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Katharine Martin

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Disbrow Confronts Proposition 8: Will Miranda Violative Statements be Admitted to Trial for Impeachment?

Proposition 8¹ had a significant effect on the rules governing the admissibility of evidence in criminal proceedings in California.² Many judicial decisions and rules of evidence serve to exclude otherwise relevant evidence.³ After adoption of Proposition 8, article 1, section 28(d) of the California Constitution requires that “all relevant evidence” be admitted to trial.⁴ The general rule of admissibility under section 28(d), however, is not absolute.⁵ The practical effect of section 28(d) is the admission of certain relevant evidence that previously would have been excluded.⁶

Whether prior inconsistent statements⁷ obtained in violation of the procedural safeguards set forth in *Miranda v. Arizona*⁸ may be

1. Proposition 8 was incorporated into the California Constitution. See CAL. CONST. art. I, §28.

2. See *In re Lance W.*, 37 Cal. 3d 873, 886 n.6, 694 P.2d 744, 751 n.6, 210 Cal. Rptr. 631, 638 n.6 (1985) (makes reference to cases other than *Lance* that section 28(d) has affected); Comment, *Impeaching the Accused with Prior Convictions: Does Proposition 8 Put Beagle In the Doghouse?*, 15 PAC. L.J. 301, 301 (1984).

3. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (excludes statements obtained in violation of certain procedural safeguards from affirmative use at trial); *People v. Disbrow*, 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) (excludes extrajudicial statements obtained in violation of the procedural safeguards in *Miranda* from use at trial); *Bryan v. Superior Court*, 7 Cal. 3d 575, 587, 498 P.2d 1079, 1087, 102 Cal. Rptr. 831, 839 (1972) (excludes testimony of a juvenile at a fitness hearing from subsequent use in a criminal proceeding); CAL. EVID. CODE §1200 (excludes out of court statements offered to prove the truth of the matter asserted).

4. CAL. CONST. art. I, §28, subd. (d). Subsection (d) states:

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

Id. (emphasis added).

5. See *infra* notes 103 and 108 and accompanying text.

6. See generally *Lance*, 37 Cal. 3d at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634 (overruled two cases on the basis of section 28(d), causing the admission of evidence that previously would have been excluded); See also *People v. Brisendine*, 13 Cal. 3d 528, 544-45, 531 P.2d 1099, 1109, 119 Cal. Rptr. 315, 325 (1975) (overruled by *Lance*); *People v. Martin*, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955) (overruled by *Lance*).

7. See *infra* notes 33-37 and accompanying text.

8. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The procedural safeguards declared

admitted as evidence for impeachment purposes is uncertain after the enactment of section 28(d).⁹ The existing rule in California, established in *People v. Disbrow*,¹⁰ excludes prior inconsistent statements obtained from defendant in violation of *Miranda* as evidence to impeach the credibility of defendant as a witness.¹¹ Unless the rule in *Disbrow* falls within an exception to the general rule of admissibility of section 28(d), the section overrules *Disbrow*.¹² If *Disbrow* has been overruled, prior inconsistent statements obtained in violation of *Miranda* are admissible for impeachment purposes.¹³ California courts have split on whether the rule excluding evidence in *Disbrow* falls within an exception to the general rule of admissibility provided by section 28(d).¹⁴

The general rule of admissibility set forth in section 28(d) is limited by two exceptions. Section 28(d) has no effect on statutory rules of evidence, those relating to hearsay or privilege existing prior to Pro-

in *Miranda* require "[p]rior to questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* The holding of *Miranda* prevents the prosecution from using statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant without demonstrating the use of procedural safeguards effective to secure the privilege against self-incrimination of the Fifth Amendment of the U.S. Constitution. *Id.*

9. The issue of whether the rule in *Disbrow* is abrogated by section 28(d) has been granted review by the California Supreme Court. *People v. May*, 172 Cal. App. 3d 194, 218 Cal. Rptr. 152, *h'g granted*, Crim. 24991 (California Supreme Court granted hearing November 27, 1985) (appellate opinion depublished, available in 218 Cal. Rptr. 152); *see People v. Kimble*, 177 Cal. App. 3d 213, 218, 222 Cal. Rptr. 818, 820 (1986) (First Appellate District held prior inconsistent statements obtained in violation of *Miranda* may not be admitted as evidence for impeachment purposes after section 28(d)); *People v. Clark*, 171 Cal. App. 3d 889, 894, 217 Cal. Rptr. 819, 823 (1985) (Third Appellate District held prior inconsistent statements obtained in violation of *Miranda* may not be admitted as evidence for impeachment purposes after section 28(d)); *People v. Barrios*, 166 Cal. App. 3d 732, 743, 212 Cal. Rptr. 644, 649-50 (1985) (Fifth Appellate District held prior inconsistent statements obtained in violation of *Miranda* may not be admitted as evidence for impeachment purposes after section 28(d)).

