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Victims Truth and Detention--The People Spoke

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"The people are turbulent and changing; they seldom judge or determine right." Alexander Hamilton[1]

INTRODUCTION

Ten years ago, under the guise of creating rights for victims of crime, several groups cooperated in the creation, promotion, and passage of the so-called "Victims' Bill of Rights."[2] Surprisingly, this initiative was largely concerned with bringing about changes in the state's criminal justice system.[3] In the eyes of the drafters

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1. RECORDS OF THE FEDERAL CONVENTION, vol. 1, at 299 (Farrand ed. 1966).

2. Victims' Bill of Rights, Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I, §§ 12, 28; CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West Supp. 1992); CAL. WELF. & INST. CODE §§ 1732.5, 1767, 6331 (West Supp. 1992)). *See* Brosnahan v. Brown, 32 Cal. 3d 236, 300-06, 651 P.2d 274, 314-20, 186 Cal. Rptr. 30, 70-76 (1982) (setting forth the ballot pamphlet containing Proposition 8's text and the arguments and analysis of the initiative).

3. The essential elements of Proposition 8 included the rights of restitution, safe schools, and the right to be involved in the sentencing process. *See Brosnahan*, 32 Cal. 3d at 242-45, 651 P.2d at 277-79, 186 Cal. Rptr. at 33-35 (summarizing the provisions of Proposition 8). These "rights" relate directly to victims. In addition, Proposition 8 called for the abrogation of most exclusionary rules, restrictions on the right to bail, the unlimited use of convictions for impeachment and for enhancement purposes, abolition of the diminished capacity defense, tougher sentences for habitual criminals, limitations on plea bargaining, and restrictions on commitment to the California Youth Authority. *Id.* These changes relate solely to procedures affecting those accused or convicted of crime. Even so, the Supreme Court of California found all these issues were "reasonably germane" to the concern for crime victims. *Id.* at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.

and supporters of the initiative, procedural changes were necessary to promote the life, liberty and happiness of victims of crime.[4]

This populist approach to justice was not new, but when basic changes are urged through initiative, such efforts must be watched.[5] These are times of televised voter education. A professionally prepared thirty-second TV "bit" featuring a well-known actor easily replaces thought. Those voting for or against Proposition 8 did not have to read the proposal or understand its significance; they could rely on the costly commercials. After all, who doesn't sympathize with victims, and who wants to hide the truth? Nobody. We must get those crooks off the streets and keep

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4. Such changes in the rules of evidence and procedure were to satisfy "the more basic expectations that persons who commit felonious acts . . . will be appropriately detained, . . . tried, . . . and punished . . . ." CAL. CONST. art. I, § 28(a) (enacted by Proposition 8).

5. Proposition 8 is an outstanding example of the limitations and risks involved in the use of the initiative process. The process is needed when a substantial number of the public believe the legislature has failed to identify and resolve a pressing social problem. However, each initiative must be strictly confined to one subject so that the voters can be fully informed on the precise problem and the proponent's proffered solution. The risk of multiple subjects is clear; a voter may be firmly in favor of one or more but not all. Such a voter may vote for something he or she is not really in favor of or is simply indifferent to. Worst of all, the side issues may be unnoticed by many.

Under normal circumstances, people rely on the legislature to remedy social, economic or political problems. The legislature is, in theory, a more deliberate body made up of persons chosen to serve us all. Unfortunately, legislative solutions are often no more acceptable than court decisions or initiatives such as Proposition 8. For instance, in response to widely publicized and alarming reports of increasing child sexual abuse, many states enacted laws easing the prosecution's proof problems in such cases. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1416 (1989); CAL. EVID. CODE § 1228(a) (West Supp. 1992). A higher conviction rate is the obvious objective of such legislation. Physical evidence is often lacking and the only real witness may be a child who is the alleged victim. But do relaxations of long standing evidence rules get us closer to the truth? Don't some of these interfere with an accused's right to confront the witnesses against him or her? *See* White v. Illinois, 112 S. Ct. 736 (1992); Maryland v. Craig, 110 S. Ct. 3157 (1990); Idaho v. Wright, 110 S. Ct. 3139 (1990) (indicating the nature of the resulting problems). What of due process when the trial judge lets a child witness testify by closed circuit television; isn't the judge telling the jury she has found the child is justifiably terrified by the defendant? What of the so-called "rape shield" laws? *See, e.g.*, CAL. EVID. CODE §§ 782, 1103(c)(1) (West Supp. 1992); FED. R. EVID. 412. Are they just specific examples of Federal Rule of Evidence 403 or California Evidence Code section 352?

them in jail. The Proposition 8 campaign told voters that restricting bail and lowering evidence barriers were steps in that direction.[6]

However, feelings of outrage persist. The more recent victory of Proposition 115, the so-called "Crime Victims' Justice Reform Act" cannot be ignored.[7] Proposition 115 has been ruled constitutional despite the claim that it encompassed more than one subject and improperly revised the Constitution.[8] It was Proposition 115 that opened the two-way street of reciprocal discovery in California.[9] Again, a majority of the voting electorate has given additional tools to the prosecution in a continued effort to scale the court-made wall which protects accused persons in this democracy.

Does such majority made law lead us to a better quality of justice? Proposition 115's discovery provision goes farther than federal law, which only allows discovery of alibi witnesses.[10] While the proponents proclaim these are great days for justice in California, it is fair to ask why the accused must help the prosecution; it is not his or her job to do so. It is well established that the state must prove its case beyond a reasonable doubt; the accused need do nothing of a testimonial nature. This is a right

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6. *See* Deukmejian, *Arguments in Favor of Proposition 8, in* CAL. BALLOT PAMPHLET 34 (June 8, 1982) (stating "THERE IS ABSOLUTELY NO QUESTION THAT THE PASSAGE OF THIS PROPOSITION WILL RESULT IN MORE CRIMINAL CONVICTIONS, MORE CRIMINALS BEING SENTENCED TO STATE PRISON, AND MORE PROTECTION FOR THE LAW-ABIDING CITIZENRY") (emphasis in original).

7. Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE § 223, 223.5 (West Supp. 1992); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1992)).

8. *See* Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

9. CAL. CONST. art. I, § 30(c) (enacted by Proposition 115). *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 363, 815 P.2d 304, 308, 285 Cal. Rptr. 231, 235 (1991) ("Proposition 115 effectively reopened the two-way street of reciprocal discovery in criminal cases in California").

10. *See* FED. R. CRIM. P. 12.1(a) (requiring a defendant to disclose the names and addresses of alibi witnesses). *See also id.* 16(b)(2) (stating the general rule that the names of defense witnesses are not subject to disclosure).

recognized in the Bill of Rights and California's Constitution.[11] In fact, the California Supreme Court (under Chief Justice Rose Bird) struck down a reciprocal discovery statute enacted by the legislature.[12]

No one doubts that victims of crime[13] suffer tremendously. Their lot deserves full attention. However, many people feel that society pays more attention to the perpetrators of crime than to the victims of crime.[14] In fact, it wasn't until 1965 that California became the first state to provide a victims' compensation plan.[15] Progress has been slow.

The problems perceived by the proponents and supporters of Proposition 8 are described in the initiative itself.[16] The now

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11. *See* U.S. CONST. amend. V; CAL. CONST. art I, § 15.

12. *See In re* Misener, 38 Cal. 3d 543, 558, 698 P.2d 637, 648, 213 Cal. Rptr. 569, 580 (1985) (finding that a statute which allowed the prosecutor to discover prior statements of defense witnesses other than the defendant was a violation of the California Constitution's provision granting the criminal defendant the privilege against self-incrimination). *Misener* has been overruled by Proposition 115. *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991).

13. We must include as "victims of crime" those witnesses who are involuntarily involved in the prosecution or defense of the accused.

14. *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) at vi (statement of Lois Haight Herrington, Chairman).

15. *See Letters of Introduction,* 11 PEPPERDINE L. REV. xiii (Governor Deukmejian's letter). By the time Proposition 8 became law in California, thirty-six other states had crime victim compensation plans in place. *Id. See also infra* notes 46-52 and accompanying text (discussing California's victim compensation system).

16. *See* CAL. CONST. art. I, § 28(a) (enacted by Proposition 8). Section 28(a) provides:

> The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.
>
> The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectations that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished that the public safety is protected and encouraged as a goal of highest importance.
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> Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

apparent consequences of particular portions of the enactment are described by several of the articles that make up this Symposium. This Article will review some of the problems targeted by the drafters of the initiative that led to the conception and eventual birth of Proposition 8 and the relationship these problems have to the California criminal justice system.[17] I will then discuss the relevance and significance of the proponents' answers to those problems.[18] The conclusion could be stated in the form of a question; has Don Quixote struck again?[19] The answer must be "Yes."

