as a vote center election if all of the following apply…").

[195] Government Code section 12172.5(d).

[196] California Code of Regulations, title 2, section 20021.

[197] Elections Code section 3018(b), emphasis added.

[198] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 743 (agreeing with the court's analysis in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777).

[199] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754.

such that the local government entity must comply in order to perform its core essential functions.[200] In *Department of Finance (POBRA),* the court addressed legislation that provided procedural protections to peace officers employed by counties, cities, and school districts, when the officer is subject to investigation or discipline.[201] Because school districts are authorized, but not required, to hire peace officers, the court held that school districts were not legally compelled to comply with the legislation.[202] In dismissing the argument that local government entities must employ peace officers when necessary to carry out their basic functions, the court said "it is not manifest on the face of the statute cited nor is there any showing in the record that [a school district] hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply."[203] Thus, the court found that school districts were not mandated by the state to comply with the test claim statute.

Here, a county elections official has no legal compulsion to establish vote centers or satellite election offices, but has the discretion to do so. Thus, the requirements imposed by the test claim statute, which are triggered by that discretionary decision, are not legally compelled by state law.

Furthermore, there is no evidence in the record to support a finding that county elections officials are practically compelled to have vote centers or satellite election offices; that they will face certain or severe penalties or other draconian consequences if they fail to establish vote centers or satellite election offices to carry out their core functions. The declaration of L. Michael Vu, who was the Registrar of Voters for the claimant from December 2012 to January 7, 2021, states that "it was necessary during the March 2020 election for the County to create satellite offices of the Registrar's permanent office at which potential voters could register through CVR" as follows:

> 7. Section 2170 of the Elections Code, which first required elections officials to offer CVR, was enacted in 2012 but not effective until the Secretary of State certified the VoteCal Statewide Voter Registration Database in 2016. Therefore, the County of San Diego first implemented CVR during the June 2018 gubernatorial primary election.
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> 8. The voter turnout for the June 2018 election was 39.8%. Attached as Exhibit 1 is a true and correct copy of a report of Registered Voters and Vote by Mail Ballot Voter Turnout maintained by our office and publicly available at https://www.sdvote.com/content/dam/rov/en/reports/voter_turnouts.pdf
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> 9. The first election in which CVR was widely utilized by potential voters in the County was the November 6, 2018 gubernatorial general election. At that

[200] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

[201] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355.

[202] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[203] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

election, the County offered CVR at the Registrar's permanent office (located at 5600 Overland Avenue, San Diego, CA 92123). The County did not implement satellite offices.

10. During the November 6, 2018 election, there was a 66.42% voter turnout. (See Exhibit 1.) During that election, 2,353 individuals exercised CVR. Of this number, 1,555 individuals did so on election day. On election day, a line wrapped around the Registrar's building equal to the length of over 5 football fields. Although the polls closed at 8:00 p.m., the last potential voter who had been standing in line since the polls closed entered the building at around midnight. This potential voter registered by CVR. The last voter left the building at approximately 1:00 a.m. on November 7, 2018.

11. Attached as Exhibit 2 is a true and correct copy of the California Secretary of State's Report of Registration as of February 10, 2019, which is publicly available at https://elections.cdn.sos.ca.gov/ror/ror-odd-year-2019/county.pdf. According to this document, as of February 2019, there were 2,229,766 individuals eligible to vote in the County of San Diego and only 1,747,383 registered voters. That meant there were 482,383 individuals who had not registered to vote but could potentially opt to do so by CVR. This was in addition to voters who needed to or would choose to re-register to vote by CVR.

12. After SB 72's amendment to Section 2170(d)(1), which mandated that county elections officials offer CVR at any satellite offices of the elections official during the 14-day period prior to the election, and offer CVR at both satellite offices and polling places on election day, there was a very real possibility that polling places would be overwhelmed with the same long lines and wait times experienced at the Registrar's permanent location in November 2018. Further, the March 2020 election was a presidential primary, and in 2016 the primary had significant voter turnout of 50.94%. (See Exhibit 1.)

13. Additionally, for the March 2020 primary election, the Registrar's office was required to make available at satellite offices and polling places a variety of ballot styles pursuant to California law. (Cal. Elec. Code § 13102.) The Registrar's office was required to make available at the polls eight different styles of ballots (for eight variations: American Independent, Democratic, Green, Libertarian, No Party Preference, No Party Preference requesting to vote in the Democratic primary, Peace & Freedom, and Republican) in five different languages (English, Spanish, Filipino, Vietnamese, and Chinese, pursuant to Voting Rights Act requirements), for a total of 40 variations of ballots. This requirement made the March 2020 election administratively complex. That complexity was compounded by SB 72's amendment to Section 2170(d)(1), which mandated that county elections officials offer CVR at any satellite offices of the elections official during the 14-day period prior to the election, and offer CVR at both satellite offices and polling places on election day. The Registrar's office anticipated this complexity would be particularly acute for poll workers who would actually be interacting with voters on election day.

> 14. In my then-capacity as Registrar, I collaborated with staff at the Registrar's office and determined that because of SB 72's amendment to Section 2170(d)(1), it was necessary during the March 2020 election for the County to create satellite offices of the Registrar's permanent office at which potential voters could register through CVR. This was necessary to avoid even longer line and wait times than voters experienced in the November 2018 election, and it was necessary to keep that traffic away from the traditional polling places.
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> 15. Therefore, the County created four satellite offices for the March 2020 election. These locations were open from February 29, 2020 through March 2, 2020 from 8:00 a.m. through 5:00 p.m., and on March 3, 2020 from 7:00 a.m. through 8:00 p.m. Additionally, there were 1,548 polling places at the March 2020 election.[204]

The Registrar's statements do not evidence that the claimant will face certain or severe penalties or other draconian consequences if it fails to establish satellite election offices to carry out its core elections functions. Mr. Vu cites to several factors as contributing to the "necessity" of establishing four satellite offices for the November 2020 election. He states that due to the high voter turnout during the November 2018 election, satellite offices were needed "to avoid even longer line and wait times," and "to keep that traffic away from traditional polling places" because "there was a very real possibility that polling places would be overwhelmed."[205] Because the March 2020 election was a presidential primary, Mr. Vu believed that voter turnout would be high.[206] He also cites to eligible voter statistics from February 2019 showing that nearly half a million residents of San Diego County were eligible but not registered to vote, whom he characterizes as potential CVR voters, in addition to any registered voters who need to re-register by CVR.[207] Finally, Mr. Vu "anticipated" that the administrative complexity caused by the convergence of the test claim statute and a separate requirement to provide 40 variations of ballots would be particularly challenging for poll workers at polling places.[208]

None of the facts alleged by Mr. Vu provide concrete evidence that any actual severe penalty or consequence would ensue if the claimant did not establish satellite offices. Instead, Mr. Vu's statements about the necessity of four satellite offices during the March 2020 election are based on hypothetical outcomes that the claimant seeks to prevent, without supporting evidence to show that such outcomes are certain or even likely ("*avoid* longer line and wait times," "*real possibility* that polling places would be overwhelmed," "482,383 individuals…*could potentially* opt to do so by CVR").[209]

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[204] Exhibit A, Test Claim, filed December 23, 2020, pages 30-33.

[205] Exhibit A, Test Claim, filed December 23, 2020, pages 32-33.

[206] Exhibit A, Test Claim, filed December 23, 2020, page 32.

[207] Exhibit A, Test Claim, filed December 23, 2020, pages 31-32.

[208] Exhibit A, Test Claim, filed December 23, 2020, page 32.

[209] Exhibit A, Test Claim, filed December 23, 2020, pages 31-33, emphasis added.

Furthermore, long lines and wait times and inundated polling places do not prevent the claimant from conducting elections. While the declaration puts forth facts showing that during the November 2018 election, there was "a line wrapped around the Registrar's building equal to the length of over 5 football fields" and the last potential voter, who registered by CVR, did not leave the building until around 1:00 a.m., even if these circumstances were to occur in later elections, they do not establish that but for satellite offices, the claimant would be unable to comply with the test claim statute or carry out its other core elections functions. There is no evidence that the high voter turnout on election day November 2018 caused voters to be unable to register to vote or vote, or prevented the county elections official from performing any of its core elections functions. The evidence provided by the claimant does not show that establishing new satellite offices is the only way as a practical matter to comply with the test claim statute.

Therefore, the requirement to provide CVR and CVR provisional voting at vote centers and satellite offices of the county elections official is not mandated by the state.

3. Although Counties Are Now Required to Perform CVR and CVR Provisional Voting Activities at Existing Satellite Offices and Polling Places, the Test Claim Statute Does Not Require Counties to Perform Any New or Additional Activities or Shift Financial Responsibility for Conducting Elections From the State to the Counties and, Thus, the Test Claim Statute Does Not Impose a New Program or Higher Level of Service.

Courts have repeatedly held that local government entities are not entitled to reimbursement simply because a state law or order increases the costs of providing mandated services.[210] Rather, reimbursement under article XIII B, section 6 requires that all elements be met, including that the increased costs result from a new program or higher level of service mandated by the state on the local agency.[211] To determine whether a test claim statute imposes a new program or higher level of service, the required activities imposed by the state must be new *and* impose a program subject to article XIII B, section 6 (by carrying out the governmental function of providing a service to the public, or imposing unique requirements on the local agency).[212] Alternatively, a new program or higher level of service can occur if the state transfers to local agencies complete or partial financial responsibility for a required program for which the state previously had complete or partial financial responsibility.[213]

The primary issue in this case is whether the test claim statute imposes any new or additional activities or duties on counties, or shifts new costs from the state to local government. To determine if a mandated activity or shift in costs from the state is new, the courts have used the

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[210] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal. 4th 859, 877; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[211] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[212] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[213] California Constitution, article XIII B, section 6(c).

ordinary meaning of the word "new" and have found that if local government was not required to perform the activity or incur the cost shifted from the state at the time the test claim statute or regulation became effective (which, in effect, requires a comparison of the law immediately before the effective date of the test claim statute or regulation), the mandated activity or shifted cost is new.

For example, in *Lucia Mar Unified School Dist.*, the 1981 test claim statute required local school districts to pay the cost of educating pupils in state schools for the severely handicapped – costs that the state had previously paid in full until the 1981 statute became effective.[214] The court held that the requirement imposed on local school districts to fund the cost of educating these pupils was new "*since at the time [the test claim statute] became effective* they were not required to contribute to the education of students from their districts at such schools."[215] The same analysis was applied in *County of San Diego*, where the court found that the state took full responsibility to fund the medical care of medically indigent adults in 1979, which lasted until the 1982 test claim statute shifted the costs back to counties.[216] In *City of San Jose*, the court addressed the1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.[217] The court denied the city's claim for reimbursement, finding that the costs were not shifted by the state since "*at the time [the 1990 test claim statute] was enacted*, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county."[218] In *San Diego Unified School District*, the court determined that the required activities imposed by 1993 test claim statutes, which addressed the suspension and expulsion of K-12 students from school, were "new in comparison with the preexisting scheme in view of the circumstances that they did not exist prior to the enactment of [the 1993 test claim statutes]."[219] And in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections were both *new duties* that local governments were required to perform, when compared to prior law.[220]

The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures that are counted against the local government's annual spending limit.[221] Thus,

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[214] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 832.

[215] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, emphasis added.

[216] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[217] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802.

[218] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812, emphasis added.

[219] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (see also page 869, footnotes 6 and 7, and page 870, footnote 9, where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes).

[220] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[221] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44

article XIII B, section 6 requires a comparison of the law as it existed immediately before the effective date of the test claim statute or regulation to determine if the state has mandated local government to perform new or additional activities and incur new costs shifted from the state that require reimbursement.

As explained below, the test claim statute here does not require counties to perform any new or additional activities or shift financial responsibility for conducting elections from the state to the counties and, thus, does not impose a new program or higher level of service.

a. The test claim statute does not require counties to perform any new or additional activities or shift financial responsibility for conducting elections from the state to the counties.

Here, the test claim statute requires that CVR and CVR provisional voting *also* be provided at existing satellite offices and polling places. However, the actual government services provided by county elections officials – providing CVR and CVR provisional voting to any voter – are not new and have not changed as a result of the test claim statute, nor have the activities that county elections officials must carry out in order to provide these services. County elections officials perform the same activities they performed under preexisting law during the same time period, except at more existing locations. Expanding the locations where the same government services are provided does not, without requiring counties to perform new activities, amount to an increase in the level or quality of those services. Nor has the test claim statute transferred financial responsibility from the state to local government. Elections have always been conducted by local government, and not by the state.[222] Thus, the test claim statute does not constitute a new program or higher level of service.

As explained in the Background, the Legislature enacted Elections Code 2170 et seq. in 2012, establishing CVR and CVR provisional voting.[223] Under Elections Code section 2170(a), a person who is otherwise qualified to vote, but who did not register or reregister by the 15-day registration deadline, is able to conditionally register to vote and provisionally vote during the 14 days prior to and on election day, if certain requirements were met.[224] While enacted in 2012, CVR and CVR provisional voting did not become operative until January 1, 2017, following the Secretary of State's certification of a statewide voter registration database (VoteCal).[225]

Elections Code section 2170 as originally enacted required county elections officials to provide CVR and CVR voting at all permanent offices of the county elections official during the 14-day

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Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[222] Elections Code section 13001 (Stats. 2008, ch. 179) provides that "[a]ll expenses authorized and necessarily incurred in the preparation for, and conduct of, elections as provided in this code shall be paid from the county treasuries, except that when an election is called by the governing body of a city the expenses shall be paid from the treasury of the city."

[223] Statutes 2012, chapter 497.

[224] Elections Code section 2170(a) (Stats. 2012, ch. 497.)

[225] Statutes 2012, chapter 497; Exhibit A, Test Claim, filed December 23, 2020, page 75.

period prior to election day and on election day.[226] Conditional voter registrants use the same affidavit of registration to register to vote as other voters – either a paper form or online through the Secretary of State's website.[227] The elections official was required to advise conditional voter registrants that a conditional voter registration is effective only if the registrant is determined to be eligible to register to vote and the information on the registration affidavit is verified.[228]

In addition, preexisting law requires county elections officials to provide a CVR voter with a provisional ballot. Under Elections Code section 2170(d)(3):

> The elections official shall conduct the receipt and handling of each conditional voter registration *and offer and receive a corresponding provisional ballot* in a manner that protects the secrecy of the ballot and allows the elections official to process the registration, to determine the registrant's eligibility to register, and to validate the registrant's information before counting or rejecting the corresponding provisional ballot.[229]

Furthermore, processing conditional voter registrations and CVR provisional ballots pursuant to Elections Code section 2170(d)(4) and (d)(5) are not newly required by the test claim statute. Elections Code section 2170(d)(4) and (d)(5), which were enacted by Statutes 2012, chapter 497, provide that, in offering CVR and CVR provisional voting, county elections officials must:

- process the CVR registration, determine the CVR registrant's eligibility to register, and validate the registrant's information before counting or rejecting the CVR voter's ballot (Elections Code section 2170(d)(4)); and
- if the CVR is deemed effective, include the CVR voter's ballot in the official canvass. (Elections Code section 2170(d)(5).

Under these provisions, the claimant alleges that as a result of the test claim statute, the county elections official was required to hire additional staff to process CVR registration forms and CVR provisional ballots and to purchase automated vote processing equipment to sort CVR provisional ballot envelopes.[230] The claimant argues that while purchasing the automated equipment to process the additional CVR provisional ballots was not expressly required by the test claim statute, doing so was necessary to avoid the higher labor costs that would have accrued otherwise.[231] However, even though the claimant may have incurred increased costs because more CVRs and CVR provisional ballots were provided and returned, the requirements in

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[226] Elections Code section 2170(d)(1) (Stats. 2012, ch. 497, § 2).

[227] California Code of Regulations, title 2, section 20022; see Elections Code sections 2102 (as last amended by Stats. 2015, ch. 736), 2150, 2170(a).

[228] Elections Code section 2170(d)(2) (Stats. 2012, ch. 497, § 2).

[229] Elections Code section 2170(d)(3) (Stats. 2012, ch. 497, § 2).

[230] Exhibit A, Test Claim, filed December 23, 2020, pages 17 19.

[231] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6.

Elections Code section 2170(d)(4) and (d)(5) were added by Statutes 2012, chapter 497, are not new, and were not amended by the test claim statute.[232]

In addition, counties have long had the duty to process conditional voter registrations and include CVR provisional ballots in the official canvass. Preexisting law requires a conditional voter registration to be processed in the same manner as a general voter registration.[233] Processing ballots is governed by other code sections that became effective before the enactment of the test claim statute. A provisional ballot cast by a conditional voter registrant is subject to the same requirements as apply to provisional voting generally.[234] Additionally, section 20025 of the Secretary of State's regulations specifies the procedures to be followed when processing a CVR provisional ballot, none of which were changed as a result of the test claim statute.[235] Because county elections officials have a preexisting duty to process CVRs and CVR provisional ballots, these activities are not newly required by the test claim statute.

Prior law did not specify the procedures now stated in Elections Code section 2170(e) when providing a CVR provisional ballot. As discussed above, section 2170(e)(1) through (e)(3) address different situations that may arise at CVR locations, including polling places, depending on whether the CVR voter's precinct can be determined and a precinct-specific ballot is available. However, county elections officials have been required to have the means to determine a CVR voter's precinct and access to a precinct-specific ballot at their permanent offices since before the enactment of the test claim statute.[236] Therefore, the requirement under (e)(1) to provide the CVR voter with a ballot for the voter's precinct is not newly required.

Furthermore, providing a CVR voter with a ballot for the voter's precinct does not require the county elections official to perform any new activities. If the polling place has the capability to determine and produce a ballot for the CVR voter's precinct, it must do so. If not, then under the language of (e)(2), providing the CVR voter with whatever ballot is available at that polling place is sufficient. Under either scenario, the county elections official is performing the same activity it was already required to perform: providing a provisional ballot.

The activities under (e)(2) are limited to providing the CVR voter with a ballot that is available at that polling place and informing the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to Elections Code section 14310(c)(3). Neither of these require a county elections official to perform new activities. As discussed above, providing the CVR voter with "a ballot"

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[232] Elections Code section 2170(d)(4), (d)(5) (as added by Stats. 2012, ch. 497).

[233] Elections Code section 2171(b).

[234] Elections Code sections 2171(c), 14310, 15350, and 15100-15112; see also Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 3.

[235] California Code of Regulations, title 2, section 20025.

[236] California Code of Regulations, title 2, section 20023(d), (Register 2018, No. 10).

does not require the county elections official to perform any new activities.[237] In addition, Elections Code section 14310(c)(3) has long provided the following:

> (c)(3) The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.
>
> > (A) If the ballot cast by the voter contains the same candidates and measures on which the voter would have been entitled to vote in his or her assigned precinct, the elections official shall count the votes for the entire ballot.
> >
> > (B) If the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in his or her assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in his or her assigned precinct.[238]

Furthermore, preexisting law requires that county elections officials provide any voter casting a provisional ballot with written instructions regarding the process and procedures for casting a provisional ballot, which must include, amongst other things, the information set forth in Elections Code section 14310(c)(3).[239] Elections Code section 14310(a)(2) provides as follows:

> (a) At all elections, a voter claiming to be properly registered, but whose qualification or entitlement to vote cannot be immediately established upon examination of the roster for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot as follows:
>
> > [¶]
> >
> > (2) The voter shall be provided a provisional ballot, written instructions regarding the process and procedures for casting the ballot, and a written affirmation regarding the voter's registration and eligibility to vote. The written instructions shall include the information set forth in subdivisions (c) and (d).[240]

Therefore, the requirement under Elections Code section 2170(e)(2), to "inform the [CVR] voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to paragraph (3) of subdivision (c) of Section 14310" is not new.

Elections Code section 2170(e)(3) provides that if the elections official is able to determine the CVR voter's precinct, but a ballot for the voter's precinct is unavailable, then the elections

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[237] Elections Code section 2170(d)(3) (as amended by Stats. 2015, ch. 734).

[238] Elections Code section 14310(c)(3) (as last amended by Stats. 2017, Ch. 806).

[239] Elections Code section 14310(a)(2) (as last amended by Stats. 2017, Ch. 806).

[240] Elections Code section 14310(a)(2), (as last amended by Stats. 2017, Ch. 806).

official may inform the voter where the voter's polling place is located. Because county elections offices are required to have the means to determine a CVR voter's precinct and provide a ballot for the voter's precinct, the scenario contemplated under section 2170(e)(3) is limited to polling places, which may or may not have the equipment necessary to determine a CVR voter's assigned precinct.[241] However, under preexisting law, county elections officials have a general duty to ensure that voters are able to locate their assigned polling place.[242] The Secretary of State's Poll Worker Training Standards, which are intended to provide elections officials with the necessary information for training poll workers, state as follows:

> If voters are in the wrong polling place, poll workers should tell them they can either go to their assigned polling place to vote a polling place ballot or they can stay and cast a provisional ballot. The poll workers should also explain the advantages and disadvantages of each option. For example, the polling place ballot may not contain all of the same candidates and measures as the ballot in a voter's home precinct. If this type of situation occurs late in the day, the poll worker should let the voter know that if the voter arrives at their assigned polling place after 8:00 p.m., the voter will not be allowed to cast a ballot.[243]

The Poll Worker Training Standards further state, consistent with the language of Elections Code section 2170(e)(3), that "[i]f the ballot for the voter's precinct is not available, the poll worker may inform the voter of the location of their polling place."[244]

Because county elections officials already have a general duty to assist voters in determining their polling place, and polling places are already required to make available to voters a means to obtain information about the voter's polling place, requiring county elections officials to inform CVR voters where their polling place is located, when they have the means to do so, does not require the county elections official to perform any new activities.

This claim is similar to *Fifteen Day Close of Voter Registration*, 01-TC-15. In *Fifteen Day Close of Voter Registration*, 01-TC-15, prior law allowed voters to newly register to vote, reregister, or change their address with county elections officials until the twenty-ninth day before an election. After that date, voter registration closed for that election.[245] The test claim statute allowed new

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[241] California Code of Regulations, title 2, section 20023(d).

[242] Elections Code section 12105(a) ("The elections official shall, not less than one week before the election, publish the list of the polling places designated for each election precinct."); Elections Code section 14105(h) (the elections official shall provide a "sufficient number of cards to each polling place containing the telephone number of the office to which a voter may call to obtain information about his or her polling place. The card shall state that the voter may call collect during polling hours").

[243] Exhibit F(3), Excerpt from California Secretary of State, 2021 Poll Worker Training Standards (Rev. August 2021), pages 5-6.

[244] Exhibit F(3), Excerpt from California Secretary of State, 2021 Poll Worker Training Standards (Rev. August 2021), page 3.

[245] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, adopted October 31, 2006, page 2.

registrations or changes to voter registrations through the fifteenth day before an election. [246] The Commission concluded that the majority of the statutory provisions at issue did not constitute a new program or higher level of service because the activities required of the county – processing and accepting voter registration affidavits and changes of address – were not newly required. County elections officials had been required to perform those activities long before the enactment of the test claim statute.[247]

Similarly, here, expanding the locations where county elections officials are required to provide CVR and CVR provisional voting does not impose any new or additional activities on county elections officials. Even without the test claim statute, counties are required to provide conditional voter registrations and provisional ballots *to all voters* requesting them regardless of the cost, and that has not changed. Nor does the test claim statute change *when* CVR and CVR provisional voting must be made available to voters, or require counties to create new polling places, vote centers, or satellite offices to provide these existing services. Under the test claim statute, county elections officials are simply performing the same activities during the same time period as was required under preexisting law, except at additional, existing locations.

Accordingly, the test claim statute does not require counties to perform any new or additional activities or shift financial responsibility for conducting elections from the state to the counties and, thus, does not impose a new program or higher level of service.

b. The cases relied on by the claimant do not support the finding that the test claim statute imposes a new program or higher level of service.

In comments on the Draft Proposed Decision, the claimant argues that because the test claim statute newly requires counties to provide CVR and CVR provisional voting at "expanded times and locations," it constitutes a new program or higher level of service.[248]

> Here, SB 72 increased the "actual level or quality" of county election officials' preexisting CVR duties by expanding the dates and locations on which these services must be offered. *San Diego Unified Sch. Dist., supra*, 33 Cal. 4th at 877. This increased service constitutes a "new program" because the requirements to offer CVR in polling places and at satellite locations during the 14-day period prior to the election and on election day were new and provided a uniquely governmental service.[249]

As explained above, the test claim statute did not expand the dates for which the county must provide CVR and CVR provisional voting. The statute only requires counties to perform those

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[246] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, adopted October 31, 2006, page 2.

[247] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, adopted October 31, 2006, page 2.

[248] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 6.

[249] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 5.

same services at existing satellite offices and polling places (defined to include vote centers), in addition to permanent county elections offices.

Nevertheless, the claimant asserts that unlike the statutes in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196, *City of Anaheim v. State* (1987) 189 Cal.App.3d 1478, and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, which involved incidental requirements that were not unique to government or did not require local government to increase the level of services provided to the public, but simply resulted in increased costs, the test claim statute here requires counties to provide *expanded* services to the public.[250]

> In contrast to merely imposing a "higher costs," [sic] when a statute requires that a local government must provide an "expanded" version of a service it is already providing to the public (as is true here), this is a reimbursable mandate. That is because the increased costs are not merely an incidental effect of a law of general application. Rather, the increased costs are borne by the local government in order to provide expanded services to the public.[251]

The claimant relies on *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, and *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546 to support its position that a statute that requires a local government to provide an expanded version of a service it is already providing to the public constitutes a reimbursable mandate.[252]

> For example, in *Carmel Valley Fire Protec. Dist. v. State of California*, 190 Cal. App. 3d 521, 537–38 (1987), the Court held that a requirement in an executive order to provide "updated equipment" to firefighters was a reimbursable mandate. The Court emphasized that fire protection is an essential and basic function of local government. *Id*. at 537. Thus the updated equipment was necessary for the government to better provide that service. *See San Diego Unified Sch. Dist., supra*, 33 Cal.4th at 877 ("Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public….")
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> In *Carmel Valley*, the local governments were already providing firefighting services to the public—and certainly were already using some equipment (hence the mandate to provide "updated" equipment). But the Court held that the requirement to update the equipment was a "new program" under Section 6. [Footnote omitted] Thus this additional mandated cost that the local governments

[250] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 2-3.

[251] Exhibit E, Claimant's comments on the Draft Proposed Decision, filed October 20, 2021, page 4.

[252] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 4-5.

incurred in order to provide basic government services was reimbursable. *Carmel Valley*, 190 Cal.App.3d at 537.

The Supreme Court of California honed in on the distinction between "higher costs" and a "higher level of service" in *San Diego Unified Sch. Dist., supra*, 33 Cal.4th at 878. In that case, the statute at issue required schools to expel students under certain circumstances. 33 Cal.4th at 868-69. The Supreme Court of California held that the schools' new duties to provide mandatory hearings constituted a higher level of service. *Id.* at 878-89. This was because the requirements did not exist prior to the statute, the mandate applied uniquely to public schools, and because enhancing the safety of the students was a service to the public. *Id*. at 879. In its discussion, the Court distinguished other cases in which Courts of Appeal found that statutes did not impose mandates when the statutes imposed universal requirements on private employers and local governments alike. *Id*. (citing *County of Los Angeles, supra*, and *City of Sacramento v. State of California*, 50 Cal. 3d 51 (1990).) The Supreme Court explained that simply because a state law increases the costs borne by local government in providing services, that does not automatically render the law a reimbursable mandate. *Id.* at 876. However, the Supreme Court contrasted such laws with statutes that impose an "increase in the actual level or quality of governmental services provided," which do impose reimbursable mandates. *Id.* at 877.

