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James R. McCall

University of the Pacific; McGeorge School of Law

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Truth in Evidence and the Privilege Clause -- A Compromised Relationship

James R. McCall*

The subsection of the California Constitution known as the "right to truth in evidence" was a small but highly significant portion of a mosaic of anticrime measures contained in what is still popularly referred to as Proposition 8.¹ This provision ultimately became Article I, section 28(d) of the California Constitution on June 8, 1982, the effective date of all provisions contained in Proposition 8.² The announced purpose of section 28(d) was "to restore balance to the rules governing the use of evidence against criminals," to "overcome some of the adverse decisions by our higher courts," that have "created additional rights for the criminally accused and placed more restrictions on law enforcement

* Professor of Law, University of California, Hastings College of Law, San Francisco, California; B.A., Pomona College, 1958; J.D., Harvard Law School, 1962.

1. CAL. CONST. art. I, § 28(d). Section 28(d) provides:

(d) *Right to Truth-in-Evidence.* Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Id.

Other provisions in Proposition 8 which became either portions of the California Constitution or Penal Code sections provided a right for California crime victims to obtain restitution from those convicted of the crimes perpetrated upon them, a right to safe schools, a requirement that public safety be the primary consideration in setting bail for persons accused of crimes, expanded admissibility of prior felony convictions as impeachment evidence, elimination of the "diminished capacity" defense in criminal prosecutions, automatic enhancement of sentences for convicted defendants who are "habitual criminals," a right for a victim of a crime to appear and make a statement at the sentencing of the perpetrator of the crime, and limits on plea bargaining for serious offenses, including driving while intoxicated.

2. CAL. CONST. art. I, § 28(d).

officers,” and to “restore victims’ rights and help bring violent crime under control.”³

In the measured apolitical words of the Legislative Analyst, section 28(d) was described as having the following effect:

Under current law, certain evidence is not permitted to be presented in a criminal trial or hearing. For example, evidence obtained through unlawful eavesdropping or wiretapping, or through unlawful searches of persons or property, cannot be used in court. This measure generally would allow most relevant evidence to be presented in criminal cases, subject to such exceptions as the Legislature may in the future enact by a two-thirds vote. The measure could not affect *federal* restrictions on the use of evidence.⁴

Within three years after its adoption, the California Supreme Court accepted what is the apparent purpose of section 28(d): To ensure that all relevant evidence be admitted in criminal prosecutions regardless of exclusionary rules that are not approved by a specified vote of the legislature or mandated by the federal constitution.⁵ The supreme court also recognized that among the specific aims of section 28(d) was that of preventing California courts from creating nonstatutory rules to exclude evidence, a practice the advocates of the provision had specifically decried.⁶

The restrictions in section 28(d) on the concept that all relevant evidence is to be admitted in criminal prosecutions are few, and appear to be precisely stated. Several of the restrictions have generated no reported cases and would appear to be unlikely to do so. This is true for example of the restriction, or exceptions, permitting exclusion of relevant evidence required by a “statutory

3. Curb, *Arguments in Favor of Proposition 8*, in CAL. BALLOT PAMPHLET 34 (June 8, 1982). The advocates who are quoted were Mike Curb, then Lieutenant Governor of the State of California (“restore balance”), George Deukmejian, the Attorney General of the State of California (“overcome decisions”), and Paul Gann (“restore victims’ rights”). *Id.* Gann was identified in the handbook as “Proponent, Victim’s Bill of Rights,” the popular name for Proposition 8. *Id.*

4. Legislative Analyst of California, *Analysis*, in CAL. BALLOT PAMPHLET *supra* note 3, at 32 (emphasis in original).

5. *In re Lance W.*, 37 Cal. 3d 873, 889, 694 P.2d 744, 754, 210 Cal. Rptr. 631, 641 (1985). See *infra* notes 55-64 (discussing the *Lance W.* decision).

6. *Id.* at 888-89 n.9, 694 P.2d at 753-54 n.9, 210 Cal. Rptr. at 641 n.9.

or constitutional right of the press.”⁷ The provision in the Evidence Code giving news media the right to withhold the identity of sources and unpublished information in litigation is expressly immune from the operation of section 28(d).⁸ Further, Evidence Code sections 782 and 1103, which exclude evidence of past sexual behavior of complaining witnesses in sex crime prosecutions and of plaintiffs in civil actions alleging sexual harassment or assault have also generated no reported cases.⁹ With one minor exception, the same is true of the express restriction for an existing statutory rule relating to hearsay.¹⁰ Finally, the explicit restriction in favor of statutory provisions enacted by two-thirds of each house of the legislature was significant, yet has generated no real controversy.¹¹

7. CAL. CONST. art. I, § 28(d).

8. See CAL. EVID. CODE § 1070 (West Supp. 1992) (affording news media the right to withhold the identity of sources in litigation). As will be discussed, California courts appear to have determined that a “privilege” for purposes of the privileges clause is a designated privilege expressly defined in sections 930-1063 of the California Evidence Code. See *infra* notes 64-67 (discussing the meaning of “privilege”). The “newsman’s immunity” provision in section 1070 is continued in Division 8 of the Evidence Code. See CAL. EVID. CODE § 1070 (West Supp. 1992). That division is titled “Privileges,” and the division contains a Chapter 4 entitled “Particular Privileges” which sets out all of what should logically be considered the designated privileges. Evidence Code section 1070 is not contained in Chapter 4 and arguably would not be considered a privilege for purposes of the privileges clause in section 28(d). The point is moot, however, because section 1070 is obviously a statutory right of the press and specifically excepted from the operation of section 28(d).

9. CAL. EVID. CODE §§ 782, 1103 (West Supp. 1992). These provisions, amended in 1974, are essentially “rape shield” statutes designed to give greater protection to complaining witnesses who are alleged victims of sex crimes from the introduction of evidence of past sexual conduct to impeach the credibility of the witness or to prove the alleged victim consented to sexual activity.

10. CAL. CONST. art. I, § 28(d). See *People v. May*, 44 Cal. 3d 309, 319-20, 748 P.2d 307, 313, 243 Cal. Rptr. 369, 375 (1988) (discussing the hearsay exception). See *infra* notes 164-94 and accompanying text (discussing the *May* decision).

11. In *People v. Otto*, 233 Cal. App. 3d 279, 290-91, 277 Cal. Rptr. 596, 608 (1991), the court rejected the argument that the future legislation restriction on the operation of section 28(d) applied to statutes passed by two-thirds of the members of each house *who voted* on the measure. *Id.* At issue was the application of the restriction to the wiretap evidence exclusion provision in California Penal Code section 631(c). The provision did not receive the vote of two-thirds of the membership of each house and was overridden by section 28(d).

Among the sections of the Evidence Code that have been reenacted with the necessary two-thirds vote of each house of the state legislature are section 1101 (generally prohibiting the admission of evidence of a character trait of a person to prove the person’s conduct on a specific occasion), section 1103(a) (allowing the admission in a criminal prosecution of evidence of a character trait of the victim of the crime for which the defendant is being prosecuted in order to prove the victim’s conduct or to rebut such proof), section 351.1 (prohibiting the admission of the results of a polygraph test), and Welfare & Institutions Code section 355.1 (excluding the testimony of a child’s custodian given in a dependency hearing from admission in subsequent criminal actions). See *People v. Kegler*,

The exception in section 28(d) allowing full operation of Evidence Code section 352 is significant and has been noted in several cases.¹² Section 352 authorizes trial courts to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the probability that its admission will consume an undue amount of time or create a substantial danger of prejudicing, confusing or misleading the jury.¹³ The operation of the section 352 exception in section 28(d) has not been controversial.¹⁴

The implicit restriction upon the operation of section 28(d) in favor of exclusions of evidence in criminal trials when required by the United States constitution is of great significance, but the appellate opinions that have addressed the restriction have been straightforward and predictable. The restriction, which is discussed below in connection with the general reception of section 28(d) by California courts, is required by the Supremacy Clause of United States Constitution.

The only restriction upon the application of section 28(d) that has generated controversial opinions is the clause stating, “[n]othing in this section shall affect any existing statutory rule of evidence relating to privilege.” The judicial controversy surrounding this provision is not surprising, given that privileges are basically contradictory in nature and purpose to the basic notion of “truth in evidence.” Thus, it is initially somewhat surprising to see that the drafters of the truth in evidence provision excepted the

197 Cal. App. 3d 72, 89-90, 242 Cal. Rptr. 897, 908-09 (1987) (discussing the reenactment of section 351.1); See *In re Katrina L.*, 200 Cal. App. 3d 1280, 1295, 247 Cal. Rptr. 754, 758 (1988) (discussing the reenactment of Welfare and Institutions Code section 355.1).

12. See, e.g., *People v. Harris*, 47 Cal. 3d 1047, 1080-81, 767 P.2d 619, 639-40, 255 Cal. Rptr. 352 (1989); *People v. Taylor*, 180 Cal. App. 3d 622, 632-33, 225 Cal. Rptr. 733, 738-39 (1986).

13. CAL. EVID. CODE § 352 (West Supp. 1992).

14. On the other hand, the relationship between section 352 and the provision in Proposition 8 making evidence of all prior felony convictions admissible for purposes of impeachment or enhancement of sentence in criminal actions has been quite controversial. The California Supreme Court interpreted that provision, which became Article I, section 28(f) of the California Constitution, to authorize trial courts to exercise the power generally given to those courts by Evidence Code section 352. *People v. Castro*, 38 Cal. 3d 301, 312-13, 696 P.2d 111, 116-18, 211 Cal. Rptr. 719, 725 (1985). Cf. *Proposition 8 and the California Supreme Court: Interpretation Run Riot?*, 60 So. CAL. L. REV. 539, 554-69 (1987) (criticizing the *Castro* opinion).

operation of statutory privileges.¹⁵ Judicial adjustment of the two antithetical concepts has produced a dubious line of cases dealing with what is undoubtedly the most sacrosanct of privileges in Anglo-American law, the privilege against self-incrimination. The line of cases compromising the otherwise coherent relationship between the truth in evidence section and the privilege clause is discussed in the concluding section of this Article, and a judicial solution to the problem that line of cases poses is proposed.¹⁶

I. THE PRIVILEGE CONCEPT IN CALIFORNIA LAW

To the contemporary attorney, the deep mistrust and hostility toward the privilege concept illustrated by common law authorities always comes as a surprise. The basic common law principle was, and currently remains, "the public has a right to every man's evidence."¹⁷ Evidentiary privileges flatly contravene this concept. The rules prohibiting the admission of irrelevant material, hearsay statements and incompetent testimony serve to eliminate untrustworthy or distracting evidence from contaminating the fact finding process. The privilege rules, on the other hand, prevent the trier of fact from considering valuable, perhaps crucial, evidence that is reliable and trustworthy. In respect to the negative effect

15. Perhaps the policy reasons that lead the legislature to enact each of the Evidence Code privileges may have been persuasive to the drafters of section 28(d). However, a more practically oriented supposition is that section 28(d) was probably drafted with some concern about offending groups that might oppose the measure. If so, avoiding the opposition of the occupational groups which enjoyed the benefit of evidentiary privileges would certainly have been a reasonable political judgment.

The drafters of section 28(d) may also have been motivated by political concerns when drafting the sex and rape shield laws exception and the exception for existing statutory or constitutional rights of the press. *See supra* note 9 and accompanying text (discussing the shield laws) *and* note 7 and accompanying text (discussing the media shield law).

16. *See infra* notes 80-203 and accompanying text.