I. PROBLEMS AND SOLUTIONS

It was not just the emotional and economic frustrations of victims and witnesses that motivated the proponents of Proposition 8. It was also the seemingly endless march of the California courts to the "left"[20] that compelled counteraction by the Victims'

> To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.

Id.

17. *See infra* notes 20-39 and accompanying text.

18. *See infra* notes 40-142 and accompanying text.

19. CERVANTES, THE HISTORY OF DON QUIXOTE DE LA MANCHA (1952). Like Don Quixote, the authors of Proposition 8 have cloaked themselves in the armor of "law and order" and set out to perform heroic deeds for victims of crime. Also like Don Quixote, they have made giants out of windmills such as the Evidence Code provisions limiting the use of character evidence and prior convictions in jury trials. Unlike Don Quixote, the drafters of Proposition 8 are real people, limiting the rights of the accused in ways that ultimately limit the rights of all citizens of California. *See infra* notes 143-153 and accompanying text.

20. By "left" I mean in favor of the accused. Until recently, the California Supreme Court provided greater protection to those accused of crime than did the United States Supreme Court. *Compare* People v. Jimenez, 21 Cal. 3d 595, 606, 580 P.2d 672, 678, 147 Cal. Rptr. 172, 178 (1978) (stating that the California Constitution requires the state to show beyond a reasonable doubt that a confession was voluntary) *with* Lego v. Twomey, 404 U.S. 477, 487-89 (1972) (federal constitution requires only a preponderance standard of proof). *See* People v. Markham, 49 Cal. 3d 63, 64-65, 775 P.2d 1042, 1043, 260 Cal. Rptr. 273, 274 (1989) (announcing the post-Proposition 8 rule in California as requiring no greater degree of proof of voluntariness than the federal preponderance standard).

Rights coalition. The majority of Californians who voted in 1982 agreed that changes were necessary.[21] They were convinced that the courts were keeping the truth from juries in an effort to protect the accused, that bail was too easily obtained, and that plea bargaining was working against the interests of the public.[22] Californians also apparently believed that victims should play a more active role in the criminal justice process.[23]

Aside from demanding more considerate treatment of victims and witnesses and some improvement in restitution rights, Proposition 8's proponents apparently intended to abolish the California version of the so-called "exclusionary rule."[24] California courts can no longer interpret the California Constitution to allow the exclusion of evidence that would be admissible under the federal constitution.[25] It was also the voting majority's perception that failure to inform jurors of the fact that the defendant "had a record," was improper; after all, would an honest

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21. 56.4% of the voters voted in favor of Proposition 8, and 43.6% were opposed. Jost, *Victims of Proposition 8*, L.A. Daily J., June 12, 1982, at 3, col. 5-6.

22. Curb, *Arguments in Favor of Proposition 8, in* CAL. BALLOT PAMPHLET, *supra* note 6, at 32.

23. *See* CAL. PENAL CODE § 1191.1 (enacted by Proposition 8) (providing for victim statements).

24. For example, prior to Proposition 8, California did not recognize an impeachment exception to the *Miranda* rule. *See* People v. Disbrow, 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976). In 1985, the Supreme Court of California held that article I, section 28(d) (enacted by Proposition 8) abrogates the authority of California's courts to develop broader remedies on search issues than those provided under federal law. *In re* Lance W., 37 Cal. 3d 873, 886-88, 694 P.2d 744, 752-54, 210 Cal. Rptr. 631, 639-40 (1985). In 1988 the Supreme Court of California applied this rationale to overrule *People v. Disbrow*. People v. May, 44 Cal. 3d 309, 318-20, 748 P.2d 307, 312-13, 243 Cal. Rptr. 369, 374-75 (1988) (extending section 28(d) to issues of compulsory self-incrimination).

25. *See In re* Lance W., 37 Cal. 3d at 886-88, 694 P.2d at 752-54, 210 Cal. Rptr. at 639-40 (holding that after Proposition 8, California courts can no longer develop broader remedies on search issues than those provided under federal law). *See also* Legislative Analyst of California, *Analysis, in* CAL. BALLOT PAMPHLET, *supra* note 6, at 32 (stating that "[u]nder current law, certain evidence is not permitted to be presented in a criminal trial or hearing. . . . This measure generally would allow most relevant evidence to be presented in criminal cases . . . [but] [t]he measure could not affect *federal* restrictions on the use of evidence") (emphasis in original).

person commit a felony?[26] Finally, pre-trial detention seemed like a good idea to many; why let crooks commit more felonies after they were arrested?[27]

To accomplish these goals, Proposition 8 amended the California Constitution by attempting to delete section 12 of Article I[28] and adding section 28 to that article. The constitutional changes included restitution for those who suffer "losses" as a result of criminal activity[29] and an assurance of safe schools for public school students and staff.[30] The California constitution was also made to proclaim that judges cannot exclude relevant evidence in criminal or juvenile proceedings.[31] In addition, section 28 of article I permits unlimited use of any felony conviction for impeachment purposes in a criminal proceeding and for

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26. *See* Legislative Analyst of California, *Analysis, in* CAL. BALLOT PAMPHLET, *supra* note 6, at 54 (stating that the proposition would change current law to allow prior felony convictions to be used "without limitation to discredit the testimony of a witness, including that of a defendant").

27. Curb, *Arguments in Favor of Proposition 8, in* CAL. BALLOT PAMPHLET, *supra* note 6, at 34 (arguing that a "yes" vote on Proposition 8 would give "us" a "tool to stop extremely dangerous offenders from being released on bail to commit more violent crimes").

28. Section 12 reads as follows: "A person shall be released on bail by sufficient sureties, except for: (a) capital crimes when the facts are evident or the presumption great; . . . Excessive bail may not be required. . . . A person may be released on his or her own recognizance in the court's discretion." CAL. CONST. art. I, § 12. Proposition 8 did not repeal section 12 because Assembly Constitutional Amendment No. 14 (1982) received a higher number of votes at the primary election held June 8, 1982.

29. *See* CAL. CONST. art. I, § 28(b) (enacted by Proposition 8).

30. *See id.* § 28(c) (enacted by Proposition 8). Under this provision, students and staff have an "inalienable right" to safe, secure and peaceful campuses. *Id.*

31. *Id.* § 28(d) (enacted by Proposition 8). However, this lowering of existing and codified barriers to proof does not to apply to California Evidence Code provisions describing privileges, governing hearsay, or to Evidence Code section 352 (the so-called "legal relevancy" provision), section 782 (limiting impeachment by prior sexual conduct of victim), and section 1103 (circumventing substantive use of prior sexual conduct of victim). CAL. CONST. art I, § 28(d) (enacted by Proposition 8). Finally, rules protecting freedom of the press remained untouched. *Id.*

enhancement of sentences.[32] So much for the constitutional changes.[33]

Proposition 8 also amended the California Penal Code so as to abolish the defense of diminished capacity[34] and to place the burden of persuasion by a preponderance of the evidence on any defendant claiming insanity as a defense.[35] Additionally, anyone convicted of a "serious felony" must receive an enhanced sentence for each prior conviction; these enhanced sentences are to run consecutively.[36]

Great public interest existed in the provisions of Proposition 8 allowing victims to express their views concerning both the crime and the criminal at sentencing and parol proceedings.[37] Additionally, lawyers active in the criminal practice must have been quite interested in the proposition's renewal of the effort to outlaw plea bargaining. According to Proposition 8, such "dealing

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32. *Id.* § 28(f) (enacted by Proposition 8). When a prior conviction is an element of the charged felony, evidence of such a conviction must be presented in open court. *Id. See infra* notes 105-114 and accompanying text (discussing decisions limiting the sweep of this otherwise plain language).

33. Proposition 8 included changes in the guidelines for setting bail. *See Text of Proposed Law, in* CAL. BALLOT PAMPHLET, *supra* note 6, at 33 (setting forth proposed CAL. CONST. art. I, § 28(e)). Under its language, public safety must be given primary consideration. *Id.* A judge could not release a person charged with a "serious felony" on his or her own recognizance. *Id.* However, these provisions never became "law." Proposition 4 was on the same ballot and passed by a greater margin; its handling of bail superseded these Proposition 8 provisions. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 254-55, 651 P.2d 274, 285, 186 Cal. Rptr. 30, 41 (1982) (finding that the bail provision was inoperative because Proposition 4 received more votes).

34. *See* CAL. PENAL CODE § 25(a) (enacted by Proposition 8). However, diminished capacity can still be considered by the judge when sentencing. *Id.* at § 25(c). *See infra* notes 126-135 and accompanying text (discussing these changes).

35. CAL. PENAL CODE § 25(b) (enacted by Proposition 8).

36. *Id.* § 667 (enacted by Proposition 8). *See id.* § 1192.7(c) (enacted by Proposition 8) (defining "serious felony").