A recent Court of Appeal decision also highlighted this distinction. *Dep't. of Fin. v. Comm'n. on State Mandates*, 59 Cal. App. 5th 546 (2021) (*Dep't of Fin*.). In *Dep't. of Fin*., the County of Los Angeles historically provided stormwater drainage and flood control services. A new Regional Board stormwater permit mandated the installation and maintenance of trash receptacles at transit stops, and the inspection of facilities to ensure compliance. *Id*. at 558. The court held that even though the County already provided stormwater drainage and flood control services, the new requirements imposed a "higher level of service" because they reduced pollution and increased compliance. *Id*. at 558. The court held that alternatively, the requirements were a new program because they provided a government service that was not mandated prior to the permit. *Id*. at 559.[253]

However, unlike this case, the statutes and executive orders in the above cases required local government to perform *new activities that were not required by prior state law*. As indicated above, the court in *San Diego Unified School Dist.* determined that statutory requirements compelling suspension and mandating a recommendation of expulsion for certain offenses committed by K-12 students "are new in comparison with the preexisting scheme in view of the

[253] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 4-5.

circumstance that they did not exist prior to the enactment of [the test claim statutes at issue]."[254] Only after finding that the duties were new did the court continue its analysis to find that the duties were unique to local government and provided a service to the public.[255]

Similarly, in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections were both *new duties* that local governments were required to perform, before concluding that the activities constituted a program within the meaning of article XIII B, section 6, and thus a new program or higher level of service.[256]

> Turning to the instant case, there are three pertinent governmental functions implicated by the challenged requirements for purposes of section 6: The operation of stormwater drainage and flood control systems; the installation and maintenance of trash receptacles at transit stops; and the inspection of commercial, industrial, and construction facilities and sites to ensure compliance with environmental laws and regulations. The first existed prior to the Regional Board's permit; *the other two are new*. Each is a governmental function that provides services to the public, and the carrying out of such functions are thus programs under the first part of the Supreme Court's definition of that term.
>
> In the case of the provision of stormwater drainage and flood control services, the trash receptacle requirement provides a higher level of service because it, together with other requirements, will reduce pollution entering stormwater drainage systems and receiving waters…
>
> The inspection requirements provide a higher level of service because they promote and enforce third party compliance with environmental regulations limiting the amount of pollutants that enter storm drains and receiving waters.[257]

The claimant also cites to the *Carmel Valley* case, asserting the following: "In *Carmel Valley*, the local governments were already providing firefighting services to the public—*and certainly were already using some equipment (hence the mandate to provide "updated" equipment)*."[258] However, the claimant cites no law to indicate that the regulatory requirements were not newly imposed by the state on fire protection districts. The regulatory requirements to provide protective clothing and safety equipment had to be newly required by state law for the Board of

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[254] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878. See also page 869, footnotes 6 and 7, and page 871, footnote 9, where the court describes in detail the state of the law immediately before the enactment of the test claim statutes at issue.

[255] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 ("the requirements were intended to provide an enhanced service to the public—safer schools for the vast majority of students").

[256] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[257] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 558

[258] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 4, emphasis added.

Control (the Commission's predecessor) and the court to approve reimbursement under the California Constitution. As recognized by Government Code section 17565, even if a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate.[259]

As explained in the *Carmel Valley* decision, the regulations were adopted by the Department of Industrial Relations in 1978 after the Legislature enacted the California Occupational Safety and Health Act (Cal/OSHA) in Statutes 1973, chapter 993. Cal/OSHA is modeled after federal law and is designed to ensure safe working conditions for all California workers.[260] Under the Act, the Occupational Safety and Health Standards Board within the Department of Industrial Relations is responsible for adopting occupational safety and health standards and orders, and the regulations at issue in *Carmel Valley* were adopted in 1978 pursuant to that law.[261]

After the Board of Control approved the Test Claim, the Legislature failed to appropriate funds for mandate reimbursement, claiming in part that the requirements were mandated by federal law. The court, however, determined that the requirements to provide protective clothing and safety equipment were not mandated by existing federal law, but were state mandated requirements imposed by the 1978 regulations.[262] The court also found that reimbursement was required pursuant to article XIII B, section 6 of the California Constitution because the regulations were passed after January 1, 1975.[263] Therefore, even though the court found the regulatory requirements to be "updated," the requirements had to be newly mandated by the state on fire protection districts in order to be reimbursable under article XIII B, section 6 of the California Constitution.

Counties have long been required to provide CVR and CVR provisional voting to all voters that request them, regardless of the cost, during the 14 days before the election and on election day, and the test claim statute does not require counties to perform any new or additional activities. Accordingly, the Commission finds that the test claim statute does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

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[259] Government Code section 17565 implements the article XIII B, section 6 of the California Constitution. However, the same provision was contained in the former statutory mandate scheme and was derived from former Revenue and Taxation Code section 2234 (added by Stats. 1975, ch. 486, § 9, amended by Stats. 1977, ch. 1135, § 8.6; Stats. 1980, ch. 1256, § 11).

[260] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541-542.

[261] Labor Code sections 140, 142.3, and 6305. See also, *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 293-294 (which also addressed the program after the Legislature suspended it pursuant to Government Code section 17581).

[262] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 544.

[263] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 548.

V. Conclusion

Based on the foregoing analysis, the Commission concludes that Elections Code section 2170, as amended by the test claim statute (Stats. 2019, ch. 565), does not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.

Accordingly, the Commission denies this Test Claim.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 6, 2021, I served the:

- **Decision adopted December 3, 2021**
- **Claimant's Additional Exhibit presented at the Commission Hearing on December 3, 2021**

  Extended Conditional Voter Registration, 20-TC-02
  Elections Code Section 2170 as Amended by Statutes 2019, Chapter 565 (SB 72)
  County of San Diego, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 December 6, 2021 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/15/21

Claim Number: 20-TC-02

Matter: Extended Conditional Voter Registration

Claimant: County of San Diego

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Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Steven Carda, *California Secretary of State's Office*
Elections Division, 1500 11th Street, 5th Floor, Sacramento, CA 95814
Phone: (916) 657-2166
scarda@sos.ca.gov

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Tracy Drager, Auditor and Controller, *County of San Diego*
Claimant Contact
5530 Overland Ave, Suite 410, San Diego, CA 92123-1261
Phone: (858) 694-2176
tracy.drager@sdcounty.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*

Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Catherine Ingram-Kelly, *California Secretary of State's Office*
Elections Division, 1500 11th Street, 5th Floor, Sacramento, CA 95814
Phone: (916) 657-2166
ckelly@sos.ca.gov

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Paige Kent, Voter Education and Outreach, *California Secretary of State's Office*
1500 11th Street, 5th Floor, Sacramento, CA 95814
Phone: (916) 657-2166
MyVote@sos.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Kirsten Larsen, *California Secretary of State's Office*
Elections Division, 1500 11th Street, 5th Floor, Sacramento, CA 95814
Phone: (916) 657-2166
KLarsen@sos.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Jana Lean, *California Secretary of State's Office*
Elections Division, 1500 11th Street, 5th Floor, Sacramento, CA 95814
Phone: (916) 657-2166
jlean@sos.ca.gov

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814

Phone: (916) 445-3274
erika.li@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Elizabeth McGinnis, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Elizabeth.McGinnis@csm.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 628-6028
Marilyn.Munoz@dof.ca.gov

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Hang Nguyen, Assistant Registrar of Voters, *County of Sacramento*
7000 65th Street, Suite A, Sacramento, CA 95823
Phone: (916) 875-6255
nguyenha@saccounty.net

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Heather Parrish-Salinas, Office Coordinator, *County of Solano*
Registrar of Voters, 675 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
HYParrishSalinas@SolanoCounty.com

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: 916-445-8717
NSidarous@sco.ca.gov

Christina Snider, Senior Deputy County Counsel, *County of San Diego*
Claimant Representative
1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-6229
Christina.Snider@sdcounty.ca.gov

Joanna Southard, *California Secretary of State's Office*
Elections Division, 1500 11th Street, 5th Floor, Sacramento, CA 95814
Phone: (916) 657-2166
jsouthar@sos.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Joe.Stephenshaw@sen.ca.gov

Brittany Thompson, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Brittany.Thompson@dof.ca.gov

Jolene Tollenaar, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*

100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov

Brain Development, Social Context, and Justice Policy

Elizabeth Scott,[*] Natasha Duell,[**] and Laurence Steinberg[***]

INTRODUCTION

Justice policy reform in the past decade has been driven by research evidence indicating that brain development is ongoing through adolescence, and that neurological and psychological immaturity likely contributes in important ways to teenagers' involvement in crime. But despite the power of this trend, skeptics point out that many (perhaps most) adolescents do not engage in serious criminal activity; on this basis, critics argue that normative biological and psychological factors associated with adolescence are unlikely to play the important role in juvenile offending that is posited by supporters of the reform trend. This Article explains that features associated with biological and psychological immaturity alone do not lead teenagers to engage in illegal conduct. Instead the decision to offend, like much risk-taking behavior in adolescence, is the product of dynamic interaction between the still-maturing individual and her social context. The Article probes the mechanisms through which particular tendencies and traits linked to adolescent brain development interact with environmental influences to encourage antisocial or prosocial behavior.

Brain development in adolescence is associated with reward-seeking behavior and limited future orientation. Further, as compared to adults, adolescents are particularly sensitive to external social stimuli, easily aroused emotionally, and less able to regulate strong emotions. The Article shows how these tendencies may be manifested in different teenagers in different ways, depending on many factors in the social context. By analyzing this dynamic relationship, the Article clarifies how social environment influences adolescent choices in ways that incline or deter involvement in crime and other risky behavior. Thus a teenager who lives in a high-crime neighborhood with many antisocial peers is more likely to

* Harold R. Medina Professor of Law, Columbia University.
** PhD. Candidate, Temple University.
*** Distinguished University Professor and Laura H. Carnell Professor of Psychology, Temple University.

get involved in criminal activity than one in a neighborhood with few such peers, even though the two may not differ in their propensities for risk-taking.

The Article's interactive model offers powerful support for laws and policies that subject adolescent offenders to more lenient sanctions than adults receive and that tailor dispositions to juveniles' developmental needs. Our examination confirms and illuminates the Supreme Court's conclusion that juvenile offenders differ in important ways from adult counterparts; juveniles deserve less punishment because their offenses are driven by biological and psychological immaturity, and also because, as legal minors, they cannot extricate themselves from social contexts (neighborhoods, schools and families) that contribute to involvement in crime. The model also confirms that correctional facilities and programs, which constitute young offenders' social settings, can support healthy development to adulthood in individual juvenile offenders, or conversely affect their lives in harmful ways.

Justice policy reform in the past decade has been driven by powerful research evidence indicating that brain development is ongoing through adolescence, and that neurological and psychological immaturity likely contributes in important ways to teenagers' involvement in crime. Courts (including the Supreme Court[1]), legislatures and agencies increasingly view juvenile offenders as different from their adult counterparts, and accept that the legal response to juvenile crime should attend to these differences. An emerging consensus holds that policies sanctioning juveniles in developmentally appropriate ways and recognizing differences between young offenders and adults will advance the criminal law goals of fairness, accountability, and crime prevention.[2]

Although lawmakers and the public increasingly accept the argument for developmentally-based justice policies, some skepticism remains. A typical response by those unpersuaded that developmental science has powerful legal and policy relevance is to point out that many (perhaps

1. The Supreme Court in a series of Eighth Amendment opinions has struck down harsh sentences for juvenile offenders. *See* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama 567 U.S. 460 (2012); Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

2. *See generally* Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675 (2016).

most) adolescents do not engage in serious criminal activity; thus, normative biological and psychological factors associated with adolescence are unlikely to play the important role in juvenile offending that is posited by those supporting the reform trend.[3] Not surprisingly, these skeptics are inclined to discount the relevance of adolescent immaturity to justice policy.[4]

To be sure, not all adolescents commit crimes—and, certainly, very few commit serious offenses.[5] As the skeptics' challenge suggests, one oversimplifies the argument for developmentally-based justice policies if one takes it to mean that features associated with biological and psychological immaturity alone lead teenagers to engage in illegal conduct. The decision to offend, like much behavior in adolescence, is the product of dynamic interaction between the still-maturing individual and her social context. In this Article, we analyze this intricate relationship and clarify how social environment influences adolescent choices in ways that incline or deter involvement in crime and in other risky behavior.

The claim that social context influences teenage criminal behavior is familiar[6] and relatively uncontroversial. What has not received much attention is the relationship between biology (and psychology) and environment, and the mechanisms through which particular tendencies and traits associated with adolescent brain development interact with environmental influences to encourage antisocial or prosocial behavior. Brain development in adolescence is associated with reward-seeking behavior and limited future orientation.[7] It is also associated with increased sensitivity to external stimuli, and particularly with heightened susceptibility to peer influence, which in turn contributes to emotional

3. GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY 18 (2018). *See also Graham*, 560 U.S. at 112 (Thomas, J., dissenting); *Miller*, 567 U.S. at 513 (Thomas, J., dissenting); *Roper*, 543 U.S. at 614 (Scalia, J., dissenting).

4. Critics, such as Justice Scalia, have noted that advocates view adolescents as mature for purposes of making abortion decisions. *See Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

5. Howard N. Snyder & Melissa Sickmund. *Law Enforcement and Juvenile Crime, in* JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT at 125 (2006).

6. *See Roper*, 545 U.S. at 569; *Graham*, 560 U.S. at 68 (recognizing the importance of peer influence on offending).

7. Adolescents tend to focus on short-term, and to discount long term, consequences of choices and behavior, particularly under conditions of emotional or social arousal. *See* discussion *infra* Part I.A.1._

arousal and impulsivity.[8] In short, social environment can play a powerful role in inclining teenagers toward risk-taking (and generally in shaping adolescent behavior); this is because, compared to adults, adolescents are particularly responsive to external stimuli (especially their peers), easily aroused emotionally, and less able to regulate strong emotions. Because they are easily aroused, adolescents are also more sensitive to threats than are adults.[9] These external influences can override the adolescent's still-developing ability to make reasoned decisions.

These tendencies associated with adolescent brain development can manifest in different teenagers in different ways; heightened tendencies toward risk-taking may impel antisocial acts in some teens, but more aggressive play on the athletic field in others.[10] Depending on the nature of the social environment, these biologically-driven inclinations can be activated "in the moment" to contribute to risky behavior, including fast driving, excessive drinking, unsafe sex, and criminal activity.[11] In this Article, we examine the interaction between developmental tendencies and contextual influences that promote or deter risk-taking and criminal involvement.

The endogenous factors that contribute to risky behavior are normative in adolescence. Although studies find substantial variations in individual propensities, adolescents, on average, exhibit these tendencies and engage in risk-taking to a greater extent than do adults. Indeed, the combination of reward-seeking, impulsivity, easily aroused emotions, and susceptibility to peer influence leads a large percentage of teens to occasionally behave in ways that could be the basis of criminal charges.[12] But, a teenager who lives in a high-crime neighborhood with many antisocial peers is more likely to get involved in criminal activity than one in a neighborhood with few such peers, even though the two may not differ in their propensities

8. *See* discussion *infra* Part I.A.2 and Part I.A.3.

9. *See* Alexandra O. Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts* 27 PSYCHOL. SCI. 549, 549-62 (2016).

10. *See* Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NATURE REV. NEUROSCI. 513, 513-18 (2013).

11. *See* Leah H. Somerville, Rebecca M. Jones, & B.J. Casey. *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN COGN. 124, 124-133 (2010).

12. *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk Taking,* 28 DEV. REV. 78, 78-106 (2008).

for risk-taking.[13] Developmental tendencies might lead the first youth to engage in criminal activity, something he would likely not consider on his own. For example, if his peers were into car racing, or if drugs were readily available and popular in the neighborhood, risk-taking behavior might take these forms. Alternatively, if he were a member of a close-knit and highly competitive basketball team, the interaction of peer influence and reward-seeking might lead to socially accepted risk-taking on the basketball court.

Scientific knowledge about the interaction between the developing adolescent and his or her social context is also important in designing correctional facilities and structuring programs for juveniles. For juveniles in the justice system, the correctional facility or program constitutes the social environment for development during the period of the sanction. Therefore, the correctional setting can have either a positive or negative impact on the young offender's future life. The adolescent brain is more malleable, or "plastic," than that of adults,[14] and because of increased plasticity, teenagers are particularly responsive to environmental stimuli, both positive and negative. During this formative developmental stage,[15] environmental influences can shape the trajectory of individuals' lives. Psychologists explain that healthy maturation during adolescence is an extended and interactive process between the individual and her social context, in which opportunities in the social environment facilitate or impede accomplishment of developmental tasks necessary to effective adult functioning.[16] A justice policy that aims to reduce recidivism and maximize the potential for juvenile offenders' transition to non-criminal adulthood recognizes the importance of social context by structuring programs and facilities to promote positive development during this formative stage.

Our inquiry into the dynamic interaction between brain development in adolescence and social context offers powerful support for policies that subject adolescent offenders to more lenient sanctions than adults receive

13. *See* discussion *infra* Part II.

14. *See* LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE at 18 (2014).

15. See discussion *infra* Part I.

16. Steinberg, *supra* note 14, at 11.

and that tailor dispositions to juveniles' developmental needs. Our examination confirms and illuminates the Supreme Court's conclusion that juveniles deserve less punishment than adult offenders because their offenses are driven by biological and psychological immaturity, and also because, as legal minors, juveniles cannot extricate themselves from social contexts (neighborhoods, schools and families) that contribute to involvement in crime.[17] Our interactive model also confirms that correctional facilities and programs are social settings that can support healthy development to adulthood in individual offenders, but can also affect young offenders' lives in harmful ways.[18] Thus our analysis provides a sound empirical and theoretical foundation for developmentally-based justice policies that have emerged over the past decade. Our analysis also informs a long-standing debate of whether an offender's deprived social environment mitigates criminal responsibility. Proponents argue that mitigation applies to defendants who have experienced severe deprivation on the ground that their impoverished environment undermined their ability to act as law abiding citizens.[19] This argument has been largely dismissed as undermining free will and as diluting responsibility for a broad range of offenders.[20] Our analysis narrows and sharpens the claim that social context is relevant to the punishment of juveniles on both retributivist and consequentialist grounds.

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17. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 AM. PSYCHOL. 1009 (2003); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEXAS L. REV. 799 (2003). The Supreme Court adopted this position in its 8th Amendment opinions. *Roper*, 545 U.S. at 569; *Miller*, 567 U.S. at 471; *Montgomery*, 136 S. Ct. 718, at 733.

18. *See* discussion *infra* Part III.

19. *See* David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976). Judge Bazelon first developed the argument in *United States v. Alexander*, 152 U.S. App. D.C. 371, 471 F.2d 923, 957-65 (1972). The argument was developed more fully by Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985). *See also* Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011); Andrew Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background Defense*, 2 ALA. CIV. RTS. & CIV. LIBERTIES. L. REV. 79 (2011); Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 501–02 (2013).

20. Stephen Morse has offered the most sophisticated rebuttal of deprivation as a defense. *See* Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF THE CRIMINAL LAW, 114 (William Heffernan & John Kleinig, eds, 2000); Stephen J. Morse, *Severe Environmental Deprivation: A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147 (2011). *See also* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 284-85 (1987).

A brief roadmap of the Article may be helpful. In Part I, we review the research evidence describing biological and psychological features of adolescent brain development that are relevant to risk-taking and offending. This research offers powerful support for the legal judgment that juveniles' criminal choices often are influenced by factors associated with normative development. Part I concludes with a description of recent cross-cultural research indicating that these attributes inhere in adolescence as a developmental stage and are not solely the product of particular social contexts.[21]

Part II analyzes how the traits described in Part I can influence behavior in a variety of ways, depending on social context, resulting in neutral, anti-social, or prosocial outcomes. As we explain, environmental factors can minimize or intensify the extent to which emotional factors contribute to risk-taking behavior—and the kinds of risky behavior chosen. Most important is the influence of peer group (constituted of other reward-seeking and impulsive adolescents). Part II then focuses directly on criminal involvement; the interaction between social context and normative biological and psychological factors in the still-maturing individual can influence the teen's involvement in an antisocial peer group and in criminal activity. In most teens, this interaction abates as the adolescent matures, leading to desistence. Part II describes briefly a category of young offenders less likely than normative adolescents to desist from antisocial activity with maturity because their offending is driven by various dispositional and environmental factors—many of which predated adolescence—and not primarily by the interaction of developmental factors and social context.

Part III explores how the social environment created by correctional programs and facilities can impede or enhance healthy brain development, because the facilities and programs through which law responds to juvenile crime create the social context for the developing young offender. Evidence of brain malleability provides reinforces the conclusion that the correctional context can influence development in a positive or negative direction, while other research points to elements of that context that can facilitate healthy maturation.

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21. Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation,* 12532 DEV. SCI. 1, 1-13 (2017).

Part IV analyzes the implications for law and policy of the interactive model of juvenile offending. The analysis provides strong support for constitutional and legal trends that have emerged in the past decade based on the premise that juveniles are different from adult offenders and that the justice system should recognize these differences. Our analysis confirms conventional wisdom that immature brain development influences offending, but also explains how the teen's interaction with his or her social context plays an important role. We also clarify how correctional programs can facilitate or undermine healthy development in adolescence, and highlight the importance of social context as a key element in policies that aim to prevent crime and promote desistence in young offenders.

I. PSYCHOLOGICAL AND BIOLOGICAL IMMATURITY

In this Part, we describe the features of psychological and neurobiological development in adolescence that form the foundation of our interactional model of teenage risk-taking behavior. This growing body of developmental research provides powerful support for the constitutional principle that "children are different,"[22] and for the growing trend toward acknowledging these differences in the legal response to juvenile crime. The research also clarifies that the developmental tendencies that contribute to involvement in crime also incline adolescents toward risk-taking generally, and that offending is a part of a larger picture.

Adolescent risk-taking can be understood, in part, as arising from a "maturity gap" between cognitive and psychosocial development. It is well understood that emotional and social maturation lags behind intellectual development and that adolescents' capacity for self-regulation is immature. As compared to adults, adolescents are particularly inclined toward reward-seeking and are extremely sensitive to their social context and particularly to peers.[23] This combination of features contributes to emotional arousal,[24] and when teenagers are emotionally aroused, they

22. *See* Miller v Alabama, 567 U.S. 460, 480-81 (2012).
23. *See* Steinberg *supra* note 12.
24. *See* Sarah-Jane Blakemore & Kathryn L. Mills, *Is Adolescence a Sensitive Period for*

tend to make impulsive, short-sighted choices and engage in risky behaviors that they might understand are ill-advised when considered in a neutral setting. This Part describes a "dual systems" model of brain development offered by developmentalists to explain adolescents' tendency toward impulsive risky choices: While brain systems implicated in reward-seeking and sensitivity to peers develop early in adolescence around puberty, brain systems that govern self-regulation mature gradually through adolescence and into early adulthood.[25] Finally, this Part explains that these attributes and tendencies are endogenous to the developmental stage of adolescence and are found in teenagers across cultures.

A. Developmental Factors Contributing to Risk-Taking

This section describes three features of adolescence that likely contribute to adolescents' inclination to engage in risky behavior to a greater extent than adults. Both biological and behavioral research confirms that, as compared to adults, adolescents are more inclined toward reward-seeking, more sensitive to social context, and more impulsive in their choices, especially under conditions of emotional arousal. Each of these tendencies is linked to normative brain development.

1. Reward Seeking

Substantial research evidence supports the conclusion that adolescents are sensitive to rewards and inclined toward reward- or sensation-seeking to a greater extent than adults, and that they focus on rewards rather than risks in making choices. As discussed below, this inclination is normative in adolescence; indeed, increased sensation-seeking is adaptive developmentally as it encourages adolescents to explore their environment and develop a sense of identity and autonomy.[26] But, reward-seeking also interacts with teenagers' sensitivity to peers in ways that can contribute to

Sociocultural Processing? 65 ANNUAL. REV. PSYCHOL. 187 (2014).

25. *See* discussion *infra* Part I.A.3.

26. *See* Eveline A. Crone & Ronald E. Dahl, *Understanding Adolescence as a Period of Social-Affective Engagement and Goal Flexibility,* 13 NATURE REV. NEUROSCI. 636, 636-50 (2012); Bruce J. Ellis et al., *The Evolutionary Basis of Adolescent Behavior: Implications for Science, Policy, and Practice,* 48 DEV. PSYCH. 598, 598-623 (2012).

harmful risk-taking.

During early adolescence, regions of the brain associated with "incentive processing," or the valuation and prediction of rewards, undergo substantial changes resulting in heightened reward sensitivity during this period.[27] Researchers have linked these changes to hormonal developments during puberty that increase the number of dopamine receptors in the brain that are implicated in approach behaviors and the experience of pleasure.[28] As a result, adolescents evince increased dopamine cell firing in response to rewarding stimuli,[29] which affects feedback learning, sensitivity to social evaluation and loss, and incentive-driven responses.[30]

Neurodevelopmental studies of risk behavior generally suggest that heightened risk-taking in adolescence is associated with greater activation of reward-sensitive brain regions among adolescents as compared to adults.[31] In brain imaging studies, when presented with images of rewarding stimuli, such as smiling faces, adolescents evince a stronger response in reward-processing regions than do children or adults. Moreover, the extent to which individuals show this sensitivity to reward is correlated positively with risk-taking.[32] This suggests that risk-taking is, to some extent, intrinsically rewarding to adolescents, or that adolescents are more sensitive to potential rewards associated with risks.

A large body of behavioral research confirms that adolescents are more sensitive to rewards and more inclined toward reward-seeking than are adults; these findings are consistent with the neurobiological evidence. In these studies, researchers typically measure reward-seeking using self-report scales that assess characteristics such as thrill- or novelty-seeking,

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27. *See* Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry,* 14 DEV. SCI. F1, F2 (2011).

28. *See* Dustin Wahlstrom, Paul Collins, Tonya White, & Monica Luciana, *Developmental Changes in Dopamine Neurotransmission in Adolescence: Behavioral Implications and Issues in Assessment,* 72 BRAIN COGN. 146, 146-59 (2010).

29. *See* Aarthi Padmanabhan & Beatriz Luna, *Developmental Imaging Genetics: Linking Dopamine Function to Adolescent Behavior,* 89 BRAIN COGN. 27, 27-38 (2014).

30. *See* Wahlstrom et al., *supra* note 28.

31. *See* Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who is at Risk?* 10 DEV. SCI. F8, F8-F14 (2007).