10. *People v. Disbrow*, 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976).

11. *Id.*

12. *See infra* notes 95-101 and accompanying text.

13. *Clark*, 171 Cal. App. 3d at 897, 217 Cal. Rptr. at 825 (Evans, Acting P.J., dissenting).

14. *Compare May*, 172 Cal. App. 3d 194, 218 Cal. Rptr. 152, *h'g granted*, Crim. 24991 with *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822 (rule excluding evidence in *Disbrow* falls within an exception to section 28(d)); *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650 (rule excluding evidence in *Disbrow* falls within an exception to section 28(d)); *see also* ATTORNEY GENERAL'S GUIDE TO PROPOSITION 8, CALIFORNIA DEPARTMENT OF JUSTICE, 4-43 to 4-45 (June 1982) (on file at *Pacific Law Journal*) (suggests *Disbrow* should not be encompassed within Evidence Code section 940, therefore, is overruled by section 28(d)); ANALYSIS OF PROPOSITION 8, Assembly Committee on Criminal Justice, 14-15 (March 24, 1982) (on file at the *Pacific Law Journal*) (discussing *Disbrow*, however no decision on whether overruled by section 28(d)); PROPOSITION 8—THE VICTIM'S BILL OF RIGHTS, California District Attorney Association (October 18, 1982) (on file at the *Pacific Law Journal*) (suggests *Disbrow* will be overruled by section 28(d)).

position 8,¹⁵ or on exclusions mandated by the United States Constitution.¹⁶ Accordingly, judicially created exclusionary rules founded solely upon the California Constitution independent of the United States Constitution are the rules which are not excepted from section 28(d).¹⁷

Courts in recent California cases¹⁸ have held that prior inconsistent statements obtained in violation of *Miranda* for impeachment purposes are still excluded after the enactment of section 28(d).¹⁹ The courts have relied upon Evidence Code section 940 in reaching this conclusion.²⁰ Evidence Code section 940 is a codification of the California and United States constitutional privileges against self-incrimination.²¹ Courts have held that section 940 encompasses the *Disbrow* rule, and, therefore, *Disbrow* falls within an exception to the general rule of admissibility of section 28(d).²²

The purpose of this comment is to show that the rule excluding evidence in *Disbrow* survives the enactment of section 28(d). Initially, this comment will review the background of the *Disbrow* rule.²³ A general discussion of section 28(d) of the California Constitution will follow.²⁴ The effect of section 28(d) on the rule of *Disbrow* will then be discussed.²⁵ In the context of California cases²⁶ affected by section 28(d), this comment will analyze why *Disbrow* should survive

15. CAL. CONST. art I, §28, subd. (d).

16. See *Malloy v. Hogan* 378 U.S. 1, 10 (1964) (required the fifth amendment of the United States Constitution to be enforced against the states through the fourteenth amendment).

17. See *Lance*, 37 Cal. 3d at 889, 694 P.2d at 754, 210 Cal. Rptr. at 641 (held section 28(d) would be defeated if the judiciary was free to adopt exclusionary rules that were not authorized by statute or mandated by the United States Constitution).

18. See *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822-23; *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650.

19. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822-23; *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650.

20. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822-23; *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650.

21. CAL. EVID. CODE §940.

22. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 739, 212 Cal. Rptr. at 647.

