1992

The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?

J. Clark Kelso
Pacific McGeorge School of Law

Brigitte A. Bass
California District Attorneys Association

Follow this and additional works at: http://scholarlycommons.pacific.edu/facultyarticles
Part of the Criminal Law Commons, Criminal Procedure Commons, and the Legislation Commons

Recommended Citation
23 Pac. L.J. 843

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
The Victims' Bill Of Rights: Where Did It Come From And How Much Did It Do?

J. Clark Kelso* and Brigitte A. Bass**

INTRODUCTION

The past fifteen years in California have been witness to a most remarkable and far reaching political and legal phenomenon. The People of the State of California successfully employed the voter initiative process to alter or entirely remake vast fields of California's constitutional and statutory law, effectively bypassing the legislative, executive, and judicial branches of government. Almost no field of law or branch of government went untouched by these changes. State and local tax law and policy were fundamentally changed by the passage of Proposition 13 in 1978. Stiff regulation of insurance companies and insurance rates was created by Proposition 103. The hundred-year-old plus post-indictment preliminary hearing in felony cases was abolished by Proposition 115, the "Crime Victims Justice Reform Act," which

* Associate Professor of Law, University of the Pacific, McGeorge School of Law. I would like to acknowledge the help of my research assistants in the preparation of this Article: Jennifer Anderson, Joan Medeiros and Jill Malat.

** Director of Legal Publications, California District Attorneys Association. I want to thank Cathy Karneszis for her help in the preparation of material for this Article.


also enacted other significant procedural changes in the handling of criminal cases. Although not an exercise of the initiative power, the People’s rejection of three justices on the Supreme Court of California in 1986 was clearly related to prior voter initiatives respecting the death penalty. Most recently, the legislature has been fundamentally restructured because of Proposition 140.

The Victims’ Bill of Rights, Proposition 8, must be considered in the same class as the somewhat more famous initiatives described above. Enacted in 1982, Proposition 8 may not be as well known to the public as Proposition 13, Proposition 103, or Proposition 140, but its effects have been no less far-reaching. Both in qualitative and quantitative terms, Proposition 8 made some of the most fundamental changes ever seen in the handling of criminal cases in California and created, virtually overnight, significant rights for victims of crime.

Other articles in this issue concentrate on one or another of the provisions of Proposition 8, and Jeff Brown’s article, in particular,


4. Initiative Measure Proposition 140 (approved Nov. 6, 1990) (codified at CAL. CONST. art. IV, §§ 2(a), 4.5, 7.5; id., art. XX, § 7).

gives a good overview of all the initiative’s provisions. Part I of this Article describes the most significant events that led up to the passage of Proposition 8. Part II attempts to assess in quantitative terms the extent to which Proposition 8 changed the law in California. As will be discussed, the inspiration for Proposition 8 was a series of California Supreme Court decisions handed down over a fifteen year period that expanded the rights of the accused far beyond the requirements of the United States Constitution. These decisions created what might be described as a “target-rich environment” for the proponents of Proposition 8, and this Article’s quantitative analysis suggests that Proposition 8 squarely hit its targets. This Article concludes that the Victims’ Bill of Rights has been, by this measure, entirely successful in accomplishing what it set out to do.

I. WHY PROPOSITION 8 WAS APPROVED

The political and legal landscape that was the seedbed of Proposition 8 was formed by many different forces over a long period of time. Although Proposition 8 changed the state constitution, its history begins, interestingly enough, with a series of decisions in the 1960’s by the United States Supreme Court interpreting the federal constitution. The leading case names and holdings are by now familiar to most lawyers and, in at least one case, to the public. In Mapp v. Ohio, the Court overruled prior cases and imposed the exclusionary rule upon the states. Gideon v. Wainwright guaranteed legal representation to

7. See infra notes 10-123 and accompanying text.
8. See infra notes 124-170 and accompanying text.
9. See infra notes 171-172 and accompanying text.
criminal defendants.\textsuperscript{14} \textit{Fay} \textit{v. Noia}\textsuperscript{15} broadened the availability of the writ of habeas corpus.\textsuperscript{16} Finally, the Court handed down \textit{Miranda v. Arizona},\textsuperscript{17} a decision whose holding has probably become, through the medium of television, more familiar to the public than the Pledge of Allegiance.

For purposes of Proposition 8, the importance of these cases lies not so much in their particular holdings as in their exclusive focus upon the rights and interests of the accused vis-a-vis the state. For example, the very first sentence of Chief Justice Warren's majority opinion in \textit{Miranda} suggests that the accused is the only person whose interests are of constitutional significance: "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."\textsuperscript{18} \textit{Miranda} and the cases cited above can be searched in vain for any reference to the rights of victims and potential victims to be protected from crime. The Court's only apparent interest in these cases was in protecting persons being prosecuted for crimes allegedly committed.

In retrospect, the Warren Court's actual influence in criminal procedure was short-lived. With Nixon appointees Burger, Blackmun, Powell, and Rehnquist replacing Warren, Black, Fortas, and Harlan, the openly liberal and activist Warren Court was succeeded by the hold-the-line Burger Court.\textsuperscript{19} The Burger Court

\begin{itemize}
  \item \textsuperscript{14} \textit{Id.} at 344.
  \item \textsuperscript{15} 372 U.S. 391 (1963).
  \item \textsuperscript{16} \textit{Id.} at 440.
  \item \textsuperscript{17} 384 U.S. 436 (1966).
  \item \textsuperscript{18} \textit{Id.} at 439.
  \item \textsuperscript{19} The change in personnel on the Court was not the only factor which led to a leveling off in the rate of pro-defendant decisions. The Court's decisions in \textit{Miranda}, \textit{In re Gault}, and \textit{Katz v. United States}, combined with the social upheavals of the late 1960's, led to substantial public criticism of the Court's criminal procedure jurisprudence, including passage by Congress of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. \textit{See \textit{In re Gault}, 387 U.S. 1 (1967) (holding that juveniles have right to notice of charges, counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination); \textit{Katz v. United States}, 389 U.S. 347 (1967) (holding that electronically listening and recording defendant's statements made in a public telephone booth was a "search and seizure" under the fourth amendment, and required prior judicial sanction to comply with constitutional standards). This criticism may have influenced the Warren Court during its final years to temper somewhat its earlier
generally did not retreat from Warren Court decisions, but the
decade of expansions was clearly at an end.\textsuperscript{20}

Faced with a United States Supreme Court that was increasingly
unwilling to entertain expansive readings of the fourth, fifth, and
sixth amendments, defense counsel and liberal interest groups
turned their attention away from the federal courts to the state
courts and state constitutions. The purely doctrinal basis for the
shift to state courts and state constitutions was unimpeachable.
State constitutions are independent expressions of state sovereignty.
The United States Constitution only \textit{limits} the burdens that states
may impose upon citizens subject to a state’s jurisdiction. Nothing
in the United States Constitution prohibits a state from granting
greater protections to an accused under state law than those granted
by the Constitution.\textsuperscript{21} Defense counsel and liberal interest groups
argued that state supreme courts have a constitutional obligation to
interpret their own constitutional provisions, and if those provisions
provide greater protection than the federal constitution, so be it.\textsuperscript{22}

The primary difficulty in relying upon state constitutional
provisions as an \textit{independent} source of substantive law is that many
state provisions are based upon, or are identical to, parallel

\textsuperscript{20} See \textit{Y. KAMISAR, The Warren Court (Was It Really So Defense-Minded?), The Burger
Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices, in \textit{The Burger
Court — The Counter-Revolution That Wasn’t} 62-91 (V. Blasi ed. 1983).