17. 12 PARL. HIST. ENG. 693 (1812) (speech in the House of Lords on May 25, 1742 by Lord Chancellor Hardwicke). *See MCCORMICK, THE LAW OF EVIDENCE* § 72 at 70-72 (3d ed. 1984) [hereinafter MCCORMICK] (discussing the quotation by Chancellor Hardwicke).

privileges have on the fact finding process, the rules of privilege are unique in the law of evidence.¹⁸

Jeremy Bentham decried the privilege concept as "one of the most pernicious and most irrational notions that ever found its way into the human mind."¹⁹ While the privilege concept had supporters in this country during the first half of this century,²⁰ the primary tone of academic commentary on the development of privileges was highly critical.²¹ Nonetheless, the number of recognized evidentiary privileges has increased and the concept appears to have flourished during the last fifty years.

Privilege advocates explain the expansion of privileges as a consequence of the recognition by society of two important interests. First, society needs to foster certain relationships and these relationships can only flourish if communications between the persons in the relationship are kept private.²² Second, the societal interest in the privacy of individuals requires the suppression of certain information that could cause embarrassing or even dangerous consequences if revealed.²³ Further, the possibility that some of the newer privileges may simply reflect the political power

18. See *State v. 62.96247 Acres of Land in New Castle County*, 193 A.2d 799, 806 (Del. Super. Ct. 1963). In *New Castle*, Justice Lynch stated:

There are many exclusionary rules of evidence that are intended to withhold evidence which is regarded as unreliable or regarded as prejudicial or misleading, but rules of privileged communications have no such purpose. Such rules of privilege preclude the consideration of competent evidence which could aid in determining the outcome of a case, and privilege in no way can be justified as a means of promoting a fair settlement of disputes.

Id.

19. 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 193-94 (J.S. Mill ed. London 1827).

20. See, e.g., 1 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 6, 8, 8a (1983) (justifying privileges for confidential communications in a few relationships).

21. See, e.g., Morgan, *Observations for a New Evidence Code*, 89 U. PA. L. REV. 145, 151 (1940) (calling for the abolition of all privileges as a needed reform, with reenactment for only a few with demonstrated public support). Professor Morgan, who served as Reporter for the drafting of the Model Code of Evidence, sponsored by the American Law Institute. He repeated his negative view of the modern development of privilege law on numerous occasions. See E. Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. OF CHI. L. REV. 285, 288-90 (1943); Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. OF CHI. L. REV. 247, 249, 285 (1937).

22. MCCORMICK, *supra* note 17, at 171. See generally Note, *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450, 1471-86 (1985) [hereinafter *Developments*] (describing and examining the utilitarian justification for privileges for confidential communications).

23. MCCORMICK, *supra* note 17, at 172.

in state legislatures of occupational groups seeking a more “professional image” through a privilege protecting communications between members of the occupation and their clients has also been recognized as a viable explanation.²⁴

Whatever the view of the privilege concept in academia, the California Legislature has avidly embraced the idea that certain communications and certain information should be shielded from disclosure in court. Since 1965, when the legislature enacted the Evidence Code, privileges may only be created by statute.²⁵ The Evidence Code contains the two privileges that date from the earliest common law development of modern trial procedure, those protecting communications between attorney and client and communications between spouses.²⁶ The Code also sets forth all of the generally accepted modern privileges, which protect communications within certain relationships including clergyman-penitent,²⁷ doctor-patient,²⁸ and psychotherapist-patient.²⁹ The other commonly accepted privileges found in the Evidence Code protect information, rather than communications, including the identity of an informer who has given information to law enforcement authorities,³⁰ government or “official” information of a confidential nature,³¹ trade secrets,³² and a citizen’s political vote.³³

24. See *Developments*, *supra* note 22, at 1493-98 (discussing political influence on the creation of privileges).

25. CAL. EVID. CODE § 911 (West 1966). To implement provisions of the state and federal constitutions, California courts have continued to develop exclusionary rules, notwithstanding section 911. See, e.g., *In re Lance W.*, 37 Cal. 3d 873, 882-84, 694 P.2d 744, 749-50, 210 Cal. Rptr. 631, 636-39 (1985) (discussing the vicarious exclusionary rules). The practical effect of some of the court originated exclusionary rules is similar to that of an evidentiary privilege.

26. CAL. EVID. CODE §§ 950-62 (West 1966 & Supp. 1991) (attorney-client communications); *id.* §§ 980-87 (West 1991) (spousal communications). The attorney-client privilege appears to date from an English case decided in 1577, and the spousal communication privilege from an English opinion in 1580. See *Developments*, *supra* note 22, at 1456.

27. *Id.* §§ 1030-1034 (West 1966).

28. *Id.* §§ 990-1007 (West 1966 & Supp. 1992).

29. *Id.* §§ 1010-27 (West 1966 & Supp. 1992).

30. *Id.* § 1041 (West 1966).

31. *Id.* § 1040 (West Supp. 1992).

32. *Id.* §§ 1060-1063 (West 1966 & Supp. 1991).

33. *Id.* § 1050 (West 1966).

The Evidence Code also contains several privileges that are found in few other jurisdictions. These privileges include protection of communications between a sexual assault victim and a counselor for such victims,³⁴ communications between a domestic violence victim and a counselor for such victims,³⁵ and communications between a patient and an educational psychologist.³⁶ These privileges also cover communications between patients and clinical social workers,³⁷ school psychologists,³⁸ and marriage, family and child counselors, all of whom are included within the Code definition of "psychotherapist."³⁹

The Evidence Code also includes separate sections incorporating the two privileges flowing from the fifth Amendment to the United States Constitution.⁴⁰ Section 930 establishes that the federal constitutional privilege held by a defendant in a criminal prosecution to refuse to take the stand and testify is considered to be a privilege set out in the California Evidence Code.⁴¹ In parallel fashion, section 940 establishes that the privilege of any person to refuse to give either testimony or any other statement under government compulsion that would tend to be self incriminating is to be considered a privilege set out in the California Evidence Code.⁴² Further, certain general procedural rules apply to all privileges in the Evidence Code,⁴³ and these rules are fully applicable to the constitutional self incrimination privileges as a result of sections 930 and 940.⁴⁴

34. *Id.* §§ 1035-1036.2 (West Supp. 1992).

35. *Id.* §§ 1037-1037.7 (West Supp. 1992).

36. *Id.* § 1010.5 (West Supp. 1992).

37. *Id.* § 1010(c) (West Supp. 1992).

38. *Id.* § 1010(d) (West Supp. 1992).

39. *Id.* § 1010(e) (West Supp. 1992). *See id.* § 1010 (West Supp. 1992) (defining psychotherapist).

40. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

41. CAL. EVID. CODE § 930 (West 1966).

42. *Id.* § 940 (West 1966).

43. *See id.* §§ 900-920 (West 1966 & Supp. 1992) (universal evidentiary procedural rules).

44. This incorporation may result in certain advantages for a person invoking the federal self incrimination privilege in California courts. For example, section 913(a) prohibits any comment upon the fact that a privilege has been claimed, and this applies to the privilege to refuse to give self incriminating testimony under section 940. CAL. EVID. CODE § 913(a) (West 1966). The rule,

Of far greater importance to the present inquiry is the fact that both section 930 and section 940 declare that the privileges against self incrimination found in *both* the federal and the California constitutions are to be considered privileges established by the terms of the California Evidence Code. In connection with section 940, which prohibits compelled testimony or statements that incriminate or inculcate the speaker, the California Supreme Court has embarked on what appears to be an erroneous line of cases restricting the operation of the truth in evidence provision based upon the fact that section 940 incorporates the California self incriminating testimony privilege as a California Evidence Code privilege.⁴⁵

It is arguable that the privilege concept in California includes any rule that excludes otherwise admissible evidence. Such rules of exclusion are invariably based upon public policy determinations that certain values must be furthered at the expense of the accurate determination of facts in judicial proceedings. A number of such provisions in the California codes provide for the exclusion from evidence of certain information or previously given statements or testimony. Among these statutory exclusions are provisions requiring rejection of evidence of confidential communications obtained through a wiretap,⁴⁶ evidence of confidential communications obtained by eavesdropping or recording,⁴⁷ evidence of past testimony given by the custodian of a child in a dependency hearing,⁴⁸ evidence of the speed of a vehicle obtained by the use of a "speed trap,"⁴⁹ and evidence obtained by an

therefore, is that no comment can be made upon the fact that a person has claimed the right to refuse to give self incriminating testimony in a civil action in a California court. *Id.* This rule contrasts with the law developed under the federal constitutional privilege, which prohibits comment upon the claiming of the privilege only in criminal prosecutions. *See Brink's, Inc. v. New York*, 717 F.2d 700, 707-10 (2nd Cir. 1983) (discussing the federal privilege against self incrimination).

45. *See infra* notes 107-123 (discussing cases addressing the California privilege against self incrimination).

46. CAL. PENAL CODE § 631(c) (West Supp. 1992).

47. *Id.* § 632(d) (West Supp. 1992).

48. CAL. WELF. & INST. CODE § 355.1 (West Supp. 1992).

49. CAL. VEH. CODE § 40803(a) (West Supp. 1992). "Speed trap" is defined in Vehicle Code section 40802 to include measured highway sections designed for calculating the speed of vehicles on highways and streets with unjustified speed limits where radar is used to measure the speed of

unconsented police examination of a depositor's bank records without a search warrant or administrative or judicial subpoena.⁵⁰

These statutory exclusionary provisions are not contained in Chapter 4 of the California Evidence Code, which is titled "Particular Privileges" and contains all of the legislatively designated evidentiary privileges.⁵¹ This fact argues against considering these exclusionary rules within the "privileges" restriction in section 28(d). On the other hand, the privilege clause in section 28(d) applies to "any existing statutory rule relating to privilege."⁵² These exclusions are contained in California statutes and relate to the privilege concept in that they produce the identical functional result as the claim of a designated privilege. As will be examined below, California courts have taken what can be termed a literal approach to the question of what constitutes a "privilege" for purposes of the privilege clause in section 28(d).⁵³ The effect of this approach is that the various statutory exclusions are effectively nullified by the truth in evidence provision.⁵⁴

II. JUDICIAL INTERPRETATION OF THE PRIVILEGE CLAUSE OF THE TRUTH IN EVIDENCE SECTION

A substantial majority of the appellate opinions interpreting section 28(d) have been consistent with the announced and apparent purposes of the drafters of the section. The basic thrust of the section was to eliminate the body of California appellate court

vehicles. *Id.* § 40802 (West Supp. 1992). Vehicle Code section 40803(a) has been abrogated by section 28(d). *See infra* notes 55-79 (discussing the effects of section 28(d)). Speed trap generated evidence, however, will still be inadmissible in criminal prosecutions because Vehicle Code section 40805 provides that no court shall have jurisdiction to render a judgment of conviction if the court admits evidence made inadmissible under section 40803(a). *Id.* § 40805 (West 1985).

50. CAL. GOV'T CODE §§ 7470-7476, 7489 (West 1980 & Supp. 1992).

51. *See supra* notes 24-39 (discussing the statutory evidentiary privileges).

52. CAL. CONST. art. I, § 28 (emphasis added).

53. *See infra* notes 75-79 (discussing the meaning of "privilege" for purposes of section 28(d)).

54. The "newsman's shield" provision in Evidence Code section 1070 is not contained in the privileges chapter of the Evidence Code, which is chapter 4, and would fall outside the shelter of the privileges clause for that reason. The issue is moot, however, because section 28(d) is expressly inapplicable to "any existing statutory or constitutional right of the press." CAL. CONST. art. I, § 28(d).

precedents excluding otherwise admissible evidence through interpretations of the state constitution. This policy was recognized by the California Supreme Court in *In re Lance W.*⁵⁵ At issue in *Lance W.* was the continuing validity of the “vicarious exclusionary rule” in California after the adoption of the truth in evidence section.⁵⁶ The rule gave standing to a defendant to object to the introduction of evidence seized in violation of the constitutional rights of a third person.⁵⁷ California courts had followed the rule as a remedy for violations of the “search and seizure” section of the California Constitution.⁵⁸ Federal courts, on the other hand, had rejected the vicarious exclusionary rule in interpreting the Fourth Amendment prohibition against unreasonable searches and seizures.⁵⁹ California constitutional rights, however, are not dependent upon the existence of rights under equivalent provisions of the federal constitution,⁶⁰ and courts of the state had continued to apply the vicarious exclusionary rule.

The court’s opinion in *Lance W.* focused upon the intent of the electorate in adopting section 28(d) and held that only the exclusionary rules developed under the federal constitution could be invoked in California courts.⁶¹ As a guide to future interpretation, the court stated:

55. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). In *People v. Smith*, 34 Cal. 3d 251, 258, 667 P.2d 149, 151-52, 193 Cal. Rptr. 692, 694-95 (1983), the truth in evidence section was held applicable only to prosecutions for crimes *perpetrated* after the effective date of the section. *Id.* For this reason, there were no significant appellate opinions addressing the truth in evidence section prior to 1985.

56. *Lance W.*, 37 Cal. 3d at 885, 694 P.2d at 751, 210 Cal. Rptr. at 638.

57. *Id.* at 883, 694 P.2d at 750, 210 Cal. Rptr. at 636-37.

58. CAL. CONST. art. I, § 13. Section 13 provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Id. In *People v. Martin*, 45 Cal. 2d 755, 761, 290 P.2d 855, 858 (1955), an appellate court adopted the vicarious exclusionary rule as a matter of California state law. *Id.*

59. See *United States v. Leon*, 468 U.S. 897, 910 (1984); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (discussing the vicarious exclusionary rule in relation to the Fourth Amendment).

60. See CAL. CONST. art. I, § 24. Section 24 provides: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” *Id.*

61. *Lance W.*, 37 Cal. 3d at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639-40.

The express intent of section 28(d) is to ensure that all relevant evidence be admitted. That purpose cannot be effectuated if the judiciary is free to adopt exclusionary rules that are not authorized by statute or mandated by the [federal] Constitution.⁶²

The *Lance W.* court rejected arguments that the truth in evidence section constituted an impermissible revision of the state constitution⁶³ and denied equal protection of the law to defendants in criminal prosecutions.⁶⁴ A number of subsequent appellate opinions have consistently applied the *Lance W.* holding,⁶⁵ and in *People v. May*,⁶⁶ the California Supreme Court reaffirmed and broadened the application of that holding.⁶⁷

The other basic question concerning the truth in evidence section was whether, as a general matter, section 28(d) negated those portions of the Evidence Code that excluded evidence from admission in criminal trials. The express restrictions upon the operation of section 28(d) preserve several Evidence Code sections,⁶⁸ but the effect of the section on such well established exclusionary provisions as the rules prohibiting admission of evidence of character to prove conduct was undecided.⁶⁹ The first

62. *Id.* at 889, 694 P.2d at 754, 210 Cal. Rptr. at 641.

63. *Id.* at 891-92, 694 P.2d at 756, 210 Cal. Rptr. at 643. The California Supreme Court had previously rejected the more plausible contention that Proposition 8, in its entirety, was a revision of the state constitution, requiring a constitutional convention. *Brosnahan v. Brown*, 32 Cal. 3d 236, 260-61, 651 P.2d 274, 288-98, 186 Cal. Rptr. 30, 44-45 (1982).

64. *Lance W.*, 37 Cal. 3d at 892-93, 694 P.2d at 756-57, 210 Cal. Rptr. at 643-44.

65. *See, e.g., In re Demetrius*, 208 Cal. App. 3d 1245, 1246, 256 Cal. Rptr. 717, 717 (1989) (federal law governs on question of exclusion of evidence from full body search upon arrest); *People v. Epps*, 182 Cal. App. 3d 1102, 1112-15, 227 Cal. Rptr. 625, 630-32 (1986) (federal law applies to exclusion question when defendant's blood sample destroyed by police); *People v. Tierce*, 165 Cal. App. 3d 256, 262-63, 211 Cal. Rptr. 325, 328-29 (1985) (federal law applicable to exclusion of evidence when issue of access to exculpatory evidence is raised).

66. 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988).

67. *Id.* at 316-18, 748 P.2d at 310-12, 243 Cal. Rptr. at 372-74. *See supra* notes 164-194 (discussing the *May* case).

68. *See infra* notes 7-11 (discussing the restrictions for privileges, hearsay and the trial court authority to exclude evidence under section 352).

69. *See* CAL. EVID. CODE § 1101 (West Supp. 1992). Section 1101 was amended in 1986, but did not receive the two-thirds vote necessary to qualify it for the future legislation clause in section 28(d). *See* 1986 Cal. Stat. ch. 1432, sec. 1 (amending CAL. EVID. CODE § 1101).

appellate opinion on the matter, *People v. Taylor*⁷⁰ noted that section 28(d) had no general restriction in favor of the long established exclusionary rules.⁷¹ Thus, the court held that an Evidence Code prohibition against the admission of character evidence was no longer operative after the passage of section 28(d).⁷²

The California Supreme Court affirmed the holding and reasoning of *Taylor* three years later in *People v. Harris*.⁷³ In *Harris*, the court stressed the broad sweep of the language of section 28(d) in holding that all Evidence Code restrictions on the admission of character evidence of a party or a witness were eliminated in criminal actions by section 28(d).⁷⁴

On the major issue of interpretation of the privilege clause, the appellate court opinions are consistent and correct. These opinions have adopted the sound, but unarticulated premise, that for a statutory rule of exclusion to qualify as a "privilege" for purposes of the express privilege clause restriction, the exclusion must be a designated privilege contained within Chapter 4 of the Evidence Code.⁷⁵ This interpretation is consistent with the language of section 28(d) providing for admission of *all* relevant evidence in criminal trials, subject to precisely drawn restrictions, a concept the state supreme court has twice declared of great significance.⁷⁶ The

70. 180 Cal. App. 3d 622, 225 Cal. Rptr. 733 (1986). The case involved Evidence Code section 790, which prohibits admission of evidence proving that a witness has the character trait of honesty, except to rebut evidence proving that the witness has the character trait of dishonesty. CAL. EVID. CODE § 790 (West 1991).

71. *Taylor*, 180 Cal. App. 3d at 631-32, 225 Cal. Rptr. at 737-38.

72. *Id.*

73. 47 Cal. 3d 1047, 767 P.2d 619, 255 Cal. Rptr. 352 (1989).

74. *Id.* at 1081-82, 767 P.2d at 640-41, 255 Cal. Rptr. at 373-74. The restrictions in section 28(d) still preserve the ability of a trial court to weigh the probative force of evidence of character against prejudicial effect, consumption of time, and jury confusion in deciding whether to admit a specific offer of evidence of that type. CAL. EVID. CODE § 352 (West 1966). The California Supreme Court has inexplicably recently stated that the issue of the effect of section 28(d) upon the character evidence rules in the Evidence Code is undecided. *People v. Jennings*, 53 Cal. 3d 334, 373, 807 P.2d 1009, 1048, 279 Cal. Rptr. 780, 819 (1991). This statement, which overlooks the square holding of *Harris* should, in all probability, be disregarded.

75. See *supra* note 52 and accompanying text (discussing the privilege clause restriction).

76. See *supra* notes 55-64 (discussing the *Lance W.* case) and notes 73-74 (discussing the *Harris* case).

interpretation is also consistent with the fact that the drafters of the truth in evidence section used the technical word "hearsay" as a parallel exclusion with "privilege," and there is no reason to believe that a technical meaning was meant to be conveyed by only one of the two words.

Pursuant to this interpretation, appellate courts have held that the following statutory exclusionary rules, both outside Chapter 4 of the Evidence Code, were abrogated by section 28(d) and not preserved by the privilege clause: Government Code section 7489, which provides that evidence of bank account records seized without proper notification under the financial privacy act is inadmissible,⁷⁷ and Penal Code section 631(c), which excludes evidence produced by a wiretap.⁷⁸ Where exclusion has been requested on a nonstatutory basis, courts have predictably held that exclusion was improper given the express language of section 28(d).⁷⁹

III. EXCLUSION OF SELF INCRIMINATING STATEMENTS IN CONCURRENT PROCEEDINGS SITUATIONS

The only area of difficulty in the interpretation of the privilege clause has been in situations involving allegedly compelled self incriminatory testimony in "concurrent proceedings." In this regard, the California Supreme Court has rendered what appears to be a clearly incorrect decision that continues to avoid being overruled.⁸⁰ The opinion is based upon a reading of the privilege clause which thwarts the intent and purpose of the truth in evidence

77. *People v. Meyer*, 183 Cal. App. 3d 1150, 1162-63, 228 Cal. Rptr. 635, 641-42 (1986).

78. *People v. Otto*, 233 Cal. App. 3d 279, 290-91, 277 Cal. Rptr. 596, 608 (1991); *People v. Ratekin*, 212 Cal. App. 3d 1165, 1169, 261 Cal. Rptr. 143, 145-46 (1989).

79. *See, e.g., People v. Wood*, 207 Cal. App. 3d Supp. 11, 16-17, 255 Cal. Rptr. 537, 540-41 (1989) (holding that a Department of Motor Vehicles regulation requirement could not be enforced by a court devised exclusionary rule); *In re Garinger*, 188 Cal. App. 3d 1149, 1154-55, 233 Cal. Rptr. 853, 855-56 (1987) (police failed to give warnings required by statute before administering a breath test, but trial court could not exclude evidence as a means of enforcing the terms of the statute requiring the warnings).

80. *See infra* notes 140-163 (discussing the case of *Ramona R. v. Superior Ct.*, 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985)).

section and, although unnoticed before, is contrary to the language of the section.

Concurrent proceedings occur when a defendant's alleged conduct supplies the basis for both a criminal prosecution and a second type of hearing, in which the person may suffer a state imposed penalty.⁸¹ If the hearing is held prior to the criminal trial, a potential self incrimination privilege problem exists. On the other hand, if the criminal prosecution has ended before the hearing begins, no self incrimination is possible because the privilege only protects a witness against criminal sentence, or penalty, resulting from a formal criminal proceeding or prosecution.⁸²

The most frequently litigated concurrent proceedings scenario involves a probation revocation hearing held to determine if a probationer's conduct violates a condition of probation, followed by a later criminal trial in which the state alleges that the same conduct also violates a penal statute. Other reported concurrent proceedings cases involve hearings to determine parole revocation, prison discipline, dependency or right to act as the custodian of a child, and the fitness of an older juvenile to be tried in a juvenile court. In each case, the hearing is followed by a criminal prosecution based upon the same facts as those alleged by the state in the hearing.

It is obvious that the defendant in a probation revocation hearing would like to give testimony to support his or her position that probation should not be revoked. This testimony may well involve statements that would make it easier for the state to prove

81. A private civil action against a defendant in which the plaintiff alleges that the defendant engaged in the same conduct for which the defendant is being prosecuted in a criminal action is not a concurrent proceedings under this definition. In the civil and criminal action situations, there has never been a controversy over the self incrimination privilege issue discussed in this article. This is because self incrimination is only possible when a witness' testimony may be used by the state against the witness in a criminal proceeding, meaning a proceeding leading to a criminal penalty. *See Allen v. Illinois*, 478 U.S. 364 (1985). The criminal proceeding can be the proceeding in which the witness is testifying, in which case the witness will also be the defendant. The criminal proceeding can also be a prosecution coming to trial *after* the witness's testimony in another proceeding has been completed. Therefore if the only disadvantage a witness may incur from testifying is a civil judgement, the self incrimination privilege is not implicated.

82. *See supra* note 42 (discussing the self incrimination privilege requirement of a criminal penalty).

its case in the later criminal trial, and the state would seek to use those statements for that purpose. The basic self incrimination problem raised in concurrent proceedings is whether testimony given by the defendant in the hearing may be used against him or her in the later criminal prosecution to prove the state's case.⁸³

Under the now well established legal analysis used in Self Incrimination Clause questions, the more specific issue is whether the state is "compelling" the defendant to testify in the hearing. "Compulsion" is obviously found present in situations in which a witness is testifying under oath in open court and the judge literally orders the witness to answer a question on pain of contempt.⁸⁴ A more subtle test, however, has occasionally been used to determine if the witness was compelled to give self incriminating testimony. That test examines the full testimonial situation to determine if the claim or assertion for the privilege not to give further testimony is "burdened" due to adverse effects the witness will suffer if he or she claims the privilege.⁸⁵ If a claim of privilege entails severely adverse consequences, then the witness has, in the eyes of the law, been denied the constitutional right to claim the privilege and refuse to give testimony. The clearest example of an adverse consequence that burdens a claim of the privilege to the extent that resulting testimony would be considered compelled is the threat of loss of the witness' government job if the witness claims the privilege.⁸⁶

83. Whether the state may impeach the defendant who testifies at trial with the defendant's hearing testimony is a separate issue. The position of the federal courts on this issue is that the state may use any previous voluntary statement to impeach the defendant's testimony at trial by showing the previous statement contradicts the later trial testimony. *See Harris v. New York*, 401 U.S. 222, 223-25 (1971) (discussing impeachment of the defendant with prior voluntary statements made without *Miranda* warnings).

84. *See, e.g., New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (stating that court order to witness to answer is the "most pristine form of compulsion").

85. *See, e.g., Spevack v. Klein*, 385 U.S. 511, 515-16 (1967) (holding that threat of disbarment of lawyer is compulsion).

86. *See, e.g., Gardner v. Broderick*, 392 U.S. 273, 276-78 (1968) (dismissal of police officer); *Slochower v. Board of Higher Education*, 350 U.S. 551, 558-59 (1961) (dismissal of teacher). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 804-08 (1977) (party official barred from holding office).

In the concurrent proceedings context, the key question for self incrimination privilege analysis is whether a claim of privilege by the defendant at the hearing would be so burdened that the defendant has no choice but to testify. If the testimony is not truly voluntary, any testimony the defendant gives at the hearing is considered compelled under Self Incrimination Clause analysis and cannot be used by the state to make the state's case at the later criminal trial.⁸⁷ The rule of exclusion of the defendant's hearing testimony if the privilege was overly burdened and the testimony therefore compelled has been described by some courts as an automatic "use immunity" that arises by operation of law to protect the defendant from any use of his or her hearing testimony by the state to prove its case against the defendant in the later criminal trial.⁸⁸

The right to refuse to give self incriminating testimony secured by the Fifth Amendment was first held binding upon state governments in 1964 in *Malloy v. Hogan*.⁸⁹ It was (and continues to be) taken for granted that when a witness voluntarily gives testimony at a trial, that person is not being compelled.⁹⁰ The voluntary testimony of the witness may then be used against that

87. It is helpful to think of the analogous issue of the admissibility in a criminal prosecution of a prior compelled *out of court* statement by the defendant. Statements made while the defendant is in custody are considered "compelled" as a matter of law under the *Miranda* decision in which the Supreme Court held that unless a defendant in custody volunteers a statement after full explanation of his or her rights, the statement is inadmissible. *Miranda v. Arizona*, 384 U.S. 436, 476-79 (1966). Similarly, if the burden or penalty placed upon the defendant witness if he or she claims the self incrimination privileged at the prior hearing is too severe, the defendant's choice to testify is, as a matter of law, "compelled" not voluntary. *Id.*

88. The term "use immunity" was used by the court in *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 809, 693 P.2d 789, 793-94, 210 Cal. Rptr. 204, 208-09 (1985). See *infra* notes 140-163 and accompanying text (discussing the *Ramona R.* case) and note 156 (discussing the use immunity concept).

89. 378 U.S. 1 (1964). The late date at which the federal right to refuse self incriminating testimony was held applicable to the states comes as a surprise to many. Perhaps even more surprising is the fact that it was not until 1924 this right was fully held applicable to noncriminal proceedings in federal courts. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). The Self Incrimination Clause was always accepted as securing the right of a person accused of a crime to refuse to take the stand and give testimony under oath at his or her trial. The privilege to refuse to give self incriminating testimony, by contrast, is held by all witnesses in all proceedings. See MCCORMICK, *supra* note 17, at 283 (comparing the Self Incrimination Clause and the privilege against self incrimination).

90. See generally MCCORMICK, *supra* note 17, at 322, 345 (discussing compulsion).

witness in a later proceeding. If the witness is a party to the action in which he or she is testifying, the testimony may be used against the witness in the very action in which the testimony is given.

The United States Supreme Court surprised many observers by introducing a new consideration to the concurrent proceedings issue in *United States v. Simmons*.⁹¹ In *Simmons*, the Court considered the issue of whether the prosecution could use a defendant's self-incriminating testimony at a pretrial suppression of evidence hearing in proving its case in a later criminal trial based upon the same facts.⁹² A majority of the court reasoned that allowing the prosecution to offer the testimony in evidence at the subsequent criminal trial would mean that the defendant's assertion of his Fourth Amendment right to be free of unreasonable searches and seizures through his own testimony would result in his losing his right to refuse to give self incriminating testimony.⁹³ The majority of the Court believed it was "intolerable that one constitutional right should have to be surrendered in order to assert another."⁹⁴ To the Court, requiring a defendant to forego one constitutional right to obtain the benefit of another amounted to "compulsion" by the state.⁹⁵ Accordingly the Court held that the prosecution was prohibited under the Fifth Amendment from offering a defendant's suppression hearing testimony into evidence at the subsequent criminal trial.⁹⁶ In a spirited dissent, Justice Black noted that the majority's position made new law, arguing that the defendant had testified voluntarily at the suppression hearing and should be held to have waived the self incrimination privilege.⁹⁷

Four years later the Court indicated a desire to severely limit, if not overrule, the *Simmons* holding in *McGautha v. California*.⁹⁸

91. 390 U.S. 377 (1968).

92. *Id.* at 393.

93. *Id.*

94. *Id.* at 394.

95. *Id.*

96. *Id.* The Court stated: "[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*

97. *Id.* at 395-99 (Black, J., dissenting).

98. 402 U.S. 183 (1971).

The specific holding of *McGautha* was that there was no Self Incrimination Clause compulsion forcing a defendant to testify in a “unitary” trial procedure in which the jury considered the guilt or innocence and the nature of the punishment at the same time.⁹⁹ The defendant was thereby required to either remain silent or give his testimony to show mitigation or other grounds to avoid the death penalty and probably thereby incriminate himself on the issue of guilt.¹⁰⁰

The procedure at issue in *McGautha* would appear to compel the defendant to testify to a much greater extent than the suppression hearing procedure involved in *Simmons*. The Court, however, saw the choice the defendant was forced to make as not that much different than the choice to testify or remain silent that any defendant in a criminal prosecution must face.¹⁰¹ Thus the Court held that there was no improper burden upon claiming the privilege and no Self Incrimination Clause compulsion.¹⁰² More generally, the Court undercut expansion of the *Simmons* rationale by stating:

Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.¹⁰³

The Court stressed that *Simmons* was justified only because the case involved Fourth Amendment rights, which are particularly valuable to society as a “sanction for unlawful police conduct.”¹⁰⁴ The *McGautha* Court stated that the Fifth Amendment interests involved in the *Simmons* case were insubstantial and that the validity of the reasoning in *Simmons* based upon anything other than protection of a defendant’s rights

99. *Id.* at 210-13.

100. *Id.*

101. *Id.* at 214-15.

102. *Id.* at 213-17.

103. *Id.* at 213-217.

104. *Id.* at 211-12.

under the Fourth Amendment was "open to question."¹⁰⁵ In view of such disavowals, commentators maintain that *Simmons* is of little significance as a precedent for interpretation of the Fifth Amendment Self Incrimination Clause.¹⁰⁶

The California Supreme Court demonstrated complete appreciation for the clear intimations of *McGautha* in *People v. Coleman*,¹⁰⁷ the first case in which the court considered the problem of self incrimination in concurrent proceedings. The defendant-probationer in *Coleman* had refused to testify at his probation revocation hearing, claiming that he feared that his revocation hearing testimony would tend to incriminate him on the pending criminal charges based upon the same facts.¹⁰⁸ The defendant's probation was revoked and he appealed the revocation, claiming that he had been denied the meaningful right to be heard at the proceeding because of the potential future use of his testimony.¹⁰⁹ The supreme court reversed the probation revocation order, specifically relying upon its inherent supervisory powers over California courts as the basis for its decision.¹¹⁰

The *Coleman* court reasoned that two policies "underlying the privilege against self incrimination" would be "adversely affected" if the prosecution could use a defendant's probation revocation hearing testimony to prove its case against the defendant at a subsequent criminal trial.¹¹¹ Those two policies are requiring

105. *Id.* at 212.

106. *See, e.g., MCCORMICK, supra* note 17, at 319.

107. 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975).

108. *Id.* at 872, 533 P.2d at 1030, 120 Cal. Rptr. at 390. The basis for both the revocation hearing and the subsequent criminal trial was an alleged property theft carried out by the defendant and his common law wife. *Id.* The supreme court generally noted that a probationer might well have given testimony at the revocation hearing that would show mitigating circumstances to explain his conduct, but which might include "damaging factual admissions" concerning his participation in the crime. *Id.* at 874, 533 P.2d at 1031, 120 Cal. Rptr. at 391. The court's statement may be true. It is not, however, readily apparent. If truly mitigating circumstances are established by the defendant's revocation hearing testimony, the more probable assumption would be that this testimony would be *helpful* to the defendant at the subsequent criminal trial.

109. *Coleman*, 13 Cal. 3d at 871, 533 P.2d at 1029, 120 Cal. Rptr. at 389. The defendant's right to a meaningful opportunity to be heard in the hearing was established by the Supreme Court of the United States in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

110. *Coleman*, 13 Cal. 3d at 872, 533 P.2d at 1030, 120 Cal. Rptr. at 390.

111. *Id.* at 875, 533 P.2d at 1032, 120 Cal. Rptr. at 392.

the state to shoulder the “entire load” of proving its case in a criminal trial and the “historic aversion to cruelty” reflected in the self incrimination privilege.¹¹² The court felt that any lessening of the state’s burden by allowing it to use the hearing testimony would affront the first policy.¹¹³ The second policy was thought to be infringed upon by requiring a probationer to choose between giving testimony that might be used by the prosecution to make its case in the subsequent criminal trial, committing perjury in the hearing, or remaining silent and thereby losing the opportunity to testify regarding mitigating circumstances and running the further risk that “his silence will be taken as an indication that there are no reasons probation should not be revoked.”¹¹⁴

The *Coleman* opinion fully discusses both *Simmons* and *McGautha*, concluding with the realization that the latter opinion eliminates *Simmons* as a constitutional precedent for applying the self incrimination privilege in concurrent proceedings situations.¹¹⁵ The court read an implication in the *McGautha* opinion that *Simmons* “should have been decided on the basis of the court’s supervisory powers over federal trials rather than the mandates of the Constitution.”¹¹⁶ The California Supreme Court then rejected the notion of basing its opinion on any type of constitutional standard as inappropriate because of the complexity and variation of concurrent proceedings situations. The court then concluded that “clothing our adjudication of the issues before us in constitutional raiment would be not only unwise but also unnecessary.”¹¹⁷

Noting its supervisory power over the state’s trial courts,¹¹⁸ the court held that evidence derived from a probationer at a

112. *Id.* at 875-78, 533 P.2d at 1032-34, 120 Cal. Rptr. at 392.

113. *Id.* at 876-77, 533 P.2d at 1032-33, 120 Cal. Rptr. at 392-93.

114. *Id.* at 878, 533 P.2d at 1034, 120 Cal. Rptr. at 394.

115. *Id.* at 878-82, 533 P.2d at 1034-37, 120 Cal. Rptr. at 394-97. *Simmons* remains good law regarding a defendant’s testimony at an evidence suppression hearing when the defendant’s claim is that the evidence in question was obtained by the police through an illegal search and seizure. *See supra* notes 91-97 (discussing the *Simmons* decision).

116. *Coleman*, 13 Cal. 3d at 881, 887 n.18, 533 P.2d at 1037 n.18, 120 Cal. Rptr. at 397 n.18.

117. *Id.* at 886, 533 P.2d at 1040, 533 Cal. Rptr. at 400.

118. *Id.* at 888-89, 533 P.2d at 1041-42, 120 Cal. Rptr. at 401-02.

probation revocation hearing could not, upon objection by the defendant, be introduced in evidence to prove the state's case in a subsequent criminal trial on the same basis.¹¹⁹ This rule was expressly "declare[d] as a judicial rule of evidence," for the reasons mentioned above.¹²⁰ The opinion also stressed that the concurrent proceedings self incrimination problem could be avoided entirely by the prosecution by initiating the probation revocation proceedings *after* completion of the criminal trial and recommended that prosecutors and probation officials follow this procedure whenever possible.¹²¹

The *Coleman* holding was followed in two appellate opinions in the early 1980's dealing with the use of probation revocation hearing testimony in later criminal trials.¹²² In both of these cases, the concurrent proceedings were based upon facts occurring prior to the effective date of section 28(d). A second line of California cases had developed during the 1970's considering the admissibility in a later criminal prosecution of statements a juvenile had made to his or her juvenile probation officer. These opinions, relying solely upon the general supervisory power of the supreme court over state trial courts and the strong policy favoring candor

119. *Id.* at 889, 533 P.2d at 1041-42, 120 Cal. Rptr. at 401-02.

120. *Id.* at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402. The nonconstitutional basis for the ruling was further reflected by the court's holdings that the rule was only prospective in operation, that probation revocation hearing testimony *could* be used to impeach the probationer defendant's testimony at the subsequent criminal trial, and the rule had no general application and was narrowly applicable only to formal, dispositive probation revocation hearings. *Id.* at 897, 892, 894-95, 533 P.2d at 1047, 1044, 1045-46, 120 Cal. Rptr. at 407, 404, 404-06.

121. *Id.* at 896-97, 533 P.2d at 1046-47, 120 Cal. Rptr. at 406-07. This solution to the problem has been recommended in virtually all subsequent concurrent proceedings opinions. *See, e.g.,* *People v. Jasper*, 33 Cal. 3d 931, 933-35, 663 P.2d 206, 207-09, 191 Cal. Rptr. 648, 649-51 (1983); *People v. Johnson*, 159 Cal. App. 3d 163, 167, 205 Cal. Rptr. 427, 431-32 (1984). However, such scheduling is not always possible. *See infra* notes 144-149 (describing the concurrent hearing involved in *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985)).

122. *See* *People v. Johnson*, 159 Cal. App. 3d 163, 167, 205 Cal. Rptr. 427, 429 (1984) (following the *Coleman* opinion); *People v. Jasper*, 33 Cal. 3d 931, 933-35, 663 P.2d 206, 207-09, 191 Cal. Rptr. 648, 649-51 (1983). *See also* *Sheila O. v. Superior Ct.*, 125 Cal. App. 3d 812, 815-817, 178 Cal. Rptr. 418, 420 (1981) (relying upon *Coleman* to hold that a juvenile's testimony in a juvenile court fitness hearing was inadmissible at a later criminal prosecution based upon the same facts).

in communications from juveniles to probation officers, held that the statements were inadmissible.¹²³

During the ten year period following *McGautha*, lower federal courts and the courts of other states took a different position from California courts on the concurrent proceedings question.¹²⁴ This was largely due to the opinion of the United States Supreme Court in *Baxter v. Palmagiano*.¹²⁵ In *Baxter*, the Court held that an inmate had not been compelled to testify in a prison discipline hearing because his claim of the privilege was not severely burdened.¹²⁶ At the start of the hearing, the inmate had been informed that if he refused to testify, "his silence would be held against him," and he was informed that any later criminal prosecution based upon the same facts that formed the basis for the hearing was a realistic possibility.¹²⁷

In 1984, the United States Supreme Court held in *Murphy v. Minnesota*¹²⁸ that a probationer's admission of a past murder to a probation officer was admissible in evidence when offered by the state in a prosecution of the probationer for the murder.¹²⁹ The probationer was under a court order to meet with the probation officer and answer the officer's questions truthfully as a condition

123. See, e.g., *In re Wayne H.*, 24 Cal. 3d 595, 599-600, 596 P.2d 1, 3-4, 156 Cal. Rptr. 344, 346-47 (1979) (holding a juvenile's admissions to a juvenile probation officer are inadmissible at a subsequent criminal trial); *Bryan v. Superior Ct.*, 7 Cal. 3d 575, 587, 498 P.2d 1079, 1087, 102 Cal. Rptr. 831, 839 (1972) (holding that admissions by a juvenile to a juvenile probation officer or juvenile court judge should be excluded from a later concurrent proceeding criminal prosecution).

124. See, e.g., *United States v. Bazzano*, 712 F.2d 826, 836 (3rd Cir. 1983); *Ryan v. State of Montana*, 580 F.2d 988, 991 (9th Cir. 1978), cert. denied, 440 U.S. 977 (1979); *United States v. Brugger*, 549 F.2d 2, 4-5 (7th Cir. 1977), cert. denied, 431 U.S. 919 (1979) (federal cases addressing the concurrent proceeding issue). See also *State v. Robinson*, 556 A.2d 342, 344 (N.J. Super. Ct. App. Div. 1989); *State v. Wahlert*, 379 N.W.2d 10 (Iowa 1985); *Evans v. State*, 153 Ga. App. 764, 764, 266 S.E.2d 545, 548 (1980); *Roberts v. State*, 584 S.W.2d 242 (Tenn. Ct. App. 1979); *State v. Cyganowski*, 21 Wash. App. 119, 584 P.2d 426, 427 (1978); *People v. Woodall*, 44 Ill. App. 3d 1003, 1009-10, 358 N.E.2d 1267, 1272 (1976); *State v. Randall*, 27 Or. App. 869, 872-76, 557 P.2d 1386, 1388-90 (1976) (state cases addressing the concurrent proceeding issue).

125. 425 U.S. 308 (1976). See MCCORMICK, *supra* note 17, at 294 (stating: "[t]he previous trend towards prohibiting burdens upon an exercise of the privilege was ended in 1976 with *Baxter v. Palmagiano*.").

126. *Baxter*, 425 U.S. at 316-20.

127. *Id.* at 312.

128. 465 U.S. 420 (1984).

129. *Id.* at 429-30.

of his probation.¹³⁰ While probation might be revoked on the basis of the probationer's answers, the probationer was free to claim the privilege against self incrimination and this claim would not, in itself, lead to a revocation of probation.¹³¹ The Court held that this situation did not "burden" a claim of the privilege and the self incriminating statements that the probationer gave were not "compelled."¹³² Thus, the statements could be used in the later prosecution against the probationer.¹³³

The *Murphy* opinion made plain the concept that even if adverse consequences of some type might be incurred by the person who claims the self incrimination privilege, a statement does not, by itself, amount to compulsion.¹³⁴ As stated in *Murphy*, the privilege against self incrimination is not "self executing," and unless a burden greater than a mere potential disadvantage in a proceeding would be suffered by a person who claimed the privilege, the person will be considered to have given the testimony or statement voluntarily.¹³⁵

To provide certainty to the area, the *Murphy* opinion explained that "compulsion" is present in only two situations: When the person giving the statement is in custody;¹³⁶ and when a witness is subject to a state imposed penalty merely for claiming the privilege and refusing to answer.¹³⁷ The fact that these two

130. *Id.* at 422.

131. *Id.* at 433.

132. *Id.* at 433-34.

133. *Id.*

134. *Id.* at 428.

135. *Id.* at 427-29.

136. *Id.* at 429-34.

137. *Id.* at 434-39. The usual form of compulsion of this type is the contempt sanction used to punish a recalcitrant defendant who does not give ordered testimony or statements. An example of this type of compulsion that has been the subject of both federal and California cases is a court order to a defendant to give statements to a psychiatrist so that the defendant's competency or sanity can be determined by the psychiatrist. In such situations, both federal and California courts have held that the Self Incrimination Clause prohibits use of the defendant's statements in any way at trial on the issue of the defendant's guilt. *See, e.g., Estelle v. Smith*, 451 U.S. 454, 456-57 (1981); *People v. Arcega*, 32 Cal. 3d 504, 520-23, 651 P.2d 338, 345-48, 186 Cal. Rptr. 94, 101-04 (1982); *Torantino v. Superior Ct.*, 48 Cal. App. 3d 465, 469-70, 122 Cal. Rptr. 61, 62-63 (1975).

The Court also mentioned a third situation, not relevant to the concurrent proceedings situation. The situation is one in which the state requires that taxpayers state any amount of gambling income or other guilt establishing information on income tax returns. *Murphy*, 465 U.S. at 439-40.

categories are listed as exclusive completely negates the general concept announced in *Simmons* that a defendant should not be compelled to choose between self incrimination and giving testifying to establish a privilege or right.¹³⁸

With the adoption of section 28(d), judicially established rules of exclusion such as those announced in *Coleman* and the juvenile court hearing cases were clearly in jeopardy. Further, the announced views of the United States Supreme Court, other federal courts and a number of state courts indicated that the policy basis underlying the *Coleman* exclusionary rule was less than convincing to other jurists.¹³⁹ However, in *Ramona R. v. Superior Ct.*,¹⁴⁰ the California Supreme Court, nonetheless, held that the concurrent proceedings exclusionary rule would continue to apply in California regardless of the truth in evidence section.¹⁴¹ In *Ramona R.*, the court held that the state could not introduce the prior testimony a juvenile defendant had given in a juvenile court "fitness hearing" in a later criminal trial on the same basis.¹⁴²

Defendant *Ramona R.* was 17 when she was charged with murdering her guardian.¹⁴³ At the fitness hearing she refused to

138. See *supra* notes 91-97 and accompanying text (discussing the *Simmons* decision).

139. See *supra* note 123 and accompanying text (discussing cases holding contrary to the *Coleman* decision).

140. 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985).

141. *Id.* at 804, 693 P.2d at 790, 210 Cal. Rptr. at 205.