23. See *infra* notes 54-94 and accompanying text.

24. See *infra* notes 95-101 and accompanying text.

25. See *infra* notes 95-109 and accompanying text.

26. *Lance*, 37 Cal. 3d at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634 (section 28(d) abrogated the vicarious and independent exclusionary rules for search and seizure violations of the California Constitution); *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 804, 693 P.2d 789, 790, 210 Cal. Rptr. 204, 205 (1985) (held use immunities were not abrogated by section 28(d)); *People v. Brisendine*, 13 Cal. 3d 528, 544-45, 531 P.2d 1099, 1109, 119 Cal. Rptr. 315, 325 (1975) (abrogated in *Lance* by section 28(d)); *People v. Martin*, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955) (abrogated in *Lance* by section 28(d)); *Clark*, 171 Cal. App. 3d 889, 894, 217 Cal. Rptr. 829, 822 (held section 28(d) did not overrule *Disbrow*); *Barrios*, 166 Cal. App. 3d at 739, 212 Cal. Rptr. at 645-47 (held section 28(d) did not overrule *Disbrow*).

section 28(d).²⁷ The argument will be made that *Disbrow* is encompassed within the scope of Evidence Code section 940.²⁸ Encompassed within Evidence Code section 940, *Disbrow* falls within an exception to the general rule of admissibility of section 28(d).²⁹ This comment will conclude that *Disbrow* is not abrogated by section 28(d).

ADMISSIBILITY CONCERNS OF PRIOR INCONSISTENT STATEMENTS

The rule in California, established in *Disbrow*, excludes for impeachment purposes prior inconsistent statements obtained in violation of *Miranda*.³⁰ Section 28(d) requires all relevant evidence admitted to trial.³¹ Because prior inconsistent statements are relevant evidence,³² the exclusion in *Disbrow* conflicts with the general rule of admissibility of section 28(d).

Prior inconsistent statements are an invaluable source of evidence for impeachment purposes at trial,³³ providing an important tool for impeaching the credibility of a witness.³⁴ The trier of fact is presented with a prior statement made by the witness outside of the trial context that contradicts the trial testimony.³⁵ The inconsistency presents evidence to the trier of fact bearing upon the veracity of the testimony. The determinative factor in the outcome of a case may rest solely upon whether the trier of fact believes the testimony of a particular witness.³⁶ Thus, the evidentiary benefits of prior inconsistent statements are apparent. A need to exclude inconsistent statements from trial, however, may arise when the statements were obtained in violation of the procedural safeguards enunciated in *Miranda v. Arizona*.³⁷

Miranda IN CALIFORNIA

In *Miranda*, the United States Supreme Court held that statements obtained during custodial interrogation of a defendant will not be

27. See *infra* notes 107-246 and accompanying text.

28. See *infra* notes 107-111 and accompanying text.

29. See *infra* notes 107-111 and accompanying text.

30. *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

31. CAL. CONST. art. I, §28, subd. (d).

32. Prior inconsistent statements are relevant evidence for determining the credibility of a witness. CAL. EVID. CODE §780(h).

33. C. MCCORMICK, ON EVIDENCE §33, at 72 (3rd ed. 1984) (most effective form of impeachment is with the use of prior inconsistent statements).

34. *Id.*

35. *Id.* at 74.

36. See, e.g., *infra* note 188 and accompanying text (the jury believed the testimony of a police officer which linked the defendant to the crime).

37. *Miranda*, 384 U.S. at 444. Compare *Harris*, 401 U.S. at 225-26 (excludes evidence from affirmative use at trial) with *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368 (excludes evidence from any and all uses at trial).

admitted to trial unless the defendant was given certain procedural safeguards prior to making the statements.³⁸ The safeguards are designed to protect against a violation of the privilege against self-incrimination of the fifth amendment of the United States Constitution.³⁹ The *Miranda* Court held a violation of the procedural safeguards requires exclusion of evidence obtained.⁴⁰

Traditionally, the fifth amendment of the United States Constitution applied only to the federal government.⁴¹ The United States Supreme Court, however, has held that the fourteenth amendment extends certain provisions of the Bill of Rights to individual states.⁴² If a right represents a guarantee "fundamental to the American scheme of Justice," the right should apply to the states through the fourteenth amendment.⁴³ The privilege against self-incrimination of the fifth amendment has been deemed fundamental,⁴⁴ and therefore, acts as a limitation upon the power of the states.⁴⁵ Therefore, all United States Supreme Court interpretations of the self-incrimination clause of the fifth amendment, including *Miranda*, apply to the states.⁴⁶

States must, at a minimum, apply constitutional standards set by the United States Supreme Court for those provisions of United States Constitution deemed applicable to the states.⁴⁷ The states, however, may impose higher standards through the state constitutions.⁴⁸ In the past fifteen years a trend has emerged among state courts affording

38. *Miranda*, 384 U.S. at 444; see *supra* note 8 and accompanying text (states the procedural safeguards in *Miranda*).