\textsuperscript{21} It is clear that a state court may not grant greater protections to an accused under the
\textit{federal} constitution than have been granted by the United States Supreme Court. \textit{Oregon v. Hass}, 420
U.S. 714, 719 (1975) (stating that “a State may not impose . . . greater restrictions [upon law
enforcement] as a matter of federal constitutional law when this Court specifically refrains from
imposing them”).

\textsuperscript{22} The secondary literature discussing the independent vitality of state constitutions is quite
extensive. One of the most complete explorations of the topic is found in a symposium published by
the Texas Law Review. \textit{See The Emergence of State Constitutional Law, 63 TEX. L. REV. 959-1338
(1985).} The contributors to the symposium included, most significantly for purposes of this Article,
Justice Stanley Mosk of the California Supreme Court. Mosk, \textit{State Constitutionalism: Both Liberal
and Conservative, 63 TEX. L. REV. 1081 (1985).} Justice Mosk noted that “[f]or the liberal, there is
the prospect of continued expansion of individual rights and liberties; the work of the Warren Court
can be carried on at the state level.” Mosk, \textit{supra}, at 1081.
provisions in the United States Constitution. Applying ordinary rules of interpretation, these provisions should have been given a construction consistent with the federal provisions upon which they were based. Lawyers have been trained, however, to take seriously Humpty-Dumpty's claim that words can mean whatever the speaker (or the reader) wants them to mean. That a state constitutional provision was identical to the fourth amendment was little more than an inconvenience. The identity in language did not prevent defense counsel from arguing for greater protections under state constitutions and did not prevent willing and sympathetic state courts in some jurisdictions from accepting those arguments and basing expansive protections of the accused upon clearly independent state grounds.

The Supreme Court of California was one of those state courts willing to ignore the decisions of the Burger Court and base conflicting decisions upon adequate and independent state grounds. One of the earliest and best examples is found in People v. Brisendine. In Brisendine, the defendant was camping with others in the Deep Creek area of the San Bernardino National Forest. Two deputy sheriffs patrolling the area arrested the campers for having an open campfire in violation of county law. Since any type of camping was prohibited in the specific area where the defendants were found, the officers requested that the campers pack up their gear and accompany the officers back to their vehicle, which was located about a half-mile away. The officers did not intend to book the campers or arrest them; they were simply going to issue citations for violation of the open fire

23. Compare, e.g., CAL. CONST. art. I, § 13 (state search and seizure clause) with U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures).


26. Id. at 532, 531 P.2d at 1101, 119 Cal. Rptr. at 317.
27. Id. at 533, 531 P.2d at 1101, 119 Cal. Rptr. at 317.
28. Id.
ordinance. In preparation for the half-mile hike back to the officers’ vehicle, the officers conducted a weapons search of the campers. The search extended to a knapsack owned by the defendant. When squeezing the knapsack did not disclose its likely contents, one of the officers opened the knapsack and began to search the contents. The officer found marijuana in a small, frosted plastic bottle and envelopes containing tablets of illegal drugs wrapped in tinfoil.

The critical issue for the court to decide was whether the search of the bottle and envelopes exceeded the constitutionally permissible scope. The defendant argued that since no weapons could conceivably have been found in either the small bottle or the envelopes, a search of those objects was constitutionally impermissible. The People argued that the search of the containers was permissible because no additional justification, such as probable cause to believe the objects concealed weapons, was necessary once the officers began a constitutionally permissible search incident to taking the defendant into custody.

Among other relevant state cases, the defendant in Brisendine cited People v. Superior Court (Simon), where the Supreme Court of California held that a full body search incident to an ordinary traffic arrest was constitutionally impermissible unless the officer had reason to suspect weapons would be discovered or feared for his or her own safety. The People relied upon two
recent United States Supreme Court decisions, *United States v. Robinson* and *Gustafson v. Florida,* where the Court held that the fourth amendment was not violated by a full body search incident to a traffic arrest in which illegal drugs were found on the defendant's person.\(^4\)

In *Brisendine,* the Supreme Court of California recognized that the searches in *Robinson* and *Gustafson* were essentially indistinguishable from the search of the defendant's knapsack, and that adherence to *Robinson* and *Gustafson* would require an affirmation of the defendant's conviction.\(^4\) In an opinion written by Justice Mosk,\(^4\) the court rejected *Robinson* and *Gustafson* and retained the *Simon* approach under California's version of the fourth amendment.\(^4\) Justice Mosk's opinion in *Brisendine* set forth, in relatively complete terms, the argument that would in future cases form the basis for ignoring other Burger Court pronouncements. Therefore, *Brisendine* is worthy of close perusal.

Justice Mosk began by observing that the Supreme Court of the United States had itself noted the states' power to impose more rigorous search and seizure standards than are required by the federal constitution.\(^4\) The next step was to note that the Supreme Court of California "has always assumed the independent vitality of our state Constitution."\(^4\)

believe that such weapons are present in the vehicle he has stopped." *Id.* at 206, 496 P.2d at 1216, 101 Cal. Rptr. at 849. The court then extended that reasoning to a pat-down search of the driver. *Id.*

42. *Brisendine,* 13 Cal. 3d at 547, 531 P.2d at 1110, 119 Cal. Rptr. at 326. After discussing *Robinson* and *Gustafson,* the court noted that "[t]he Supreme Court has taken like facts and reached a contrary result." *Id.* at 547, 531 P.2d at 1111, 119 Cal. Rptr. at 328.
43. Justice Mosk has been one of the leading proponents of the independent vitality of the California Constitution. See Mosk, *supra* note 22, at 1081.
44. *Brisendine,* 13 Cal. 3d at 536, 531 P.2d at 1111, 119 Cal. Rptr. at 326. See CAL. CONST. art. I, § 13 (prohibiting unreasonable searches and seizures).
46. *Brisendine,* 13 Cal. 3d at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 329.

850
So far, so good; both propositions cited by Justice Mosk are incontrovertible. The critical issue, of course, was not whether the Supreme Court of California had the power to interpret the California Constitution differently from the federal constitution -- that power surely exists -- but whether the court should exercise that power.