142. *Id.* at 805-6, 693 P.2d at 790-92, 210 Cal. Rptr. at 5-7. Fitness hearings are held to determine whether a juvenile between the ages of 16 and 18 will benefit from juvenile court treatment, meaning that the juvenile is "amenable to the care, treatment, and training program available through the facilities of the juvenile court." CAL. WELF. & INST. CODE § 707(a) (West 1991). If the juvenile is "fit" for the juvenile court treatment, that court retains jurisdiction of the criminal offense and the juvenile is tried for the charged criminal offense in that court. If the juvenile court determines that the juvenile is not fit for treatment as a juvenile, the case is transferred to the superior court. Criteria considered by the juvenile court in a fitness hearing include: The juveniles's degree of criminal sophistication, the juveniles's prospects for rehabilitation through the juvenile court's programs, the juvenile's previous delinquent history and past attempts at juvenile court rehabilitation, and the nature of the offense allegedly committed by the juvenile. *Id.*

The hearing determines whether an older juvenile will be tried on a criminal charge in the juvenile court, or tried as an adult in a superior court prosecution in which a more serious sentence may be imposed. If the crime with which the juvenile is charged is one of the serious felonies listed in Welfare and Institutions Code section 707(b), the juvenile is presumed to be unfit for juvenile court treatment and must meet the burden of proving that he or she is fit in order to avoid being tried as an adult in superior court. CAL. WELF. & INST. CODE § 707(c) (West 1991).

143. *Ramona R.*, 37 Cal. 3d at 805, 693 P.2d at 791, 210 Cal. Rptr. at 206.

give testimony in her own behalf on the ground that any incriminating portions of the testimony could be introduced against her to prove the state's case at the later criminal trial on the matter.¹⁴⁴ The juvenile probation officer's report found Ramona unfit for juvenile court treatment.¹⁴⁵ The juvenile court referee agreed and ordered that the defendant be tried as an adult on the charge of murder in the superior court.¹⁴⁶ Ramona sought a writ to vacate the order.¹⁴⁷

The California Supreme Court acknowledged that the existing judicially developed exclusionary rules based upon the court's supervisory power, such as the rules in *Coleman* and the juvenile court cases, were no longer valid after the adoption of section 28(d).¹⁴⁸ The court, however, held that the exclusionary rule for a defendant's juvenile court fitness hearing testimony would continue to apply in California because it should be considered part of the California statutory privilege against self incriminating testimony under Evidence Code section 940.¹⁴⁹

The *Ramona R.* court declared that the federal law was in a state of "confusion,"¹⁵⁰ and that the right to exclude or the right

144. *Id.* The defendant also refused to discuss the alleged murder with her probation officer on the ground that these statements might be used by the state to prove its case in a later prosecution. *Id.* It was such statements to a probation officer that were held constitutionally admissible in the *Murphy* decision by the United States Supreme Court. *See supra* notes 128-138 (discussing the *Murphy* decision).

Ramona's refusal to talk to her probation officer does not present a separate self incrimination issue. This is because all courts, including the California Supreme Court in *Ramona R.*, have viewed statements to probation officers as being identical to testimony at hearings for the purpose of Self Incrimination Clause analysis. *See Ramona R.*, 37 Cal. 3d at 807, 693 P.2d at 792-93, 210 Cal. Rptr. at 207-08.

145. *Id.* at 805-06, 693 P.2d at 791, 210 Cal. Rptr. at 206.

146. *Id.* at 806, 693 P.2d at 791, 210 Cal. Rptr. at 206.

147. *Id.* at 804, 693 P.2d at 790, 210 Cal. Rptr. at 205.

148. *Id.* at 807-08, 693 P.2d at 793, 210 Cal. Rptr. at 208.

149. *Id.* at 808-10. 693 P.2d at 793-95, 210 Cal. Rptr. at 208-10. Section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." CAL. EVID. CODE § 940 (West 1991).

In *Ramona R.*, the court held that a juvenile's statements to a probation officer in connection with the preparation of a fitness hearing report could not be used against the juvenile in a subsequent criminal trial. *Ramona R.*, 37 Cal. 3d at 810, 693 P.2d at 795, 210 Cal. Rptr. at 210.

150. *Id.* at 808-09, 693 P.2d at 793-94, 210 Cal. Rptr. at 208-09. Actually, the federal law was quite clear. *See supra* notes 81-87 and accompanying text (discussing the relevant federal law).

of privilege could not be based upon the United States Constitution.¹⁵¹ On this point, it is striking that the opinion contains no mention of the *Murphy* opinion by the United States Supreme Court less than one year before which removed any “confusion” from the issue in holding that there is no privilege under the federal constitution in concurrent proceedings situations.¹⁵²

To qualify as a section 940 privilege, the court had to adopt the *Coleman* rule of exclusion as a judicial interpretation of the self incrimination provision of the California Constitution.¹⁵³ The bulk of the *Ramona R.* opinion is devoted to this task, and the court asserts that the exclusionary rule qualifies under the privilege clause of the truth in evidence section.¹⁵⁴

To accomplish this result, the court notes the discussion in *Coleman* addressing the policies served by the Self Incrimination Clause that are impinged by allowing use of hearing testimony at the subsequent criminal trial.¹⁵⁵ This is preceded by a passage stating the court’s conclusion that although *Coleman* was expressly decided on a nonconstitutional basis “*Coleman* clearly

151. *Ramona R.*, 37 Cal. 3d at 808-09, 693 P.2d at 793, 210 Cal. Rptr. at 208.

152. *Murphy v. Minnesota*, 465 U.S. 420, 427-29 (1984). The opinion in *Ramona R.* cites *Melson v. Sard*, 402 F.2d 653, 655 (D.C. Cir. 1968) as a decision holding that the privilege exists, and *Ryan v. State of Montana*, 580 F.2d 988, 991 (9th Cir. 1978) as a decision holding that no privilege exists. *Ramona R.*, 37 Cal. 3d at 808-09, 693 P.2d at 793, 210 Cal. Rptr. at 208. To be charitable, the discussion is remarkably incomplete. The *Melson* opinion was based upon the *Simmons* opinion of the United States Supreme Court, but was handed down before *McGautha* and *Baxter v. Palmagiano*. See *supra* notes 98-99 and accompanying text (discussing the effect of the *McGautha* decision on the precedential value of *Simmons*) and notes 125-126 (discussing the conclusive effect of the *Baxter v. Palmagiano* decision). *Melsen* has never been held persuasive on the self incrimination privilege by any court, with the sole exception of the *Ramona R.* opinion. See, e.g., *McCracken v. Corey*, 612 P.2d 990, 996 (Alaska 1980) and *People v. Rocha*, 272 N.W.2d 699, 703 (Mich. Ct. App. 1979). On the other hand, the *Ryan* decision was one of many federal and state court opinions holding that no self incrimination privilege exists in concurrent proceedings situations. See *supra* note 124 and accompanying text (discussing the federal and state cases on this issue).

153. See *supra* notes 107-121 (discussing the *Coleman* decision).

154. *Ramona R.*, 37 Cal. 3d at 809-11, 693 P.2d at 793-95, 210 Cal. Rptr. at 208-10.

155. *Id.*

demonstrates that the use of immunities there adopted are essential to California's privilege against self-incrimination."¹⁵⁶

The *Ramona R.* opinion never mentions the fact that the *Coleman* court consciously rejected basing the exclusionary rule on constitutional grounds because of the "infeasibility of propounding a constitutional rule" and because such a basis would be "unwise."¹⁵⁷ The reasoning of the *Coleman* court on the point was fully elaborated,¹⁵⁸ but goes unmentioned and unacknowledged in *Ramona R.* Aside from slighting *Coleman* as a precedent, the *Ramona R.* opinion is also deficient in terms of coming to grips with the constitutional analysis required for application of the Self Incrimination Clause under either the United States or California constitutions. At no place in the majority opinion does the court even attempt to define the "burden" on the defendant's claim of privilege that would constitute "compulsion" of any testimony she might give.¹⁵⁹

156. *Id.* at 809, 693 P.2d at 794, 210 Cal. Rptr. at 209. The *Ramona R.* opinion speaks in terms of a "use immunity" operating as a matter of law to protect a defendant who has testified earlier in a hearing from any use of his or her hearing testimony by the prosecution in a later criminal trial. *Id.* The concept of such a use immunity created by operation of law comes from *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964). The concept was introduced into California law in *Byers v. Justice Court*, 71 Cal. 2d 1039, 1057-58, 458 P.2d 465, 477, 80 Cal. Rptr. 853, 865 (1969).

157. *Coleman*, 13 Cal. 3d at 886, 533 P.2d at 1040, 120 Cal. Rptr. at 400.

158. *Id.* at 878-89, 533 P.2d at 1034, 120 Cal. Rptr. at 394.

159. See *Murphy v. Minnesota*, 465 U.S. 420, 429-30 (1984) (discussing the meaning of "compulsion"). Of the six members of the California Supreme Court participating in the *Ramona R.* decisions, only Justice Grodin mentions the requirement in his concurrence. *Ramona R.*, 37 Cal. 3d at 811-12, 693 P.2d at 795-96, 210 Cal. Rptr. at 210 (Grodin, J. concurring). He deemed various aspects of the fitness hearing procedure, particularly the statutory presumption of *Ramona R.*'s unfitness for juvenile court treatment, to constitute state compulsion. *Id.* See *supra* notes 84-87 and accompanying text (discussing the contrary position of the United States Supreme Court on the federal Self Incrimination Clause). It should be noted that there are a number of United States Supreme Court opinions holding that the fact that a presumption of illegal activity has arisen against a potential witness does *not* mean that the witness is compelled to testify for purposes of the self incrimination privilege. See, e.g., *United States v. Rylander*, 460 U.S. 752, 757-62 (1983), *reh'g denied*, 462 U.S. 1112 (1983) (presumption that a person failing to comply with a subpoena is in contempt of court does not compel, for Self Incrimination Clause purposes, that person to testify at a civil contempt hearing); *Yee Hum v. United States*, 268 U.S. 178, 185 (1925) (presumption that possession of opium is possession of illegally imported opium does not compel, for Self Incrimination Clause purposes, a defendant to testify to dispel the presumption).

It is certainly arguable that *Ramona R.* is virtually a paradigm of the type of judicial opinion that the voters were trying to combat by adopting section 28(d). First, the opinion overrules a crucial aspect of the respected precedent in the field in that the elaborate analysis in *Coleman* rejecting a constitutional basis for the exclusionary rule is completely disregarded. Second, the opinion goes beyond and is directly contrary to contemporary civil liberties precedents under the United States Constitution. Third, the opinion "constitutionalizes" a rule so that the state legislature cannot reverse, alter, refine or attempt to bring precision to the area through a statute.

The California Supreme Court has followed the exclusionary rule adopted in *Ramona R.* on one occasion.¹⁶⁰ In *People v. Weaver*,¹⁶¹ the court held that the *Coleman* rule giving the defendant in a criminal trial the right to exclude testimony he or she previously gave in a probation revocation hearing survived the adoption of section 28(d) as a section 940 privilege on the basis of *Ramona R.*¹⁶² The majority opinion was written by then Associate Justice Lucas, who took some pains to indicate considerable doubt about the *Ramona R.* opinion.¹⁶³

The only other opinion of the California Supreme Court addressing the privilege clause in section 28(d) was also written by Chief Justice Lucas. Between the *Weaver* opinion in 1985 and

160. A court of appeal has also applied the *Ramona R.* exclusionary rule to statements given by a defendant in a treatment program ordered by juvenile court in a dependency hearing. See *In re Jessica B.*, 207 Cal. App. 3d 504, 518-21, 254 Cal. Rptr. 883, 892-93 (1989).