32. Dustin Albert & Lawrence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ADOLESC. 211, 217-218 (2011).

or behavioral tasks that assess responsiveness to rewarding stimuli (such as monetary rewards). For example, some studies use gambling tasks in which individuals must learn to discriminate between gambles that are likely to be rewarding (e.g., drawing cards from a deck that is likely to pay off) and those that are likely to be costly (e.g., drawing cards from decks that are likely to lead to losses).[33] Others have used "temporal discounting" tasks, in which players are asked to choose between smaller, immediate rewards (e.g., $200 today) versus larger, but delayed ones (e.g., $1,000 in six months).[34]

Both self-report[35] and behavioral[36] studies of reward-seeking indicate that this behavior peaks in mid-adolescence, and subsequently declines in adulthood. Cross-sectional studies of performance on gambling tasks demonstrate that mid- to late adolescents learn from rewards at a faster rate than do their younger peers or adults; these studies also demonstrate that the tendency to learn more quickly from rewarding experiences than from costly ones is substantially stronger among teens than among adults, who tend to learn from rewarding and costly experiences at similar rates.[37] Studies of temporal discounting have found that younger adolescents demonstrate a stronger preference for smaller, immediate rewards, whereas older adolescents and adults are willing to wait longer for larger ones.[38] Studies also show that younger adolescents characterize themselves in self-report surveys as being less future-oriented (i.e., regulating behavior in favor of long-term goals) and less inclined to consider the future consequences of their actions.[39] Thus, mid-adolescents (ages fifteen through seventeen) demonstrate a heightened sensitivity to rewards compared to younger or older individuals, and this sensitivity seems to

33. *See* Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task,* 46 DEV. PSYCHOL. 193, 193-207 (2010).

34. *See* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting,* 80 CHILD DEV. 28, 28-44 (2009).

35 *See* Anahi Collado, Julia W. Felton, Laura MacPherson, & C.W. Lejuez, *Longitudinal Trajectories of Sensation Seeking, Risk Taking Propensity, and Impulsivity Across Early to Middle Adolescence,* 39 ADDICT. BEHAVE. 1580, 1580-88 (2014).

36. *See* Dana G. Smith, Lin Xiao, & Antoine Bechara, *Decision Making in Children and Adolescents: Impaired Iowa Gambling Task Performance in Early Adolescence,* 48 DEV. PSYCHOL. 1180, 1180-87 (2012).

37. *See* Cauffman et al., *supra* note 33.

38. *See* Steinberg et al. *supra* note 34.

39. *See* Steinberg et al., *supra* note 34.

motivate decision-making that is oriented toward the present rather than the future, even if the future-oriented decision is superior.

2. Sensitivity to Social Environment.

Adolescence is a period of heightened sensitivity to the social environment and the individual's relationship to that context. Recent research indicates that a network of brain systems governing thinking about social relationships undergoes significant changes in adolescence in ways that increase individuals' concern about the opinion of other people, particularly peers.[40] These brain regions, sometimes collectively referred to as "the social brain," are more easily activated in adolescence than before or after, making teenagers especially attuned to both the positive and negative emotions of those around them.[41] During this developmental period, individuals are more sensitive to both praise and rejection than are either children or adults, making them potentially more susceptible to peer influence and responsive to threats.[42]

Recent evidence sheds light on the relationship between peer sensitivity and reward-seeking in adolescence, with important implications for adolescent risk-taking. Jason Chein and colleagues have examined the impact of the presence of peers on individuals' neural responses to a potential reward, comparing adolescents between ages fourteen to eighteen, with younger (nineteen to twenty-two) and older (twenty-four to twenty-nine) adults making decisions in a simulated driving task. The study found that observation by peers increased activation in reward-related brain regions in adolescents but not in the adults, and that activity in these regions predicted risk-taking (running a stoplight to complete the task faster) in the tasks.[43]

Much behavioral research confirms adolescents' sensitivity to peers, and finds a correlation between peer influence and risk-taking in

40. *See* Sarah-Jane Blakemore, *Development of the Social Brain in Adolescence,* 105 J. R. SOC. MED. 111, 111-16 (2012); Blakemore & Mills, *supra* note 24.

41. Blakemore & Mills, *supra* note 24.

42. *See* Amanda E. Guyer et al., *Probing the Neural Correlates of Anticipated Peer Evaluation in Adolescence*, 80 CHILD DEV. 1000, 1000-15 (2009); Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 DEV. NEUROSCI. 220, 220-27 (2014).

43. *See* Chein et al., *supra* note 27, at 7. Risk taking involved running stoplights, risking a crash.

adolescence. Social scientists have studied age differences in responses to peer influence by presenting individuals with hypothetical dilemmas involving peer influence. Studies presenting participants with situations involving pressure to engage in antisocial conduct have found that peer influence increases between childhood and mid-adolescence and declines slowly during the late adolescent years.[44] Peer influence can operate directly when teenagers respond to peer pressure; however, desire for peer approval and fear of rejection also affect adolescents' choices more than those of adults.[45] The increased salience of peers likely makes their approval especially important in group situations. It is not surprising, perhaps, that juveniles are far more likely to offend in groups than are adults.[46]

It is well established that adolescents take more risks in the presence of peers than when they are alone or with an adult,[47] and that this "peer effect" is not found among adults.[48] The presence of peers also influences risk preference among adolescents, as adolescents (but not adults) are more likely to endorse the benefits of risky activities relative to costs in the presence of peers than when they are alone.[49] One study has found that the presence of peers increases risk-taking among adolescents even when they are given information about the probability of positive and negative outcomes.[50]

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44. This pattern has been long established. *See* Thomas J. Berndt, *Developmental Changes in conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608, 608-616 (1979); Kathryn C. Monahan, Laurence Steinberg, & Elizabeth Cauffman, *Affiliation with Antisocial Peers, Susceptibility to Peer Influence, and Desistance from Antisocial Behavior During the Transition to Adulthood,* 45 DEV. PSYCHOL. 1520, 1520-30 (2009)

45. *See* Guyer et al., *supra* note 42, at 1001.

46. *See* Franklin E. Zimring & Hannah Laqueur, *Kids, Groups, and Crime: In Defense of Conventional Wisdom*, 52 J. RES. CRIME DELINQ. 403, 403-413 (2015).

47. *See* Margo Gardner & Laurence Steinberg, *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision-Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 625-35 (2005); Karol Silva, Jason Chein, & Laurence Steinberg, *Adolescents in Peer Groups Make More Prudent Decisions When a Slightly Older Adult is Present*, 27 PSYCHOL. SCI. 322, 322-30 (2016).

48. *See* Dustin Albert, Jason Chein, & Laurence Steinberg, *Peer Influences on Adolescent Decision Making*, 22 CURR. DIR. PSYCHOL. SCI. 114, 114-120 (2013).

49. *See* Gardner & Steinberg, *supra* note 47.

50. *See* Ashley Smith, Jason Chein, & Laurence Steinberg, *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes are Known*, 50 DEV. PSYCHOL. 1564, 1564-68 (2014).

3. Impulsivity and Cognitive Control

When adolescents are emotionally aroused by the anticipation of rewards in the presence of peers, they tend to make riskier choices that they are less able to control than are adults. As described in Section B below, deficits in self-control in adolescence are thought to derive from immaturity in the system of cognitive regulation, which is centered in the prefrontal cortex, and its connections to social and emotional brain regions. This system develops slowly during adolescence and is not fully mature until the early to mid-twenties. In adolescence, it can be overwhelmed by emotional and social responses, contributing to short-sighted choices.[51]

Studies measure self-regulation using both self-report scales that assess the tendency to act without thinking (e.g., "I act on the spur of the moment") and behavioral tasks that require individuals to resist making automatic, reactive responses to specific stimuli. Studies of self-reported impulse control find that this psychological trait improves into early adulthood.[52] Age patterns in studies involving behavioral tasks are more complex. On simple tasks requiring only that participants inhibit an automatic response, individuals demonstrate adult levels of self-regulation by mid-adolescence.[53] In contrast, mature performance is not observed until early adulthood when tasks involve distractions that cause attentional interference or require planning and complex reasoning.[54]

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51. *See* Bernd Figner, Rachael J. Mackinlay, Friedrich Wilkening, & Elke U. Weber, *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXP. PSYCHOL. LEARN. MEM. COGN. 709, 709-30 (2009).

52. *See* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764, 1764-78 (2008); Steinberg, *supra* note 11, at 4.

53. For example, on the Stroop task, participants are asked to quickly and accurately indicate the color in which a word is displayed while ignoring its semantic meaning. When a color word is displayed in an incongruent color (e.g., the word 'blue' displayed in green font), the participants must inhibit the automatic response to read the word and instead respond on the basis of the word's physical color. Studies using the traditional Stroop color-word task find no differences in cognitive control between mid-adolescents and adults. *See* Jessica R. Andrews-Hanna et al., *Cognitive Control in Adolescence: Neural Underpinnings and Relation to Self-Report Behaviors*, 6 PLOS ONE, e21598, 1-14 (2011).

54. *See* Monica Luciana et al., *The Development of Nonverbal Working Memory and Executive*

The most interesting recent research measuring impulse control has compared responses to behavioral tasks under neutral (non-emotional) and emotional conditions. These studies have found that adolescents perform poorly on self-control tasks under emotional conditions and that performance under both neutral and emotional conditions improves into adulthood.[55] A major study sponsored by the MacArthur Foundation Research Network on Law and Neuroscience (of which two of us were members) is illustrative. In this research, almost 150 adolescents, (between thirteen and seventeen), young adults (eighteen to twenty-one) and older adults (twenty-two to twenty-five) were asked to perform a standard task measuring self-control under neutral conditions and conditions involving positive and negative emotional arousal (anticipation of winning money versus hearing an aversive sound). Under conditions of positive arousal, adolescents' performance on the self-control task was substantially poorer than that of the two adult groups, while under conditions of negative arousal, both the adolescent and young adult group performed more poorly than the older adults. Moreover, under emotionally arousing conditions, young adults evinced decreased activation in cognitive control networks and increased activation in brain regions implicated in emotional processing; this combination is thought to have contributed to poorer performance on the self-control task.[56] Another recent study found that those adolescents whose self-control was disrupted during emotionally arousing tasks engaged in more risk-taking during driving simulation tasks than did same-aged individuals whose self-control was less disrupted.[57] Other studies have shown that social arousal, created by the presence of peers, activates reward regions in the adolescent brain,[58] which in turn is

Control Processes in Adolescents, 76 CHILD DEV. 697, 697-712 (2005).

55. For example, studies using an emotional version of the Stroop, *see id.*, in which colors and color-words are replaced with emotional faces and phrases, report improvements in self-regulation into adulthood. Even under neutral conditions, adolescents perform more poorly than older adults. *See* Cohen, *supra* note 9, at 559.

56. *See* Alexandra O. Cohen et al., *The Impact of Emotional States on Cognitive Control Circuitry and Function* 28 J. COG. NEUROSCI. 446, 446-59 (2016).

57. *See* Morgan Botdorf et al., *Adolescent Risk-Taking is Predicted by Individual Differences in Cognitive Control Over Emotional, But Not Non-Emotional, Response Conflict*, 31 COGNITION & EMOTION 972, 972-79 (2017).

58. *See* Ashley Smith et al., *Age Differences in the Impact of Peers on Adolescents' and Adults' Neural Response to Reward*, 11 DEV. COG. NEUROSCI. 75, 75-82 (2015).

associated with riskier decision making.[59] The evidence that emotional contexts interfere with self-control in adolescence sheds light on teenagers' heightened tendency to engage in risk taking in emotionally and socially arousing contexts.[60]

Together with research demonstrating that adolescents tend to evince greater reward seeking and relatively less self-regulation compared to adults, studies also show that these psychological traits are linked with greater engagement in risk taking. For example, higher levels of reward seeking have been associated with self-reported substance use, delinquent acts, and risky driving, as well as risk taking on several laboratory measures of risk taking. Similarly, greater impulsivity has been associated with higher rates of self-reported substance use and delinquent activity, as well as with increased risk taking on behavioral risk taking tasks.[61]

B. Dual Systems Model of Risk Taking

Developmental scientists in recent years have offered "dual systems" or "maturational imbalance" models in seeking to explicate the relationship between emotional immaturity and risk-taking.[62] Brain maturation comprises several processes that vary in their developmental timetable across different brain regions: Dual systems models emphasize research showing that brain systems involved in reward seeking and those regulating self control follow different developmental trajectories.[63] This imbalance, it is believed, results in poor regulation of emotions and a tendency to focus on the immediate rewards of choices, while discounting

59. *See* Chein et al., *supra* note 27, at 7.

60. *See* B.J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANN. REV. PSYCHOL. 295, 295-319 (2015); Ashley Smith, Jason Chein & Laurence Steinberg, *Impact of Socio-Emotional Context, Brain Development, and Pubertal Maturation on Adolescent Risk-Making*, 64 HORMONES & BEHAV. 323, 323-32 (2013).

61. *See* Natasha Duell, Grace Icenogle & Laurence Steinberg, *Adolescent Decision Making and Risk Taking,* CHILD PSYCHOLOGY: A HANDBOOK OF CONTEMPORARY ISSUES 263, 263-284 (L. Balter & C.S. Tamis-LeMonda eds., 3d ed. 2016).

62. *See* Smith et al., *supra* note 58; *and* Chein, *supra* note 27.

63. *See* B.J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANN. REV. PSYCHOL. 295, 298–300 (2015); Elizabeth P. Shulman et al., *The Dual Systems Model: Review, Reappraisal, and Reaffirmation*, 17 DEV. COG. NEUROSCI 103, 103-05 (2016).

long-term costs; this combination increases inclinations to engage in risky behavior, including offending.[64]

Neurodevelopmental research indicates that the development of subcortical brain regions implicated in socioemotional processing is more or less completed by adolescence. As explained above, these developments stimulate reward-seeking and increase sensitivity to peers, beginning with the onset of puberty and diminishing as individuals mature into young adulthood, such that these responses are particularly powerful during adolescence. Unlike the subcortical regions, the prefrontal cortex and other brain regions involved in impulse control and emotional regulation develop slowly through adolescence and are not mature until early adulthood.[65] The prefrontal cortex plays a key role in advanced cognitive abilities, including planning ahead, comparing risk and reward, and self-regulation. Immaturity in the prefrontal cortex is thought to make adolescents more susceptible than are mature adults to impetuous decision-making and more vulnerable to the effects of emotional and social arousal on cognitive functioning.[66]

Maturation of the prefrontal cortex involves multiple processes that are ongoing during adolescence but completed at different ages.[67] For example, synaptic pruning, which increases the efficiency of information processing, is largely complete by mid-adolescence; thus, basic cognitive capacities of reasoning and understanding are adult-like by about age fifteen and improve little in later years. In contrast, connectivity between prefrontal regions and the regions that process rewards and respond to emotional and social stimuli are not fully established until individuals are in their mid-twenties.[68] These connections are critically important to emotional regulation and impulse control. The prefrontal regions are

64. *See* Steinberg, *supra* note 12; Shulman et al., *supra* note 63, at 103-17.

65. B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEV. REV. 62, 62-77 (2008); Linda Patia Spear, *Adolescent Neurodevelopment*, 52 J. ADOLESCENT HEALTH S7, S7-S13 (2013).

66. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOL. 739, 739-50 (2009); *see* Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category*, 85 FORDHAM L. REV. 641, 641-666 (2016).

67. *See* Cohen, *supra* note 9, at 2.

68. *See* Casey, *supra* note 60; Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity using fMRI*, 329 SCI. 1358, 1358-1361 (2010); Bonnie et al., *supra* note 66.

implicated in feedback evaluation, integrating experiential information to guide future behavior, and controlling emotional impulses in favor of long-term goals.[69] The lack of functional connectivity leaves adolescents more prone than adults to making emotion-based decisions with inadequate cognitive oversight, suggesting why aspects of social and emotional functioning are slower to mature than basic cognitive functioning. Adolescents' deficient capacity to regulate behavior in the face of highly arousing stimuli may lead to suboptimal decision-making in contexts requiring the coordination of emotion and thinking. In sum, brain systems that govern "cold cognition" (thinking under neutral conditions) reach adult levels of maturity long before those that govern "hot cognition" (thinking under conditions of social and emotional arousal).[70]

C. Cross-cultural Research on Brain Development

For the most part, the developmental brain research that has informed our understanding of various aspects of the dual systems model has been conducted in the United States and a few Western European countries (most notably, the Netherlands).[71] Because expectations and norms for adolescent behavior vary considerably around the world, it is important to ask whether the account of the sensation-seeking, impulsive teenager that emerges from these studies accurately represents young people in other cultural and economic contexts. Adolescence in America and much of Western Europe is a time during which a certain degree of recklessness, especially in its socially acceptable forms, is tolerated—and perhaps even encouraged. Does this characterization of adolescents apply to young people growing up in less individualistic (and perhaps less permissive) cultural contexts?

A recent extensive study of more than 5,000 people between the ages of ten and thirty from eleven different countries suggests that it does.

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69. *See* Antoine Bechara, *Decision Making, Impulse Control and Loss of Willpower to Resist Drugs: A Neurocognitive Perspective*, 8 NAT'L NEUROSCI. 1458, 1458-63 (2005).

70. *See* Figner et al. *supra* note 51.

71. This includes research on heightened reward sensitivity during adolescence, protracted maturation of cognitive control through adolescence and into young adulthood, and the resulting propensity of adolescents, relative to children or adults, to engage in risk taking. *See* Shulman et al., *supra* note 63, at 4.

Laurence Steinberg and colleagues used identical test batteries to measure likely contributors to adolescent risk-taking in a diverse sample of countries (China, Colombia, Cyprus, India, Italy, Jordan, Kenya, the Philippines, Sweden, Thailand, and the United States) to determine whether the trajectories of sensation-seeking, self-control, and risk-taking are similar in these varied cultural contexts. Importantly, some of these countries are relatively more tolerant of adolescent recklessness (e.g., Sweden, and the United States), whereas, in others, young people are expected to demonstrate strong self-control (e.g., China and Jordan). Although there were differences among countries in patterns of psychological functioning, there were important and striking similarities.

Three such similarities are especially relevant to the present discussion: First, age trajectories of sensation-seeking and self-control that have been described in studies of American youth were observed internationally.[72] Scores on a composite measure of sensation-seeking (combining both self-reports and behavioral indicators) followed an inverted U-shaped pattern, increasing between preadolescence and late adolescence, peaking during the late teen years, and declining thereafter. On average, the peak was observed at a slightly older age (nineteen years) than had been reported in previous studies of American youth. Perhaps this is due to a somewhat later onset of puberty, which has been shown to contribute to the increase in reward sensitivity in adolescence,[73] in less developed nations than in developed ones; this would shift the average peak in sensation seeking to an older age when the sample is aggregated. In contrast, self-control matured gradually between pre-adolescence and the mid-twenties, at which point it plateaued in some countries (e.g., China, Italy) but continued to mature further in others (e.g., Colombia, Cyprus). Generally speaking, the prolonged maturation of self-control into the late-twenties was more likely to be seen in countries in which the increase during adolescence was less dramatic.[74] Taken together, these results suggest that the characterization of the late teen years as a time during which reward-seeking is heightened and self-regulation is still maturing applies cross-

72. *See id*.

73. *See* Grace Icenogle et al., *Puberty Predicts Approach But Not Avoidance on the Iowa Gambling Task in a Multinational Sample*, 88 CHILD DEV. 1598, 1598-1614 (2017).

74. *Id.*

culturally.

Second, the researchers found in other countries the inverted-U shaped trajectory of risk-taking that has been observed in the United States, with risky behavior more common during adolescence than before or after.[75] This set of analyses distinguished between real-world risk taking, measured through self-reports of involvement in activities such as drinking, riding with an intoxicated driver, vandalism, and fighting, and risk taking propensity, assessed with experimental tasks such as a the video driving game described earlier. The authors hypothesized that age patterns in real-world risk taking would be more culturally variable than age patterns in risk taking propensity, since the former is both a function of developmental immaturity and contextual opportunity, whereas the latter is not influenced by contextual conditions (i.e., the test setting was identical across the various countries). This hypothesis was confirmed: Countries were significantly more similar with respect to trajectories of risk taking propensity than with respect to real world risk-taking. Further, as expected, risk-taking propensity peaked earlier than did real-world risk taking, suggesting that the manifestation of adolescents' inherent inclination to engage in risky behavior is delayed by the real world context in which development occurs. Finally, the peak age for antisocial risk-taking was earlier (around age nineteen, similar to that reported in studies of the "age-crime curve") than that for health risk-taking (which peaked in the mid-twenties), presumably because the latter can be delayed by societally imposed constraints that are age-related (for example, age restrictions on purchasing alcohol).[76] This study is especially relevant to our interest in this essay, because it shows how the maturationally-driven tendencies inherent in adolescence can be tempered by social context.

Third, the researchers observed in the international sample the "maturity gap" found in American studies (described above),[77] in which cognitive abilities such as working memory reach adult levels of maturity well before the psychosocial capacities thought to contribute to reckless

75. *See* Natasha Duell et al., *Age Patterns in Risk Taking Across the World,* 47 J. YOUTH ADOL. 1052 (2017).

76. *Id.*

77. *See* Laurence Steinberg et al., Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, & Marie Banich, *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOL. 583, 583-594 (2009).

behavior in adolescence.[78] Age patterns in cognitive abilities were far more similar internationally than patterns in psychosocial capacities; this likely is due to relatively greater cultural variability in expectations for psychosocial maturity than for intellectual competence. Most importantly, whereas the main period for maturation of cognitive competence was during early adolescence (tending to plateau around age sixteen), in virtually all of the countries studied considerable psychosocial maturation took place during the late teens and early twenties.[79]

This Part has explained that psychosocial factors associated with adolescent brain development contribute to a tendency toward risk-taking that declines as individuals mature. These tendencies are normative in adolescence and found across cultures. In the next Part, we turn to the questions of how these inclinations interact with social context and why teenagers vary substantially in the extent and form of risk-taking.

II. SOCIAL ENVIRONMENT AND RISKY BEHAVIOR IN ADOLESCENCE

Risk-taking in adolescence is driven by developmental factors, but as this Part explains, the individual adolescent's social context plays a critical role in triggering risky behavior; it also influences the forms of risk-taking in which the teenager engages. As the description of behavioral and biological research in Part I explained, endogenous developmental traits and tendencies associated with adolescence contribute to a heightened sensitivity to the social environment and an inclination to respond intensely to exciting and threatening stimuli in that environment. These stimuli contribute to emotional arousal, which, in the face of immature self-regulatory competence, can overwhelm the adolescent's cognitive capacity for rational choice, contributing to reckless behavior. This dynamic interaction is especially likely to be triggered in the presence or with the encouragement of peers, since adolescents are particularly oriented toward peers and susceptible to peer influence.[80] Peers play an

78. *See* Grace Icenogle, et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational Sample*. LAW HUM. BEHAV. (under review).

79. *Id.*

80. *See* discussion *infra* Part II.B.

important role in determining the extent and form of the individual adolescent's risk. Thus, an important contextual variable contributing to whether an adolescent becomes involved in criminal behavior is the degree to which his or her peer group is antisocial.[81] This Part explores how developmental changes in emotional arousability and self-regulation interact with the adolescent's social context to shape peer affiliations in ways that can lead to involvement in risky activities. Finally, this Part suggests why and how these tendencies dissipate and risk-taking declines with maturation.

A. Decision-making in a Neutral Context

As the discussion in Part I confirms, by mid-adolescence, individuals have the cognitive capacity to make rational decisions that is similar to that of adults. A teenager can understand and process information, engage in hypothetical thinking to compare alternative options and make reasoned decisions.[82] In short, when not subject to exogenous influences that undermine rationality, the normative adolescent usually is a competent decision-maker. This has been confirmed, for example, in studies of competence to stand trial, which does not improve after age fifteen.[83]

Much research supports the conclusion that adolescent decision-making is comparable to adults under neutral conditions but deteriorates when disrupted by external stimuli that contribute to emotional arousal. Early studies finding that adolescents were adult-like in their decision-making were conducted in laboratory settings under conditions in which the undistracted teenage subjects had time to respond to vignettes without stress.[84] Two important bodies of research focused on comprehension of

81. Gary Sweeten, Alex Piquero, & Laurence Steinberg, *Age and the Explanation of Crime, Revisited*, 42 J. YOUTH & ADOLESCENCE 921 (2013).

82. *See* discussion *supra* Part I.B.

83. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (finding that 16 and 17 year old subjects performed as well as adults).

84. *See* Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (14 year olds competent to make medical decisions in laboratory setting); *see also* Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 L. & HUM. BEHAV. 129 (1992) (study of abortion decisionmaking with similar findings).

Miranda rights and ability to give informed consent to medical treatment. These studies found that that by mid –adolescence, teenagers performed similarly to adults.[85]

More recent research has sought to compare the impact on adolescent decision-making of neutral settings and settings in which subjects are exposed to external stimuli associated with emotional arousal. To test decision-making under states of emotional arousal, researchers have designed laboratory tasks with reward components (e.g., presenting images of happy faces or offering a monetary reward) and threat components (e.g., exposing participants to the possibility of hearing an aversive noise). Findings from these studies suggest that adolescents act more impulsively in the presence of both rewarding and threatening stimuli than under more neutral conditions.[86] Impulsive decision-making in the presence of an emotional stimulus has been associated with decreased activity in brain regions implicated in behavioral control and increased activity in brain regions involved in emotional processing.[87] Research evidence also suggests that, compared to adults, adolescents take more risks in the presence of rewarding stimuli.[88] In contrast, adolescents show comparably better impulse control and engage in less risky decision-making in neutral contexts (e.g., in the absence of a reward or peers).[89] Thus, research examining the impact of emotional stimuli on adolescent decision-making generally indicates that teenagers demonstrate a neural sensitivity to both rewards and threats that undermines impulse control and increases risky decision-making.

The interaction of social context with the decision-making competence of older adolescents is important in some legal settings. For example, a mature minor is likely competent to make a medical decision, which typically is made in a relatively neutral context. The adolescent is not likely to be subject to external conditions that contribute to emotional arousal or impulsive decision-making. Peers are seldom present and the inclination toward sensation-seeking is unlikely to be stimulated by the

85. *See* Duell et al., *supra* note 75.

86. *See* Cohen et al., *supra* note 9; *see also* B.J. Casey et al., *Braking and Accelerating of the Adolescent Brain*, 21 J. RES. ON ADOLESCENCE 21 (2011).

87. *Id.*

88. *See* Casey *supra* note 60; Figner et al., *supra* note 51.

89. *Id.*

anticipated short-term rewards of treatment, which are likely to be gradual.[90] Given these conditions, it is not surprising perhaps that mature minors are authorized to consent to some medical treatments without involving their parents, because they are presumed competent to do so.[91] In contrast, although laboratory studies have found that most older youths comprehend the meaning of *Miranda* rights,[92] there is good reason to question whether a juvenile in the real-world setting of an interrogation room is likely to make a competent decision about waiving or asserting these rights. Police tactics that combine implicit threats of punishment unless the juvenile agrees to waiver and promises of rewards (such as permission to end the interrogation) compound the stress of an interrogation for adolescents. Substantial evidence indicates that juveniles waive their *Miranda* rights at a much higher rate than do adults, and confess falsely at a higher rate.[93] It seems likely that the competence that teenagers show in the research setting is compromised by emotional factors in this social context, justifying special scrutiny of juveniles' waivers and confessions.[94]

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90. Steinberg et al., supra note 12. Cosmetic treatment is excluded under the mature minor rule, in part because health benefits are minimal. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW (COUNCIL DRAFT 2) §19.01, Medical Decisions by Mature Minors (2017). Adolescents might also be more inclined to make impulsive decisions to obtain cosmetic treatment, focusing on immediate rewards. *Id.*

91. *See, e.g.,* Cardwell v. Bechtol, 724 S.W.2d 739, 748 (Tenn. 1987) (adopting the mature minor doctrine, factoring in "age, ability, experience, education, training, and degree of maturity or judgment obtained by the minor, as well as upon the conduct and demeanor of the minor at the time of the incident involved . . . , totality of the circumstances, the nature of the treatment and its risks or probable consequences, and the minor's ability to appreciate the risks and consequences."). Mature minors are authorized to make abortion decisions without involving their parents. *See generally* Bellotti v. Baird, 443 U.S. 622 (1979). Although this decision may be associated with more stress than other medical decisions, the adolescent has the opportunity to deliberate, distinguishing it from "in-the-moment" choices associated with risk-taking.