If the language of article I, section 13 of the California Constitution and the apparent intent of the drafters of that section meant anything, the court should have concluded that the state search and seizure clause was coextensive with the fourth amendment. Article I, section 13 provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.47

The fourth amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.48

If the near identity in language was not enough to convince a court that the California provision was modeled upon the federal provision, there is the commentary of a delegate to the 1849 California Constitutional Convention that the California counterpart to the fourth amendment "was word for word from the Constitution of the United States, 4th article."49

---

48. U.S. CONST. amend. IV.
49. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA (1849) (quoted in Brisendine, 13 Cal. 3d at 555 n.3, 531 P.2d at 1102 n.3, 119 Cal. Rptr. at 318 n.3 (Burke, J., dissenting)).
The Supreme Court of California had previously recognized the obvious implication to be drawn from the similarity in language and the drafting history of the California search and seizure provision. As recently as four years prior to the decision in *Brisendine*, the court had this to say about the relationship between the fourth amendment and California’s search and seizure clause:

Since sections 19 and 13 of article I of the California Constitution are substantially equivalent to the Fourth Amendment and to the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution respectively, our analysis of the validity of the claim and delivery law in respect to the above provisions of the federal Constitution is applicable in respect to the above sections of the state Constitution.50

Justice Mosk began his attack upon common sense and prior cases in *Brisendine* by claiming that the court had previously departed from the fourth amendment in interpreting California’s search and seizure clause and had granted the accused greater rights than existed under federal law.51 Justice Mosk cited *People v. Martin*52 and its California progeny for this proposition.53 In *Martin*, which was decided before the Supreme Court of the United States made the federal exclusionary rule binding upon the states,54 the court adopted the so-called “vicarious exclusionary rule” under which the defendant is permitted to assert the search and seizure rights of a third person.55 The Supreme Court of the United States subsequently rejected the vicarious exclusionary rule in *Alderman v. United States*.56

51. *Brisendine*, 13 Cal. 3d at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 326.
53. *Brisendine*, 13 Cal. 3d at 548, 531 P.2d at 1112 , 119 Cal. Rptr. at 328.
55. *Martin*, 45 Cal. 2d at 760, 290 P.2d at 857.
According to Justice Mosk, the critical case in which the Supreme Court of California supposedly departed from Fourth Amendment jurisprudence was *Kaplan v. Superior Court*, decided in 1971 after *Alderman* was handed down. Justice Mosk's reliance upon *Kaplan* is flawed. The court in *Kaplan* held, in an opinion authored by Justice Mosk, that the recently amended section 351 of the California Evidence Code incorporated the *Martin* rule as a matter of statutory interpretation. The *Kaplan* court explicitly disclaimed an intention to base its decision upon the California Constitution:

This conclusion [that section 351 preserves the *Martin* rule] makes it unnecessary for us to reach defendant's constitutional arguments that (1) the *Martin* rule is required by the search and seizure clause of article I, section 19, of the California Constitution...

*Kaplan* was Justice Mosk's only California authority in the *Brisendine* opinion for the proposition that California's search and seizure provision had been interpreted more broadly than the fourth amendment, and *Kaplan* was insufficient to the task.

Justice Mosk's only other argument in favor of construing the California search and seizure clause more broadly than the fourth amendment rewrites the intent of the framers of the California Constitution. Justice Mosk expressed the following:

It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their

---

57. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).
58. *Brisendine*, 13 Cal. 3d at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328.
59. *Kaplan*, 6 Cal. 3d at 159, 491 P.2d at 5, 98 Cal. Rptr. at 654. The version of section 351 quoted in *Kaplan* provided that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." *CAL. EVID. CODE* § 351 (West 1966). The court's comment to section 351 explained that the section "abolishes all limitations on the admissibility of relevant evidence except those that are based on a statute, including a constitutional provision." *Id.* 6 Cal.3d at 160, 491 P.2d at 7, 98 Cal. Rptr. at 656 (quoting CAL. EVID. CODE § 351 Comment) (The court concluded that the *Martin* rule was "based upon" constitutional provisions (including the fourth amendment) even though it was not a rule "required by" the fourth amendment). *Id.* at 161, 491 P.2d at 7, 98 Cal. Rptr. at 656.
60. *Id.* at 161 n.9, 491 P.2d at 8 n.9, 98 Cal. Rptr. at 656 n.9.
federal counterpart. The lesson of history is otherwise: the Bill of Rights
was based upon the corresponding provisions of the first state
constitutions, rather than the reverse.61

Justice Mosk’s version of history and its relation to resolution
of the issue presented in Brisendine is topsy-turvy. In the first
place, the historical basis for the Bill of Rights was not the issue
in Brisendine; the basis for California’s search and seizure
provision should have been the focus. Second, the “fiction” that
Mosk describes was fact in California. As noted above, the
deleagtes to the California Constitutional Convention used the
fourth amendment virtually “word for word” as the basis for
California’s search and seizure clause.62 Justice Mosk never
explains how this drafting history can be squared with giving
California’s search and seizure clause an interpretation at odds with
the fourth amendment.63

Justice Mosk’s final authority in Brisendine was a decision of
the Hawaii Supreme Court in State v. Kaluna.64 The Hawaii
Constitution, like the California Constitution, contained a search
and seizure clause essentially identical to the fourth amendment.65
The Hawaii Supreme Court, with no analysis of the language or
drafting history of the Hawaii Constitution, simply asserted its
power to interpret provisions of the Hawaii Constitution differently
from the federal constitution.66 If essentially unreasoned opinions
are authority, then Justice Mosk certainly found authority in
Kaluna.

---

61. Brisendine, 13 Cal. 3d at 550, 531 P.2d at 1113, 119 Cal. Rptr. at 329.
62. See supra note 49 and accompanying text.
63. Justice Mosk rather awkwardly ducked this central inquiry with the following: “We need
not further extend this opinion to trace to their remote origins the historical roots of state
constitutional provisions. Yet we have no doubt that such inquiry would confirm our view of the
matter.” Brisendine, 13 Cal. 3d at 550, 531 P.2d at 1113, 119 Cal. Rptr. at 329. It was, of course,
easier for the court to “have no doubt” when it refused to conduct the inquiry into the state’s
constitutional history. Given the importance of the issue, the People of California would surely not
have objected to a “further extend[ed]” opinion.
64. 55 Haw. 361, 520 P.2d 51 (1974).
65. Compare HAW. CONST. art. I, § 7, with U.S. CONST. amend. IV.
66. See Kaluna, 55 Haw. 361, 520 P.2d at 55.
When all is said and done, *Brisendine* firmly established the fundamental principle that California's search and seizure clause meant whatever the Supreme Court of California said it meant, and in interpreting that clause, the Supreme Court of California would be guided by neither the language nor the history of the clause. Rather, the court would be guided only by its own sense of what it considered "reasonable" and how "unreasonable" searches could be most effectively deterred.

As the Supreme Court of California increasingly departed from United States Supreme Court precedent, it opened itself up to the charge that California law had run amuck and that dramatic changes, such as Proposition 8, were needed. For example, in the search and seizure context, the Supreme Court of California gave us the following decisions, among others. First, in *People v. Krivda,* the court held that a warrantless search of a trash container placed adjacent to the street for pickup violated the defendant's rights, and that the fruits of that search were inadmissible. In *People v. Superior Court (Hawkins),* the court held that a lawful arrest was a necessary prerequisite to requiring a suspect to take a blood test, and that probable cause to believe that a crime has been committed for which a blood test would be relevant, such as driving under the influence, was constitutionally insufficient to justify the test. Finally, in *People v. Longwill,* the court held that a full body search of a person who was not necessarily going to be incarcerated, but who was...

---

67. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).
68. *Id.* at 365, 486 P.2d at 1267, 96 Cal. Rptr. at 67. *Krivda* was overruled by Proposition 8, insofar as it relied upon the state constitution, and was overruled by *California v. Greenwood,* 486 U.S. 35 (1988), insofar as it relied upon the federal constitution. See *Greenwood,* 486 U.S. at 44.
69. 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972).
70. *Id.* at 763, 498 P.2d at 1149, 100 Cal. Rptr. at 285. The court's holding was contrary to *Cupp v. Murphy,* 412 U.S. 291, 295-96 (1973) (holding that police were justified in taking scrapings from a suspect's fingernails where probable cause existed to believe he had committed a murder, even though the suspect was not arrested), and *Schmerber v. California,* 384 U.S. 757, 768 (1966) (holding that an arrestee may be required to take a blood test where probable cause existed to believe that he had been driving under the influence). Proposition 8 abrogated *Hawkins.* *People v. Trotman,* 214 Cal. App. 3d 430, 432, 262 Cal. Rptr. 640, 641 (1989); *People v. Deltoro,* 214 Cal. App. 3d 1417, 1422, 263 Cal. Rptr. 305, 308 (1989).
under custodial arrest, was impermissible and that evidence found pursuant to such a search must be suppressed.\textsuperscript{72}

In the area of admissions and confessions, the Supreme Court of California gave us the following decisions. In \textit{People v. Disbrow},\textsuperscript{73} the court held that a defendant's extrajudicial statements elicited in violation of \textit{Miranda} were inadmissible for impeachment purposes.\textsuperscript{74} In \textit{People v. Jimenez},\textsuperscript{75} the court held that the People had the obligation to prove the voluntariness of the defendant's confession beyond a reasonable doubt.\textsuperscript{76} In \textit{People v. Pettingill},\textsuperscript{77} the court held that once a suspect had invoked his \textit{Miranda} right to remain silent, \textit{any} police-initiated interrogation whatsoever violated his privilege against self-incrimination.\textsuperscript{78}

\textsuperscript{72} Id. at 945, 538 P.2d at 754, 123 Cal. Rptr. at 298. The court's holding was contrary to Gustafson v. Florida, 414 U.S. 260, 266 (1973) (holding that a police officer was entitled to make a full search, incident to arrest, of defendant's person and cigarette package found thereupon, even though the officer had no subjective fear that the defendant was armed), and United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search of the defendant's person and cigarette package found thereupon did not violate the fourth amendment where the officer had probable cause to arrest the defendant). Proposition 8 abrogated \textit{Longwill}. \textit{In re Demetrius A.}, 208 Cal. App. 3d 1245, 1247, 256 Cal. Rptr. 717, 718 (1989). See \textit{People v. Otto}, 226 Cal. App. 3d 1630, 277 Cal. Rptr. 596, 602-03 (1991), review granted, 280 Cal. Rptr. 91, 808 P.2d 234, 1991 LEXIS 1648 (LEXIS, Cal. library, Cases file) (April 15, 1991), \textit{reprinted for tracking pending review}, 233 Cal. App. 3d 279 (1991) (Sixth District Court of Appeal of California decision finding \textit{Longwill} has been abrogated by Proposition 8). The court's grant of review in \textit{Otto} is limited to the issue of admissibility of tape recordings the victim made of telephone conversations between the defendants. \textit{Otto}, 280 Cal. Rptr. 91, 808 P.2d 234, 1991 LEXIS 1648 (LEXIS, Cal. library, Cases file).

\textsuperscript{73} 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

\textsuperscript{74} Id. at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368. The court's holding was contrary to the federal rule which permits such statements to be used for purposes of impeachment. Harris v. New York, 401 U.S. 222, 225-26 (1971). Proposition 8 abrogated \textit{Disbrow}. \textit{People v. May}, 44 Cal. 3d 309, 311, 748 P.2d 307, 307-08, 243 Cal. Rptr. 369, 369-70 (1988).

\textsuperscript{75} 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978).

\textsuperscript{76} Id. at 608, 580 P.2d at 679, 147 Cal. Rptr. at 179. The federal rule requires only proof by a preponderance of the evidence that a confession was voluntary. Lego v. Twomey, 404 U.S. 477, 489 (1972). Proposition 8 abrogated \textit{Jimenez}. \textit{People v. Markham}, 49 Cal. 3d 63, 65, 775 P.2d 1042, 1043, 260 Cal. Rptr. 273, 274 (1989).


\textsuperscript{78} Id. at 251, 578 P.2d at 121, 145 Cal. Rptr. at 874. The court's holding was contrary to the federal rule. See, e.g., \textit{Michigan v. Mosley}, 423 U.S. 96, 107 (1975) (holding that interrogation by police two hours after the defendant had invoked his \textit{Miranda} right to remain silent did not violate the defendant's privilege against self-incrimination where the defendant's previous refusal to speak was "scrupulously honored" and where defendant received a readmonition of his \textit{Miranda} rights). Proposition 8 abrogated \textit{Pettingill}. \textit{People v. Harris}, 211 Cal. App. 3d 640, 647, 259 Cal. Rptr. 462, 465 (1989); \textit{People v. Warner}, 203 Cal. App. 3d 1122, 1124, 250 Cal. Rptr. 462, 463 (1988).
Of course, the California Supreme Court's pro-defendant rulings were not limited to constitutional issues. In *People v. Drew*, the court rejected the two-pronged *M'Naghten* test of insanity as a criminal defense and replaced it with the American Law Institute's test, which is generally more favorable to mentally disordered defendants. In a series of cases beginning with *People v. Beagle*, the court imposed relatively strict limits upon the circumstances in which trial courts could admit evidence of prior convictions for impeachment purposes. In two instances, the court's decisions created such an outcry that the court was prompted to reconsider. In *People v. Tanner*, the court held in a four to three decision that the "use-a-gun, go-to-prison" law, which provided generally that "[p]robation shall not be granted to . . . any person who uses a firearm during the

---

80. *See M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843) (defining the test for insanity as a question of whether the defendant did not know the nature and quality of the act he was doing or, if he did know what he was doing, whether he did not know that what he was doing was wrong).
Section 25(b) of the Penal Code provides as follows:
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.
Id.
83. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).
commission" of certain listed crimes, was discretionary rather than mandatory and did not abrogate the trial court's inherent discretion to strike a charge under section 1385 of the Penal Code. After extraordinary public criticism, the court, in an extremely unusual order, granted a motion for rehearing, vacated its prior opinion, and, because Justice Mosk changed his vote, held that the use-a-gun, go-to-prison law was mandatory. In another flip-flop, the court first held in People v. McGaughran that a police officer could not run a routine warrant check upon a driver validly stopped for a traffic offense absent "specific and articulable facts causing [the officer] to reasonably suspect that there may be an outstanding warrant for the driver's arrest." Following another storm of protest, the court granted a motion for rehearing, vacated its prior opinion, and modified its reasoning to permit a routine warrant check so long as the check is conducted within "the period of time necessary [for the officer] to discharge the duties that he incurs by virtue of the traffic stop." The cases just described had the effect of damaging the credibility of the Supreme Court of California in criminal matters, at least in the eyes of a large segment of California's population. These were cases that made headlines, in part because of the cases

86. CAL. PENAL CODE § 1203.06 (West Supp. 1992). George Deukmejian was an author of this statute when he was a state senator. SENATE FINAL HISTORY 1975-1976 at 161 (setting forth legislative history of S.B. 278, chaptered Sept. 23, 1975 as 1975 CAL. STAT. ch. 1004, § 2, at 2357 (enacting CAL. PENAL CODE § 1203.06)). Deukmejian would later as Governor become a supporter of Proposition 8.

87. Tanner, 587 P.2d at 1124, 151 Cal. Rptr. at 311. The lead opinion by Justice Tobriner garnered only three votes. Chief Justice Bird concurred separately on the ground that the enactment of Penal Code section 1203.06 violated the Separation of Powers principle. Id. at 1124, 151 Cal. Rptr. at 311 (Bird, C.J., concurring and dissenting).


90. 585 P.2d at 208, 149 Cal. Rptr. at 586.

91. McGaughran, 25 Cal. 3d 577, 584, 601 P.2d 207, 214, 159 Cal. Rptr. 191, 194 (1979). With modern technology, most warrant checks can now be completed in a few minutes, well within the time that it ordinarily takes to carry out the usual functions incident to a traffic stop. Id. at 584 n.6, 601 P.2d at 209 n.6, 159 Cal. Rptr. at 195 n.6. The detention in McGaughran for the warrant check was an atypical 10 minutes, and because the officer never intended to ticket the driver (but intended only to give a warning), the court held that the particular detention in McGaughran was unlawful. Id. at 587, 601 P.2d at 215, 159 Cal. Rptr. at 196.
themselves, and in part because of the public reactions to the cases by highly placed government officials.

The court's credibility was further and most seriously eroded in capital cases. Perhaps more than with any other criminal justice issue, the California Supreme Court's handling of the death penalty engendered deeply rooted electoral hostility. The public was overwhelmingly in favor of the death penalty, while the court was openly hostile to the death penalty and, as a result, indirectly hostile to the electorate. The initial round in this battle came in 1972 when, in People v. Anderson, the court struck down California's death penalty statute as violative of article I, section 6 of the California Constitution. The voters responded that very same year with an initiative overruling Anderson.

The year 1972 also saw the United States Supreme Court's decision in Furman v. Georgia, where the Court struck down death penalty statutes that granted too much discretion to the sentencing authority. The California Legislature responded to

92. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
93. Id. at 634, 493 P.2d at 883, 100 Cal. Rptr. at 155. Article I, section 6 provided as follows:
   All persons shall be bailable by sufficient sureties, unless for capital offenses when the
   proof is evident or the presumption great. Excessive bail shall not be required, nor
   excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses
   shall not be unreasonably detained, nor confined in any room where criminals are actually
   imprisoned.
CAL. CONST. art. I, § 6. The eighth amendment to the federal constitution provides, "Excessive bail
shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.
CONST. amend. VIII. The court in Anderson held that California's constitution imposed a stricter
standard than imposed by the eighth amendment because section 6 prohibited "cruel or unusual"
punishments while the eighth amendment prohibited only "cruel and unusual" punishments.
Anderson, 6 Cal. 3d at 634-39, 493 P.2d at 888, 100 Cal. Rptr. at 160.
94. Initiative Measure Proposition 17 (approved Nov. 7, 1972) (codified at CAL. CONST. art.
I, § 27). Article I, section 27 of the California Constitution provides as follows:
   All statutes of this state in effect on February 17, 1972 [the date of the Anderson
decision], requiring, authorizing, imposing, or relating to the death penalty are in full force
and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.
   ... The death penalty provided for under those statutes shall not be deemed to be, or to
constitute, the infliction of cruel or unusual punishments within the meaning of Article I,
Section 6, nor shall such punishment for such offenses be deemed to contravene any other
provision of this constitution.
CAL. CONST. art. I, § 27.
95. 408 U.S. 238 (1972).
96. Id. at 313.
Furman by enacting a new death penalty statute. This statute was subsequently declared unconstitutional under the Eighth Amendment by a unanimous Supreme Court of California in Rockwell v. Superior Court, because of the statute's incompatibility with a series of United States Supreme Court decisions in the mid-1970's. The California Legislature enacted another death penalty statute, and this statute was upheld in People v. Frierson.

The People of California had also been working on a new death penalty statute, which was approved in 1978. Despite prodding by both the legislature and the People, the Supreme Court of California managed from 1977 until the passage of Proposition 8 in 1982 to reverse the imposition of the death penalty in twenty-two cases and affirm only two such convictions.

---


98. 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).

99. Id. at 445, 556 P.2d at 1116, 134 Cal. Rptr. at 665. See Gregg v. Georgia, 428 U.S. 153, 207 (1976) (upholding Georgia's statutory death penalty system since it narrowed the class of murders subject to the death penalty and provided for a bifurcated proceeding and automatic appeal to the state supreme court); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976) (upholding Florida's statutory death penalty procedures which required the judge to consider specific aggravating and mitigating factors and provided for state supreme court review); Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding Texas's capital sentencing procedure which required the jury to consider five categories of aggravating circumstances and focused on the particularized circumstances of the individual offense and offender); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (upholding Louisiana's death penalty scheme which narrowly defined five categories of first-degree murder and which required mandatory jury instruction in first-degree murder cases on manslaughter and second-degree murder).


Turning from the primarily judicial to the primarily political side of history, the first glimmerings of what would become the Victims' Bill of Rights can be seen in April of 1977, when Governor Edmund G. (Jerry) Brown, Attorney General Evelle J. Younger, Senator George Deukmejian, Assemblyman Alister McAlister, and countless law enforcement officials and organizations, at the prompting of the California District Attorneys Association, observed California's first Victims' Rights Week. This annual event is now in its sixteenth year.

Many of the California Supreme Court's unpopular rulings were based upon the California Constitution, and only a constitutional amendment could overrule those decisions. Proponents of reform met with stiff opposition in the California Legislature and, particularly, in the Assembly Criminal Justice Committee, even on non-constitutionally based issues. In these circumstances, the


Subsequent to Proposition 8's enactment, the California Supreme Court struck down portions of the death penalty initiative and, in other cases, managed to find some constitutional violation in the specific manner in which the penalty-phase jury was instructed. See, e.g., People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985); People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985); People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983); People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982); People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), rev'd, 463 U.S. 992 (1983).

In 1986, the People refused to reconfirm three justices largely because of the public perception that these justices were an obstacle to enforcement of the death penalty. See Paonita, Voters in 3 States Reject Chief Justices, The Nat'l Law J., Nov. 17, 1986, at 3.

initiative process stood out as the only remaining vehicle for achieving the reforms being sought. The first attempt to use that process began in 1977 immediately after the first Victims’ Rights Week. Assemblymen Alister McAlister and Dave Stirling, and Senators Robert B. Presley and Jim Nielsen, in cooperation with the California District Attorneys Association, began pursuit of a criminal justice initiative, which was, in many respects, a precursor of Propositions 8 and 115. This first effort failed because insufficient funding and inadequate political organization prevented the sponsors from securing the requisite number of signatures to qualify the measure for the ballot.

Ironically, one of the most important events in the history of Proposition 8 had nothing to do with the criminal justice system. In 1978, the decade of the initiative began with the shocking and spectacular success of Proposition 13, the Jarvis-Gann property tax initiative. Proposition 13’s success was a clear signal that even extraordinarily fundamental changes in state law could be achieved through the voter initiative process if the proponents of the initiative were (1) sufficiently financed, (2) sufficiently organized, and (3) tied to an emotional issue of concern to every citizen. Proposition 13 thus held out to other groups the promise and possibility of significant reform through voter initiatives.

April 22, 1981 marks the beginning of specific efforts that would lead directly to the enactment of Proposition 8. Paul Gann, who along with Howard Jarvis had pushed through Proposition 13, joined Republican legislators in public criticism of the Assembly Criminal Justice Committee and warned Democratic legislators that criminal justice reform would be achieved through a Victims’ Bill of Rights if several then-pending legislative proposals were not enacted. In late May of 1981, drafting for the Victims’ Bill of Rights began in earnest. The principal drafters were Senator John Doolittle, Senator Alister McAlister, and Senior Assistant Attorney

---

105. CAL. CONST. art. XIIA (enacted by Proposition 113).
General George Nicholson, who for years had been working publicly and behind-the-scenes for criminal justice reform. Special Assistant Attorney General Rodney Blonien was also a key player in the drafting, and significant contributions were made by other legislators and lawyers.

On June 9, 1981, after the legislature failed to adopt criminal justice reform measures satisfactory to the proponents of reform, Paul Gann submitted to the attorney general the text of the Victims’ Bill of Rights. Gann announced on June 18, 1981, that he had bipartisan support, which included eight senators and twenty-four assembly members, for a Victims’ Bill of Rights. Initiative support committees were also formed in August.

Proposition 8 almost did not make it to the ballot. In order to qualify, proponents needed to submit 553,790 valid signatures to the Secretary of State, March Fong Eu. The proponents submitted petitions containing 663,409 signatures. Based upon a five percent random sampling of the petitions, the Secretary of State determined that the proponents had secured 108.76% of the required number of signatures. State law at that time required that, if the statistical sampling method was used to verify the validity of signatures, the proponent had to submit 110% of the number of signatures required. Secretary Eu initially refused to

109. The Citizen’s Committee to Stop Crime was chaired by Gann and included as members Senators Jim Nielsen and John Doolittle, former head of the Los Angeles Office of the Federal Bureau of Investigation, Ted Gunderson, and Senior Assistant Attorney General George Nicholson. A statewide initiative support committee was also formed, with San Francisco Board of Supervisor Quentin Kopp as Northern California Chair and San Diego Mayor Pete Wilson as Southern California Chair. Co-chairpersons on this committee included Senator William Campbell, Assembly members Alister McAllister and Carol Hallett, and George Nicholson. Campaign Launched for “Victims’ Rights” Initiative, Metropolitan News, Sept. 28, 1981, at 2.
110. Brosnahan v. Eu, 31 Cal. 3d 1, 3, 641 P.2d 200, 200, 181 Cal. Rptr. 100, 100 (1982). See CAL. CONST. art. II, § 8(b) (initiative measures may be proposed by presenting the Secretary of State with petition setting forth text of proposed statute or constitutional amendment, signed by 5% of the states electors in case of statute and 8% in case of constitutional amendment).
111. Brosnahan, 31 Cal. 3d at 2, 641 P.2d at 200, 181 Cal. Rptr. at 100.
112. See CAL. CONST. art. II, § 8 (California’s initiative provision).
113. Brosnahan, 31 Cal. 3d at 3, 641 P.2d at 200, 181 Cal. Rptr. at 100.
114. Id.
certify the initiative and instead ordered local election officials to verify each signature, an expensive and time-consuming process. The proponents filed suit to compel the Secretary to certify the initiative, and the suit resulted in an order that the proponents had “substantially complied” with the Elections Code and that the initiative should be certified for the June ballot.

The proponents of Proposition 8 worked not only in the courts, but also in the legislature, to ensure that Proposition 8 would appear on the June ballot. The proponents were able to push through the legislature an urgency measure, which in effect, reduced the statistical requirement from 110% to 105%. As drafted, the measure applied only to Proposition 8.

In the meantime, the lawsuit quickly came before the Supreme Court of California. Oral argument was held on March 9, 1982, and on March 11, 1982, the court released its per curiam opinion in Brosnahan v. Eu. The court recited the facts, including the statute reducing to 105% the number of required signatures, and, without identifying any reason for the decision, simply “conclude[d] that the initiative measure should be placed on the ballot of the June 1982 primary election.”

The political campaign for Proposition 8 continued in the typical manner of such things, with proponents and opponents seeking as much favorable publicity as possible. The Assembly Criminal Justice Committee jumped into the fray with a one hundred-page report severely criticizing Proposition 8, asserting that the proposition was “unconstitutional, misdrafted, or vaguely worded,” and would provoke “a storm of litigation which could overwhelm our appellate courts and substantially disrupt the criminal justice system.”

115. Id.
116. Id.
117. Id. at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.
118. Id.
119. Id. at 1, 641 P.2d 200, 181 Cal. Rptr. 100.
120. Id. at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.
The voters came down heavily on the side of criminal justice reform with a 56.4% vote of approval for Proposition 8. The initiative was subsequently upheld against various constitutional challenges in Brosnahan v. Brown.