161. 39 Cal. 3d 654, 703 P.2d 1139, 217 Cal. Rptr. 245 (1985).

162. *Id.* at 659, 703 P.2d at 1142, 217 Cal. Rptr. at 248-49. Appellant Weaver had conceded that *Coleman* was "overruled" by section 28(d) in the petition for hearing he filed with the California Supreme Court. Appellant's Petition for Hearing filed on June 5, 1984 in California Supreme Court Crim. No. 23932. The petition was filed seven months before *Ramona R.* was decided and indicates the opinion of appellate attorneys specializing in these issues prior to issuance of the *Ramona R.* opinion. Appellant Weaver was represented by the California Public Defender.

163. *Weaver*, 39 Cal. 3d at 659 n.2, 703 P.2d at 1142 n.2, 217 Cal. Rptr. at 249 n.2. Justice Lucas stated:

I did not participate in *Ramona R.* and I have several reservations regarding its analysis and ramifications. But the case did settle the narrow question of whether *Coleman's* exclusionary rule reflects a 'statutory' rule of privilege for purposes of Proposition 8, and, to that extent, I concur in its conclusion.

Id.

*People v. May*¹⁶⁴ in 1988, the composition of the court had changed dramatically and the basic attitude of the court toward the truth in evidence provision was significantly different.¹⁶⁵ In *May*, a new majority of the court fully accepted a broader purpose for section 28(d) and used this purpose as a guide in interpreting the hearsay provision in the privilege clause.¹⁶⁶ The *May* opinion also reconfirmed the holding in *Ramona R.*,¹⁶⁷ but the manner in which this was done appears both misconceived and inconsistent with the major premises of the opinion.

At issue in *May* was the effect of the truth in evidence section upon the California rule prohibiting the introduction in evidence of a defendant's prior out of court statements to impeach the defendant's testimony at trial if the out of court statements were obtained in violation of *Miranda v. Arizona*.¹⁶⁸ The United States Supreme Court had squarely held that the Self Incrimination Clause in the United States Constitution did not prohibit the use of such statements on the ground that a criminal defendant's privilege to testify in his own defense "cannot be construed to include the right to commit perjury."¹⁶⁹ However, the California Supreme Court, basing its decision on the Self Incrimination Clause in the

164. 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988).

165. In 1986, Chief Justice Bird and Associate Justices Grodin and Reynoso were denied reconfirmation in their positions by a majority of California voters in the general election held in November of that year. Governor Dukemajian, who had been one of the advocates of Proposition 8, appointed Associate Justice Lucas to be Chief Justice and appointed Associate Justices Arguelles, Eagleson and Kaufman to the court.

In the last days of the tenure of the court as previously composed, that court issued an opinion in *May* which retained the exclusionary rule at issue. That opinion was recalled by the newly composed court. The reasoning in that opinion, which was written by Justice Mosk, is similar to the reasoning Justice Mosk used in his dissenting opinion to the ultimate *May* decision which was issued almost a year later in February, 1988. See *People v. May*, 44 Cal. 3d 309, 320-27, 748 P.2d 307, 313-18, 243 Cal. Rptr. 369, 375-80 (1988) (Mosk, J., dissenting).

166. *Id.* at 318-20, 748 P.2d at 312-13, 243 Cal. Rptr. at 374-75.

167. *Id.* at 317, 748 P.2d at 312, 243 Cal. Rptr. at 374.

168. *Id.* at 311, 748 P.2d at 307, 243 Cal. Rptr. at 369. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements of a suspect held in custody are considered compelled and are inadmissible to prove the state's case in a criminal prosecution of the suspect unless the suspect has waived the rights to remain silent and consult with an attorney). In order to ensure that any waiver by the suspect is valid, the *Miranda* opinion required police to give the suspect warnings that fully explain the suspect's rights before the suspect can effectively waive those rights. *Id.* at 476-79.

169. *Harris v. New York*, 401 U.S. 222, 225 (1971).

California Constitution, arrived at a different result in *People v. Disbrow*,¹⁷⁰ holding that statements taken in violation of *Miranda* were inadmissible for the purpose of impeaching the defendant in a criminal prosecution.¹⁷¹

The court of appeal in *May* held that section 28(d) abrogated the ruling in *Disbrow*, and, with substantial additions, the California Supreme Court adopted the court of appeal opinion.¹⁷² The reasoning of the supreme court addressing the purpose of section 28(d) was clearly stated in the opinion:

[T]he "Truth-in-Evidence" provision of our Constitution was probably intended by the California voters as a means of (1) abrogating *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, while (2) preserving *legislatively* created rules of privilege insulating particular communications such as the attorney-client or physician-patient privilege. As we recently observed, "The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing those rights, *except as required by the Constitution of the United States.*"¹⁷³

In *Lance W.*, the court had recognized the purpose of the truth in evidence section only in connection with the California search and seizure evidence restrictions,¹⁷⁴ but in *May* the full scope of the underlying intent of the section is recognized by the court in a direct manner. The majority opinion stated:

Thus it seems very likely that Proposition 8 was crafted for the very purpose, among others, of abrogating cases such as *Disbrow*, which had elevated the procedural rights of the criminal defendant above the level required by the federal constitution, as interpreted by the United States Supreme Court.¹⁷⁵

170. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

171. *Id.* at 108-14, 545 P.2d at 276-80, 127 Cal. Rptr. at 364-68 (1976).

172. *May*, 44 Cal. 3d at 315-18, 748 P.2d at 310-12, 243 Cal. Rptr. at 372-74.

173. *Id.* at 318, 748 P.2d at 312, 243 Cal. Rptr. at 374 (emphasis in original).

174. *See supra* notes 55-64 and accompanying text (discussing the *Lance W.* case).

175. *May*, 44 Cal. 3d at 318, 748 P.2d at 312, 243 Cal. Rptr. at 374. *See Curb, Arguments in Favor of Proposition 8*, in CAL. BALLOT PAMPHLET, *supra* note 3, at 34.

The defendant in *May* had argued that *Disbrow* had established a particular application of the privilege against self incrimination guaranteed by the California Constitution.¹⁷⁶ According to the defendant's theory, this meant that under the holding in *Ramona R.*, Evidence Code section 940 applied to the *Disbrow* rule to make it "an existing statutory rule of evidence relating to privilege" and thereby excepted from the sweep of section 28(d).¹⁷⁷ In response, the *May* court stressed that *Disbrow* was explicitly based upon the Self Incrimination Clause of the California Constitution, and stated:

Defendant disregards the realities underlying the passage of Proposition 8 in discerning some "statutory" privilege which insulates and protects *Disbrow*. That case neither concerned nor created any mere statutory privilege [but was based upon article I, section 15 of the California Constitution]. We believe that section 28(d) was intended to preclude this kind of reliance on the state Constitution to create new exclusionary rules rejected by applicable decisions of the United States Supreme court. Thus, to accept defendant's thesis would thwart the probable intent of the framers of, and voters for, Proposition 8.(citations)¹⁷⁸

The *May* court used the same argument to brush aside a virtually identical argument based upon the hearsay phrase in the privilege clause.¹⁷⁹ Evidence Code section 1204 states that any hearsay evidence that is admissible under a hearsay exception shall nonetheless be considered inadmissible if allowing the hearsay in evidence would violate either the United States or California constitutions.¹⁸⁰ When enacted in 1965, section 1204, like section

176. *May*, 44 Cal. 3d at 315-15, 748 P.2d at 310-11, 243 Cal. Rptr. at 372-73.

177. *Id.*

178. *Id.* at 318-19, 748 P.2d at 312-13, 243 Cal. Rptr. at 374-75 (citations omitted).

179. *Id.* at 319-20, 748 P.2d at 313, 243 Cal. Rptr. at 375.

180. CAL. EVID. CODE § 1204 (West 1966). Section 1204 provides:

A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

Id.

If the right of criminal defendants to confront witnesses against him or her would be abridged by the operation of one of the many exceptions to the hearsay rule contained in Evidence Code sections 1220-1350, the hearsay evidence will nonetheless be inadmissible under the section. This

940, stated an obvious truism: If admission of evidence against a criminal defendant would violate either the federal or state constitutional rights of the defendant, the evidence must not be admitted.¹⁸¹ Justice Mosk's dissenting opinion in *May* argued strongly that *Disbrow* had made the use of the hearsay admissions of a criminal defendant inadmissible under article I, section 15 of the California Constitution.¹⁸² Under section 1204, the *Disbrow* rule was, therefore, a "statutory rule relating to hearsay."¹⁸³ This was exactly the same argument that Justice Mosk had adopted in his majority opinion for the court in *Ramona R.*, essentially bootstrapping a California constitutional interpretation by the state supreme court into an "open ended" statutory provision for the purpose of the privilege clause exception to section 28(d).¹⁸⁴

In *Ramona R.* a differently composed court had endorsed this reasoning, but in *May* the majority brushed it aside, stating:

[S]ection 1204 (in much the same manner as section 940) simply acknowledges the existence of judicial decisions under the state or federal Constitutions which bear upon the admissibility issue. As we have previously explained in the context of our analysis of section 940, in adopting section 28(d) and its exception for "statutory rules of evidence," the voters probably intended to preserve *legislatively* created evidentiary rules, while abrogating *judicial* decisions which had required the exclusion of evidence solely on state constitutional grounds. We would wholly frustrate this intent were we to hold that the *Disbrow* rule survived merely because the Legislature had acknowledged the existence

exclusion is also required by the Confrontation Clause of the Sixth Amendment to the United States Constitution. See *California v. Green*, 399 U.S. 149, 155-64 (1970) (discussing the Confrontation Clause restrictions on otherwise admissible hearsay evidence).

181. CAL. EVID. CODE § 1204 (West 1966). However, section 940 has other procedural effects in addition to simple exclusion of evidence. For example, the invocation of the self incrimination privilege may not be commented upon in the trial of a civil matter because the constitutional privilege is also made a statutory privilege by section 940, and is thus subject to section 913(a). CAL. EVID. CODE § 940 (West 1966).

182. *May*, 44 Cal. 3d at 325-27, 748 P.2d at 317-18, 243 Cal. Rptr. at 379-80 (Mosk, J., dissenting).

183. *Id.* at 324-25, 748 P.2d at 316-17, 243 Cal. Rptr. at 378-79 (Mosk, J., dissenting).

184. See *Ramona R.*, 37 Cal. 3d at 808, 693 P.2d at 793, 210 Cal. Rptr. at 208.

of judicial rules such as *Disbrow* in statutes such as sections 940 and 1204.¹⁸⁵

Having established the proper approach to interpreting both the general language of section 28(d) and the privilege clause, it is unfortunate that the court did not overrule *Ramona R.* In view of the fact that Chief Justice Lucas had for many years urged the supreme court to adopt a broader view of the intentions of California voters in adopting Proposition 8,¹⁸⁶ the approval in the *May* opinion of *Ramona R.* is somewhat confusing. The explanation may well be that then Associate Justice Lucas, with considerable explicit reservations, accepted *Ramona R.* as a narrow precedent in his opinion for the court in *Weaver*.¹⁸⁷

In the *May* opinion, *Ramona R.* is noted twice.¹⁸⁸ In the court of appeal opinion that was adopted as part of the supreme court's opinion, *Ramona R.* is distinguished on the ground that *federal* constitutional precedents required the *Ramona R.* court to hold that the shifted burden of proof which constituted a "legislatively compelled self-incriminating statement" involved in the case could not be used in a subsequent trial.¹⁸⁹ The original portion of the supreme court opinion distinguished *Ramona R.* "on the further ground that its rule of use immunity was adopted in the face of conflicting signals from the federal courts regarding the necessity of such a remedy under the federal constitution."¹⁹⁰ For reasons discussed above, neither distinction is based upon a correct premise.¹⁹¹

185. *May*, 44 Cal. 3d at 319-20, 748 P.2d at 313, 243 Cal. Rptr. at 375 (emphasis in original).