92. *See* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1143 (1980) (finding deficiencies in fourteen and fifteen year olds, but not older youths).

93. Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. L. & SOC. SCI. 193 (2008).

94. RESTATEMENT, CHILDREN AND THE LAW (COUNCIL DRAFT), Rights of a Juvenile in Custody §14.21 (2016) (describing cases finding that juveniles are particularly vulnerable to coercion and that special scrutiny of waivers is required). Another important dimension of decision-making is background knowledge. Adults often rely on intuitive, non-deliberative decision-making, but they are more likely to make a less risky choice because they have knowledge and experience to lead them to that choice. Adolescents may lack this useful background. In the case of waiving their *Miranda* rights, not only do they have to make a choice on-the-spot in a stressful situation, but many youths also have

A final example provides a transition to our discussion of adolescent risk taking in the next section. In laboratory studies, adolescents are capable of perceiving the risks associated with different behaviors as well as adults, and they are no worse than adults at estimating their vulnerability to risk.[95] In fact, some studies suggest that adolescents overestimate the risks associated with various behaviors, including getting sick from alcohol or contracting a sexually transmitted infection.[96] But, in the presence of peers and free of adult supervision, teenagers' cognitive awareness of risk may do little to deter participation in dangerous, but exciting, activities such as drinking, drug use, fast driving and criminal offending. The confluence of exogenous influences and the adolescent's inclination toward reward-seeking can lead to reckless choices driven by emotional arousal. Through similar mechanisms, the perception of threat in the social context can lead to emotional arousal, undermining rationality and contributing to impulsive decisions.[97]

B. Risk-taking in Adolescence: The Risk-Inclined Individual in Risky Social Context

As the preceding section suggests, in a neutral setting, a normative adolescent is a competent decision-maker who perceives the risks of

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limited or no knowledge of the implications of their choice. *See generally* Bonnie L. Halpern-Felsher et al., *The Role of Behavioral Experience in Judging Risks*, 20 HEALTH PSYCHOL. 120 (2001); Elizabeth P. Shulman & Elizabeth Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167 (2014).

95. Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 PSYCHOL. SCI. IN THE PUB. INT. 1 (2006).

96. *See, e.g.,* Susan G. Millstein & Bonnie L. Halpern-Felsher, *Judgments about Risk and Perceived Invulnerability in Adolescents and Young Adults*, 12 J. RES. ON ADOLESCENCE 399 (2002). In one study exploring age differences in risk perception, individuals between the ages of 11 and 24 were asked to evaluate the riskiness, dangerousness, potential harmfulness, and relative costs of each of a series of risky activities such as riding in a car with a drunk driver, having unprotected sex, or shoplifting. Young adolescents ages 11-13 years were more likely than any other age group to rate these activities as risky, scary, dangerous, and more harmful than beneficial. After age 13, there were no age differences in risk perception; adolescents' risk perceptions were no different than those of younger teens. Elizabeth Cauffman et al., *Age Differences in Psychosocial Capacities Underlying Competence to Stand Trial*, 27 L. HUM. BEHAV. 333 (2003).

97. Cohen et al, *supra* note 9; Erika E. Forbes et al., *Neural Systems of Threat Processing in Adolescents: Role of Pubertal Maturation and Relation to Measures of Negative Affect,* 36 DEV. NEUROPSYCHOLOGY 429-52 (2011); *see also* Kassin, *supra* note 93.

dangerous choices as accurately as adults. In this section, we explore why many adolescents (and young adults) engage in risk-taking behavior at higher rates than older adults. We posit that much risk-taking behavior is a product of an adolescent inclined toward exciting or rewarding experiences (the normative adolescent), whose social context presents opportunities facilitating the pursuit of those experiences. "Opportunity" has two components: First, the risky activity must be accessible in the teenager's social context; and second, the adolescent associates with willing peers who encourage participation.[98]

1. Parental Influence and Accessibility of Risky Activity.

Adolescents are free to engage in risky behavior to a greater extent than younger children in part because they are subject to less supervision by parents and other adult authority figures. Developmentally appropriate separation from parents and increased freedom to associate with peers without supervision is a part of normal maturation and healthy development, processes through which teenagers learn to make their own decisions without external control.[99] However, less monitoring by parents, who (presumably) possess mature impulse control and an interest in promoting their children's welfare, leaves teenagers with less protection against developmentally normative impulsive choices and behavior.

Some parents, of course, exercise more supervision over their teenage children than others. The role that parents assume during this developmental stage can affect whether adolescents are allowed to pursue risky activities without constraint or are subject to appropriate discipline (which, to some extent, can limit opportunities for risk-taking).[100] The challenge for parents is to find the right balance between rigid restriction of their children's freedom and lax disengagement. Developmentalists explain that authoritative parenting is critically important to healthy development in adolescence.[101] Authoritative parenting involves active

98. Adolescents sometimes engage in risky activities without peers of course, as we discuss below; frequently they may anticipate peer approval.

99. LAURENCE STEINBERG, AGE OF OPPORTUNITY 44 (2014); *see also* Ellis et al., *supra* note 26**.**

100. Ralph J. DiClemente et al., *Parental Monitoring: Association with Adolescents' Risk Behaviors*, 107 PEDIATRICS 1363 (2001).

101. *See, e.g.*,ROBERT E. LARZELERE ET AL., AUTHORITATIVE PARENTING: SYNTHESIZING

engagement with the teenager's life but not excessive monitoring, which can either generate intense opposition or inhibit development of the individual's ability to make autonomous choices and live independently. The upshot is that even the best parenting will not prevent adolescent risk-taking. Optimally, parents (and other adults in authority) will present adolescents with opportunities to take developmentally appropriate risks, such as playing on a sports team, and seek to minimize opportunities for engaging in risks that compromise adolescents' health and well-being.

The freedom that adolescents need to separate from parents and learn to be independent, combined with the normative traits and tendencies of this developmental stage, increases teenagers' vulnerability to involvement in risky activities. The extent to which teenagers engage in risk-taking, and the form of that risk-taking, depends on opportunities presented in the adolescent's social context. For example, the leading cause of death for adolescents and young adults is motor vehicle crashes.[102] Alcohol use plays a part in this statistic (see below), but car racing (or just driving fast) is an exciting activity for young males, and one that reward-seeking teenagers are likely to pursue, given the opportunity. But, most teens will only engage in this activity when they are licensed to operate a vehicle by the state. Thus, while a fourteen-year-old has reward-seeking inclinations that are similar to those of an older teen, he will seldom engage in reckless driving.[103] Similarly, most New York City teenagers simply do not have the opportunity to engage in this form of risk-taking.[104]

The same analysis applies to other forms of risk-taking, such as alcohol and drug use. Although under-age drinking is common, acquiring alcohol becomes easier as individuals approach the legal minimum drinking age. College students and other young adults engage in underage drinking at far higher rates than do high school students.[105] Indeed, one rationale for

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NURTURANCE AND DISCIPLINE FOR OPTIMAL CHILD DEVELOPMENT (2013).

102. Laura Kann et al., *Youth Risk Behavior Surveillance – United States, 2015*, 54 SURVEILLANCE SUMMARIES 1 (2016).

103. Of course the younger unlicensed teen may be a passenger in a vehicle driven by an older teen.

104. Also cultural influences may be important. As noted earlier, a recent study of cross-cultural differences in adolescent risk taking found greater variability in real-world risk taking than in laboratory based measures of risk-taking propensity. Duell et al., *supra* note 75.

105. National Research Council, Committee on Juv. Justice Reform, Reforming Juvenile Justice:

setting the minimum age for purchasing alcohol at twenty-one was to reduce illegal drinking among *high school* students.[106] Lawmakers thought that lives would be saved by creating a substantial gap between the age at which individuals have ready access to alcohol and the minimum driving age. But, because alcohol is legal for adults (who are presumed less inclined toward risk-taking), it is readily available in every community, and, not surprisingly, a relatively high percentage of adolescents experiment with drinking. Perhaps unsurprisingly, given the relatively lower driving age in the United States than in most of the developed world, automobile fatalities among adolescents are higher here than abroad.[107]

Illegal drug use is another risky activity that might well appeal to many normative adolescents—reward-seeking individuals with immature impulse control who are inclined to focus on short-term benefits and discount long-term costs. In contrast to alcohol, drugs generally cannot be acquired legally, and both use and sale can result in criminal penalties. Thus, access and opportunities to engage in this risky activity are more limited and drug use among adolescents is less prevalent than alcohol use. Again, the teenager's social context plays a role in the form of risk-taking teenagers choose.

Teenagers' inclination to engage in unsafe sex provides a somewhat different variation on the theme, but also demonstrates how social context can increase or decrease the inclination to engage in risky activities. If teenagers are encouraged to use contraceptives and condoms, and such protection is readily available, the incidence of unsafe sex and pregnancy will be lower than if protection is difficult to obtain.[108] The immediate decision to have sex is likely to be driven by the reward-seeking, impulsive inclinations of adolescents, who may fail to consider the potential serious long term consequences. But if the adolescent can easily acquire contraceptives, the decision to have safe sex can be made in a more neutral setting in which the adolescent can rationally consider the

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A Developmental Approach (2013).

106. FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE **3-6** (2013).

107. Organization for Economic Co-operation and Development (OECD) & International Traffic Safety Data and Analysis Group, *Road Safety Annual Report 2013* (2013).

108. Douglas B. Kirby, *The Impact of Abstinence and Comprehensive Sex and STD/HIV Education Programs on Adolescent Sexual Behavior*, 5 SEXUALITY RES. & SOC. POL'Y 18 (2008).

benefit of avoiding pregnancy and disease.[109]

Adolescent involvement in criminal activity receives more attention from policymakers than any other form of teenage risk-taking. We postpone a comprehensive analysis of this issue until we have explored the role of peer influence, the primary dimension of social context influencing teenage criminal choices. But as our analysis in this section suggests, many other variables in the adolescents' social context can increase or decrease the likelihood that teenage risk-taking involves criminal activity, and, if so, the form of criminal activity. We have discussed the role of parents and the availability (or not) of activities that might tempt the reward-seeking teenager. But social context also includes the neighborhood, school, and community, each of which can either constrain or encourage the adolescent's inclination to get involved in risky, antisocial activities. The school, for example, may be a well-managed facility in which discipline is maintained and students, supervised by authoritative adults, engage in positive learning experiences and extra-curricular activities. Alternatively, the school can be a chaotic setting in which teachers and administrators have little control over students, and those students who are so inclined are free to pursue antisocial activities. In either case, social context plays a key role in deterring or facilitating antisocial activities.

2. Peer Influence and Risky Activity

Peers constitute the environmental stimuli that most powerfully influence adolescents' involvement in risky activities. As Part I showed, adolescents are susceptible to peer influence to a greater extent than either younger children or adults, and they also seek peer approval, which may involve initiating activities that peers will find exciting or pleasurable. In addition, recent research has shown that the mere presence of peers

109. Experts attribute a decline in teenage pregnancy rates recently to policies designed to facilitate contraceptive use by authorizing minors' independent access to contraceptives in convenient locations. Some evidence suggests that declines in teen pregnancy are linked to the increased use of long-acting reversible contraceptives that mitigate the effects of adolescent impulsivity. *See, e.g.*, Justin T. Diedrich et al., *Long-Acting Reversible Contraception in Adolescents: A Systematic Review and Meta-Analysis*, 216 AM. J. OBSTETRICS & GYNECOLOGY 364.e1 (2017), http://www.ajog.org/article/S0002-9378(16)46213-7/fulltext.

activates the brain's reward circuitry to a much greater extent among adolescents than adults, and that this heightened activation is linked to increased risk-taking.[110] Thus, peers play a major role in creating opportunities for risk-taking and in influencing whether an adolescent pursues particular opportunities otherwise available in the social environment.

The adolescent propensity for risk-taking is normative, but its form and extent are often driven by peers. Indeed, despite the hard-wired developmental traits that facilitate engagement in risky behavior, *solitary* risk-taking is less common among adolescents than among adults.[111] In real world settings, adolescents and young adults typically drink alcohol, use drugs, exceed the speed limit, and (particularly) commit crimes in the presence of, or in complicity with, peers to a greater extent than older adults.[112] Moreover, peers can influence teens in both pro-social and anti-social directions.[113] Pro-social peers can reinforce the goals of getting good grades and excelling in socially useful activities.[114] Indeed, research demonstrates that peers can have direct positive impact on adolescent risk behavior. For example, one laboratory-based study using a driving simulation game found that adolescents ages sixteen to seventeen demonstrated safer driving while in the presence of a cautious (rather than risky) peer, regardless of individual differences in susceptibility to peer pressure.[115] However, peers who encourage, facilitate, or support

110. Chein et al., *supra* note 27**.** As described in Part I, an adolescent in a laboratory setting, who is merely told that he or she is being observed by peers, experiences heightened activation in brain regions associated with reward processing and tends to take greater risks in completing assigned tasks than one who believes that he or she is alone.

111. Zimring & Laqueur, *supra* note 46.

112. Dustin Albert & Laurence Steinberg, *Peer Influences on Adolescent Risk Behavior*, *in* INHIBITORY CONTROL AND DRUG ABUSE PREVENTION: FROM RESEARCH TO TRANSLATION 211 (Michael T. Bardo et al. eds., 2011).

113. B. Bradford Brown et al., *A Comprehensive Conceptualization of the Peer Influence Process in Adolescence*, *in* UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS 17 (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008); Sophia Choukas-Bradley et al., *Peer Influence, Peer Status, and Prosocial Behavior: An Experimental Investigation of Peer Socialization of Adolescents' Intentions to Volunteer*, 44 J. YOUTH & ADOLESCENCE 2197 (2015).

114. For example, members of a high school sports team can support each other in channeling their reward-seeking impulses in a direction that is less harmful than drinking or car racing.

115. *See* Christopher N. Cascio et al., *Buffering Social Influence: Neural Correlates of Response Inhibition Predict Driving Safety in the Presence of a Peer*, 27 J. COGNITIVE NEUROSCIENCE 83 (2015).

involvement in risky activities can serve as catalysts that mobilize the adolescent's proclivity for sensation-seeking and direct it toward potentially harmful actions.

Peer groups vary in the extent to which antisocial risk-taking plays a role in their social interactions. Some teenagers associate with peers who only occasionally engage in dangerous risk-taking, while others are part of antisocial peer groups heavily involved in one or more forms of illicit activities.[116] Yet, no sharp dichotomy typically exists between pro-social and anti-social peers. A broad range of adolescents are attracted to exciting activities that may be associated with physical and social risks. Thus, generally pro-social teenagers can sometimes instigate or participate in potentially harmful activities, just as anti-social adolescents also sometimes respond to peer influence to engage in socially desirable behavior.[117]

Most adolescents experiment with some mix of the risky behaviors described earlier. But whether a teenager engages in a particular form of risk-taking, and to what extent, is influenced by its availability and by the preferences of the peer community, which interact with broader cultural factors that can vary over time and across cultures. For example, teenage drinking and drug use have been more popular in some historic periods than others, and peer sub-communities may vary in their substance of choice. Criminal activity is also influenced by cultural factors. Criminologists credit the widespread availability of guns as a key contributor to the spike in juvenile homicide rates in the late 1980s and early 1990s.[118] Disputes that were settled through fistfights in an earlier era were resolved with guns in the late twentieth century.

Only recently has research directly shed light on how the interaction between the individual adolescent and the peer group facilitates participation in risky activities. A study by Jason Chein and colleagues found that the presence of peers leads to increased risk-taking by adolescents but not adults. The study also found that peer presence

116. Chris Melde & Finn-Aage Esbensen, *Gang Membership as the Turning Point in the Life Course*, 49 *CRIMINOLOGY* 513 (2011).

117. Sarah Fischer & Gregory T. Smith, *Deliberation Affects Risk Taking Beyond Sensation Seeking,* 36 PERSONALITY & INDIV. DIFFERENCES 527, 527-37 (2004).

118. Zimring & LaQuer, *supra* note 46.

activated the brain regions associated with the anticipation of potential rewards in adolescents, suggesting that greater neural activation in the brain's reward centers is associated with increased risk taking. Importantly, in this study, subjects were merely *told* that they were being observed by peers from another room; the responses in brain activity and risk-taking were not due to actual peer pressure.[119] Other studies from this team of scientists have shown that, even in the absence of opportunities to engage in risk-taking, the presence of peers activates adolescents' reward centers and increases adolescents' preference for immediate rewards.[120]

It is possible to hypothesize with some confidence the dynamic between individual adolescents and peers that leads to risky activities in real-world settings when we consider the following: a) normative adolescents are particularly susceptible to peer influence due to heightened sensitivity in the social brain; b) peers collectively constitute the primary component of social context for the individual adolescent; and c) those peers themselves typically are sensation-seeking adolescents who are prone to acting impulsively under conditions of emotional arousal and whose sensitivity to rewards is activated in the peer group context. In combination, it is unsurprising that the interaction among adolescent peers can be volatile, as one or more teenager serves as an active catalyst, encouraging others to participate in risky behavior that perhaps none would undertake on his or her own.

This dynamic interaction between individual and peers plays out against a backdrop in which opportunities to engage in risky activities vary, as described above. The patterns of risk-taking varies with age; for example, fifteen-year-olds drink alcohol less than twenty-year-olds. It also varies with parental norms and supervision, and by neighborhood, school setting and other factors that determine whether, how, and if sensation-seeking adolescents will likely act on their impulses.

It is well established that risk-taking declines as individuals mature. Most forms of risky behavior peak in late adolescence and early

119. *See* Chein et al., *supra* note 27.

120. *See* Ashley R. Smith et al., *Age Differences in the Impact of Peers on Adolescents' and Adults' Neural Response to Reward*, 11 DEV. COGNITIVE NEUROSCIENCE 75 (2015); Alexander Weigard et al., *Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards*, 17 DEV. SCI. 71 (2014).

adulthood:[121] a trend that is observed across cultures varying in their social, political, cultural, and economic contexts.[122] This pattern likely reflects the reality that many forms of risky behavior are driven by the interaction of an immature individual and a social context of peers who encourage risk-taking.[123] As adolescents mature, their propensity for sensation-seeking declines and the brain's executive functions improve, along with communication between the pre-frontal cortex and emotional centers of the brain. This maturation process results in better emotional regulation and behavioral control in arousing contexts, reducing impulsivity and the inclination to engage in risk-taking, including criminal activity. Importantly, this developmental process toward maturity proceeds in most adolescents alongside his peers such that the individual's social context changes as his peers also mature; he is no longer surrounded by sensation-seeking individuals, inclined, as he was, to make impulsive choices when emotionally aroused.[124]

A key insight of this analysis is that the primary exogenous influence on normative adolescent risk-taking is other adolescents, who as individuals are themselves inclined toward risk-taking, and who collectively constitute the main component of the teenager's social context. As individual adolescents mature, they become less susceptible to peer influence, less inclined toward sensation-seeking, and less impulsive; this maturation process also diminishes the individual's role as part of a risk-promoting peer context. Thus, each adolescent is both an individual maturing into adulthood who is becoming less inclined toward risk taking and a part of the social context that is becoming less facilitative of risk-taking due in part, as discussed below, to the assumption of work and relationship responsibilities.[125]

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121. Steinberg, *supra* note 12.

122. *See* Duell et al., *supra* note 75.

123. *See, e.g.*, Kathryn C. Monahan, Lawrence Steinberg, & Elizabeth Cauffman, *Affiliation with Antisocial Peers, Susceptibility to Peer Influence, And Desistance from Antisocial Behavior During the Transition to Adulthood*, 45 DEV. PSYCHOL. 1520 (2009).

124. Sweeten, Piquero & Steinberg, *supra* note 81, at 934-936.

125. Research indicating low rates of exposure to delinquent peers in early adolescence, increasing rates in middle and late adolescence and declining rates thereafter is consistent with this point. Mark Warr, *Age, Peers and Delinquency* 31 CRIMINOLOGY 17, 17-40 (1993). Early adolescents as individuals are developmentally less inclined toward antisocial behavior than older teens; thus the peer group of delinquent teens is small.

B. Adolescent Criminal Activity and Social Context

In conversations about crime prevention and public protection, juveniles are usually treated as a sub-category of offenders—a group that offends at high rates due to adolescent immaturity. But most adolescent involvement in criminal activity has more in common with teenage drinking, unsafe sex and car racing than with the criminal choices of adult offenders. For our purposes, it is more useful to view juvenile offending as a form of adolescent risk-taking than as a discrete form of antisocial behavior. It is often observed that age eighteen is the peak age for involvement in criminal activity, and that the crime rate falls steeply after the early twenties.[126] Other risky behavior follows a similar pattern, and developmentalists generally think the same biological and psychological mechanisms underlie criminal activity as other forms of risk-taking.[127] Thus, juvenile offending often may be attributed to youths acting upon a developmentally normative drive toward novel, exciting experiences. In a facilitative social context, adolescents direct their drive for sensation and risk toward anti-social or delinquent behaviors.

Like other forms of risk-taking in adolescence, criminal activity involves a dynamic interaction between the still-maturing teenager and his or her social context. As is true with other risk-taking, social context can deter or facilitate anti-social behavior. Thus, authoritative parents can provide structure and supervision for their children that reduce the risk of youthful offending, while disengaged parents likely perform no such deterrent function. Indeed, research suggests that greater parental monitoring is associated with longitudinal decreases in delinquency and aggression among young adolescents, regardless of affiliations with delinquent peers.[128] Neighborhoods also vary as social contexts for offending. In low-crime neighborhoods, non-criminal residents perform an

126. Manuel Eisner, *Crime, Problem Drinking, and Drug Use: Patterns of Problem Behavior in Cross-National Perspective*, 580 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 204 (2002); Sweeten, Piquero & Steinberg, *supra* note 81, at 931-934. Scott, Bonnie & Steinberg, *supra* note 66.

128. Julia A. Graber et al., *A Longitudinal Examination of Family, Friend, and Media Influences on Competent Versus Problem Behaviors Among Urban Minority Youth*, 10 APPLIED DEV. SCI. 75, 80-81 (2006).

informal monitoring function and may discourage criminal activity simply by being out and about on the streets and sidewalks and in the parks.[129] In high-crime neighborhoods, in contrast, residents may stay indoors out of fear for their safety, providing greater opportunity for criminal activity.[130] Neighborhood conditions can also reinforce both anti-social behaviors and psychological traits such as impulsivity. Research has linked community violence to disrupted behavioral control[131] and perpetual hyper-arousal among youth.[132] Further, dangerous environments can teach youth that violence is an effective method of problem solving, and therefore violence and delinquency become learned behaviors.[133] For individuals living in high-crime neighborhoods who feel chronically threatened, carrying a gun and acting reflexively or impulsively may be adaptive behaviors. As suggested above, schools also can be safe and supervised educational settings, or environments in which adolescents, gathered together in close proximity for extended periods, are subject to few exogenous constraints and many temptations to engage in antisocial behavior. Further, the extent to which youth are engaged in educational pursuits and feel connected to their school correlate with long-term effects on adolescent delinquency and substance use.[134]

As we have indicated, peers constitute the element of social context most likely to activate an individual adolescent's reward-seeking tendencies, and typically peers are the most important contextual contributor to risk-taking. Research confirms that affiliation with anti-social peers is the factor most predictive of juveniles' involvement in

129. Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy for Children*, 277 *SCI.* 918, 918-919 (1997) .

130. *Id.*

131. *See generally* Michael R. Cooley-Quille et al., *Emotional Impact of Children's Exposure to Community Violence: A Preliminary Study*, 34 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1362 (1995); Patrick Fowler et al., *Community Violence: A Meta-Analysis on the Effect of Exposure and Mental Health Outcomes of Children*, 21 DEV. & PSYCHOPATHOLOGY 227, 227-59 (2009); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy for Children*, 277 *SCI.* 918 (1997).

132. W. Cody Wilson & Beth S. Rosenthal, *The Relationship Between Exposure to Community Violence and Psychological Distress Among Adolescents: A Meta-Analysis*, 18 VIOLENCE & VICTIMS 335 (2003); Fowler et al., *supra* note 131.

133. Fowler et al., *supra* note 131.

134. Yibing Li et al., *The Role of School Engagement in Preventing Adolescent Delinquency and Substance Use: A Survival Analysis*, 34 J. ADOLESCENCE 1181 (2011).

criminal activity.[135] Even adolescents who are not inherently delinquent or anti-social are more likely to engage in anti-social behaviors when they socialize in groups of teens in unstructured, unsupervised settings; this finding highlights the important role of context in facilitating adolescent risk behavior.[136] In this section, we examine how anti-social peer affiliation develops and probe the interaction between the individual and his or her adolescent peer group as that interaction relates to offending. This interaction can shed some light on the functioning of juvenile gangs. It also informs our understanding of the role of peers in the trend toward desistence in early adulthood.

1. Affiliation with Anti-Social Peer Groups

Although most adolescents engage in risk-taking, including some forms of criminal activity, most do not associate with peers whose risk-taking takes the form of chronic or serious criminal activity. Why do some adolescents tend to affiliate with anti-social peers while others find friends less likely to get into serious trouble? This question has been the focus of some research in recent years; not surprisingly, it appears that several factors contribute to peer group affiliation.

First, the tendencies and traits of the individual adolescent play a role in peer associations. Some teens are more inclined toward sensation-seeking and more impulsive than the norm, and they may be attracted to the extreme risk-taking activities of anti-social peers; others may lack the social skills to affiliate with more desirable peer groups. Studies of peer group formation show that some teenagers resort to anti-social peer groups because they are rejected from higher-status crowds.[137] Of course, intense sensation seekers might associate with peer groups that pursue extreme sports or other dangerous activities, but some will likely be attracted to a peer group that engages in criminal activity if such a group is available or if access to more pro-social groups is constrained.

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135. Sweeten, Piquero & Steinberg, *supra* note 81.

136. Sonja E. Siennick & D. Wayne Osgood, *Hanging Out with Which Friends? Friendship-Level Predictors of Unstructured and Unsupervised Socializing in Adolescence*, 22 J. RES. ADOLESCENCE 646, 647-48 (2012).

