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Proposition 8: California Law after In re Lance W. and People v. Castro

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Proposition 8: California Law After *In re Lance W.* and *People v. Castro*

Until recently, California provided a relatively high level of constitutional protection to criminal defendants. With the passage of Proposition 8 in 1982, the California voters expressed their desire to decrease this level of protection in order to remove impediments to the effective prosecution of criminally accuseds. This comment will examine two of the major provisions of Proposition 8 and their effect on California law in light of major cases decided by the California Supreme Court in 1985.

I. INTRODUCTION

In our system of federalism, state constitutions have a significant role to play as protectors of individual rights and liberties. State courts have traditionally interpreted state constitutional criminal provisions as the equivalent of the corresponding federal rights.[1] Since the Warren Court's standards of protection were so extensive, state courts seldom required more than the federal minimum.[2] However, in the last decade, since the Burger Court has limited the reach of the broader Warren Court decisions, state courts have gradually turned to their own constitutions as a source for expanding the scope of criminal procedural rights.[3] This approach has been further encouraged by decisions of the Supreme Court which have left no doubt that the state courts are free to ignore the Supreme Court's less expansive interpretations of analogous federal constitutional provisions when deciding a case on state constitutional grounds.[4]

Through numerous decisions, the Supreme Court has developed a body of constitutional law in the areas of criminal procedure that guides the behavior of state courts as well as their federal counterparts. By way of the due process clause of the fourteenth amendment, the Court has applied to the states nearly all the criminal procedural safeguards of the fourth, fifth, sixth, and eighth

1. Comment, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368 (1982).

2. C. WHITEBREAD, CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 592 (1980). *See also* Comment, *1982 California Courts of Appeal Survey: Search and Seizure*, 5 WHITTIER L. REV. 201, 207 (1983).

3. Comment, *supra* note 1, at 1368-69.

4. *Id.* at 1369.

amendments.[5]

The passage of Proposition 8 in California on June 8, 1982 severely limited California state courts' ability to utilize the doctrine of independent state grounds in certain areas of criminal procedure. This comment seeks to examine the viability of prior interpretations by California courts in the areas of criminal procedure in light of the passage of the initiative. Since an understanding of the doctrine of independent state grounds is necessary for a full comprehension of the Proposition, the history and development of the doctrine in California will first be briefly outlined. The purpose and direct effect of Proposition 8 on the California Constitution will be discussed, followed by a comparison of relevant pre-Proposition 8 California cases with United States Supreme Court cases illustrating the distinctive features of California law of criminal procedure in place at the time Proposition 8 was passed. Finally, the comment will examine legal challenges to the Proposition, and the future course of California law in light of leading cases reflecting the impact of Proposition 8.

II. HISTORY AND DEVELOPMENT OF INDEPENDENT STATE GROUNDS IN CALIFORNIA

The doctrine of independent state grounds has been firmly established in the decisions of the United States Supreme Court since

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5. *Id.* at 1367. The text of these amendments reads as follows:

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

For a list of representative cases holding these protections applicable to the states, see Comment, *supra* note 1, at 1367 n.1.

Cooper v. California.[6] In that case, the defendant was arrested for violation of narcotics laws and his automobile was seized pursuant to a California statute authorizing such seizure. The statute further provided for delivery of the vehicle to the Division of Narcotic Enforcement, to be held as evidence until forfeiture was declared or release ordered. In holding that a warrantless search one week after the defendant's arrest was not unreasonable under the fourth amendment, Justice Black, writing for the majority, noted that "[o]ur holding . . . does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."[7]

Recognition of an adequate independent state ground precludes review by the United States Supreme Court.[8] Therefore, a state court which bases its ruling on its own constitution may effectively avoid Supreme Court scrutiny. The result is that law enforcement officials will be unable to obtain relief in a federal forum in any case in which the state decision is based on state constitutional requirements broader than those of the federal constitution.[9]

The definitive case on independent state grounds in California is the case of *People v. Brisendine.*[10] In *Brisendine,* the California Supreme Court invalidated a search of the defendant's knapsack after his apprehension for a fire ordinance violation. The court reasoned that the officers who arrested the defendant and other campers in a forest area had a legitimate concern for their own safety because of the need to escort the arrestees a considerable distance out of the forest, and hence were justified in conducting a simple patdown of the defendant's knapsack for weapons.[11] Additionally, the court reasoned that the officers were justified in looking inside the

6. 386 U.S. 58 (1967).

7. *Id.* at 62. *See also* Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 491-92 (1965) ("even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision").

8. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

9. *See* C. WHITEBREAD, *supra* note 2, at 593.

10. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

11. *Id.* at 535-37, 531 P.2d at 1103-04, 119 Cal. Rptr. at 319-20. The defendant and his fellow campers had been arrested for having an open campfire in a designated "high fire hazard area" in which both open campfires and overnight camping were prohibited. Because the officers had left their citation books in their patrol car and because of the prohibition against camping, the campers were escorted out of the forest area. The officers' concern for safety was heightened because of several adverse factors. The journey back took about two hours, much of which was in darkness due to the failure of the officers' flashlights. Also, the journey required strenuous climbing in

knapsack, since this pat-down search proved insufficient to allay fear that the interior might contain a weapon.[12] However, the court concluded that the legitimate scope of the search was exceeded when the officers searched a closed bottle in the knapsack, in which narcotics were discovered, reasoning that such action could not rationally be claimed to be necessary for the officers' protection.[13]

The California Supreme Court in *Brisendine* chose to ignore the existing case law established by the United States Supreme Court in *United States v. Robinson*[14] and *Gustafson v. Florida.*[15] Under the standards enunciated in these cases, the entire search would have been legal. Instead, relying on *Cooper v. California*[16] and *Jankovich v. Indiana Toll Road Commission,*[17] the court indicated that it was not bound to follow *Robinson* and *Gustafson* since they prescribed only the minimum threshold requirements to survive the fourth amendment proscription on unreasonable searches and seizures.

Although the wording of the provision protecting against unreasonable searches and seizures in California's constitution is similar to that of the United States Constitution,[18] a stricter interpretation and higher California standard was justified by the court in *Brisendine* by stating that "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart."[19] The basis for the court's decision rested "exclusively on article I, section 13, of the California Constitution, which requires a *more exacting standard* for cases arising within this state,"[20] and from the people's adoption of article I, section 24 in which it was declared that, " '[r]ights guaran-

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which it was necessary for the campers to aid each other. Much of the time, the officers had no idea where each of the arrestees was.

12. *Id.* at 543, 531 P.2d at 1108, 119 Cal. Rptr. at 324.

13. *Id.* The court cited People v. Collins, 1 Cal. 3d 658, 663, 463 P.2d 403, 406, 83 Cal. Rptr. 179, 182 (1970), in which it was stated that:

> an officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down.

Id.

14. 414 U.S. 218 (1973). *See infra* note 48 for the facts of the case.

15. 414 U.S. 260 (1973). In this case, the defendant was arrested for driving without having a valid driver's license in his possession. During a pat-down search, the arresting officer found and seized marijuana cigarettes. The defendant was later tried and convicted of unlawful possession. Upholding the conviction, the Supreme Court held that a full search of a suspect incident to a lawful custodial arrest did not violate the fourth amendment.

16. 386 U.S. 58 (1967).

17. 379 U.S. 487 (1965).

18. *See supra* note 5 for the wording of U.S. CONST. amend. IV. The language is mirrored in CAL. CONST. art. I, § 13.

19. 13 Cal. 3d at 550, 531 P.2d at 1113, 119 Cal. Rptr. at 329.

20. *Id.* at 545, 531 P.2d at 1110, 119 Cal. Rptr. at 326 (emphasis added).

teed by this Constitution are *not dependent* on those guaranteed by the United States Constitution.' "[21]

By reading these two constitutional provisions together, the California Supreme Court justified its stricter interpretation of a clause identical to that in the United States Constitution and invoked the doctrine of independent state grounds to its fullest. California courts have thus determined that the California Constitution is and always has been a document of independent force.[22] Accordingly, California courts have secured greater rights for its citizens in many areas than those guaranteed by the federal Constitution. The practical effect has been the suppression of evidence which would otherwise be admissible under federal law.

III. PROPOSITION 8

In response to California voters' desire to change certain existing provisions of the California Constitution, Proposition 8, known as "The Victim's Bill of Rights," was passed on June 8, 1982. Section 3 of the initiative added section 28(a) to article I of the California Constitution. The section provides a statement of the purpose of amending the California Constitution:

> The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.
>
> The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance . . . .
>
> To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.[23]

The most prominent of these reforms are discussed below.

A. The Truth-in Evidence Section

One of the most prominent provisions of Proposition 8 is the addi-

21. *Id.* at 551, 531 P.2d 1114, 119 Cal. Rptr. at 330 (emphasis added) (quoting from CAL. CONST. art. I, § 24).

22. *Id.* at 549-50, 531 P.2d at 1113, 119 Cal. Rptr. at 329.

23. CAL. CONST. art. I, § 28(a).

tion of section 28(d) to the California Constitution. This section, entitled "Right to Truth-in-Evidence," provides that "relevant evidence shall not be excluded in any criminal proceeding."[24] The Truth-in-Evidence provision appears, by its plain language, to effectively abolish application of California's exclusionary rule[25] wherever that rule is more strict than its federal counterpart.

Essentially, the initiative gave the voters a choice between the retention of current California standards regarding the admission of relevant evidence and the less restrictive federal standards. Armed with the information contained in the voter's pamphlet to the effect that the proposition would make "radical changes" in the state constitution, the voters nonetheless chose the federal standards.[26] The passage of Proposition 8 was therefore "a clear repudiation, by the people, of state law embellishments on federal decisions which operate to exclude relevant evidence from criminal proceedings."[27]

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24. CAL. CONST. art. I, § 28(d). The full text of this provision is as follows:

> (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.

25. CAL. PENAL CODE § 1538.5 (West Supp. 1984). The relevant portions of the California exclusionary rule provide as follows:

> (a) Grounds. A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
>
> (1) The search or seizure without a warrant was unreasonable.
>
> (2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards . . . .
>
> (d) Effect of Granting Motion. If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the . . . evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section . . . are utilized by the people.

26. California's exclusionary rule has not been expressly repealed. Therefore, the effect of Proposition 8 was not to abolish the doctrine in its strictest sense. Rather, the initiative requires the California Supreme Court to interpret what constitutes an *unreasonable* search and seizure in a manner consistent with that of the United States Supreme Court. The effect is really to redefine what constitutes an illegal search. The exclusionary rule still exists and may be appropriately invoked in all cases in which the United States Supreme Court finds the search to be unreasonable. *See* Comment, *supra* note 2, at 203. An exception to this arises in the area of standing where the search may be concededly illegal but the aggrieved party is not granted standing to challenge that illegal search.

27. Wilson v. Superior Court, 134 Cal. App. 3d 173, 212, 670 P.2d 325, 346, 185 Cal. Rptr. 678, 699 (1982), *rev'd* 34 Cal. 3d 777, 195 Cal. Rptr. 671 (1983), *cert. denied,* 104 S.

One of the evils of pre-Proposition 8 law perceived by the initiative supporters was the exclusion of relevant evidence in a criminal prosecution. This was suggested in the argument for Proposition 8 that its passage would "restore balance to the rules governing the use of evidence against criminals."[28] The Legislative Analyst predicted that the measure, if adopted, would override the exclusion of "evidence obtained through . . . unlawful searches of persons or property" to the extent permissible under federal law.[29] Proponents of the initiative specifically indicated that the Truth-in-Evidence provision would not affect the federal restrictions on the use of evidence which function as the constitutional minimums for protection of individual rights.[30]

The primary impact of this constitutional amendment on California law is in cases involving the exclusionary rule. A different result will be required, departing from existing case law in which the California Supreme Court has exercised its prerogative of deciding the case on independent state grounds and, in so doing, has excluded evidence which would otherwise be admissible under the body of federal constitutional law. The Truth-in-Evidence provision purports to eliminate this more expansive evidentiary exclusionary rule which is based on the California Constitution. After this additional layer of criminal procedural rights is removed, the decisional law of the United States Supreme Court, as derived from its interpretation of the federal Constitution, would then become the relevant authority.

Under the system of stare decisis, California courts are obligated to follow the decisions of the United States Supreme Court in the latter's interpretation of federal constitutional safeguards.[31] Furthermore, the supremacy clause of the Constitution[32] requires that the federal exclusionary rule, made applicable to the states in *Mapp v. Ohio*,[33] must still be followed by the California Supreme Court.

Ct. 1929 (1984). This case was reversed based on a determination by the California Supreme Court that not even the federal standards were met. Accordingly, the court never reached the Proposition 8 issues.

28. Ballot Pamp., Proposed Amend. to Cal. Const. with Argument to Voters, Primary Elec. (June 8, 1982), Argument in Favor of Proposition 8, Mike Curb, Lieutenant Governor, p. 34.

29. *Id.* at 32.

30. *Id.*

31. Calderon v. City of Los Angeles, 4 Cal. 3d 251, 259, 481 P.2d 489, 493, 93 Cal. Rptr. 361, 365 (1971). *See also* People v. Hannon, 19 Cal. 3d 588, 606, 564 P.2d 1203, 1214, 138 Cal. Rptr. 885, 896 (1977).

32. U.S. CONST. art. VI, cl. 2.

33. 367 U.S. 643 (1961) (the right to privacy embodied in the fourth amendment is

However, although decisions of lower federal courts on federal questions may be persuasive authority, they are by no means binding on California courts.[34] In the absence of a United States Supreme Court decision on point, the California Supreme Court is free to interpret federal constitutional principles as it pleases.[35]

B. The Use of Prior Convictions Section

Another provision of Proposition 8 that will have a tremendous impact on the manner in which criminal trials are conducted is the section entitled "Use of Prior Convictions," which adds section 28(f) to article I of the California Constitution. This amendment to the California Constitution provides that prior felony convictions may be used "without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding,"[36] substantially modifying the evidence rules in effect prior to passage of the initiative.

Before Proposition 8 became effective, evidence of prior felony convictions could be used, with certain limitations, to attack the credibility of a witness.[37] However, under section 352 of the California

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enforceable against states in the same manner and to like effect as other basic rights secured by the due process clause).

34. People v. Bradley, 1 Cal. 3d 80, 86, 460 P.2d 129, 132, 81 Cal. Rptr. 457, 460 (1969). *See also* Gould v. People, 56 Cal. App. 3d 909, 128 Cal. Rptr. 743 (1976), *overruled on other grounds,* Von Alta v. Scott, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980).

35. Of course, with the destruction of the doctrine of independent state grounds, a decision by the California Supreme Court in an area not yet decided by the United States Supreme Court would be subject to federal review.

36. CAL. CONST. art. I, § 28(f). The full text of this provision is as follows:

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

Id.

37. Section 788 of the California Evidence Code provides as follows:

> Prior felony conviction. For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:
>
> (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
>
> (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.
>
> (c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.
>
> (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

CAL. EVID. CODE § 788 (West 1966).

Evidence Code, if the witness was also the defendant, the judge, at his discretion, could exclude most such evidence as unduly prejudicial to the defendant.[38] California courts have determined that a prior conviction is unduly prejudicial unless it is for an offense involving dishonesty,[39] it is not too remote in time,[40] and it is not identical to the crime for which the defendant is being tried.[41] Proposition 8's amendment to the California Constitution adding section 28(f) indicates that such convictions may be used for impeachment "without limitation," thereby creating a clear conflict between the constitution and the statute. Since a constitutional provision will prevail over a conflicting statute, section 352 is rendered inapplicable to evidence of prior felony convictions introduced for impeachment purposes.[42]

Prior to passage of Proposition 8, the California exclusionary rule in this area was somewhat more restrictive than federal law.[43] Fed-

38. Section 352 of the California Evidence Code states that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) *create substantial danger of undue prejudice,* of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1966) (emphasis added).

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

40. People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972).

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

42. Hale v. Bohannon, 38 Cal. 2d 458, 471, 241 P.2d 4, 11 (1952); Chesney v. Byram, 15 Cal. 2d 460, 464, 101 P.2d 1106, 1108 (1940). *But see* People v. Castro, 38 Cal. 3d 301, 317, 696 P.2d 111, 121, 211 Cal. Rptr. 719, 729 (1985).