186. See *People v. Fritz*, 40 Cal. 3d 227, 233, 707 P.2d 833, 837, 219 Cal. Rptr. 460, 464 (1985) (Lucas, J., dissenting); *People v. Castro*, 38 Cal. 3d 301, 322-23, 696 P.2d 111, 124-25, 211 Cal. Rptr. 719, 732 (Lucas, J., dissenting).

187. See *supra* notes 160-163 and accompanying text (discussing Justice Lucas' treatment of *Ramona R.* in *Weaver*).

188. *May*, 44 Cal. 3d at 317-18, 748 P.2d at 311-12, 243 Cal. Rptr. at 373-74.

189. *Id.* at 317, 748 P.2d at 311, 243 Cal. Rptr. at 373.

190. *Id.* at 318, 748 P.2d at 312, 243 Cal. Rptr. at 374 (citing *Ramona R.*, 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985)).

191. Contrary to the court of appeal's stated premise, the United States Supreme Court held, prior to *Ramona R.*, that the only forms of "compulsion" that implicate the federal self-incrimination clause are custodial interrogations and direct criminal penalties imposed by the state for refusal to

The supreme court's discussion of *Ramona R.* in *May* is unnecessary for the holding of the latter opinion that statements of the defendant taken in violation of *Miranda* may be used to impeach the defendant in a criminal prosecution.¹⁹² The discussion of *Ramona R.* is also unnecessary for the rationale adopted by the court in *May* to reach its holding that judicial decisions requiring exclusion of evidence solely on the basis of a provision in the California Constitution were abrogated by section 28(d).¹⁹³ The distinctions regarding *Ramona R.* are therefore dicta, and subject to future challenge. This is fortunate, because neither distinction is sound.¹⁹⁴

As to the two cases in which courts have relied upon *Ramona R.*, under either of the grounds for distinguishing that opinion from the rationale adopted in *May*, both are incorrectly decided. In

give statements or testimony. See *supra* notes 136-138 and accompanying text (discussing the compulsion requirement in the Self Incrimination Clause). The court of appeal apparently believed that the existence of a statutory rebuttable presumption against the *Ramona R.* defendant "compelled" her to testify for purposes of federal Constitutional law. See *May*, 44 Cal. 3d at 317, 748 P.2d at 311, 243 Cal. Rptr. at 373. This was a clear misreading of the law. The United States Supreme Court has long held that a statutorily mandated shift in the burden of proof against a party refusing to explain or deny a presumed fact is *not* compulsion for purposes of the Self Incrimination Clause. See *supra* note 159 and accompanying text.

The California Supreme Court adopted the false premise that federal courts had not resolved the question of the application of the federal self-incrimination clause to concurrent proceedings at the time *Ramona R.* was decided. *Ramona R.*, 37 Cal. 3d at 808, 693 P.2d at 793, 210 Cal. Rptr. at 208. The United States Supreme Court's opinion in *Murphy* had clearly established that the federal privilege against self-incrimination did *not* apply to prior testimony in concurrent hearings. See *supra* notes 128-138 and accompanying text (discussing the *Murphy* decision). The California Supreme Court opinion in *Ramona R.* neglected to mention the controlling *Murphy* opinion and the numerous lower federal and state court opinions holding in accord with *Murphy*. See *supra* notes 150-152 and accompanying text (discussing the *Ramona R.* opinion's failure to mention the *Murphy* opinion) and note 152 (citing federal and state court opinions in accord with *Murphy*).

The contentions that *Ramona R.* merely followed federal law or was decided while federal law was uncertain were unconvincing to at least one member of the California Supreme Court in *May*. Justice Eagleson concurred in the judgment of the majority, but expressed his view that *Ramona R.* "clearly created" a new remedial exclusionary rule. *May*, 44 Cal. 3d at 320, 748 P.2d at 313, 243 Cal. Rptr. at 375 (Eagleson, J., concurring).

192. *May*, 44 Cal. 3d at 319, 748 P.2d at 313, 243 Cal. Rptr. at 375.

193. *Id.* at 318, 748 P.2d at 312, 243 Cal. Rptr. at 374. In dissent, Justice Mosk stated: "[I]n support of their conclusion. . . , the majority reason in substance that the intent of those who drafted and voted for section 28(d) was to abrogate judicial decisions requiring the exclusion of evidence solely on state constitutional grounds. . . ." *Id.* at 325, 748 P.2d at 317, 243 Cal. Rptr. at 378 (Mosk, J., dissenting).

194. See *supra* note 191.

Weaver, the procedure of the parole revocation proceeding involved did not include a shift of the burden of proof requiring the state to prove its case. There was also no confusion over the United States Supreme Court's position on concurrent proceeding probation hearing testimony at a later criminal trial after *Minnesota v. Murphy*.¹⁹⁵ The same is true of *Jessica B.*,¹⁹⁶ there being no reversal of the burden of proof in a dependency hearing and, following *Murphy*, no conflict on the proposition that the federal Self Incrimination Clause privilege did not apply in the concurrent proceedings situation at issue.

Regardless of the fact that *Ramona R.* appears to have been undercut by the state supreme court's opinion in *May*, the opinion still stands as an ostensibly valid precedent and lower courts will have to deal with both *Ramona R.* and the two cases that have followed it. *Ramona R.* should be overruled for the reasons clearly indicated in *May*. It is an opinion that created a new privilege under the California Constitution and an exclusionary rule to implement that privilege three years after the electorate of the state had adopted a state constitutional provision intended to eliminate past judicially created exclusionary rules and prohibit future judicially created exclusionary rules.

A coherent basis for overruling *Ramona R.* is available, and it proceeds from the realization found in the portion of the court of appeal opinion adopted by the supreme court in *May*.¹⁹⁷ *Ramona R.* extended the self incrimination privilege under the California Constitution rather than merely adding an exclusionary rule to the remedies that could be invoked to protect an existing privilege.¹⁹⁸ The *Ramona R.* opinion thereby created a new right possessed by defendants in concurrent proceedings to give testimony (that the *Ramona R.* opinion considered to be compelled by virtue of a shifted burden of proof) in a hearing without running the risk that the testimony might be used against the defendant in a subsequent

195. See *supra* notes 128-138 and accompanying text (discussing the *Murphy* decision).

196. See *supra* note 160 (discussing the *Jessica B.* decision).

197. See *May*, 44 Cal. 3d at 317-18, 748 P.2d at 312, 243 Cal. Rptr. at 374 (discussing the scope of the privilege against self-incrimination as determined in the *Ramona R.* opinion).

198. *Id.*

criminal prosecution. The court used the term “use immunity” as a shorthand for this right, with the idea being that *if* the defendant chooses to be a witness and testify at the hearing, his or her testimony will be treated as if the state had conferred use immunity upon the defendant witness.

This creation of a new privilege under article I, section 15 of the California Constitution did not occur until the *Ramona R.* decision was handed down in 1985. Prior to that, the right had been considered an exclusionary rule and was nonconstitutional in nature under the express holding of *Coleman*. For this reason, the privilege created by *Ramona R.* was not “existing” on June 8, 1982, the date on which section 28(d) became effective. The privilege clause exception excludes from the operation of the truth in evidence section “any existing statutory rule of evidence relating to privilege.”¹⁹⁹ The exception should apply only to privileges in existence, meaning those enacted by the state legislature or, accepting the premise of *Ramona R.*, by judicial interpretation of article I, section 15 of the California Constitution, rendered in an opinion issued before June 8, 1988.²⁰⁰ The privilege to exclude prior hearing testimony created by the *Ramona R.* opinion, issued January 28, 1985, was neither.

It is an accepted maxim in constitutional interpretation that in interpreting any amendment to the document, meaning should be given to every word in the amendment.²⁰¹ The term “existing,” as used in the privileges clause, can only refer to a privilege that was in existence on the date that section 28(d) became effective. This would obviously prevent the state legislature from creating a new privilege excluding evidence after the effective date, unless

199. CAL. CONST. art. 1, § 28(d).

200. Of course it is highly questionable whether the California constitutional privilege created by *Ramona R.* should logically be considered a statutory privilege, even under the open ended language of Evidence Code section 940. If the question were one of first impression for the same California Supreme Court that decided *May*, the answer is clear that the *Ramona R.* privilege would not be considered “statutory.” However, the *Ramona R.* court had a different composition and decided that the privilege it created in that case was “statutory.” *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 804, 693 P.2d 789, 790, 210 Cal. Rptr. 204, 205 (1985).

201. *In re Lance W.*, 37 Cal. 3d 873, 902-03, 694 P.2d 744, 763-64, 210 Cal. Rptr. 631, 650-51 (1985) (Mosk, J., dissenting).

each of the two houses of the legislature approved the new privilege by greater than a two thirds vote. By the same token, the word "existing" should prevent a court from creating a new privilege after the effective date of section 28(d). This should be the case regardless of the basis on which the court claims to be creating the privilege, including the claim that the new privilege is created by an interpretation of article I, section 15 of the state constitution which arguably becomes a statutory privilege under Evidence Code section 940. Of course any privileges created by court interpretation of article I, section 15 of the California Constitution *prior* to the effective date of section 28(d) will still be valid.²⁰²

This common sense reading of section 28(d) not only would give effect to a crucial word in the truth in evidence section, but would also harmonize both section 15 and section 28(d) of the California Constitution. The previous omission of the courts to consider this point is attributable to the fact that the argument was not made to the supreme court in *Ramona R.*²⁰³ At the first opportunity, a court presented with a concurrent proceeding question should address the omission and overrule *Ramona R.*

IV. CONCLUSION

With the exception of the 1985 opinion in *Ramona R.*, which requires attention in the manner indicated above, California courts

202. In *People v. Jacobs*, 158 Cal. App. 3d 740, 745-51, 204 Cal. Rptr. 849, 852-57 (1984), a court of appeal held that a California court interpretation of section 15 excluding evidence of silence upon arrest was not abrogated by the adoption of section 28(d) because of the effect of Evidence Code section 940 and the privileges clause. *Id.* At issue in the case was whether the self incrimination privilege prevented a prosecutor from mentioning the defendant's post arrest silence during cross examination of the defendant at trial. *Id.* While the federal courts had held that the practice did not violate the Fifth Amendment privilege, the California Supreme Court had not decided the issue.

After reviewing a number of California appellate opinions issued before adoption of section 28(d), the *Jacobs* court held that past precedent supported an interpretation of the California constitutional Self Incrimination Clause prohibiting the practice. *Id.* at 749-50, 204 Cal. Rptr. at 856. The *Jacobs* opinion demonstrates a logical method to give effect to both the privilege clause and the intent of the drafters of section 28(d) to make the "open ended" section 940 available for privileges developed by court interpretation *prior* to the effective date of section 28(d).

203. See briefs in *Ramona R.* on file in Hastings Law Library.

have been both pragmatic and observant of the electorate's intent in applying the terms of the privileges clause in the truth in evidence section. After the California Supreme Court's opinion four years ago in *May*, lower courts have a conclusive statement of guiding principle to employ in the future. At present, the most important required application of that principle would be to overrule of the *Ramona R.* decision.