The history outlined above shows that the Victims’ Bill of Rights was not simply a flash-in-the-pan development. The pressures that inspired the proponents of Proposition 8 were a long time in developing. The proponents first attempted to achieve criminal justice reform through the legislature; only when that avenue was effectively blocked and after the success of Proposition 13 did proponents turn seriously to the voter initiative process. That the proponents were able to focus seriously the electorate’s attention upon the topic of criminal justice reform was itself an indication of how the public viewed the California Supreme Court’s performance in this field of law during the 1970’s.

II. The Quantitative Impact Of Proposition 8

Elsewhere in this volume, Jeff Brown summarizes many of the qualitative impacts of Proposition 8 from the perspective of a public defender. Other articles in this volume explore particular aspects of Proposition 8 in greater detail. This section highlights very briefly the quantitative impact of Proposition 8 by resort to the numbers. Bean counting and statistics are no substitute for qualitative analysis and understanding, but counting the cases may more effectively communicate the breadth and depth of Proposition 8’s many changes.

Probably the single most startling statistic—at least to the authors—is that Proposition 8 succeeded in abrogating no fewer than twenty-seven leading cases of the Supreme Court of

123. 32 Cal. 3d 236, 657 P.2d 274, 186 Cal. Rptr. 30 (1982).
California. 125 Those leading cases were of course relied upon in subsequent decisions by the supreme court and by lower courts in California. In total, there are well over one thousand appellate cases that were affected by Proposition 8 (and an undetermined number of superior court rulings). It is a rare piece of legislation or judicial decision that, in one stroke, accomplishes such a remarkable result. In the discussion which follows, focusing upon

some of Proposition 8’s most significant reforms, we show in numbers the cases that Proposition 8 targeted and the success that Proposition 8 has had.

The exclusionary rule was one of Proposition 8’s primary targets. California’s modern history with the exclusionary rule began in 1955 when Justice Traynor, writing for a four-justice majority in People v. Cahan,126 overruled prior decisions to the contrary and adopted the exclusionary rule in California.127 The court created the “vicarious exclusionary rule” the following year in People v. Martin.128 Cahan has been cited 400 times, and Martin has been cited 242 times.129 As noted above, Cahan and Martin were formally placed upon independent state grounds as a result of Kaplan v. Superior Court,130 People v. Superior Court (Simon),131 and People v. Brisendine.132

Although Proposition 8 was approved by the voters in June of 1982, many of its effects were not immediate. There is often a lag between the enactment of new statutory or constitutional provisions and their full incorporation into the organic law. Proposition 8 also was held to apply prospectively, with the result that many post-1982 cases were decided under prior law.133 With Proposition 8, the lag was approximately three years, and the beginning of its full incorporation into the law came with the decision in In re Lance W.134 The issue in In re Lance W. was whether California’s independent exclusionary rule and vicarious exclusionary rule survived the enactment of Proposition 8.135 In a four to three

127. Id. at 448, 282 P.2d at 913. At the time Cahan was decided, the federal exclusionary rule had not yet been imposed upon the states. See Irvine v. California, 347 U.S. 128 (1954); Wolf v. Colorado, 338 U.S. 25 (1949). The rule was subsequently imposed upon the states in Mapp v. Ohio, 367 U.S. 643 (1961).
129. These numbers include only decisions from the California Supreme Court and California Courts of Appeal.
130. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).
131. 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972).
135. Id. at 879, 694 P.2d at 746, 210 Cal. Rptr. at 633.
decision authored by Justice Grodin, the court held that Proposition 8 had indeed overruled the *Cahan-Martin* line of cases, at least insofar as the cases relied upon the California Constitution.\textsuperscript{136} In the space of only eight years, *In re Lance* has been cited 295 times. Figures A-C graphically show how the *Cahan-Martin* line of cases have been overwhelmed by Proposition 8.\textsuperscript{137}

---

\textsuperscript{136} Id. at 886, 694 P.2d at 752, 210 Cal. Rptr. at 639.

\textsuperscript{137} It is interesting to note that in each of the figures, citations to the "old" cases actually rose in 1985, the year *In re Lance* was decided. The increase is due to the number of courts which cite the old case only in order to contrast the old law with Proposition 8. As the rule from a case becomes incorporated into the fabric of the judicial system, appellate citations to that case will tend to become less frequent because lower courts will make fewer and fewer mistakes. This tendency can most clearly be seen in Figure A, where citations to *Cahan* were most numerous in the few years after the decision was rendered. After five or six years, the number of citations to *Cahan* essentially levelled off at around 10 to 15 cases per year. Citations to *In re Lance* and other Proposition 8 cases will no doubt ultimately show a similar pattern.
**FIGURE A**

**Exclusionary Rule**

**People v. Cahan**

Legend
- Cahan
- In re Lance W.

Number of Citations

Year

869
**FIGURE B**

**Exclusionary Rule**

**People v. Martin**

Legend
- Martin
- In re Lance W.

Number of Citations

Year

55 58 61 64 67 70 73 76 79 82 85 88 91

870
FIGURE C

Exclusionary Rule

Independent State Grounds

Legend
- Kaplan
- Simon
- Brisendine
- In re Lance W.

Number of Citations

Year

70 73 76 79 82 85 88 91
In *Harris v. New York*, the Supreme Court of the United States held that voluntary, extrajudicial statements elicited in violation of an accused’s *Miranda* rights could be used to impeach the accused’s testimony at trial. The Supreme Court of California initially adopted this rule in *People v. Nudd*. Two years later, however, the court reconsidered *Nudd*, and in a four to three decision in *People v. Disbrow*, rejected both *Harris* and *Nudd*, citing primarily the compelling need to deter wrongful police conduct and the likelihood that a jury would use the inculpatory statements for more than just impeachment purposes. *Disbrow* has been cited 127 times.

In *People v. May*, the Supreme Court of California, adopting the court of appeal’s decision, held that Proposition 8 had overruled *People v. Disbrow*, and that inculpatory statements elicited in violation of *Miranda* could henceforth be used to impeach the defendant’s trial testimony. *May* has been cited forty-nine times in only four years. Figure D shows the distribution of citations for *Disbrow* and *May*.

139. *Id.* at 226.
141. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).
142. *Id.* at 111-13, 545 P.2d at 278, 127 Cal. Rptr. at 366.
144. *Id.* at 319, 748 P.2d at 313, 243 Cal. Rptr. at 375.
FIGURE D

Miranda Violations

Use for Impeachment Purposes

Legend

- Disbrow
- May

Year

Number of Citations

1992 / The Victim’s Bill of Rights
In *Lego v. Twomey*, the Supreme Court of the United States held that the state had to prove the voluntariness of a confession only by a preponderance of the evidence. The Supreme Court of California rejected that rule in *People v. Jimenez*, imposing a "beyond reasonable doubt" standard. Jimenez has been cited 152 times. In 1989, Jimenez was declared a dead letter by the court in *People v. Markham*. Markham has been cited twenty-four times in its short two-year-plus life. Figure E shows the breakdown of citations to these two cases.