37. *See id.* § 1191.1 (enacted by Proposition 8) (providing victims of crime or their next of kin the right to appear at sentencing proceedings and "reasonably express his or her views concerning the crime, the person responsible, and the need for restitution"); CAL. WELF. & INST. CODE § 1767 (enacted by Proposition 8) (providing similar rights to victims of crime or next of kin in juvenile sentencing proceedings). These remarks of the victim must be expressly noted by the deciding authority who must then state his or her conclusion as to whether the convicted person will pose a threat to public safety if released. CAL. PENAL CODE § 1191.1 (enacted by Proposition 8); CAL. WELF & INST. CODE § 1767 (enacted by Proposition 8).

with justice" is prohibited when a "serious felony" or driving under the influence of alcohol or drugs is charged, unless insufficient evidence exists to convict or no real difference in sentence will follow.[38] One wonders when these excepted circumstances can exist or make a difference in an ethically correct criminal justice system.

Finally, Proposition 8 amended the Welfare and Institutions Code to mandate that judges cannot sentence to the Youth Authority persons who are 18 or older when they are convicted of a "serious felony."[39]

II. THE SIGNIFICANCE OF THE CHANGES

The practical significance of the additions to the State's constitution and statutes is scattered. Most of the provisions have not changed the picture in any noticeable way. A few have affected procedures to some extent--several of these will be discussed here. The first three provisions that will be discussed, i.e., restitution, safe schools, and victim statements, deal with true victims' rights. The rest are concerned with changes that affect those suspected, charged, or convicted of crime.

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38. CAL. PENAL CODE § 1192.7 (enacted by Proposition 8). *See id.* § 1192.7(c) (defining serious felonies)

39. CAL. WELF. & INST. CODE § 1732.5 (enacted by Proposition 8). It should be noted that a section on Mentally Disordered Sex Offenders was also added to the Welfare and Institutions Code but no real change in law is apparent. *See id.* § 6331 (enacted by Proposition 8). Another important point is that the Proposition specifically requires a two-thirds majority of the legislature to change any of these additions to the statutes of California. *See* CAL. PENAL CODE §§ 25(d), 667(e), 1191.1, 3043 (enacted by Proposition 8); CAL. WELF. & INST. CODE §§ 6331, 1767 (enacted by Proposition 8).

A. Restitution

Criminal offenders are subject to civil liability for harms committed to victims, but few offenders are able to pay.[40] Additionally, there are times when victims have what most would consider valid tort claims against public employees or agencies.[41] Unfortunately, tort actions against such arms of the government may be worthless because recovery may be denied on immunity grounds.[42] Some victims' rights proponents seem opposed to such immunity barriers; isn't there a right not to be a victim?[43]

Although most of us will be a victim of crime before we depart this world, limited governmental immunity seems justified.[44] However, such governmental tort immunity does not preclude

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40. Even though an offender has liability insurance, the insurer will not have to pay if the harm inflicted by the offender was "expected or intended." *See* Fire Insurance Exchange v. Abbott, 204 Cal. App. 3d 1012, 1022-24, 1028-29, 251 Cal. Rptr. 620, 626-27, 630-31 (1988) (providing that there was no coverage for harm resulting from defendant's sexual contacts with minors despite psychiatric evidence that the defendants did not intend to injure their victims). *See also* CAL. INS. CODE § 533 (West 1972) (statutory bar to coverage for harm expected or intended).

Some states, such as New York, enacted laws designed to make wrongdoers disgorge to victims any proceeds from the wrongdoer's "speech" about the crime. *See* N.Y. EXEC. LAW § 632-2 (McKinney 1982 & Supp. 1992). *See also* Hudson, *The Crime Victim and the Criminal Justice System: Time For Change*, 11 PEPPERDINE L. REV. 23, 47 (listing 17 other states that, as of 1984, had enacted similar provisions). However, New York's law was held to violate the First Amendment because it was a content-based, financial disincentive on speech that was not justified by the state's interest in compensating victims. Simon & Schuster Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501, 508 (1991). There may be statutes in other states that are within the guidelines set by this unanimous opinion.

41. Although the right to civil recovery exists, how far can it go? The old notion that "the King can do no wrong," no longer exists, but limits must be placed on the civil liability of governments and public employees. The identification of the limits of such immunity is not easy.

42. Martinez v. California, 444 U.S. 277 (1980), is often raised in such discussions. In *Martinez*, the parole agency released an individual with a history of sex offenses; he killed a fifteen year old girl shortly after being released. *Martinez*, 444 U.S. at 279. Should the agency be held legally liable for this "error in judgment?" The answer was "No." *Id.* at 282-83.

43. *See* Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPPERDINE L. REV. 63 (1984).

44. *See* Berkovitz v. United States, 486 U.S. 531 (1988) (providing a helpful discussion of this problem for the uninitiated).

recovery of restitution from either the state or the offender, or both.[45]

It was in 1965 that California enacted the first statute providing state compensation for innocent victims of crime.[46] Proposition 8 has added teeth to these rights by amending the California Constitution to require restitution be provided to all persons suffering losses as a result of criminal activity.[47]

As of 1986, the California Penal Code specifically provides that every victim be provided with information concerning their right to civil recovery and the opportunity to be compensated from the Restitution Fund.[48] Under California Penal Code section 679, victims of crime are to be honored and protected "in a manner no less vigorous than the protections afforded criminal defendants."[49] Additionally, restitution is now a condition of probation in every case where a person is convicted of a crime and is granted

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45. Do not overlook the duty of the probation officer to include in the report to the trial judge the officer's determination of whether the defendant is a person who is required to pay a fine under section 13967 of the Government Code, and whether the court should require as a condition of probation restitution to the victim (or to the Indemnity Fund if assistance has been granted). *See* CAL. PENAL CODE § 1203 (West 1982 & Supp. 1992).

46. *See* 1965 Cal. Stat. ch. 1549, secs. 1-2, at 3641-42 (enacting CAL. WELF. & INST. CODE §§ 1500.02, 11211). The current victim compensation system is codified at California Government Code sections 13959 through 13969.2. *See* CAL. GOV'T CODE §§ 13959-13969.2 (West 1980 & Supp. 1992). *See also* CAL. PENAL CODE § 679 (setting forth a listing of statutory rights of victims and witnesses of crimes and requiring that victims and witnesses be advised of their rights to civil recovery and the opportunity to be compensated from the Restitution Fund created and administered under the Government Code). *See also* 42 U.S.C.A. § 10601 (West 1991) (creating a federal crime victims' restitution fund); 18 U.S.C.A. § 1501, 1512-15, 3579-80 (West 1984 & Supp. 1991) (the federal Omnibus Victim and Witness Protection Act of 1982, which establishes specified rights for victims and witnesses). Many other states now have such laws. *See, e.g.*, N.Y. PENAL LAW § 60.27 (McKinney 1987 & Supp. 1992); ARIZ. REV. STAT. ANN. § 13-603c (1989).

47. CAL. CONST. art. I, § 28(f) (enacted by Proposition 8).

48. CAL. PENAL CODE § 679.02(a)(8) (West Supp. 1992). Section 679.02 was enacted in 1986 as part of Title 17 of the California Penal Code, entitled *Rights of Victims and Witnesses of Crime*. 1986 Cal. Stat. ch. 1427, sec. 1, at 5119 (enacting CAL. PENAL CODE §§ 679, 679.01, 679.02). *See supra* notes 40-45 and accompanying text (discussing the limitations that exist on the victim's right to tort recovery). *See also* CAL. GOV'T CODE §§ 13959-13969.2 (West 1980 & Supp. 1992) (providing for the establishment and maintenance of the Restitution Fund).

49. CAL. PENAL CODE § 679 (West 1988).

probation.[50] These explicit orders to law enforcement agencies, prosecutors, and judges to pay closer attention to the civil, moral and restitutionary rights of victims reflect Proposition 8's amendments to the California Constitution requiring restitution[51] and declaring a "grave statewide concern" for the rights of victims of crime.[52]

B. Safe Schools

Thanks to Proposition 8, the California Constitution now reads: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[53] This so-called "safe schools" provision of Proposition 8 has had little practical effect. While the provision sounds great and probably had a powerful impact on those voting in 1982, it accomplished nothing.

In one case interpreting the provision, a student filed suit claiming a public school teacher abused, beat, and publicly humiliated him in violation of this duty.[54] The trial judge sustained the demurrer filed by the defendants (the teacher, school district, board of education, and the school).[55] The First District Court of Appeal of California affirmed, holding that section 28(c) does not provide an independent basis for a private right of action

50. *Id.* § 1203.04(a) (West Supp. 1992). Section 1203.04 was enacted in 1983. 1983 Cal. Stats. ch. 568, sec. 2, at 2434.