137. ROBERT B. CAIRNS & BEVERLEY D. CAIRNS, LIFELINES AND RISKS: PATHWAYS OF YOUTH IN OUR TIME 130-46 (1994).

Parents play an important, if indirect, role in their children's peer group associations. Research has found that parents' values and preferences about their children's associations seem to influence adolescent peer group affiliations.[138] If parents are distant and fail to monitor their children, or if parents themselves endorse antisocial or criminal norms, it is more likely that teenagers will affiliate with deviant peer groups.[139] One study found evidence that parents fostered certain traits or behavior patterns in their children, which then predicted peer group affiliation.[140] Moreover, parents' influence on peer affiliation likely predates adolescence. Snydor and colleagues found parental failure to discipline their children's anti-social behavior to be a precursor to association with deviant peers.[141] Parents also determine the neighborhood, community, and school in which the teen will live, which determine the peer groups that are *available* for affiliation. Of course, parents themselves may have few residential options due to economic and social constraints. These limitations can restrict poor families to high-crime neighborhoods where delinquent peers are ubiquitous. In this situation, the adolescent's social context may offer few pro-social peer group options.

This last point is important in understanding why adolescents in some neighborhoods and communities are far more likely to associate with deviant peers than teenagers in other settings. In some neighborhoods, most male peer groups are committed to involvement in criminal activity. In this environment, an adolescent's realistic options may not include pro-social peer groups. Neighborhood geography also may limit the choices available to individual teens; urban teenage gang members are likely to live in close proximity to one another. The alternative of avoiding peer affiliation altogether is unattractive to most teenagers, although it may appeal to parents seeking to protect their children from gang involvement.

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138. B. Bradford Brown, Nina S. Mounts, Susie D. Lamborn & Laurence Steinberg, *Parenting Practices and Peer Group Affililiation in Adolescence*, 64 CHILD DEV. 467 (1993).

139. Several early studies found a link between affiliation with deviant peers (usually involved in drug use) and parental modeling or disengagement. *See generally* Denise B. Kandel & Kenneth Andrews, *Processes of Adolescent Socialization by Parents and Peers*, 22 INT'L J. ADDICTIONS 319 (1987); E.R. Oetting & Fred Beauvais, *Peer Cluster Theory, Socialization Characteristics, and Adolescent Drug Use: A Path Analysis*, 34 J. COUNSELING PSYCHOL. 205 (1987).

140. Brown, Mounts, Lamborn, & Steinberg, *supra* note 138.

141. J. Snyder, T.J. Dishion & G.R. Patterson, *Determinants and Consequences of Associating with Deviant Peers during Preadolescence and Adolescence*, 6 J. EARLY ADOLESCENCE 20 (1986).

Further, in high-crime neighborhoods, peer group affiliation may be deemed a source of security as well as excitement and camaraderie. Hostility among adolescent peer groups may leave the unaffiliated youth vulnerable to attack and harassment, as gang membership provides a defense against attacks by other gangs.[142] The upshot is that adolescents in high-crime neighborhoods may be very limited in their peer group options. They may affiliate with deviant peers as "the only game in town."

2. Peer Group Influence and Juvenile Offending

Adolescents' susceptibility to peer influence and desire to please peers can influence juvenile offending in two ways. First, adolescents offend in groups at substantially higher rates than do adults.[143] The impact of peers on one another in a group setting likely enhances the salience of potential rewards associated with certain behaviors, leading to emotional arousal and sensation-seeking, which in turn may overwhelm the adolescent's still maturing ability to control impulsive behavior. Thus, the prospect of acquiring money or vanquishing a rival gang that poses a threat becomes more exciting in the peer context. Each youth likely is also sensitive to the approval of others in the group. As the planning of a crime proceeds, withdrawal by individual youths may be very costly, leading to rejection and even exclusion from the peer group. Moreover, in his emotionally aroused state, the adolescent is more likely to focus on the potential short-term rewards of the criminal act, while paying scant attention to the potential downside.

The power of peer influence on the individual adolescent operates even without overt peer pressure or even peer presence.[144] Thus, a second form of peer influence occurs if a teenager acts with the goal of positively impressing his peer group. An adolescent seeking peer approval might act alone to steal something in anticipation of his friends' approving response. This variation is important for two reasons. First, it suggests that

142. Charles M. Katz et al., *Understanding the Relationship Between Violence Victimization and Gang Membership*, 39 J. CRIM. JUST. 48 (2011) ("[T]he cohesiveness and solidarity among gang members . . . result[s in] . . . members' perception that the gang provides valuable protection").

143. Zimring & LaQueur, *supra* note 46.

144. Chein, *supra* note 27 (describing study in which subjects were told that peer was watching them perform task; adolescents took more risks than adults).

anticipated peer response can influence adolescent behavior, even when peers are not present.[145] Second, it suggests that identifying an adolescent as a leader (or initiator of criminal activity) or follower may sometimes not be a meaningful distinction. An adolescent who acts to impress antisocial peers may simply be conforming to peer group expectations.

We can only tentatively describe the actual process through which individual adolescents in an anti-social peer group plan and execute a criminal offense; not surprisingly, field research has not been undertaken. However, the body of developmental knowledge that we have described can inform our understanding of the interaction between individuals and peer groups in this context. The following scenario comports well with developmental knowledge: Several friends are hanging out on a Friday evening when one suggests robbing the local convenience store. As the group discusses the idea, they become excited at the prospect of the cash they will acquire in the hold-up; several advocate eagerly for the plan and others join in the enthusiasm; most do not consider the potential risks they may face, including the risk of apprehension or the possibility that the store clerk will be armed and will fire in self-defense; most also do not think about the cost of a delinquency adjudication to their future lives, and those who do consider the potential risks may decide that the benefits of the act (e.g., peer approval, earning money, having fun) outweigh the potential costs. Any youth who has qualms about the plan is silent, not wanting to earn the anger or ridicule of his friends.

In situations of gang rivalry, involvement in criminal activity may implicate more complex responses in adolescent gang members than the reward-seeking impulses associated with juvenile offenses aimed at financial gains.[146] When adolescent gangs compete with one another for territorial dominance, individual members of each gang are likely emotionally aroused by the prospect of the gains associated with victory over the rival. A rival gang poses a threat of physical harm, but threats, like rewards, can be emotionally arousing.[147] The dual sources of

145. *Id.*

146. For a comprehensive analysis of gang membership and behavior in a developmental perspective, see TERENCE P. THORNBERRY ET AL., GANG AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE (2003).

147. Cohen, et. al., *supra* note 9; Amanda E. Guyer et al., *A Developmental Examination of Amygdala Response to Facial Expressions,* 20 J. COGNITIVE NEUROSCIENCE 1565, 1565-82 (2008)

emotional arousal experienced by gang members may escalate emotional responses, creating in individual members of each gang a hyper-vigilance to anticipated attack and urgent desire to preempt rivals in attaining territorial goals. In planning a gang activity, individual members are likely to reinforce one another in their excitement about the prospect of attaining the goal, with little immediate attention to the risk of injury or death inherent in the confrontation. But as the confrontation unfolds, the threat of harm becomes highly salient, triggering quick responses. This dynamic interaction between the individual adolescent and his peer group in a hostile, threatening context invites impulsive responses that often involve violence.[148]

3. Social Context and Limits on Exit

The Supreme Court in its juvenile sentencing opinions has underscored a final point about social context and juvenile offending. A juvenile by virtue of his status as a legal minor cannot escape his family, neighborhood, or his limited options for peer associates.[149] Unlike an adult, who (theoretically, at least) can leave the temptation of a high-crime neighborhood, a juvenile cannot extricate himself.[150] Thus, the adolescent whose circumstances place him in a social context that encourages involvement in crime does not have the option of moving to a community in which he can enjoy the benefit of authoritative parents, an enriched educational setting, a safe neighborhood, and pro-social peers—elements of social context that would reduce the likelihood that he will get involved in serious crime.

(compared to adults ages 21-40, adolescents ages 9-17 evinced greater activation to fearful faces in the amygdala, which is responsible in part for processing emotional information); Jeffrey M. Spielberg et al., *Exciting Fear in Adolescence: Does Pubertal Development Alter Threat Processing?*, 8 DEV. COGNITIVE NEUROSCIENCE 86, 86-95 (2014).

148. Katz et al., *supra* note 142**.**

149. *See* Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama 567 U.S. 460 (2012).

150. Scott & Steinberg, *supra* note 17.

4. Social Context and Desistence from Criminal Activity.

It is well established that criminal offending increases through adolescence, peaks between ages seventeen and eighteen, and declines sharply thereafter.[151] This pattern is similar to that observed for other forms of risk-taking, although the peak age varies somewhat for different types of risky behavior.[152] Further, the factors contributing to the decline in other risk-taking in late adolescence and young adulthood also may drive desistence from criminal activity. Most importantly, desistence from crime is correlated with the declining susceptibility to influence from antisocial peers. Substantial evidence supports that the decline in affiliation with anti-social peers as adolescents transition to adulthood is the most important contributor to the declining rate of participation in crime post-adolescence.[153]

Most adolescents desist from offending (and other forms of risk-taking) through a process that is linked to maturation; as the individual adolescent and his peers mature, the dynamic interaction that propelled juvenile offending weakens. Reward-seeking and extreme sensitivity to peers, developmentally normal tendencies in adolescence, decline with maturity: as the individual ages, he or she is less prone to emotional arousal at the prospect of criminal activity with peers.[154] At the same time, decision-making improves as the young adult becomes less impulsive and the executive functions of the brain operate more effectively, facilitating the regulation of emotions and consideration of future consequences.[155] As noted earlier, because this maturation is typical of most adolescents, both the individual and his peers (the most important exogenous contributor to adolescent involvement in crime) are changing simultaneously. The individual becomes less inclined to offend, and the peer group is less

151. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 52-53 (2008).

152. *See generally* Ivy N. Defoe et al., *A Meta-Analysis on Age Differences in Risky Decision Making: Adolescents Versus Children and Adults*, 141 PSYCHOL. BULL. 48 (2015); Teena Willoughby et al., *Examining the Link Between Adolescent Brain Development and Risk Taking from a Social-Developmental Perspective*, 83 BRAIN & COGNITION 315 (2013); Scott, Bonnie & Steinberg, *supra* note 66.

153. Sweeten, Piquero & Steinberg, *supra* note 81.

154. *See* discussion *supra* Part I.A.1 and Part II.B.2.

155. *See* discussion *supra* Part I.B.

likely to play its facilitative role of inducing emotional arousal and promoting criminal activity. The excitement associated with criminal activity declines while the potential costs and risks become more salient.[156]

As adolescents mature into adulthood, social context changes in other ways that likely contribute to desistence from offending. Robert Sampson and John Laub have argued that employment and spousal roles in adulthood encourage desistence from involvement in criminal activity.[157] For most adults, these conventional roles provide structure and a social context that limits opportunities for risk-taking. The time demands and routines of work and family responsibilities make participation in criminal activity more costly. This account is compatible with the rationale for desistence that emphasizes the impact of adolescents' normal maturation on both the individual propensity toward offending and the peer group's catalytic role. The conventional adult roles that bring stability to the lives of formerly anti-social youth require maturity; sensation-seeking, impulsive adults are unlikely to be successful as employees and life partners. Moreover, as peers themselves mature and assume adult roles, social pressure to engage in criminal activity likely declines and mainstream social norms encourage responsible fulfillment of role obligations.

C. Non-Normative Antisocial Behavior in Adolescence

Not all offending by juveniles can be explained as a product of the interaction between immature, but developmentally normative, adolescents and their peers, who are themselves immature teenagers. Some individuals are inclined toward serious anti-social behavior in childhood, differing in important ways from teens whose involvement in criminal activity begins in adolescence. Some early-onset offenders may also desist as they mature,[158] but normative brain development in adolescence, by definition,

156. Elizabeth Shulman, Kathryn Monahan, & Laurence Steinberg, *Severe Violence During Adolescence and Early Adulthood and Its Relation to Anticipated Rewards and Costs*, 88 CHILD DEV. 16, 17 (2017).

157. JOHN LAUB & ROBERT SAMPSON, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 6-24 (1993).

158. Rolf Loeber & Thomas J. Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCHOL. BULL. 68, 78-81 (1983). Terrie E. Moffitt & Avshalom Caspi, *Childhood Predictors*

does not contribute to their early maladaptive behavior. Moreover, although most juvenile offending declines sharply beginning in late adolescence, some individuals persist in criminal pursuits into adulthood;[159] either they have failed to mature or maturation has not led them to desist from criminal activities. Although this category of offenders is small compared to normative juveniles, it includes the most serious offenders who cause the most social harm.[160]

Comprehensive examination of early-onset offenders and "life-course-persistent"[161] offenders is beyond the scope of this Article. Nonetheless, brief consideration of these individuals, and how their involvement in crime differs from that of normative adolescents, is in order. Developmentalists and criminologists agree that several factors contribute to serious antisocial behavior in childhood, including hyperactivity and attention-deficit disorders, other neurological deficits, learning disabilities, and inadequate or abusive parenting.[162] Early-onset offenders are often children with complex problems whose parents are incapable of providing adequate supervision and the support needed to overcome the challenges they face. Indeed, even adequate parents may be unsuccessful in dealing with these children.[163] Thus, the source of their antisocial behavior may be endogenous, or it may be the product of an interaction of individual factors and childhood social context. Unlike normative adolescent offenders, however, the individual factors are not primarily normal developmental influences, and peers do not constitute the primary influence of social context. But, when these children persist in their anti-social behavior into adolescence, their individual deficits may combine with normative influences associated with adolescence, making them particularly vulnerable and likely to engage in criminal activity.

Some adolescent delinquents become adult criminals, and their

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Differentiate Life-Course-Persistent and Adolescence-Limited Antisocial Pathways Among Males and Females 13 DEV PSYCHOPATHOL 355, 367-79 (2001).

159. Terrie E. Moffitt. *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy* 100 PSYCH REV. 674, 677 (1993).

160. *Id.*

161. *Id.* Moffitt offers a taxonomy in which most juvenile offenders are "adolescence-limited"; their offending begins and ends in adolescence. A small group, however, are "life-course persistent" offenders, whose antisocial conduct begins in childhood and continues into adulthood.

162. *Id*. at 679-682.

163. *Id.* at 682.

offending can no longer be attributed to normal developmental immaturity and the predictable influence of normative peers. This group includes early onset offenders, but also individuals who began to offend in adolescence.[164] In the latter case, as we discuss below, the individual's life trajectory may have been shaped by his interaction with the justice system, and by sanctions that impede normal development. In general, however, the impulsive, sensation-seeking behavior of the adult criminal will be taken to represent individual characterological deficits and not residual adolescent immaturity from which the individual is likely to emerge.[165] For our purposes, the important point is that we currently lack the tools to distinguish accurately during adolescence the normative juvenile offender who likely will mature out of his or her tendency to get involved in crime from the emerging career criminal or the psychopath.[166] Because the vast majority of adolescents who violate the law do not become chronic adult criminals, information about an offender's adolescent misbehavior is seldom predictive of adult criminality.

III. CORRECTIONAL PROGRAMS AS SOCIAL SETTINGS

To this point, we have focused on how the dynamic interaction between the still-maturing adolescent and his or her peers (and other environmental influences) contributes to risk-taking, including criminal activity. Beyond this, the extreme sensitivity of adolescents to their social context has a broader impact on their development to adulthood: the individual's interaction with her social context during adolescence can determine whether he or she accomplishes developmental tasks essential to successful maturation. For adolescents in the justice system, correctional facilities and programs constitute this social context and can

164. Rolf Loeber & Magda Stouthamer-Loeber, *Development of Juvenile Aggression and Violence: Some Common Misconceptions and Controversies*, 53 AM. PSYCHOLOGIST 242 (1998).

165. Scott and Steinberg, *Blaming Youth*, *supra* note 17.

166. Jennifer L. Skeem & Elizabeth Cauffman, *Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory*, 21 BEHAV. SCI. & L. 737 (2003); Gina M. Vincent et al., *Subtypes of Adolescent Offenders: Affective traits and Antisocial Behavior Patterns*, 21 BEHAV. SCI. & L. 695 (2003). *But see* Randall T. Salekin, *Psychopathy and Recidivism From Mid-Adolescence to Young Adulthood: Cumulating Legal Problems and Limiting Life Opportunities*, 117 J. ABNORMAL PSYCHOL. 386 (2008).

have a critical impact on whether they successfully navigate the transition to productive adulthood.

Developmental psychologists explain that adolescence is a formative period of psychological and social development, during which an individual's experience can shape the trajectory of his or her future life. During adolescence, individuals begin to acquire skills and capacities necessary for successful maturation and the assumption of conventional adult roles of employee, spouse or intimate partner, and citizen.[167] For most adolescents, this maturation process depends on several conditions in the social context that provide "opportunity structures"[168] for healthy development. Two of these conditions represent the obverse of the elements of social context that promote antisocial risk-taking: the presence of an authoritative adult who cares about the youth and can provide guidance and structure,[169] and membership in a pro-social peer group (and minimal influence of antisocial peers). A third important condition of a healthy social context, more indirectly implicated in risk-taking, is participation in meaningful activities that promote autonomous decision-making and critical thinking. The accomplishment of essential developmental tasks in adolescence typically involves reciprocal interaction between the individual and a social context that provides these conditions.[170]

In recent years, work in developmental neuroscience indicating that adolescence is a heightened period of neural plasticity has buttressed this view of adolescence as a formative period in psychological development.[171] "Plasticity" refers to the capacity of the brain to change with experience. Neuroscientists distinguish between two types of plasticity: "developmental plasticity" permits large-scale transformations in brain circuitry, including the development of new circuits and the

167. He Len Chung, Michelle Little, & Laurence Steinberg, *The Transition to Adulthood For Adolescents in the Juvenile Justice System: A Developmental Perspective*, ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 68-91 (W. Osgood et al., eds., 2005).

168. *See* SCOTT & STEINBERG, *supra* note 151, at 58, 213.

169 For many youths, this adult is a parent, but another adult can also fulfill this role. *Id.* at 56

170. *Id.* at 56-57.

171. Adriana Galván, *Insights about Adolescent Behavior, Plasticity, and Policy from Neuroscience Research*, 83 NEURON 262 (2014), http://linkinghub.elsevier.com/retrieve/pii/S0896627314005492.

disappearance of old, unnecessary ones, while "adult plasticity" only allows for minor modifications of existing brain circuits.[172] Adolescence is thought to be the last period of developmental plasticity.

Adolescence is a unique period of developmental plasticity in four important respects, all of which have implications for juvenile justice policy and practice.

First, adolescence is a second period of particularly heightened plasticity, the first being the first few years of life. It has long been known that the brain is particularly sensitive to the environment during the early years,[173] an observation that has understandably motivated much discussion about the importance of investing in high-quality prenatal and postnatal care, child care, and early education. More recent research has revealed that the brain undergoes a second burst of plasticity at adolescence.[174] Researchers only recently have begun to articulate the underlying mechanisms of this burst in plasticity, but several studies point to the impact of pubertal hormones on the brain as its likely trigger.[175] We have explained that adolescence is a time during which individuals are especially sensitive to the social environment; a response thought to be associated with puberty.[176] An important implication of this discovery is that the social context in which the adolescent spends time may have a more profound impact on his or her behavior than during childhood or adulthood. Not surprisingly, this knowledge has begun to inform discussions about the treatment of young people in the justice system.

Second, the brain regions that are thought to be especially plastic during adolescence are those involving the adolescent's response to reward and those involving the development of self-regulation.[177] As we

172. The brain is always somewhat plastic—it would be impossible to learn new skills or acquire new information if it were not. Charles A. Nelson III & Margaret A. Sheridan, *Lessons from Neuroscience Research for Understanding Causal Links Between Family and Neighborhood Characteristics and Educational Outcomes*, *in* WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 27-46 (Greg J. Duncan & Richard J. Murnane eds., 2011).

173. *See* Spear *supra* note 63 at S10.

174. *See* Galván *supra* note 171.

175. Jiska S. Peper et al., *Sex*, *Steroids and Connectivity in the Human Brain: A Review of Neuroimaging Studies*, 36 PSYCHONEUROENDOCRINOLOGY 1101, 1102-03 (2011); Cheryl L. Sisk & Julia L. Zehr, *Pubertal Hormones Organize the Adolescent Brain and Behavior*, 26 FRONTIERS IN NEUROENDOCRINOLOGY 163, 169 (2005).

176. *See* Moffitt, *supra* note 159.

177. Kathrin Cohen Kadosh, David E.J. Linden, & Jennifer Y.F. Lau, *Plasticity During*

have explained, because the interplay between these brain regions is thought to play a crucial role in adolescent risk taking, experiences during adolescence have the potential to enhance or diminish normative development in the very parts of the brain implicated in criminal and other antisocial behavior. That is, experiences during this period have the potential to strengthen or weaken self-control, and to strengthen or weaken reward sensitivity.

Third, the heightened malleability of the adolescent brain is a dual-edged sword.[178] On the positive side, the susceptibility of the adolescent brain to positive influence makes the period one of great opportunity, during which individuals may be especially good candidates for rehabilitative interventions. On the negative side, however, the same plasticity that makes the brain susceptible to positive influence makes it vulnerable to toxic experiences. Thus, research has shown that adolescents are particularly vulnerable to addiction, especially responsive to stress, and more likely than at any other time to experience serious mental health problems.[179] One important implication of this is that residential and correctional facilities in which adolescents are placed are likely to have a profound impact on their psychological functioning and development. Harmful correctional experiences, such as exposure to violence or social isolation, are likely to be particularly damaging at this stage of life.

Finally, just as there is a significant increase in plasticity early in adolescence, there is a corresponding decrease during the transition from adolescence to adulthood. The fact that the brain becomes less plastic as individuals mature out of adolescence is now well-established although the mechanisms that trigger this loss of plasticity have yet to be identified. Nonetheless, it is likely that adolescence represents an especially formative period in brain development, and that major changes in the brain

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Childhood and Adolescence: Innovative Approaches to Investigating Neurocognitive Development,16 DEV. SCI. 574, 576 (2013); Lynn D. Selemon, *A Role for Synaptic Plasticity in the Adolescent Development of Executive Function*, 3 TRANSLATIONAL PSYCHIATRY e238, e231-e232 (2013).

178. Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?*, 27 NEUROSCIENCE & BIOBEHAVIORAL REV. 3 (2003).

179. Lisa Eiland & Russell D. Romeo, *Stress and the Developing Adolescent Brain*, 249 NEUROSCIENCE 162 (2013); Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GENERAL PSYCHIATRY 593 (2005); Nora Volkow & Ting-Kai Li, *The Neuroscience of Addiction*, 8 NATURE NEUROSCIENCE 1429 (2005).

become increasingly intractable with age. This creates special urgency to intervene during this period to promote positive psychological functioning.

The research on brain plasticity in adolescence underscores the important impact of juvenile correctional programs on individual maturation during a critical developmental stage. Thinking about correctional settings as social contexts for development during a period in which individuals are highly sensitive and responsive to that context provides a critical perspective from which to evaluate justice system facilities and programs. As we saw in Part II, negative conditions (or the absence of positive conditions) in the adolescent's social context can contribute to harmful risk-taking. Neglectful parents, antisocial peers, and schools and neighborhoods devoid of productive, engaging activities contribute to juveniles' involvement in crime. Some correctional settings are also likely to have a very negative impact. The social-context framework clarifies why prisons are widely viewed as toxic developmental settings.[180] The likelihood that the adolescent inmate will establish a relationship with an authoritative adult is negligible. Relationships between guards and prisoners typically are hostile and distant, and adult inmates are unlikely to care for and provide positive adult guidance to juvenile prisoners.[181] The adolescent prisoner may find himself surrounded by anti-social peers and adults, and often has a great deal of unstructured time in their company.[182] Educational and vocational programs in prison often are deficient and few are tailored to the needs of adolescents.[183] Not surprisingly, juveniles sentenced to prison have high recidivism rates.

This analysis clarifies that even though much juvenile offending is the product of the interaction of immature adolescents and a social context that promotes risk-taking, maturation and desistence are not inevitable.

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180. U.S. Department of Justice, Bureau of Justice Statistics, *Correctional Population in the United States, 1995* (1997); SCOTT & STEINBERG, *supra* note 151, at 208-13; Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 254-164 (Jeffrey Fagan & Franklin E. Zimring, eds., 2000).

181. Juvenile prisoners are vulnerable to violent exploitation by older prisoners; alternatively, young inmates may be trained to become career criminals. SCOTT & STEINBERG, *supra* note 151; *see also* Jennifer Woolard et al., *Juveniles within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 1, 9 (2012), http://www.tandfonline.com/doi/abs/10.1080/14999013.2005.10471209.

182. *Id.*

183. *See* Bishop & Frazier, *supra* note 180.

Given heightened brain plasticity during adolescence, social context plays a key role in whether juveniles successfully accomplish the developmental tasks necessary to make the transition to productive adulthood, and it can undermine as well as facilitate progress. Thus the correctional setting in which the juvenile is sanctioned can play an important role in determining the trajectory of his or her future life.[184] Programs that aim to facilitate desistence in young offenders and encourage their transition to productive adulthood will attend to the impact of the developing youth's social context and seek to provide the conditions for healthy development.

IV. LEGAL IMPLICATIONS OF THE INTERACTIVE FRAMEWORK

In this Part, we explore the importance of the interactive framework that we have developed in this Article for legal doctrine and policy aimed at sanctioning juveniles for their crimes and deterring juvenile crime. First, the framework powerfully reinforces constitutional principles under which juvenile offenders generally are deemed less culpable than adults, and more likely to desist from offending as they mature into adulthood. These principles, in turn, support a broad range of justice policies premised on juveniles' reduced culpability and greater potential for reform. Our analysis of the interaction between the individual youth and his or her social context provides an effective response to the skeptics who reject the importance of immaturity as a mitigating factor in criminal liability on the ground that many adolescents do not engage in serious criminal conduct. Second, our interactive framework clarifies the importance of social context as a legitimate, but limited, contributor to a theory of mitigation, and as such it offers a useful intervention in a longstanding debate among criminal law scholars.[185] We have shown that social context has a far narrower, but more direct, impact on adolescents' criminal choices than was proposed by advocates arguing generally that environmental deprivation based on " rotten social background" [186] reduces culpability.

184. *See* THORNBERRY, *supra* note 146, analyzing the impact of gang membership on the trajectory of a young gang member's life.

185. *See infra* Part IV.C.

186. Delgado, "*Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*," *supra* note 19.

Finally, we highlight the policy importance of social context in developing sanctions for juveniles that are likely to promote, and not undermine, healthy maturation and desistence from crime. In general, focusing on the interaction between maturing adolescents and their social context provides a more complete account of juvenile offending and desistence than a model that emphasizes only the immaturity of teenage brains.

A. Reduced Culpability and Potential for Reform

The Supreme Court in its juvenile sentencing opinions announced that "children are different," and cited studies of brain development in its conclusion that harsh criminal sentences that might be appropriate for some adult offenders are unconstitutional for juveniles under the Eighth Amendment.[187] The Court focused primarily on how the immaturity of adolescents can lead them to make impulsive, reckless decisions and engage in "heedless risk-taking;"[188] it also observed that, because their crimes are the product of immaturity, most juvenile offenders will reform as they mature into adulthood and should be given the opportunity to do so.[189] Culpability skeptics have challenged this analysis, pointing to the very serious crimes committed by the juvenile petitioners in the cases before the Court, and observing that few adolescents commit similar crimes.[190]

It is not our purpose to analyze whether Chris Simmons (who killed a neighbor, bound her, and threw her in a nearby river) was driven by factors associated with adolescent immaturity or by largely endogenous influences.[191] Instead, we propose that our interactive framework provides important confirmation of the Supreme Court's "children are different" principle and shows that the skeptics' critique targets a narrow and empirically incomplete version of the Court's mitigation analysis. Indeed,

187. *Miller*, 567 U.S. at 480-81; *Graham*, 560 U.S. at 48; *Montgomery*, 136 S. Ct. at 73___.