43. *Cf.* FED. R. EVID. 609. The text of this rule is as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect . . . .

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime

eral rules will allow the admission of *any* felony as long as its probative value outweighs the prejudice to the defendant, or any crime involving dishonesty regardless of punishment or any prejudicial effect.[44] California, on the other hand, allowed only felonies involving dishonesty, and only as long as the probative value was not substantially outweighed by the prejudicial effect.[45]

Proposition 8 eliminated even the federal limitations, allowing use of any prior felony for impeachment purposes without regard to prejudicial effect, remoteness, or nature of the crime. California is, of course, under no obligation to follow federal standards as embodied in the Federal Rules of Evidence, since those standards are not of constitutional dimension. Any state is free to adopt independent statutes or constitutional provisions as long as those laws do not infringe on rights protected by the United States Constitution and as long as there has been no federal preemption.[46] Since no constitutional protections appear to be involved here,[47] California, by Proposition 8, has mandated law considerably less restrictive than corresponding federal statutes.

IV. CALIFORNIA LAW OF CRIMINAL PROCEDURE BEFORE PROPOSITION 8

In addition to a stricter California exclusionary rule, the independent state grounds of the California Constitution and other state statutes have historically resulted in California case law providing other criminal procedural protections than those provided by the United States Supreme Court. Proposition 8 was proposed to prevent California courts from establishing and applying procedural safeguards for criminal defendants higher than the federal standard mandated to protect federal constitutional rights.

The historic divergence between California law and federal constitutional standards becomes evident when the two are compared. An examination of the case law before and immediately after the passage

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which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Id.

44. *Id.* Even though this rule appears to allow admission of *any* crime involving dishonesty, that admissibility is still limited by FED. R. EVID. 403 which requires the court to exclude otherwise relevant evidence if its probative value is substantially outweighed by its prejudicial effect. There is also some limitation, also grounded on potential prejudicial effect, regarding crimes that are too remote in time.

45. *See supra* note 39 and CAL. EVID. CODE § 352 (West 1966).

46. *See* the discussion on independent state grounds, *supra* notes 6-22 and accompanying text.

47. It remains to be seen if, in extreme cases, the defendant may have a valid argument that he has been denied due process or a fair trial. If so, there may then be some constitutional limitations on this provision.

of Proposition 8 illustrates the distinctive features of California law, and suggests the potential impact of the initiative on those features. In the following pages, the changing status of California law will be analyzed in the context of federal law in various areas in the field of criminal procedure. The areas discussed are by no means a comprehensive list of all areas potentially affected by Proposition 8, but they serve to illustrate the possible ramifications of this constitutional amendment.

A. Exclusionary Rule Cases

1. Searches incident to arrest

Under the rule announced in *United States v. Robinson,*[48] the Supreme Court held that a full body search incident to any lawful custodial arrest is reasonable under the fourth amendment, even for minor offenses such as a traffic arrest. The arrest itself justifies an incidental search. As a corollary to this, federal law as stated in *Chimel v. California*[49] permits a search of the area within the immediate control of the arrestee. The justification for this holding was to prevent the suspect from reaching into the area within his control to grab a weapon or to attempt to dispose of evidence. The case of *New York v. Belton*[50] extended this rationale to justify a search incident to

48. United States v. Robinson, 414 U.S. 218 (1973). In *Robinson,* an officer, with probable cause to believe that the defendant was driving with a revoked license, made a custodial arrest. In accordance with normal procedures, he made a pat-down search of defendant, in the course of which he felt an object in a coat pocket. He extracted a cigarette package containing heroin. The court of appeals held that the heroin had been obtained as a result of a search which violated the fourth amendment. *Id.* at 220-24. In reversing the lower court, the Supreme Court ruled that:

> [a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id. at 235.

49. 395 U.S. 752 (1969). The police officers in *Chimel v. California* went to defendant's home with probable cause to arrest him for burglary. After waiting until he arrived home, the police arrested the defendant and searched the entire house and garage during which stolen coins were found. *Id.* at 753-54. In invalidating the warrantless search of the home, the Court stated that an arresting officer may only make a warrantless search of the person arrested, in order to seize evidence on his person, and of the immediate area into which the arrestee might conceivably reach for a weapon or evidentiary items. *Id.* at 763.

50. 453 U.S. 454 (1981).

arrest of the passenger compartment of a vehicle in which an arrestee is riding.[51]

Employing a strict justification approach, the California Supreme Court rejected this federal standard in *People v. Brisendine*[52] to require that any search incident to a custodial arrest be no broader than necessary under the circumstances. To conduct more than a mere pat-down search, an officer must be able to show "specific and articulable facts reasonably supporting his suspicion that the suspect is armed."[53] This approach bars searches incident to arrest for minor underlying offenses.[54] Under the *Chimel* rationale, the fact of the arrest itself justifies a search of the area, even without specific articulable facts. The *Brisendine* requirement is much stricter than that set forth in *Chimel.*

The California Supreme Court's most recent pronouncement in this area was in the post-Proposition 8 case of *People v. Laiwa.*[55] In *Laiwa,* the court totally ignored an opportunity to rule on Proposi-

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51. The facts of *New York v. Belton* indicate that while defendant was being arrested for speeding, the officer smelled burnt marijuana and saw an envelope of marijuana on the floor of the car. After searching the occupants, the officer then searched defendant's jacket which was in the passenger section of the car. Upon unzipping one of the pockets, cocaine was discovered. The Court relied on the holding of *Chimel* in concluding that the passenger compartment of an automobile might be well within " 'the area into which an arrestee might reach' " for a weapon or for evidence. *Id.* at 460 (quoting *Chimel,* 395 U.S. at 763). The *Belton* Court therefore concluded that, with a valid "custodial arrest" of the occupants of an automobile, an officer may search not only the passenger compartment, but also any containers found therein. 453 U.S. at 460.

52. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). *See supra* notes 10-13 and accompanying text.

53. *Id.* at 542, 531 P.2d at 1107-08, 119 Cal. Rptr. at 323-24 (quoting People v. Collins, 1 Cal. 3d 658, 662, 463 P.2d 403, 406, 83 Cal. Rptr. 179, 182 (1970)).

54. Current California case law forbids searches incident to arrest when the offense allows an alternative to jailing, such as cite and release, bail, or a citation to appear. This is because there is little in those cases to indicate potential danger to the arresting officers. *See, e.g.,* People v. Superior Court, 7 Cal. 3d 186, 206, 496 P.2d 1205, 1219-20, 101 Cal. Rptr. 837, 851-52 (1972) (when an officer issues a traffic citation, a pat-down search must be based on specific facts giving him reasonable grounds to believe that a weapon is hidden on the motorist's person). Other examples of such minor offenses include fire code violations and misdemeanor traffic citations.

55. 34 Cal. 3d 711, 669 P.2d 1278, 195 Cal. Rptr. 503 (1983). This case dealt with a defendant who was observed walking "robot-like" and later arrested for being under the influence of PCP. At the time of arrest, an "accelerated booking search" (one conducted in the field instead of at the police station) was conducted in which a closed tote bag was taken from the defendant and, when opened, yielded a PCP-laced cigarette. In upholding defendant's motion to suppress, the court held that an accelerated booking search is not an exception to the search warrant requirement. The rationale was that a booking search of a person in public is a greater invasion of privacy than if it were conducted "in the relatively sequestered milieu of the property room of a police station." *Id.* at 726, 669 P.2d at 1287, 195 Cal. Rptr. at 512. The court further stated that the real purposes of a booking search (inventory of belongings and jail safety) are not served by the accelerated booking search, and therefore the justifications for such a search cannot be the same. *Id.*

tion 8 by deciding the case solely on California law prior to the passage of the initiative. Had Proposition 8 been applied, the legality of an accelerated booking search incident to the arrest of defendant would never have been questioned, since the search of the defendant's tote bag would have been justified under *New York v. Belton.* The effect of Proposition 8 in this area is to restore the "bright-line" tests of *Robinson* and *Belton,* and in so doing, expand the scope of admissible evidence against defendants.

2. Searches conducted by a private party

The federal exclusionary rule regarding evidence obtained as the result of an illegal search pertains only to the fruits of searches conducted by *government* agents; the prosecution may use evidence which was independently and unlawfully seized by private persons.[56] Private security guards are considered to be private citizens,[57] and evidence obtained by them illegally is thus not subject to fourth amendment provisions.

By comparison, California has extended the application of the exclusionary rule in *People v. Zelinski*[58] to protect one's right of privacy against searches conducted by private security personnel. The court relied on *United States v. Price*[59] in stating that "a person does not need to be an officer of the state to act under color of law and therefore be responsible, along with such officers, for actions prohibited to state officials when such actions are engaged in under color of law."[60]

56. Burdeau v. McDowell, 256 U.S. 465, 475 (1921). In *Burdeau,* some of defendant's papers were unlawfully taken from his room by a private person without his consent and given to government officials for use against defendant in an indictment. Because the Court found no evidence that any government agent participated in or knew of the seizure, there was no reason why use could not be made of the evidence. *See also* United States v. Calandra, 414 U.S. 338, 354 (1974).

57. United States v. Francoeur, 547 F.2d 891, 893-94 (5th Cir.), *cert. denied,* 431 U.S. 932 (1977).

58. 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979). A private store detective at Zody's Department Store saw defendant shoplifting. After arresting her, he searched her purse and found heroin. The defendant was later charged with possession of the heroin. The court held that, although the store personnel were authorized to arrest or detain the defendant and conduct a weapons search, they exceeded their authority in searching further. The purse search was invalidated. *Id.* at 364, 594 P.2d at 1004, 155 Cal. Rptr. at 579.

59. 383 U.S. 787 (1966).

60. People v. Zelinski, 24 Cal. 3d at 367, 594 P.2d at 1006, 155 Cal. Rptr. at 581 (citing United States v. Price, 383 U.S. 787, 794 (1966)). Curiously, although the court accorded private security guards the status of government agents for purposes of applying the exclusionary rule, it failed to allow them the right to search incident to

Applying Proposition 8 in this case would change California law and bring it in line with the federal standard of *Burdeau v. McDowell.*[61] The extra protection offered the criminal defendant in this area would correspondingly decrease.

3. Automobile searches

Federal law currently provides for two exceptions to the search warrant requirement for automobile searches. First, in *New York v. Belton,*[62] the Court held that after a lawful custodial arrest of an occupant of an automobile, an officer may, "as a contemporaneous incident of that arrest, search the passenger compartment" of the vehicle without a warrant.[63] Second, *United States v. Ross*[64] established a "bright-line" test in holding that, when police officers have probable cause to stop an automobile on the street, and the object of their search is not some specifically identifiable container known to be inside, they may search the entire car, including the trunk, and open any packages or containers they may find therein, whether they have a search warrant or not.[65]

Under California law announced in *Wimberly v. Superior Court,*[66] a warrantless search of the passenger compartment of a vehicle is proper, providing officers have probable cause to believe that a vehicle stopped on a highway contains fruits or evidence of a criminal activity.[67] However, the *Wimberly* court also held that the existence of probable cause to search the interior of an automobile does not neces-

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arrest. Instead, the court found the search illegal as a matter of law by treating the arrest as one by a private citizen. 24 Cal. 3d at 364, 594 P.2d at 1004, 155 Cal. Rptr. at 579.

61. 256 U.S. 465 (1921). *See supra* note 56.

62. 453 U.S. 454 (1981). *See supra* notes 50-51 and accompanying text.

63. *Id.* at 460.

64. 456 U.S. 798 (1982). Acting on probable cause that defendant was selling heroin from his automobile trunk, police officers stopped defendant's car and arrested him. Upon opening the car trunk, one of the officers found a closed paper bag which was opened to reveal heroin. The car was then driven to police headquarters where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Based on this evidence, defendant was convicted of possession of heroin with intent to distribute. *Id.* at 801.

65. *Id.* at 825. The Court reasoned that "the scope of the warrantless search . . . is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Id.*

66. 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976). The police in this instance pulled the defendant over for erratic driving and, after approaching the car, observed marijuana seeds and a smoking pipe in the front seat. The interior of the car was searched and a plastic bag containing a small amount of marijuana was found. The arresting officers then opened the trunk of the car and found several pounds of marijuana in a suitcase. *Id.* at 562, 547 P.2d at 420, 128 Cal. Rptr at 644.

67. *Id.* at 565, 547 P.2d at 422, 128 Cal. Rptr. at 646. Prior California cases requiring evidence of exigent circumstances to accompany the probable cause requirement have been eroded to the point where sufficient exigency exists whenever probable cause is first determined to be sufficient at the time the police stop a vehicle and have

sarily suffice to justify a search of the trunk, absent specific articulable facts which give rise to probable cause to believe that contraband is in fact concealed in the trunk.[68] The evidence discovered in the passenger compartment was sufficient only to show that defendant was a casual user of marijuana and did not give rise to a reasonable belief that further contraband was contained in the trunk.[69]

In the post-Proposition 8 case of *People v. Chavers*,[70] the California Supreme Court once again deferred ruling on the amendment's applicability by deciding that the challenged search and seizure were valid under prior California law from *Wimberly* without having to resort to the federal law of *United States v. Ross*.[71] Using the *Wimberly* analysis, the court held that there was sufficient probable cause to search the interior of the defendant's car, the glove compartment, and an opaque shaving kit found in the glove compartment. Although a substantially more extensive search was justified in *Chavers*, the key determining factor was the existence of specific probable cause in *Chavers* for searching each area of the car; this specific probable cause was lacking in *Wimberly*.

Although the same result was reached in *Chavers* via the *Wimberly* analysis as would have been achieved by application of the federal standard enunciated in *Ross*, the tedious step-by-step analysis needed to find specific probable cause for each area of search serves to emphasize by contrast the advantage that would be achieved by

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not had a prior opportunity to obtain a warrant. *See* People v. Chavers, 33 Cal. 3d 462, 467-68, 658 P.2d 96, 99, 189 Cal. Rptr. 169, 172 (1983).

68. 16 Cal. 3d at 568, 547 P.2d at 424, 128 Cal. Rptr. at 648.

69. *Id.* at 572, 547 P.2d at 427, 128 Cal. Rptr. at 651.

70. 33 Cal. 3d 462, 658 P.2d 96, 189 Cal. Rptr. 169 (1983). An arrest of the defendant for robbery and a subsequent search of the automobile glove box and a shaving kit found therein produced a handgun which was used in the robbery. Following *Wimberly v. Superior Court*, the court held that the officer had probable cause to believe that the automobile contained contraband, and therefore a warrantless search was justified. *Id.* at 468, 658 P.2d at 100, 189 Cal. Rptr. at 173. The court next approved the glove compartment search because the suspects had no identification on them, and because the glove box is a traditional repository of vehicle registration and possibly other evidence of identification. The court also noted probable cause to believe a robbery weapon could be found in the glove box because of its close proximity to the suspects. *Id.* at 470, 658 P.2d at 101, 189 Cal. Rptr. at 174. Inquiring into the propriety of opening the opaque shaving kit found in the glove box, the court found that the seizure of the kit was entirely legitimate, noting that the officer legitimately gained knowledge that the case contained a gun by inadvertently feeling its outline. This, coupled with the potential danger posed by the handgun, rendered the warrantless search reasonable. *Id.* at 471, 658 P.2d at 102, 189 Cal. Rptr. at 175.

71. 456 U.S. 798 (1982). *See supra* notes 64-65.

utilization of the less strict federal standard. Under Proposition 8, the evidence seized in *Wimberly* as well as *Chavers* would be admissible. It would not have been necessary to articulate facts showing the existence of specific probable cause in *Chavers*; the trunk search in *Wimberly* would have yielded admissible evidence even though facts justifying probable cause specific to the trunk could not have been articulated.