51. CAL. CONST. art. I, § 28(b) (enacted by Proposition 8).

52. *See* CAL. CONST. art. I, § 28(a) (enacted by Proposition 8).

53. CAL. CONST. art. I, § 28(c) (enacted by Proposition 8).

54. Clausing v. San Francisco Unified School Dist., 221 Cal. App. 3d 1224, 1230, 1235-36, 271 Cal. Rptr. 72, 73, 77 (1990), *review denied,* 1990 Cal. LEXIS 4382 (LEXIS, Cal. library, Cases file) (1990).

55. *Id.* at 1235, 271 Cal. Rptr. at 77.

for damages.[56] This is not an unusual result.[57] It takes more than a constitutional provision to create a cause of action in tort.[58]

One may ask why the proponents of Proposition 8 did not specifically create a tort cause of action for victim's of school violence. It may be that they thought they had done so; what isambiguous about an "inalienable right?" After all, for every right there is a remedy.[59]

It is more likely the proponents of Proposition 8 recognized the dangers that would accompany such an effort. Not only would such an effort press the proposition closer to the barrier created by the single subject doctrine,[60] it might also have strengthened the opposition's position by providing them with support from the

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56. *Id.* at 1237, 271 Cal. Rptr. at 79. According to the court in *Clausing*, section 28(c) is not self-executing in the sense of supplying a right to sue for damages. *Id.* It declares a general right without specifying any rules for its enforcement, imposes no express duty on anyone to make schools safe, and is devoid of procedures from which a damages remedy could be inferred. *Id.* at 1237-38, 271 Cal. Rptr. at 79. *See* Leger v. Stockton Unified School District, 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688 (1988) (Third District Court of Appeal of California decision reaching the same conclusion as *Clausing*).

57. *See, e.g.*, Arroyo v. Pla, 748 F. Supp. 56, 60 (1990) (which was guided by *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) in reaching the holding that there is no private cause of action under the United States Constitution for failure to provide adequate security or medical attention).

58. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (dismissing a damages action based on an unlawful search and seizure by Federal narcotics agents); Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978) (holding that a child did not have a cause of action against parents despite the existence of statutes providing that children must receive proper nurturing, support, and physical care).

59. This answer is unlikely. Anyone close to law (e.g. legislators, public administrators, etc.) knows that tort liability is not created by such general language. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978). *See also* Cort v. Ash, 422 U.S. 66 (1975) (setting forth several factors relevant to determining whether a private remedy is implicit in a statute that does not expressly provide for one). *But see* Comment, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 PAC. L.J. 1309, 1319-32 (1983) (discussing California Constitution article I, section 28(c) and interpreting the section as self-executing and as providing a cause of action for damages for violation of a constitutional right).

60. *See* CAL. CONST. art. II, § 8(d) (requiring that an initiative measure may only embrace one subject). Even the majority in *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30, might have found the contents of such a package no longer "reasonably germane." *See id.* at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36 (1982) (Supreme Court of California held that all the issues contained in Proposition 8 were "reasonably germane" to the concern for crime victims).

insurance industry. Regardless of the real reason, the creation of such a cause of action should not be left to a majority of voters. So many issues must be carefully considered when adopting or rejecting a change in the tort liability of a person or entity, let alone of public institutions such as schools.[61] This work is best left to the courts and legislatures of this country.

C. Victim's Statements

Because of Proposition 8, it is now a given that victims of crime are to be treated with dignity and respect by law enforcement agencies, prosecutors, and judges.[62] Furthermore, victims must be notified of court proceedings and must be given the opportunity to speak at sentencing proceedings and juvenile hearings.[63] In addition, victims are to be informed about their right to civil recovery and their opportunity to be compensated from the Restitution Fund.[64] Finally, victims are to be notified when the defendant is to be placed on parole.[65] In other words, victims are no longer the forgotten people in criminal proceedings. This is good.

Of particular interest to many is Proposition 8's grant to victims of the right to attend sentencing proceedings and express his or her views concerning the crime, the person responsible, and the victim's need for restitution.[66] The sentencing judge must consider such statements when imposing a sentence and must state on the

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61. *See* L. GREEN, THE LITIGATION PROCESS IN TORT LAW (2d ed. 1977); W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS § 53, at 356 (5th ed. 1984) (for review on the factors that enter into decisions on this so-called "duty question").

62. *See* CAL. PENAL CODE § 679 (West 1988). While not enacted by Proposition 8, this and similar provisions of the California Penal Code ensuring victims' rights most likely would not have been enacted without Proposition 8's addition of section 28(a) to the California Constitution.

63. CAL. PENAL CODE §§ 679.02(a)(1), (3)-(4) (West Supp. 1992); *id.* § 1191.1 (enacted by Proposition 8).

64. CAL. PENAL CODE § 679.02(a)(8) (West Supp. 1992); *id.* § 1191.2 (West Supp. 1992); CAL. GOV'T CODE §§ 13959-13969.2 (West 1980 & Supp. 1992).

65. CAL. PENAL CODE § 679.02(a)(11) (West Supp. 1992).

66. CAL. PENAL CODE § 1191.1 (enacted by Proposition 8).

record whether the defendant would pose a threat to public safety if granted probation.[67]

One special circumstance must be mentioned. The propriety of victim statements making an issue of a murder victim's high community standing or of the bereavement of the victim's family has been considered by the Supreme Court of the United States several times in recent years.[68] When such victim statements are admitted, it can be argued that the defense, when the shoe fits, could disparage the victim. Surely this shouldn't be allowed. Many believe that when a jury is asked to choose between death or life imprisonment for a convicted murderer, their decision must turn on the defendant's character, not the happenstance of whether the victim was a vagrant or a pillar of the community.[69]

Faced with this issue, the Supreme Court of the United States, in two recent decisions, barred victim impact statements from jury consideration in capital cases.[70] However, this seemingly established rule was reversed as being ill-considered in *Payne v. Tennessee*.[71]

In *Payne*, Chief Justice Rehnquist mustered a majority of the court who chose not to compound what it considered error; it overturned its own recent precedents.[72] It is now the rule that the eighth amendment erects no *per se* barrier prohibiting a capital sentencing jury from considering "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a

67. *Id. See also id.* § 1191.15 (West Supp. 1992) (providing that, when necessary, a victim's statement may be written, audiotaped, or videotaped).

68. *See* Booth v. Maryland, 482 U.S. 496 (1986), *overruled*, 111 S. Ct. 2597 (1991); South Carolina v. Gathers, 490 U.S. 805 (1989), *overruled*, 111 S. Ct. 2597 (1991).

69. *See The Court Sets a Death Agenda*, N. Y. Times, April 27, 1991, § 1, at 24, col. 1 (expressing this opinion editorially).

70. *See Booth*, 482 U.S. at 509; *Gathers*, 490 U.S. at 809-10 (holding that evidence and argument relating to the victim and the impact of the victim's death on the victim's family was *per se* inadmissible at a capital sentencing hearing). Justices Powell and Brennan, respectively, were the authors of the now discarded majority opinions.

71. 111 S. Ct. 2597 (1991).

72. *Id.* at 2608.

prosecutor from arguing such evidence at a capital sentencing hearing.[73] Apparently the extent of harm caused by the defendant is a relevant factor in determining the appropriate punishment.[74]

Justices Marshall, Blackmun, and Stevens dissented. Justice Marshall, with whom Justice Blackmun joined, was concerned about such a sudden change in law by the Supreme Court.[75] They pointed out that it was only four years earlier in *Booth v. Maryland* that a five-Justice majority held that "victim impact" evidence could not constitutionally be introduced during the penalty phase of a capital trial, and just two terms ago an effort to rebuff *Booth* was denied.[76] These dissenters fear that this reaction by the present majority reflects a feeling that the Court is free to discard any principle of constitutional liberty just because it has the power to do so.[77]

In his dissent, Justice Stevens points out that, until *Payne*, capital punishment jurisprudence required that any decision to impose the death penalty be based solely on evidence that tends to inform the jury about the character of the offense and the character of the defendant.[78] Whether the victim was moral or immoral was irrelevant and inadmissible.[79]

A local and recent illustration of how "victim impact" statements may produce problems is provided by *People v. Edwards*.[80] In *Edwards*, it was held that evidence of the impact of the crime (murder and attempted murder) on the surviving victim and the victim's family is a "circumstance of the crime"

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73. *Id.* at 2608-09.

74. *See* People v. Edwards, 54 Cal. 3d 787, 832-36, 819 P.2d 436, 464-67 1 Cal. Rptr. 2d 696, 727-27 (1991) (setting forth California's reaction to this issue). *See infra* notes 80-85 and accompanying text (discussing *People v. Edwards*).

75. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting).

76. *Id.* (Marshall, J., dissenting). *See* Booth v. Maryland, 482 U.S. 496, 509 (1986); South Carolina v. Gathers, 490 U.S. 805 (1989).