188. *Miller*, 567 U.S.,at 471 (quoting *Roper*, 543 U.S. 551, 569 (2005)).

189. *Miller*, 567 U.S. 460; *Montgomery*, 136 S. Ct. at 735; *Roper*, 545 U.S. 551.

190. YAFFE, *supra* note 3; *Graham*, 560 U.S. at 112 (Thomas, J., dissenting); *Miller*, 567 U.S. at 513 (Thomas, J., dissenting)**.**

191. Chris Simmons was the petitioner in *Roper v. Simmons*. The Supreme Court finding his death sentence unconstitutional did not focus on Simmons individually, but observed the difficulty in distinguishing between the juvenile who was "irretrievably depraved," from the adolescent whose crime represented transient immaturity. *Roper*, 543 U.S. at 553

the Court in its sentencing opinions underscored the importance of social context and adolescents' normative sensitivity to that context as a key feature of juvenile offenders' reduced culpability. In *Miller v. Alabama*, the Court stated that juveniles are "constitutionally different from adults for purposes of sentencing, [in part because] they are more vulnerable . . . to negative influences and outside pressures, including from their family and peers"; they have "limited control over their own environment," and "lack the ability to extricate themselves from horrific crime-producing settings."[192] In these words, the Court succinctly summarized its understanding that important dimensions of the reduced culpability of juveniles and of their potential for reform can be found both in their extreme sensitivity to social context (an endogenous developmental factor), and in that social context itself (an exogenous influence). Neither of these contributors to juvenile offending is substantially within the control of the juvenile.

This point deserves elaboration. Adolescents' sensitivity to social context, particularly to emotional arousal in the presence of peers, is endogenous, associated with development of the social brain after puberty. The adolescent's control over this aspect of development is no greater than her control over other aspects of brain development, including the inclination toward reward-seeking or the tendency to make impulsive choices when aroused. To the extent that normative developmental immaturity mitigates juveniles' criminal culpability, susceptibility to peer influence and sensitivity to social context are as salient as other endogenous influences on decision-making. Further, like the teenager's inclination toward reward-seeking, susceptibility to peer influence declines with maturation.[193] This susceptibility is one dimension of developmental change that supports the Supreme Court's conclusion that juvenile offenders have a greater potential for reform than their adult counterparts. In short, the endogenous features of brain development that make adolescents particularly sensitive to social context function similarly to other aspects of social-emotional brain development (such as reward seeking and impulsivity) to distinguish juvenile offenders from adults. In combination, these features play a key role in criminal choices and support

192. *Miller*, 567 U.S. at 471 (quoting in part Roper v. Simmons, 543 U.S. 551, 569-70 (2005)).
193. *See* Gardner & Steinberg *supra* note 47.

greater leniency toward juvenile offenders.

The Supreme Court also recognizes that juveniles often have little control over their social context and usually no ability to extricate themselves from a setting that facilitates criminal activity.[194] Children and adolescents do not choose their parents, neighborhoods, schools, or communities. Parents may be neglectful and provide little supervision; the neighborhood and school may be dangerous, with little positive structure and few prosocial activities; and available peers may be inclined toward antisocial behavior. These conditions, as Part II explained, create a social context that facilitates youthful involvement in criminal activity. But, as legal minors, teenagers living with these conditions are not free to move to a new neighborhood, enter a new school, or (usually) find prosocial peers with whom to associate. The upshot is that most youths have little ability to control or change a social context that may contribute to their offending. The Supreme Court, in finding social context itself to contribute to juveniles' reduced culpability, in effect recognizes its importance in facilitating teenage criminal behavior.

As skeptics of mitigation based on immaturity observe, endogenous developmental factors alone provide an inadequate basis for treating young offenders as a special category, because many adolescents do not commit serious crimes. Some critics of the recent science-based trend see juveniles as indistinguishable from adults when it comes to criminal liability,[195] apparently viewing antisocial behavior generally as motivated by the individual's deficient character. The Supreme Court, however, recognized that juveniles deserve more lenient treatment than adults, not only because of developmental traits and tendencies, but also because their social context, over which they have little control, impels them to offend. The interactive framework that we have offered strongly supports and elucidates the Court's position.

The Supreme Court's analysis draws on two conventional sources of mitigation under criminal law doctrine.[196] Mitigation applies to criminal

194. *Roper*, 543 U.S. at 553. This point is based on the analysis of two of the authors. Scott & Steinberg, *Less Guilty by Reason of Adolescence, supra* note 17.

195. Mark R. Fondacaro, *Rethinking the Scientific and Legal Implications of Developmental Differences in Juvenile Justice Research,* 17 NEW CRIM. L. REV. 404 (2014); YAFFE, *supra* note 3.

196. Scott & Steinberg, *Less Guilty by Reason of Adolescence*, *supra* note 17; Steinberg & Scott,

acts that reflect diminished decision-making capacity; like mental illness or intellectual disability, immaturity can be the source of deficiencies in decision-making. As we have explained, social and emotional factors associated with adolescent brain development can undermine teenagers' capacity for rational decision-making under some conditions. Mitigation also applies to acts that respond to exogenous coercive pressures; indeed, the defense of duress is based on the intuition that a defendant who offends under truly extraordinary pressure is not culpable at all. As our interactive model demonstrates, these sources of mitigation are uniquely interwoven in adolescent criminal choices. Normative endogenous vulnerabilities make teenagers particularly susceptible to exogenous pressures from which they may be unable to escape, leading to impulsive, short-sighted choices.

Our interactive framework also provides strong support for the Court's conclusion that adolescents should receive less punishment than adult counterparts due to their potential for reform. The biologically-based tendencies that contribute to juvenile offending change and diminish as adolescents mature into adulthood, reducing their inclination to engage in reward-seeking and make impulsive choices in response to social context. At the same time, key elements of the social context also change, as peers themselves mature and become less inclined to encourage risky peer group behavior. Unless the trajectory of normal development is derailed, individuals predictably will make the transition to non-criminal adulthood as they mature.

The Court applied its developmental framework in the juvenile sentencing opinions to young offenders facing the most severe criminal sanctions and the Court's holdings affect a small category of young offenders. But, as courts, legislatures and policymakers have recognized, the "children are different" principle applies broadly to the justice system's treatment of young offenders. Courts have cited *Miller* and other Supreme Court opinions in decisions that have prohibited the use of sentences imposed on juveniles under adult enhanced- sentencing schemes,[197] and have excluded juvenile sex offenders from sex offender

Blaming Youth, *supra* note 17.

197. Scott et al., *supra* note 2, at 703. *See* United States v. Howard, 773 F.3d 519, 528 (4th Cir. 2014).

registries.[198] A few courts have prohibited the use of *any* mandatory minimum sentence for a juvenile.[199] Legislatures also have adopted the court's developmental principles in creating special parole regulations for juvenile offenders.[200] In recent years, state regulators as well have embraced developmental principles in responding to juvenile crime, implementing policies that recognize the unique attributes of young offenders and aim to shape their development to adulthood in a positive direction.[201] The upshot is that our interactive framework, in clarifying the dynamic relationship between the developing adolescent brain and social context, reinforces the developmental approach to juvenile crime that has emerged in the past decade.

B. "Severe Environmental Deprivation" Revisited

In the 1970s and 1980s, criminal law scholars and judges debated whether a defendant's impoverished background served to mitigate criminal responsibility.[202] Some scholars argued that offenders who have experienced severe socio-economic deprivation are less culpable than other offenders and deserve less (or no) punishment, because deprivation excuses or mitigates criminal responsibility. Other scholars argued against this position, on the ground that an offender's impoverished background is simply not the kind of condition that reduces liability under conventional criminal law principles.

Richard Delgado, the leading proponent of the severe environmental deprivation (SED) defense, points to the reality that a large percentage of offenders come from deprived social backgrounds. On the basis of this correlation, he posits that poverty causes some individuals to commit crimes.[203] On Delgado's view, SED can constrain the criminal actor's free

198. Scott et al., *supra* note 2, at 709. *See*, *e.g.,* In re C.P., 967 N.E.2d 729, 732 (Ohio 2012); State v. Dull, 351 P.3d 641, 648-50, 660 (Kan. 2015); C.P., 967 N.E.2d at 740-41; In re J.B., 107 A.3d 1, 18-20 (Pa. 2014).

199. Scott et al., *supra* note 2, at 676. *See*, *e.g.,* State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014); State v. Ragland, 836 N.W.2d. 107, 122 (Iowa 2013).

200. *See* CAL. PENAL CODE §§ 3041, 3046, 3051, 4801 (West 2016). A similar statute was adopted by Washington State in 2014. *See* WASH. REV. CODE ANN. §10.95.030 (West 2016).

201. National Research Council, *supra* note 94, at 162.

202. *See* discussion of scholarly debate, *supra* notes 17 and 18.

203. *See* Delgado, *Rotten Social Background*, *supra* note 19, at 10.

choice as effectively as conventional sources of exculpation and therefore can be accommodated within criminal law doctrine. Delgado describes aspects of living in poverty that contribute to stress and anger in individuals; these environmental influences include inadequate schools, unemployment, substandard housing, other living conditions and a social context that contributes to an "alternative value system."[204] He argues that these factors in combination could seriously undermine behavioral controls, leading the individual to engage in criminal conduct. On Delgado's view, the inclination to commit crime is a pathology caused by poverty.[205]

Other scholars have rejected the argument that economic deprivation excuses or mitigates criminal conduct.[206] Stephen Morse has pointed out that causation is a capacious concept and that behavior, including criminal acts, can be traced to many causal factors. On Morse's view, even if poverty contributes to offending in a causal sense, that alone is insufficient to diminish an offender's criminal liability because deprivation does not impede the individual's capacity for rational reflection in making choices in a way that affects criminal responsibility. Nor does the experience of living in poverty create an irresistible compulsion to offend, or make the actor facing a "hard choice" (perhaps made harder by conditions of deprivation) incapable of choosing *not* to engage in criminal conduct.[207] Thus, offenders who have experienced economic deprivation simply cannot legitimately claim a defense based on conventional exculpatory principles of criminal law.

While SED has interested scholars and advocates, and is sometimes described in passing in treatises,[208] it has had little impact on the law.[209] As

204. *Id.* at 30.

205. As Delgado explains, "The kind of pent-up rage and despair that can result from living in a crowded, violent neighborhood can cause an explosion of violence just as disordered brain circuitry can." *Id.* at 76.

206. *See* Morse, *Deprivation and Desert*, *supra* note 20. *See also* Mythri Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002). *See also infra* note 211 and accompanying text.

207. Morse, *supra* note 20.

208. *See, e.g.*, JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 725-28 (4th ed. 2007).

209. According to Morse, no legislature and few courts have even considered the defense. Morse, *supra* note 20, at 170.

Delgado acknowledged in 2011, no state has adopted a defense of extreme economic deprivation.[210] This is not surprising, perhaps. For both conceptual and practical reasons, SED is a hard sell. Courts may fear that applying and limiting the defense would be extraordinarily difficult, if not impossible. With its broad conception of causation and capacious view of mitigating constraints on free choice, the SED defense would transform criminal litigation. A large percentage of defendants could plausibly claim that their crimes were mitigated or excused by the deprivation they experienced. Thus on purely pragmatic grounds, lawmakers have been unwilling to open a Pandora's box by adopting a defense that would also undermine the basic principles of criminal responsibility.[211]

The argument for a defense based on severe economic deprivation is far broader than our claim that social context interacts with endogenous features of adolescence in ways that can affect the decision-making of young offenders. The interactive framework we describe focuses on the peculiar vulnerability to environmental stimuli of individuals during a discreet stage of normal development; moreover, the environmental stimuli that impact criminal choices in our framework are limited to those that influence adolescents *because* of endogenous vulnerabilities associated with this stage. Thus the developmental framework is self-limiting. In contrast, the harm of severe economic deprivation, on Delgado's view, may begin in childhood and adolescence, but its impact and relevance to criminal responsibility can extend to any adult criminal who has suffered the effects of deprivation. Moreover, the sources of the harm that can impact individual criminal behavior include many aspects of life in an impoverished community, from deficient parenting to physical

210. Delgado, *The Wretched of the Earth*, *supra* note 19, at 5.

211. *See* Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C. L. L. REV. 79, 121 (2011) ("[The RSB defense violates] basic precepts of mens rea, entity liability, moral culpability, and duty toward others that violate our whole sense of what defines American criminal law."); Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 343 (2002) ("Using Rotten Social Background as an excuse defense is impracticable, because it is nearly impossible to show that, based on his Rotten Social Background, the defendant did not know the nature and quality of his act."). Morse acknowledges this although his objections are based on the incompatibility of SED with principles of criminal responsibility. *Deprivation and Desert*, supra note 20. Morse acknowledges this although his objections are based on the incompatibility of SED with principles of criminal responsibility. *Deprivation and Desert*, *supra* note 20.

conditions (such as substandard housing) to unemployment. Further, Delgado views the inclination to offend as a pathology caused by poverty, not as a response characteristic of a normative developmental stage.[212]

The importance of social context under our framework is specific and limited. Peers and other aspects of the adolescent's social environment stimulate normal biological tendencies toward reward-seeking and impulsivity in ways that undermine the youth's capacity for rational choice and deliberation. These developmental influences do not excuse the youth from criminal responsibility; the interaction does not deprive the youth altogether of the capacity for rational reflection or result in irresistible compulsion. But a normative adolescent capable of making a rational decision under neutral conditions predictably will be inclined to act impulsively and with little consideration of future consequences when associating with risk-inclined peers. Also predictably, most youths will outgrow this tendency to engage in risky activity. As the Supreme Court clarified, adolescent immaturity is relevant to the law's response to juvenile crime for two reasons: first, teenage decision making is impaired due to developmentally-linked influences and, second, most juvenile offenders will mature out of their antisocial inclinations; their welfare, as well as social welfare, will be enhanced if the legal response to their offending offers the opportunity to do so.

To be sure, many adolescents who get involved in criminal activity live under conditions of socio-economic deprivation. But only those aspects of the social context that interact directly with the developing brains of adolescents are relevant to our analysis and only to the extent that these factors contribute directly to normative risk-taking by encouraging reward-seeking and impulsivity. Thus, physical conditions and many environmental influences that likely influence the life trajectories of youth living in poverty are excluded from our analysis, although they may indeed contribute to criminal behavior. This is not to say that lawmakers should ignore the impact of economic deprivation,[213] but only to clarify that the argument for criminal mitigation on this ground is far broader than the one we are making.

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212. *See* Delgado, *supra* note 19, at 24-25.

213. Clearly amelioration of poverty is good social policy on many grounds including the likely contribution to crime reduction.

C. Correctional Policy in an Interactive Framework.

Part III explained that correctional programs constitute social contexts for young offenders and that youths' tinteractions with correctional settings can shape the trajectories of their future lives. Criminal sanctions that fail to offer conditions important for the accomplishment of essential developmental tasks can undermine the adolescent's maturation to productive adulthood. But correctional programs that embrace the developmental lessons that we have described can maximize the likelihood that the juvenile offender will mature out of his inclination to get involved in criminal activity. Correctional settings that incorporate developmental knowledge help the juvenile to make a successful transition to adulthood by assisting him to acquire the skills and tools needed to assume adult work and family roles.

Successful correctional programs and facilities will recognize the importance of social context to healthy adolescent development.[214] Effective correctional interventions aim to provide an antidote to the environmental influences that encouraged antisocial behavior by incorporating the three conditions needed to facilitate social development.[215] As Part III explained, these included an authoritative parent or other adult invested in the youth's welfare to provide support and guidance,[216] association with pro-social peers (and limited exposure to antisocial peers),[217] and meaningful activities to assist the adolescent to acquire skills needed for adult roles and to develop autonomy.[218] We discuss each dimension in turn.

First, policies grounded in the interactive framework aim to foster the relationship between the young offender and one or more authoritative adults. Ideally, this can be accomplished by assisting parents to adequately

214. *See* SCOTT & STEINBERG, *supra* note 151, at 59.

215. *Id.* at 56-58; NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 120 (2013).

216. Laurence Steinberg, *We Know Some Things: Adolescent-Parent Relationships in Retrospect and Prospect,* 11(1) J. RES. ON ADOLESCENCE 1, 8 (2001); SCOTT & STEINBERG, *supra* note 151, at 56.

217. B. Bradford Brown & James Larson, *Adolescents' Relationship with Peers, in* HANDBOOK OF ADOLESCENT PSYCHOLOGY (Richard Lerner & Laurence Steinberg, eds., 2004); SCOTT & STEINBERG, *supra* note 151, at 57.

218. SCOTT & STEINBERG, *supra* note 151, at 57.

fulfill their role. The most successful community-based correctional programs aim, as a core goal, to enable parents of young offenders to function more competently.[219] These programs teach parents the importance of engagement, supervision, and guidance as keys to effective parenting of adolescents and seek to provide the tools needed to function as authoritative parents. The importance of involving parents in juvenile correctional programs and teaching them to fulfill their critically important role in their children's lives has led experts to insist that residential correctional facilities be close enough to the juvenile's home that parents can participate in rehabilitation programs.[220] If parents are unable or unwilling to participate meaningfully in a program aimed at developing their competency, or if their child cannot accept them, another caring adult can serve as a substitute, providing guidance and mentorship.[221] This adult may be a correctional professional or therapist, or it may be a teacher, coach, or social worker with whom the juvenile has, or can develop, a close relationship.

Second, a healthy correctional setting limits the influence of antisocial peers and facilitates engagement with pro-social peers. This presents a challenge in residential programs for juvenile offenders since, by definition, the peer group consists of youths who have demonstrated an inclination to engage in antisocial behavior. One implication of the developmental analysis is that residential programs should be small and create a structured environment. The residential delinquency programs thought to be most effective follow some version of what has been called the Missouri model, which is based on small facilities near juvenile offenders' homes (to facilitate parental involvement); the program provides structure and adult supervision and limits casual peer contact. For juveniles in community correctional programs, the antisocial peer group represents a serious temptation to return to involvement in criminal

219. SCOTT & STEINBERG, *supra* note 151, at 216-218; NATIONAL RESEARCH COUNCIL, *supra* note 215, at 125, 159; Scott W. Henggeler, Gary B. Melton, & Linda A. Smith, *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 J. CONSULTING & CLINICAL PSYCHOL. 953 (1992).

220. Governor David Patterson's Task Force on Transforming Juvenile Justice, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE, 49-51 (2009); National Research Council, *supra* note 105, at 428.

221. Facility staff, probation officer, teacher or other relative can fill this role.

activity. Programs that effectively reduce recidivism aim to provide tools that will assist the youth in resisting antisocial peer influence and to facilitate connection with pro-social peers.[222] Because integration (or reintegration) of the juvenile offender into pro-social peer groups is so important, a school district policy that segregates or excludes former offenders is problematic as it will likely isolate these youths from pro-social influences.[223] Community programs that encourage offenders' involvement in sports and other mainstream peer activities potentially can deter association with antisocial peers and promote healthy peer relationships.

Finally, programs can prepare young offenders for adult lives by assisting them to develop social, educational and vocational skills and to learn to make decisions independently and engage in critical thinking. Youths in the community can participate in mainstream educational programs and programs that assist them to prepare for work roles, under the supervision of correctional professionals who can provide support, encourage compliance with requirements, and insist on completion.[224] Providing meaningful programming is more difficult in a residential setting, but some states have adopted educational and skill building programs in residential facilities that aim to prepare juvenile offenders for adult life.

Our analysis of the importance of the correctional setting in achieving the law's goal of minimizing recidivism and facilitating healthy maturation has an important general policy implication. Large institutions historically have dominated juvenile correctional systems in many states; our analysis indicates that these facilities are impoverished social contexts that lack the conditions that promote healthy development.[225] Typically these institutions are in rural settings far from young offenders' (urban) homes, and thus do not readily accommodate involvement of parents in

222. *See* National Research Council, *supra* note 105, at 414-429; CHARTING A NEW COURSE, *supra* note 220, at 51.

223. National Research Council, *supra* note 105, at 181; Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124 (2009).

224. NATIONAL RESEARCH COUNCIL, *supra* note 215, at 79.

225. Bishop & Frazier, *supra* note 162, at 7-16; Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youths in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. FAM. CT. J. 1 (1989).

programs. Staff in large institutions necessarily act as custodians and guards; the setting does not lend itself to the kind of relationship between authoritative adults and adolescents that meets developmental needs.[226] Beyond this, juvenile institutions house large numbers of offenders and generally lack the capacity to supervise the residents, exacerbating the influence of antisocial peers on one another. Moreover, rival factions that threaten one another are more likely to develop in an impersonal setting in which teenagers do not know all of the other residents. And finally, large institutions seldom provide the customized educational and skill-building programs needed to prepare juveniles for adult life.[227] It is not surprising that as part of the recent reform movement in juvenile justice, many states have closed large institutions and shifted resources to community-based programs.[228] An important report by the National Academy of Science strongly recommends closing juvenile correctional institutions. The report explains that if residential placement is needed for the safety of the community or the juvenile, small facilities near the offenders' homes are likely to provide far better developmental settings.[229]

In general, reformers have favored community-based correctional programs, although few have focused explicitly on how these programs can provide a social context for healthy development more effectively than a residential program.[230] The view that community programs are superior to residential facilities may seem counterintuitive, in that the social context of the juvenile's peers, family, and neighborhood likely contributed to his criminal activity. But a community-based correctional program can assist the juvenile to navigate these social contexts and prepare for adult life in the community by focusing directly on the conditions for healthy development. The premise of Multi-systemic Therapy, among the most successful correctional programs in reducing recidivism in juveniles, is that the therapist engages with the juvenile in all of the youth's social contexts—family, peers, school, and neighborhood.[231] This program

226. SCOTT & STEINBERG, *supra* note 151, at 208.

227. Bishop & Frazier, *supra* note 162, at 256; Kenneth Adams, *Adjusting to Prison Life*, *in* CRIME AND JUSTICE 275-97 (Michael Tonry, ed., 1992).

228. SCOTT & STEINBERG, *supra* note 151, at 220.

229. *See* NATIONAL RESEARCH COUNCIL, *supra* note 215, at 414-29.

230. *Id.* at 42.

231. Henggeler, Melton, & Smith, *supra* note 219, at 953-61; Scott Henggeler et al., *Family*

assists parents to function more capably and provides juveniles with the tools to avoid antisocial peers and to affiliate with pro-social peers.[232] To be sure, community-based programs face the challenge of assisting delinquent youths to avoid the temptation of rejoining their antisocial peer groups. But this temptation will exist when the juvenile is released from residential placement, and community-based programs confront the challenge head-on.

CONCLUSION

Contemporary lawmakers increasingly have recognized the critical importance of adolescent brain development in formulating policies that respond to juvenile crime. Attention has focused primarily on how endogenous biological and psychological factors undermine teenage decision-making and contribute to involvement in criminal activity. This Article broadens the lens to provide a more comprehensive picture, examining the interaction between the immature adolescent brain and the youth's social context. Our interactive framework clarifies that youthful offending, like adolescent risk-taking generally, is a product of a dynamic relationship between the teenager and her environment. Our analysis of the unique salience of social context during this developmental period provides more robust support for arguments for mitigation than claims based narrowly on biological and psychological immaturity. It also provides powerful evidence that correctional programs providing young offenders with healthy developmental contexts are more likely to realize the law's goal of crime reduction than sanctions that ignore the importance of social environment.

Preservation Using Multisystemic Treatment: Long-Term Follow-up to a Clinical Trial with Serious Juvenile Offenders, 2 J. CHILD & FAM. STUD. 283 (1993); Mark Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, *in* WHAT WORKS? REDUCING REOFFENDING (James McGuire, ed., 1995).

232. PETER GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY 72 (2006).

U.S. Department of Justice
Office of Justice Programs

JUVENILE JUSTICE STATISTICS

NATIONAL REPORT SERIES BULLETIN

Chyrl Jones, OJJDP Acting Administrator • Jennifer Scherer, NIJ Acting Director

May 2021

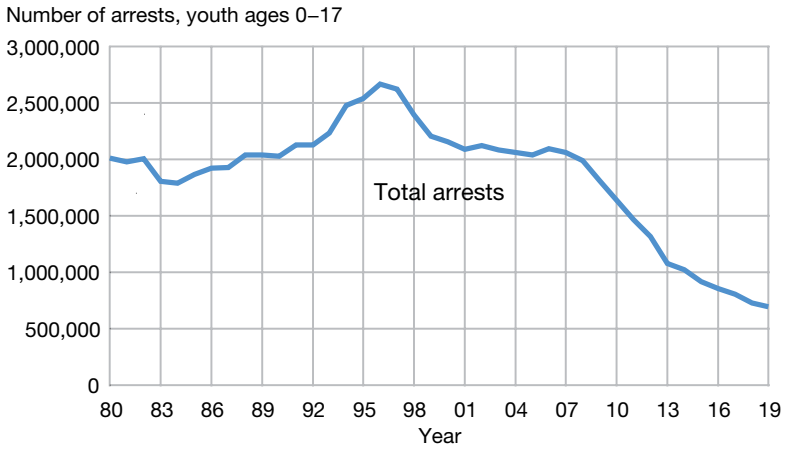
Juvenile Arrests, 2019

Charles Puzzanchera

Highlights

This bulletin documents the latest trends in arrests involving juveniles (youth younger than age 18) by drawing on arrest estimates developed by the Bureau of Justice Statistics and the National Center for Juvenile Justice based on analyses of data from the Federal Bureau of Investigation's Uniform Crime Reporting program. Overall, juvenile arrests have been on the decline for more than two decades, but patterns vary by demographic group and offense.

In 2019, law enforcement agencies made an estimated 696,620 arrests of youth younger than 18—the fewest arrests of juveniles in nearly 4 decades



- Arrests of juveniles (youth ages 0–17) peaked in 1996, at nearly 2.7 million. Arrests of juveniles have since declined—the number in 2019 was 74% below the 1996 peak. In comparison, arrests of adults fell 24% during the same period.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

- After increasing in recent years, the juvenile arrest rate for murder fell 6% in the last year, and the rates for robbery and aggravated assault reached a new low in 2019.
- Juvenile arrest rates for property crimes have declined in recent years. By 2019, juvenile arrest rates for larceny-theft, burglary, and arson were at their lowest levels since at least 1980, while the rate for motor vehicle theft was above its 2013 low point.
- In 2019, the violent crime arrest rate for older juveniles (ages 15–17) was lower than the rates for young adults (ages 18–20 and 21–24).
- Male and female juvenile arrest rates have declined in the last 10 years; however, the relative declines have been greater for males than for females across many offenses. As a result, the female share of juvenile arrests has grown since 1980.
- Juvenile arrest rates involving violent crimes (such as murder and robbery) tend to be much higher for black youth than for white youth. Conversely, arrest rates for liquor law violations were higher for American Indian and white youth than black youth.

A Message From OJJDP and NIJ

This bulletin summarizes recent trends in juvenile arrests in the United States based on data from the Federal Bureau of Investigation's Uniform Crime Reporting program. The cumulative data in this bulletin reveal recent and long-term shifts in juvenile arrests based on offense, gender, and race. It is a useful tool for juvenile justice practitioners, researchers, policymakers, and others who seek to prevent, intervene in, and respond to juvenile delinquency.