4. Closed container searches

Current federal law as stated in *United States v. Ross*[72] and *United States v. Johns*[73] provides that when police have probable cause to search a vehicle without a warrant for a particular type of evidence (narcotics, stolen property, etc.), a warrantless search is also permitted of any closed container found in the vehicle during the course of the search, provided that the container could conceivably hold the evidence sought. The only limitation to this authority is that the search of the closed container occur as part of an automobile search, with probable cause for the entire vehicle. Under the rationale of *New York v. Belton,* if the search is incident to a custodial arrest, even if there is no probable cause, not only the interior of an automobile may be searched, but also any containers found therein.[74]

Employing a more stringent standard, the California Supreme Court in *People v. Minjares*[75] held that a closed container found in a vehicle may not be searched without a warrant if there is a reasonable expectation of privacy in the container's contents unless real exigencies exist.[76] The court rejected the rationale of *Ross* and *Belton* and attempted to analogize the situation to that of *United States v. Chadwick,*[77] even though the facts are more in line with *Ross.*

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72. 456 U.S. at 823.

73. 105 S. Ct. 881 (1985). The Court in this case reaffirmed the automobile exception of *United States v. Ross.*

74. 453 U.S. 454 (1981). *See supra* note 51.

75. 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied,* 444 U.S. 887 (1979). After police gave hot pursuit of a robbery getaway car, the defendant was arrested and the automobile was impounded. A closed, zippered tote bag found in the trunk of the car was opened by police to reveal clothing described by witnesses to the robbery, three guns, and a roll of pennies from the store that was robbed. *Id.* at 415, 591 P.2d at 516, 153 Cal. Rptr. at 226. *See also* People v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979) (state was required to show probable cause *and* exigent circumstances to justify a warrantles search of boxes in the suspect's car).

76. 24 Cal. 3d at 419, 591 P.2d at 518, 153 Cal. Rptr. at 228. The court felt that an individual's interest in keeping private the contents of personal luggage is not lost simply because that luggage is placed in an automobile, even though probable cause for the search was originally focused on the automobile, contrary to the situation in *United States v. Chadwick. Id.* at 419, 591 P.2d at 518, 153 Cal. Rptr. at 228.

77. In United States v. Chadwick, 433 U.S. 1 (1977), federal narcotics agents seized a footlocker, with ample probable cause to believe that it contained marijuana, after it had been placed in the trunk of an automobile. After defendants together with the footlocker were taken to a federal facility, the footlocker was opened one and one-half

Following Proposition 8, California courts are constrained to follow the federal standard established in *Ross* and *Belton* wherever similar situations arise. As noted above, this would allow arresting officers to make warrantless searches of closed containers found in automobiles incident to a custodial arrest or whenever there is sufficient probable cause to believe the car contains weapons or evidence. Under this standard, the search declared illegal by *Minjares* would now be valid, and the evidence obtained thereby would be admissible.

5. Trash can searches

Although the federal standard for trash can searches has not been reviewed by the Supreme Court, it appears to be reasonably well settled at the circuit court level. In *United States v. Shelby,*[78] the Seventh Circuit Court of Appeals found that there was no reasonable expectation of privacy[79] in garbage cans left for collection, and therefore a warrantless search was permissible. In the court's view, "the placing of trash in the garbage cans at the time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment."[80]

California, on the other hand, has adopted the contrary position. In *People v. Krivda,*[81] a case with facts almost identical to those of

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hours later without a warrant, revealing large quantities of marijuana. In granting defendants' motion to suppress, the Court held that the automobile exception to the search warrant requirement does not apply where the search is not incident to a lawful arrest, and where probable cause did not exist for the automobile, but only for the container. *Id.* at 14-16.

The Court also cited the lack of exigency, because the search was conducted over an hour after the federal agents had gained exclusive control of the footlocker and long after the defendants had been securely in custody. *Id.* at 15. The Court concluded that a closed container search will only be valid without a warrant if it comes within the purview of the automobile exception of *Ross* or the search incident to arrest exception as applied to an automobile in *Belton. Id.*

78. 573 F.2d 971 (7th Cir.), *cert. denied,* 439 U.S. 841 (1978). In this case, the defendant worked as a supervisor for a janitorial company rendering cleaning services to a number of banks. Upon leaving that employment, he retained keys to the banks which were subsequently used to steal about $3,000.00 in coins. Rubbish collectors were asked by the FBI and local police to search the defendant's trash cans upon pick-up. In doing so, the collectors found aluminum bank trays and coin wrappers, which were then used as the basis for obtaining a search warrant for the defendant's home. *Id.* at 972-73.

79. *See* Katz v. United States, 389 U.S. 347 (1967).

80. 573 F.2d at 973. *See also* United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied,* 440 U.S. 959 (1979); Magda v. Benson, 536 F.2d 111, 112 (6th Cir. 1976); United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972).

81. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated,* 409 U.S. 33 (1972), *aff'd on rehearing,* 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973), *cert. denied,*

Shelby,[82] the California Supreme Court found that even placing the trash in the well of the refuse truck did not extinguish the defendant's expectation of privacy, and a warrantless search constituted an unreasonable governmental intrusion into that privacy. In reaching this holding, the court stated that "defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant."[83] Following Proposition 8, California courts may conceivably ignore *Shelby,* as persuasive rather than binding authority, although such a decision would most likely be subject to subsequent Supreme Court review. Review is the more likely because, after Proposition 8, independent state grounds would no longer provide any valid justification for a divergent opinion.

6. Telephone records

Federal law currently holds that a person has no legitimate expectation of privacy in information voluntarily turned over to third parties.[84] Using this rationale, the Supreme Court held in *Smith v. Maryland*[85] that the defendant had no expectation of privacy in a list compiled by the telephone company of all phone numbers dialed from his phone. The Court concluded that when the defendant chose to use his phone, he voluntarily conveyed the numbers he was calling to the phone company. He therefore assumed the risk that the phone company might in turn convey that information to the police.[86]

In the California case of *People v. Blair,*[87] the court acknowledged that there was no factual distinction from the *Smith* case. Neverthe-

412 U.S. 919 (1973). The case was vacated and remanded because the United States Supreme Court could not tell if the decision had been made on federal grounds or on independent state grounds. On remand, the California Supreme Court confirmed that the decision was rendered solely on state grounds.

82. After receiving an anonymous tip that the defendants were engaged in criminal activity, the police began observing the defendants' home. When they saw trash cans by the curb for collection and collectors approaching the cans, the officers asked the collectors to empty the well of their trash truck before collecting the defendants' garbage. After examining the contents of the well, the officers discovered paper sacks containing marijuana debris and seeds. This evidence was used, in large part, to convict the defendants of possession. 5 Cal. 3d at 360, 486 P.2d at 1263-64, 96 Cal. Rptr. at 63-64.

83. *Id.* at 367, 486 P.2d at 1268, 96 Cal. Rptr. at 68.

84. *See, e.g.,* United States v. Miller, 425 U.S. 435, 442-44 (1976) (no expectation of privacy in financial information voluntarily conveyed to banks in the ordinary course of business); Couch v. United States, 409 U.S. 322, 335-36 (1973) (no expectation of privacy in financial information voluntarily given to an accountant for purposes of income tax return preparation).

85. 442 U.S. 735 (1979).

86. *Id.* at 744. *See also* SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. 2720, 2726 (1984) (one cannot object if third party who receives information confidentially conveys information to law enforcement authorities).

87. 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979).

less, the court concluded that California law did not allow seizure of such a list without a search warrant.[88] A person making telephone calls "has a reasonable expectation that the calls he makes will be utilized only for the accounting functions of the telephone company and that he cannot anticipate that his personal life, as disclosed by the calls he makes and receives, will be disclosed to outsiders without legal process."[89] Thus, California decided the issue solely on the basis of independent state grounds, a justification no longer available after Proposition 8.

7. Search warrant affidavits

The United States Supreme Court held in *Franks v. Delaware*[90] that, although perjury or a reckless disregard of truth is shown in a supporting affidavit, a search warrant may still be valid if the remaining content is sufficient to establish probable cause. However, the California Supreme Court in *People v. Cook*[91] took a stricter position by holding that deliberate or reckless affidavit misstatements, whether material or not, compel the quashing of the search warrant as a matter of state law. In the case of negligent misstatements, California will still uphold the warrant if it would otherwise be valid absent the incorrect information.[92] The court reaffirmed the holding of *Cook* in *People v. Kurland,*[93] indicating that any material fact omitted

88. *Id.* at 654, 602 P.2d at 737, 159 Cal. Rptr. at 827. The only difference of any possible substance was that, in *People v. Blair,* the calls were made from a California hotel phone and the list was compiled by the hotel. *See infra* note 132 for the disposition of records obtained from a Pennsylvania hotel.

89. *Id.* at 653, 602 P.2d at 746, 159 Cal. Rptr. at 826.

90. 438 U.S. 154 (1978). In *Franks v. Delaware,* the defendant was charged with rape based upon evidence obtained after a search warrant had been issued. The defendant challenged the truthfulness of certain statements in the affidavits supporting the warrant as being intentional misstatements. The Court held that the defendant would be allowed to present evidence at a hearing to show that the statements were intentionally false or made with reckless disregard for the truth. However, the Court stated that even if the defendant were to show that the false statements were intentionally made, he would also have to show that the remaining portions of the affidavits were insufficient to establish probable cause for a search warrant. *Id.* at 155-56.

91. 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978). Defendant Cook was prosecuted for possession of marijuana and other drugs after a magistrate had issued a warrant for a search of defendant's residence. The court upheld his motion to suppress due to the fact that the affidavit of the investigating officer contained intentional misstatements. *Id.* at 86-87, 583 P.2d at 141, 148 Cal. Rptr. at 616.

92. *See* Theodor v. Superior Court, 8 Cal. 3d 77, 100-01, 501 P.2d 234, 251, 104 Cal. Rptr. 226, 243 (1972).

93. 28 Cal. 3d 376, 390, 618 P.2d 213, 221-22, 168 Cal. Rptr. 667, 676 (1980), *cert. denied,* 451 U.S. 987 (1981).

from an affidavit for the purpose of misleading a magistrate justifies a striking of the entire warrant, regardless of the sufficiency of the remaining warrant.

Proposition 8 makes the federal *Franks* approach, rejected in *Cook* and *Kurland*, the California standard. Proposition 8's impact will arguably be felt in decreased incidence of quashed search warrants and of products of such searches, thereby giving prosecutors more evidence on which to build their cases.

8. Warrant information from informants

The recent Supreme Court decision in *Illinois v. Gates*[94] clarified the federal standard for issuing a search warrant based on information received from an informer. Under the new standard, a magistrate is authorized to make a pre-trial "common-sense" determination of whether the informant's information provides sufficient probable cause. In making this determination, the magistrate need only take into account the "totality of the circumstances."[95]

This new approach has yet to be widely accepted by California courts, many of which continue to adhere to the former federal *Aguilar-Spinelli* test.[96] The *Aguilar-Spinelli* approach uses a two-prong test which requires that all informers whose information is involved in the issuance of a search warrant be shown to be not only reliable or credible, but also capable of knowing the truth of that which they perceive.

Proposition 8 mandates the acceptance of the federal "totality of the circumstances" test of *Gates* by California. This test appears to be more flexible in terms of allowing an affiant to establish probable

94. 462 U.S. 213 (1983).

95. *Id.* The "totality of the circumstances" providing probable cause for issuance of a search warrant in *Gates* consisted of the police department's receipt of an anonymous letter which included statements that the defendants, husband and wife, were engaged in selling drugs; that the wife would drive their car to Florida on May 3rd to be loaded with drugs; that the husband would fly down in a few days to drive the car back; that the trunk of the car would be loaded with drugs; and that over $100,000.00 worth of drugs were presently in defendants' basement. Relying on this tip, a police officer determined defendants' address and confirmed the husband's May 5th flight reservation to Florida. Subsequent surveillance by the Drug Enforcement Administration corroborated the husband's flight to Florida and return trip by car to Illinois. Based on the anonymous letter and subsequent corroboration, a search warrant was issued by a state judge. *Id.* at 225-26.

96. This test was derived from a combination of the cases of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). The test was used by the Illinois Supreme Court in *People v. Gates*, 85 Ill. 2d 376, 423 N.E.2d 887 (1982), *rev'd*, 462 U.S. 213 (1983), to hold that the issuance of the search warrant was invalid. The Court felt that the anonymous letter and supporting affidavits failed to satisfy the two-pronged test because they did not (1) reveal the informant's "basis of knowledge" or (2) provide facts sufficient to establish either the informant's "veracity" or the "reliability" of the report. 462 U.S. at 227-28.

cause for a search warrant than does the more rigid *Aguilar-Spinelli* two-prong test which many California courts still employ.[97]

9. Standing to challenge illegal searches

In *Alderman v. United States*,[98] the Supreme Court restricted the right of an accused to exclude evidence obtained during the illegal search by limiting standing to seek suppression of the evidence to only those persons whose fourth amendment rights were immediately violated.[99] The Court adhered to the general rule that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted,"[100] reasoning that "[t]here is no necessity to exclude evidence against one defendant in order to protect the rights of another."[101]

By contrast, the California Supreme Court established a so-called vicarious exclusionary rule which provides for an extension of the availability of standing to any party potentially aggrieved. This expansion allows a party whose rights have not been immediately violated to seek suppression of allegedly illegally obtained evidence if that evidence could potentially lead to his conviction.[102]

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97. For recent examples of the use of the *Aguilar-Spinelli* test by California courts, see People v. Mason, 132 Cal. App. 3d 594, 183 Cal. Rptr. 246 (1982) (affidavit passed the first prong, but failed the second prong because the affidavit supporting the search warrant failed to set forth facts on which the magistrate could rationally believe that the confidential informant was credible or reliable); People v. Reagan, 128 Cal. App. 3d 92, 180 Cal. Rptr. 85 (1982) (an anonymous phone call to a police officer's secretary about a motorcycle robbery failed to pass the first prong because the supporting affidavit for the search warrant did not establish that the anonymous informant spoke with personal knowledge, but merely created an inference that the speaker was relating information he had heard from others).

98. 394 U.S. 165 (1969).

99. *See also* Rakas v. Illinois, 439 U.S. 128 (1978). In this case, an automobile was stopped and searched after the police received a radioed robbery report. A sawed-off rifle was found under the seat and rifle shells were found in the glove box. The Court held that the passengers had no legitimate expectation of privacy, since they had no interest in the automobile or the items recovered in the search, and denied standing to challenge the search. *Id.* at 148-49.

100. Alderman v. United States, 394 U.S. at 174.

101. *Id.*

102. *See* People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955). In that case, the California Supreme Court determined that a defendant has standing to object to the use of evidence, not because of a violation of his own constitutional rights, but because the government must not be allowed to profit from its own wrong, thus encouraging lawless enforcement of the law. *See also* Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971). In *Kaplan*, police stopped a car for speeding and engaged in an illegal pat-down search which revealed LSD in the driver's shirt pocket. The driver was given immunity in exchange for his testimony that he bought the LSD from his passenger. *Id.* at 161, 491 P.2d at 2, 98 Cal. Rptr. at 651. Following *Martin*,

California law has now been substantially revised in this area as a result of Proposition 8. The California Supreme Court has, for the first time, in the case of *In re Lance W.*,[103] unequivocally recognized that the doctrine of independent state grounds as it relates to the admissibility of evidence in a criminal trial is no longer valid. In the *Lance W.* case, the defendant moved to suppress marijuana illegally seized from a third party's pick-up truck. After determining that California's broader standing rule could not be used, the court went on to apply the *Alderman* standard and refused to extend standing to contest the search. Since the *Lance W.* case is a seminal case in post-Proposition 8 California law, it will be examined in some detail in Part V of this comment.[104]

10. Use of illegal statements for impeachment purposes

In the landmark case of *Miranda v. Arizona*,[105] the Supreme Court established a set of rules governing custodial interrogation by police officers. Prior to custodial interrogation, the suspect must be clearly apprised of certain constitutional rights.[106] Unless these warnings are given and waiver obtained from the suspect, any statement resulting from further interrogation is inadmissible as substantive evidence in the prosecution's case in chief.[107] The Supreme Court held in a subsequent case, *Harris v. New York*,[108] that a statement obtained in violation of *Miranda* which would be otherwise inadmissible could be used for the limited purpose of impeaching the credibility of a defendant. Reasoning that the safeguards granted in

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the court held that the defendant had standing to exclude the illegally obtained evidence. *Id.* at 161, 491 P.2d at 8, 98 Cal. Rptr. at 657.

103. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

104. *See infra* notes 178-219 and accompanying text.

105. 384 U.S. 436 (1966).

106. The substantial content of the following rights must be stated to the suspect:

(1) You have the right to remain silent.

(2) If you choose not to remain silent, anything you say or write can and will be used against you in a court of law.

(3) You have a right to consult a lawyer before any questioning, and you have a right to have the lawyer present with you during any questioning.

(4) You not only have a right to consult with a lawyer before any questioning, but if you lack the financial ability to retain a lawyer, one will be appointed to represent you before any questioning, and you may have the appointed lawyer present with you during any questioning.

(5) If you choose not to remain silent and do not wish to consult with a lawyer or have a lawyer present, you still have the right to remain silent and the right to consult with a lawyer at any time during the questioning. *Id.* at 467-73.

107. *Id.* at 479.

108. 401 U.S. 222 (1971). In *Harris v. New York*, the defendant was found guilty of selling narcotics. Defendant's trial testimony was impeached by a statement which was inadmissible in the prosecution's case in chief because defendant had not been given *Miranda* warnings, but which otherwise satisfied legal standards of trustworthiness. *Id.* at 224.

Miranda should not become a license for perjury,[109] the Court concluded that the deterrent function of *Miranda* would be adequately preserved by forbidding the prosecution's use of the tainted evidence in its case in chief.[110]

In sharp contrast to the boundaries of the *Miranda* exclusionary rule set by the United States Supreme Court in *Harris*, the California Supreme Court held in *People v. Disbrow*[111] that statements violating *Miranda* are inadmissible for any purpose, including impeachment. The court emphasized the doctrine of independent state grounds by stating that "[w]e pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."[112] The court went on to hold that the privilege against self-incrimination precludes use by the prosecution of *any* statement made by the defendant which was obtained as the result of a *Miranda* violation, whether used for affirmative evidence or for impeachment.[113]

Proposition 8 as applied in this area requires the federal precedent of *Harris v. New York* to be applied in California, as well as any other exception to the *Miranda* rule established by the Supreme Court.[114] Thus, post-Proposition 8 California law must allow for impeachment of defendants with otherwise inadmissible statements.

11. Right to counsel at lineups

The Supreme Court has held that the federal constitutional right to counsel attaches to all post-indictment lineups.[115] Therefore, any identification at a post-indictment lineup where counsel is not present and the right to counsel has not been waived will be inadmissible

109. *Id.* at 225-26.

110. *Id.* at 225. For additional exceptions to the *Miranda* rule, see New York v. Quarles, 104 S. Ct. 2626 (1984) (public safety exception); Nix v. Williams, 104 S. Ct. 2501 (1984) (inevitable discovery and independent source exceptions).

111. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

112. *Id.* at 114-15, 545 P.2d at 280, 127 Cal. Rptr. at 368.

113. *Id.* at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

114. *See supra* note 110.

115. *See* Gilbert v. California, 388 U.S. 263 (1967) (testimony at trial regarding uncounseled post-indictment lineup excluded, absent an opportunity to show an independent source of the in-court identification); United States v. Wade, 388 U.S. 218 (1967) (conviction reversed where the defendant had been indicted and later identified in a lineup of which his counsel neither had been notified nor had an opportunity to attend).

at trial. The rationale is that a post-indictment lineup is a critical stage in the criminal process for which sixth amendment protections are available.[116]

However, the Court in *Kirby v. Illinois*[117] declined to extend the right to those cases involving lineups occurring before "the initiation of adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," because a critical stage in the criminal prosecution to which the sixth amendment will apply has not yet been reached.[118]

Under its doctrine of independent state grounds, the California Supreme Court recently required in *People v. Bustamante*[119] that counsel be in attendance at pre-indictment lineups. Although not specifically indicating that the pre-indictment lineup is a "critical stage of the prosecution,"[120] the court rejected the *Kirby* limitation as "wholly unrealistic."[121] Proposition 8 requires application of the *Kirby* rule in California, and only the *Kirby* rule. As a consequence, defendants no longer will be able to use the argument of a denial of the right to counsel to exclude identifications obtained in pre-indictment lineups.

12. Good faith exceptions to the exclusionary rule

In *Michigan v. DeFillippo,*[122] the Supreme Court permitted a limited good faith exception to the exclusionary rule for evidence obtained during an arrest based on a statutory violation when that statute was subsequently held unconstitutional at trial. The search involved here was held to be reasonable in light of the officer's good faith reliance on the statute. Since the rationale behind the exclusionary rule is to deter future police misconduct, that purpose could not be served in this instance because the police did not act in bad faith.[123]

An opposite conclusion was reached on this issue by a California appellate court in *Jennings v. Superior Court,*[124] where evidence

116. *Gilbert,* 388 U.S. at 272-73; *Wade,* 388 U.S. at 224, 237.

117. 406 U.S. 682 (1972).

118. *Id.* at 689.

119. 30 Cal. 3d 88, 102, 634 P.2d 927, 935-36, 177 Cal. Rptr. 576, 585 (1981).

120. *Wade,* 388 U.S. at 237.

121. 30 Cal. 3d at 100, 634 P.2d at 935, 177 Cal. Rptr. at 584.

122. 443 U.S. 31 (1979). Here the officer who arrested defendants had abundant probable cause to believe that defendants' conduct violated a presumptively valid city ordinance. Therefore, the arrest of defendants and seizure of drugs found during a search of the defendants were held to be lawful despite the fact that the city ordinance was later declared unconstitutional. *Id.* at 40.

123. *See id.* at 38 n.3. *See also* Ball, *Good Faith and the Fourth Amendment; The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635 *passim* (1978).

124. 104 Cal. App. 3d 50, 163 Cal. Rptr. 391 (1980). In *Jennings,* the court invali-

seized incident to an arrest was suppressed when the reviewing court invalidated the ordinance on which the arrest was based. On a closely related issue in *People v. Ramirez*,[125] the California Supreme Court held that no limited good faith exception is available when police act pursuant to an outdated warrant. In this instance, the defendant's arrest resulted from a radioed warrant check of the police computer system that improperly revealed an outdated bench warrant. The court invalidated the arrest and excluded the evidence seized as a consequence.[126]

In the federal arena, the boundaries of the exclusionary rule have been substantially contracted in the years since *DeFillippo*. In 1976, the Supreme Court indicated that the rationale of the so-called "imperative of judicial integrity" as an independent basis for suppressing evidence obtained as a result of police misconduct should seldom be used.[127] As a result, the nearly exclusive purpose of the federal exclusionary rule in this area has become deterrence.

With this in mind, the Supreme Court has recently recognized much broader "good faith" exceptions to the exclusionary rule than those provided in *DeFillippo*. In *United States v. Leon*,[128] the Court concluded that, as long as the police officers acted in good faith in obtaining a search warrant, the fact that the magistrate issuing the warrant was mistaken as to the sufficiency of probable cause will not

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dated a seizure of heroin found in the back seat of a police car used to transport defendant to jail following her arrest under a municipal vagrancy ordinance. The ordinance was later construed to require an element of maliciousness by a person who obstructs a public place; the maliciousness was not shown in this case. *See id.* at 52-58, 163 Cal. Rptr. at 392-96.

125. 34 Cal. 3d 541, 668 P.2d 761, 194 Cal. Rptr. 454 (1983). Although this was a post-Proposition 8 case, Justice Bird's concurring opinion noted that the application of Proposition 8 was not necessary to the determination of the case, since the arrest was made long before the effective date of the initiative. *Id.* at 552, 668 P.2d at 768-69, 194 Cal. Rptr. at 462 (Bird, C.J., concurring).

126. The court indicated that, while the arresting officers no doubt acted in good faith reliance on the information provided to them through "official channels," law enforcement officials are collaterally responsible for keeping those channels free of outdated, incomplete, or inaccurate warrant information. *Id.* at 552, 668 P.2d at 768, 194 Cal. Rptr. at 461.

127. United States v. Janis, 428 U.S. 433 (1976).

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution . . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. . . . [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

Id. at 458-59 n.35.

128. 104 S. Ct. 3405 (1984).

result in exclusion of evidence resulting from the search.[129] Similarly, in the companion case of *Massachusetts v. Sheppard*,[130] the Court held that where police officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate, and had been assured of the validity of the warrant by the magistrate, the exclusionary rule would not be applied, notwithstanding the fact that the warrant was subsequently determined to be invalid.

Although the California Supreme Court has never excluded evidence solely for the purpose of preserving "judicial integrity,"[131] it has, in the face of increasing criticism, reasserted the doctrine as an alternative basis for the exclusionary rule.[132] With this "judicial integrity" doctrine still in force, the California Supreme Court had a

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129. *Id.* at 3421. The rationale was that, since the purpose of the exclusionary rule was to deter misconduct, and since the application here could not affect conduct of the police, exclusion would not serve the purpose. *Id.* at 3420. The Court stated that "the exclusionary rule is designed to deter *police* misconduct rather than to punish the errors of judges and magistrates," *id.* at 3418 (emphasis added), and to have any deterrent effect "it must alter the behavior of individual law enforcement officers or the policies of their departments." *Id.* at 3419.

130. 104 S. Ct. 3424 (1984). In this case, there was sufficient probable cause and the police acted properly throughout the investigation. The problem arose because the proper warrant form could not be found. To request authority to search, the officer used a form normally used to search for controlled substances to apply for authorization to search for evidence of a homicide. The judge made some changes on the form but did not change the substantive portion which continued to authorize a search for controlled substances. He then signed the warrant and returned it with assurances that it was sufficient authority in form and content to authorize the search requested. The Court concluded that the police acted in reasonable reliance upon the assurances of the judge and that application of the exclusionary rule would therefore not serve its intended purpose. *Id.* at 3429-30.

131. In discussing judicial integrity, the California Supreme Court stated that the " 'success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced . . . . Out of regard for its own dignity as an agency of justice and custodian of liberty, the court should not have a hand in such "dirty business." ' " People v. Blair, 25 Cal. 3d 640, 656, 602 P.2d 738, 748, 159 Cal. Rptr. 818, 828 (1979) (quoting People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955)).

132. *See* People v. Blair, 25 Cal. 3d 640, 655, 602 P.2d 738, 748, 159 Cal. Rptr. 818, 828 (1979). In this case, the defendant was convicted of murder based partially on evidence obtained as the result of a seizure of telephone records: records of calls made by the defendant from a hotel room in California; and records of calls made by an associate of the defendant in Pennsylvania. *Id.* at 647-48, 602 P.2d at 742-43, 159 Cal. Rptr. at 822-23. Defendant objected to the use of these records because the method by which they were obtained violated California law.

The court finally held that, although the seizure of the records was illegal under California law, the *purposes* of the exclusionary rule would not be served by suppressing the records as evidence because the records were seized by federal agents in Pennsylvania and the method of seizure was entirely legal under Pennsylvania and federal law. The *Blair* court reiterated that from its inception there has been a dual purpose for the exclusionary rule: (1) to deter police from engaging in unconstitutional searches and seizures by eliminating the incentive to do so; and (2) to relieve the courts from being compelled to participate in illegal conduct. *Id.* at 655, 602 P.2d at 748, 159 Cal. Rptr. at 828.

The court concluded that the first goal of the exclusionary rule would not be served through exclusion of the evidence. Because no California law enforcement personnel

theoretical basis for rejecting any future reformation of the federal exclusionary rule.

As long as independent state grounds were available to the California courts, it was unlikely that California would ever adopt a good faith exception to the exclusionary rule. Even absent deterrent effect, such an exception would likely have been disapproved solely on the basis of the desire to preserve judicial integrity.

Proposition 8 impact in this area is obvious. First, it requires application of the *DeFillippo* holding to situations where a statute is later found to be invalid. This results in overruling *Jennings* and probably *Ramirez*. Second, any good faith exception recognized by the United States Supreme Court, such as those of the *Leon* and *Sheppard* cases, is now mandated in California. Independent state grounds may not be used to justify a reassertion of the doctrine of judicial integrity as a basis for expanding the scope of the exclusionary rule.

B. Prior Conviction Cases

The California standard for impeachment with prior felony convictions was established in *People v. Beagle*[133] in 1972. In this case, the defendant was charged with arson and attempted arson. At the trial the prosecution attempted to introduce evidence of the defendant's prior felony conviction for issuing a check without sufficient funds for purposes of attacking the credibility of the defendant's testimony. The trial court admitted the evidence and the defendant was convicted.

In a unanimous decision, the California Supreme Court upheld the conviction. First, the court examined the two relevant provisions of the Evidence Code[134] and determined that, taken together, they clearly gave discretion to the trial judge to exclude evidence of prior

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participated in the search of the records, and because the seizure was not illegal in Philadelphia, there could be no deterrent effect on police from either jurisdiction. *Id.*

In addressing the goal of judicial integrity, the court concluded that because defendant's expectation of privacy was not violated in the state where he resided, the venture was not lawless and thus, in this instance, the government would not be acting as a lawbreaker. Although the court eventually decided not to suppress the Pennsylvania records, they did so only after considering both aspects of the exclusionary rule. This illustrates that the doctrine of judicial integrity may be subject to reassertion at any time by the California courts, and could be used as the basis for application of the exclusionary rule regardless of the lack of any potential deterrent effect. *But see supra* notes 87-89 and accompanying text for disposition of the California records.

133. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

134. The two relevant provisions are CAL. EVID. CODE §§ 352 and 788 (West 1966). *See supra* notes 37 and 38 for the text of these statutes.

felony convictions "when their probative value on credibility is outweighed by the risk of undue prejudice."[135]

The court then considered the factors that should be taken into account in applying this balancing test.[136] First, since the purpose is only to attack the witness' credibility, the prior crime should involve conduct which reflects on the witness' honesty and integrity. Generally, those convictions involving violent or assaultive conduct have little or no bearing on honesty and thus would have little relevance for impeachment purposes.[137] In *Beagle,* since "[a]n essential element of the crime of issuing a check without sufficient funds is intent to defraud,"[138] the conviction had substantial relevance to the issue of the defendant's credibility.

Second, the prior crime should not be too remote in time. Even if the crime involves dishonesty, if it occurred a long time ago with no other crimes following, it is probably not very probative of the witness' credibility at the time of his testimony. No definite standard is set; as with the other factors, it is left to the discretion of the trial judge. In this case, the prior crime was committed less than five years before the time of testimony and was therefore held to be probative.[139]

The final major factor for consideration is whether or not the prior crime was the same as or similar to the one for which the defendant is currently being tried. The court reasoned that, if the crime were the same, jurors would inevitably tend to find present guilt because the defendant committed the crime before. Admission of such evidence would therefore be extremely prejudicial. In the *Beagle* case, the court determined that the prior crime presented no close analogy to the current charges and concluded that "the probative value of this prior felony conviction was substantially high and the risk of undue prejudice was minimized."[140]

The *Beagle* test was again relied upon in *People v. Fries.*[141] An attempt was made to impeach the defendant with evidence of a prior crime that was identical to that for which the defendant was currently on trial.[142] The court held that, although the crime might be

135. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

136. The court took its analysis from Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967), an opinion written by Chief Justice Warren Burger when he was still a circuit judge. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

137. *See also* People v. Rollo, 20 Cal. 3d 109, 118, 569 P.2d 771, 775, 141 Cal. Rptr. 177, 181 (1977). *But cf.* People v. Harrison, 150 Cal. App. 3d 1143, 198 Cal. Rptr. 762 (1984) (hearing granted).

138. People v. Beagle, 6 Cal. 3d at 454, 492 P.2d at 9, 99 Cal. Rptr. at 321.

139. *Id.*

140. *Id.*

141. 24 Cal. 3d 222, 594 P.2d 19, 155 Cal. Rptr. 194 (1979).

142. The crime involved was second degree robbery.

somewhat probative of the defendant's credibility, the fact that the crime was identical created a substantial risk of undue prejudice.[143] The same rationale was used to exclude the evidence in *People v. Spearman.*[144] Not only was the prior crime in *Spearman* identical, thereby creating a risk of undue prejudice, but it was also not a crime involving dishonesty, and was therefore irrelevant to a determination of credibility.[145]

In *People v. Woodard*[146] in 1979, the California Supreme Court extended the application of section 352 of the Evidence Code to witnesses who are not defendants, noting that section 788 of the Evidence Code refers only to witnesses generally, without specifying whether or not the witness is the defendant.[147] The court took issue with the prosecution's argument that a prior crime of the witness could not prejudice the defendant, stating that the mere fact that the witness may be less believable or that he may not be put on the stand due to the possibility of prejudice could be unfair to the defendant.[148] Applying the *Beagle* balancing test, the court held that the prior convictions were not probative of the credibility of the witness, were unfairly prejudicial to the defendant, and therefore should have been excluded.[149]

In 1982, three cases were decided at the appellate level involving similar factual situations and utilizing essentially the same analysis. *People v. Williams*[150] involved two defendants convicted of burglary.

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143. 24 Cal. 3d at 230, 594 P.2d at 25, 155 Cal. Rptr. at 200.

144. 25 Cal. 3d 107, 599 P.2d 74, 157 Cal. Rptr. 883 (1979).

145. The defendant was charged with possession of heroin for sale and transporting heroin. At the trial, the prosecution attempted to impeach with evidence of a prior conviction of possession of heroin for sale. *Id.* at 116, 599 P.2d at 78, 157 Cal. Rptr. at 887.

146. 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1979). In this case, the defendant was charged with second degree robbery. At trial, a witness to the robbery testified that the defendant was not the perpetrator. The prosecution used prior convictions for voluntary manslaughter and possession of a concealable firearm by a felon to impeach the witness' testimony. Without even reaching the balancing test of *Beagle,* the trial judge refused to exclude the evidence.

147. Id. at 337, 590 P.2d at 396, 152 Cal. Rptr. at 541.

148. Where the resolution of a critical issue depends on whose testimony is to be believed, a jury may act arbitrarily and give little weight to the testimony of a witness whose character has been brought into question by the introduction of prior felony convictions.

. . . .

In addition, the possibility of prejudice may influence a party so that a witness, who might otherwise present relevant evidence, is not called.

Id. at 338, 590 P.2d at 396, 152 Cal. Rptr. at 541.

149. *Id.* at 340, 590 P.2d at 397, 152 Cal. Rptr. at 542.

150. 128 Cal. App. 3d 981, 180 Cal. Rptr. 734 (1982).

Although one defendant did not testify, the trial court ruled that, if he chose to testify, he could be impeached with his 1976 robbery conviction. On appeal, the court, relying on *Beagle* for the factors to be considered and *Fries* for the proposition that a prior robbery has some relevance to credibility, upheld the decision of the trial court.[151]

The case of *People v. Logan*[152] involved a conviction for armed robbery. After the trial court denied the defendant's motion for exclusion of evidence of a prior conviction for the same crime, the defendant chose not to testify. On appeal, the court held that, although the trial court's ruling erroneously prevented the defendant from testifying, that error was not prejudicial because it was not reasonably probable that a different result would have been reached in the absence of error.[153]

In the case of *People v. Bishop*,[154] the defendant was convicted of rape. His attempt to suppress the evidence of a prior burglary was denied by the trial court. On appeal, the defendant claimed that the prosecution failed to meet its burden of proving that burglary involved a dishonest act. The appellate court upheld the conviction on the ground that the burden is on the defendant to prove that his prior conviction of burglary did not involve a dishonest act.[155] The court stated further that the trial judge had adequately balanced the potential prejudice to the defendant against the probative value of his prior conviction, citing the fact that the court had determined that a prior robbery was not admissible because it was overly prejudicial.[156]

One case involving these issues reached the California Supreme Court in 1982. This case, *People v. Barrick*,[157] further limited the use of prior convictions for impeachment purposes. Although Proposition 8 had been passed at the time the appeal was heard, the original trial had occurred prior to the passage date. Therefore, the court re-

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151. The court of appeal accurately and concisely summarized the *Beagle* holding as follows:

> In deciding whether to admit a prior [conviction], the trial court must first determine its probative value by assessing both the relevance of the prior to honesty and veracity, and its remoteness. When weighing these factors against the possible prejudice, the court must consider the similarity of the offense to the crime charged, and the adverse effect on the administration of justice should the defendant elect not to testify for fear of impeachment.

128 Cal. App. 3d at 988-89, 180 Cal. Rptr. at 739.

152. 131 Cal. App. 3d 575, 182 Cal. Rptr. 543 (1982).

153. *Id.* at 578, 182 Cal. Rptr. at 544. The missing cash was found in the defendant's car immediately after the robbery. The defendant confessed, and the defendant was identified at trial by the person he robbed. Under these circumstances it is unlikely that a different result would have ensued had the defendant testified.

154. 132 Cal. App. 3d 717, 183 Cal. Rptr. 414 (1982).

155. *Id.* at 721, 183 Cal. Rptr. at 416.

156. *Id.* at 722, 183 Cal. Rptr. at 417.

157. 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982).

fused to apply the initiative.[158]

Barrick involved the question of whether a "sanitized" reference to a prior crime would be admissible for impeachment purposes.[159] The trial court ruled such reference admissible, and the defendant therefore chose not to testify. The appellate court sustained the conviction, finding this to be an acceptable method of introducing the prior conviction without prejudicing the defendant.[160] The California Supreme Court reversed the conviction, on the ground that the method might involve even more prejudice since "the jury would assume that the undisclosed prior offense was indeed identical to the crime charged."[161]

As discussed earlier in this comment,[162] Proposition 8's addition of section 28(f) to article I of the California Constitution appears to directly conflict with and overrule the entire line of prior convictions cases discussed here. These cases were decided under section 352 of the California Evidence Code, which imposes limits stricter than those of the federal rules. The constitutional amendment mandates admission of prior felony convictions for impeachment "without limitation,"[163] thus appearing to eliminate any exclusion of prior felony convictions for impeachment purposes.

V. CALIFORNIA LAW AFTER PROPOSITION 8

A. Challenges to Proposition 8

As expected, a number of challenges have been made against the implementation of Proposition 8. These challenges attacked the constitutionality of the initiative as a whole rather than the validity of

158. *Id.* at 120 n.1, 654 P.2d at 1245 n.1, 187 Cal. Rptr. at 718 n.1.

> Our analysis in this case does not consider the impact of [article I, section 28(f)] on the law regarding the use of prior felony convictions . . . . [R]ather than rushing to resolve speculative questions not now before us, the orderly development of the law will be better served by leaving to future cases questions regarding the validity and impact of particular sections of Proposition 8. These difficult issues should be considered in cases where the trial courts and Courts of Appeal have had an opportunity to consider the issues and add their insights, and where the issues have been orally argued before this court.

Id.

159. In *People v. Barrick*, the defendant was on trial for automobile theft. The trial court ruled that reference to the defendant's prior conviction for automobile theft could be "sanitized" by referring to it as a "felony involving theft" without actually naming the crime. *Id.* at 126-28, 654 P.2d at 1249-51, 187 Cal. Rptr. at 722-24.

160. 124 Cal. App. 3d 767, 177 Cal. Rptr. 522.

161. 33 Cal. 3d at 127, 654 P.2d at 1250, 187 Cal. Rptr. at 723.

162. *See supra* notes 36-47 and accompanying text.

163. *See supra* note 36 for the full text of the amendment.

specific individual provisions. Following is a limited review of the more significant challenges.

1. Violation of the single subject rule.

In *Brosnahan v. Brown*,[164] the California Supreme Court rejected several challenges to the general constitutionality of Proposition 8 that focused on alleged violations of the single subject rule.[165] The single subject rule, as embodied in the California Constitution, provides that "an initiative measure embracing more than one subject may not be submitted to the electors or have effect."[166] The purposes of this rule were enunciated in *Amador Valley Joint Union High School District v. State Board of Equalization*.[167] In that case, the court stated that the two purposes were to: 1) minimize the risk of voter confusion and deception; and 2) avoid exploitation of the initiative process by combining in a single measure several provisions which might not have commanded majority support if considered separately.[168]

Interpreting the prior body of case law on the single subject rule,[169] the court reasoned that " 'an initiative measure does not vio-

164. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

165. *Id.* In *Brosnahan v. Brown*, three taxpayers and voters sought writs of mandate or prohibition asserting various constitutional defects in the manner in which Proposition 8 was submitted to the voters. The California Supreme Court found that: 1) the proposition did not violate the single subject rule; 2) the proposition did not violate article IV, section 9 of the constitution, which provides that a section of a statute may not be amended unless the section is reenacted as amended; 3) the proposition did not on its face constitute an undue impediment of essential government functions; and 4) the change effected by the proposition was not so extensive as to change directly the substantial entirety of the constitution by deletion or alteration of numerous existing provisions, thereby necessitating a constitutional convention. *Id.*

166. CAL. CONST. art. II, § 8(d).

167. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978). This case involved an earlier similar challenge to Proposition 13, also known as the Jarvis-Gann initiative.

168. *Id.* at 231-32, 583 P.2d at 1291, 149 Cal. Rptr. at 249 (citing Schmitz v. Younger, 21 Cal. 3d 90, 97, 577 P.2d 652, 656, 145 Cal. Rptr. 517, 521 (1978) (Manuel, J., dissenting) and McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787 (1948), *cert. denied*, 336 U.S. 918 (1949)). *See also* Argument in Favor of Prop. 10, Cal. Voter's Pamphlet, General Election, Nov. 2, 1948.

169. The court in *Amador Valley* cited the case of Perry v. Jordan, 34 Cal. 2d 87, 207 P.2d 47 (1949), for its interpretation of the single subject initiative rule. The *Perry* case dealt with an initiative to repeal an article of the California Constitution relating to aid for the aged and blind. The California Supreme Court, in upholding the proposed constitutional amendment, indicated:

> *"Numerous provisions, having one general object, if fairly indicated in the title, may be united in one act.* Provisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act. . . . The legislature may insert in a *single act all legislation germane to the general subject* as expressed in its title and within the field of legislation suggested thereby. . . . *Provisions which are logically germane to the title of the act and are included within its scope may be united. The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents . . . . A provision*

late the . . . requirement if, despite its varied collateral effects, *all of its parts are "reasonably germane"* to each other,' and to the general purpose or object of the initiative."[170] By adopting this reasoning, the court rejected an argument that the various provisions of an initiative must be "interdependent." While Proposition 8's provisions might not be interdependent, the court held that they were reasonably germane to each other because they were related to the same general object—the effective prosecution of criminals.[171] The court therefore concluded that Proposition 8 did not violate the single subject requirement of the California Constitution.

2. Retroactive effect

In response to a challenge regarding the retroactive effect of Proposition 8, the California Supreme Court held in *People v. Smith*[172] that the initiative would be applied only to crimes committed after June 9, 1982, the effective date of Proposition 8. In *Smith*, the trial

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which conduces to the act or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose, is germane within the rule."

34 Cal. 2d at 92-93, 207 P.2d at 50 (quoting Evans v. Superior Court, 215 Cal. 58, 62, 8 P.2d 467, 469 (1932)) (emphasis added) (citations omitted).

The *Perry* court also noted (again, quoting *Evans)* that: " 'the [single subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, *all parts of which are reasonably germane.*' " *Id.* at 92, 207 P.2d at 50 (emphasis added) (quoting Heron v. Riley, 209 Cal. 507, 510, 289 P. 160, 161 (1930)).

See also Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 559 P.2d 46, 157 Cal. Rptr. 855 (1979).

170. 32 Cal. 3d at 245, 651 P.2d at 279, 186 Cal. Rptr. at 35 (quoting, in part, from *Amador,* 22 Cal. 3d at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248) (emphasis added in *Brosnahan*).

171. "[W]e merely respect this court's liberal interpretative tradition . . . of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." 32 Cal. 3d at 253, 651 P.2d at 284, 186 Cal. Rptr. at 40.

For a critique of the court's approach in *Amador* and *Brosnahan,* see Comment, *The California Initiative Process: The Demise of the Single-Subject Rule,* 14 PAC. L.J. 1095 (1983) (recommending adoption of the interdependence standard).

172. 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983). The defendant in this case was arrested for possession of stolen property and, after being transported to a police station and given *Miranda* warnings, was interrogated. He invoked his right to remain silent and declined to answer any questions. Later, at the county jail, the defendant was again given *Miranda* warnings and interrogated by a sergeant of the sheriff's department, who had been aware of defendant's previous refusal to testify. During this second session, defendant confessed to the robbery. Since the court had determined that Proposition 8 would not operate retroactively, pre-Proposition 8 case law was applied. Under this prior case law the confession was ruled illegal and therefore inadmissible.

court allowed a confession into evidence which was admissible under *Michigan v. Mosley*[173] (federal law) but was inadmissible under *People v. Pettingill*[174] (pre-Proposition 8 California law). Smith appealed his conviction on the ground that the confession was improperly admitted. The state contended that the federal precedent should be applied under the authority of Proposition 8, even though the offense was committed before its effective date.

Reversing the conviction, the California Supreme Court held that Proposition 8 could not be applied retroactively. Based on statements in the voter's pamphlet, the court reasoned that the initiative was designed to prevent future crime and that retroactive application would not serve such a purpose.[175] The court further noted that the substantive-procedural mixed nature of the Proposition might make its retroactive application unconstitutional as an ex post facto law.[176] In order to avoid any doubts as to the constitutionality of Proposition 8, the court refused to apply the initiative to any crime committed before June 9, 1982.[177]

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173. 423 U.S. 96 (1975). Defendant, after being arrested on robbery charges, was given proper *Miranda* warnings. When defendant indicated that he did not want to discuss the robberies, the detective immediately ceased interrogation. After an interval of over two hours and following a second reading of *Miranda* rights, the defendant made an inculpatory statement in response to another detective's questioning about an unrelated murder. The Court held that the admission of the incriminating statement made during the subsequent questioning did not violate *Miranda*, because defendant's right to cut off questioning surrounding the robberies was scrupulously honored and the subsequent questioning about the homicide was consistent with a reasonable interpretation of his earlier refusal to answer questions about the robbery. *Id.* at 107.

174. 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978). After being arrested for a burglary, defendant was given *Miranda* warnings and asked if he wanted to talk with the police. Defendant declined. Two hours later, the same officer again gave *Miranda* warnings to the defendant and asked him if he wished to discuss the burglary arrest. Again defendant declined. Over 60 hours later, a police detective from another county once again gave *Miranda* warnings to the defendant and began questioning him about four unrelated burglaries in the other county. During the interrogation, defendant confessed to the four burglaries. The California Supreme Court excluded the confession, on the ground that once a suspect indicates he wishes to assert his right to remain silent, it is unlawful for police to continue or renew the interrogation, and any statement elicited thereafter is inadmissible. *Id.*

175. 34 Cal. 3d at 253, 667 P.2d at 152, 193 Cal. Rptr. at 695. *But see* Justice Richardson's dissent, in which he suggested that the immediate implementation of Proposition 8 would in fact operate to deter future crime. *Id.* at 273, 667 P.2d at 162, 193 Cal. Rptr. at 705 (Richardson, J., dissenting).

176. A statute has an ex post facto effect when it alters the situation of the accused to his disadvantage by: 1) making criminal an action that was innocent when done; 2) making more serious an act that was already criminal when done; 3) inflicting greater punishment than that prescribed for the act at the time it was committed; or 4) permitting a person to be convicted with less than was required when the act was done. People v. Sobiek, 30 Cal. App. 3d 458, 472, 106 Cal. Rptr. 519, 528, *cert. denied*, 414 U.S. 855 (1973).

177. 34 Cal. 3d at 262, 667 P.2d at 154, 193 Cal. Rptr. at 697.

B. The Impact of Proposition 8

1. The Exclusionary Rule: *In re Lance W.*

On February 1, 1985, the California Supreme Court handed down a decision that probably represents the most far-reaching impact of Proposition 8 to date. The case was *In re Lance W.*,[178] involving the vicarious standing rule as it relates to section 28(d) of the California Constitution as amended by Proposition 8, the Truth-in-Evidence provision. Since the case is so significant, resulting in the virtual extinction of the doctrine of independent state grounds for the exclusionary rule in this area, it will be examined in some detail here.

The case arose as the result of observations by plainclothes police officers of the defendant, Lance W., then 16 years old. On November 2, 1982,[179] Lance was observed approaching several vehicles in a park in which it was believed drug sales were taking place. Transfers of items occurred between Lance and the occupants of several vehicles. As Lance approached the officers' vehicle, one of them asked him if he knew where to get some "smoke." Lance indicated that he did not, then walked to a pickup truck and dropped a plastic bag into the open window on the driver's side.

The officers then approached the truck, opened the door and removed the bag which was found to contain marijuana. Neither of the two occupants of the truck gave permission to open the door or to remove the bag. Lance was then arrested and searched. This search revealed another plastic bag of marijuana and $35.00 in cash. Lance was subsequently charged with possession of marijuana for sale.[180]

At trial, Lance moved to suppress the evidence obtained during the search, as well as statements made at the time of his arrest. He argued that the warrantless search was improper, and undertaken without probable cause. The trial court, relying on *Remers v. Superior Court*,[181] concluded that the observations of the officers did not establish probable cause for the search of the truck, nor for the arrest and search of Lance. Accordingly, suppression of the evidence under existing California case law was required.[182]

178. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

179. Invocation of Proposition 8 was appropriate since this crime occurred after June 9, 1982, its effective date. *See supra* notes 172-77 and accompanying text.

180. Lance W. was charged under CAL. HEALTH & SAFETY CODE § 11359 (West Supp. 1985).

181. 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970).

182. There would have been no standing problem under California law. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). *See supra* note 102.

However, the trial court also recognized that Proposition 8, in adding section 28(d) to article I of the California Constitution, eliminated any independent state ground for the suppression of the evidence. Lance therefore lacked standing to contest the illegality of the search on federal grounds, as enunciated in *Alderman v. United States*[183] and *Rakas v. Illinois*.[184] The motion accordingly was denied and the evidence admitted. On appeal, with the illegality of the search conceded, the trial court result was affirmed.[185]

Before the California Supreme Court, Lance argued that Proposition 8 did not eliminate California's vicarious standing rule for a number of reasons. First, since Proposition 8 did not repeal either section 13[186] or section 24[187] of article I of the California Constitution, he argued that section 13 provides an independent state ground for exclusion. Second, he contended that the vicarious exclusionary rule is merely a rule of procedure never intended to be affected by Proposition 8. Third, he argued that Proposition 8 must be declared unconstitutional insofar as it would require the admission of unlawfully seized evidence which would be excluded under federal standards mandated by the United States Supreme Court. Fourth, he urged the court to find that the amended section 28(d) constituted an impermissible constitutional revision rather than an amendment, because it abrogated the exclusively judicial prerogative of fashioning appropriate remedies for violation of constitutional rights. Fifth, he argued that the new section 28(d) denied equal protection to criminal defendants who may not now seek suppression on the same basis as parties to civil litigation. Finally, Lance contended that reenactment of section 1538.5 of the California Penal Code[188] reinstated the vicarious standing rule.

Justice Grodin, writing for the majority,[189] first reviewed the federal law, which makes no provision for vicarious standing to challenge an illegal search. Justice Grodin noted that application of the federal exclusionary rule has been restricted to areas where its remedial objectives will be best served. Believing that use of the exclusionary rule exacts a substantial social cost,[190] the United States

183. 394 U.S. 165 (1969). *See supra* note 98 and accompanying text.

184. 439 U.S. 128 (1978). *See supra* note 99.

185. 149 Cal. App. 3d 838, 197 Cal. Rptr. 331 (1984).

186. *See supra* notes 5 and 18.

187. *See supra* note 21 and accompanying text.

188. In August, 1982, two amendments were enacted that made minor procedural changes to CAL. PENAL CODE § 1538.5 (West Supp. 1984). *See supra* note 25 for the relevant portion of the statute, which was unchanged by the amendments.

189. Justices Kaus, Broussard, and Lucas concurred.

190. *See* Rakas v. Illinois, 439 U.S. 128 (1978). "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and search for truth at trial is deflected." *Id.* at 137.

Supreme Court restricted its application to situations where the government seeks to use evidence incriminating the *victim* of the unlawful search. In other situations, the social cost involved is judged to outweigh any potential deterrent effect.

Justice Grodin then compared California law to the federal standard. A broader application had been thought necessary in this state "both to deter unlawful police conduct and to preserve the integrity of the judicial process."[191] Because of this broader purpose, the exclusionary rule was " 'applicable whenever evidence is obtained in violation of constitutional guarantees, . . . whether or not it was obtained in violation of the particular defendant's constitutional rights.' "[192] California's courts had reasoned that other remedies had been ineffective and that admission of improperly obtained evidence would involve the court in implied approval of the improper conduct.[193] Under California's doctrine of independent state grounds, this position was easily justified.

The court then addressed the defendant's arguments. First, agreeing with the defendant that Proposition 8 repealed neither section 13 nor section 24 of article I of the California Constitution, the court found nonetheless that neither section mandated any basis for the exclusion of evidence on independent state grounds. The court found that Proposition 8 simply eliminated the exclusionary rule as a judicially created remedy for conduct that would still amount to violations under the California Constitution.[194] The court stated that the

191. 37 Cal. 3d at 883, 694 P.2d at 750, 210 Cal. Rptr. at 637.

192. *Id.* (quoting People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955)).

193. *Id.*

194. The court stated that:

> The substantive scope of both provisions remains unaffected by Proposition 8. What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution. What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.

37 Cal. 3d at 886-87, 694 P.2d at 752, 210 Cal. Rptr. at 639 (emphasis in original).

The obvious alternative interpretation was unmentioned by the court in *In re Lance W.* In many cases, what the United States Supreme Court determined to be a reasonable search, and therefore lawful, the California Supreme Court on independent state grounds determined to be unreasonable, and therefore unlawful. It is possible that the electorate intended not to eliminate a judicially created remedy, but rather to modify the judicially created standard for finding an illegal search, i.e., to change the definition of an unreasonable search to comport with the federal standard. Therefore, what was once illegal must now be considered legal. This analysis was, of course, unnecessary in *Lance W.* because the search was conceded to be illegal. *See supra* note 26.

new section 28(d) added to the constitution by Proposition 8 is an "unambiguous command . . . . 'Relevant evidence shall not be excluded' simply does not mean 'relevant evidence shall not be excluded unless it was seized in violation of article I, section 13.' "[195]

The court found also that the intent of the electorate *was* to abrogate the vicarious standing rule, contrary to the defendant's assertion. Examining the language of the section together with its legislative and electoral history, the court concluded that "the electorate intended to mandate admission of relevant evidence, even if unlawfully seized, to the extent admission of the evidence is permitted by the United States Constitution."[196] Since some exceptions were provided within section 28(d) of the California Constitution,[197] other exceptions should not be implied or presumed pursuant to other sections, such as section 13. "That purpose [of the enacting body] cannot be effectuated if the judiciary is free to adopt exclusionary rules that are not authorized by statute or mandated by the Constitution."[198]

Defendant's third argument—that section 28(d) of the California Constitution violates the United States Constitution—was dispatched summarily by the court. Since the court concluded that Proposition 8 was intended to permit exclusion of unlawfully obtained though relevant evidence only when required by the United States Constitution, its amendment of the California Constitution is impliedly subject to any applicable federal restrictions, and therefore cannot conflict with federal law. Even if this were not the case, the court concluded that Proposition 8 was intended only to apply to any situation in which it is constitutionally permissible.

Lance W.'s argument that Proposition 8 constituted an impermissible revision to the constitution was already rejected in *Brosnahan v. Brown*.[199] That decision necessarily included the conclusion that section 28(d) was itself proper, as well as adopted properly. Therefore, this court concluded that since the people could, by amendment, eliminate section 13 entirely, the adoption of the much narrower section 28(d) by amendment was also permissible. Such an adoption "cannot be considered such a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch as to constitute a revision of the Constitution . . . ."[200]

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195. 37 Cal. 3d at 886, 694 P.2d at 752, 210 Cal. Rptr. at 639.

196. *Id.* at 887, 694 P.2d at 753, 210 Cal. Rptr. at 640.

197. Section 28(d) states that: "[n]othing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103." CAL. CONST. art. I, § 28(d).

198. 37 Cal. 3d at 889, 694 P.2d at 754, 210 Cal. Rptr. at 641.

199. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). *See supra* notes 164-65.

200. 37 Cal. 3d at 892, 694 P.2d at 756, 210 Cal. Rptr. at 643.

The court also disposed of the defendant's equal protection argument with relative ease. Lance contended that, since section 28(d) applies only to criminal proceedings, criminal defendants are being treated differently than civil litigants who may still seek exclusion of illegally obtained evidence under independent state grounds. However, as the court pointed out, this contention presumes the applicability of the exclusionary rule to civil proceedings. The court cited several cases in which a court had refused to apply the rule unless the proceedings were deemed to be "quasicriminal."[201] Moreover, the court concluded, even if the exclusionary rule were applicable to civil proceedings, Proposition 8's focus on criminal procedure would be constitutional because "[i]t is constitutionally permissible for the electorate to determine that the public stake in criminal proceedings, and in assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact, justifies the admission of evidence that would be excluded in other proceedings."[202]

Defendant's final argument, reduced to its essential terms, was that the 1982 amendments to section 1538.5 of the Penal Code[203] reestablished violation of article I, section 13 as a basis for exclusion of evidence. Because section 28(d) allows exceptions by statute enacted by a two-thirds vote of each house of the legislature and because "[a] section of a statute may not be amended unless the section is reenacted as amended,"[204] defendant claims that the 1982 amendments to section 1538.5 reenacted the section as originally adopted and applied prior to adoption of section 28(d).

However, the 1982 amendments to the Penal Code were minor, adopted unanimously as part of a non-controversial clean-up bill.[205] The court rejected defendant's arguments, stating that "[w]e cannot

201. The cases cited included Emslie v. State Bar, 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974) (declining to extend exclusionary rule to State Bar proceedings); *In re* Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970) (exclusionary rule not applicable in parole revocation proceedings); People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (exclusionary rule applicable in narcotic addiction proceedings, based on close identity with aims and objectives of criminal law enforcement); People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964) (exclusionary rule applicable, given these in rem proceedings' close identity with aims and objectives of criminal law enforcement).

202. 37 Cal. 3d at 893, 694 P.2d at 756, 210 Cal. Rptr. at 644.

203. *See supra* note 25.

204. CAL. CONST. art. IV, § 9.

205. The summary of Assembly Bill No. 2984 prepared by the Senate Committee on the Judiciary stated that: "The bill would also amend Sections 871.5 and 1538.5 of the Penal Code. The Amendments are clean-up amendments to two other bills, SBs 1743 and 1744, which are pending on the Assembly floor on the consent calendar. The

assume that the Legislature understood or intended that such far-reaching consequences—virtually a legislative repeal of the 'Truth-in-Evidence' section of Proposition 8—would follow an amendment so casually proposed and adopted without opposition."[206] The court concluded, therefore, that the amendment had neither the intent nor the effect of restoring exclusionary rules abrogated by Proposition 8.

The dissent, written by Justice Mosk,[207] makes three arguments countering those of the majority. First, the dissent claims that the majority interpretation of section 28(d) results, despite its assertion to the contrary, in the implied repeal of section 13 and section 24 of article I—a result contrary to the intent of the electorate, and contrary to principles of statutory construction. Second, the dissent contends that the majority ignores not only principles for the construction of the amendment, but also other judicial precedent regarding statutory construction. Finally, the dissent argues that the consequences of the majority interpretation are absurd, in light of the purported purposes of Proposition 8.[208]

The dissenting opinion begins with the premise that the majority's interpretation of the constitutional amendment effected by Proposition 8 is so expansive as to repeal sections 13 and 24. Mosk cites the well-settled principle of statutory construction that " 'the two acts must be irreconcilable, clearly repugnant, and so inconsistent as to prevent their concurrent operation' " in order to overcome the presumption against repeal when two enactments appear inconsistent,[209] to argue for the reconciliation of section 28(d) with section 24 and section 13 of the California Constitution. Section 24 was adopted in 1974 to codify the fundamental principle that the California Constitution is a document of independent force; section 13 provided the basis for a judicial exclusionary rule necessary to give substance to protected rights. Because these provisions are so essential to the protection of constitutional rights, the dissent refused to accept the argument that "such a firmly established and fundamental rule . . . was impliedly overruled by the broad nonspecific language of Proposition 8."[210]

Furthermore, the dissent argues, had the drafters of Proposition 8 intended repeal, they could have easily accomplished their result by expressly repealing the contradictory sections. Since Proposition 8

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amendments are not controversial." *See* 37 Cal. 3d at 894 n.14, 694 P.2d at 756 n.14, 210 Cal. Rptr. at 644 n.14.

206. 37 Cal. 3d at 894 n.14, 694 P.2d at 756 n.14, 210 Cal. Rptr. at 644 n.14.

207. Justice Mosk was joined by Chief Justice Bird and Justice Reynoso.

208. 37 Cal. 3d at 899, 694 P.2d at 761, 210 Cal. Rptr. at 648 (Mosk, J., dissenting).

209. *Id.* at 903, 694 P.2d at 764, 210 Cal. Rptr. at 651 (quoting from Warne v. Harkness, 60 Cal. 2d 579, 587-88, 387 P.2d 377, 382, 35 Cal. Rptr. 601, 606 (1963)).

210. 37 Cal. 3d at 905, 694 P.2d at 765, 210 Cal. Rptr. at 652.

expressly repealed another section of the California Constitution,[211] the fact that no repeal was proposed in conjunction with section 28(d) is evidence that no repeal was intended.[212] There was not even any mention of the intent to eliminate more all-encompassing state exclusionary rules in the pre-adoption arguments of Proposition 8's proponents. The Legislative Analyst did not indicate that unlawfully seized evidence would become admissible unless excluded by the federal Constitution. "[T]hat there is no such statement anywhere in the ballot materials indicates that the majority's interpretation . . . is not compelled."[213]

The dissent's second argument rests on an interpretation of the 1971 California Supreme Court decision in *Kaplan v. Superior Court.*[214] That case was also a vicarious standing case in which the court considered whether newly enacted Evidence Code section 351[215] repealed an earlier judicial rule established in *People v. Martin.*[216] Based on the fact that the drafters of the new evidentiary statute were silent regarding the effect on the firmly established and fundamental rule of *Martin,* but were not similarly silent in many other less important areas, the *Kaplan* court concluded that such revision was not intended. Using the same rule of statutory construction in this case, the dissent stated that "[i]n light of the 'deafening silence' of a contrary intent . . . it must therefore be concluded that [the drafters] did not intend section 28(d) to abrogate the rule of vicarious standing or other independent state grounds for the exclusion of evidence."[217]

Finally, the dissent argues that the majority's interpretation of the new constitutional provision would lead to absurd results. Justice Mosk contends that a rape victim's address and telephone number, for example, could be introduced in open court, or a crime victim's religious beliefs could be introduced and challenged. The dissent

211. Section 2 of Proposition 8 expressly deleted article I, section 12 of the Constitution which afforded accused persons the right to be released on bail while awaiting trial.

212. This argument ignores, however, the potential effect repeal of article I, section 24 would have on the remainder of the constitution. Independent state grounds are not abolished by Proposition 8, but rather modified to exclude their invocation in the area of criminal procedure.

213. 37 Cal. 3d at 905, 694 P.2d at 766, 210 Cal. Rptr. at 653.

214. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

215. "Except as otherwise provided by statute, all relevant evidence is admissible." CAL. EVID. CODE § 351 (West 1966).

216. 45 Cal. 2d 755, 290 P.2d 855 (1955). *See supra* note 102.

217. 37 Cal. 3d at 908, 694 P.2d at 768, 210 Cal. Rptr. at 655.

views with some concern the use of specific instances of conduct to attack the credibility of witnesses, arguing that these results would run counter to the avowed purpose of Proposition 8—to implement safeguards for victims of crimes and deal more harshly with violent criminals—and could not have been intended.[218]

Although this case focuses on the effect of Proposition 8 on California's vicarious standing rule, the discussion of Proposition 8's Truth-in-Evidence provision provides a far more general basis for California courts' exclusionary rule decisions in the future. The court clearly indicated that the doctrine of independent state grounds is no longer a valid basis for exclusion of evidence.[219] Evidence must be admitted to the extent permitted by the United States Constitution, regardless of what California law may have been prior to passage of Proposition 8.

This case therefore displaces the California case law prior to Proposition 8 that allowed an exclusionary rule even more restrictive than the federal version. After Proposition 8, California prosecutors will more easily be able to admit evidence, however obtained, to convict the criminal.

2. Use of prior convictions: *People v. Castro*

The first comprehensive interpretation and application of Proposition 8 regarding the use of prior convictions for impeachment purposes was undertaken by a California intermediate appellate court in *People v. Castro*.[220] In *Castro*, the defendant was convicted by a jury of receiving stolen property.[221] Her only ground for appeal was that

218. This concern, however, ignores the narrow focus of the amendments to the California Constitution enacted by Proposition 8. With respect to the examples in the text, the amendment still requires that the evidence be relevant to be admissible. *See supra* note 24. Neither of the examples mentioned in the text appear to be even marginally relevant to a criminal inquiry; in addition, an inquiry into religion obviously presents that rare instance in which evidentiary questions rise to the level of constitutional rights protected by the first amendment. Justice Mosk also uses, as an example of a specific instance of conduct, a police-officer witness' expulsion from school for cheating. Theoretically, according to the dissent, this information could be used to impeach the police officer acting as the prosecution's witness. However, the pertinent constitutional amendment provides for unlimited use of *prior felony convictions* for impeachment purposes. *See supra* note 36; *see also infra* notes 222-23 and accompanying text. This remote and scarcely felonious example is subject to the general relevance requirement of the other constitutional amendment. Even where such an incident is deemed to be relevant, it may well be acceptable as a necessary cost in order to achieve the overall purpose of the initiative.

219. Since this case involved the admission of concededly illegally obtained evidence, it is presumed that the courts will have even less difficulty in admitting evidence as mandated by federal law when the illegality of the search or seizure is merely questionable.

220. 151 Cal. App. 3d 48, 198 Cal. Rptr. 645 (1984). *See also* People v. Juarez, 149 Cal. App. 3d 1104, 197 Cal. Rptr. 397 (1983).

221. CAL. PENAL CODE § 496 (West Supp. 1985).

the trial court erroneously denied her pretrial motion to exclude evidence of a prior conviction for possession of heroin.

The trial court concluded that section 28, subdivision (f) of article I of the California Constitution (the Use of Prior Convictions provision) was more specific than section 28, subdivision (d) (the Truth-in-Evidence provision) and was therefore controlling.[222] At trial, the defendant's prior criminal history came to light as a result of her own testimony. Her prior convictions for possession of heroin and possession of heroin for sale were later used to attack her credibility as a witness.

Under pre-Proposition 8 case law, based on *Beagle* and its progeny, it would have been error to fail to exclude the evidence since heroin possession is not a crime involving dishonesty. However, since the crime with which the defendant was charged occurred after the effective date of Proposition 8, the appellate court reexamined the case law in light of the constitutional amendment.[223] The court in *Castro* found that the intent of the electorate was to permit the use of all prior convictions for impeachment purposes, without limitation: "By enacting Proposition 8, the electorate has decreed that *all* prior felony convictions indicate lack of honesty and veracity and are thus relevant when offered to impeach a witness in a criminal proceeding."[224] The court thus overruled *Beagle* to admit evidence of prior convictions, regardless of apparent lack of relevance or potential for undue prejudice.[225]

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222. The trial judge stated:

> I'm going to deny the motion, and I'll explain why . . . . Subsection (f) says that prior convictions are admissible, notwithstanding any other limitations of law. Subsection (d) says . . . that Section 352 applies to everything within the section. I believe that it is very poorly written, and either (d) controls (f), or (f) controls (d), and since (f) is more specific and refers only to the prior conviction issue, I'm going to hold that prior convictions are admissible. However, I hope and I'm sure that it will happen that the Court of Appeals will resolve this discrepancy in the law.

38 Cal. 3d 301, 305 n.3, 696 P.2d 111, 112 n.3, 211 Cal. Rptr. 719, 720 n.3 (1985).

223. *See* 151 Cal. App. 3d at 52, 198 Cal. Rptr. at 647.

224. *Id.* at 56, 198 Cal. Rptr. at 650.

225. CAL. CONST. art. I, § 28(d) specifically indicates that the admissibility of relevant evidence is still subject to the limitations of CAL. EVID. CODE § 352 (West 1966). *See supra* notes 24 and 38. On the other hand, CAL. CONST. art. I, § 28(f) contains no such language. *See supra* note 36. The *People v. Castro* court dealt with this apparent contradiction by attempting to discover the intent of the electorate through an examination of the arguments in favor of Proposition 8 as presented to the voters. 151 Cal. App. 3d at 52-54, 198 Cal. Rptr. at 648-49. The court dealt with any remaining federal constitutional impediment by holding that the operation of section 28(f) did not violate due process or requirements for equal protection. *Id.* at 56-59, 198 Cal. Rptr. at 651-52.

A similar result was reached in a different California appellate district at about the same time. In *People v. Harrison*,[226] the defendant was charged with attempted robbery and the use of a deadly weapon in the commission of that crime. His pretrial motion to exclude the use of a prior robbery conviction for impeachment purposes in the event that he testified was denied. The defendant chose not to testify. Even though the defendant did not testify, the trial court allowed the prosecutor to inquire whether the defendant had been convicted of a prior felony involving theft.[227]

In affirming the conviction, the appellate court held that Proposition 8 was intended to abrogate the decisions of the long line of cases based on the exclusionary rule enunciated in *Beagle*. "To hold that the retention of Evidence Code section 352 in [the Truth-in-Evidence provision] resurrected that line of authority would be to render [the Use of Prior Convictions provision] mere ineffective surplusage."[228] The court found that the electorate expressly withdrew discretion from the trial courts in this area and "necessarily determined that valid felony convictions of any nature are relevant on the issue of a witness's credibility."[229]

On June 5, 1984, the case of *People v. Castro* was argued before the California Supreme Court, the first Proposition 8 case dealing with the evidentiary use of prior convictions to be heard at the highest state appellate level. The decision,[230] rendered on March 11, 1985, does little to aid in the implementation of Proposition 8 with respect to article I, section 28(f) of the California Constitution. Although the defendant's conviction was upheld by all seven Justices, four separate opinions were written, none of which were able to command a majority. Moreover, the *Castro* opinions suggest that the court may impose some judicial limitations on the impact of Proposition 8 in this area.

The California Supreme Court considered three challenges to the trial court's interpretation and application of section 28(f) of article I of the California Constitution, the amendment enacted by Proposition 8. First, Castro argued that section 28(f) did not abrogate section 352 of the Evidence Code,[231] thereby eliminating the trial court's au-

226. 150 Cal. App. 3d 1142, 198 Cal. Rptr. 762 (1984).

227. *See supra* notes 159-61 for a discussion of a case involving a "sanitized" reference to a prior crime.

228. 150 Cal. App. 3d at 1156, 198 Cal. Rptr. at 771.

229. *Id.* at 1159, 198 Cal. Rptr. at 773. The court also found that People v. Barrick, 33 Cal. 3d 114, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982), had been overruled by Proposition 8. Therefore, the court held, the trial court erred in sanitizing the conviction because it should have allowed the unlimited use of that conviction for impeachment purposes. However, since the sanitization benefited the defendant, that error afforded no grounds for reversing the conviction. 150 Cal. 3d at 1163, 198 Cal. Rptr. at 776-77.

230. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).

231. *Id.* at 305-06, 696 P.2d at 113, 211 Cal. Rptr. at 721. *See supra* note 38 for the text of this statute.

thority to exclude unduly prejudicial evidence. Second, Castro argued that, insofar as the trial court's authority is curtailed by section 28(f) in criminal proceedings, the failure to similarly curtail the trial court's authority in civil proceedings constitutes a denial of equal protection. Third, the State Public Defender as amicus curiae argued that the automatic admissibility of all prior felony convictions is a denial of due process.[232]

The plurality opinion, written by Justice Kaus and joined by Justices Mosk and Broussard, held that section 28 "was not intended to abrogate the traditional and inherent power of the trial court to control the admission of evidence by the exercise of discretion to exclude marginally relevant but prejudicial matter . . . ."[233] In attempting to set some guidelines for use by the trial courts, Justice Kaus further held that "subject to the trial court's discretion under [Evidence Code] section 352—subdivision (f) authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty."[234] Prior convictions of felonies which do not *necessarily* involve moral turpitude could not be used.

After establishing that the holding applies to all witnesses, whether or not the witness is the defendant, Justice Kaus reviewed the history of section 352 and its application to evidence of prior convictions to impeach. The first case that applied section 352 to such evidence was *People v Beagle*[235] in 1972. Discussing a number of subsequent decisions delineating the boundaries of permissible judicial discretion in light of *Beagle,*[236] Justice Kaus reasoned that the judi-

232. *Id.* at 306, 696 P.2d at 113, 211 Cal. Rptr. at 721.

233. *Id.*

234. *Id.*

235. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). *See supra* notes 133-40 and accompanying text.

236. The following cases were cited by Kaus in his *Castro* opinion: People v. Barrick, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982) ("sanitizing" a prior auto theft conviction by calling it a "felony involving theft" is not allowed); People v. Fries, 24 Cal. 3d 222, 594 P.2d 19, 155 Cal. Rptr. 194 (1979) (court cannot admit a robbery prior to impeach a defendant accused of robbery); People v. Woodard, 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1979) (prior convictions for voluntary manslaughter and felon in possession of a firearm had no bearing on truthfulness and should have been excluded even though admission was sought to impeach a non-party witness); People v. Rollo, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977) (trial court erred in admitting only the fact of the prior conviction, allowing defendant to disclose its nature); People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976) (trial court abused its discretion in admitting a five-month-old robbery conviction in a robbery prosecution when a two-year-old dissimilar conviction of credit card forgery was avail-

cially-developed guidelines had, in fact, removed much of the discretion of the trial court. He concluded that this severe restriction on the court's discretion was the impetus behind the passage of section 28(f), intended to revitalize section 788 of the Evidence Code,[237] countering the effect of *Beagle.*

To determine the extent to which the discretion of the trial court was to be affected by Proposition 8's amendment of the California Constitution in this area, Justice Kaus turned next to an examination of the intent of the electorate. He first examined the wording of all amending provisions of Proposition 8 to discover the voter's intent.[238] Subdivision (f) of new constitutional section 28 mandates the use of "[a]ny prior felony conviction . . . without limitation." Subdivision (d)'s limitation presents an apparent conflict: "[n]othing in this *section* shall affect . . . Evidence Code, [section] 352 . . . ." On its face, the wording in subdivision (d) limits the application of subdivision (f), thereby leaving unaffected the trial court's ability to exclude prior felony convictions pursuant to section 352.[239]

The plurality concluded that the intention of the electorate "was to restore trial court discretion as visualized by the Evidence Code and to reject the rigid black letter rules of exclusion which we had grafted onto the code by the *Antick* [and *Beagle*] line of decisions."[240] Based on the literature supporting Proposition 8 as well as the Proposition's subsections, the plurality reasoned that the public was dissatisfied with the appellate courts. Since "the initiative itself expressed continued trust in the discretion of the trial courts"[241] by its recognition of section 352 in subdivision (d), the plurality concluded that the discretion provided under section 352 was expressly retained with respect to the entire initiative.

After determining that the trial court does retain some discretion to exclude prior felony convictions under section 352 of the Evidence Code, the plurality then addressed the question of what felonies

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able); People v. Antick, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975) (remote prior convictions could not be used).

237. *See supra* note 37 for the text of this statute.

238. 38 Cal. 3d at 309, 696 P.2d at 115, 211 Cal. Rptr. at 723. As phrased in the plurality opinion, the question in *Castro* is whether the voters "intended to abolish the trial court's power under section 352 or merely to revert to the rule that, subject to trial court discretion, priors are admissible to impeach." *Id.* Answering this question becomes difficult because of the apparent conflict between section 28(d), which is specifically limited by section 352, and section 28(f), which makes no reference to section 352.

239. 38 Cal. 3d at 310, 696 P.2d at 115-16, 211 Cal. Rptr. at 723-24. The state argued that, due to poor draftsmanship, subdivision (d)'s subordination of "this section" to Evidence Code section 352, should be read as merely "this subdivision," leaving subdivision (f) as a grant of unlimited admissibility of prior felony convictions.

240. *Id.* at 312, 696 P.2d at 117, 211 Cal. Rptr. at 725. *See supra* note 236.

241. *Id.*

would be admissible to attack the credibility of a witness. The plurality noted once again that the voters clearly wanted a change from the current law of *Beagle* and its progeny. Therefore, since the trial court may still exercise discretion, the plurality defined new standards for determining when exclusion will be appropriate, in accordance with due process requirements set forth by the United States Constitution.

In so doing, the plurality limited the "without limitation" language of section 28(f) governing the admissibility of prior felony convictions for impeachment purposes. Impeachment with prior convictions is prohibited by due process if it cannot " 'be said with substantial assurance that the credibility of a witness is adversely affected by his having suffered [those] conviction[s].' "[242] Therefore, the convictions used must somehow be relevant to the veracity of the witness. A fair trial cannot be achieved without this relevance requirement.[243]

To determine when a felony conviction relates to the credibility of a witness, the plurality relied on the opinion of Justice Holmes:

> (W)hen it is proved that a witness has been convicted of crime, the only ground for disbelieving him which such proof affords is the *general readiness to do evil* which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in a particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of *bad character* and unworthy of credit.[244]

Based on this rationale, "if the felony of which the witness had been convicted does not show a 'readiness to do evil,' the fact of conviction simply will not support an inference of readiness to lie"[245] and should therefore not be allowed to attack credibility. Without evidence of a readiness to do evil, there is no rational relationship between the prior conviction and the credibility of the witness. Therefore, the plurality concluded, due process requirements necessarily limit the "without limitation" language of the provision.[246]

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242. *Id.* at 313, 696 P.2d at 118, 211 Cal. Rptr. at 726 (paraphrasing Leary v. United States, 395 U.S. 6, 46 (1969)).

243. The court quoted from Bruton v. United States, 391 U.S. 123, 131 n.6 (1968): " 'An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.' "

244. 38 Cal. 3d at 314, 696 P.2d at 118, 211 Cal. Rptr. at 726 (quoting Gertz v. Fitchburg Railroad, 137 Mass. 77, 78 (1884) (emphasis added by the *Castro* court)).

245. *Id.*

246. *Id.* at 314 n.8, 696 P.2d at 119 n.8, 211 Cal. Rptr. at 727 n.8. The plurality cited the following United States Supreme Court decisions for the proposition that inferences must be based on a rational connection between the fact proved and the fact to

The plurality determined that crimes that did not involve moral turpitude of any kind could not be used. More difficult was deciding to what extent crimes involving moral depravity other than dishonesty could be used. Although it is obviously easier to infer that a witness is lying if the prior conviction involves dishonesty as a necessary element, the plurality held that "[t]here is . . . some basis—however tenuous—for inferring that a person who has committed a crime which involves moral turpitude other than dishonesty is more likely to be dishonest than a witness about whom no such thing is known."[247]

The holding of the plurality results in the necessity of determining, in each case, if the prior conviction offered involves moral turpitude. If it does, it is admissible, subject to exclusion in the discretion of the trial court. The more tenuous the connection between the moral depravity and dishonesty, the more likely it will be inadmissible for impeachment purposes.[248]

The final problem for the plurality was to determine if the trial court could look only to the elements of the offense or if it could receive extrinsic evidence on the underlying facts. Reasoning that the use of such extrinsic proof would create unfair surprise and confusion of the issues, the plurality concluded that only the fact of the conviction could be admitted. "Obviously . . . if the conviction is only admissible if it evinces moral turpitude and such turpitude can only be established through extrinsic evidence, confusion of issues become inevitable and unfair surprise more than probable."[249]

The federal constitutional issues of due process and equal protection were not addressed at length in the plurality opinion. Since the due process challenge was premised on the assumption that the trial court would be deprived of discretion, and since the decision determined that the court retains discretion under Proposition 8, due process was not at issue. The equal protection challenge was summarily dismissed because the plurality found no authority for the proposition that the Constitution requires that rules of evidence in criminal cases be the same as those applying to civil litigation.