77. *Id.* (Marshall J., dissenting).

78. *Id.* at 2625-26 (Stevens, J., dissenting).

79. *Id.* (Stevens, J., dissenting).

80. 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991).

which is admissible as an aggravating factor at the penalty phase of a capital case.[81] Justice Mosk, dissenting on this point, questioned the use of "victim impact" evidence in the death penalty phase of this and similar cases.[82] The death penalty proceeding should be based upon the "circumstances of the crime."[83] The "circumstances" include the manner in which the *actus reus* was performed and the motive that underlay the *mens rea*.[84] Assuming the drafters of California's 1978 death penalty law desired its constitutionality, and because victim impact evidence had not, in 1978, received acceptance as a penalty factor, the effect of the crime on the victim's family was not relevant to any material circumstance and was therefore unconstitutional.[85]

Letting victims express themselves may be beneficial to their mental health but adds little to the judge's basis for sentencing. Judges know that victims suffer and that stiffer sentences often help some victims "feel better" about the system. But what are the judge's proper concerns at this stage of the case? Sympathy is not an issue. How is the victim's loss relevant to sentencing? The question of proper restitution is treated separately.

The right to speak has a therapeutic value in many cases. If the victim is allowed to speak only for therapeutic reasons, aren't we

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81. *Id.* at 835, 819 P.2d 467, 1 Cal. Rptr. 2d at 727. With this view, we should compare *People v. Gordon*, 50 Cal. 3d 1223, 792 P.2d 251, 270 Cal. Rptr. 451 (1990), where the court wrote: "In the general case--and certainly here--the effect of the crime on the victim's family is not relevant to any material circumstance. Nor is sympathy for the victim. Obviously, evidence on these matters is inadmissible." *Id.* at 1266-67, 792 P.2d at 277-78, 270 Cal. Rptr. at 477-78. *Gordon* was decided under the *Booth* and *Gathers* rule. *Id.* at 1268, 792 P.2d at 278, 270 Cal. Rptr. at 478.

82. *Edwards*, 54 Cal. 3d at 851, 819 P.2d at 477, 1 Cal. Rptr. 2d at 737 (Mosk, J., concurring and dissenting).

83. *See* CAL. PENAL CODE § 190.3 (West 1988).

84. *Edwards*, 54 Cal. 3d at 853, 819 P.2d at 478-79, 1 Cal. Rptr. 2d at 738-39 (Mosk, J., concurring and dissenting).

85. *See id.* at 855, 819 P.2d at 479-80, 1 Cal. Rptr. at 739-40 (Mosk, J., concurring and dissenting). *See also* CAL. PENAL CODE § 190.3 (West 1988) (death penalty statute enacted by initiative in 1978).

reverting to the old "eye for an eye" level of justice?[86] Restitution is properly provided, but retribution or revenge is out.

It can only be hoped that the use of such material will be carefully guarded by trial judges. Victims can assist judges at the sentencing stage but this help must be fairly confined. Lawyers and judges must rein in efforts by victims to get revenge; victims' rights and justice must go hand-in-hand.

D. Truth In Evidence

One of the main goals of the proponents of Proposition 8 seems to have been the correction of what proponents perceived to be the injustice of the California Evidence Code as construed by the courts of this state. The so-called "Truth-in-Evidence" provision is the result. Its language is simple:

> [R]elevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103.[87]

First of all, the truth (in a factual sense) is seldom known. What we have is evidence of the truth. Most of this evidence is testimonial. By its nature, testimonial proof is of questionable value. Without reviewing your courses in evidence, just recall the four soft spots of testimonial proof; perception, memory, language,

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86. *See Dahmer Gets 15 Life Terms,* San Francisco Chronicle, Feb. 15, 1992, A1, col. 2 (setting forth a vivid portrayal of Rita Isbell, the sister of victim Errol Lindsey, screaming obscenities at serial killer Jeffrey Dahmer). *See also Serial Killer Apologizes To Families, id.* at col. 4 (story accompanying picture) (describing how Isbell, shaking her fists and shouting obscenities at Dahmer, had to be physically removed from the courtroom). Nine relatives of Dahmer's victims described for the court the pain they suffered due to Dahmer's killing, butchering and having sex with the corpses of their family members. *Id.*

87. CAL. CONST. art. I, § 28(d) (enacted by Proposition 8).

and sincerity. For instance, suppose A claims there was a bear in his backyard on Christmas Day; does his saying so make to true? What of Anita Hill and Judge (now Justice) Thomas; do we know the truth? One special species of testimonial proof is especially suspect; what we call "hearsay" is too unreliable for use by jurors, except when uttered under special circumstances.[88]

Even so-called "real evidence" has its probative problems. The problems of authenticity and original integrity come immediately to mind. Suppose our friend "A" produced a plaster cast of a bear's paw print found in his backyard? Does this convince you A was telling the truth? The rules of evidence recognize such problems of reliability.[89] When you add our reliance on lay jurors to find the truth in both civil and criminal cases, the need for experience-based rules of evidence becomes apparent.[90]

The rules of evidence have, from the beginning, served to assist jurors in their search for the truth. Only proof that may mislead jurors, or evidence that must be excluded for policy reasons is kept from the eyes and ears of lay jurors by today's rules. Existing rules recognize that some proof is too "hot" for lay persons. For example, we severely limit the admissibility of character evidence and prior convictions. Under Proposition 8, most of the problems associated with these types of evidence are now left to California Evidence Code section 352.[91]

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88. *See* CAL. EVID. CODE §§ 1200-1205 (West 1966) (general provisions of California's hearsay rules); FED. RULE EVID. 801-806 (federal hearsay rules).

89. *See* CAL. EVID. CODE §§ 1400-1454 (West 1966 & Supp. 1992) (California authentication provisions); *id.* §§ 1500-1511 (West 1966 & Supp. 1992) (California's best evidence rule). *See also* FED. RULE EVID. 901-903 (federal authentication provisions); *id.* 1001-1008 (federal best evidence rules).

90. Even though England has abolished the use of juries in all but a few civil cases, they do rely on them in criminal cases. Therefore, some exclusionary rules still exist in England.

91. *See* CAL. EVID. CODE § 352 (West 1966) (allowing the court discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will unduly waste time or create a substantial danger of undue prejudice, confusion or misguidance of the jury). Under the terms of Proposition 8, existing California privileges and hearsay statutes remain intact. CAL. CONST. art. I, § 28(d) (enacted by Proposition 8). *See also* FED. R. EVID. 403 (the federal equivalent to California Evidence Code section 352).

The proposition simply requires that "relevant evidence" not be excluded. By definition, "relevant evidence" includes evidence relating to the credibility of a witness or hearsay declarant, and evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.[92] On its face, this drops the barrier to character evidence, proof of prior acts and other prejudicial matters. Fortunately, section 352 of the California Evidence Code is still with us.[93] It provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[94]

These relevancy rules, together with the retained sections governing privileges and hearsay, are all a well-trained trial judge needs to handle a criminal case. However, such a "one-armed" set of rules for criminal trials leaves much to be desired. Section 352 leaves questions of admissibility to the discretion of the trial judge. Without more precise guidance, it is possible for one judge to admit evidence that another would reject.

The more precise rules, set forth in the California Evidence Code, describing the use of character evidence were carefully developed over a period of many years. Experience established their value in our jury-dependent adversary system. Any proposed change in these rules should be studied carefully; modification is not something to be left to a majority vote of the general public.[95]

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92. CAL. EVID. CODE § 210 (West 1966).

93. *See* CAL. CONST. art. I, sec. 28(d) (enacted by Proposition 8) ("Nothing in this section shall affect. . .Evidence Code, Sections 352. . .").

94. CAL. EVID. CODE § 352 (West 1966).

95. The codification of the rules of evidence is now widespread. But even the most recent codifications are altered from time to time. *See, e.g.,* FED. R. EVID. 609 (dealing with the admissibility of convictions on the issue of credibility). A rather thorough revision of this rule went into effect a few months ago. *See* FED. RULE EVID. 609 Historical and Statutory Notes. Rape shield laws and tender years exceptions to the hearsay rule are other examples. *See* CAL. EVID. CODE § 1103(c)(1) (West Supp. 1992) (California's rape shield law making opinion evidence, reputation

Trial judges operating under the "Truth-in-Evidence" system are left with little real guidance; they are starting over.[96]

E. Prior Convictions

At common law, convicted felons were incompetent witnesses; they could not testify under oath at any trial.[97] In 1917, the Supreme Court of the United States ruled that "the dead hand of the common law rule" of disqualification should no longer apply in federal courts.[98] The rule has disappeared from all courts today. Even so, most courts admit evidence regarding a witness' prior conviction of certain felonies as relevant to the issue of credibility in both civil and criminal cases.[99] In California, under *People v.*

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evidence or specific instances of the complaining witness' sexual conduct (except sexual conduct with the defendant) inadmissible to prove consent); *id.* § 782 (West Supp. 1992) (governing the procedure for admission of evidence of sexual conduct of complaining witness); *id.* § 1228(a) (West Supp. 1992) (California's "tender years" exception providing that a statement by a minor child under 12 describing sexual abuse to that child is not made inadmissable by the hearsay rule); FED. RULE EVID. 412 (federal rape shield law). Again, regardless of your view as to their desirability, each rule was worked out deliberately by qualified persons.