The number of arrests involving juveniles in 2019 was at its lowest level since at least 1980, and much of the decline has occurred in the past 10 years. Between 2010 and 2019, the number of juvenile arrests fell 58%. Among violent crimes, arrests for robbery declined 13% and arrests for aggravated assault declined 6% between 2015 and 2019, while arrests for murder increased 10%. In 2019, there were an estimated 83,690 juvenile arrests for larceny-theft. Four in 10 (40%) of these arrests involved females, 3 in 10 (30%) involved youth younger than 15, and more than half (55%) involved white youth.

Relative declines in arrests have been greater for boys than for girls across many offenses. As a result, the female share of juvenile arrests has grown since 1980.

OJJDP and NIJ remain committed to supporting research, programs, and initiatives to combat juvenile delinquency and to provide positive outcomes for youth, their families, and their communities.

Chyrl Jones
OJJDP Acting Administrator

Jennifer Scherer, Ph.D.
NIJ Acting Director

The FBI's UCR Program provides data about juvenile arrests

What do arrest statistics count?

Findings in this bulletin are drawn from data that local law enforcement agencies across the country report to the Federal Bureau of Investigation's (FBI's) Uniform Crime Reporting (UCR) program. To properly interpret the material presented, the reader needs a clear understanding of what arrest statistics count. Arrest statistics report the number of arrests that law enforcement agencies made in a given year—not the number of individuals arrested nor the number of crimes committed. The number of arrests is not the same as the number of people arrested because an unknown number of individuals are arrested more than once during the year. Nor do arrest statistics represent the number of crimes that arrested individuals commit because a series of crimes that one person commits may culminate in a single arrest, and a single crime may result in the arrest of more than one person. This latter situation, where many arrests result from one crime, is relatively common in juvenile law-violating behavior because juveniles* are more likely than adults to commit crimes in groups. For this reason, one should not use arrest statistics to indicate the relative proportions of crime that juveniles and adults commit. Arrest statistics are most appropriately a measure of entry into the justice system.

Arrest statistics also are limited in measuring the volume of arrests for a particular offense. Under the UCR program, the FBI requires law enforcement agencies to classify only the most serious offense charged in an arrest. For example, the arrest of a youth charged with aggravated assault and possession of a weapon would be reported to the FBI as an arrest for aggravated assault. Therefore, when arrest statistics show that law enforcement agencies made an estimated 16,080 arrests of young people for weapons law violations in 2019, it means that a weapons law violation was the most serious charge in these arrests. An unknown number of additional arrests in 2019 included a weapons charge as a lesser offense.

* In this bulletin, "juvenile" refers to persons younger than age 18. In 2019, this definition was at odds with the legal definition of juveniles in eight states—seven states where all 17-year-olds are defined as adults, and one state where all 16- and 17-year-olds are defined as adults.

Crime in the United States Reports Data on Murder Victims

Each *Crime in the United States* report, published by the FBI, presents estimates of the number of crimes reported to law enforcement agencies. Although many crimes are never reported, murder is one crime that is nearly always reported. An estimated 16,425 murders were reported to law enforcement agencies in 2019, or 5.0 murders for every 100,000 U.S. residents. The murder rate was essentially constant between 1999 and 2006 and then fell 22% through 2014, reaching its lowest level since at least 1980. The rate increased 19% through 2017 then fell 6% through 2019.

Of all murder victims in 2019, 92% (or 15,065 victims) were 18 years old or older. The other 1,360 murder victims were younger than age 18 (i.e., juveniles). The number of juvenile murder victims declined 33% between 2007 and 2013, reaching its lowest level since at least 1980. After reaching that historic low, the number of juvenile murder victims increased 16% through 2017, declined 6% in 2018, and then increased 4% in the past year. As a result, the number of juvenile murder victims in 2019 was 13% above the 2013 low point and 53% below the 1993 peak, when an estimated 2,880 juveniles were murdered.

Of all juveniles murdered in 2019, 32% were younger than age 5, 73% were male, 42% were white, and more than half (58%) were killed by a firearm.

In 2019, law enforcement agencies in the United States made fewer than 700,000 arrests of persons younger than 18

The number of arrests of juveniles in 2019 was 58% fewer than the number of arrests in 2010

Most serious offense	2019 estimated number of juvenile arrests	Percent of total juvenile arrests			Percent change		
		Female	Younger than 15	White	2010–2019	2015–2019	2018–2019
Total	696,620	31%	32%	63%	–58%	–24%	–4%
Violent Crime*	44,010	21	30	49	–40	–8	–5
Murder and nonnegligent manslaughter	860	11	12	47	–15	10	–6
Rape*	NA	NA	NA	NA	NA	NA	NA
Robbery	16,080	12	22	36	–41	–13	–7
Aggravated assault	27,070	26	35	56	–40	–6	–3
Property Crime Index	119,790	33	30	55	–67	–43	–9
Burglary	20,700	14	33	57	–68	–42	–7
Larceny-theft	83,690	40	30	55	–70	–46	–10
Motor vehicle theft	13,610	20	27	47	–14	–7	–8
Arson	1,800	15	57	69	–61	–33	–2
Nonindex							
Other (simple) assault	126,130	38	44	59	–40	–4	1
Forgery and counterfeiting	850	23	16	62	–50	–17	–18
Fraud	3,690	33	25	50	–36	–18	–22
Embezzlement	540	46	6	47	22	–8	–7
Stolen property (buying, receiving, possessing)	8,940	18	21	35	–39	–14	–4
Vandalism	31,950	20	43	70	–59	–23	4
Weapons (carrying, possessing, etc.)	16,080	10	29	56	–49	–17	–6
Prostitution and commercialized vice	290	71	14	47	–73	–51	9
Sex offense (except rape and prostitution)*	NA	NA	NA	NA	NA	NA	NA
Drug abuse violation	81,320	26	20	75	–52	–18	–10
Gambling	190	29	17	58	–86	–60	7
Offenses against the family and children	3,060	41	37	67	–19	–11	–8
Driving under the influence	5,570	26	2	89	–54	–16	2
Liquor law violation	26,650	42	16	86	–72	–38	1
Drunkenness	3,470	33	15	77	–73	–37	6
Disorderly conduct	53,990	37	44	55	–65	–24	–7
Vagrancy	350	25	30	72	–84	–68	–49
All other offenses (except traffic)	144,160	30	30	67	–51	–14	3
Curfew and loitering	14,650	34	34	66	–80	–59	–27

- The number of arrests involving juveniles in 2019 was at its lowest level since at least 1980, and much of the decline has occurred in the past 10 years. Between 2010 and 2019, the number of juvenile arrests fell 58%.
- Among violent crimes, arrests for robbery declined 13% and arrests for aggravated assault declined 6% between 2015 and 2019, while arrests for murder increased 10%.
- In 2019, there were an estimated 83,690 juvenile arrests for larceny-theft. Forty percent (40%) of these arrests involved females, 30% involved youth younger than 15, and more than half (55%) involved white youth.

*Beginning in 2013, the FBI broadened the definition of rape, removing the phrase "forcible" from the offense name and description. (See the Notes on page 13 for more detail.) Due to differences in agency reporting practices, national estimates for the offenses of "rape" and "sex offenses" are not available after 2012. The "violent crimes" category (which includes murder, robbery, and aggravated assault) replaces the Violent Crime Index (which included "forcible rape"), as the latter category is no longer compatible with prior years. In any given year prior to the change in the rape definition, these three offenses accounted for more than 95% of arrests for Violent Crime Index offenses.

Note: Detail may not add to totals because of rounding.
Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

Juvenile arrests for violent crimes reached a new low in 2019

Juvenile arrests for violent crimes declined in the past 2 years

This bulletin uses a measure of violence that includes the offenses of murder, robbery, and aggravated assault.* Following 10 years of decline between 1994 and 2004, juvenile arrests for violent crimes increased through 2006 and then declined through 2015. After 2 years of stability, juvenile arrests for violent crimes fell 9% through 2019, reaching its lowest level since at least 1980, and 69% less than the 1994 peak.

After falling 71% between 1993 and 2004, juvenile arrests for murder increased through 2007, then declined 46% through 2012 to reach the lowest level in three decades. The number of juvenile arrests for murder increased each year between 2012 and 2018, then fell 6% through 2019. Juvenile arrests for robbery were cut in half between 1995 and 2002, increased through 2008, and then fell 47% through 2015. The number of juvenile robbery arrests increased each of the next 2 years then declined 17% through 2019, reaching its lowest level since at least 1980. The number of juvenile arrests for aggravated assault, which accounted for 61% of all juvenile arrests for violent crime in 2019, fell 68% between 1994 and 2019 to the lowest level in the last 40 years.

*See the Notes on page 13 for differences in the definition of rape that prohibit it from being included in the measure of violent crimes for trending purposes.

Juvenile property crime arrests declined each year since 2008

Law enforcement agencies nationwide consistently report data on four offenses that form the Property Crime Index—burglary, larceny-theft, motor vehicle theft, and arson—to determine trends in the number of property crime arrests.

For the period 1980–1994, during which juvenile violent crime arrests increased substantially, juvenile property crime arrests remained relatively constant. After this long period of relative stability, juvenile property crime arrests began a 25-year decline.

Between 1994 and 2019, the number of juvenile Property Crime Index arrests fell 84% and reached its lowest level since at least 1980. Between 2010 and 2019, juvenile arrests declined for individual property offenses: burglary (68%), larceny-theft (70%), motor vehicle theft (14%), and arson (61%).

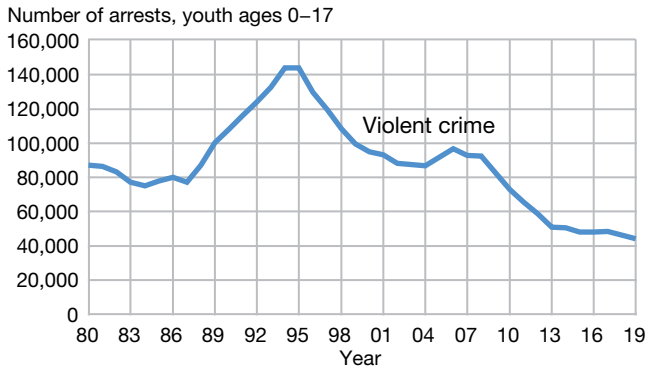
Percent change in juvenile arrests 2010–2019

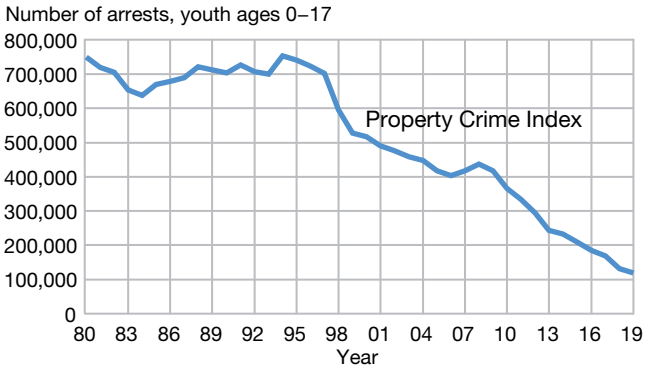
Most serious offense	Juvenile	Adult
Violent crime*	–40%	–7%
Murder	–15	0
Robbery	–41	–31
Aggravated assault	–40	–1
Property Crime Index	–67	–25
Burglary	–68	–33
Larceny-theft	–70	–26
Motor vehicle theft	–14	20
Arson	–61	8
Simple assault	–40	–17
Weapons law violation	–49	7
Drug abuse violation	–52	1

*Includes murder, robbery, and aggravated assault.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

Juvenile arrests for violent crimes and Property Crime Index offenses reached new low points in 2019



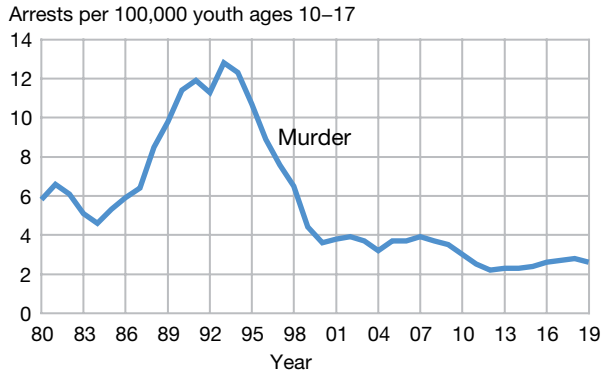


- Juvenile arrests for violent crimes were down by more than half (54%) between 2006 and 2019.
- Arrests for Property Crime Index offenses have declined annually since 2008, falling 73% by 2019.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

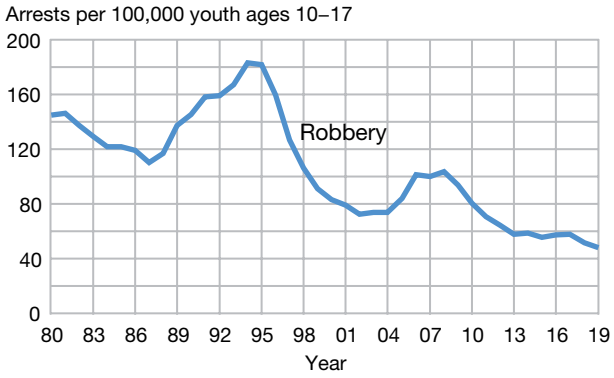
Juvenile arrest rates for robbery and aggravated assault fell to new lows, while murder declined for the first time in 6 years

Murder rate



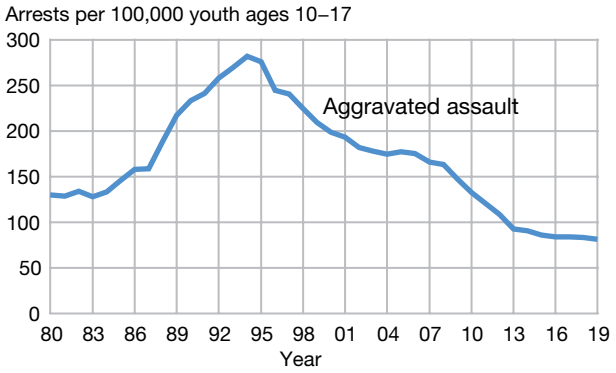
- The juvenile murder arrest rate fell 44% between 2007 and 2012, when it reached its lowest level since at least 1980. The rate increased annually through 2018 (up 27%), then fell 6% through 2019.
- Despite the increase between 2012 and 2018, the juvenile murder rate in 2019 was 80% less than its 1993 peak.

Robbery rate



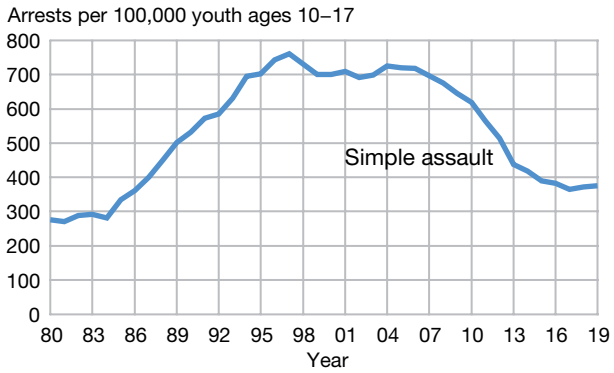
- The juvenile robbery arrest rate in 2015 reached its lowest level in more than three decades. The rate increased over the next 2 years then fell 16% through 2019 to reach a new low point. The rate in 2019 was half the 2008 rate and 74% below the 1994 peak.
- Juvenile robbery arrest rates declined for all gender and racial subgroups since 2008: 54% for males, 41% for females, 57% for blacks, 49% for Asians, 45% for whites, and 28% for American Indians.

Aggravated assault rate



- Unlike the pattern for robbery, the juvenile arrest rate for aggravated assault declined steadily for 25 years. Following a 39% decline in the past 10 years, the rate in 2019 was at the lowest level since at least 1980 and 71% below the 1994 peak.
- Since 2004, the relative decline in the number of juvenile arrests for aggravated assault outpaced that of adults (55% vs. 5%). As a result, 7% of aggravated assault arrests in 2019 involved a juvenile, compared with 14% in 2004.

Simple assault rate

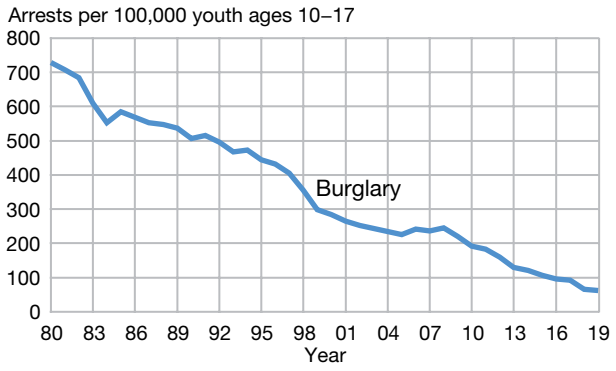


- The simple assault arrest rate was cut in half between 2004 and 2017, then increased 3% through 2019. Unlike the rate trend for aggravated assault, which reached a new low in 2019, the 2019 simple assault rate remained well above the 1981 low point.
- The relative decline in juvenile arrest rates over the past 10 years was the same for simple assault and aggravated assault (39% each).

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice and population data from the U.S. Census Bureau and the National Center for Health Statistics. (See data source note on page 13 for details.)

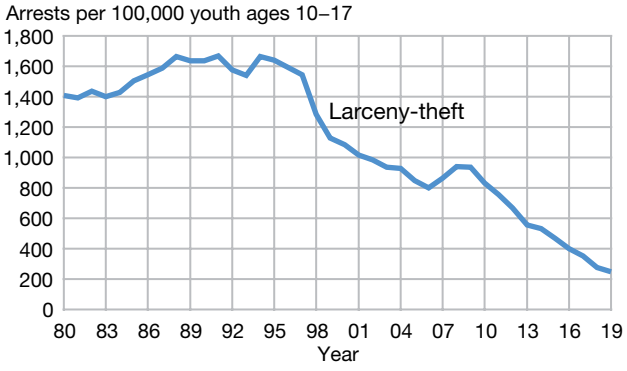
Juvenile arrest rates for burglary, larceny-theft, and arson declined more than 50% since 2010

Burglary rate



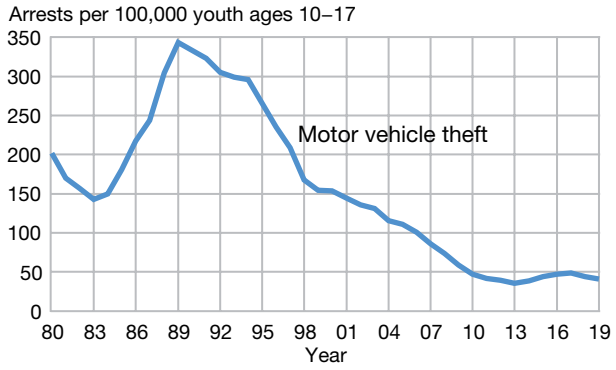
- The juvenile arrest rate for burglary declined steadily since 2008. By 2019, the rate reached its lowest level since at least 1980, and was 68% below the rate 10 years earlier.
- The large decline in juvenile burglary arrests was not reflected in the adult statistics. For example, between 2010 and 2019, the number of juvenile burglary arrests fell 68%, while adult burglary arrests fell 33%. As a result, the juvenile share of burglary arrests declined from 23% in 2010 to 12% in 2019.

Larceny-theft rate



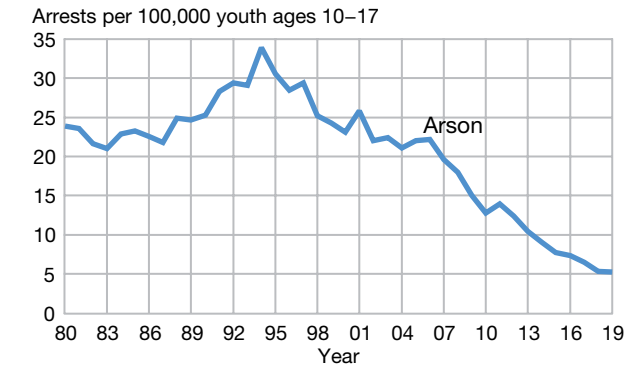
- The juvenile larceny-theft arrest rate declined steadily from the mid-1990s through 2006. This decline was interrupted by 2 years of increase, and then declined steadily to reach a new low in 2019. In 2019, the rate was 73% below the 2008 rate and 85% below the 1991 peak.
- Juvenile arrests for larceny-theft typically involve older juveniles (ages 15–17). Since 2008, older juveniles accounted for 70% or more of juvenile larceny-theft arrests.

Motor vehicle theft rate



- Like the larceny-theft pattern, the juvenile motor vehicle theft arrest rate declined considerably since the mid-1990s. However, unlike larceny-theft, the motor vehicle theft arrest rate reached its low point in 2013, then increased 39% through 2017. Following a 16% decline in the past 2 years, the 2019 rate was 17% above the 2013 low point.
- Juvenile motor vehicle theft arrest rates decreased for most demographic subgroups since 2017: 18% for males, 9% for females, 38% for Asians, 20% for blacks, and 13% for whites. The rate for American Indians increased 3% during the same period.

Arson rate

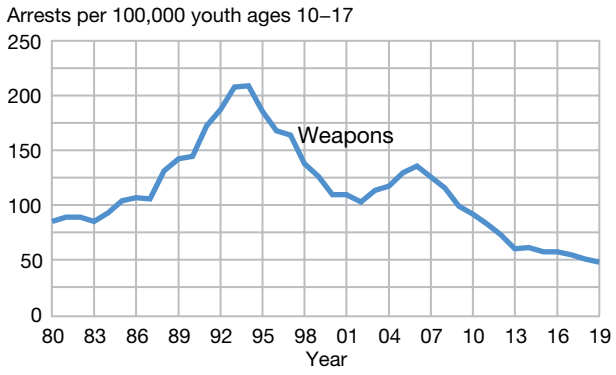


- The juvenile arrest rate for arson fell 63% since 2011, resting at a level in 2019 that was 85% below the 1994 peak.
- Arson is the criminal act with the largest proportion of juvenile arrestees. In 2019, 20% of all arson arrests were arrests of juveniles, and most of these juvenile arrests (57%) involved youth younger than 15. In comparison, 10% of all larceny-theft arrests in 2019 involved juveniles, but only 30% of these juvenile arrests involved youth younger than 15.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice and population data from the U.S. Census Bureau and the National Center for Health Statistics. (See data source note on page 13 for details.)

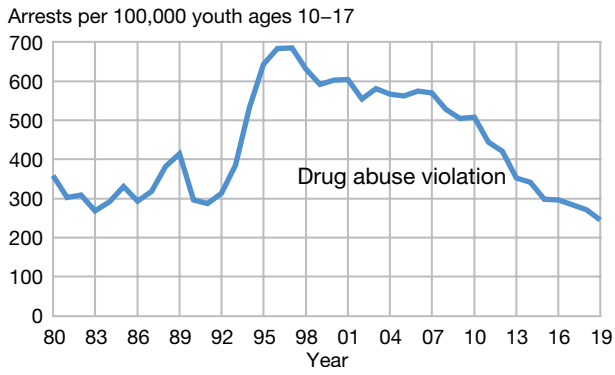
Juvenile arrest rates for weapons law violations, disorderly conduct, and drug abuse violations reached new lows in 2019

Weapons law violation rate



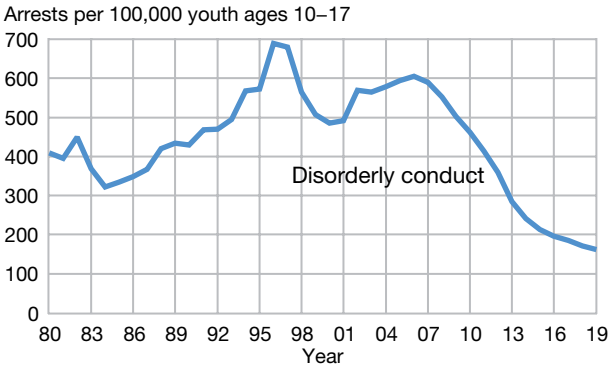
- The juvenile arrest rate for weapons law violations declined considerably since the mid-1990s. This decline was interrupted between 2002 and 2006, when the juvenile weapons law violation arrest rate increased 32%. The rate has since fallen 65%, bringing the 2019 rate to its lowest level since at least 1980, and 77% below the 1994 peak.
- Juvenile arrests for weapons law violations typically involve older juveniles (ages 15–17). Since 2005, older juveniles accounted for at least two-thirds of juvenile weapons law violation arrests.

Drug abuse violation rate



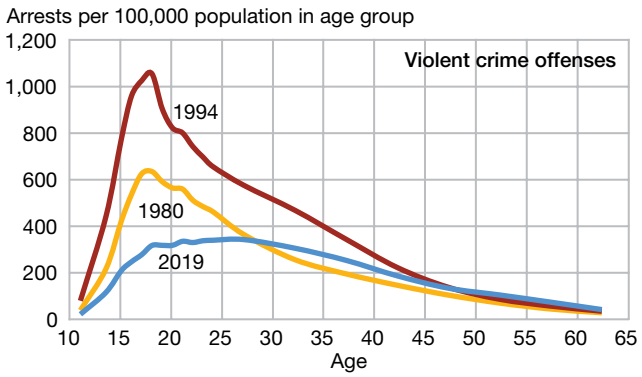
- In 2019, the juvenile arrest rate for drug abuse violations was 244.2 arrests per 100,000 youth ages 10–17—the lowest rate since at least 1980 and 64% below the 1997 peak when the rate was 684.5.
- The juvenile drug abuse violation arrest rate was cut in half in the past 10 years, falling 52% since 2010.

Disorderly conduct rate



- The juvenile arrest rate for disorderly conduct has declined annually since 2006. By 2019, the juvenile disorderly conduct arrest rate fell to its lowest level since at least 1980 and 77% below the 1996 peak.
- Since 2006, the relative decline in the number of juvenile arrests for disorderly conduct outpaced that of adults (74% vs. 48%). As a result, 17% of disorderly conduct arrests in 2019 involved a juvenile, compared with 30% in 2006.

Violent crime age rate



- Regardless of age, the violent crime (murder, robbery, and aggravated assault) arrest rate grew substantially between 1980 and 1994. During this period, the relative increase was greater for juveniles than adults.
- By 2019, arrest rates for violent crimes fell substantially from the 1994 peak for every age group younger than 50. Juveniles showed the largest decline, falling more than 70% in each age group from 10 through 17. In comparison, the rates dropped an average of 65% for young adults ages 18–20, 53% for adults ages 21–24, 40% for ages 25–29, 30% for ages 30–39, and 9% for ages 40–49.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice and population data from the U.S. Census Bureau and the National Center for Health Statistics. (See data source note on page 13 for details.)

In 2019, one-third of juvenile property crime arrests involved females and more than 4 in 10 involved minority youth

Females accounted for 31% of juvenile arrests in 2019

In 2019, law enforcement agencies made 212,650 arrests of females younger than age 18 and 483,970 arrests of males. Although males accounted for the majority (69%) of juvenile arrests overall in 2019, the female share was relatively high for certain offenses, including liquor law violations (42%), larceny-theft (40%), simple assault (38%), and disorderly conduct (37%). Females accounted for 33% of juvenile Property Crime Index arrests and 21% of juvenile violent crime arrests in 2019.