---

146. Id. at 479.
147. 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978).
148. Id. at 600, 580 P.2d at 674, 147 Cal. Rptr. at 174.
FIGURE E

Confessions

Proof of Voluntariness

Legend
[ ] Jimenez
[ ] Markham

Year

Number of Citations

Markham is especially significant because it marks the first time Justice Mosk joined the majority in recognizing the effect of Proposition 8. Justice Mosk had dissented in both In re Lance W. and People v. May. Justice Mosk's "reluctan[t]" concurring opinion in Markham communicates his fundamental disagreement with Proposition 8, which he describes as "retrogressive," as follows:

The blame for the sorry situation in which we find ourselves must be placed squarely on Proposition 8. That ill-conceived measure has struck down California precedents on individual rights as it has encountered them in its path of destruction. [citations omitted] Jimenez is the latest casualty -- and regrettably, probably not the last.

These are only a few of the cases interpreting Proposition 8's many provisions. The graphs suggest two conclusions about Proposition 8. First, Proposition 8 was drafted in response to an enormous body of law. Proposition 8 was not a reaction to simply one or two cases; it was a reaction to literally hundreds of decisions in the appellate reporters (and to the hundreds or thousands of unreported superior court decisions following the rules crafted by the appellate courts). Second, Proposition 8 appears largely to have been successful in remaking the legal landscape.

More cases are on the way. The California Courts of Appeal are, of course, ahead of the Supreme Court of California in interpreting Proposition 8. For example, in People v. Superior Court (Hawkins), the court held that a blood test could be taken only after a suspect had been lawfully arrested. In People v. Trotman and People v. Deltoro, the courts held

---

151. Markham, 49 Cal. 3d at 73, 775 P.2d at 1048, 260 Cal. Rptr. at 279 (Mosk, J., concurring).
152. 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972).
153. Id. at 764, 493 P.2d at 1149, 100 Cal. Rptr. at 285.
that Proposition 8 overruled *Hawkins*; accordingly, the police may
require a blood test prior to arrest if there is probable cause to
believe a crime has been committed for which a blood test would
be relevant, such as driving under the influence.\(^\text{156}\)

In *People v. Shuey*,\(^\text{157}\) the court held that evidence seized
pursuant to a warrant would be suppressed if the premises searched
had been "secured" before the warrant had been obtained.\(^\text{158}\) The
court of appeal in *People v. Gesner*\(^\text{159}\) held that *Shuey* was
overruled by Proposition 8 and, in accord with United States
Supreme Court precedent, that a warrant in such circumstances
would be valid if there was an independent source of information
for the warrant.\(^\text{156}\)

In *People v. Longwill*,\(^\text{161}\) the court held that a full body search
of a person who was not necessarily going to be incarcerated was
impermissible, and evidence found pursuant to such a search must
be suppressed.\(^\text{162}\) The courts in *In re Demetrius A.*\(^\text{163}\) and
*People v. Otto*\(^\text{164}\) held that Proposition 8 overruled *Longwill* and
that California courts must now follow the federal rule that permits

\(^{156}\) Trotman, 214 Cal. App. 3d at 436, 262 Cal. Rptr. at 644; Deltoro, 214 Cal. App. 3d at 1426-27, 262 Cal. Rptr. at 310. See Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that police were justified in taking scrapings from a suspect’s fingernails where probable cause existed to believe he had committed a murder, even though the suspect was not arrested); Schmerber v. California, 384 U.S. 757, 772 (1966) (holding that an arrestee may be required to take a blood test where probable existed to believe that the he had been driving under the influence).

\(^{157}\) Id. at 851, 533 P.2d at 222, 120 Cal. Rptr. at 94.

\(^{158}\) Id. at 835, 533 P.2d at 211, 120 Cal. Rptr. 83 (1975).


\(^{160}\) Id. at 592, 248 Cal. Rptr. at 330. See Segura v. United States, 468 U.S. 796, 813-14 (1984) (holding that evidence obtained in a search conducted under a valid warrant one day after an illegal entry was admissible since the information on which the warrant was secured was derived from a source independent of the illegal entry).

\(^{161}\) 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975).

\(^{162}\) Id. at 952-53, 538 P.2d at 758-59, 123 Cal. Rptr. at 302-03.


full body searches following a lawful custodial arrest. The Supreme Court of California granted review in People v. Otto on April 15, 1991.

Finally, in People v. Aranda, the court held that one defendant's extrajudicial statements that implicate a co-defendant are inadmissible when both defendants are tried jointly. In People v. Boyd, the court held that Proposition 8 overruled Aranda and that, consistent with the federal rule, such inculpatory statements are admissible so long as the defendant who made the extrajudicial statements is available for cross-examination.

CONCLUSION

In light of the breadth of issues touched by Proposition 8 and the sheer number of cases that it overruled, Proposition 8 must be viewed as a wholesale shift in the philosophy of the criminal justice system in California. By casting the measure in the form of an initiative designed to introduce the concept of "victims' rights" into the criminal justice system, Proposition 8 succeeded in capturing the attention of the voters, who were obviously dissatisfied with what they perceived to be an excessive judicial focus upon the rights of the accused.

165. Otto, 277 Cal. Rptr. at 596; Demetrius A., 208 Cal. App. 3d at 1247-48, 256 Cal. Rptr. at 718-19. See Gustafson v. Florida, 414 U.S. 260, 266 (1973) (holding that a police officer was entitled to make a full search, incident to arrest, of the defendant's person and a cigarette package found thereupon, even though the officer had no subjective fear that the defendant was armed); United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search of the defendant's person and cigarette package found thereupon did not violate the fourth amendment where the officer had probable cause to arrest the defendant).


168. Id. at 531, 407 P.2d at 274, 47 Cal. Rptr. at 362.


170. Id. at 563, 271 Cal. Rptr. at 752. See Bruton v. United States, 391 U.S. 123, 137 (1968) (holding that admission of a co-defendant's extrajudicial statement inculpating defendant in a joint trial was error since the co-defendant was unavailable for cross-examination).

171. See supra notes 110-123 and accompanying text (discussing the history of Proposition 8's enactment).
Proposition 8 must also be judged successful in meeting the goals that it set out to accomplish. An enormous number of cases and rules have been overruled by Proposition 8, and the cases overruled were exactly the set of cases that created the public outcry in the 1970’s.172 The proponents of the Victims’ Bill of Rights have, on this tenth anniversary, good reason to be proud of their accomplishment.

172. See supra notes 124-170 and accompanying text (discussing the quantitative impact of Proposition 8).