96. I have not mentioned sections 782 and 1103 of the California Evidence Code; they were retained by California Constitution article I, section 28(d). CAL. CONST. art. I, § 28(d) (enacted by Proposition 8). These rules (governing the admissibility of evidence of prior sexual conduct of the victim as impeachment or to prove consent) are but particular statements of the result a well-trained trial judge could reach using just California Evidence Code sections 210 (defining relevant evidence) and 352 (giving the court discretion to exclude evidence). Try it yourself.

97. WIGMORE, EVIDENCE §§ 519- 520, at 725-30 (Chadbourn Rev. ed. 1979).

98. Rosen v. United States, 245 U.S. 467, 471 (1918).

99. *See* CAL. EVID. CODE § 788 (West 1966); FED. RULE EVID. 609.

Beagle[100] and its progeny,[101] a carefully limited rule developed.[102]

Under the guise of victims' rights, the proponents of Proposition 8 attempted to wipe out all barriers to the admission of evidence of felonies when such evidence was offered for impeachment purposes.[103] This change, governing the admission of convictions for impeachment purposes, could have caused the most significant step to the rear traceable to Proposition 8. Look at the language: California's Constitution now states that *any* prior

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100. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

101. *See* People v. Barrick, 33 Cal. 3d 115, 122-30, 654 P.2d 1243, 1250-52, 187 Cal. Rptr. 716, 719-26 (1982) (stating that it is error for trial judge to sanitize the auto theft prior conviction in an auto theft case because it allowed the jury to speculate regarding the nature of the prior offense); People v. Spearman, 25 Cal. 3d 107, 113-19, 599 P.2d 74, 76-80, 157 Cal. Rptr. 883, 885-90 (1979) (finding that it was an abuse of discretion to introduce a possession of narcotics prior conviction in a narcotics case because possession of narcotics did not involve dishonesty); People v. Fries, 24 Cal. 3d 222, 226-34, 594 P.2d 19, 22-27, 155 Cal. Rptr. 194, 197-202 (1979) (admission of prior conviction for robbery was error in a current robbery case were no dissimilar prior convictions were available); People v. Woodward, 23 Cal. 3d 329, 334-42, 590 P.2d 391, 393-99, 152 Cal. Rptr. 536, 538-44 (1979) (error for trial court to fail to exercise discretion to exclude evidence of prior convictions for voluntary manslaughter and ex-felon with a gun because these convictions ostensibly had no bearing on truthfulness); People v. Rollo, 20 Cal. 3d 109, 115-23, 569 P.2d 771, 773-77, 141 Cal. Rptr. 177, 179-84 (1977) (error to admit only fact of the prior conviction, leaving the defense with an option to disclose nature of the prior conviction); People v. Rist, 16 Cal. 3d 211, 218-23, 545 P.2d 833, 838-41, 127 Cal. Rptr. 457, 462-65 (1976) (trial court abused its discretion by introducing a prior conviction for robbery in a current robbery case where dissimilar prior convictions were also available); People v. Antick, 15 Cal. 3d 79, 96-100, 539 P.2d 243, 254-56, 123 Cal. Rptr. 475, 486-88 (1975) (introduction of a prior conviction required reversal because prior conviction was remote in time). *See also* People v. Harrison, 150 Cal. App. 3d 1142, 198 Cal. Rptr. 762 (1984) (this line of cases abrogated by Proposition 8).

102. In *Beagle*, the California Supreme Court held that a trial judge must exercise discretion to prevent impeachment of a witness by evidence of a prior felony conviction when the probative value of such evidence is substantially outweighed by the risk of undue prejudice. *Beagle*, 6 Cal. 3d at 447, 492 P.2d at 4, 99 Cal. Rptr. at 316. The *Beagle* court gave further guidance to the trial courts by setting forth important factors that trial courts must consider in determining the admissability of prior convictions. *Id.* at 453-54, 492 P.2d at 8, 99 Cal. Rptr. at 320. Following these guidelines, trial courts developed a line of decisions excluding evidence of prior convictions that were too remote in time, too similar to the offense charged, or that were convictions for acts of violence, since violent or assaultive crimes generally do not bear on the honesty or veracity of the actor. *See supra* note 101 (setting forth the decisions following the *Beagle* guidelines).

103. CAL. CONST. art. I, § 28(f) (enacted by Proposition 8).

felony conviction can be used for impeachment purposes in any criminal proceeding.[104]

Even though the electorate believed evidence of convictions should be freely admitted on the credibility issue, a majority of the Supreme Court of California feared such a bold and simple approach would violate due process rights.[105] Under the court's interpretation in *People v. Castro*,[106] a majority of the Supreme Court of California held that the strident language of section 28(f) could not be taken literally; only a conviction for a crime involving "moral turpitude" may be considered on the issue of credibility.[107] Of such convictions, only those that meet the balancing tests of section 352 of the California Evidence Code are admissible.[108]

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104. *Id.* Section 28(f) provides:

> *Any* prior *felony conviction* of any person in any criminal proceeding, whether adult or juvenile, *shall* subsequently *be used without limitation for purposes of impeachment* or enhancement of sentence *in any criminal proceeding.* When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

Id. (emphasis added). California lawyers readily recognized this as an about-face from *People v. Beagle*, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). Of course, *Beagle* and its progeny (the so-called "*Antick* line of cases") were among the biggest problems with our criminal justice system in the eyes of the supporters of Proposition 8. *See* Curb, *Arguments in Favor of Proposition 8, in* CAL. BALLOT PAMPHLET, *supra* note 6, at 34. *See also supra* note 101 (setting forth the *Antick* line of cases).

105. *But see* People v. Castro, 38 Cal. 3d 301, 321, 696 P.2d 111, 124, 211 Cal. Rptr. 719, 732 (1985) (Grodin, J., concurring and dissenting). Citing to *Spencer v. Texas*, 385 U.S. 554 (1967), Justice Grodin admits that the due process issue is not without strength. *Castro*, 38 Cal. 3d at 321, 696 P.2d at 124, 211 Cal. Rptr. at 732. However, Justice Grodin believes it would fail. *Id.* He discusses several decisions from the District of Columbia for support. *Id.* The interest in getting evidence bearing upon the credibility of witnesses before the jury in a criminal case may outweigh its inescapably prejudicial effect. *Id.*

106. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985). The defendant in *Castro* was convicted of receiving stolen property. *Id.* at 305, 696 P.2d at 112, 211 Cal. Rptr. at 720. She was impeached with what proved to be prior convictions of possession of heroin and possession of heroin for sale. *Id.* at 305-06, 696 P.2d at 112-13, 211 Cal. Rptr. at 720-21. It was held that simple possession did not necessarily involve "moral turpitude," but that possession for sale did. *Id.* at 317, 696 P.2d at 121, 211 Cal. Rptr. at 729. "Possession for sale" can reasonably be characterized as "immoral." *Id.*

107. *Id.* at 309-17, 696 P.2d at 115-20, 211 Cal. Rptr. at 723-28.

108. *Id.* at 317, 696 P.2d at 120, 211 Cal. Rptr. at 728.

How this variation of seemingly plain language was created is interesting. On the one hand, Justice Grodin could not imagine how a person wishing to admit *any* felony conviction on the issue of credibility could have worded the subdivision more clearly.[109] On the other hand, Justice Kaus, joined in his successful search for ambiguity by Justices Mosk, Broussard, and Bird, concluded that the electorate did not intend to abrogate entirely the discretion of the trial judge under section 352,[110] which Kaus characterized as "a traditional, inherent and, in truth, indispensable tool of the law of evidence."[111] Kaus reasoned that since section 28 contained two subdivisions, the subdivisions must be reconciled.[112] Each must be subject to the section 352 balancing test.[113] However, Justice Lucas (now Chief Justice) and Justice Grodin agreed that the language of subsection (f) was clear and therefore any felony conviction is admissible on the question of a witness's credibility in a criminal proceeding.[114]

It can be argued that convictions should never be used to impeach a witness. Such proof of the witness's past has little probative value on his or her credibility while testifying in the

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109. *See id.* at 319, 696 P.2d at 122, 211 Cal. Rptr. at 730 (Grodin, J., concurring and dissenting).