From 2010 through 2019, arrests of juvenile females decreased less than male arrests in most offense categories (e.g., robbery, aggravated and simple assault, burglary, and drug abuse violations).

Percent change in juvenile arrests 2010–2019

Most serious offense	Female	Male
Violent crime*	–34%	–41%
Robbery	–29	–42
Aggravated assault	–36	–41
Simple assault	–36	–42
Property Crime Index	–71	–65
Burglary	–61	–69
Larceny-theft	–74	–67
Motor vehicle theft	8	–18
Vandalism	–45	–61
Weapons	–52	–48
Drug abuse violation	–24	–58
Driving under influence	–53	–54
Liquor law violation	–69	–74
Disorderly conduct	–62	–67

*Includes murder, robbery, and aggravated assault.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

Gender differences also occurred in arrest trends for adults. For example, between 2010 and 2019, adult male arrests for robbery fell 34% while adult female arrests fell 11%, and adult male arrests for burglary fell 37% while adult female arrests fell 11%. Therefore, the female proportion of arrests grew for each offense for adults, as it did for juveniles. The number of aggravated assault arrests declined more for juvenile males (41%) than females (36%) between 2010 and 2019, while it declined 3% for adult males and increased 3% for adult females. Over the same time, the number of simple assault arrests of juvenile females fell 36% while it fell 42% for juvenile males, and adult female arrests fell 7% while male arrests fell 20%.

Juvenile arrests disproportionately involved black youth

The racial composition of the U.S. juvenile population ages 10–17 in 2019 was 75% white, 17% black, 6% Asian/Pacific Islander, and 2% American Indian. In 2019, 55% of all juvenile arrests for Property Crime Index offenses involved white youth, 42% involved black youth, 2% involved Asian youth, and 2% involved American Indian youth. For violent crime arrests, the proportions were 49% white youth, 48% black youth, 2% Asian youth, and 2% American Indian youth. [Not all agencies provide ethnicity data through the Uniform Crime Reporting program; therefore, arrest estimates for juveniles of Hispanic ethnicity are not available.]

Proportion of juvenile arrests in 2019

Most serious offense	Black
Violent crime*	48%
Murder	50
Robbery	62
Aggravated assault	40
Simple assault	38
Property Crime Index	42
Burglary	40
Larceny-theft	41
Motor vehicle theft	50
Vandalism	27
Weapons	41
Drug abuse violation	21
Liquor law violation	7

*Includes murder, robbery, and aggravated assault.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

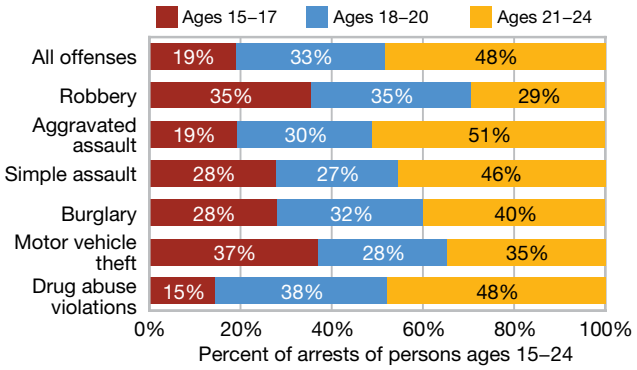
In 2019, juveniles were involved in about 1 in 5 arrests for robbery and arson and 1 in 10 arrests for larceny-theft and weapons law violations

	Juvenile arrests as a percentage of total arrests						
Most serious offense	All	Male	Female	White	Black	Indian	Asian
Total	7%	6%	8%	6%	9%	6%	6%
Murder	8	8	7	8	8	13	1
Robbery	22	23	16	17	25	11	24
Aggravated assault	7	7	8	6	8	6	4
Burglary	12	13	8	10	17	18	13
Larceny-theft	10	11	10	9	14	9	13
Motor vehicle theft	17	18	15	12	29	19	10
Arson	20	21	14	19	22	20	9
Other (simple) assault	12	11	16	11	15	10	9
Vandalism	18	19	15	18	18	16	11
Weapon	10	10	11	11	10	13	12
Drug abuse violation	5	5	5	5	4	9	6
Liquor law violation	15	13	21	17	7	18	13
Disorderly conduct	17	15	22	15	24	10	14

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice. (See data source note on page 13 for details.)

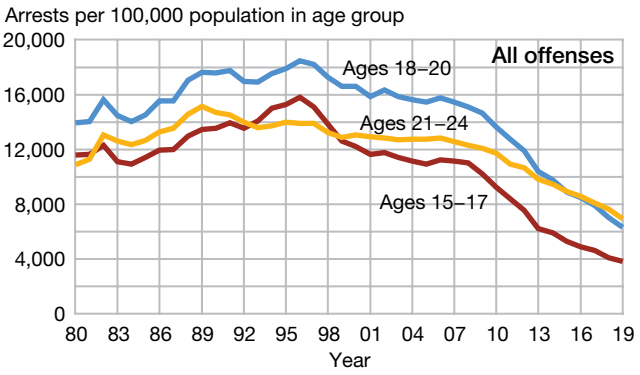
Arrest rates for older juveniles were lower than the rates for young adults

Age profile of older juveniles and young adults



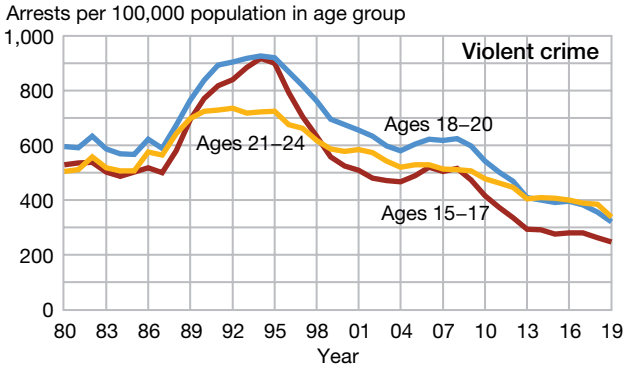
- Across most offenses, older juveniles accounted for a smaller proportion of arrests than young adults ages 18–20 or ages 21–24. For example, in 2019, juveniles ages 15–17 accounted for 19% of all aggravated assault arrests of persons ages 15–24, and 15% of drug abuse violation arrests.
- Arrests for motor vehicle theft offenses did not follow this pattern. In 2019, older juveniles accounted for 37% of motor vehicle theft arrests involving persons ages 15–24, compared with 28% for young adults ages 18–20 and 35% for those ages 21–24.

All offenses



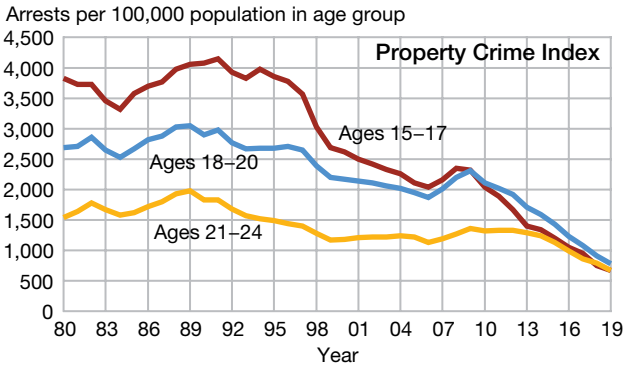
- The overall arrest rate for older juveniles and young adults ages 18–20 followed a similar pattern. Rates peaked in 1996 for both groups, then declined (76% and 66%, respectively) to reach their lowest level in 2019.
- Comparatively, the arrest rate for adults ages 21–24 peaked earlier (1989) then declined 54% by 2019 to its lowest level since at least 1980.

Violent crime



- Violent crime arrest rates for older juveniles and young adults ages 18–20 followed a similar pattern between 1980 and 2019. Rates peaked for both age groups in 1994, then fell considerably (73% and 65%, respectively) through 2019.
- Comparatively, the violent crime arrest rate for adults ages 21–24 peaked in 1992, then declined 54% through 2019. Rates in 2019 for each age group reached their lowest level since at least 1980.

Property Crime Index

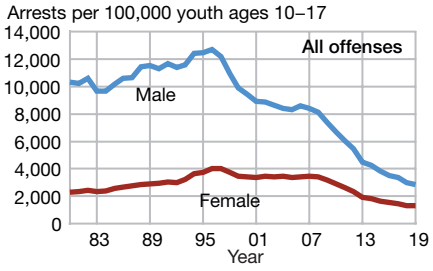


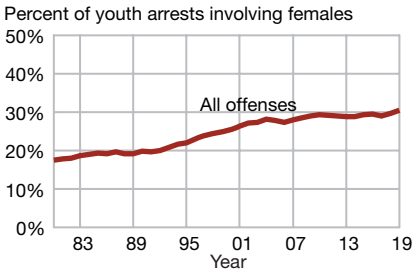
- Despite a brief interruption in the mid-2000s, Property Crime Index arrest rates declined steadily for older juveniles and young adults since the mid-1990s. In the last 10 years, rates declined 67% for older juveniles, 63% for young adults ages 18–20, and 49% for young adults ages 21–24; by 2019, Property Crime Index arrest rates for each age group were at their lowest level since at least 1980.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice and population data from the U.S. Census Bureau and the National Center for Health Statistics. (See data source note on page 13 for details.)

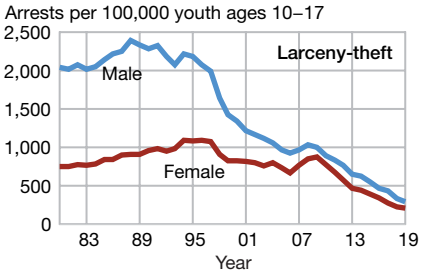
Females accounted for 3 of every 10 juvenile arrests in 2019

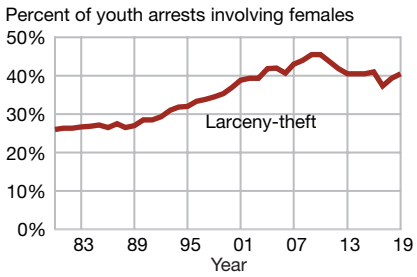
All offenses



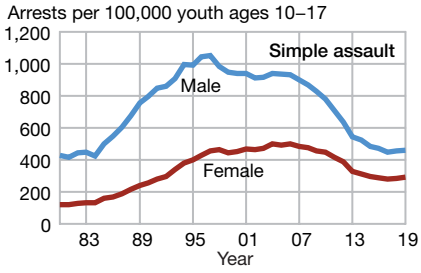


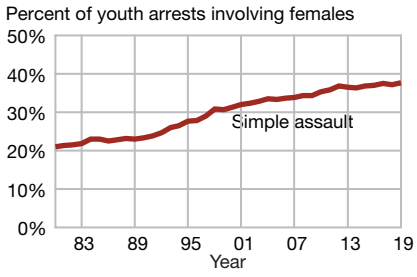
Larceny-theft



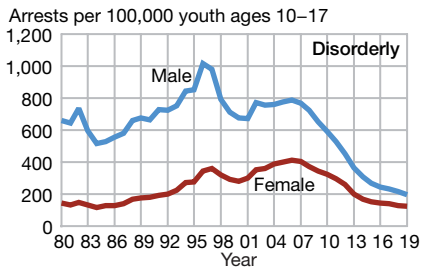


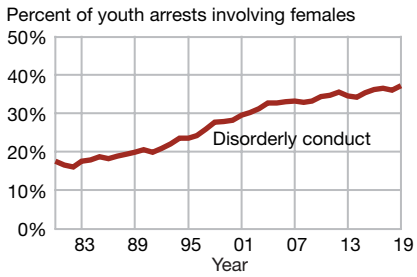
Simple assault





Disorderly conduct



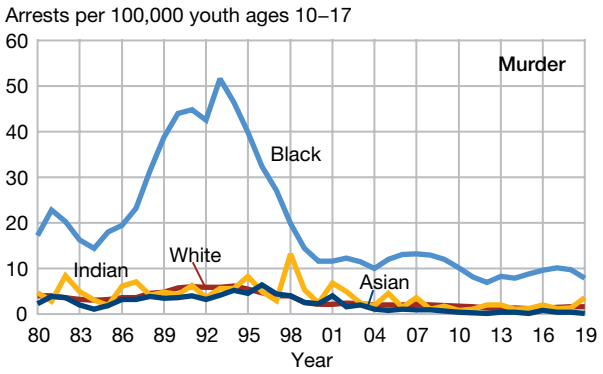


- After reaching a peak in 1996, the overall juvenile arrest rate decreased substantially through 2019 for males and females, falling to their lowest levels since at least 1980.
- The relative decline in the overall juvenile arrest rate was greater for males than females. Since 1996, the male arrest rate fell 78%, compared with 68% for females. As a result, the female share of juvenile arrests has increased, from 18% in 1980 to 31% in 2019.
- Larceny-theft arrest rate trends were marked by two periods of substantial decline. From the mid-1990s through the mid-2000s, the decline in the male rate outpaced that of females (57% vs. 33%). In the more recent 10-year period, the female rate declined 73%, compared with 67% for males.
- The net result was that the female share of juvenile larceny-theft arrests peaked in the late 2000s, declined through 2017, then rose to 40% by 2019.
- The male juvenile arrest rate for simple assault peaked earlier than the rate for females (1997 and 2004, respectively). Since their peaks, rates fell more for males (56%) than for females (42%).
- By 2019, females accounted for nearly 4 in 10 (38%) juvenile arrests for simple assault.
- The disorderly conduct arrest rate for males and females declined annually between 2006 and 2019; during that period, the relative decline was greater for males (75%) than for females (70%).
- Females have accounted for at least one-third of juvenile arrests for disorderly conduct since 2006; in 2019, they accounted for 37%.

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice and population data from the U.S. Census Bureau and the National Center for Health Statistics. (See data source note on page 13 for details.)

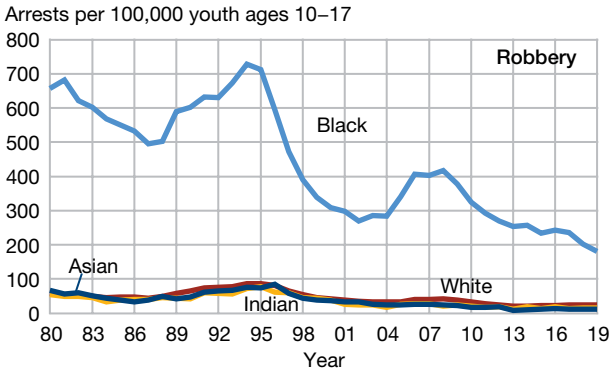
Arrest rates for murder and robbery were higher for black youth than youth of other races

Murder



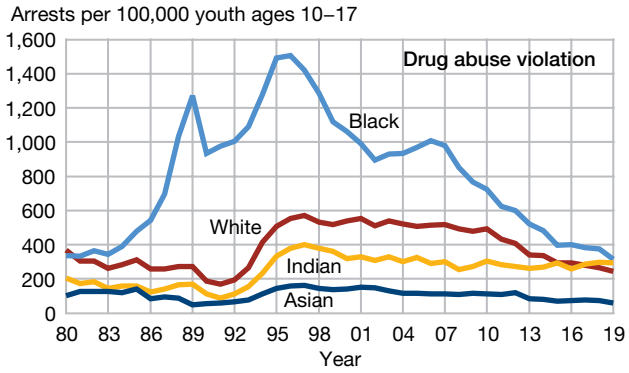
- The murder arrest rate for white juveniles reached a historic low in 2013, 82% below its 1994 peak, while the rate for black juveniles found its low point 1 year earlier, 87% below its 1993 peak. Since their respective low points, the rate for white youth increased 46% through 2019, while the rate for black youth increased 47% through 2017 then declined 23% through 2019.
- The disparity in black-to-white juvenile murder arrest rates peaked in 1993, when the black rate was nearly nine times the white rate. Following the decline in the murder arrest rate for black youth, the ratio fell below 5 to 1 in 2019.

Robbery



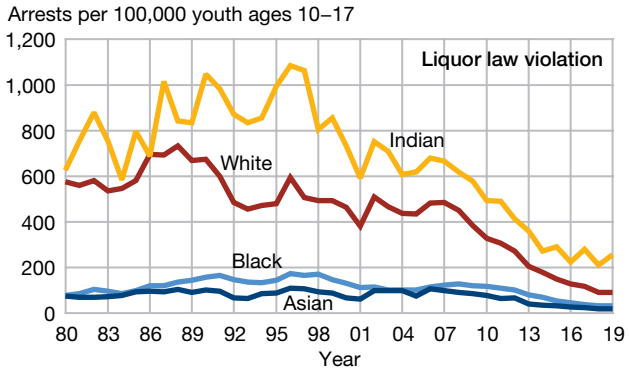
- Juvenile robbery arrest rates reached a historic low in 2013 for white, American Indian, and Asian youth. From their low points to 2019, rates increased 13% for white youth, 19% for American Indian youth, and 49% for Asian youth.
- Unlike the pattern for other race groups, the robbery arrest rate for black youth has been on the decline. Between 2008 and 2019, the robbery arrest rate for black youth fell 57%, and reached its lowest level since at least 1980.

Drug abuse violation



- In the last 10 years, the drug arrest rate declined 56% for black youth, 51% for white youth, 46% for Asian youth, and 3% for American Indian youth.
- The black-to-white ratio in the drug abuse violation arrest rate has narrowed in recent years, largely influenced by the considerable decline in the black arrest rate since the mid-1990s (79% vs. 52% for the white arrest rate). The ratio peaked in 1991, at nearly 6 to 1; by 2019, the black arrest rate was 1.3 times the white rate.

Liquor law violation



- Liquor law violations are one of the few offenses for which rates are higher for American Indian juveniles than for other race groups. The American Indian rate in 2019 was more than twice the white rate, nearly 8 times the rate for black youth, and more than 14 times the rate for Asian youth.
- White youth accounted for the overwhelming majority (86%) of juvenile arrests for liquor law violations in 2019, followed by black youth (7%), American Indian youth (6%), and Asian youth (1%).

Data source: Analysis of arrest data from the Bureau of Justice Statistics and the National Center for Juvenile Justice and population data from the U.S. Census Bureau and the National Center for Health Statistics. (See data source note on page 13 for details.)

Many factors can influence state variations in juvenile arrest rates

Although state data are available from the Uniform Crime Reporting program, comparisons should be made with caution because of variations in jurisdictional standards and reporting

State	2019 reporting population coverage	Arrests of juveniles under age 18 per 100,000 juveniles ages 10–17, 2019			
		Aggravated assault	Larceny-theft	Drug abuse	Weapons
U.S. total	77%	83	389	234	49
Alabama	2	12	808	104	35
Alaska	94	158	444	216	25
Arizona	77	127	489	512	50
Arkansas	88	113	506	292	39
California	97	94	168	63	67
Colorado	85	92	619	388	68
Connecticut	100	34	400	162	43
Delaware	100	210	597	278	64
District of Columbia	0	NA	NA	NA	NA
Florida	100	89	597	202	45
Georgia	22	62	397	231	56
Hawaii	81	31	288	265	15
Idaho	98	65	439	467	49
Illinois	1	140	441	822	160
Indiana	40	73	312	270	42
Iowa	82	143	694	327	45
Kansas	55	84	313	352	30
Kentucky	97	34	272	91	23
Louisiana	75	188	701	253	106
Maine	100	20	462	240	6
Maryland	100	122	656	304	103
Massachusetts	86	70	122	21	18
Michigan	96	67	278	42	31
Minnesota	96	72	700	249	55
Mississippi	42	42	439	158	60
Missouri	63%	107	461	335	36
Montana	88	178	724	356	18
Nebraska	91	32	952	573	59
Nevada	96	212	414	591	93
New Hampshire	94	31	208	291	3
New Jersey	100	57	247	332	68
New Mexico	65	108	183	303	49
New York	51	54	359	166	26
North Carolina	69	44	383	192	51
North Dakota	100	68	747	444	29
Ohio	79	60	354	147	35
Oklahoma	99	62	357	241	40
Oregon	88	80	465	378	21
Pennsylvania	25	144	377	223	50
Rhode Island	100	57	358	118	95
South Carolina	84	73	444	318	90
South Dakota	92	100	623	860	122
Tennessee	95	119	566	331	66
Texas	90	85	312	282	25
Utah	89	48	616	520	46
Vermont	100	48	251	50	32
Virginia	96	39	345	230	34
Washington	93	62	276	124	33
West Virginia	53	18	33	60	2
Wisconsin	94	91	699	489	77
Wyoming	88	66	595	901	22

NA = Arrest counts were not available for the District of Columbia in the FBI's *Crime in the United States, 2019*.

Notes: Arrest rates for jurisdictions with less than complete reporting may not be representative of the entire state. Although juvenile arrest rates may largely reflect juvenile behavior, many other factors can affect the magnitude of these rates. Arrest rates are calculated by dividing the number of youth arrests made in the year by the number of youth living in the jurisdiction. Therefore, jurisdictions that arrest a relatively large number of nonresident juveniles would have a higher arrest rate than jurisdictions where resident youth behave similarly. Jurisdictions (especially small ones) that are vacation destinations or that are centers for economic activity in a region may have arrest rates that reflect the behavior of nonresident youth more than that of resident youth. Other factors that influence arrest rates in a given area include the attitudes of citizens toward crime, the policies of local law enforcement agencies, and the policies of other components of the justice system. In many areas, not all law enforcement agencies report their arrest data to the FBI. Rates for such areas are necessarily based on partial information and may not be accurate. Comparisons of juvenile arrest rates across jurisdictions can be informative. Because of factors noted, however, comparisons should be made with caution.

Data source: Analysis of arrest data from *Crime in the United States, 2019* (Washington, DC: Federal Bureau of Investigation, 2019) tables 3 and 22, and population data from the National Center for Health Statistics' *Vintage 2019 Postcensal Estimates of the Resident Population of the United States (April 1, 2010, July 1, 2010–July 1, 2019), by Year, County, Single-Year of Age (0, 1, 2, . . . , 85 Years and Over), Bridged Race, Hispanic Origin, and Sex* [machine-readable data files available online at www.cdc.gov/nchs/nvss/bridged_race.htm, as of July 9, 2020].

Notes

Data source

Arrest estimates developed by the Bureau of Justice Statistics for 1980–2014 were retrieved from their Arrest Data Analysis Tool [available online at www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm, retrieved December 12, 2018]; the National Center for Juvenile Justice developed arrest estimates for 2015–2019 based on data published in the FBI's *Crime in the United States* reports for the respective years; population data for 1980–1989 are from the U.S. Census Bureau, *U.S. Population Estimates by Age, Sex, Race, and Hispanic Origin: 1980 to 1999* [machine-readable data files available online, released April 11, 2000]; population data for 1990–1999 are from the National Center for Health Statistics (prepared by the U.S. Census Bureau with support from the National Cancer Institute), *Bridged-Race Intercensal Estimates of the July 1, 1990–July 1, 1999, United States Resident Population by County, Single-Year of Age, Sex, Race, and Hispanic Origin* [machine-readable data files available online at www.cdc.gov/nchs/nvss/bridged_race.htm, released July 26, 2004]; population data for 2000–2009 are from the National Center for Health Statistics (prepared under a collaborative arrangement with the U.S. Census Bureau), *Intercensal Estimates of the Resident Population of the United States for July 1, 2000–July 1, 2009, by Year, County, Single-Year of Age (0, 1, 2, . . . , 85 Years and Over), Bridged Race, Hispanic Origin, and Sex* [machine-readable data files available online at www.cdc.gov/nchs/nvss/bridged_race.htm, as of October 26, 2012, following release by the U.S. Census Bureau of the revised unbridged intercensal estimates by 5-year age group on October 9, 2012]; and population data for 2010–2019 are from the National Center for Health Statistics (prepared under a collaborative arrangement with the U.S. Census Bureau), *Vintage 2019 Postcensal Estimates of the Resident Population of the United States (April 1, 2010, July 1, 2010–July 1, 2019), by Year, County, Single-Year of Age (0, 1, 2, . . . , 85 Years and Over), Bridged Race, Hispanic Origin, and Sex* [machine-readable data files available online at www.cdc.gov/nchs/nvss/bridged_race.htm, as of July 9, 2020, following release by the U.S. Census Bureau of the unbridged vintage 2019 postcensal estimates by 5-year age group, retrieved on July 29, 2020].

Data coverage

FBI arrest data in this bulletin are counts of arrests detailed by age of arrestee and offense categories from all law enforcement agencies that reported complete data for the calendar year. (See *Crime in the United States, 2019* for offense definitions.) The proportion of the U.S. population covered by these reporting agencies ranged from 70% to 86% between 1980 and 2019, with 2019 coverage of 70%.

Estimates of the number of persons in each age group in the reporting agencies' resident populations assume that the resident population age profiles are like the nation's. Reporting agencies' total populations were multiplied by the U.S. Census Bureau's most current estimate of the proportion of the U.S. population for each age group.

The reporting coverage for the total United States (77%) in the table on page 12 includes all states reporting arrests of persons younger than age 18. This is greater than the coverage in the rest of the bulletin (70%) for various reasons. For example, a state may provide arrest counts of persons younger than age 18 but not provide the age detail required to support other subpopulation estimates.

Changes in the definition of rape in the FBI data

Since 1927, forcible rape was defined by the FBI as "the carnal knowledge of a female, forcibly and against her will." Beginning in 2013, the FBI adopted a broader definition of rape: "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." Unlike the definition in place for more than 80 years, the new definition does not require force and is gender neutral.

Under current reporting practices, law enforcement agencies may submit data on rape arrests based on either the new definition or the legacy definition. Due to differences in agency reporting practices, national estimates for the offenses of "rape" and "sex offenses" are not available after 2012. Additionally, estimates for the Violent Crime Index (which included "forcible rape") are not shown as this category is no longer compatible with prior years. More information about these changes can be found on the FBI's website [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final].

Visit OJJDP's Statistical Briefing Book for More Information on Juvenile Arrests

OJJDP's online Statistical Briefing Book (SBB) offers access to a wealth of information about juvenile crime and victimization and about youth involved in the juvenile justice system. Visit the "Law Enforcement and Juvenile Crime" section of the SBB at ojjdp.gov/ojstatbb/crime/faqs.asp for more information about juvenile arrest rate trends detailed by offense, gender, and race, including a spreadsheet of all juvenile arrest rates used in this bulletin.

U.S. Department of Justice
Office of Justice Programs
Office of Juvenile Justice and Delinquency Prevention
8660 Cherry Lane
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Acknowledgments

This bulletin was written by Charles Puzzanchera, Senior Research Associate at the National Center for Juvenile Justice, with funds provided by the National Institute of Justice to support the National Juvenile Justice Data Analysis Project.

This bulletin was prepared under grant number 2019–JX–FX–K001, awarded and managed by the National Institute of Justice with funding support provided by the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice.

The opinions, findings, and conclusions or recommendations expressed in this publication are those of the author and do not necessarily reflect those of the Department of Justice.

The Office of Juvenile Justice and Delinquency Prevention and the National Institute of Justice are components of the Office of Justice Programs, which also includes the Bureau of Justice Assistance; the Bureau of Justice Statistics; the Office for Victims of Crime; and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking.