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INTRODUCTION

Many practitioners hold the view that Proposition 8 led to dramatic changes in the California criminal justice system. Indeed, while some of the changes could be labeled "dramatic," even more dramatic is the resistance of our criminal justice system to change, as evidenced by its reaction, or lack thereof, to Proposition 8. California voters' efforts to reform our criminal justice system have been frustrated. Proposition 8's mandate, in the hands of the criminal justice establishment, has been delayed, ignored, and even changed.[1] This Article examines the criminal justice system's response to the enactment of Proposition 8 and its implementation of the proposition's major provisions. Part I discusses the right to

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1. Proposition 8 was proposed by Paul Gann in 1982 and was intended to make major changes to the California Constitution regarding criminal justice. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON VICTIM'S RIGHTS vii (1988). Proposition 8 added section 28 to article I of the state constitution. *See* CAL. CONST. art. I, § 28. The proposition's preamble provides, in part:

> (a) The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance. . . .

Id. § 28(a). The initiative also added various sections to the California Penal and Welfare and Institutions Codes. *See* CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West 1988); CAL. WELF. & INST. CODE §§ 1767, 1732.5, 6331 (West 1982).

victim restitution.[2] Part II evaluates the abandonment of the diminished capacity defense,[3] and Part III analyzes the use of prior felony convictions for impeachment.[4] Part IV discusses the Right to Truth-in-Evidence, including federalization of the exclusionary rule and repeal of the evidence code.[5] This Article concludes that the criminal justice system has delayed, and possibly failed in, the implementation of Proposition 8.[6]

I. THE RIGHT TO VICTIM RESTITUTION

One of the key rights which California voters intended to bestow upon crime victims was "the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts."[7] However, the voters also specified that sufficient punishment of wrongdoers was an even "more basic" right of crime victims than restitution.[8] Regarding restitution, Proposition 8 states that "all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes."[9] The proposition further provides:

> Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.[10]

Unfortunately, California voters entrusted the legislature to implement their intent. The statutory framework which the legislature enacted to implement victim restitution has been

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2. *See infra* notes 7-18 and accompanying text.
3. *See infra* notes 19-43 and accompanying text.
4. *See infra* notes 44-70 and accompanying text.
5. *See infra* notes 71-125 and accompanying text.
6. *See infra* notes 126-130 and accompanying text.
7. CAL. CONST. art. I, § 28(a).
8. *Id.*
9. *Id.* § 28(b).
10. *Id.*

infuriating for both California prosecutors and crime victims. The voters intended that all crime victims suffering financial losses would receive restitution from the persons convicted to compensate such losses in "*every* case, regardless of the sentence or disposition imposed."[11] However, until 1986, the statutory framework provided for victim restitution only when the defendant was given a probationary sentence.[12] In other words, if the defendant was sentenced to state prison, the defendant could not be ordered to pay restitution to the victim. This prompted one court to state:

> [W]e question whether the Legislature fully implemented the constitutional mandate [of Proposition 8] where the defendant is imprisoned, there are substantial property losses suffered by victims of crimes for which the defendant is convicted, and the victims' only avenue of relief for restitution is by civil remedy. The electorate gave a clear directive requiring restitution to be ordered in every case involving a victim absent extraordinary reasons. We doubt it anticipated the current statutes, which in some cases still leave the victims to individually bear the costs and endure the rigors of seeking civil judgments.[13]

In 1986, the statutory scheme was amended so that if the defendant was sentenced to state prison, the court could order restitution to the victim, but only up to $10,000.[14] This statutory

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11. *Id.* (emphasis added).

12. 1981 Cal. Stat. ch. 166, sec. 3, at 968-69 (amending former CAL. GOV'T CODE § 13967 (West Supp. 1981)); 1984 Cal. Stat. ch. 980, sec. 4, at 3391 (amending CAL. PENAL CODE § 1203.1 (West Supp. 1984)).

13. People v. Downing, 174 Cal. App. 3d 667, 672, 220 Cal. Rptr. 225, 228 (1985).

14. 1986 Cal. Stat. ch. 1438, sec. 1, at 5141 (amending CAL. GOV'T CODE § 13967 (West Supp. 1986)). The former version of section 13967 provided:

> In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the defendant is denied probation, in lieu of imposing all or a portion of the restitution fine, the court shall order restitution to be paid to the victim. Notwithstanding subdivision (a), [which provides for a restitution fine of up to $10,000,] restitution shall be imposed in the amount of the losses, but not to exceed ten thousand dollars ($10,000). . . .

1981 Cal. Stat. ch. 166, sec. 3, at 968-69 (amending former CAL. GOV'T CODE § 13967 (West Supp. 1981)). Under this provision the victim could not receive more than $10,000 restitution in cases where the defendant was not given a probationary sentence. *See* People v. Rowland, 206 Cal. App. 3d 119, 125, 253 Cal. Rptr. 190, 193 (1988) (holding that, notwithstanding Proposition 8's mandate requiring restitution to all persons who suffer losses, a trial court is not statutorily authorized to order

framework produced an extraordinary result. In cases where crime victims suffered losses exceeding $10,000, an extremely common occurrence in felony white collar crime cases, the victim would exert pressure on the prosecution and court to give the defendant a probationary sentence in order to gain full restitution.[15] Paradoxically, the greater the victim's loss, the greater the victim's desire to seek a probationary sentence for the criminal wrongdoer rather than a state prison sentence! The prosecutor was thus placed in the awkward position of upsetting the crime victim if the prosecutor took the position that those most deserving of state prison should be sent to state prison. In many white collar crime cases, the prosecution became a collection agent instead of an agent of the criminal justice system, seeking sufficient punishment of those most deserving of it. Contrary to the voters' explicit intent, the right to sufficient punishment for criminal wrongdoers often played a subordinate role to the right to restitution.[16]

It took the California Legislature until 1989 to see the folly of this extraordinary situation, and amend the statutory framework to eliminate the $10,000 limitation on restitution in cases where the defendant is sent to state prison.[17] Now, even in cases in which the defendant is sent to state prison, restitution can be ordered "in the amount of the losses, as determined," and such an order is

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direct restitution to victims where it has sentenced defendant to state prison unless the defendant expressly agrees to such restitution).

15. For example, except in unusual cases where the interests of justice would best be served by granting a person probation, probation is not supposed to be granted to any person convicted of a theft offense involving a loss exceeding one hundred thousand dollars. CAL. PENAL CODE § 1203.045(a) (West 1992). However, in my experience as a prosecutor, victims suffering over one hundred thousand dollars in losses are almost always more interested in restitution than retribution. In one case I prosecuted involving an approximate two hundred and fifty thousand dollar loss, the victim agreed with the defense attorney to appear before the court and request leniency in return for approximately one hundred and fifty thousand dollars in restitution. Ironically, the victim has a constitutional right to make such an appearance under a different section of the same Victims' Bill of Rights which mandates restitution. CAL. CONST. art. I, § 6; CAL. PENAL CODE § 1191.1 (enacted by Proposition 8) (providing that crime victim or next of kin has right to attend sentencing and express his or her views concerning crime)). Consequently, even in cases exceeding the one hundred thousand dollar loss, defendants ordinarily receive probation.

16. *See supra* note 8 and accompanying text (discussing the "more basic" right of sufficient punishment).

17. 1989 Cal. Stat. ch. 712, sec. 1, at 2111-12 (amending CAL. GOV'T CODE § 13967(c) (West Supp. 1989)).

enforceable as a civil judgment.[18] Although this amendment is a step in the right direction, it is too early to tell whether elimination of the limitation on restitution will be effective in remedying the problems which frustrated the clear intent of the voters behind victim restitution.

II. ABOLITION OF THE DIMINISHED CAPACITY DEFENSE

Among the changes Proposition 8 sought to make was the abolition of the "diminished capacity" defense,[19] a defense which had previously, at least in theory, been legislatively abolished in California.[20] California voters wanted to increase the difficulty of proving mental defenses.[21] Again, their intent was not carried out.

The former diminished capacity defense was available to defendants in homicide or attempted homicide prosecutions for the purpose of reducing a charge from murder to voluntary manslaughter or attempted voluntary manslaughter.[22] The charge of murder requires the prosecution to prove that the defendant harbored "malice aforethought," namely, an intent to kill or a conscious disregard for human life.[23] Voluntary manslaughter, on the other hand, is an intentional killing without "malice."[24] "Malice" can be negated, and a charge of murder reduced to

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18. *Id.*

19. CAL. PENAL CODE § 25 (West 1988) (enacted by Proposition 8 (approved June 8, 1982)). Proposition 8 added section 25(a) to the California Penal Code, which provides:

> The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

CAL. PENAL CODE § 25(a) (West 1988).

20. *See* 1981 Cal. Stat. ch. 404, sec. 4, at 1592 (amending CAL. PENAL CODE § 28 (West Supp. 1981)). Section 28(b) of the California Penal Code provides: "As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing." CAL. PENAL CODE § 28(b) (West 1988).

21. Legislative Analyst of California, *Analysis, in* CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION 54 (June 8, 1982).

22. People v. Spurlin, 156 Cal. App. 3d 119, 123-25, 202 Cal. Rptr. 663, 665-67 (1984).

23. California Jury Instructions, Criminal, CALJIC No. 8.11 (5th ed. 1988).

24. *Id.* at CALJIC No. 8.40 (5th ed. 1988).

voluntary manslaughter, in two ways, as follows: 1) If the defendant killed in the heat of passion,[25] or 2) if the defendant killed with the honest but unreasonable belief he was defending himself.[26] Prior to the enactment of Proposition 8, the law provided for a third way of negating "malice": diminished capacity -- a judicially recognized form of voluntary manslaughter under which elements of "malice" could be rebutted by a showing of diminished mental capacity, falling short of a complete insanity defense, due to mental illness, intoxication, trauma, disease, or defect.[27] Proposition 8 sought to abolish this third judicially created theory for negating "malice" -- the diminished capacity

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25. CAL. PENAL CODE § 192(a) (West 1988).

26. People v. Flannel, 25 Cal. 3d 668, 672, 603 P.2d 1, 2, 160 Cal. Rptr. 84, 85 (1979).

27. *See* People v. Spurlin, 156 Cal. App. 3d 119, 126-28, 202 Cal. Rptr. 663, 667-69 (1984) (explaining pre-Proposition 8 law of diminished capacity and concluding that the defense is no longer available to negate "malice" and thereby reduce murder to manslaughter). The prior jury instruction for diminished capacity read as follows:

> If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, or any other cause, you must consider what effect, if any, this diminished capacity had on the defendant's ability to form any of the specific mental states that are essential elements of murder and voluntary manslaughter. . . . Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did, maturely and meaningfully, premeditate, deliberate, and reflect upon the gravity of his contemplated act, or form an intent to kill, you cannot find him guilty of a willful, deliberate and premeditated murder of the first degree. . . . Also, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he was able to form the mental states constituting either express or implied malice aforethought, you cannot find him guilty of murder of either the first or second degree.
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> (If you have a reasonable doubt 1) whether he was able to form an intention unlawfully to kill a human being, or 2) whether he was aware of the duty imposed on him not to commit acts which involve the risk of grave injury or death, or 3) whether he did act despite that awareness, you cannot find that he harbored express malice.)
>
> (Further, if you have a reasonable doubt 1) whether his acts were done for a base, anti-social purpose, or 2) whether he was aware of the duty imposed on him not to commit acts which involve the risk of grave injury or death, or 3) whether he did act despite that awareness you cannot find that he harbored implied malice.)
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> (Furthermore, if you find that as a result of mental illness, mental defect, or intoxication, his mental capacity was diminished to the extent that he neither harbored malice aforethought nor had an intent to kill at the time the alleged crime was committed, you cannot find him guilty of murder or voluntary manslaughter.)

California Jury Instructions, Criminal, CALJIC No. 8.77 (4th ed. 1979). This CALJIC instruction is not contained in the current edition of CALJIC. *See generally* California Jury Instructions, Criminal (5th ed. 1988).

defense.[28] The provision of Proposition 8 which purported to abolish the diminished capacity defense is another example of a provision which has brought about no change in the day-to-day practice of criminal law in our state. In practice, Proposition 8 has not effected change in the way murder cases have been prosecuted and defended.

Rather than accept the abolition of the diminished capacity defense, the criminal defense bar has simply presented the same defense under a new label. Practitioners commonly refer to this new defense as the "diminished actuality" defense.[29] Under this defense, defendants have introduced evidence of their mental capacity, intoxication, trauma, disease, or defect, arguing that such evidence negates "malice" requiring a reduction from murder to voluntary manslaughter. Consequently, the evidence and arguments in murder cases after Proposition 8 have remained unchanged. The only difference is that the "diminished actuality" defense, unlike the old "diminished capacity" defense, has no express judicial or statutory recognition and, therefore, is not contained in the pattern jury instructions.[30] Thus, during trials, the defense has not been able to point to any jury instructions to support its argument that evidence of "diminished actuality" requires a reduction from murder to voluntary manslaughter. If criminal practitioners are correct in their common perception that jury instructions have little impact on the outcome of cases, then the absence of the "diminished actuality" defense in jury instructions, as a means to

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28. CAL. PENAL CODE § 25(a) (West 1988) (enacted by Proposition 8). *See supra* note 19 (quoting California Penal Code § 25(a) (West 1988)).

29. The phrase "diminished actuality" is derived from section 28(a) of the California Penal Code, which provides:

> Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the *capacity* to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease mental defect, or mental disorder is admissible solely on the issue of whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

CAL. PENAL CODE § 28(a) (West 1988) (emphasis added).

30. *See supra* note 27 and accompanying text (discussing prior "diminished capacity" jury instructions).

reduce murder to voluntary manslaughter, may have little impact on case outcomes. Although not legally sound, the "diminished actuality" argument represents essentially an appeal to the jury to "go easy" on a defendant when extenuating circumstances are proven.

What is even more remarkable than the defense bar's attempts to slip in the same evidence and arguments under a new label, is that courts have sanctioned this approach.[31] For example, in the infamous case of *People v. Massip,*[32] the defendant placed her baby under the tire of her car and ran over him.[33] The defendant entered dual pleas of not guilty and not guilty by reason of insanity, but was convicted by jury of second degree murder, and found sane.[34] Thereafter, the trial judge, applying the so-called "diminished actuality" rationale but without calling it such, reduced the charge to voluntary manslaughter since the defendant was suffering from postpartum depression.[35] On appeal, the prosecution argued that Proposition 8 abolished the "diminished capacity" defense as a means of negating "malice," and thereby reducing murder to voluntary manslaughter.[36] Thus, the prosecution contended that the trial judge erred in reducing the verdict based on defendant's mental condition.[37] Remarkably, the appellate court found that even after Proposition 8, a defendant can negate "malice," thus reducing a charge from murder to voluntary manslaughter, by presenting evidence of mental disease or defect.[38]

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31. *See, e.g.,* People v. Molina, 202 Cal. App. 3d 1168, 1173-76, 249 Cal. Rptr. 273, 275-77 (1988). *But see* People v. Spurlin, 156 Cal. App. 3d 119, 202 Cal. Rptr. 663 (1984) (concluding that the defense of diminished capacity was abolished by Proposition 8); People v. McAlroy, 230 Cal. App. 3d 782, 785-89, 271 Cal. Rptr. 335, 335-38 (1990), *review granted,* 798 P.2d 1213, 274 Cal. Rptr. 370 (1990), *review dismissed,* 1992 WL 39335 (1992) (holding that jury instruction proffered by defense in an attempted murder prosecution was properly denied where jury was instructed that it could not find defendant acted with express malice if due to his alleged reduced mental functioning).

32. 229 Cal. App. 3d 1400, 235 Cal. App. 3d 1884, 271 Cal. Rptr. 868 (1990), *review granted,* 798 P.2d 1212, 274 Cal. Rptr. 369 (1990).

33. *Massip,* 235 Cal. App. 3d at 1889, 271 Cal. Rptr. at 869.

34. *Id.*

35. *Id.* at 1889-90, 271 Cal. Rptr. at 869.

36. *Id.* at 1895, 271 Cal. Rptr. at 873.

37. *Id.*

38. *Id.* at 1895-1900, 271 Cal. Rptr. at 873-76.

The holding of the court of appeal in *Massip* bears careful attention. Rarely has a written opinion been more convoluted. The court held:

> Although voluntary manslaughter has traditionally been thought to include the intent to kill, no such requirement appears in the statute, rather, the term "voluntary" implies the intentional commission of a person endangering act . . . . The [trial] court could reasonably have determined malice was absent, and concluded Massip committed a voluntary manslaughter, if it found an unlawful homicide without a person endangering state of mind had taken place.[39]

The "reasoning" the appellate court employed is pure gibberish. First, the court said that voluntary manslaughter requires proof of a "person endangering state of mind."[40] Then, the court contradicted itself by stating that the defendant could have been found guilty of voluntary manslaughter if she did not have a person endangering state of mind.[41] Fortunately, as of the date of this writing, *Massip* is pending review by the Supreme Court of California.[42] Just before the close of 1991, the supreme court finally signed the death warrant for the legally untenable "diminished actuality" defense, ruling that evidence of diminished mental capacity is not a basis for reducing murder to voluntary manslaughter.[43]

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39. *Id.* at 1897, 1899, 271 Cal. Rptr. at 874-75.

40. *Id.* at 1897, 271 Cal. Rptr. at 874.

41. *Id.* at 1899, 271 Cal. Rptr. at 875.

42. People v. Massip, 235 Cal. App. 3d 1884, 271 Cal. Rptr. 878 (1990), *review granted*, 798 P.2d 1213, 274 Cal. Rptr. 369 (1990).

43. People v. Saille, 54 Cal. 3d 1103, 820 P.2d 588, 2 Cal. Rptr. 2d 364 (1991). In *Saille*, evidence was introduced to show that defendant was drunk when he murdered a bar security guard. *Id.* at 1105, 820 P.2d at 590, 2 Cal. Rptr. 2d at 366. The supreme court ruled that the trial court was not required to instruct the jury that evidence of voluntary intoxication could negate express malice and reduce what would otherwise be murder to voluntary manslaughter. *Id.* at 1113, 820 P.2d at 598, 2 Cal. Rptr. 2d at 374.

III. USE OF PRIOR CONVICTIONS FOR IMPEACHMENT

Proposition 8 amended section 28(f) of article I of the California Constitution to provide that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."[44] The electorate intended to "require" the admission of prior felony convictions for impeachment "without limitation," since under pre-Proposition 8 law such information could be used only under limited circumstances.[45]

Under ordinary principles of statutory construction, section 28(f) can be interpreted to mandate the use of felony convictions to impeach a witness' credibility.[46] Thus, immediately after the passage of Proposition 8, commentators,[47] legislators,[48] courts,[49] and practitioners[50] widely assumed that an attorney could attack a witness' credibility by cross-examining him about any prior felony conviction without limitation. Thus, initially all elements of the criminal justice establishment promptly implemented the clear voter intent regarding adult conviction felony impeachment. Then

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44. CAL. CONST. art. I, § 28(f).

45. *See* Legislative Analyst of California, *Analysis, in* CALIFORNIA BALLOT PAMPHLET, *supra* note 21, at 54.

46. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A.L. REV. 621, 627 n.46 (1991); Jenkins and Thomas, *People v. Castro: A Road Back to* Beagle *and Beyond*, 13 W. ST. U.L. REV. 27, 34 (1985) (asserting that the intent of voters was not carried out by Proposition 8); Comment, *Impeaching the Accused with Prior Convictions: Does Proposition 8 Put* Beagle *in the Doghouse?*, 15 PAC. L.J. 302, 310 (1984).

47. *See* Comment, *supra* note 46, at 310.

48. According to the Assembly Committee on Criminal Justice, Proposition 8 mandated "the use of prior felony convictions for impeachment purposes even though the probative value is outweighed by the danger of substantial prejudice." CALIFORNIA ASSEMBLY COMM. ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8: THE CRIMINAL JUSTICE INITIATIVE 31 (1982).

49. In *People v. Turner*, 50 Cal. 3d 668, 789 P.2d 887, 268 Cal. Rptr. 706 (1990), the Supreme Court of California explained that until it addressed the issue, all but one originally published court of appeal decision addressing the question had concluded that Proposition 8 permitted the unlimited use of prior felony convictions for impeachment, and that it was "widely assumed that the 'without limitation' language of section 28(f) eliminated *all* restrictions on the admissibility of prior felony convictions for purposes of impeachment." 50 Cal. 3d at 703-04, 789 P.2d at 905-06, 268 Cal. Rptr. at 724-25.

50. *See Turner*, 50 Cal. 3d at 703-04, 789 P.2d at 905-06, 268 Cal. Rptr. at 724-25.

in 1985, despite the language of section 28(f), stating that any prior felony conviction "whether adult or *juvenile*" can be used for impeachment,[51] one appellate court held that juvenile convictions could not be used.[52] The controversy over the use of juvenile convictions for impeachment has not yet been resolved.[53]

Also in 1985, the Supreme Court of California, in *People v. Castro*,[54] ignored the clear voter mandate favoring felony impeachment by narrowly interpreting Proposition 8.[55] In *Castro*, the supreme court placed two important limitations on section 28(f)'s requirement that "any prior felony" shall be admitted "without limitation."[56] First, the court held that California voters did not really intend to deprive a trial court of discretion to exclude impeachment with prior felonies if the prejudicial impact of the impeachment exceeded its probative value.[57] This result supposedly steered "clear of [federal] constitutional obstacles" which the court felt would be created if trial courts were deprived of their discretion to limit prior felony impeachment.[58] A second limitation that the court placed on section 28(f) related to that section's language making "any prior felony" admissible.[59] The court held that a trial court could only allow impeachment of a prior felony involving "moral turpitude"--a readiness to do evil.[60] Again, this result was rationalized under the theory that convictions not involving moral turpitude are irrelevant to credibility and, therefore, introducing these convictions would violate the due

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51. CAL. CONST. art. I, § 28(f) (emphasis added).
52. People v. Sanchez, 170 Cal. App. 3d 216, 218, 216 Cal. Rptr. 21, 23 (1985).
53. People v. Pitts, 223 Cal. App. 3d 1547, 1555, 273 Cal. Rptr. 389, 393-94 (1990).
54. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).
55. *Castro*, 38 Cal. 3d at 313-16, 696 P.2d at 117-21, 211 Cal. Rptr. at 725-29.
56. *Id.* at 313, 696 P.2d at 117-18, 211 Cal. Rptr. at 725-26. *See supra* notes 47-54 and accompanying text (discussing the constitutional provision allowing the use of prior felony adult or juvenile convictions for impeachment).
57. *Castro*, 38 Cal. 3d at 313, 696 P.2d at 117, 211 Cal. Rptr. at 725.
58. *Id.* at 313, 696 P.2d at 117-18, 211 Cal. Rptr. at 725-26.
59. *Id.*
60. *Id.*

process clause of the United States Constitution,[61] which prohibits introducing irrelevant evidence.[62]

However, there is no support for the contention that the United States Constitution compels the result in *Castro* and, indeed, there is considerable authority to the contrary.[63] Thus, the *Castro* court completely altered section 28(f) by grafting limitations onto the provision created out of whole-cloth. As the Supreme Court of California recently stated, "[o]ur *Castro* decision . . . rejected the overwhelming weight of appellate authority and consciously declined to accept the apparent plain meaning of the constitutional language [of Proposition 8]."[64] But despite this suggestion of a willingness to reconsider its *Castro* decision, the supreme court has not yet done so.

Admittedly, the changes in the rules regarding the use of prior felony convictions, even as limited by *Castro*, have been somewhat significant. Prior to the enactment of Proposition 8, the Supreme Court of California had interpreted California statutory law allowing impeachment by use of prior felony convictions into virtual extinction.[65] The court allowed such impeachment only if the prior felony was not for the same or similar type of offense for which the accused stood charge,[66] and if the prior offense necessarily involved dishonesty as part of its legal definition.[67] Today, these limitations are merely two of several factors, rather than dispositive tests, which trial judges often take into consideration in exercising their discretion as to felony

61. U.S. CONST. amend. XIV, § 1.

62. *Castro*, 38 Cal. 3d at 313-17, 696 P.2d at 117-21, 211 Cal. Rptr. at 725-29.

63. *See* Goldberg, *supra* note 46, at 628-33, and authorities cited therein; Imwinkelried and Méndez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1017-19 (1992).

64. People v. Turner, 50 Cal. 3d 668, 703, 789 P.2d 887, 906, 268 Cal. Rptr. 706, 725 (1990).

65. For a more detailed discussion of pre-Proposition 8 law regarding felony impeachment, see Goldberg, *supra* note 46, at 622-24.

66. People v. Fries, 24 Cal. 3d 222, 230, 594 P.2d 19, 25, 155 Cal. Rptr. 194, 200 (1979).

67. People v. Spearman, 25 Cal. 3d 107, 114, 599 P.2d 74, 77, 157 Cal. Rptr. 883, 886 (1979).

impeachment.[68] In practice, however, trial judges rarely allow impeachment by use of felonies which involve the same or similar type of conduct for which the defendant is charged.[69] Under current practice, despite the intent of California voters to liberally use felony convictions for impeachment, such impeachment--even under Proposition 8--is more restrictive than in most other jurisdictions.[70]

IV. REPEAL OF THE EVIDENCE CODE

Section 28(d) of article I of the California Constitution, enacted by Proposition 8, commonly known as the "Right to Truth-in-Evidence," or "Truth-in-Evidence" provision, was perhaps the most ambitious provision contained in the initiative.[71] The failure of the criminal justice establishment to promptly implement the Right to Truth-in-Evidence is also Proposition 8's greatest disappointment. Section 28(d) provides as follows:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . ., or hearing of a juvenile for a criminal offense. . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Section 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.[72]

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68. *See* People v. Stewart, 171 Cal. App. 3d 59, 63-64, 215 Cal. Rptr. 716, 719-20 (1985) (explaining factors to be considered in exercise of trial court's discretion involving felony impeachment).

69. *See, e.g.*, People v. Ortiz, 170 Cal. App. 3d 1024, 216 Cal. Rptr. 847 (1985), *rehearing granted*, (Sept. 3, 1985) (opinion on rehearing not for publication) (Oct. 25, 1985). In *Ortiz*, the appellate court found that the trial court erred in exercising its discretion allowing impeachment with a prior conviction identical to that for which defendant was charged. *Id.* at 1030, 216 Cal. Rptr. at 850. This fear of error often motivates judges not to allow impeachment with identical offenses in daily practice.

70. *See* Goldberg, *supra* note 46, at 630-33, and authorities cited therein (discussing laws of sister jurisdictions and federal courts which liberally allow impeachment with prior convictions).

71. CAL. CONST. art. I, § 28(d).

72. *Id.*

This provision was intended both to federalize the exclusionary rule, and to expand the admissibility of relevant evidence in criminal cases.

A. Federalization of the Exclusionary Rule

The plain language of the Truth-in-Evidence provision suggests its implications for repealing evidentiary provisions restricting the admissibility of relevant evidence. However, a less obvious and less significant implication of the provision was to federalize the exclusionary rule, a rule which generally makes unconstitutionally obtained evidence inadmissible at trial.[73] The Legislative Analyst explained the impact of the initiative on the federal exclusionary rule in the Proposition 8 ballot pamphlet as follows:

> Under current law, certain evidence is not permitted to be presented in a criminal trial. For example, evidence obtained through unlawful eavesdropping or wiretapping, or through unlawful searches of persons or property, cannot be used in court. This measure generally would allow most relevant evidence to be presented in criminal cases subject to such exceptions as the Legislature may in the future enact by a two-thirds vote. The measure could not affect *federal* restrictions on the use of evidence.[74]

California voters intended this provision to abrogate judicial decisions which had required the exclusion of relevant evidence solely to deter police misconduct in violation of a suspect's constitutional rights under the state constitution.[75] The People apparently decided that the exclusion of evidence was not an acceptable means of implementing those rights, except as required by the United States Constitution.[76]

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73. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

74. Legislative Analyst of California, *Analysis, in* CALIFORNIA VOTERS PAMPHLET, *supra* note 21, at 32.

75. *See* People v. May, 44 Cal. 3d 309, 318, 748 P.2d 307, 312, 243 Cal. Rptr. 369, 374 (1988) (implementing provisions of Proposition 8 which federalize the exclusionary rule).

76. *Id.*

Thus, to the extent that evidence was obtained in violation of the California Constitution, but not in violation of the United States Constitution, such evidence would still be admissible. This change was of limited significance since the state and federal constitutions contain the same provisions regarding criminal procedure.[77]

Since the passage of Proposition 8, California courts have resisted abandoning outmoded rules of criminal procedure which were faithfully applied prior to the initiative. It is still common for practitioners and trial judges to erroneously apply invalid pre-Proposition 8 law.[78] The checkered history of Proposition 8's application to the exclusionary rule is understandable considering the outright opposition of many in the criminal justice establishment to the measure.[79] This antipathy was expressed eloquently by none other than Supreme Court of California Justice Mosk, who stated:

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77. *Compare* CAL. CONST. art. I, § 13 (prohibiting unreasonable searches and seizures); *with* U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures). *Compare also* CAL. CONST. art. I, § 15 (right to remain silent and right to counsel); *with* U.S. CONST. amends. V-VI (right to remain silent and right to counsel, respectively). For a list of major changes in the exclusionary rule brought about by Proposition 8, see Allen, *Defense Motions After Lance W.*, 13 W. ST. U.L. REV. 35 (1985), and Jenkins and Thomas, *supra* note 46, at 28-29.

78. Occasionally such misstatements of law show up in appellate court cases. Most recently, in *People v. Renteria*, 2 Cal. App. 4th 440, 2 Cal. Rptr. 2d 925 (1992), the appellate court made a glaring mistake, quoting pre-Proposition 8 case law, which defined the legal standard justifying an investigatory detention of a person as follows:

> "[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that 1) some activity relating to crime has taken place or is occurring or about to occur, and 2) the person he intends to stop or detain is involved in that activity. Not only must be *subjectively entertain* such a suspicion, but it must be objectively reasonable for him to do so."

Id. at 443, 2 Cal. Rptr. 2d at 927 (quoting *In re* James D., 43 Cal. 3d 903, 914, 741 P.2d 161, 172, 239 Cal. Rptr. 663, 674 (1987)) (citations omitted) (emphasis added). This is a correct statement of pre-Proposition 8 California law. *In re* Tony C., 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978). However, under post-Proposition 8 law--federal law--whether an officer validly stopped a person turns on "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not the officer's actual state of mind at the time the challenged action was taken." Maryland v. Macon, 472 U.S. 463, 470-71 (1985).

79. The Assembly Committee on Criminal Justice strongly opposed the initiative. CALIFORNIA ASSEMBLY COMM. ON CRIMINAL JUSTICE, *supra* note 47, at 68-72 (citing alleged "constitutional defects," "contradictions and sloppy draftings," "litigation explosion and other unintended consequences," and "fiscal priorities" as reasons for opposition). *See infra* note 80 and accompanying text (opining Proposition 8 to be an "ill-conceived measure").

> I must observe . . . that in Asia, Latin America, and other areas of this troubled world courageous men and women are striving, and some are dying, to *establish and expand* individual rights. It is ironic that in California our existing individual rights are being *curtailed.* . . . We cannot blame the United States Constitution or the United States Supreme Court for this situation. . . . Rather, the blame for the sorry situation in which we find ourselves must be placed squarely on Proposition 8. That ill-conceived measure has struck down California precedents on individual rights as it has encountered them in its path of destruction.[80]

Given the resentment toward Proposition 8, it is not surprising that in the three areas of criminal procedure which most commonly arise in daily practice--search and seizure, police interrogations, and right to counsel issues--the Supreme Court of California has been slow to implement Proposition 8. Considering the rather poor performance in implementing other key provisions of Proposition 8, the Supreme Court of California was *comparatively* quick in ruling that the rules regarding the admissibility of evidence resulting from a search or seizure were to be governed by federal, not California, law.[81] This ruling, in 1985, took only two and one-half years after Proposition 8's passage.[82] One commentator noted that "two and one half years to decide so urgent a question was simply too long. . . . No one has yet come forth with a credible reason why the main substantive issues raised by the initiative could not have been reached before 1985."[83]

In 1987, the Supreme Court of California stopped Proposition 8 dead in its tracks, following the approach some lower courts took, by ruling in an opinion authored by Justice Mosk, that the initiative had no application to the admissibility of evidence resulting from police interrogations which violated defendant's

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80. People v. Markham, 49 Cal. 3d 63, 72-73, 775 P.2d 1042, 1048, 260 Cal. Rptr. 273, 279-80 (1989) (Mosk, J., concurring).

81. *See In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

82. *Id.*

83. Bedsworth, In re Lance W.: *The Ship of State Makes a Course Correction*, 13 W. ST. U.L. REV. 9, 11 (1985).

Miranda[84] rights.[85] In other words, issues involving *Miranda* violations would continue to be governed by California law, notwithstanding the voters' clear intent to federalize the exclusionary rule. Not until 1988 did the court finally reverse itself, and fully implement Proposition 8 to govern the admissibility of evidence taken in violation of *Miranda*.[86]

Even now, however, there are major unresolved areas involving the federalization of the exclusionary rule on which the Supreme Court of California has yet to rule. Most significantly, although there are slight differences between the California and federal rights to counsel,[87] it has not been conclusively determined whether evidence alleged to have been gathered in violation of defendant's right to counsel is governed by federal or California law.[88]

B. Repeal of the Rules of Evidence

The public, "perceiv[ing an] imbalance in favor of defendants in the rules regarding the admissibility of evidence," enacted the Truth-in-Evidence provision.[89] The Truth-in-Evidence provision was intended to "restore balance to the rules governing the use of evidence against criminals."[90] By its plain terms, the provision expresses the electorate's intent that "both judicially created and statutory rules restraining admission of relevant evidence in criminal cases be repealed except insofar as 28(d) expressly preserves them."[91] The average lay person reading the Truth-in-Evidence provision would immediately appreciate that, except to

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84. Miranda v. Arizona, 384 U.S. 436 (1966).

85. People v. May, 43 Cal. 3d 436, 729 P.2d 778, 233 Cal. Rptr. 344 (1987), *vacated by* 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988).

86. *May*, 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369.

87. *See* People v. Houston, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986).

88. *See* People v. Ledesma, 204 Cal. App. 3d 682, 689-96, 251 Cal. Rptr. 417, 419-24 (1988) (holding that right to counsel questions are governed by Proposition 8).

89. People v. Taylor, 180 Cal. App. 3d 622, 632, 225 Cal. Rptr. 733, 738 (1986).

90. Curb, *Arguments in Favor of Proposition 8, in* CALIFORNIA BALLOT PAMPHLET, *supra* note 21, at 34.

91. People v. Harris, 47 Cal. 3d 1047, 1082, 767 P.2d 619, 641, 255 Cal. Rptr. 352, 374 (1989).

the extent expressly preserved, the rules of evidence are repealed by the initiative. The reluctance of the courts to apply the Truth-in-Evidence provision to the area of the exclusionary rule was disappointing. However, the courts' unwillingness to apply the provision to the question of the repeal of the rules of evidence was astonishing. Despite the passage of a decade since the Truth-in-Evidence provision was added to the constitution, California courts have failed to determine whether key evidentiary rules are still in effect.

In 1982 the Assembly Committee on Criminal Justice compiled an extensive laundry list of important evidentiary rules which Proposition 8 would repeal, including rules limiting the use of character evidence against the defendant, rules governing impeachment evidence, and rules governing the admissibility of scientific evidence.[92] Ten years after the enactment of Proposition 8, the effect of the measure on most of these evidentiary rules has not even been addressed, let alone resolved.

The continuing validity of Evidence Code section 1101[93]--which excludes propensity evidence--has not been determined. Section 1101 severely limits the admissibility of character evidence involving a defendant's prior criminal acts to prove his guilt in a current case.[94] In 1984, the Supreme Court of California declined to decide the issue of the validity of section 1101 in *People v.*

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92. CALIFORNIA ASSEMBLY COMM. ON CRIMINAL JUSTICE, *supra* note 48, at 12, 19-21.

93. CAL. EVID. CODE § 1101 (West 1992). Section 1101 provides:

a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or trait of his or her character (whether in the form on an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Id.

94. *Id.*

Tassell[95] stating, "the effect, if any, of Proposition 8 on the questions of admissibility of evidence of other offenses is not considered here since the offenses in this case predate June 1982."[96] After the decision in *Tassell*, three appellate courts, applying various rationales, concluded that Evidence Code section 1101 survived the enactment of Proposition 8.[97] Since these

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95. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984).

96. *Tassell*, 36 Cal. 3d at 82 n.1, 679 P.2d at 3 n.1, 201 Cal. Rptr. at 569 n.1.

97. *See* People v. Scott, 194 Cal. App. 3d 550, 239 Cal. Rptr. 588 (1987); Newman v. Superior Court, 179 Cal. App. 3d 377, 224 Cal. Rptr. 538 (1986); People v. Perkins, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984). In *People v. Perkins*, the Second District Court of Appeal strained to find that evidence code section 1101 remained in effect. The court concluded as follows: "The text of the 'Truth-in-Evidence' provision expressly preserves only three sections of the Evidence Code, sections 325 [sic] [352], 782, and 1103. The retention of section 1103 also means the retention of section 1101. . . . The text of 1103 states that the section exists as an exception to 1101. . . . Section 1103 cannot exist as an exception to a nonexistent rule." *Id.* at 650, 205 Cal. Rptr. at 627. However, this analysis failed to note that section 1103 actually contains two subsections. *See* CAL. EVID. CODE § 1103(a), (b) (West Supp. 1992). Section 1103(a) allows evidence of the character of the crime victim when offered by the defendant to prove conduct in conformity with such character. *Id.* § 1103(a) (West Supp. 1992). Section 1103(b) provides that in certain sexual assault cases character evidence regarding the victim's sexual conduct is not admissible to prove consent by the victim. *Id.* § 1103(b) (West Supp. 1992). Section 1103(b) was not repealed because the voters must have intended to preserve the so-called rape shield law, which safeguards rape victims from certain types of cross-examination at trial and is codified in that section and section 782, which was also expressly preserved. *See id.* § 782 (West 1966) (providing for certain procedural safeguards to be followed when evidence of the sexual conduct of the complaining witness is offered to attack the credibility of the witness in sexual assault cases). The Truth-in-Evidence provision of Proposition 8 only repeals evidentiary provisions which *restrict* the admissibility of relevant evidence. *See supra* notes 89-91 and accompanying text (discussing the Truth-in-Evidence provision). Since section 1103(a) does not *restrict* the admissibility of evidence but rather *provides* for the admission of certain types of character evidence, the Truth-in-Evidence provision would not affect it. Therefore, there was no need to expressly include section 1103(a) as one of the provisions which the Truth-in-Evidence provision preserved. That section 1103(a) was expressly preserved is meaningless surplusage, which should not be read as an attempt to preserve section 1101. Despite its shortcomings, the line of reasoning developed in *Perkins* was affirmed in the First District Court of Appeal in *Newman v. Superior Court*, 179 Cal. App. 3d at 382, 224 Cal. Rptr. at 540.

In *People v. Scott*, yet another theory was advanced by the an appellate court for the retention of Evidence Code section 1101. People v. Scott, 194 Cal. App. 3d 550, 239 Cal. Rptr. 588 (1987). The Third District Court of Appeal concluded that the Truth-in-Evidence provision did not repeal section 1101 but rejected the *Perkins* analysis. *Id.* at 553-54, 239 Cal. Rptr. at 589-91. The *Scott* court reasoned that Truth-in-Evidence provision expressly provides that the legislature may reenact evidence code provisions. *Id.* at 554, 239 Cal. Rptr. at 591. Since the legislature amended section 1101 after the enactment of Proposition 8, the court interpreted this amendment to constitute a reenactment of that section. *Id.* at 554-56, 239 Cal. Rptr. at 590-92. However, the legislature only intended the amendment of section 1101 to overrule the Supreme Court of California's restrictive interpretation of section 1101 in *People v. Tassell*, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984), which narrowly construed section 1101 to limit the admissibility of character evidence. CAL.

appellate court decisions which strained to maintain section 1101 were decided, the Supreme Court of California has stated three times that the continuing validity of section 1101 is still an open question, and has declined to resolve the issue.[98] Also, one court of appeal questioned the three appellate decisions which suggested that section 1101 survived Proposition 8 and stated that the issue of the section's validity is still unresolved.[99] It is remarkable that the continuing validity of this cornerstone of the Anglo-American system of jurisprudence is still in doubt. As Professors Imwinkelried and Méndez state in their article on this topic: "[I]t is virtually unthinkable that ten years after the passage of Proposition 8 uncertainty still surrounds the standard governing the admissibility of such crucial and frequently used evidence."[100]

Before the passage of Proposition 8, except for felony convictions, all evidence of specific instances of conduct, including misdemeanor convictions, were inadmissible to attack or support a witness' credibility.[101] However, the Supreme Court of California, in *People v. Harris*,[102] held that the Truth-in-Evidence provision nullified the evidence code provisions which precluded attacking or supporting a witness' credibility with specific instances of conduct.[103] The court also stated that in passing Proposition 8, the electorate intended that "both judicially created and statutory rules

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EVID. CODE § 1101 (West Supp. 1992) (historical and statutory notes to 1986 legislation).

98. People v. Sully, 53 Cal. 3d 1195, 1225-26, 812 P.2d 163, 180-81, 283 Cal. Rptr. 144, 161-62 (1991); People v. Stoll, 49 Cal. 3d 1136, 1151 n.16, 783 P.2d 698, 707 n.16, 265 Cal. Rptr. 111, 120 n.16 (1989); People v. Harris, 47 Cal. 3d 1047, 1081, 767 P.2d 619, 640, 255 Cal. Rptr. 352, 373 (1989).

99. People v. Lankford, 210 Cal. App. 3d 227, 237-40, 258 Cal. Rptr. 322, 327-29 (1989).

100. Imwinkelried and Méndez, *supra* note 63, at 1012.

101. CAL. EVID. CODE § 787 (West 1966). Section 787 provides that "[s]ubject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." *Id.* Section 788 of the California Evidence Code provides, in part, that "[f]or the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ." *Id.* § 788 (West 1966).

102. 47 Cal. 3d 1047, 767 P.2d 619, 255 Cal. Rptr. 352 (1989).

103. *Id.* at 1081, 767 P.2d at 640, 255 Cal. Rptr. at 373. Thus, the court held that is was permissible to bolster the credibility of a police informant witness with evidence of his prior instances of reliability, evidence which prior to Proposition 8 would have been inadmissible. *Id.* at 1081-82, 767 P.2d at 640-41, 255 Cal. Rptr. at 373-74.

restraining admission of relevant evidence in criminal cases be repealed except insofar as 28(d) expressly preserves them."[104]

In another section of the *Harris* opinion, the court suggested that now, under the Truth-in-Evidence provision, misdemeanor convictions could be used for impeachment.[105] At least this is how commentators,[106] and courts[107] interpreted the decision. Interestingly, two appellate court decisions so interpreting *Harris* have been depublished.[108] Although this fact does not necessarily indicate the court's position on the issue, in the light of the failure of the supreme court to hand down express pronouncements about the Truth-in-Evidence provision, trial courts and practitioners increasingly attempt to speculate about the court's intent through the cases it chooses to depublish.

Harris and several appellate court cases have interpreted the Truth-in-Evidence provision as repealing the prior restriction against cross-examining a witness about specific instances of misconduct, which did not result in a conviction, to discredit the witness' credibility.[109] For example, the Supreme Court of California recently ruled in *People v. Mickle*[110] that, under the Truth-in-Evidence provision, the defense should have been allowed to cross-examine a prosecution witness about that witness having

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104. *Id.* at 1082, 767 P.2d at 641, 255 Cal. Rptr. at 374.

105. *Id.* at 1090-91, 767 P.2d at 646-48, 255 Cal. Rptr. at 379-81. In *Harris*, the court addressed the propriety of the trial court's disallowing the defense to impeach a prosecution witness with the fact of his misdemeanor probation. *Id.* at 1090, 767 P.2d at 646, 255 Cal. Rptr. at 379. The court stated that, although impeachment with misdemeanors was improper under former law, "because section 28(d) now makes all relevant evidence admissible in criminal proceedings except as provided in that section, the evidence is not inadmissible unless it is excluded pursuant to Evidence Code Section 352." *Id.* at 1090-91 n.22, 767 P.2d at 647 n.22, 255 Cal. Rptr. at 380 n.22 (referring to CAL. EVID. CODE § 352 (West 1966)). Nevertheless, the court held that the trial court properly exercised its discretion in excluding such impeachment under Evidence Code section 352. *Id.* at 1081, 767 P.2d at 640, 255 Cal. Rptr. at 373.

106. *See* Goldberg, *supra* note 46, at 634-35; Imwinkelried and Méndez, *supra* note 63, at 1016-17.

107. *But see* People v. Wheeler, 230 Cal. App. 3d 1406 (1991) (providing for misdemeanor impeachment), *review granted*, 1 Cal. App. 4th 1388 (1991).

108. People v. Bloodsaw, 224 Cal. App. 3d 1610, 274 Cal. Rptr. 653 (1990), *ordered not published pursuant to* CAL. R. CT. 979; People v. Pinkins, 223 Cal. App. 3d 69a, 69c-d (1990), *ordered not published pursuant to* CAL. R. CT. 979.

109. *See, e.g.*, Goldberg, *supra* note 46, at 642-44, and authorities cited therein.

110. 53 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991).

threatened other witnesses to prevent them from testifying against him in a previous legal proceeding.[111] The court held that such conduct showed a "morally lax character from which the jury could reasonably infer a readiness to lie."[112] The *Mickle* case would have been the perfect opportunity for the court to clearly articulate a new test governing the admissibility of such evidence. However, the supreme court did not do so. In fact, several key issues were not addressed. For example, can misconduct which only results in a juvenile conviction or which results in an acquittal be used for impeachment? Can a witness who testifies invoke his right to remain silent if questioned about uncharged criminal acts? And most importantly, what types of misconduct can a witness be cross-examined about? These issues have gone virtually unanswered by courts and commentators.[113]

In *Harris*, the same case which held that Proposition 8 repealed evidentiary rules restraining the admissibility of relevant evidence, the supreme court also suggested that the *Kelly-Frye* rule governing the admissibility of scientific evidence was not repealed.[114] The *Kelly-Frye* rule precludes otherwise relevant scientific evidence from being admitted unless it meets certain requirements for reliability--particularly general acceptance in the scientific community.[115] In *Harris*, the defendant contended that the trial judge improperly disallowed evidence of his polygraph examination, arguing that Proposition 8 repealed the prior evidentiary rule disallowing such evidence.[116] The court held that the Truth-in-Evidence provision did not have any impact on "accepted rules by which the reliability and thus the relevance of scientific evidence is determined."[117] Therefore, the court

111. *Mickle*, 54 Cal. 3d at 168, 814 P.2d at 318, 284 Cal. Rptr. at 539. For additional cases with similar holdings, see Goldberg, *supra* note 46, at 641-43.

112. *Id.* at 168, 814 P.2d at 318, 284 Cal. Rptr. at 539.

113. Goldberg, *supra* note 46, at 643-50.

114. People v. Harris, 47 Cal. 3d 1047, 1094, 767 P.2d 619, 649, 255 Cal. Rptr. 352, 382 (1989).

115. People v. Kelly, 17 Cal. 3d 24, 30-32, 549 P.2d 1240, 1244-45, 130 Cal. Rptr. 144, 148-49 (1976) (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

116. *Harris*, 47 Cal. 3d at 1094, 767 P.2d at 649, 255 Cal. Rptr. at 382.

117. *Id.*

suggested that the *Kelly-Frye* rule survived, and precluded the admission of defendant's proffered polygraph.[118] Professors Imwinkelried and Méndez, in their article, point out that the *Harris* court's "mistake is patent: Reliability and relevance are different concepts," and that *Kelly-Frye* often serves to exclude relevant evidence.[119] Moreover, the rule has been abandoned in many jurisdictions throughout the nation.[120] Of course, the Supreme Court of California did not indicate whether *Kelly-Frye* might have been modified by the Truth-in-Evidence provision to a simple relevancy test. In fact, since *Harris*, the Supreme Court of California has specifically held that the continuing validity of the *Kelly-Frye* rule under the Truth-in-Evidence provision has not yet been decided.[121]

The failure to implement Proposition 8's repeal of the rules of evidence cannot be blamed exclusively on the courts. Criminal practitioners are also to blame. For example, for the first nine years after the enactment of Proposition 8, no court or commentator addressed the issue of whether the *corpus delicti* rule remained in effect. Under this rule, a defendant's confession is inadmissible unless there is slight evidence apart from the confession to corroborate that the crime was, in fact, committed.[122] Recently, a law student wrote a comment arguing that the Truth-in-Evidence provision has abolished, or at least modified, the *corpus delicti* rule.[123] Despite the fact that *corpus delicti* rule is frequently an issue in trial courts, prosecutors have not argued in response to defense objections that the *corpus delicti* rule has not been

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118. *Id.* at 1094-95, 767 P.2d at 649-50, 255 Cal. Rptr. at 382-83. The whole *Kelly-Frye* issue could have been avoided in *Harris* since after the enactment of Proposition 8, as the court noted, the legislature passed an evidentiary rule prohibiting the admissibility of polygraph evidence. *Id.* at 1095 n.26, 767 P.2d at 650 n.26, 255 Cal. Rptr. at 383 n.26 (citing CAL. EVID. CODE § 351.1 (West 1992)).

119. Imwinkelried and Méndez, *supra* note 63, at 1021.

120. *Id.* at 11.

121. People v. Stoll, 49 Cal. 3d 1136, 1152 n.16, 783 P.2d 698, 707 n.16, 265 Cal. Rptr. 111, 120 n.16 (1989) (stating that whether Proposition 8 affected the *Kelly-Frye* rule and other evidentiary rules relating to the admissibility of scientific evidence is undecided).

122. B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 140 (2d ed. 1988).

123. Comment, *Reevaluation of the California* Corpus Delicti *Rule: A Response to the Invitation of Proposition 8*, 78 CALIF. L. REV. 1571 (1990).

satisfied: "Your honor, there is no *corpus delicti* rule, that rule is no longer in existence." In fact, criminal practitioners are constantly citing repealed evidentiary rules and trial judges are applying them every day in courts throughout our state. Even after the California courts made it clear that prosecutors could impeach witnesses by cross-examining them about specific instances of uncharged misconduct, prosecutors have not asked trial judges to allow them to do so. Interestingly, in the small handful of appellate cases interpreting Proposition 8's impact on the rules of evidence, it was often the defense which argued that a particular evidentiary provision had been repealed[124]--a curious result considering that Proposition 8 was intended to correct a perceived imbalance favoring criminal defendants in the rules of evidence.[125] Practitioners can claim that they were waiting for clear guidance from the courts before advancing evidentiary arguments based on Proposition 8. But, it may have been the courts which were waiting for the practitioners to advance the arguments before they decided them.

CONCLUSION

There is enough blame to be shared for the failed and delayed implementation of Proposition 8. The legislature, in the area of victim restitution, for example, failed to promptly enact legislation to carry out the initiative.[126] The courts, in major areas--including application of the initiative to the abolition of the diminished capacity defense, the exclusionary rule, and the liberalization of

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124. *E.g.*, People v. Mickle, 54 Cal. 3d 140, 168, 814 P.2d 290, 318, 284 Cal. Rptr. 511, 539 (1991) (defense argued that rules precluding impeachment with uncharged misconduct had been repealed by Proposition 8) (discussed *supra* notes 111-13 and accompanying text); *Harris*, 47 Cal. 3d at 1094-95, 767 P.2d at 649-50, 255 Cal. Rptr. at 382-83 (defense argued that *Kelly-Frye* had been repealed by Proposition 8) (discussed *supra* note 114 and accompanying text); People v. Bergschneider, 211 Cal. App. 3d 144, 164-65, 259 Cal. Rptr. 219, 230-31 (1989) (defense argued that rules precluding impeachment with uncharged misconduct had been repealed by Proposition 8); People v. Adams, 198 Cal. App. 3d 10, 14-16, 243 Cal. Rptr. 580, 582-83 (1988) (defense argued that rules precluding impeachment with uncharged misconduct had been repealed by Proposition 8).

125. *See supra* notes 89-90 and accompanying text (discussing *People v. Taylor* and Curb's argument in favor of Proposition 8, which was printed in the ballot pamphlet).

126. *See supra* notes 7-18 and accompanying text (discussing the right to victim restitution).

felony impeachment and evidentiary rules--delayed and subverted the voters' intent.[127] Prosecutors, perhaps, have been lax in failing to urge arguments based on Proposition 8. The defense bar, as the history of the initiative in the area of the diminished capacity defense amply illustrates, circumvented the proposition's mandate.[128]

This is an interesting time in our state's legal history, almost ten years after Proposition 8's passage, for a major California law review to be publishing a symposium on Proposition 8. Quite recently, the California electorate again attempted a major change in the criminal justice system by passing Proposition 115, commonly known as the Crime Victim Justice Reform Act.[129] Already, voices can be heard that the initiative is being applied so as to frustrate "the people's expressed purpose to create 'a system in which justice is swift and fair.'"[130] It will be interesting to see whether ten years from now Proposition 115 will have fared better at the hands of the criminal justice establishment than did Proposition 8.

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127. *See supra* notes 19-43 and accompanying text (discussing the abolition of the diminished capacity defense, the use of prior convictions for felony impeachment, and the repeal of the evidence code).

128. *See supra* notes 29-43 and accompanying text (discussing the defense bar's use of the "diminished actuality" defense after the enactment of Proposition 8).

129. CAL. CONST. art. I, §§ 24, 29, 30.

130. Whitman v. Superior Court, 54 Cal. 3d 1063, 1075, 820 P.2d 262, 274, 2 Cal. Rptr. 2d 160, 172 (1991) (Kennard, J., dissenting).