110. *Id.* at 306-14, 696 P.2d at 113-18, 211 Cal. Rptr. at 721-26.

111. *Id.* at 309, 696 P.2d at 115, 211 Cal. Rptr. at 723.

112. *Id.* at 309-14, 696 P.2d at 115-18, 211 Cal. Rptr. at 723-26.

113. *Id.* at 312-13, 696 P.2d at 117-18, 211 Cal. Rptr. at 725. The Justices did not agree on how this was to be exercised. It was Justice Kaus' view that only convictions evidencing a "readiness to do evil" (i.e. moral turpitude) should be considered. *Id.* at 314-16, 696 P.2d at 119-20, 211 Cal. Rptr. at 726-28. To take into account any and all convictions could raise serious due process questions. *Id.* at 317, 696 P.2d at 120-21, 211 Cal. Rptr. at 728. Justices Mosk, Broussard, and Grodin agreed on the moral turpitude threshold. *Id.* at 317, 322, 696 P.2d at 120-21, 124, 211 Cal. Rptr. at 728, 732 (Grodin, J., concurring and dissenting). Justice Lucas would admit all felony convictions. *Id.* at 322-23, 696 P.2d at 124-25, 211 Cal. Rptr. at 732-33 (Lucas, J., concurring and dissenting). Justice Bird would simply apply the factors set forth in *Beagle* to any conviction. *Id.* at 323-32, 696 P.2d at 125-32, 211 Cal. Rptr. at 733-40 (Bird, C.J., concurring and dissenting). In then-Chief Justice Bird's view, the majority view not only lacked clarity but was an open-ended invitation to judicial chaos. *Id.* at 336, 696 P.2d at 134, 211 Cal. Rptr. at 742 (Bird, C.J., concurring and dissenting).

114. *Id.* at 319, 696 P.2d at 122, 211 Cal. Rptr. at 730 (Grodin, J., concurring and dissenting); *id.* at 322-23, 696 P.2d at 124-25, 211 Cal. Rptr. at 732-33 (Lucas, J., concurring and dissenting).

presence of a jury.[115] Under rules remaining after passage of Proposition 8, the admission of evidence of convictions is treated much more liberally than evidence of other specific instances of conduct[116] or proof of character.[117] However, the fact that a person has been convicted of a felony is no more relevant in a logical sense than proof of other instances of specific conduct or proof of a person's character; it is simply easier to show. None should be shown.

Under *Castro*, assuming due process prohibits conviction on the basis of the consideration of irrelevant evidence, a witness may not be impeached with a prior felony conviction unless that conviction is relevant to the witness's veracity.[118] According to *Castro*, the question should be whether it can be said with substantial assurance that the credibility of a witness is adversely affected by his having suffered this conviction.[119] To answer this question, the majority in *Castro* instructed us to limit ourselves to convictions showing a general readiness to do evil--crimes involving "moral turpitude."[120] Using this test, one appellate court approved the use of a conviction based on violation of California Penal Code section 422;[121] the defendant had threatened serious harm to another.[122] The defendant's argument that this conviction had nothing to do with his veracity was

115. Grave doubt about the validity of convictions as tests for the credibility of a testifying witness has existed for years. *See, e.g.*, Ladd, *Credibility Tests--Current Trends*, 89 U. PA. L. REV. 166, 177-78 (1940). There is little doubt that limiting instructions are not effective. *See, e.g.*, People v. Montgomery, 268 N.E.2d 695, 697 (Ill. 1971).

116. *See, e.g.*, CAL. EVID. CODE § 787 (West 1966) (proof of a specific instance of conduct is inadmissible to attack or support credibility).

117. *See, e.g.*, CAL. EVID. CODE § 786 (West 1966) (proof of character traits other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness).

118. People v. Castro, 38 Cal. 3d 301, 315, 696 P.2d 111, 119, 211 Cal. Rptr. at 719, 727 (1985).

119. *Id.*

120. *Id.* at 316, 696 P.2d at 120, 211 Cal. Rptr. at 728.

121. *See* CAL. PENAL CODE § 422 (West Supp. 1992) (setting forth the elements of the offense of "terrorist threats").

122. People v. Thornton, 1992 Cal. App. LEXIS 135 (LEXIS, Cal. library, Cases file) (*reported in* San Francisco Daily J., D.A.R. at 1759, (Feb. 6, 1992)).

rejected as unsound.[123] The Fourth District Court of Appeals had no doubt that making such threats violates accepted standards of moral behavior and, therefore, the trial judge did not err in permitting the defendant to be impeached by such a conviction.[124]

Once admitted, proof of a prior conviction is devastating. The fear that prior convictions will be admitted has kept many a defendant from taking the stand. Who has not heard jurors lament that they weren't told that the defendant they just freed had "done it" before?

The best rule would be to exclude proof of prior convictions altogether in jury trials. Since this view is not acceptable to most, the recently amended federal rule is probably the best alternative.[125]

F. Diminished Capacity and Insanity

Some may find it difficult to fit the change of rules relating to diminished capacity and insanity in California criminal law under the heading of "Victims' Rights." These changes to the California Penal Code, enacted by Proposition 8, affect defenses available to persons accused of crime, not the rights of a victim of crime.[126]

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123. *Id.* 1992 Cal. App. LEXIS 135 (*reported in* San Francisco Daily J., Daily Appellate Report at 1759, 1760 (Feb. 6, 1992)).

124. *Id.*

125. *See* FED. R. EVID. § 609(a). Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonest or false statement, regardless of the punishment.

Id. See generally Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) (containing an interesting history of this area of evidence law).

126. *See* CAL. PENAL CODE § 25 (enacted by Proposition 8).

The so-called "diminished capacity" defense had its California origin in *People v. Wells.*[127] The true nature of the defense is clear:

> [S]ince certain crimes, by definition, require the existence of a specific intent, any evidence relevant to the existence of that intent, including evidence of an abnormal mental condition not constituting legal insanity, is competent for the purpose of [negating] that intent. . . . [T]he actual purpose of such evidence is to establish, by negating the requisite intent for a higher degree of offense, that in fact a lesser degree of the offense was committed.[128]

Unfortunately, problems marked the development of this doctrine in California. The Supreme Court of California finally urged the legislature to reconsider the wisdom of statutes providing for bifurcated trials, and the diminished capacity and insanity defenses often used in such trials; there seemed to be serious duplications of evidence.[129] In partial response, the legislature abolished diminished capacity as a defense.[130] Shortly thereafter,

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127. 33 Cal. 2d 330, 202 P.2d 53 (1949), *cert. denied*, 338 U.S. 836; *overruled*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978). In *Wells*, a life-term prisoner killed a prison guard. *Id.* at 334, 202 P.2d at 56. This would be a capital offense if done with malice aforethought. *Id.* The defendant offered psychiatric testimony that he was suffering from an abnormal physical and mental condition which caused him to fear for his personal safety in response to even slight external stimuli. *Id.* at 344, 202 P.2d at 62. His defense was that he was reacting to an honest but unreasonable fear of bodily harm when he assaulted the guard. *Id.* at 345, 202 P.2d at 62. The Supreme Court of California held that the trial court erred in excluding this evidence. *Id.* at 345, 202 P.2d at 63. Evidence which tends to show that a (then presumed) legally sane defendant either did or did not in fact possess the required specific intent or motive is admissible. *Id.* at 350-51, 202 P.2d at 66.

Mental infirmities or even intoxication may fill this bill. This must be distinguished from the insanity defense which goes to whether the defendant can be found legally responsible for his actions. It is only the legally sane defendant that may rely on diminished capacity as a defense to a charged offense requiring a specific (but unattainable) intent. This was sound law.

128. Annotation, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R. 3d 1228, 1238 (1968).

129. *See* People v. Wetmore, 22 Cal. 3d 318, 331, 583 P.2d 1308, 1317, 149 Cal. Rptr. 265, 274 (1978).

130. *See* Note, *Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left After the Reforms of the Diminished Capacity Defense*, 16 PAC. L.J. 305 (1984-85) (providing a full discussion of this issue).

Proposition 8 followed the same course.[131] The present state of diminished capacity in a murder case is described in *People v. Saille*,[132] a 1991 decision by the Supreme Court of California. The *Saille* court reiterated the rule that evidence of mental disease, disorder, or defect is still admissible on the issue of whether the accused actually formed an intent unlawfully to kill (i.e. the malice aforethought question),[133] but such proof cannot be used to reduce murder to voluntary manslaughter.[134] This is compatible with *People v. Wells*[135] and should not adversely affect the rights of an accused person.

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131. CAL. PENAL CODE § 25 (enacted by Proposition 8). Section 25 provides as follows:

> (a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.
>
> (b) . . .
>
> (c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

Id.

132. 54 Cal. 3d 1103, 820 P.2d 588, 2 Cal. Rptr. 2d 364 (1991).

133. *Id.* at 1115, 820 P.2d at 595, 2 Cal. Rptr. 2d at 372.

134. *Id.*

> In our view, under the law relating to mental capacity as it exists today, it makes more sense to place on the defendant the duty to request an instruction which relates the evidence of his intoxication to an element of the crime, such as premeditation and deliberation. This is so because the defendant's evidence of intoxication can no longer be proffered as a defense to a crime but rather is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case the defendant is attempting to relate his evidence of intoxication to an element of the crime.

Id. at 1120, 820 P.2d at 598-99, 2 Cal. Rptr. 2d at 374-75.

135. 33 Cal. 2d 330, 202 P.2d 53 (1949). *See supra* note 127 and accompanying text (discussing the *Wells* decision).

G. Plea Bargaining

To many lay persons, the outlawing of plea bargaining in "serious felonies" automatically moves the criminal justice system closer to justice; no longer can lawyers make deals that permit criminals to escape their just desserts.[136] Those accused of crime must stand trial; "negotiated justice" is contrary to public interests.

Since the passage of Proposition 8, plea bargaining is prohibited[137] when the information charges a "serious felony" or driving under the influence of alcohol or drugs is involved.[138] If this statute was to be literally applied, the criminal justice system would grind to a halt. As anyone directly involved in the prosecution or defense of criminal cases knows, plea bargaining is still in place and performing its function.[139] However, since plea bargaining is now banned in superior courts, Proposition 8 has caused a shift to action in the lower courts.[140] Therefore, the majority of serious felony cases now conclude before preliminary hearing. This change means more cases are concluded before victims or witnesses can testify and often before background checks are completed. The promoters of Proposition 8 wanted to encourage public participation in the prosecution of such serious cases; the opposite occurs more frequently.

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136. Cohen & Doob, *Public Attitude to Plea Bargaining*, 32 CRIM. L.Q. 85 (1989-90).

137. Judicial discretion is out; the word "prohibited" is clear. *See* People v. Superior Court, 140 Cal. App. 3d 304, 316, 189 Cal. Rptr. 669, 677-78 (1983), *hearing granted*, May 4, 1983, *case discharged*, Jan. 19, 1984.

138. *See* CAL. PENAL CODE § 1192.7 (enacted by Proposition 8).

139. Plea bargaining has its counterpart in the civil justice system. Settlement of civil claims is a must; only a small percentage of civil disputes can or need be tried. In fact, it can be argued that settlement of either civil or criminal matters is a fair and efficient way to handle disputes in our adversary system. The outcome of trials that must be tried furnish the basis for the disposition of the thousands of cases that are settled.

140. McCoy & Tillman, Controlling Felony Plea Bargaining in California: The Impact of the "Victims' Bill of Rights" 4 (Aug. 1986) (monograph prepared for Criminal Justice Fellowship Program sponsored by the California Department of Justice) (Copy on file at *Pacific Law Journal*). Ms. McCoy studied Alameda, San Diego, and part of Los Angeles County court records. *Id.* at 19.

The system works very well so long as prosecutors and defense lawyers do their jobs in an ethical and professional manner. Any lapses are subject to detection and correction by trial judges.[141] The advantages of negotiation rather than trial are apparent. Not only does it save prosecutor resources, but with cooperative witnesses, concessions will be minimal. By producing swift convictions, any deterrent value should be enhanced.

Justice can be accomplished efficiently when proper plea bargaining exists. Again it is fortunate that this portion of Proposition 8 has had little practical effect on the actions of either the prosecution or defense of accused persons.[142]

CONCLUSIONS

Justice Mosk, dissenting in *Brosnahan*, said it best: "The Goddess of Justice is wearing a black arm-band today, as she weeps for the Constitution of California."[143] Justice Mosk lamented that a bare majority of the court had just declared that initiative promoters may now offend with greater ease established constitutional and code limitations; the requirement that initiative measures embrace a single subject[144] is now impotent.[145] Therefore, promoters feasting on the fleeting whims of public opinion and prejudice can, by simply selling even the most radical of proposals to 51 percent of those who vote, change longstanding,

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141. Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499 (1971); Hobbs, *Judicial Supervision Over California Plea Bargaining: Regulating the Trial*, 59 CAL. L. REV. 962 (1971).

142. *See* White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

143. Brosnahan v. Brown, 32 Cal. 3d 236, 299, 651 P.2d 274, 313, 186 Cal. Rptr. 30, 69 (1982) (Mosk, J., dissenting).

144. *See* CAL. CONST. art. II, § 8(d) (California's single subject rule).

145. The provisions of Proposition 8 are "germane" to each other and "serve a common purpose;" this satisfies the constitutional limitation. *Brosnahan*, 32 Cal. 3d at 253, 651 P.2d at 284, 186 Cal. Rptr. at 40 (1982).

well considered rules that, to them, seem to impede the achievement of their special goals.

In the case of Proposition 8, the possibility of great damage to the criminal justice system has been rather well contained by the courts.[146] However, Hamilton's warning[147] was put in a slightly different way by Justice Wright:

> A democratic government must do more than serve the immediate needs of a majority of its constituency--it must respect the 'enduring general values' of the society. Somehow, a democracy must tenaciously cling to its long-term concepts of justice regardless of the vacillating feelings experienced by a majority of the electorate.[148]

The criminal justice system itself can resolve most of the problems with more adequate funding. The system can improve its response time and its treatment of victims and witnesses during the tedious but necessary investigative procedures. The apprehension and processing of those suspected of crime must also be improved. However, it must be remembered that every suggested change is of consequence not only to those directly affected but also to each member of society. For example, making it easier to charge a person or to convict those who have been charged may work out to be an undesirable solution.[149] What we need is better training and the more wide-spread presence of law enforcement personnel.

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146. However, consider the more devastating consequences of Proposition 115. The final score is not yet in on this more recent initiative.

147. *See supra* note 1 and accompanying text.

148. Wright, *The Role of Judiciary*, 60 CAL. L. REV. 1262, 1267 (1972) (quoted by Justice Mosk in his dissent in *Brosnahan*). *See Brosnahan*, 32 Cal. 3d 236, 299, 651 P.2d 274, 313, 186 Cal. Rptr. 30, 69 (Mosk, J., dissenting).

149. *See supra* notes 87-125 and accompanying text (discussing Proposition 8's changes in rules governing the truth-in-evidence provision and use of convictions). It shouldn't take a privately owned video camera to convince us that police violence still exists. *See Brutality!*, TIME, March 23, 1991, vol. 137, no. 12, at 16-19 (coverage of the Rodney King incident). Why don't we protect victims of claimed police brutality by lowering the standards governing charging, prosecuting, and convicting a police officer? What of these victims?

The adjudicative procedures themselves are dependant on the help and testimony of victims and witnesses; without them, prosecution would be impossible.[150] From the initial report of crime, through the closing of the case, the victim and witnesses are entitled to consideration and respect. They don't always get it. However, simply changing the rules won't solve the problem. Providing a "right" has no meaning in many hard pressed criminal justice systems;[151] it takes money.

To sum up, some of the more active victim rights proponents point to the well-articulated rights bestowed on an accused person, and argue that equally clear rights must be adopted for victims. These rights for victims properly include remedies for restitution, civil recovery, and crime victim compensation.[152] To a large extent, such rights already exist. Efforts to change the rules governing criminal procedure by initiatives produced and pressed by special interest groups, however sincere, must be discouraged.[153] To a large extent Proposition 8 is an excellent example of such risky endeavors.

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150. Notifying victims and witnesses of needed appearances and keeping them fully advised of the progress and disposition of each case takes time and well-trained personnel. The widespread failure of the system in this area is one of the chief complaints of both victims and witnesses. *See, e.g.*, Kelly, *Victims' Perception of Criminal Justice*, 11 PEPPERDINE L. REV. 15, 19 (1984).

151. All agree that an individual's contact with the system should be as painless as possible. Trial judges are charged with the duty of protecting witnesses from harassment and undue embarrassment. *See* CAL. EVID. CODE § 765 (West Supp. 1992), FED. R. EVID. 611(a). There is no doubt as to the need for judicial control in this area. *See Berger v. United States*, 295 U.S. 78, 84-85 (1935), *overruled*, 361 U.S. 212 (1960) (transcript of the prosecutor's cross-examination).

152. *See* Hudson, *A Bill of Rights for Crime Victims*, 5 VICTIMOLOGY: AN INT'L. J. 428 (1980); Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 33 (1984).

153. It is important that we distinguish democracy and liberty. In a "democracy" the people rule; a majority vote decides disputed matters. But "liberty" refers to the rights and obligations of each member of a democracy. A simple majority cannot affect individual rights; these rights are enforced by the courts guided by our constitution.