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be inferred: Ulster County Court v. Allen, 442 U.S. 140, 157 (1979); Barnes v. United States, 412 U.S. 837, 844-45 (1973); Leary v. United States, 395 U.S. 6, 46 (1969). It follows from this proposition that a prior conviction of a witness must allow at least a rational inference of dishonesty before that conviction may be used for impeachment purposes.

In arriving at this conclusion, the court rejected the determination by the Supreme Court of Washington that the legislature could reasonably have determined that there was a rational nexus between the commission of any felony, regardless of whether or not it involved moral turpitude, and that person's propensity to lie. State v. Ruzika, 89 Wash. 2d 217, 570 P.2d 1208 (1977).

247. 38 Cal. 3d at 315, 696 P.2d at 119, 211 Cal. Rptr. at 727.

248. *Compare supra* note 244 and accompanying text.

249. 38 Cal. 3d at 317, 696 P.2d at 120, 211 Cal. Rptr. at 728.

Applying these rules of law to the facts involved in this case, the plurality held that possession of heroin alone does not involve moral turpitude and therefore cannot be used for impeachment. However, the plurality reasoned that possession of heroin for sale does involve moral turpitude, not because it indicates dishonesty directly, but because it indicates the intent to corrupt others. Since impeachment with this conviction was therefore appropriate, the plurality affirmed the conviction.[250]

Justice Grodin wrote a concurring and dissenting opinion[251] in which he disagreed with almost all of the plurality's arguments. First, he took a different view of the rules of statutory construction, relying on California statutes[252] to find that, since section 28(f) is more specific than section 28(d), section 28(f) controls where any inconsistencies appear. This is in complete agreement with the decision by the trial court.[253]

According to Justice Grodin, the language of section 28(f) is clear and unambiguous. In fact, "it is difficult to conceive how [the electorate] could have found better language"[254] to ensure than any prior convictions could be used for impeachment without limitation. Reading the unambiguous language together with statutory rules of construction left no doubt in Justice Grodin's mind that the voters did not intend to limit section 28(f) by section 352 of the Evidence Code.

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250. Possession of heroin for sale was the same felony which the court refused to admit for the purpose of attacking credibility prior to the passage of Proposition 8 and the amending of the California Constitution. People v. Spearman, 25 Cal. 3d 107, 599 P.2d 74, 157 Cal. Rptr. 883 (1979). The inquiry in *Spearman* was whether the crime involved dishonesty under the standard of *Beagle*. The court stated that "moral heinousness of an offense [does not] make it relevant on the issue of credibility." *Id.* at 115, 599 P.2d at 78, 157 Cal. Rptr. at 887 (citing People v. Woodard, 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1970)). Here, after Proposition 8, the result is opposite.

Although the admission of a prior conviction of possession of heroin to impeach was error, the error was not prejudicial because the jury knew of the defendant's criminal past before the introduction of the prior convictions; the conviction of possession of heroin for sale, as noted above, was deemed properly admitted, and the plurality therefore affirmed. 38 Cal. 3d at 319, 696 P.2d at 122, 211 Cal. Rptr. at 730.

251. 38 Cal. 3d at 319, 696 P.2d at 122, 211 Cal. Rptr. at 730 (Grodin, J., concurring and dissenting).

252. *Id. See* CAL. CIV. PROC. CODE § 1859 (West 1983), stating in part that "when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." *Id.*

253. 151 Cal. App. 3d 48, 54, 198 Cal. Rptr. 645, 658 (1984). *See supra* note 222 and accompanying text.

254. 38 Cal. 3d at 319, 696 P.2d at 121, 211 Cal. Rptr. at 730. (Grodin, J., concurring and dissenting). Justice Grodin noted in the alternative that any apparent inconsistency could be avoided by reading the word "section" in subdivision (d) as "subdivision." *Id. Compare supra* note 239.

Justice Grodin dealt with the constitutional due process argument by analogizing the legislative and electoral history of the Proposition to a comparable enactment in the District of Columbia. Following a decision similar to the California *Beagle* opinion,[255] Congress amended the applicable statute to provide that prior convictions "shall be admitted if offered."[256] The same due process argument raised by the public defender as amicus curiae in the *Castro* case was used to challenge the amended District of Columbia statute. That challenge to the District of Columbia statute was rejected in *Dixon v. United States.*[257] The same conclusion was subsequently reached by the United States Court of Appeals for the District of Columbia Circuit which indicated that " 'the public interest in getting before the jury this evidence bearing upon the credibility of the defendant-witness outweighs its inescapably prejudicial effect.' "[258] Based on the persuasive reasoning and factual similarity of the District of Columbia decision, Justice Grodin concluded that the due process argument had no merit.

Justice Grodin agreed with the plurality in limiting, however minimally, the admissibility of prior convictions, despite the explicit language of the constitutional amendment. He accepted the "moral turpitude" test proposed by the plurality because "evidence so potentially prejudicial must at least meet a threshold constitutional standard of 'relevance.' "[259] Since the problems of defining these standards will give rise to difficulties in judicial administration, Justice Grodin suggested that the only viable solution would be for the legislature to enumerate those crimes having a sufficient relationship to dishonesty to be admissible. Finally, agreeing that admission of the crimes in this case constituted harmless error in any event, the Justice, like the plurality, affirmed the defendant's conviction.

Justice Lucas also wrote an opinion in *Castro,*[260] concurring in the result but dissenting from the plurality's analysis on two points. First, he agreed with Justice Grodin that section 28(f) "was intended to abrogate *all* judicially created restrictions upon the admissibility of prior felony convictions, and to preclude the exercise of discretion to exclude certain prior convictions pursuant to section 352 of the Evidence Code."[261]

However, Justice Lucas departed from both the plurality's and Jus-

255. Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

256. Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

257. 287 A.2d 89 (D.C.), *cert. denied,* 407 U.S. 926 (1972).

258. 38 Cal. 3d at 322, 696 P.2d at 124, 211 Cal. Rptr. at 732 (Grodin, J., concurring and dissenting) (quoting United States v. Belt, 514 F.2d 837, 849 (D.C. Cir. 1975)).

259. 38 Cal. 3d at 322, 696 P.2d at 124, 211 Cal. Rptr. at 732 (Grodin, J., concurring and dissenting).

260. *Id.* (Lucas, J., concurring and dissenting).

261. *Id.* (emphasis in original).

tice Grodin's opinions and refused to recognize the creation of a "moral turpitude" exception. Justice Lucas took his stand on the plain language of section 28(f): that prior convictions shall be used "without limitation." Recognizing the bare possibility of applicable federal due process restrictions, he stated explicitly that he was unaware of any such restrictions and had been cited to no case imposing any. The conclusion of Justice Lucas' opinion is emphatic, and notably clear in the context of the convoluted qualifications of the other *Castro* opinions: *"the commission of a felony offense necessarily bears on one's credibility regardless of the nature of that offense."*[262]

A concurring and dissenting opinion was also written by Chief Justice Bird, joined by Justice Reynoso.[263] While agreeing that trial courts retain discretion to exclude evidence of prior convictions under Evidence Code section 352, Chief Justice Bird rejected the moral turpitude standard proposed by the plurality and Justice Grodin. Instead, she and Justice Reynoso would reaffirm the pre-Proposition 8 *Beagle* standard as a guide to the trial courts in the exercise of their discretion.

The Chief Justice's opinion adopts the reasoning of a California appellate court opinion[264] in which the court held that prior felony convictions must be relevant to the witness' credibility to be admissible for impeachment purposes. The appellate court indicated that, although the commission of any felony may reflect upon the character of the individual, it is not necessarily probative of the truthfulness of that individual. To be admissible for impeachment purposes, the crime for which the witness was convicted must involve some element of dishonesty.

Chief Justice Bird adopted the lower court's two-step analysis to determine the relevance of a prior felony:

> Any rational theory of impeachment by a prior felony conviction requires two inferential steps. First, the trier of fact must link the commission of the felony, i.e., conduct, to some propensity in the witness to lie, i.e., a character trait. From this propensity, the fact finder may then infer the witness is dishonest or untruthful. In the most obvious example, the fact finder hears evi-

262. *Id.* at 323, 696 P.2d at 125, 211 Cal. Rptr. at 733 (emphasis in original).

263. *Id.* (Bird, C.J., and Reynoso, J., concurring and dissenting).

264. Chief Justice Bird adopted virtually the entire opinion of Justice Work in the case of People v. Hoffman, 162 Cal. App. 3d 376, 208 Cal. Rptr. 609 (1984). In that case, involving a defendant charged with burglary, the trial court denied a motion before trial to prevent the prosecution from impeaching with evidence of a prior conviction for rape. On appeal, the conviction was reversed on the ground that a rape conviction was not relevant to the credibility of the witness and therefore should not have been admitted for impeachment purposes.

> dence of the witness's past conduct of making false statements under oath from which he can infer the witness has a character trait for untruthfulness, from which he may further infer the present testimony is likely incredible.[265]

The Chief Justice rejected the moral turpitude standard of the plurality, reasoning that the admission of any felony conviction as probative of credibility would totally eliminate the second inferential step, and improperly so, because it is not necessarily true that all former felons will lie under oath. Furthermore, an offer of past felonious conduct may support other inferences such as a propensity for violence, thereby becoming unduly prejudicial.[266]

Chief Justice Bird also rejected the moral turpitude standard because of lack of certainty in its application, enumerating examples of the various definitional problems applied to the term.[267] In addition to the problems of definition, she noted that "trial judges will apply their own personal views as to the mores of the community in deciding whether an offense involves moral turpitude,"[268] leading to inconsistent results and requiring the reversal of many convictions. She concluded by stating that "[t]he trial courts need clear guidance as to which felonies are admissible to impeach the credibility of a witness. Today's decision not only lacks that clarity but is an open-ended invitation to judicial chaos."[269] Chief Justice Bird and Justice Reynoso's opinion also affirms the conviction, but does not state the grounds on which the conviction is upheld. Presumably, the Chief Justice also believes that any errors committed by the lower courts were not prejudicial to the defendant.

It is somewhat difficult to determine where we are left after the *Castro* opinion. Although no more than three Justices could agree completely, four did agree that the trial court does have some discretion in this area and that a "moral turpitude" standard should be used to determine the boundaries of that discretion. The difficulty, of course, is in defining what crimes involve moral turpitude as a nec-

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265. *Hoffman*, 162 Cal. App. 3d at 384, 208 Cal. Rptr. at 615.

266. 38 Cal. 3d at 328, 696 P.2d at 128-29, 211 Cal. Rptr. at 736-37. (Bird, C.J., and Reynoso, J., concurring and dissenting).

267. United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947) (never clearly or certainly defined and lacking in legal precision); *In re* Higbie, 6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972) (an elusive concept, incapable of precise general definition); *In re* Halliman, 43 Cal. 2d 243, 272 P.2d 768 (1954) (any crime or misconduct committed without excuse); *In re* McAllister, 14 Cal. 2d 602, 603, 95 P.2d 932, 933 (1939) (contrary to justice, honesty, modesty or good morals); *In re* Craig, 12 Cal. 2d 93, 97, 82 P.2d 442, 444 (1938) ("an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man"). *See also In re* Rothrock, 16 Cal. 3d 449, 106 P.2d 907 (1940); Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 435 P.2d 553, 64 Cal. Rptr. 785 (1968); *In re* Boyd, 48 Cal. 2d 69, 307 P.2d 635 (1957); *In re* Hatch, 10 Cal. 2d 147, 73 P.2d 885 (1937).

268. 38 Cal. 3d at 334, 696 P.2d at 133, 211 Cal. Rptr. at 741 (footnote omitted).

269. *Id.* at 336, 696 P.2d at 134, 211 Cal. Rptr. at 742.

essary element. As Justice Tobriner has observed, "[t]erms such as . . . 'moral turpitude' stretch over so wide a range that they embrace an unlimited area of conduct."[270] Prosecutors will now direct their arguments to the question of whether the prior conviction involved moral turpitude as a necessary element, resulting in an entirely new body of law to cover this area. Because of the definitional problems "moral turpitude" presents, this new body of law is likely to be extremely contradictory and unpredictable at the appellate court level.

There is considerable uncertainty as to what the *Castro* decision will do to the *Beagle* line of cases. The requirement that the prior crime involve dishonesty apparently is overruled and replaced with the moral turpitude standard. However, since at least a plurality of the California Supreme Court has apparently determined that the trial judge still has discretion to exclude under section 352 of the Evidence Code, prior convictions could still be deemed inadmissible, most probably where they are disallowed if they were so remote in time or so identical to the crime alleged as to be unduly prejudicial.

The first requirement of admissibility is still relevance. Convictions involving moral turpitude were found by a majority of the court to contain the necessary element of relevance. However, it is not clear that a remote crime would also be found to be relevant. Although it is likely that the same crime will be relevant if it involves moral turpitude, there are some hints that the trial court may still have the discretion to balance this relevance against the potential for unfair prejudice in determining whether to admit the conviction. No clear guidance as to these practical problems of the trial court is offered by the supreme court.

Chief Justice Bird's conclusion is probably entirely correct insofar as she characterizes the *Castro* decision as an invitation to judicial chaos. Certainly there would be little disagreement on the part of the proponents of Proposition 8's constitutional amendment with that statement, or with her statement that trial courts need clear guidance as to which felonies are admissible to impeach. Ironically, however, the Chief Justice's solution—apparently to return to the *Beagle* standard—not only ignores but also directly controverts the clear guidance the new section 28(f) of article I of the California Constitution provides, as enacted by Proposition 8 and as approved by the people of California. Almost as ironically, Justice Grodin would turn

270. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 224-25, 461 P.2d 375, 382, 82 Cal. Rptr. 175, 182 (1969).

to the legislature for definition, apparently oblivious to the clear guidance the constitutional amendment offers to legislature and courts alike.

With the single exception of Justice Lucas, the California Supreme Court in *Castro* appears to be entangled, at least for now, in the judicial chaos their multiple opinions invite. The implementation of Proposition 8's clear guidelines in this area must await another day in court; it seems reasonable to predict, given the need for that clarity that was very nearly the only issue upon which the Justices could all agree, that the trial courts and appellate courts of California will follow the lead of the trial and appellate courts in *Castro,* resulting in more cases presenting the opportunity for definitive and appropriate California Supreme Court review in the years to come.

VI. CONCLUSION

With the passage of Proposition 8, the California voters expressed their dissatisfaction with the state of California law as it relates to crucial and highly publicized areas of criminal procedure. Proposition 8's constitutional amendments were aimed at the abolition of the "independent state grounds" doctrine the California courts had employed in these areas to extend protection to criminal defendants beyond those rights mandated by the United States Constitution.

The principle involved behind constitutional amendment is that the California Constitution, like any constitution, is to be a dynamic expression of the most deeply-felt will of the people, not a static, archaic artifact. It has long been recognized "that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it."[271] In the face of the clear language of the constitutional amendments enacted by the people in Proposition 8, judicial re-imposition of the restrictive standards of pre-Proposition 8 case law would be in violation of the people's expressed will.

The California Supreme Court, with the *Lance W.* decision, has recognized that the will of the people was expressed in Proposition 8. The *Castro* case was not so clear. Some judicial restrictions have been removed in *Castro*; the lack of certainty and clarity, as well as the many unresolved issues of *Castro,* raise the hope that when those issues are addressed, the mandate of the people in Proposition 8 will be recognized in full.

A quote from California Supreme Court Justice Stanley Mosk identifies the deeply-felt judicial need to which Proposition 8 as enacted offers at least an initial response:

271. United States v. Chambers, 291 U.S. 217, 226 (1934).

> I must concede there is an element of accuracy to the oft-repeated contention that "criminals have all the rights." This is elementary constitutional law. One will look in vain among our Bill of Rights and among its counterpart in the state constitution for guarantees to victims, or to the public, or to any person other than the accused.[272]

Perhaps the public has taken the first step toward solving this problem by the passage of the Victims's Bill of Rights, amending the California Constitution by Proposition 8. The rights of which Justice Mosk spoke are now part of the California Constitution, properly enacted and consistent with the United States Constitution. Henceforth, the interpretations of the California courts must look to these rights, however halting that judicial process may be at times, to make California law.

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272. Mosk, *The Mask of Reform*, 10 SW. U. L. REV. 885, 889-90 (1978).