THE VICTIMS' BILL OF RIGHTS—THIRTY YEARS UNDER PROPOSITION 8

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INTRODUCTION

In 1982, the California electorate approved an initiative entitled the "Victims' Bill of Rights." Though the initiative made broad changes in the state's criminal justice system,[1] this Article focuses on those provisions that introduced radical changes in the state's rules of evidence and some aspects of criminal law and procedure. The most far-reaching provision, entitled the "Right to Truth-in-Evidence," resulted in a new evidence code that applies only to criminal cases. Section 28(d) provides:

> 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 . . . . 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. . . ."[2]

Section 28(d) is not simply a statutory change in the rules of evidence. The section is an amendment to the California Constitution. Accordingly, it supersedes any statutory or decisional bar to the introduction of relevant evidence unless the evidence is governed by the rules relating to privilege, hearsay, or Evidence Code sections 352, 782, or 1103. The effect of the section is to create two evidence codes. The California Evidence Code, enacted in 1965 to govern the admissibility of evidence, still applies in civil proceedings. However, section 28(d) creates a new evidence code for regulating the admissibility of evidence in criminal proceedings. In effect, the section gives the prosecution and the defense a constitutional right to introduce relevant evidence. Unless the evidence is barred by the rules relating to privilege, hearsay, or Evidence Code sections 352, 782, or 1103, the evidence must be admitted as a matter of state law.[3]

This approach turns evidence theory and doctrine on its head. The rules of evidence, including the California Evidence Code, can be viewed as a body of law designed to bar or limit the introduction of relevant evidence. Professor Edmund Morgan underscored this approach to modern evidence theory in his foreword to the Model Code of Evidence, the first concise statement of evidentiary principles of general application, an approach adopted by the American Law Institute in 1942 and followed by all American evidence systems:

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1. Among the changes the initiative called for in the criminal justice system are restitution for crime victims, the right to attend safe schools, consideration of public safety in setting bail, enhanced punishment for habitual criminals, the right of crime victims to be heard at sentencing, and prohibiting plea bargaining where enumerated crimes are charged. *See* CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION, JUNE 8, 1982 33, 56 (March Fong Eu ed., 1982).

2. *See* CAL. CONST. art. I, § 28(d). This provision is now section 28(f)(2). Because many cases use the original designation, this article uses 28(d).

3. *Id*. Section 28(d), of course, cannot override federal constitutional provisions prohibiting the use of evidence acquired in violation of the Fourth (unreasonable searches and seizures), Fifth (self-incrimination), and Sixth (right to counsel) Amendments. *See* U.S. CONST. amends. IV-VI.

> A code of evidence should concern itself primarily with admissibility, and in this respect it should be complete in itself. Consequently it should begin with a sweeping declaration that all relevant evidence is admissible, that no person is incompetent as a witness and that there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it. Then it should set up specific exceptions to this fundamental rule.[4]

Following this model, the California Evidence Code contains two provisions that form the cornerstone upon which the entire evidence structure is constructed. Section 350 provides that "[n]o evidence is admissible except relevant evidence."[5] Section 351 then postulates that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."[6] Since these two sections form the cornerstone upon which the entire evidence structure is constructed, it is indispensable to know what is meant by "relevance."

Section 210 defines relevant evidence as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[7] This section defines relevance in terms of two components. One refers to the proving or disproving quality of an item of evidence. This aspect is known as the probative value of an item of evidence.[8] The other focuses on the relationship between an item of evidence and disputed facts that are of consequence to the determination of the action. This relationship is known as materiality.[9]

To be material, an item of evidence must be directed at a proposition that is properly provable in the action being tried.[10] Typically, that determination can be made by referring to the pleadings and the substantive law that governs the action.[11] If the proffered evidence is beyond the definition of the action as defined by the substantive law, it is immaterial.

Materiality also encompasses the credibility of witnesses. Section 210 expressly includes "evidence relevant to the credibility of a witness or hearsay declarant" within the definition of "relevant evidence."[12] This is not surprising, as often a trial's outcome will depend on which of two conflicting versions of an event a jury believes.[13] Accordingly, evidence of the veracity or mendacity of the witnesses may be of special consequence to the determination of the action. To underscore the importance of evidence relating to credibility, the semi-

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4. MODEL CODE OF EVIDENCE 11 (1942).

5. *See* CAL. EVID. CODE § 350 (West 2013).

6. *See id.* § 351.

7. *See id.* § 210.

8. *See generally* MIGUEL A. MÉNDEZ, THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH § 2.01 (5th ed. 2012).

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* CAL. EVID. CODE § 210 (West 2013).

13. *See generally* MÉNDEZ, *supra* note 8, § 2.03.

nal rule on credibility, section 780, provides that in determining the credibility of a witness the trier of fact may consider "any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony."[14]

Having defined relevant evidence expansively, the vast majority of the rules in the Evidence Code then ban or limit the introduction of relevant evidence. These are the rules abolished by section 28(d), with the exceptions of the rules contained in the sections relating to privilege, hearsay, or Evidence Code sections 352, 782, or 1103.

Section 782 requires judges to screen evidence of the complaining witness's sexual conduct when offered to attack the credibility of the complaining witness in sexual assault prosecutions.[15] Even if the evidence is relevant, judges may exclude it if its probative value on the witness's credibility is substantially outweighed by other concerns, such as undue prejudice to the complaining witness.[16] Section 1103(c) embodies California's rape shield law. In sexual assault prosecutions, it limits defendants to offering only evidence of the complaining witness's sexual conduct with them when offered to prove the witness's propensity to engage in consensual sex.[17] It prohibits defendants from offering the complaining witness's sexual conduct with others when offered for this purpose.[18]

Section 352 empowers California judges to exclude otherwise admissible evidence when they determine that its probative value is substantially outweighed by such countervailing concerns as undue consumption of time, undue prejudice, confusion of issues, or misleading the jury.[19] Although giving judges discretion to exclude otherwise admissible evidence of marginal value is found in the Evidence Code, the Federal Rules of Evidence,[20] and state evidence codes based on the Federal Rules, entrusting trial judges with such power was initially controversial. When the American Law Institute ("A.L.I.") met to discuss approving the Model Code of Evidence, at least one member described such discretion as "dangerous."[21] Professor Morgan, the reporter, defended the rule on the ground that detailed rules would be required to regulate evidence of marginal value if the judges lacked discretion to exclude it.[22] His view prevailed, but as will be discussed, the discretionary principle embodied in provisions such as section 352 assumes the existence of a large body of rules that excludes or otherwise limits the use of relevant evidence. Only if the evidence offered overcomes all of these obstacles can the objecting party ask the judge to

14. *See* CAL. EVID. CODE § 780 (West 2013).
15. *See id.* § 782(a).
16. *See id.* § 782(a)(3).
17. *See id.* § 1103(c)(3).
18. *See id.* § 1103(c)(1).
19. *See id.* § 352.
20. *See* FED. R. EVID. 403.
21. *See* 19 A.L.I. PROC. 221 (1941-42).
22. *See id.* at 223.

use his or her discretionary power to exclude it. Proposition 8 expands enormously a judge's power to exclude otherwise admissible evidence by eliminating numerous limitations the Code imposes on the use of broad categories of evidence. Evidence that was formerly inadmissible under discrete rules is now subject to discretionary exclusion by the judge. This clearly was not the judicial role the framers of modern evidence codes, including the California Evidence Code, envisaged. Moreover, as will be explained, subjecting categories of evidence formerly inadmissible to discretionary exclusion complicates trial planning both for prosecutors and defense counsel.

Two other provisions of Proposition 8 will be examined. Section 28(f), also a constitutional amendment, provides that:

> Any prior 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 conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.[23]

This provision literally overturns a number of important limitations the California Supreme Court imposed on the use of convictions under the Evidence Code to impeach witnesses, including criminal defendants.[24] The court used section 352 as the statutory basis for imposing rules trial judges should follow in exercising their discretion to exclude convictions whose probative value on a witness's credibility is substantially outweighed by other concerns, including unfair prejudice.[25] But stripping judges of their discretion to exclude convictions of marginal utility conflicts with another constitutional provision also enacted by Proposition 8, namely, section 28(d), which constitutionalizes their discretion to exclude marginal evidence under section 352. This Article traces how the California Supreme Court has attempted to reconcile the two conflicting constitutional provisions.

Another Proposition 8 provision defines legal insanity for the first time. Prior to the initiative, the California Penal Code simply recognized that a criminal defendant could be acquitted on the basis of insanity.[26] The Penal Code, however, did not define insanity. The courts initially filled the gap by adopting the well-known *M'Naghten* test of legal insanity.[27] Dissatisfaction with this test led the California Supreme Court to replace it with the test formulated by the American Law Institute in the Model Penal Code.[28] The proponents of Proposition 8 disliked the more expansive A.L.I. test, so they proposed adding section 25(b) to the Penal Code:

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23. *See* CAL. CONST. art. I, § 28(f). This provision is now § 28(f)(4). Because many cases use the original designation, this article uses 28(f).

24. *See generally* MÉNDEZ, *supra* note 8, § 15.07.

25. *Id*.

26. *See* CAL. PENAL CODE § 26 (West 2013).

27. *See* People v. Drew, 583 P.2d 1318, 1321 (Cal. 1978).

28. *Id*. at 1326.

> In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense.[29]

Apparently, the proponents wanted much more than a return to the *M'Naghten* test. Under that test, a defendant can be acquitted on the grounds of insanity if at the time he committed the offense he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act, or if he did know it, as to not know that his act was wrong.[30] As the example provided by the Model Penal Code illustrates, under this formulation a defendant is not guilty by reason of insanity if as a result of a mental disease she believes she is squeezing lemons when in fact she is squeezing necks.[31] Moreover, even if she was aware that she was squeezing necks, she would not be guilty by reason of insanity if as a result of a mental disease she believes that there is nothing wrong with squeezing necks. However, Penal Code section 25(b), as approved in the initiative, uses "and" instead of "or" in setting out the two prongs.[32] The use of the conjunctive would require the defendant to prove that by reason of a mental disease she not only thought that she was squeezing lemons but also that she believed that there was nothing wrong with squeezing necks. Such a test has been described as the "wild beast" test on the assumption that such extreme cognitive dysfunctions would reduce a human to the cognitive level of a wild beast.[33] As will be discussed below, in *People v. Skinner*[34] the California Supreme Court confronted the difficult question of whether Proposition 8 indeed called for the application of an insanity test much more restrictive than the *M'Naghten* test.[35]

Part I of this Article examines the extensive changes that section 28(d), the Right to Truth-in-Evidence provision, made to the rules of evidence that apply in criminal proceedings. That Part also describes the California appellate courts' response to changes that a literal application of section 28(d) would make to these rules and evaluates the changes from a policy perspective. Lastly, Part I explores the impact that section 28(f) would have on the use of convictions to impeach witnesses in criminal proceedings and describes how the California appellate courts have attempted to reconcile the apparent conflict be-

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29. *See* CAL. PENAL CODE § 25(b) (West 2013) (emphasis added).

30. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 7.1 (West 4th ed. 2003).

31. *See* MODEL PENAL CODE & COMMENTARIES § 4.01 (1985).

32. *See* CAL. PENAL CODE § 25(b) (Deering 2008).

33. *See* Trial of Edward Arnold, Kingston Assizes, 16 How. St. Tr. 695, 764 (1724), reprinted in J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 809 (1940); *see also* People v. Skinner, 704 P.2d 752, 759 (Cal. 1985). Wild beasts might object to this comparison.

34. 704 P.2d at 752.

35. *Id*. at 759.

tween section 28(f), which eliminates judicial discretion in admitting convictions, and section 28(d) which constitutionalizes the discretion judges have in excluding evidence of marginal value, including conviction evidence. Part II describes how the California Supreme Court resolved the question of whether Proposition 8 called for the use of an insanity test even more restrictive than the *M'Naghten* test. Part III examines the impact section 28(d) had on Penal Code provisions restricting the use of intoxication and diminished capacity evidence in criminal cases. Part IV enumerates some of the corrective measures the legislature has undertaken to undo the unanticipated effects of section 28(d).

Part V examines two important questions. One is whether the initiative process is a sound way to effect significant changes in California law. Should the electorate be entrusted with the responsibility of deciding complex legal questions, such as enacting an evidence code, and determining when cognitive and volitional deficits should result in acquittals and whether convictions should be used without limitation to impeach witnesses in criminal cases? The second, equally important question is whether California's initiative process needs to be reformed to help ensure an informed electorate when voters are asked to enact statutes and constitutional amendments.

I. EVIDENCE CODE SECTIONS AFFECTED BY PROPOSITION 8

If Proposition 8 is construed literally, the Evidence Code provisions most affected are (1) the rules governing the use of character evidence, (2) the rules pertaining to experts and expert evidence, (3) some rules disfavoring the use of evidence for "extrinsic" or policy reasons, (4) the rules regulating the use of evidence to attack or support the credibility of witnesses, (5) the rules determining whether witnesses are qualified to testify, and (6) the rules generally requiring a party to prove the contents of a writing by offering the original writing and not a copy or testimony about its contents. As we shall see, however, appellate decisions and legislative amendments have limited the effect of the initiative principally to the rules governing credibility.

A. *Character Evidence Limitations*

The Code generally prohibits the prosecution from offering evidence in its case-in-chief of the accused's bad character to prove his or her propensity to commit the offense charged.[36] Two main concerns account for the ban. One is that the fact finder might overestimate the probative value of character evidence: if jurors learn that on other occasions the accused engaged in the misconduct charged, they might jump to the unwarranted conclusion that the ac-

36. *See* CAL. EVID. CODE § 1102 (West 2013). Recent amendments allow the prosecution to offer the defendant's misconduct as proof of his or her propensity to commit the misconduct charged. *See, e.g.*, *id.* § 1108 (sexual assault prosecutions); *id.* § 1109 (domestic violence prosecutions).

cused must be guilty of the misconduct charged.[37] The other is the belief that character evidence might invite jurors to return verdicts against "bad" persons. Especially in criminal cases, a major concern is that bad character evidence might tempt jurors to apply a theory of culpability that is based on character rather than on the commission of a punishable act. Having heard evidence of the accused's bad character, jurors might conclude that the accused is a bad person deserving of punishment, irrespective of whether the other evidence convinces them of the accused's guilt.[38] The principle that individuals are accountable only "for what they do and not for what they are"[39] is central to the law's concept of criminal blameworthiness. The United States Supreme Court has elevated the principle to constitutional status.[40]

Evidence that the accused is predisposed to commit the offense charged is, however, relevant. The Right to Truth-in-Evidence provision would thus appear to repeal the character evidence ban. For over thirteen years the California Supreme Court declined to rule on the effects a literal construction of Proposition 8 would have on the character evidence rules.[41] When the court finally confronted the question in *People v. Ewoldt*,[42] it held that amendments to the character evidence rules enacted after the initiative had been approved rendered it unnecessary to answer the question.[43] Because the re-enactment was by more than the two-thirds vote required by Proposition 8 for amendments to the initiative, the court ruled that the re-enactment superseded any repealing effects that the initiative may have had on the character evidence rules.[44] *Ewoldt* thus reinstated in criminal cases the limitations the Code places on the use of character evidence. But, as will be explained, the reinstatement was inadvertent.

Prior to *Ewoldt*, the California Supreme Court in *People v. Tassell*[45] focused on when evidence of specific misdeeds can be offered, not as evidence of a person's predisposition to commit the misdeed charged, but as evidence of a

37. *See* 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940).

38. *Id*. Bad character evidence also presents the risk that the jurors might convict for crimes other than those charged. *See* United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982).

39. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 73–74 (1968).

40. *See* Robinson v. California, 370 U.S. 660, 667 (1962), *reh'g denied*, 371 U.S. 905 (1962) (holding that the Eighth Amendment's prohibition of cruel and unusual punishments prohibits punishing an addict on account of his narcotics addiction). The United States Supreme Court has not ruled on the question of whether the prosecution's use of propensity evidence against the accused violates due process. *See* Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991).

41. *See* People v. Sully, 812 P.2d 163, 180-81 (Cal. 1991); People v. Harris, 767 P.2d 619, 640 (Cal. 1989).

42. 867 P.2d 757 (Cal. 1994).

43. *Id*. at 762.

44. *Id*. at 763.

45. 679 P.2d 1 (Cal. 1984), *overruled by* People v. Ewoldt, 867 P.2d 757, 769 (Cal. 1994).

relevant non-character proposition.[46] The court was especially concerned with the common plan or scheme doctrine. Under this doctrine, prosecutors may seek to prove guilt by offering uncharged misdeeds as evidence the defendant committed the misdeed charged. The uncharged misdeeds are not offered as character evidence, that is, as evidence that the defendant committed the charged misdeed because he is the kind of person who commits those types of misdeeds. Rather, the theory of admissibility is that the defendant is guilty of committing the misdeed charged because he committed the uncharged and charged misdeeds as part of a single conception or plot.[47] Because of the risk that jurors might misuse the uncharged misdeeds as evidence of the defendant's predisposition to commit the misdeed charged, the court emphasized the need for the prosecution to explain how the uncharged misdeed evidence is probative of a relevant proposition other than the defendant's predisposition to commit the misdeed charged.[48]

Tassell was convicted of rape. He claimed that the victim had consented. In his concurring and dissenting opinion, Justice Reynoso emphasized that forcible rape is a crime of negligence.[49] Even if the victim did not consent, a defendant is not guilty of forcible rape if he reasonably believed that the victim had consented.[50] Accordingly, he disagreed with the majority's holding that because Tassell had conceded having sex with the victim, the prosecution's evidence that he committed other rapes was probative only of his predisposition to commit the rape charged.[51]

In 1986 the legislature sided with Justice Reynoso by amending Evidence Code subdivision 1101(b) to include among the illustrative list of matters that can be proved by evidence of uncharged offenses "whether a defendant in a prosecution for an unlawful sexual act or attempted sexual act did not reasonably and in good faith believe that the victim consented."[52] Except as otherwise provided, subdivision 1101(a) prohibits the use of evidence when offered to prove that on a particular occasion a person conformed his or her conduct to a character trait.[53] Each house of the legislature approved the amendment to subdivision 1101(b) by more than a two-thirds vote of the members entitled to vote.[54] Because the votes exceeded the number required by the Right to Truth-in-Evidence provision for approval of statutes restricting the right to offer rele-

46. *Tassell*, 679 P.2d at 4.
47. *Id*. at 5.
48. *Id*. at 7.
49. *Id*. at 11 (Reynoso, J., concurring in part and dissenting in part).
50. *Id*.
51. *Id*.
52. *See* CAL EVID. CODE § 1101(b) (West 2013).
53. *See id*. § 1101(a).
54. People v. Ewoldt, 867 P.2d 757, 762 (Cal. 1994).

vant evidence, *Ewoldt* held that the effect of the vote was to re-enact section 1101 in its entirety, including subdivision (a).[55]

Restoring the character evidence ban was not the legislature's goal; it was simply adding another example of the kind of specific acts that can be offered to prove propositions other than a person's predisposition to conform his or her conduct to a trait of character. Nonetheless, the legislature's action in amending subdivision 1101(b) had the effect of re-enacting the entire section, including the character evidence ban.

Of course, there was no way that voters untrained in the law of evidence could have contemplated the adverse effects the Right to Truth-in-Evidence provision would have on the values that moved the California Legislature to enact the character evidence restrictions. The legislative analyst's overview in the ballot pamphlet merely notes in the evidence section that the initiative "would all allow most relevant evidence to be presented in criminal cases" even though under current law "certain evidence is not permitted to be presented in a criminal trial or hearing."[56] The proponents of Proposition 8 make no mention of the effect of the initiative on the general ban on the use of bad character evidence against those accused of crimes. In the ballot pamphlet Mike Curb, then Lieutenant Governor, urged voters to vote for the initiative to "restore balance to the rules governing the use of evidence against criminals."[57] He does not say "against those accused of committing crimes"; instead, he equates prosecution with guilt, ignoring the time-honored constitutional principle that the accused is presumed to be innocent until the state proves his guilt beyond a reasonable doubt.[58] Another proponent, George Deukmejian, then Attorney General, complains in his argument that "higher courts of this state have created additional rights for the criminally accused" and argues that the proposition would "overcome some of the adverse decisions by our higher courts."[59] That argument, however, would not put the electorate on notice of the repealing effect the initiative would have on the character evidence rules. These rules and the values they protect were created by the legislature, not the higher courts. Deukmejian, however, did get it right when he argued in upper case letters that "THERE IS ABSOLUTELY NO QUESTION THAT THE PASSAGE OF THIS PROPOSITION WILL RESULT IN MORE CRIMINAL CONVICTIONS."[60] Admittedly, eliminating any evidentiary barrier to conviction will, of course, favor prosecutors by improving their conviction-acquittal ratio, but easing the proof problems confronting prosecutors cannot be the overriding liberty value in a free society. The third proponent, Paul Gann (co-author of Proposition 13, the anti-tax initiative), made no reference to the effect the initiative would have

55. *Id*.
56. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 54.
57. *Id*. at 34.
58. *See In re* Winship, 397 U.S. 358, 364 (1970).
59. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 34.
60. *Id*.

on any of the evidence rules; instead, he viewed the initiative as essential to protecting crime victims, whom he saw not just as crime victims but also as "victims of our criminal justice system—the liberal reformers, lenient judges and behavior modification do-gooders who release hardened criminals again and again to victimize the innocent."[61]

To be fair to the proponents and opponents of Proposition 8, a ballot pamphlet is not the place for detailed and considered arguments concerning important legal rights. Those discussions need to occur in such places as legislative hearings, appellate arguments and opinions, and debates among legal experts, among others. Nor can such discussions take place in the sound bites accompanying political ads favoring or opposing complex initiatives. But if that is the case, one cannot avoid asking whether initiatives are a sound means for implementing the kind of extensive changes Proposition 8 effected in the Evidence Code, a question examined in detail in Part V.

B. *Expert Testimony and Scientific Evidence*

The Code imposes a number of limitations on the use of expert testimony.[62] Before a judge may admit expert evidence, the judge must find, among other matters, that the jurors need the expert's help, the expert is qualified to provide that help by virtue of education, training, or experience, and the expert followed accepted protocols in reaching his or her opinion.[63] In addition, in cases involving novel scientific principles or techniques, the judge must also find that the technique or principle has been generally accepted as reliable by the pertinent scientific community.[64] Because the California Supreme Court has acknowledged that some of these limitations exclude unquestionably relevant evidence,[65] a literal application of Proposition 8 would repeal the Evidence Code limitations on the use of expert opinion in criminal cases since the limitations are not among the enumerated exceptions. But in *People v. Harris*,[66] the California Supreme Court rejected the claim that Proposition 8 mandated the use of polygraph evidence that failed California's general acceptance test. Mistakenly assuming that unreliable evidence is irrelevant, the court held that judges may use section 352 to exclude scientific evidence that fails the general acceptance test.[67] Section 352 is expressly exempted from the operation of the Right to Truth–in–Evidence provision. In the court's view, this section incorpo-

61. *Id*. at 35.

62. *See* CAL. EVID. CODE §§ 800-05 (West 2013).

63. *See generally* MÉNDEZ, *supra* note 8, §16.04.

64. *See generally id*. §16.04.

65. *See* People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976) (acknowledging that the general acceptance test excludes relevant evidence).

66. 767 P.2d 619 (Cal. 1989).

67. *Id*. at 649.

rates section 350, which mandates the exclusion of irrelevant evidence,[68] and evidence that fails to meet the general acceptance test is, according to the court, irrelevant.[69] Whether the court's analysis is right or wrong, *Harris*'s effect has been to exempt the Code's limitations on expert testimony from the Right to Truth-in-Evidence provision of Proposition 8.

It is unlikely that the proponents of the initiative foresaw that a literal application of the Right to Truth-in-Evidence provision could repeal the Code's limitations on the use of expert testimony and scientific evidence. While a judge could still invoke section 352 to exclude evidence of doubtful scientific validity, the accepted practice in all jurisdictions is that judges should play an important role in screening expert testimony to ensure its reliability before it is offered to the jury.[70] The detailed Evidence Code standards that guide judges in making this determination are far superior to the balancing test of section 352. Moreover, these standards offer parties clear guidelines in preparing, offering, and opposing expert testimony and scientific evidence. Contemporary standards for the admissibility of expert evidence are the product of decades of thoughtful judicial and scholarly evolution.[71] In their ballot arguments, the proponents of Proposition 8 make no reference to the Code's rules on expert evidence. It seems inconceivable that they would seek to eliminate these rules and instead have individual judges determine the use of expert evidence in a particular criminal case under the necessarily general but imprecise standards of section 352. A problem with initiatives, especially those dealing with complex subjects, is that they can carry unanticipated consequences.

C. *Evidence Excluded on the Basis of Extrinsic Policies*

Like other evidence systems, the Code excludes classes of evidence on account of "extrinsic" policies.[72] These policies refer to the legislature's decision to exclude unquestionably relevant evidence in order to promote other policies it considers more important. A policy rule potentially affected by Proposition 8 is the section prohibiting the use of evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty in unsuccessful plea negotiations.[73]

Prosecutors would have an easier time obtaining convictions if they could offer the jury evidence that prior to the trial the accused offered to plead guilty to the offense charged or to some lesser offense. Though such evidence would constitute a relevant admission, it is nonetheless excluded in order to encourage plea bargains. Evidence Code section 1153 prohibits the use of such evidence

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68. *Id*.

69. *Id*.

70. *See, e.g*., FED. R. EVID. 702-04; CAL. EVID. CODE §§ 800-05 (West 2013).

71. *See generally* MÉNDEZ, *supra* note 8, §16.03.

72. *Compare* CAL. EVID. CODE §§ 1150-55 (West 2014), *with* FED. R. EVID. 407-11 (West 2011).

73. *See* CAL. EVID. CODE § 1153 (West 2014).

in "any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."[74] Moreover, evidence of a plea of guilty, later withdrawn, is also made inadmissible by section 1153,[75] and in the case of some felonies, by section 1192.4 of the Penal Code.[76] Since ordinarily the accused is not permitted to withdraw a plea of guilty except for good cause shown,[77] the policies favoring the withdrawal of the plea in a given case would be defeated if the prosecution were permitted to use the withdrawn guilty plea against the accused at the trial. Evidence of a withdrawn guilty plea, however, would nonetheless constitute a relevant admission at the trial.

To date, no appellate court has considered the applicability of the initiative to these rules. Practicality, however, may account for the dearth of cases regarding the admissibility of the accused's admissions in plea bargaining sessions. Because prosecutors have an interest in preserving plea bargaining, they have no incentive to overturn the prohibition on the use as admissions of offers to plead guilty and related plea statements.

D. *Proposition 8 and Credibility Restrictions*

Trial lawyers know that the outcome of a trial will be determined in almost all cases by which witnesses the jurors choose to believe and which ones they decide to ignore. Telling jurors which witnesses to believe or disbelieve is thus a crucial part of a closing argument. But such an appeal will not be persuasive unless the lawyer can give the jurors reasons rooted in the evidence about why a witness should be believed or disbelieved. This inescapable dynamic of jury trials encourages lawyers to produce the most favorable evidence about the credibility of their witnesses and the most unfavorable about their opponents' witnesses.[78] As we shall see, however, the rules of evidence counter this inclination by placing strict limits on the use of evidence to support or attack the credibility of witnesses. Despite the unquestioned relevance of such evidence, the rules proceed on the assumption that the unrestrained use of evidence on witness credibility may distract from and confuse jurors about the issues to be decided.[79] In the memorable words of Dean Charles McCormick, without limi-

74. *See id*. § 1153.

75. *Id*.

76. The Penal Code provides that if an accused's plea of guilty to certain felonies is rejected by the prosecuting attorney and the court, the plea is deemed withdrawn, and the "pleas so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals." *See* CAL. PENAL CODE § 1192.4 (West 2013).

77. *See* CAL. PENAL CODE § 1018 (West 2013).

78. *See generally* MÉNDEZ, *supra* note 8, § 15.01.

79. *See generally id*. § 15.01.

tations, the "sideshow" on witness credibility would threaten to take over the "circus" on the disputed issues.[80]

The Evidence Code restricts the use of evidence on witness credibility in two ways. First, the rules limit the kind of evidence that can be used to support or attack the credibility of witnesses. Other than convictions, for example, the Code does not permit a party to offer specific acts of misconduct as evidence of a witness's predisposition to lie under oath.[81] Second, the Code limits the circumstances under which such evidence can be used. For example, under the Code, evidence that a witness has made statements that are consistent with the witness's testimony on direct examination is generally inadmissible to support the witness unless the opposing party has first attacked the witness's credibility.[82]

Since evidence attacking or supporting the credibility of witnesses is obviously relevant, the Right to Truth-in-Evidence provision repeals those sections of the Evidence Code that ban or limit the use of such evidence.[83] The initiative also threatens to overturn the decisional restraints on the use of such evidence.

1. Prior Bad Acts as Evidence of Lack of Veracity

The Evidence Code rejects the common law prior bad acts doctrine.[84] This doctrine allows the cross examiner to impeach a witness by inquiring into acts of misconduct by the witness that have not been the subject of a conviction.[85] Other than convictions, section 787 prohibits the use of specific instances of a

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80. *See* CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 41 (Edward W. Cleary et al. eds., 2d ed. 1972). In deciding whether to go forward with a case, lawyers often take into account their assessment of the credibility of key witnesses. For example, a review of the forensic evidence for all sexual assault cases reported in Duval County, Florida during a two-year period showed that prosecutors cited problems with the credibility of the complaining witness as the most common reason for dropping cases. *See also* Kelly Gray-Eurom et al., *The Prosecution of Sexual Assault Cases: Correlation with Forensic Evidence*, 39 ANNALS EMERGENCY MED. 39-46 (Jan. 2002).

81. *See* CAL. EVID. CODE § 787 (West 2013).

82. *See id*. § 791.

83. *See* People v. Stern, 3 Cal. Rptr. 3d 479, 489 (Cal. Ct. App. 2003) (holding that the Evidence Code's ban on the use of prior bad acts to attack the credibility of witnesses has been abrogated by Proposition 8 in criminal cases); *see also In re* Freeman, 133 P.3d 1013, 1020, n.5 (Cal. 2006) (same).

84. Even before the Evidence Code was adopted, California did not recognize the prior bad acts doctrine. *See* CAL. PROC. CODE § 2051, *repealed by* CAL. EVID. CODE § 1101 (West 1966) (excluding evidence of specific acts that had not been the subject of a conviction).

85. *See* CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 41 (Kenneth S. Broun et al. eds., 6th ed. 2006). Among the reasons some jurisdictions reject the prior bad acts doctrine are "the dangers of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse by asking unfounded questions, and of the difficulties, as demonstrated in the appellate cases, of determining whether particular acts relate to character for truthfulness." *Id*. To that list can be added the danger of surprise to lawyers who cannot reasonably be expected to know all of the past misdeeds of the witnesses they sponsor.

witness's conduct to prove the witness's predisposition to testify truthfully or untruthfully.[86] In civil proceedings, the Code's ban on the use of prior bad acts continues in effect. In criminal cases, however, Proposition 8 repeals section 787.[87] Evidence that a witness has cheated on his income tax returns is probative of the witness's character for lack of veracity. The proposition that the witness is the kind of person who will not tell the truth under oath is rendered more likely by evidence that he lies on his income tax returns than the proposition would be without the evidence.[88] Accordingly, under Proposition 8 such evidence is admissible in criminal cases unless excluded by the judge under section 352.[89]

The common law restricted the use of the prior bad acts doctrine by binding the cross examiner to the witness's answer.[90] If the witness, for example, denied having cheated on his taxes, the cross examiner could not call other witnesses to contradict the witness. Even if IRS witnesses were willing and available to testify, their testimony could not be received over objection. This limitation was designed to prevent the current trial from being converted into one on whether or not the witness engaged in the bad act, here, evasion of taxes.[91]

But testimony by the IRS agents that the witness cheated on his taxes is as probative of the witness's penchant for lack of veracity as is the witness's admission that he evaded taxes. Under a literal application of Proposition 8, the IRS agent's testimony would be admissible, unless excluded by the trial judge under section 352.[92] Similarly, countervailing evidence that the witness did not cheat on his taxes would likewise be relevant and admissible. Thus, under Proposition 8, unless the judge firmly restricts the use of the prior bad acts doctrine, a lurking danger is that the doctrine will overwhelm the issues to be decided in the current trial. A trial over whether the accused committed a felonious assault could also become a trial over whether a defense or prosecution witness evaded income taxes.[93]

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86. *See* CAL. EVID. CODE § 787.

87. *See* People v. Harris, 767 P.2d 619, 639-41 (Cal. 1989); *see also* People v. Adams, 243 Cal. Rptr. 580, 584 (Cal. Ct. App. 1988) (holding that under Proposition 8 the accused was entitled to offer evidence that the complaining witness in a rape case had falsely accused others of rape).

88. *See* CAL. EVID. CODE § 210.

89. *See* People v. Hill, 41 Cal. Rptr. 2d 39, 45 (Cal. Ct. App. 1995) (holding that the accused was entitled to impeach a prosecution witness by evidence that the witness threatened to kill a woman who had reported a criminal incident involving the witness's boyfriend to the police).

90. *See* MCCORMICK ON EVIDENCE (2d ed.), *supra* note 90, § 42.

91. *Id*.

92. *See Hill*, 41 Cal. Rptr. 2d at 45 (allowing the accused to offer extrinsic evidence of the witness's prior bad act after the witness denied the act on cross-examination).

93. *See id*. (holding that, even though the accused could impeach a prosecution witness with evidence that she threatened to kill a woman who reported to the police a "criminal incident" involving the witness's boyfriend, the accused was not entitled to show that the incident concerned a charge of rape); *accord* People v. Box, 5 P.3d 130, 163 (Cal. 2000) (hold-

Under Proposition 8, the prior bad acts doctrine has a flipside. Evidence relevant to the credibility of witnesses includes evidence supporting as well as attacking their veracity. Accordingly, Proposition 8 also introduces a "prior good acts doctrine" which sanctions the use of specific instances of conduct to support the credibility of witnesses. In *People v. Harris*,[94] for example, the California Supreme Court held that Proposition 8 allowed the prosecution to support the credibility of a witness who had served as an informant by calling an officer to testify that the witness had proved reliable in past cases.[95] Prior to Proposition 8, section 787 would have prohibited the use of the witness's past reliability to prove that the witness should be believed because his behavior in the past made him the kind of person worthy of belief.[96]

2. Prior Bad Acts as Evidence of Lack of Credibility other than Lack of Veracity

Under the Code, a party may seek to impeach a witness by evidence, for example, that a witness was under the influence of a mind-distorting substance at the time the witness claims to have made the crucial observations. Such evidence is relevant under section 780(c), as mind-altering substances could adversely affect the witness's capacity to perceive, and perhaps recollect accurately, the subject matter of his or her testimony.[97] Under the Code, however, a party may not prove that a witness was under the influence of such a substance by evidence of the witness's propensity to use such substances.[98] A party, for example, may not offer evidence that on other occasions, the witness was under the influence of such a substance when offered for this purpose. Although the ban on the use of character evidence does not apply when the evidence is offered to attack the credibility of a witness,[99] the Evidence Code provisions regulating credibility limit the use of character evidence to establish only a witness's character for veracity or lack of veracity.[100] Moreover, even when offered to prove a witness's character for veracity or lack of veracity, the only evidence of specific instances permitted by the Code is felony convictions.[101]

But as we have seen, the Code's limitations on the use of specific instances to prove a witness's character for lack of veracity have been repealed by the

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ing that the accused was entitled to impeach a mental health expert by evidence that the state had filed charges of unprofessional conduct that could result in the revocation of his license, but the accused was not entitled to show that the charges stemmed from allegations of sexual misconduct with six patients).

94. 767 P.2d 619 (Cal. 1989).

95. *Id.* at 639-41.

96. *See* CAL. EVID. CODE § 787 (West 2013).

97. *See id.* § 780(c).

98. *See id.* § 1101(a).

99. *See id.* § 1101(c).

100. *See id.* § 786.

101. *See id.* § 787.

Right to Truth-in-Evidence provision. Proposition 8 has introduced the prior bad acts doctrine. But under the relevance provisions of the Code, any character evidence relating to credibility—not just veracity—would be relevant.[102] Accordingly, evidence of a witness's prior drug use should now be admissible to establish the witness's predisposition to be under the influence of that drug on the occasion in question.

3. Felony Convictions

Evidence Code section 788 embodies the common law rule that a witness's credibility can be attacked by evidence that the witness has been convicted of a crime.[103] Section 788 follows this tradition by allowing a party to impeach a witness by evidence that the witness has been convicted of a felony.[104]

The California Evidence Code justifies the use of convictions to impeach witnesses on the basis of a character theory of relevance.[105] Convictions allow the fact finders to consider the misconduct underlying the conviction as evidence of a flaw in the witness's character for truth telling under oath. Logically, only convictions for criminal misconduct that is probative of a witness's predisposition to lie under oath should be admissible. The Code, however, does not limit the use of convictions to those involving dishonesty or false statement. Moreover, the Code does not distinguish between convictions predicated on negligence or strict liability and convictions based on a higher *mens rea*, such as recklessness, knowledge or purpose, or the nature of the crime committed. Section 788 permits impeachment by any felony conviction.[106] Accordingly, the impeaching party may use even felony convictions based on unintentional misconduct having no probative value on the witness's predisposition to lie under oath.

The logical flaw in section 788 could have been eliminated if the California Legislature had adopted the recommendation of Professor James H. Chadbourne who, at the request of the California Law Revision Commission, prepared the study that eventually gave rise to the Evidence Code. He recommended a rule that would have limited convictions offered to impeach a witness to those in which an essential element of the crime is dishonesty or false statement.[107] Perjury is an example of such a crime. A violation requires proof that a person knowingly stated as true a material matter the person knew to be

102. *See id*. §§ 210, 780.

103. *See id*. § 788.

104. *Id*.

105. *Id*.

106. *Id*.

107. *See* CALIFORNIA LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, ARTICLE IV. WITNESSES 715 (Mar. 1964).

false.[108] But in enacting section 788, the legislature rejected Professor Chadbourne's recommendation and instead opted to retain the approach formerly contained in the Civil Procedure Code. That approach allows a witness to be impeached by any felony conviction.[109]

Section 788, however, does not strip California trial judges of discretion to exclude felony convictions when offered to impeach a witness. Because section 788 merely states that a party "may" show that the witness has been convicted of a felony, the use of the permissive term "may" has enabled the California appellate courts to employ section 352 to formulate rules disfavoring the use of convictions that say little or nothing about a witness's character for lack of veracity but pose a substantial risk of undue prejudice to the objecting party.[110]

Beginning with its 1972 decision in *People v. Beagle*,[111] the California Supreme Court sought to limit impeachment with convictions to those felonies that tell the fact finder something about the witness's character for lack of veracity. The court held that judges should use section 352 to exclude those felonies "when the probative value of such evidence is substantially outweighed by the risk of undue prejudice."[112] To guide judges and litigants, the court specified five circumstances when the risk of undue prejudice outweighs the probative value of the conviction.

First, when the conviction has little or no direct bearing on the witness's lack of veracity, it should be excluded.[113] As a rule, the court held that only convictions involving dishonesty are probative of a witness's lack of veracity.[114] Second, even when the conviction involves dishonesty and is not remote, the conviction should be excluded if it is remote in time and the witness has led a blameless life since the conviction.[115] Third, even when the conviction involves dishonesty, the conviction should be excluded if it is for conduct identical or substantially similar to that for which the witness is on trial.[116] Fourth, where the witness has many convictions, the convictions should be excluded even when they involve dishonesty and are dissimilar to the conduct for which the witness is on trial because of the prejudice inherent in their numbers.[117] Finally, even when the conviction involves dishonesty and is dissimilar to the conduct for which the witness is on trial, it should be excluded when its introduction would deter the witness from taking the stand, and the judge concludes

108. *See* CAL. PENAL CODE § 118 (West 2013).

109. *See* CALIFORNIA LAW REVISION COMMISSION, *supra* note 107, at 716.

110. For extended discussion of how the California appellate courts have limited the use of felony convictions to impeach witnesses, *see* MÉNDEZ, *supra* note 8, § 15.07L.

111. 492 P.2d 1 (Cal. 1972).

112. *Id.* at 4.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

that it is more important to let the jury have the benefit of the witness's testimony than to have the witness remain silent.[118] In *People v. Woodard*[119] the California Supreme Court made it clear that *Beagle* applied to all witnesses, not just the accused, and in all trials, not just criminal cases.[120]

A literal application of Proposition 8's state constitutional mandate that in criminal proceedings any felony conviction be used to impeach a witness "without limitation" would not only overturn *Beagle* and its progeny but would suspend all statutory limitations on the use of convictions. Only the Federal Constitution would constrain the right of parties to criminal proceedings to impeach witnesses with their felony convictions.

Not surprisingly, the California Supreme Court relied on the Fourteenth Amendment to place limits on this provision of Proposition 8. In *People v. Castro*[121] the court held that due process requires the exclusion of felony convictions that do not involve moral turpitude.[122] In the court's view, the use of such convictions offends due process because they say nothing about the witness's lack of veracity.[123] Therefore, to permit the fact finder to consider convictions devoid of moral turpitude would deprive the accused of a fair trial in which the fact finder considers only relevant and competent evidence on the issue of guilt or innocence.[124]

Why are convictions involving moral turpitude probative of a witness's lack of veracity? According to the court, because "a witness's moral depravity of any kind has some 'tendency in reason' . . . to shake one's confidence in his honesty."[125] Which felonies involve moral turpitude? Clearly, felonies involving false statement—of which perjury is the paradigm—since these felonies say something about a witness's willingness to lie under oath.[126] But according to *Castro*, any crime evincing a "readiness to do evil" involves moral turpitude.[127] Presumably, witnesses with such a character trait might do mischief on the stand by disregarding their obligation to testify truthfully under oath.

In determining whether a felony involves moral turpitude, a judge may not consider the evidence that gives rise to the conviction. As the court empha-

118. *Id*.

119. 590 P.2d 391 (Cal. 1979).

120. *Id*. at 395. Applying *Beagle* to civil cases encourages the parties to call witnesses who possess relevant information but who otherwise might not be called if they could be impeached by convictions that do not involve dishonesty or that are remote. In addition to the harm suffered by the parties, "the search for truth in our system of justice is impeded when prior felony convictions are improperly admitted to impeach the credibility of a nonparty witness." *Id*.

121. 696 P.2d 111 (Cal. 1985).

122. *Id*. at 118.

123. *Id*.

124. *Id*. at 119.

125. *Id*.

126. *Id*.

127. *Id*.

sized, if moral turpitude "can only be established through extrinsic evidence, confusion of issues becomes inevitable and unfair surprise more than probable. Therefore, . . . a witness's prior conviction should only be admissible for impeachment if the least adjudicated elements of the conviction necessarily involve moral turpitude."[128] A trial judge, therefore, must determine whether a conviction qualifies from a facial assessment of the statute violated.[129]

As has been noted, Proposition 8 contains two seemingly conflicting positions on a judge's discretionary power to exclude convictions. Section 28(f) of Article 1 of the California Constitution strips judges of any such discretion by requiring that felony convictions be used to impeach witnesses "without limitation."[130] On the other hand, section 28(d) (the Right to Truth-in-Evidence provision) reaffirms a judge's power to exclude relevant evidence whenever its probative value is substantially outweighed by the concerns enumerated in section 352. To reconcile the two constitutional provisions, *Castro* interpreted Proposition 8 as restoring the kind of discretion judges had to exclude convictions for undue prejudice prior to *Beagle*.[131] But in exercising their discretion, judges are to be guided, not bound, by the limitations set out in *Beagle*.[132] Applying these guidelines, the California Supreme Court has held that even a felony conviction involving moral turpitude (voluntary manslaughter) may be excluded under section 352 if it is remote in time (twenty-two years) and the witness has led a blameless life since the conviction.[133]

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128. *Id*. at 120.

129. *See* People v. Feaster, 125 Cal. Rptr. 2d 896, 900 (Cal. Ct. App. 2002). Since *Castro*, the California appellate courts have had to determine whether diverse felonies involve moral turpitude. For a collection of the most significant cases, see MÉNDEZ, EVIDENCE, *supra* note 8, § 15.07.

130. CAL. CONST. art. I, § 28(f).

131. People v. Castro, 696 P.2d 111, 119 (Cal. 1985). Most likely because of its due process concerns, the court did not employ a rule of statutory interpretation that would have exempted section 28(f) from the operation of section 28(d): where constitutional provisions cannot be harmonized or reconciled, the specific provision (section 28(f)) should control the general one (section 28(d)). *See, e.g.,* People v. W. Air Lines, 268 P.2d 723, 732 (Cal. 1954).

132. *See* People v. Clair, 828 P.2d 705, 719 (Cal. 1992) (applying *Beagle* to a witness who was not the accused); People v. Collins, 722 P.2d 173, 175, 182 (Cal. 1986) (applying *Beagle* to the accused).

133. *See Clair*, 828 P.2d at 719. In determining whether the witness has led a blameless life since the conviction, the judge may disregard convictions that are remote. But in assessing whether the witness has led a blameless life for a time sufficiently long to render the conviction remote, the court may discount periods in which the witness was incarcerated. *See* People v. Turner, 878 P.2d 521, 557 (Cal. 1994).

The California Court of Appeal has relied on the continued vitality of section 352 in holding that, even after Proposition 8, trial judges retain discretion to withhold from the jury the nature of a conviction offered to impeach the accused if the conviction is similar or identical to the charge filed against the accused. *See* People v. Ballard, 16 Cal. Rptr. 2d 624, 630-31 (Cal. Ct. App. 1993). In these circumstances, a judge may simply tell the jurors that the accused has been convicted of a crime involving moral turpitude. *Id*.

In his ballot argument in favor of Proposition 8, then-Attorney General Deukmejian argued that the "higher courts of this state [had] created additional rights for the criminally accused" and that the "proposition [would] overcome some of the adverse decisions by our higher courts."[134] Although he did not mention *Beagle* by name, it is inconceivable that the Attorney General did not have *Beagle* and its progeny in mind. But by placing two seemingly contradictory provisions in the same initiative, the proponents opened the door to judicial efforts to reconcile the provisions. The result has been a substantial revival of the *Beagle* rules in criminal cases,[135] though judges and counsel no longer refer to the rules by this name.

4. Misdemeanor Convictions

Under the Evidence Code, misdemeanor convictions may not be used to establish a witness's character for lack of veracity. Only felony convictions may be used for this purpose.[136] Misdemeanor convictions, moreover, may not be used for this purpose in criminal cases under section 28(f) of the initiative, since this provision focuses exclusively on the use of felony convictions. However, misdemeanor convictions that are probative of a witness's character for lack of veracity are relevant. Accordingly, over an irrelevance objection, such convictions are now admissible under the Right to Truth-in-Evidence provision.[137] To qualify for impeachment, however, misdemeanor convictions, like felonies, must evince "moral turpitude."[138]

134. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 34.

135. *See, e.g.*, *Clair*, 828 P.2d at 179 (holding that trial judges may apply the *Beagle* limitations as guidelines); *Collins*, 722 P.2d at 175, 182 (holding that judges may apply the *Beagle* limitations when the accused testifies); *Ballard*, 16 Cal. Rptr. 2d at 630-31 (holding that judges may withhold the nature of the conviction offered to impeach the accused when the conviction is for misconduct similar or identical to the misconduct for which the accused is on trial).

136. *See* CAL. EVID. CODE § 788 (West 2013).

137. *See* People v. Wheeler, 841 P.2d 938, 944 (Cal. 1992).

138. *See id.* at 945. Misdemeanor convictions qualifying as crimes of moral turpitude include possessing a concealed handgun, People v. Robinson, 124 P.3d 363, 385 (Cal. 2005), embezzlement, People v. Martinez, 127 Cal. Rptr. 2d 305, 312 (Cal. Ct. App. 2002), failing to appear in court, People v. Maestas, 34 Cal. Rptr. 3d 503, 506 (Cal. Ct. App. 2005), and sexual battery, People v. Chavez, 100 Cal. Rptr. 2d 680, 682 (Cal. Ct. App. 2000). But misdemeanor simple battery convictions do not qualify as crimes involving moral turpitude. *See* People v. Lopez, 29 Cal. Rptr. 3d 586, 597 (Cal. Ct. App. 2005).

The party opposing the use of a misdemeanor conviction may object on hearsay grounds. For a discussion of how this objection is resolved after Proposition 8, see MÉNDEZ, *supra* note 8, § 15.07.

5. Juvenile Adjudications and Proposition 8

The Evidence Code is silent on whether juvenile adjudications can be used to impeach witnesses. *People v. Sanchez*[139] holds that juvenile adjudications cannot be used because juvenile proceedings are not criminal proceedings and do not result in criminal convictions.[140] But *People v. Lee*[141] holds that in California criminal cases the misconduct giving rise to juvenile adjudications may be used to impeach a witness if the misconduct evinces moral turpitude as required by *Castro* and the juvenile has not been released from the penalties and disabilities arising from the adjudication by having been discharged honorably by the California Youth Authority.[142] In effect, the Right to Truth-in-Evidence provision allows the misconduct giving rise to the juvenile adjudication to be offered as a prior bad act, though the juvenile adjudication itself remains inadmissible.

Under *Lee* it is immaterial whether the juvenile adjudication is for misconduct that violates a felony or misdemeanor.[143] Thus in *Lee* the witness was impeached by evidence of misconduct giving rise to felony burglary as well as misdemeanor theft.[144]

6. Expungement and Proposition 8

As enacted, section 788(c) prohibits the use of felony convictions to impeach a witness where the conviction has been expunged.[145] Under the Penal Code, a defendant who has fulfilled the conditions of probation may move to set aside his guilty plea or guilty verdict and enter a plea of not guilty.[146] If the motion is granted, the court must dismiss the accusations against the defendant, thereby releasing the defendant "from all penalties and disabilities resulting from the offense of which he or she [had] been convicted."[147] Since a conviction that is probative of a witness's lack of veracity is nonetheless legally relevant even if it has been expunged, one would expect the Right to Truth-in-Evidence provision of Proposition 8 to override section 788(c)'s expungement provisions in criminal cases. *People v. Field*,[148] however, holds otherwise. Though expunged convictions say almost nothing about a witness's lack of credibility and should be excluded under a judge's section 352 authority to ex-

139. 216 Cal. Rptr. 21 (Cal. Ct. App. 1985).
140. *Id*. at 23.
141. 34 Cal. Rptr. 2d 723 (Cal. Ct. App. 1994).
142. *Id*. at 730–31.
143. *Id*.
144. *Id*.
145. *See* CAL. EVID. CODE § 788(c) (West 2013).
146. *See* CAL. PENAL CODE § 1203.4 (West 2013).
147. *Id*.
148. 37 Cal. Rptr. 2d 803 (Cal. Ct. App. 1995).

clude evidence of dubious value, *Field* mistakenly holds that such convictions are inadmissible because they are irrelevant.[149]

Expunged convictions are also implicated by the initiative's constitutional provision mandating the use of felony convictions for impeachment without limitation. The defendant in *Field* urged the appellate court to use this provision to authorize the use of expunged felony convictions to impeach a witness. But the court declined to do so. It held the provision inapplicable because "by virtue of expungement, there no longer is a prior conviction."[150]

Section 788 prohibits the use of felony convictions in four circumstances. A felony conviction may not be used to impeach a witness where (1) a pardon based on the witness's innocence has been granted by the jurisdiction in which the witness was convicted, (2) a pardon has been granted on the basis of a certificate of rehabilitation, (3) the conviction has been expunged because the felon has fulfilled the conditions of probation, or (4) the witness has been convicted by another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to procedures substantially equivalent to those described in (2) and (3).[151]

These limitations, however, conflict with section 28(f)'s constitutional mandate that felony convictions be used without limitation and section 28(d)'s constitutional mandate to admit relevant evidence, and presumably have been repealed by the initiative in criminal cases. Nonetheless, because the probative value of these convictions on the witness's character for lack of veracity would appear at best to be slight, they should ordinarily be subject to exclusion under section 352 as unduly prejudicial.

7. Reputation and Opinion Regarding Veracity

Evidence Code sections 786-87 permit a party to impeach the credibility of a witness by opinion or reputation evidence impugning the witness's character for honesty or veracity.[152] The same sections also permit a party to rehabilitate a witness by opinion or reputation evidence supporting the witness's character for honesty or veracity.[153] But under section 790, evidence of the witness's good character is inadmissible unless the witness's character has first been attacked and then only if the attack takes one of two forms—by opinion or reputation evidence impugning the witness's character for honesty or veracity,[154] or

149. *Id*. at 810. Evidence that a witness has been convicted of a crime that is probative of the witness's character for lack of veracity is relevant irrespective of whether the conviction has been expunged. For an extended discussion of this point, see MÉNDEZ, EVIDENCE, *supra* note 8, § 2.04.

150. *See Field*, 37 Cal. Rptr. at 810.

151. *See* CAL. EVID. CODE § 788(a)-(d) (West 2013).

152. *See id*. §§ 786-87.

153. *Id*.

154. *See id*. § 786.

by a felony conviction.[155] Prior bad acts do not qualify because the Code, as previously noted, does not recognize the doctrine.

In criminal cases, a literal application of Proposition 8 repeals the statutory and judicial restraints on the use of character evidence to attack or support the credibility of witnesses. A literal interpretation of the Right to Truth-in-Evidence provision has the following effects:

First, it repeals section 790, which prohibits the introduction of good character evidence until after the witness's character for honesty and veracity has been attacked.[156] A witness's credibility becomes an issue the moment the witness takes the stand. Therefore, the calling party should be able to support the witness's credibility even though it has not been attacked. Accordingly, *People v. Taylor* holds that a criminal defendant who takes the stand is entitled to offer good character evidence of his honesty and veracity even if the prosecution has not first attacked the defendant's character as a witness.[157]

Second, in proving a witness's character for honesty or dishonesty, the proponent is no longer limited to reputation or opinion evidence. Because specific instances of honesty or dishonesty are also probative of a witness's character for honesty or dishonesty, specific acts are now admissible. *People v. Harris*, for example, holds that the prosecution may prove an informant's predisposition to testify honestly at the trial by evidence of his past reliability as an informant,[158] and *People v. Adams* holds that the accused in a rape prosecution may prove the complaining witness's character for dishonesty as a witness by evidence that she had falsely accused others of rape.[159] Accordingly, Proposition 8 repeals section 787, which bans the use of specific acts (other than convictions) to prove a witness's character for veracity or lack of veracity.[160] Since this outcome favors defendants as well as prosecutors, it is doubtful that the proponents of Proposition 8 foresaw the benefits that could accrue to defendants in an admittedly anti-defendant initiative.

The use of character evidence—whether in the form of opinion, reputation, or specific acts—is still subject to discretionary exclusion under section 352 after Proposition 8. A California judge can exclude all or some of this evidence if its prejudicial effects substantially outweigh its probative value on the witness's character for honesty or dishonesty. Where the witness who is to be impeached by the character evidence is the accused, special concerns arise. A risk exists that the jury might improperly convict the accused on account of his or

155. Convictions are admissible on the theory that they are probative of a witness's character for lack of honesty and veracity. *See id.* § 788. Accordingly, their use permits a witness to be rehabilitated by good character evidence for honesty and veracity in the form of opinion or reputation evidence. *See id.* §§ 787, 790, and comments.

156. *See id.* § 790.

157. 225 Cal. Rptr. 733, 738 (Cal. Ct. App. 1986).

158. 767 P.2d 619, 639-41 (Cal. 1989).

159. 243 Cal. Rptr. 580, 584 (Cal. Ct. App. 1988).

160. *See* CAL. EVID. CODE § 787 (West 2013).

her bad character rather than upon the evidence of his or her guilt. The risk is especially pronounced when the prosecution seeks to impeach the accused with specific acts of dishonesty that are similar to the offenses charged against the accused. In this circumstance, judges can use section 352 to diminish the risk so as to ensure that those accused of crime are convicted on the basis of evidence of what they did and not who they are.

8. Religious Beliefs

To prevent the injection of religious bias in trials,[161] Evidence Code section 789 prohibits the use of a witness's religious beliefs (or lack thereof) to establish the witness's character for veracity or lack of veracity.[162] The Code does not prohibit the use of a witness's religious affiliations if offered for some other purpose, for example, to prove bias or interest. In criminal cases, however, the Right to Truth-in-Evidence provision repeals the Code's prohibition on the use of a witness's religious beliefs to attack or support the credibility of the witness. Evidence that a witness belongs to a religious organization that prohibits "bearing false witness" would be probative of the witness's predisposition to tell the truth under oath, and hence would be relevant. The California appellate courts, however, have yet to pass on the effect on section 789 of the Right to Truth-in-Evidence provision.

9. Inconsistent Statements

The Code recognizes that a witness's credibility can be impeached by evidence that the witness has made statements that are inconsistent with the witness's testimony at the trial.[163] The Code abandons the common law requirement that before witnesses can be asked about their prior inconsistent statements, the examiner must disclose the contents of the statement to the witness.[164] Disclosure diminishes the effectiveness of the attack by removing the element of surprise and giving dishonest witnesses an opportunity to reshape their testimony in conformity with their earlier statements.[165]

The Code also rejects the common law requirement that a party confront the witness with the prior inconsistent statement before offering extrinsic evidence of the statement.[166] From an advocacy perspective, confronting the witness with the prior statement has advantages. The examiner may persuade the witness to acknowledge making the prior statement and to adopt it as reflecting

161. *See* CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 46 (Kenneth S. Broun et al. eds., 7th ed. 2006).

162. *See* CAL. EVID. CODE § 789.

163. *See id.* § 770.

164. *See id.* § 769.

165. *See id.*

166. *See id.*

the truth. If she fails in this endeavor, the examiner is still free to impeach the witness with the statement.[167]

In some cases, however, the examiner may not want to confront the witness with his prior inconsistent statement. Disclosure may prevent the effective cross-examination of several collusive witnesses.[168] Accordingly, the Code permits the examiner to forego confronting the witness.[169] The examiner will still be allowed to offer extrinsic evidence of the statement, so long as the witness has not been permanently excused from giving further testimony in the action.[170] Since the unexcused witness remains subject to being recalled, the opposing party and the witness are afforded an opportunity to have the witness explain or deny the statement before the evidence is closed.[171]

Where the interests of justice require, the Code permits the introduction of extrinsic evidence of an inconsistent statement even though the witness has been excused and has not had an opportunity to explain or deny the statement.[172]

> An absolute rule forbidding introduction of such evidence where the specified conditions are not met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available to testify.[173]

A literal interpretation of the Right-to-Truth provision of Proposition 8 would repeal the Code limitations on the use of extrinsic evidence to prove a witness's prior inconsistent statement. Such a statement would be probative of the witness's credibility irrespective of whether the witness has been given an opportunity to explain or deny the statement before the close of the evidence. The California courts, however, have not decided whether the initiative has repealed these restrictions.[174]

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167. *See* MÉNDEZ, *supra* note 8, § 15.03. Moreover, if the examiner anticipates claiming in summation that the witness lied, the examiner is likely to confront the witness with the prior inconsistent statement. Jurors are more likely to accept this claim when the examiner confronts the witness directly. Conversely, if the examiner simply anticipates claiming that the witness was mistaken, the examiner may forego confronting the witness with the prior inconsistent statement.

168. *Id*.

169. *Id*.

170. *Id*. § 770(b).

171. *Id*.

172. *Id*. § 770.

173. *Id*.

174. A post-Proposition 8 decision discussing the need to give the witness an opportunity to explain or deny the statement fails to mention the impact of Proposition 8 on this requirement. *See* People v. Garcia, 273 Cal. Rptr. 666, 669-70 (Cal. Ct. App. 1990).

10. Prior Consistent Statements

Evidence Code section 791 allows a party to support the credibility of witnesses with statements by the witnesses that are consistent with their testimony if one of two conditions is satisfied.[175] First, if the witness was impeached with a prior inconsistent statement, the witness can be rehabilitated with a consistent statement, if the statement was made before the alleged inconsistent statement.[176] Second, where the witness has been expressly or impliedly charged with fabricating his testimony or allowing bias or other improper motive to shape his testimony, the witness can be rehabilitated with a prior consistent statement if the statement was made before the motive to fabricate or other improper motive is alleged to have arisen.[177]

Evidence that a witness has made statements that are consistent with his testimony is as probative of the witness's credibility as is evidence that the witness has made statements that are inconsistent with his testimony. A witness's credibility becomes an issue the moment the witness takes the stand. Accordingly, a literal application of the Right to Truth-in-Evidence provision repeals the limitations of section 791 and permits parties in criminal proceedings to offer prior consistent statements to support the witness's credibility even though the witness's credibility has not been attacked. The fact that the Code creates a hearsay exception for prior consistent statements does not exempt them from the operation of the Right to Truth-in-Evidence provision. Section 1236 simply creates a hearsay exception for prior consistent statements.[178] It does not purport to regulate the circumstances of their admissibility. Section 791, on the other hand, is limited to prescribing the circumstances when prior consistent statements may be offered to support the credibility of a witness. Only if the offering party first satisfies one of the conditions of admissibility under section 791, may that party take advantage of the hearsay exception in section 1236.

Nonetheless, under Proposition 8, judges can still exclude evidence of prior consistent statements under section 352 if they determine that their probative value is substantially outweighed by such concerns as waste of time. A California judge could thus find that the probative value of prior consistent statements that fail to satisfy the conditions of section 791 is so slight that they do not justify the time needed to receive them. But whether a judge will use section 352 to exclude such statements in a given trial cannot be known *ex ante*. The judge's decision may well depend on her assessment of the need for the evidence and the time required to receive it. To be sure, neither the California Supreme Court nor the Court of Appeal has decided whether Proposition 8 repeals section 791, and cases decided since the adoption of the initiative in June 1982

175. *See* CAL. EVID. CODE § 791 (West 2013).
176. *See id*. § 791(a).
177. *See id*. § 791(b).
178. *See id*. § 1236.

assume the continuing validity of the section.[179] The point, however, is not when the appellate courts will determine whether section 791 has been repealed by the Right to Truth-in-Evidence provision. Rather, it is that the certainty supplied by such sections as 791 has now been replaced by the necessarily imprecise standards of section 352. As we shall see, trial lawyers do not welcome this kind of uncertainty in planning their trials. Nor do most trial judges relish the task of having to engage in a section 352 on-the-record analysis when in former times sustaining an objection on the basis of a clear, simple rule would take care of the matter.[180]

E. *Competency of Witnesses*

The Evidence Code disqualifies persons from testifying if they cannot express themselves in a manner in which they can be understood or cannot understand their duty to testify truthfully.[181] The competency requirements would prevent a person from offering otherwise admissible relevant testimony if that person, for example, does not understand the duty to testify truthfully. The fact that such a person might not be credible would not render his or her testimony irrelevant. Although credibility is an aspect of relevance, it is not the only one.

Under the Evidence Code, an item of evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[182] In other words, the item of evidence must be material, that is, it must be directed at proving a proposition that is properly provable in the action.[183] In a homicide prosecution, for example, testimony by a witness with first-hand knowledge that she saw the defendant shoot the victim would be material. That testimony is directed at proving a fact (the identity of the perpetrator) that is properly provable in that kind of an action. Her testimony remains material and therefore relevant even if the witness does not appreciate her duty to testify truthfully and could impeached on that basis. Since the competency requirements can bar relevant testimony, they are repealed by a literal application of the Right to Truth-in-Evidence provision of Proposition 8.

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179. *See, e.g.*, People v. Hayes, 802 P.2d 376, 394 (Cal. 1990); People v. Frank, 798 P.2d 1215, 1224 (Cal. 1990); People v. Andrews, 776 P.2d 285, 289-91 (Cal. 1989).

180. Trial judges are required to engage in on-the-record weighing in order to provide reviewing courts with an adequate record for meaningful review of claims of abuse of discretion under Evidence Code section 352. *See, e.g.*, People v. Green, 609 P.2d 468, 482 (Cal. 1980). No such weighing is required when a judge excludes the evidence by properly sustaining the opponent's objection to the introduction of evidence that is based on a specific rule of evidence. Thus, as a trial management matter, it was easier for trial judges to administer the admissibility of evidence prior to the enactment of the Right to Truth-in-Evidence provision of Proposition 8.

181. *See* CAL. EVID. CODE § 701(a) (West 2014).

182. *See id.* § 2.10.

183. *See generally* MÉNDEZ, *supra* note 8, § 2.01.

Under the Evidence Code, the competency requirements are not limited to ordinary witnesses; they apply also to judges and jurors called as witnesses. Over the objection of a party, judges may not testify as witnesses in trials over which they preside.[184] As the California Law Revision explains:

> Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party a judge appears in a partisan attitude before the jury. Objections to questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally.[185]

Against objection of a party, jurors sworn and impaneled in the trial of an action may not testify before the jury in that trial as witnesses.[186] According to the California Law Revision Commission:

> A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight.[187]

It is immaterial whether the judges' or jurors' testimony would constitute admissible relevant evidence. Precisely because the disqualifications bar the introduction of relevant evidence, they are repealed by a literal application of the Right to the Truth-in-Evidence provision. To date, however, no appellate court has ruled on the initiative's effect on the rules prohibiting the use of judges' or jurors' testimony.

In California post-verdict proceedings, jurors may be called to testify about "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such character as [are] likely to have influenced the verdict improperly."[188] But to protect jurors from harassment, jurors may not testify about the effect such statements, conduct, conditions, or events had in influencing them to assent or dissent from the verdict or upon the mental pro-

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184. *See* CAL. EVID. CODE § 703 (West 2014).

185. *Id*.

186. *See id*. § 7.04(b).

187. *Id*.

188. *See* CAL. EVID. CODE § 1150 (West 2013). A trial judge is not limited to considering declarations and affidavits in determining whether juror misconduct has occurred. The judge may hold an evidentiary hearing on the question of misconduct. However, the judge does not need to hold the hearing unless the party charging the misconduct convinces the judge that the hearing will be productive. Where the misconduct evidence to be produced at the hearing consists of inadmissible hearsay, the judge may decline to hold the hearing. *See* People v. Hayes, 989 P.2d 645, 673 (Cal. 1999).

cesses by which they reached the verdict.[189] Thus, the Code permits evidence of misconduct by trial jurors to be received but forbids the receipt of juror evidence about the effect of such misconduct on the deliberations of the jurors.[190]

In proceedings to set aside a guilty verdict, however, the central question is usually whether the erroneous admission of evidence, the use of improper jury instructions, or juror misconduct prejudiced the defendant. Jurors would be the best source of the effect such evidence, instructions, or misconduct had on their deliberations. Accordingly, a literal application of the Right to Truth-in-Evidence provision would repeal the Evidence Code restrictions. In *People v. Steele*,[191] however, the California Supreme Court rejected this construction of Proposition 8 with respect to evidence of juror misconduct. The court saved the Code's prohibition by holding that it is a substantive, not an evidentiary, limitation. If the bar against the use of evidence proving the effect of the erroneous admission of evidence is substantive, then no party may offer such evidence. Any such evidence would be immaterial because it would be directed at a proposition that is not properly provable at the hearing. Immaterial evidence is irrelevant.[192] This construction allowed the court to conclude that evidence of the effect of juror misconduct can still be excluded because it is outside the purview of the relevance provision of Proposition 8.[193]

As in the case of expert evidence, it is unlikely that the proponents of Proposition 8 intended to repeal the Evidence Code's restrictions on the use of juror testimony, especially since defendants would most likely be the party offering such testimony. Again, a problem with complex initiatives is that they can have unanticipated consequences.

F. *The Best Evidence Rule*

When Proposition 8 was approved by the voters in 1982, California followed the Best Evidence Rule. Unless certain exceptional circumstances existed, the Best Evidence Rule required the content of a writing to be proved by the original writing and not by testimony recounting its contents or by a copy of the writing.[194] A major purpose of the rule was to minimize the possibility of misinterpretation that could occur if the production of the original writing was not

189. *See* CAL. EVID. CODE § 1150 (West 2014). Other goals include preserving the stability of verdicts, discouraging postverdict jury tampering, and protecting the privacy of jury deliberations. *See In re* Hamilton, 975 P.2d 600, 614 n.18 (Cal. 1999).

190. *See* CAL. EVID. CODE § 1150 (West 2014); *see also In re* Hamilton, 975 P.2d at 616, n.19 (1999) ("However, the rule against proof of juror mental processes is subject to the well-established exception for claims that a juror's preexisting bias was concealed on voir dire.").

191. 47 P.3d 225, 247 (Cal. 2002).

192. For an extended discussion of this point, *see* MÉNDEZ, *supra* note 8, § 2.01.

193. *Steele*, 47 P.3d at 247.

194. *See* former CAL. EVID. CODE § 1500 (repealed 1998).

required to prove its contents.[195] Accordingly, if before the initiative the defense offered in evidence a writing claimed to be a confession by a third party, the defense had to authenticate the writing as the third party's. Moreover, in the absence of exceptions, the defense had to persuade the judge that the writing was the original confession.[196]

But after the initiative, once the writing is authenticated as the third party's, his admissions become relevant. This is true irrespective of whether the writing offered is the third party's original confession or even if instead of the writing the defense offers the testimony of a witness who claims first-hand knowledge about the contents of the writing. In short, the effect of the Right to Truth-in-Evidence provision was to repeal the Best Evidence Rule in criminal cases. However, there are no published opinions about the effect of the initiative on the Best Evidence Rule. The most plausible explanation is that neither prosecutors, defense counsel, nor presiding judges imagined that the Right to Truth-in-Evidence provision repealed the well-established Best Evidence Rule.

The effect of the initiative became moot in 1999 when the legislature replaced the Best Evidence Rule with the Secondary Evidence Rule by the required super-majority.[197] The new rule generally allows a party to prove the contents of a writing by an otherwise admissible original or secondary evidence of the original.[198] In criminal cases, however, the Secondary Evidence Rule requires the court to exclude secondary evidence of the content of a writing if the judge determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before the trial.[199]

Like the Best Evidence Rule, the Secondary Evidence Rule disfavors the use of testimony to prove the contents of a writing. Oral testimony is admissible only if (1) the proponent does not have possession or control of a copy of the original and the original was lost or destroyed without fraudulent intent on the part of the proponent, or (2) the proponent does not have possession or control of the original or a copy of the original and (a) neither the original nor a copy was reasonably procurable by the proponent by use of the court's process

195. *See generally* MÉNDEZ, *supra* note 8, § 13.06.

196. In addition, the defense would have to overcome the prosecution's hearsay objection. The confession would be hearsay, as it would be offered by the defense to prove the truth of the matter asserted, namely, the third party's responsibility for the crime charged against the accused. The confession, however, would be admissible under the exception for declarations against penal interest if the defense persuades the judge of the unavailability of the third party to appear as a witness. *See* CAL. EVID. CODE § 1230 (West 2013).

197. *See* CAL. EVID. CODE § 1521 (West 2013). The Secondary Evidence Rule became operative on January 1, 1999. *Id*. The vote in the Senate was 33 to 2 and in the Assembly, 56 to 15. *See Complete Bill History, S.B. No. 177*, OFFICIAL CAL. LEGIS. INFO., http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0151-0200/sb_177_bill_19980706_history.html (last visited May 7, 2014).

198. *See id*.

199. *See id*. § 1522(a).

or other available means, or (b) the writing is not closely related to the controlling issues in the case and it would be inexpedient to require its production.[200] Returning to our example, only if the defense complies with one of these conditions would it be allowed today to offer testimony about the contents of a written confession that has been authenticated as the third party's.

II. PROPOSITION 8 AND THE INSANITY DEFENSE

As discussed in the introduction, under the *M'Naghten* test, a defendant can be acquitted on the grounds of insanity if at the time he committed the offense he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, *or* if he did know its nature and quality, he did not know that his act was wrong.[201] However, Penal Code section 25(b), which was added by section 4 of Proposition 8,[202] uses "and" instead of "or" in setting out the two prongs.[203] In the case of a defendant charged with homicide by strangulation, the use of the conjunctive would require a defendant to prove that by reason of a mental disease he not only thought that he was squeezing lemons but also that he believed that there was nothing wrong with squeezing necks. As the introduction underscores, such a test has been described as the "wild beast" test because of the belief that such extreme cognitive dysfunctions reduce a human to the cognitive level of a wild beast.[204] Confronted with the question whether the use of the conjunctive instead of the disjunctive was a drafting error, the California Supreme Court in *People v. Skinner*[205] held that it was.[206]

Prior to the codification of the insanity test by Proposition 8, California had no statutory definition of insanity, and the courts employed the *M'Naghten* test as a result of judicial decision.[207] In *People v. Drew* the California Supreme Court replaced the *M'Naghten* test with the more liberal test formulated by the American Law Institute.[208] Unlike *M'Naghten* the A.L.I. test also includes a volitional prong: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks a substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."[209] As the court explained:

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200. *See id*. § 1523(b)-(c).
201. *See* LAFAVE, *supra* note 30, § 7.1.
202. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 33.
203. *See* CAL. EVID. CODE § 25(b) (Deering 2008).
204. *See* People v. Skinner, 704 P.2d 752, 759 (Cal. 1985).
205. *Id*. at 752.
206. *Id*. at 759.
207. *See* People v. Drew, 583 P.2d 1318, 1321 (Cal. 1978).
208. *Id*. at 1326.
209. *See* MODEL PENAL CODE § 4.01(1) (Am. Law Inst. 1962).

> *M'Naghten*'s exclusive emphasis on cognition would be of little consequence if all serious mental illness impaired the capacity of the affected person to know the nature and wrongfulness of his action. Indeed, the early decision of *People v. Hoin*, rejecting the defense of "irresistible impulse," rested on this gratuitous but doubtful assumption. Current psychiatric opinion, however, holds that mental illness often leaves the individual's intellectual understanding relatively unimpaired, but so affects his emotions or reason that he is unable to prevent himself from committing the act. "[I]nsanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as a result of the mental disease."[210]

Because the subsequent codification of the definition of insanity was effected through Proposition 8, the court reviewed the ballot summaries and arguments and found them unhelpful.[211]

> The Attorney General's summary of Proposition 8 advises only that the measure included a provision "regarding . . . proof of insanity." The analysis of the Legislative Analyst quotes the conjunctive language and states only that the provision "could increase the difficulty of proving that a person is not guilty by reason of insanity." No reference to the insanity provision appears in the arguments for or against Proposition 8.[212]

The court turned to the history of the insanity defense and found that the use of the *M'Naghten* test since 1850 had been accepted:

> [A]s the rule by which the minimum cognitive function which constitutes wrongful intent will be measured in this state. As such it is itself among the fundamental principles of our criminal law. Had it been the intent of the drafters of Proposition 8 or of the electorate which adopted it both to abrogate the more expansive ALI-Drew test and to abandon that prior fundamental principle of culpability for crime, we would anticipate that this intent would be expressed in some more obvious manner than the substitution of a single conjunctive in a lengthy initiative provision.[213]

Having framed the issue as one implicating fundamental principles of criminal responsibility, the court concluded that the drafters of the initiative had inadvertently erred when they used "and" instead of "or" in defining the two prongs of the insanity test.

As the court recognized, the problem with Proposition 8 is that a literal application of its language would have made sweeping and radical changes to California's law of criminal responsibility. Other than the use of "and" instead

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210. *See Drew*, 583 P.2d at 1322 (citations omitted).

211. *See* People v. Skinner, 704 P.2d 752, 758 (Cal. 1985).

212. *Id.* (citations omitted). In his argument in favor of Proposition 8, Mike Curb, the Lieutenant Governor, did argue that by approving Proposition 8 voters would "limit the ability of violent criminals to hide behind the insanity defense." CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 56. But it is unclear whether he had the *M'Naghten* or "wild beast" test in mind.

213. *See Skinner*, 704 P.2d at 759.

of "or," the court was unable to find any language in the initiative that conveyed an informed choice by the electorate to revert to the wild beast test of insanity. Of course, this is not surprising, since only criminal law experts (e.g., the criminal bench, the criminal bar, criminal law professors, and law students fortunate enough to have a comprehensive criminal law course) would understand the relationship of mental illness to *mens rea* and criminal responsibility. Only they would understand that a literal construction of the provision would place California in a class of one when defining insanity. But even the court's construction of Proposition 8 is troubling in this respect. To believe that voters chose to return only to the *M'Naghten* test assumes that voters understood the relationship of mental disease to volition and of volition to the fundamental principles of criminal responsibility, including a blameworthy state of mind. Of course, ballot statements are hardly the means to instruct on these difficult criminal law concepts. But if they are not, should such choices be placed before the electorate?

III. PROPOSITION 8 AND INTOXICATION AND DIMINISHED CAPACITY EVIDENCE

California adopted its most influential penal code in 1872. Although extensively amended, it has endured to this day. Section 22 of the Penal Code as originally enacted provided that "[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition."[214] The next sentence, however, undercut this prohibition by providing that:

> [W]henever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.[215]

Section 22 could thus be viewed as a legislative compromise, one that disallows the use of intoxication to escape criminal liability unless it disproves some mental element of the offense charged.

The problem with this view is that the legislature's choice of terms in the second sentence makes this construction less than certain. Terms such as "particular purpose" or "intent" do not embrace the entire universe of mental states. Today, with the benefit of the Model Penal Code, we know that offenses can be committed purposely, knowingly, recklessly, negligently, and even without any state of mind.[216] Logically, intoxication can disprove purpose, knowledge, and recklessness if one accepts the scientific claim that intoxication reduces or destroys cognitive capacity. But the framers of section 22 did not have the benefit

214. CAL. PENAL CODE § 22 (1872).

215. *Id*.

216. *See* MODEL PENAL CODE §§ 2.02(1)-2.02(2) (Am. Law Inst. 1962).

of the clarity introduced by the Model Penal Code. The legislators used terms familiar in their times, including "motive," which today is generally understood as evidence that may help prove an element of a particular offense, but is not necessarily as an element of the offense itself.

To eliminate the uncertainties inherent in section 22, in *People v. Hood,* the California Supreme Court adopted the "specific" and "general" intent formulation.[217] According to the court, a defendant could offer evidence of his voluntary intoxication under section 22 only to disprove the mental state of a "specific intent" but not a "general intent" offense.[218] To guide judges and parties in determining whether intoxication should be admitted, the court provided the following definitions:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.[219]

This construction of section 22 remained intact until shortly after Dan White's infamous assassinations of San Francisco Mayor George Moscone and Supervisor Harvey Milk in 1978. In its case-in-chief, the prosecution made out a prima facie case that White, a former member of the board of supervisors, had killed Moscone and Milk with express malice.[220] The defense countered with evidence that White killed while under the heat of passion (specifically, rage upon finding out from the mayor that he was not going to be reappointed to the board of supervisors) and under circumstances that impaired his capacity to harbor malice aforethought, the element that distinguishes murder from manslaughter, and to premeditate and deliberate, the elements that distinguish first degree from second degree murder.[221] Apparently choosing to rely on the defense experts, the jury returned voluntary manslaughter convictions.

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217. 462 P.2d 370, 371 (Cal. 1969).

218. *Id.* at 378.

219. *Id.*

220. For an extended statement of the evidence presented in this prosecution, see generally Miguel A. Méndez, *Diminished Capacity in California: Premature Reports of its Demise,* 3 STAN. L. & POL'Y REV. 216 (1991).

221. *Id.* at 219. Some of the evidence offered by the defense in support of diminished capacity instructions focused on the effect that excessive consumption of sugar had on Dan White's inability to form an intent to kill. Because much of his sugar intake resulted from his consumption of Twinkies, the press labeled this evidence as the "Twinkie Defense." The jury, however, convicted Dan White of voluntary manslaughter, which at the time required proof that White intended to kill his victims. Had the jury accepted the defense evidence of diminished capacity, the jury would have convicted White of involuntary (negligent) manslaughter, as they would have accepted the defense claim that White did not have the ability to entertain the mens rea of either murder or voluntary manslaughter. For further discussion of this point, see *id.* at 222-23.

Much of the public disagreed with their verdict, however. By nightfall on the day the verdicts were announced, several thousand protestors surrounded San Francisco's city hall, where a brawl broke out between them and the police. Before the night was out, over 120 people were injured, many more were arrested, and property damage totaled tens of thousands of dollars. Members of San Francisco's gay community were especially offended by a verdict that seemingly devalued the life of the city's top gay leader, Harvey Milk, a verdict that in their view allowed Dan White to literally get away with murder. Their sense of injustice was shared by many others and prompted the introduction of Senate Bill 54 (SB 54) the following year.[222]

When introduced in December 1980, SB 54 took direct aim at those provisions of California law that had allowed Dan White's experts to contest the *mens rea* of the murder charges. As enacted in September 1981, SB 54 amended the Penal Code by declaring that, "[a]s a matter of public policy, there shall be no defense of diminished capacity."[223] To dispel any uncertainties about the legislature's intention, a companion provision as enacted stated that "[e]vidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state."[224] A final enacted provision prohibits mental health experts from telling jurors whether the defendant entertained the mental state of the crime charged at the time of its commission.[225]

Although Dan White had not offered any evidence of intoxication, another provision targeted its use in disproving the *mens rea* of an offense. As enacted, it provided that:

> (a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crime charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.[226]

But the legislature's resolve to crack down on criminals was less firm than initially appears. As finally approved, SB 54 allowed the mental disease, defect, or disorder evidence to be offered "solely on the issue of whether or not the accused actually formed" the *mens rea* of the offense charged.[227] In the case of intoxication, a parallel provision states that:

> Whenever the actual existence of any mental state, including, but not limited to, purpose, intent, knowledge, or malice aforethought is a necessary element

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222. *Id*. at 222-23.

223. *See* CAL. PENAL CODE § 28(c) (West 2001).

224. *Id*. § 28(a).

225. *Id*. § 29.

226. *See* CAL. PENAL CODE § 22(a) (West 2013).

227. *Id*. The provision was subsequently amended to limit the evidence to disproving the mental state only of specific intent offenses.

> to constitute any particular species of or degree of crime, evidence that the accused was voluntarily intoxicated at the time of the commission of the crime is admissible on the issue as to whether the defendant actually formed any such mental state.[228]

A facial analysis of the intoxication section reveals that this provision eliminated the general intent offense limitation imposed by *Hood* and, instead, substituted a relevance approach. If intoxication helps disprove "any mental state," it is admissible irrespective of whether the crime charged is designated as a general or specific intent offense.

The relevance approach of SB 54 is consistent with the Right to Truth-in-Evidence provision. Indeed, the initiative would go further by allowing the intoxication evidence to also disprove a defendant's capacity to form the mental state of the offense charged. It is ironic that two anti-crime measures, SB 54 and Proposition 8, had the effect of freeing defendants from the *Hood* restrictions on the defense use of intoxication evidence.

In late 1982, the legislature re-enacted section 22 by the required supermajority but with a significant change. The amendment revived *Hood* by providing that "[e]vidence of voluntary intoxication [would be] admissible solely on the issue of whether or not the defendant actually formed a required specific intent when a specific intent crime is charged."[229]

Although the intoxication provisions of SB 54 play a significant role in the trial of criminal cases, it was the evidence of diminished capacity introduced at Dan White's trial that moved the legislature to enact SB 54. As originally enacted, section 28(a) of the Penal Code prohibited the use of evidence of "mental disease, mental defect, or mental disorder" "to negate the capacity to form any mental state . . . with which the accused committed the act."[230] But as in the case of the intoxication statute, the legislature's resolve turned out to be less than firm. A second sentence allowed the use of the very same evidence to prove that the accused did not "actually" form the mental state of the offense charged.[231]

Opening the door to this kind of evidence would, of course, be consistent with the Right to Truth-in-Evidence provision. Moreover, as in the case of the intoxication statute, the initiative would be even more generous to defendants. It would allow them to offer the diminished capacity evidence to disprove as well their capacity to form the mental state of the offense charged. To avoid this outcome, in August 1982 the legislature re-enacted section 28 by the supermajority vote required by Proposition 8. It now limits the use of evidence of "mental disease, mental defect, or mental disorder" "solely on the issue of

228. *See id*. § 22(b) (West 2013). For a summary of the history of SB 54, including its predecessors, see Méndez, *supra* note 220, at 219 n.15, 220 n.16.

229. *See* CAL. PENAL CODE § 22(b) (1982).

230. *See id*. § 28(a).

231. *Id*.

whether or not the accused actually formed a required specific intent . . . when a specific intent crime is charged."[232]

The mischief caused by the Right to Truth-in-Evidence provision went even further. SB 54 also added section 29 to the Penal Code. This section prohibits an expert from telling the jurors whether a defendant's mental illness, disorder, or defect prevented the defendant from forming the mental state of the crime charged.[233] "The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."[234] But an expert's testimony about whether a defendant entertained the mental state of crime charged on account of mental infirmities is obviously relevant. Accordingly, SB 54's restriction was repealed by the Right to Truth-in-Evidence provision. To nullify this outcome, in 1984 the legislature re-enacted section 29 by the super-majority vote required by Proposition 8.

Until Proposition 8 was enacted, SB 54 was California's major anti-crime measure. It says something about the shortcomings of Proposition 8 that the initiative, itself anti-crime measure, undermined the aims of SB 54 until the legislature came up with corrective action.

IV. ADDITIONAL LEGISLATIVE PATCHES

A. *Hypnotized Witnesses*

In *People v. Shirley*, the California Supreme Court held that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the hypnotic session forward."[235] The court was not convinced that the relevant scientific community had generally accepted the use of hypnosis to restore the memory of a potential witness as a reliable technique.[236] On the contrary, the court was troubled that "[d]uring the hypnotic session, neither the subject nor the hypnotist [could] distinguish between memories and pseudo memories . . . and when the subject [repeated the] recall in a waking state (e.g., in a trial) neither an expert nor a lay observer (e.g., the judge or jury) [could] make a similar distinction."[237] The court was equally concerned with the ineffectiveness of cross-examination in exposing pseudo memories. Since a witness who has undergone hypnosis sincerely believes that his testimony on the stand is his true recall and not the product of deliberate or inadvertent suggestion dur-

232. *See id*.
233. *See* CAL. PENAL CODE § 29 (West 2013).
234. *Id*.
235. 723 P.2d 1354, 1383 (Cal. 1982).
236. *Id*.
237. *Id*. at 1382.

ing the hypnotic session, even the most vigorous cross-examination cannot expose pseudo memories.[238]

Barring the testimony of previously hypnotized witnesses, however, can exclude relevant evidence. A literal application of Proposition 8 would thus overturn *Shirley*. Concerned that the initiative would permit previously hypnotized witnesses to testify in all criminal cases, the legislature reinstated *Shirley* in part by adding section 795 to the Evidence Code in 1984.[239] This section strikes a middle ground between Proposition 8 and the disqualification announced in *Shirley* by permitting a previously hypnotized witness to testify if the judge finds that strict guidelines have been followed. These guidelines are designed to prevent the hypnotic session from improperly contaminating the witness's recall.[240]

B. *Polygraph Results*

Prior to the passage of Proposition 8, California courts excluded evidence based on polygraph examinations on the ground that the relevant scientific community had not generally accepted the scientific principles underlying polygraphy.[241] A literal application of the Right to Truth-in-Evidence provision would overturn the judicially created exclusionary rule and commit the admissibility of the evidence to the judge's discretion, since the proposition favors the admissibility of all relevant evidence irrespective of whether it has the support of the scientific community.[242] A year after Proposition 8 was enacted, the legislature revived the prohibition by adding Evidence Code section 351.1 to ban "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination . . . in any criminal proceeding . . . unless all parties stipulate to the admission of such results."[243]

C. *Truth Serum*

Because truth serum dispels inhibitions, it induces subjects to talk freely.[244] But a looser tongue is not necessarily a more truthful one.[245] What a

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238. *Id*. at 1383.

239. *See* CAL. EVID. CODE § 795. Section 795 complies with the super-majority requirement. *See* A.B. 2669, at 1656 (Cal. 1984); 2 ASSEMBLY FINAL HISTORY (1983-84).

240. *See* People v. Aguilar, 218 Cal. App. 3d 1556, 1563 (Cal. Ct. App. 1990).

241. *See* People v. Wochnick, 219 P.2d 70, 72 (Cal. 1950).

242. *See supra* text accompanying notes 65-67.

243. *See* CAL. EVID. CODE § 351.1 (West 2013). Section 351.1 complies with the super-majority requirement. *See* S.B. 266, at 185 (Cal. 1984); SENATE FINAL HISTORY (1983-84).

244. *See* Ramona v. Superior Court (Ramona), 57 Cal. App. 4th 107, 116, n.10 (Cal. Ct. App. 1997).

245. *Id*.

person says under the influence of sodium amytal may be no more reliable than what he says under the influence of large amounts of alcohol.[246] Consequently, the courts have excluded evidence of what a person says under the influence of sodium amytal on the ground that the relevant scientific community has not generally accepted the scientific principles underlying truth serum.[247] But truth serum evidence, like polygraph evidence, is relevant. In this instance, however, the legislature has not acted to revive the judicial ban. This may be due to the fact that the leading case on truth serum, *Ramona v. Superior Court*,[248] arose fifteen years after the initiative was enacted, and by that time the California Supreme Court had ruled that the Right to Truth-in-Evidence provision did not repeal the limitations on the use of expert testimony.[249] Accordingly, until the courts find otherwise, truth serum evidence should be excluded under the rules pertaining to expert testimony and scientific evidence, without regard to the effect of the Right to Truth-in Evidence provision.

D. *Psychiatric Examinations*

Prior to the adoption of the Evidence Code in 1965, California shared the common law's antipathy to the use of expert testimony to attack or support the credibility of witnesses.[250] The reason given for rejecting "psychiatric testimony as to the mental or emotional condition of a witness for purposes of impeachment"[251] was that the law governing impeachment said nothing about the use of expert testimony.[252] More to the point were the policy concerns raised by the California Supreme Court in *Ballard v. Superior Court*:

> We do not overlook Judge Jerome Frank's warning against needlessly embarking "on an amateur's voyage on the fog-enshrouded sea of psychiatry." . . . A psychiatrist's testimony on the credibility of a witness may . . . not be relevant; the techniques used and theories advanced may not be generally accepted; the psychiatrist may not be in any better position to evaluate credibility than the juror; difficulties may arise in communication between the psychiatrist and the jury; too much reliance may be placed upon the testimony of the psychiatrist; partisan psychiatrists may cloud rather than clarify issues; the testimony may be distracting, time-consuming and costly.[253]

Since jurors were assumed to be as good as experts in assessing the credibility of witnesses, there simply was no need for expert testimony.[254] The courts, for

246. *Id*.

247. *Id*. at 116 and cases cited therein.

248. *See id*.

249. *See supra* text accompanying note 65.

250. *See* MÉNDEZ, *supra* note 8, § 15.09.

251. Ballard v. Superior Court, 410 P.2d 838, 846 (Cal. 1966).

252. *Id*. at 847.

253. *Id*. at 848 n.10.

254. For a discussion of how common law trials evolved to using jurors as lie detectors, see George Fisher, *The Jury's Rise As Lie Detector,* 107 YALE L.J. 575, 577 (1997).

example, were unreceptive to expert testimony explaining why eyewitnesses, though honest, could be mistaken on account of stress and other factors.[255]

Only in one area were the California courts somewhat receptive to the use of expert testimony to assess a witness's credibility. In cases involving sexual assaults, especially on females, fear of psychotically induced false charges moved the courts to permit the use of expert testimony about the victim's mental and emotional instability.[256] Relying on its authority to promulgate rules of criminal procedure in the absence of legislation, the California Supreme Court gave trial judges discretion to "order a psychiatric examination of the complaining witness in [cases] involving a sex violation if the defendant [presented] a compelling reason for such an examination."[257] But in a move favoring prosecutors, the legislature in 1980 amended the Penal Code to eliminate this judicial discretion.[258] Concerned that the Right to Truth-in-Evidence provision might repeal the amendment, the legislature in 1984 re-enacted the amendment by the super-majority required by the proposition.[259]

V. THE WISDOM OF LEGISLATING THROUGH INITIATIVES

One problem with complex initiatives, such as the Victims' Bill of Rights, is that the large number of measures contained in a single ballot pamphlet makes it difficult for voters to focus on a particular initiative. For example, the Victims' Bill of Rights was in a ballot pamphlet that comprised eighty-seven pages covering a new prison construction bond act, three legislative constitutional amendments, three initiative statutes relating to taxes, four referendum statutes covering reapportionment and water facilities, and Proposition 8.[260] Another difficulty with complex initiatives is that specific provisions that might be of special interest to voters may be part of a single measure covering numerous subjects. The Victims' Bill of Rights is again illustrative. It contains ten sections that in addition to relevant evidence, convictions, and insanity, address restitution, safe schools, diminished capacity, habitual criminals, victim statements, plea-bargaining, sentencing, and mentally disordered offenders.[261]

In this regard, another anti-crime initiative, the Safe Neighborhood Act, is a worse example. Among other matters, it asked the voters to approve important amendments to the Evidence Code creating a forfeiture hearsay exception and declaring contumacious witnesses unavailable. These amendments were among many other provisions that ranged from establishing a commission to evaluate publicly-funded programs designed to deter crime, to a crime-

255. *See* People v. Guzman, 121 Cal. Rptr. 69, 71-72 (Cal. Ct. App. 1975).
256. *See* People v. Neely, 39 Cal. Rptr. 251, 253 (Cal. Ct. App. 1964).
257. *See* Ballard v. Superior Court, 410 P.2d 838, 846 (Cal. 1966).
258. *See* CAL. PENAL CODE § 1112 (West 2013).
259. *Id*.
260. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 56.
261. *Id*. at 3.

stoppers reward fund, a new witness tampering offense, new assessments on fines, new parole procedures, increased penalties for vandalism, increased penalties for joyriding, new probation limitations for persons who have committed more than one act of vehicle theft, expanded accomplice liability in some obstruction of justice cases, new penalties for violating criminal gang injunctions, a new cause of action for suing criminal street gangs, a new convict registration statute, new prison sentences for possession of enumerated controlled substances, increased penalties for some felons who possess firearms, new prohibitions on the release of illegal immigrants on bail or their own recognizance when charged with enumerated crimes, new prohibitions on the release of defendants on bail or their own recognizance when charged with violent crimes if they previously have failed to appear in court, new parole procedures, and the establishment of a new annual half billion dollar fund (to be adjusted for inflation) to support public safety, anti-gang, and juvenile justice programs.[262] The Safe Neighborhood Act, which appeared on the November 2008 ballot, was rejected by the voters.

But even if voters could easily find important provisions in initiatives, a much more serious issue is the competency of the electorate to pass on initiatives affecting complex legal matters. The Right to Truth-in-Evidence provision asked the electorate to adopt a new evidence code for use in criminal cases. That was tantamount to asking the voters to sit as a legislative committee of the whole to propose, assess, and approve at *one* sitting the rules that should govern the admissibility of evidence in the most important of hearings—the trial on guilt or innocence. In this regard, the extensive legislative history of the California Evidence Code and the Federal Rules of Evidence is instructive. Unlike the electorate, neither Congress nor the California Legislature was asked to approve an evidence code at the time of its introduction. The rules Congress and the California Legislature considered had been vetted by their respective committees, which had approved the rules after extensive hearings. Moreover, in each instance the rules their respective committees considered had been independently formulated by experts after years of study and public hearings. These experts did not create the rules out of whole cloth. They had the benefit of three decades of research on an ideal set of evidence rules. They were able to draw on earlier model codes, including the Model Code of Evidence approved by the American Law Institute in 1942[263] and the Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws in 1953.[264] Moreover, the members of the American Law Institute and the

262. *Office of the Attorney General*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, http://ag.ca.gov (search "Safe Neighborhood Act"; follow link) (last visited Apr. 25, 2014). The summary provided here is designed to give the reader only a sense of the breadth of topics covered by the initiative. Readers interested in all its provisions as well as in the complete text should consult the initiative.

263. *See* MODEL CODE OF EVIDENCE 7 (Am. Law Inst. 1942).

264. *See* UNIF. R. EVID. (Nat'l Comm'rs on Uniform State Laws 1953).

Commissioners on Uniform State Laws could look for guidance to the detailed traditions of the common law.

In 1958 the House of Delegates of the American Bar Association recommended the adoption of uniform rules of evidence for use in the federal courts.[265] In 1961 the United States Supreme Court appointed a committee to do a feasibility study, and the committee recommended drafting uniform rules.[266] In 1965 the Court appointed judges, lawyers, and law professors to an Advisory Committee to draft the rules and four years later, in 1969, the Judicial Conference Standing Committee circulated the Advisory Committee's proposed draft for comment.[267] After reviewing the comments, first the Advisory Committee and then the Judicial Conference approved the revised draft and submitted it to the Court for promulgation in 1970. The Court, however, returned the draft to the Judicial Conference for further comment, and in 1971 a final draft was forwarded to the court.[268] In 1972 the Court promulgated the Federal Rules of Evidence to take effect in July 1973.[269] Congress, however, deferred the implementation of the Rules until it had an opportunity to review and approve them.[270] Both the House and the Senate Judiciary Committees held extensive hearings at which numerous witnesses testified,[271] and after making revisions Congress approved the Rules in January 1975 to take effect in July of that year.[272]

The history of the Evidence Code reveals a similar deliberative process. The Code is the product of an exhaustive study commenced in 1956 by the California Law Revision Commission to determine whether California should replace its hodgepodge rules of evidence with a modern code modeled on the Uniform Rules of Evidence.[273] The Commission retained a nationally known evidence expert, Professor James H. Chadbourne, to head the study. As a result of his work, nine tentative recommendations and research studies relating to the Uniform Rules were published by the Commission and circulated for public comment.[274]

In January 1965, the Commission published its Recommendation Proposing an Evidence Code and presented it to the California Legislature.[275] Each house of the legislature referred the recommendation to its respective Judiciary

265. *See* J.R. SCHMERTZ, PROPOSED FEDERAL RULES OF EVIDENCE 2, 201-02 (Callaghan & Co. 1974).

266. *Id*.

267. *Id*.

268. *Id*.

269. *Id*.

270. *Id*.

271. *Id*.

272. *See* MIGUEL MÉNDEZ, EVIDENCE: A CONCISE COMPARISON OF THE FEDERAL RULES WITH THE CALIFORNIA CODE 325 (West 2013).

273. *See* PARKER'S EVIDENCE CODE OF CALIFORNIA vi-vii (1979).

274. *Id*.

275. *Id*.

Committee for further study. In April 1965, the Assembly Committee on the Judiciary provided the Assembly with a special report on the Commission's recommendation. Later that month, the Senate Judiciary Committee presented its report. Except for a limited number of "new or revised" comments, the Senate committee adopted the recommendation as revised by the Assembly committee. Later that year, both houses approved the recommendation and the Evidence Code became effective on January 1, 1967. The Code was the first complete revision of the rules of evidence since the evidence portion of the Civil Procedure Code was enacted in 1872.[276]

In contrast to the comparatively open, transparent process followed by the Advisory Committee and Congress and by the California Law Revision Commission and the California Legislature,[277] the framers of Proposition 8 are largely unknown and conducted their work in private.[278] They did not circulate their draft to the public or hold public hearings to hear from supporters and opponents.[279] As is apparent from the many patches the courts and the legislature have had to devise to fix unanticipated consequences, the proponents apparently did not undertake a systematic study to identify flaws in the proposed measure. Given the proponents' goal, their most glaring failure was not anticipating the adverse effects their anti-crime measure would have on existing anti-crime laws, most notably SB 54.

But as we have seen, the proponents' apparent shortsightedness extended to other areas of the law affected by a literal application of the Right to Truth-in-Evidence provision. Eliminating the character evidence ban would help prosecutors secure convictions by enabling them to offer evidence of the defendant's bad character. But ending the ban also opened the door to the use of specific instances of conduct by defendants to clear their names.[280] Removing

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276. *Id*.

277. For a critique of the influence of special interests in shaping the California Evidence Code, see Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOYOLA L. REV. 279, 291 (1971).

278. In his Rebuttal to Argument Against Proposition 8, Paul Gann identifies then Senior Assistant Attorney General George Nicholson as "a chief architect" of the initiative. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 35. Justice Nicholson has served on the California Court of Appeal, Third District, since 1990. *See Greg Nicholson*, CALIFORNIA COURTS, http://www.courts.ca.gov/2646.htm (last visited Apr. 25, 2014). The court's website identifies him as the "Statewide Co-Chair and Principal Author, Proposition 8, Victims' Bill of Rights." *Id*.

279. On March 24, 1982 the Chair of the Assembly Committee on Criminal Justice provided the Speaker of the Assembly with its staff analysis of Proposition 8. *See* ASSEMBLY CMTY. ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8 THE CRIMINAL JUSTICE INITIATIVE (March 24, 1982). Not counting the transmittal letter and the table of contents, the analysis takes up ninety-nine typewritten pages. *Id*. Despite its length, the staff warns that the analysis "is not meant to be an exhaustive review" in light of the extensive nature of the initiative. *Id*. at 1.

280. *See supra* text accompanying note 40.

the Code's ban on the use of specific instances of misconduct (other than convictions) to impeach witnesses has allowed defendants to use such evidence against prosecution witnesses, including victims in sexual assault cases.[281] Moreover, without the benefit of the California Supreme Court's post-initiative *Harris* analysis, a literal application of the Right to Truth-in-Evidence provision would have led an informed reader of the ballot pamphlet to conclude that the initiative would repeal the Evidence Code limitations on the use of expert evidence.[282] To make the admissibility of expert evidence turn on individual judges' exercise of discretion would introduce an almost intolerable level of uncertainty in the planning and administration of criminal trials.

Likewise, without the benefit of the Supreme Court's post-Proposition 8 analysis of the restrictions on the use of juror evidence, an informed reader of the Right to Truth-in-Evidence provision would have concluded that the initiative would repeal the restrictions.[283] And although the issue has not been decided by the appellate courts, a literal application of the initiative would also repeal the Code's provisions prohibiting judges and jurors from testifying in trials in which they are participants and encouraging plea bargaining by barring the use of admissions defendants make in the course of plea negotiations.[284] Without plea bargains, California would be unable to process those charged with crimes. Even with the continued exclusion of plea-bargaining admissions, the state lacks the courts, prosecutors, public defenders, and other resources needed to process adequately the cases pending before the courts.

A literal application of the Right to Truth-in-Evidence provision would repeal as well the Code's prohibition on the use of a witness's religious belief to attack or support the credibility of the witness.[285] Although the courts have not passed on this issue, lifting the ban risks injecting religious bias into criminal proceedings. A literal application of the initiative would also repeal the limitations the Code places on the use of consistent and inconsistent statements, limitations designed to enhance the probative value of consistent statements and prevent the unfair use of inconsistent statements.[286]

One of Proposition 8's greatest weakness stems from the proponents' apparent inability to appreciate fully the adversarial nature of trials. Because in the United States the lawyers—not the trial judge—play the key role in how a trial unfolds, in planning their trials lawyers need to know whether the judge will admit or exclude evidence they want to offer. An evidentiary regime that commits the admissibility of evidence to the trial judge's discretion ignores this reality and cannot work in the American-style adversarial trial.

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281. *See supra* text accompanying note 87.
282. *See supra* text accompanying note 65.
283. *See supra* text accompanying note 185.
284. *See supra* text accompanying note 73.
285. *See supra* text accompanying note 163.
286. *See supra* text accompanying notes 78 and 82.

If asked, most first-year law students will respond that the judge is the most important person in a trial. Judges, after all, dress differently from all others—whether lawyers, parties, jurors, or spectators—attending the trial. Only judges wear a black robe. Moreover, they sit at a special place (the bench), which is usually elevated. When a judge enters the courtroom, an armed guard (the bailiff) orders all others to stand. No one can sit until after the judge sits. No one can speak until after the judge formally opens the proceedings, usually by announcing the case to be heard that day.

The reality is otherwise, however. In jury trials, it is the lawyers who are the most important players. In criminal trials, for example, the prosecutor and defense counsel are responsible for the manner in which the trial unfolds. The lawyers decide which witnesses to call and the order in which they will testify. The lawyers decide whether non-testimonial evidence will be offered and when it will be offered. The lawyers determine what the witnesses will say, since witnesses are expected to respond only to the questions put to them. The lawyers formulate these questions and put them to the witnesses. Even though the presiding judge is free to ask questions of witnesses, most judges leave this task almost exclusively to the lawyers.[287]

Other than ministerial duties such as opening trials and informing the jurors of the law that applies to the case, a judge's principal role in a jury trial is to rule on objections to the introduction of evidence. But even this role is circumscribed. The rules of evidence operate in an adversarial environment. Whether a particular rule of evidence will be applied will depend initially on whether its application is invoked by a party. If a party fails to object to evidence offered by the opponent, the party as a general rule loses the right to complain on appeal about the introduction of inadmissible evidence.[288]

Judges also benefit from an evidence system that prescribes in detail what evidence is inadmissible. Ruling on objections is a much simpler task under the Evidence Code than under a system that commits the admissibility of evidence to the judge's discretion. It is in this context that the role of Evidence Code section 352 must be understood. Under the Code, a party may not resort to this section to exclude evidence unless the judge has overruled all of his specific objections.[289] To be sure, Proposition 8 does not commit the admissibility of all relevant evidence to the judge's discretion. The Right to Truth-in-Evidence provision exempts the exclusionary rules pertaining to hearsay, privileges, a crime victim's character, and the credibility of sexual assault victims. Nonetheless, the admissibility of much evidence formerly restricted by the Code in criminal cases is now subject to discretionary admission. Yet, in their ballot ar-

287. The degree to which the lawyers control the interrogation of witnesses is evidenced by the virtual disuse of a procedure available in California and some other states. Jurors, under certain circumstances, can ask questions of witnesses. *See* MÉNDEZ, *supra* note 8, § 17.12.

288. *See* CAL. EVID. CODE § 353 (West 2013).

289. *See id*. § 352.

guments in support of the Victims' Bill of Rights, the proponents made no mention of the adverse consequences the initiative could have on the planning and administration of criminal trials.

The drafting flaws are not limited to the proponents' failure to foresee the full consequences of the Right to Truth-in-Evidence provision. The proponents included in the same initiative two conflicting constitutional amendments.[290] One requires judges in criminal cases to admit felony convictions offered to impeach without limitation. The other vouchsafes to judges their discretionary power to exclude relevant evidence (including convictions) whenever in their estimation the probative value of the evidence is substantially outweighed by countervailing concerns. Any second or third-year law student would have foreseen that the presence of two conflicting provisions of equal legal status would necessarily force the courts to attempt to reconcile them. This is precisely what the appellate courts have done, with the result being a substantial resurrection of the *Beagle* limitations that existed prior to the voters' approval of the initiative.[291]

Suppose, however, that the proponents had anticipated all of the Evidence Code sections that would have been repealed by the Right to Truth-in-Evidence provision and had listed all of these sections in the initiative. Would these additional steps have allowed most voters to make an informed choice? The answer is obviously "no" since an informed choice presupposes an appreciation of the interests advanced by the rules that would be affected. A grounding in evidence law and trial advocacy would be essential. The Right to Truth-in-Evidence provision also would have repealed the Penal Code limitations on the use by defendants of intoxication and diminished capacity evidence. An informed choice on whether to repeal these limitations would require an understanding of the role that intoxication and cognitive disabilities should have on culpability. As a normative matter, should California allow those who commit criminal harms escape liability on these bases? Most voters lack the legal knowledge needed to make this normative decision.

There is nothing ambiguous about the provision requiring defendants to prove both *M'Naghten* prongs to be acquitted on the grounds of insanity. Suppose that the proponents of the initiative had taken the additional step of informing the voters that approval of this provision would have taken California back to the almost medieval "wild beast" test. Would that have enabled the voters to make an informed choice about whether to retain the A.L.I. test, return to *M'Naghten*, or adopt the wild beast test? The answer again is "no." Most voters have not had the opportunity to study and reflect on the relationship of mental disease to cognition and volition and their link to the fundamental principles of criminal responsibility, including a blameworthy state of mind. And, as has

290. *See supra* text accompanying note 130.

291. *See supra* text accompanying note 130.

been pointed out, ballot pamphlet statements are hardly the place to instruct on these difficult criminal law concepts.

The legislative process, to be sure, does not always guarantee a perfect statute. But it does afford an opportunity for the kind of scrutiny designed to flag the type of unanticipated difficulties posed by such sweeping measures as Proposition 8. For all their faults, properly conducted legislative hearings can generate the information needed for a more complete analysis and an informed choice. The legislative process is simply better at identifying and eliminating the uncertainties and ambiguities that can plague initiatives. Current law, however, does not require the legislature to hold hearings on initiatives that have qualified for the ballot. Instead, the Elections Code places a much less onerous burden on the legislature. Upon preparing the circulating title and summary of a proposed initiative, the Attorney General is required to transmit copies of the text of the measure and the circulating title and summary to the Senate and the Assembly.[292] The appropriate committees may, but are not required to, hold public hearings on the subject of the proposed measure.[293] And even if the legislature holds hearings, it may not alter or prevent the initiative from appearing on the ballot.[294]

Initiatives, such as Proposition 8, can make it more difficult for the legislature to do its job. The Right to Truth-in-Evidence and insanity provisions require the membership of each house to approve by at least a two-thirds vote amendments to exclude relevant evidence or make changes to the insanity definition.[295] As we have seen, occasionally the legislature has had to act to void unanticipated changes made by the Right to Truth-in-Evidence provision. In each instance, the legislature succeeded only because the proponents of the amendments were able to garner the required super-majority.

Although the use of the initiative has been viewed as a progressive reform measure, not all agree about the role it should have in a representative democracy. In their study, *Lawmaking by Initiative*,[296] Phillip Dubois and Floyd Feeney identify direct participation by the people as a subject of classic debates about democracy.

> James Madison and those who wrote the United States Constitution preferred a system of representative government. Believing that most important public questions were too complicated to be decided by popular vote, they designed a system calling for elected representatives who would have the time to study and understand the issues. The Populists and Progressives who fashioned and promoted the initiative, the referendum, and the recall in the late 1800s and the early 1990s, saw a somewhat different picture. They believed

292. *See* CAL. ELEC. CODE § 9007 (West 2013).

293. *See id*.

294. *See id*.

295. *See* CAL. CONST. art. I, § 28(f)(2); CAL. PENAL CODE § 28(d) (West 2013).

296. PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE (Bernard Grofman ed., 1998).

> that legislators and political machines had become far too dependent on special interests. Trusting the populace itself to make better judgments, they thought that the cure was more democracy. While they did not want to abolish representative government, they wanted much more popular participation.[297]

Initiatives, however, also have their detractors. As Dubois and Feeney note, those disfavoring initiatives believe that "societal problems have become much too complicated for the black and white kind of solutions [supporters] believe possible through the use of the initiative process. Detractors are also appalled by the demagoguery and simple-minded campaigns that characterize initiative elections."[298]

The initiative, nonetheless, has taken root nationwide. Between 1898 (when South Dakota became the first state to adopt the initiative) and 1992, twenty-five states have adopted this device.[299] Nineteen had done so by 1918, when the Populist and Progressive influences were at their height.[300] California was among these states, having adopted the initiative in 1911 to allow the electorate to enact statutes as well as constitutional amendments.[301] California's initiative process is of the more expansive type. It authorizes the direct initiative that allows the electorate to vote on a measure that qualifies for the ballot by citizen petition.[302] A few states permit only the indirect initiative. Once the required number of signatures is gathered, the measure goes to the legislature for consideration. If the legislature adopts the measure, it becomes law. If it rejects the measure or fails to act within a prescribed time, the measure is placed on the ballot at the next election.[303] A few states permit both direct and indirect initiatives. At the time of their study, Dubois and Feeney found that three states use the indirect initiative for statutes and the direct initiative for constitutional amendments, and that two use both the direct and indirect initiative for statutes.[304]

California is among the states making the most extensive use of the initiative. From the time the first state adopted the initiative through 1996, only Oregon has exceeded California in the number of measures appearing on the ballot (292 to 257).[305] Between 1978 and 1996, however, California overtook Oregon (98 to 86).[306]

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297. *Id*. at 2.
298. *Id*.
299. *Id*. at 28.
300. *Id*. at 28-29.
301. *Id*.
302. *Id*. at 27.
303. *Id*. at 35.
304. *Id*. at 27-29.
305. *Id*. at 30.
306. *Id*. at 31.

Of the 257 measures on the California ballot between 1911 and 1996, the voters approved 85, or 33%.[307] Among those approved are measures eliminating the poll tax, creating the governor's line item veto in appropriation bills, repealing prohibition, eliminating partisan elections for the selection of judges, reinstating the death penalty, creating environmental protections for coastal areas, enacting campaign and political ethics legislation, reducing property taxes,[308] restricting ownership of land by persons ineligible for naturalization (at the time mainly Japanese immigrants), repealing a fair housing law previously approved by the legislature,[309] and making undocumented aliens ineligible for public social services, health services, and education.[310] More recent initiatives prohibit the state from granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, education, or contracting,[311] but allow the use of marijuana for medical purposes,[312] and specify that only a marriage between a man and a woman is valid in California.[313]

Based on their review of polling data, Dubois and Feeney conclude that while Californians continue to express "strong support" for the initiative process, that support is waning.[314] Support declined from 83% in 1979 to 73% in 1989 to 62% in 1991.[315]

> A 1982 poll, for instance, showed that 84 percent of those questioned doubted the capacity of many voters to make an informed decision on initiatives; 86 percent thought special interests benefit from the process; 82 percent believed that one-sided campaign spending distorts election outcomes away from the will of the people and toward the interests of big-campaign contributors; 63 percent agreed that campaign spending has "a great deal of effect" on the outcome of proposition elections; and 78 percent agreed that most of the ballot issues are too complicated to be decided by a simple yes or no vote. A 1990 poll revealed that only 21 percent of those questioned thought the typical voter could understand most or all of the ballot propositions.[316]

More recent polling data of voter sentiment are consistent. A 2011 Field Poll found that support for initiatives declined to 53% and that twice as many

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307. *Id*. at 13.

308. *Id*. at 13-14.

309. *Id*.

310. *See* CALIFORNIA BALLOT PAMPHLET GENERAL ELECTION NOV. 8, 1994, 91-92.

311. *See* CAL. CONST. art. I, § 31. For an examination of how initiatives can be misused to undermine rights accorded to disadvantaged groups, see Christine Chambers Goodman, *(M)Ad Men: Using Persuasion Factors in Media Advertisements to Prevent a "Tyranny of the Majority" on Ballot Propositions*, 32 HASTINGS COMM. & ENT. L.J. 247 (2010).

312. *See* CAL. HEATH & SAFETY CODE § 11362.5 (West 2013) (added by Proposition 215, § 1 in November 1996).

313. *See* CAL. CONST. art. I, § 7.5.

314. *See* DUBOIS & FEENEY, *supra* note 296, at 4-6.

315. *Id*.

316. *Id*. at 5 (footnotes omitted).

voters believe that the results of most statewide ballot proposition elections come out the way organized special interests want.[317]

Dubois and Feeney's review of polling data shows that Californians strongly favor some reforms to the initiative process. Large majorities support submitting "proposed initiatives to the secretary of state for review and comment on conformity to law and clarity of language *prior* to their circulation for signatures."[318] An overwhelming majority (87%) favor "full disclosure in initiative campaign advertisements of the sponsoring industry or interest group."[319] However, other reform proposals, such as limiting the number of initiatives on a single ballot, increasing the number of signatures for initiatives to qualify for the ballot, and prohibiting the use of paid signature gatherers, while still supported by a majority, are favored only by two to four percentage points.[320]

With respect to the public's view of the competency of voters to assess technical matters, Dubois and Feeney cite a 1982 poll that reveals that "two-thirds of the population saw the legislature as better suited than voters to make decisions about highly technical or legal policy matters."[321] A 2011 Field Poll echoes the same sentiment. A "55% to 34% majority believes elected representatives rather than the voting public are 'better suited to decide upon highly technical or legal policy matters.'"[322] That view, however, has not resulted in changes giving the legislature exclusive authority to legislate on such matters. Nor has it revived the use of the indirect initiative with regard to these matters. Because the indirect initiative was used so rarely, it was deleted from the California Constitution in 1966 on the recommendation of the Constitution Revision Commission.[323]

Some reforms of the initiative process have taken place, however. One requires the Secretary of State to send each voter a pamphlet outlining the arguments for and against each proposed initiative.[324] Another restricts initiatives to the November ballot when voters turn out in greater numbers than in June primary elections.[325] A third, added to the California Constitution in 1948, impos-

317. *See* MARK DICAMILLO & MERVIN FIELD, THE FIELD POLL (Oct. 13, 2011), *available at* http://www.field.com/fieldpollonline/subscribers/Rls2394.pdf.

318. *See* DUBOIS & FEENEY, *supra* note 296, at 5 (emphasis in original).

319. *Id*. (footnote omitted).

320. *Id*.

321. *Id*. at 6.

322. DICAMILLO, *supra* note 317.

323. *See* DUBOIS & FEENEY, *supra* note 296, at 92. Legislation was introduced in the 2011-2012 Regular Session of the Assembly reviving the indirect initiative. *See also* California Constitutional Amendment No. 12, ACA 12 Amended (Aug. 21, 2012), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/aca_12_bill_20140305_introduced.htm.

324. *See* DUBOIS & FEENEY, *supra* note 296, at 4 n.8. *See also* CAL. ELEC. CODE § 9094(a) (West 2013).

325. *See* CAL. CONST. art. II, § 8(c).

es the single subject rule.[326] It provides that "an initiative embracing more than one subject may not be submitted to the electors or have any effect."[327] The limitation, however, has not reduced the complexity of initiatives. To date, the California Supreme Court has not found any initiative, including the Victims' Bill of Rights, in violation of this provision.[328] One reason is that the court has interpreted the provision in the same way it has interpreted a similar, but older, constitutional provision requiring legislative acts to "embrace but one subject, which subject shall be expressed in its title."[329] The court has construed the legislative restriction as allowing the legislature to "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."[330] With respect to initiatives, the court has taken the view that an initiative does not violate the single subject rule if all of its parts are "reasonably germane" to each other and to the "general purpose or object of the initiative."[331] Despite its numerous and diverse provisions, the court has held that the Victims' Bill of Rights meets this standard:

> Each of its several facets bears a common concern, "general object" or "general subject," promoting the rights of actual or potential crime victims. As explained in the initiative's preamble, the 10 sections were designed to strengthen procedural and substantive safeguards for victims in our criminal justice system. These changes were aimed at achieving more severe punishment for, and more effective deterrence of, criminal acts, protecting the public from the premature release into society of criminal offenders, providing safety from crime to a particularly vulnerable group of victims, namely school pupils and staff, and assuring restitution for the victims of criminal acts.[332]

The court's reluctance to strike initiatives on the basis of the single subject rule is rooted in its respect for the role of initiatives. It believes that it has a "solemn duty jealously to guard the sovereign people's initiative power, 'it being one of the most precious rights of our democratic process.'"[333] When passing on the validity of initiatives, the court uses an interpretative rule resolving "any reasonable doubts in favor of the exercise of this precious right."[334]

In their study, Dubois and Feeney include a number of recommendations for improving initiatives. Had they been enacted, some could have applied to Proposition 8. One recommendation aims to reduce the complexity of initiatives by adopting rules that define "single subject" more narrowly for initiatives

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326. *See id*. § 8(d).

327. *Id*.

328. *See* DUBOIS & FEENEY, *supra* note 296, at 130.

329. *See* CAL. CONST. art. IV, § 9.

330. Perry v. Jordan, 207 P.2d 47, 50 (Cal. 1949).

331. Brosnahan v. Brown, 651 P.2d 274, 279 (Cal. 1982).

332. *Id*. at 274.

333. *Id*. at 277 (quoting from Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1290 (Cal. 1978)).

334. *Brosnahan*, 651 P.2d at 277.

than for legislation.[335] A rule, for example, that classifies as separate subjects criminal law and criminal procedure would have divorced the Right to Truth-in-Evidence provision from others affecting the substantive criminal law, such as the definition of insanity and the punishment of habitual criminals. Isolating the provision on criminal evidence would have given proponents and opponents a greater opportunity to comment on the implications of the changes called for by the provision.

Dubois and Feeney also recommend creating a board consisting of the Attorney General, the Secretary of State, and Legislative Counsel, to review initiatives that have qualified to determine if they contain provisions whose consequences are not readily apparent.[336] Unless a voter was familiar with the Evidence Code, the voter would be unlikely to understand that a purpose of the Right to Truth-in-Evidence provision was to create a special evidence code for criminal cases.

Dubois and Feeney approve the use of the indirect initiative. They recommend that all initiatives adding or making statutory changes be submitted first to the legislature and not be submitted to the voters if the legislature adopts the substance of the initiative. As they explain:

> The theory of the initiative is that it is a way of adopting legislation when the legislature refuses to act. Allowing the legislature the option of acting on initiatives gives practical meaning to this theory. It forces the legislature to be accountable, saves the electorate from voting on matters unnecessarily, and need not be harmful to the proponents' interests.[337]

Had this recommendation been in effect in 1982, it would have given the legislature an opportunity to consider whether adopting a special evidence code for criminal cases was consistent with California's policies as expressed in the Penal Code and by the courts. Legislative hearings on the initiative would have given both proponents and opponents an opportunity to explain and justify their respective positions at a level of detail that is simply beyond the space restrictions of ballot pamphlets and in language free of the uninformative political sloganeering so prevalent in the ballot arguments. California voters, however, are skeptical about enlarging the legislature's role in initiatives. A 2011 Field Poll found that—by 53% to 35%—voters disapprove "of allowing the legislature to place a companion proposal on the same election ballot after an initiative qualifies that, if approved, can amend all or some of the initiative's provisions."[338]

Dubois and Feeney also target the super-majority provisions of initiatives such as Proposition 8. As they point out:

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335. DUBOIS & FEENEY, *supra* note 296, at 229.

336. *Id*.

337. *Id*. at 224.

338. *See* DICAMILLO, *supra* note 317.

> Statutes enacted by the legislature may be amended or repealed at any time by the legislature. Initiatives in some states, however, may be changed only by very difficult procedures, such as a two-thirds vote of both houses of the legislature. These highly restrictive rules make it very difficult to change initiative statutes and in effect give initiative statutes some of the qualities of constitutional amendments. . . .
>
> While there may have once been fears that legislatures would hastily tear down what the people enacted through the initiative process, the general experience in the United States is that legislatures are reluctant to change laws that have been adopted through the initiative process. There is no valid reason, therefore, for significantly limiting the legislature's ability to amend and repeal initiative statutes.[339]

As we have seen, on several occasions the California Legislature has had to act to prevent unanticipated consequences made by the Right to Truth-in-Evidence provision. In each instance, the fixes or patches required the legislature to garner at least a two-thirds vote of the membership of each house.

Dubois and Feeney would also tighten the rules for initiatives amending state constitutions. They point out, for example, that in California constitutional amendments initiated by the legislature require a two-thirds vote of each house as well as approval by a majority of the electorate.[340] In contrast, an initiative amending the constitution requires only gathering signatures at least equal to eight percent of those who voted in the last election and approval by a majority of the voters at the next election.[341] Since the collection of signatures is "simply a matter of being able to spend enough money,"[342] this "means that in many instances it is easier for proponents with resources to use the initiative than to use the legislative process to secure consideration of proposed constitutional amendments."[343]

> Any structure that makes it easier to amend the state constitution through the initiative than through the legislature is unsound. We therefore recommend that the number of signatures required for initiative constitutional amendments be made high enough to encourage proponents to seek amendment first through the legislative process. In California, for example, the number of signatures should be increased from 8 to at least 10 percent of the voters at the last gubernatorial election. . . .
>
> An increase in the number of signatures required for amendments to the state constitution would have the additional positive effect of creating an additional incentive for proponents to propose statutory changes rather than constitutional amendments. This is in keeping with the general policy that change should be placed in constitutional form only if it is of a fundamental nature.[344]

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339. *See* DUBOIS & FEENEY, *supra* note 296, at 224.

340. *Id*. at 223.

341. *See* CAL. CONST. art. 2, § 8.

342. *See* DUBOIS & FEENEY, *supra* note 296, at 223.

343. *Id*.

344. *Id*. at 223-24.

This recommendation, if implemented prior to 1982, would have affected Proposition 8's constitutional amendments creating the Right to Truth-in-Evidence provision and the provision requiring felony convictions offered for impeachment to be used without limitation. Had the legislature chosen to make these changes, it would have not resorted to amending the constitution. It simply would have enacted the changes as amendments to the Evidence Code or as part of a new evidence code applicable only to criminal cases. Combined with the change Dubois and Feeney recommend for the indirect initiative, the changes would have given the legislature an opportunity to hold hearings on the two provisions where both proponents and opponents could explain and justify their respective positions.

A 2007 Field Poll suggests that most California voters are prepared to go even farther in making changes to initiatives that amend the California Constitution. "Most voters (56%) support the idea of increasing the vote requirements needed to approve amendments to the state constitution from a simple majority to a two-thirds majority vote of the people in an election."[345]

Another aspect of Proposition 8 bears elaborating. It was not coincidental that the proponents titled their initiative, "The Victims' Bill of Rights," and the provision banning the exclusion of relevant evidence, "The Right to Truth-in-Evidence." Who can be against crime victims and the truth?

Embedded in such anti-crime measures as the Crime Victims' Bill of Rights and the Safe Neighborhood Act[346] is a dangerous artificial dualism. These measures reflect a "we versus them" attitude that is pointedly missing in the Bill of Rights. Surely, criminals were no more loved at the adoption of the Constitution than they are today. Yet, one cannot help but sense that the Founders were thinking about themselves, not just muggers, rapists, child abusers, batterers, and murderers, when contemplating the rights that all of us should enjoy when our freedom is threatened by the state. They understood the need to grant the state a virtual monopoly on lawful violence, including the curtailment of freedom and even the imposition of death, but in turn the Founders appreciated the need to place strict limits on that "awe full" power.

The Founders' sense that "we" too can be fair game in the state's quest for order appears to have been largely lost. In the anxieties unleashed by the 1960s generational conflict, Richard Nixon hit pay dirt on the 1968 campaign trail with his "law and order" theme. Politicians know a good thing when they see it. They still play the theme today. Regrettably, deliberately playing to the public's fears can impede the kind of measured discourse urgent societal problems require. In the field of criminal law and evidence, a "we versus them" mentality not only obscures what needs to be done to make us safer, but can lead to ill

345. MARK DICAMILLO & SARAH HENRY, THE FIELD POLL 3 (Oct. 14, 2009), *available at* http://www.field.com/fieldpollonline/subscribers/Rls2316.pdf.

346. *See supra* text accompanying note 247.

thought-out measures that threaten hard-won rights and liberties all of us should cherish.