39. *Miranda*, 384 U.S. at 444.

40. *Id.*

41. *Barron v. Baltimore*, 32 U.S. 243, 249 (1833).

42. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (holding the fifth amendment guarantee against double jeopardy acts as a limitation upon the states through the fourteenth amendment); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding the sixth amendment right to jury trial acts as a limitation upon the states through the fourteenth amendment); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding the fifth amendment privilege against self-incrimination acts as a limitation upon the states through the fourteenth amendment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding the fourth amendment right against unreasonable search and seizures acts as a limitation upon the states through the fourteenth amendment); *Pointer v. Texas*, 380 U.S. 400, 406 (1960) (holding the sixth amendment right of an accused to confront the witness against him acts as a limitation upon the states through the fourteenth amendment).

43. *Benton*, 395 U.S. at 795; see also 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §272.

44. See *Malloy*, 378 U.S. at 10-11.

45. *Id.*

46. *Id.*

47. See *Cooper v. California*, 386 U.S. 58, 62 (1967) (court recognized standards set by the United States Supreme Court does not affect power of the states to impose higher standards than required by federal law); *Brisendine*, 13 Cal. 3d at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328 (overruled by *Lance*) (state courts are arbiters of state law so long as the judicial interpretations does not restrict liberties in the federal constitution).

48. See *Cooper v. California*, 386 U.S. at 62.

an accused greater protection under state constitutions than required by the United States Constitution.⁴⁹ Most states adopted provisions similar to the Bill of Rights in their state constitutions.⁵⁰ In California, for example, the privilege against self-incrimination is set forth in article 1, section 15 of the California Constitution.⁵¹ The California Supreme Court in *Disbrow* interpreted the California constitutional privilege against self-incrimination more strictly than the United States Supreme Court interpreted the United States constitutional privilege against self-incrimination.⁵² Therefore, the interpretation by the California Supreme Court gave an accused greater protection than did the interpretation by the United States Supreme Court.⁵³

Disbrow, THE CALIFORNIA RESPONSE

In 1976, the California Supreme Court interpreted the privilege against self-incrimination of article 1, section 15 of the California Constitution in *People v. Disbrow*.⁵⁴ Disbrow was convicted for the murder of his wife, and for the voluntary manslaughter of a friend of his wife.⁵⁵ Certain postarrest statements made by Disbrow obtained in violation of *Miranda* were admitted for impeachment purposes.⁵⁶ The statements were obtained while Disbrow was being wheeled on a gurney from the emergency room.⁵⁷ The detective informed Disbrow of his rights under *Miranda*.⁵⁸ Disbrow stated that he wished to remain silent and to consult an attorney.⁵⁹ The detective continued the interrogation in violation of *Miranda*.⁶⁰ Disbrow proceeded to make certain inculpatory statements under representations that any statements he made could not be used against him in court.⁶¹ The statements were nevertheless admitted to trial.⁶² The California Supreme Court

49. Y. KAMISAR, W. LAFAYE & J. ISRAEL, BASIC CRIMINAL PROCEDURE at 47 (1980).

50. *Brisendine*, 13 Cal. 3d at 550-51, 531 P.2d at 1113, 119 Cal. Rptr. at 329 (overruled by *Lance*) (citing 1 SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY at 383 (1971)).

51. The self-incrimination clause of the United States Constitution contains virtually identical language to the self-incrimination clause of the California Constitution. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST., amend. V. "Persons may not be compelled in a criminal case to be a witness against themselves." CAL. CONST. art. 1, §15.

52. Compare *Harris*, 401 U.S. at 225 with *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

53. *Disbrow*, 16 Cal. 3d at 114-15, 545 P.2d at 280-81, 127 Cal. Rptr. at 368-69.

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

55. *Id.* at 103, 545 P.2d at 273, 127 Cal. Rptr. at 361.

56. *Id.*

57. *Id.* at 104-105, 545 P.2d at 273-74, 127 Cal. Rptr. at 361-62.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

reversed the conviction on the basis that the postarrest statements obtained in violation of *Miranda* should not have been admitted to trial to impeach Disbrow.⁶³

The California Supreme Court in *Disbrow* interpreted the California Constitution as affording an accused greater protection than required by the federal constitution.⁶⁴ The court held that the use of any extrajudicial statements obtained in violation of *Miranda* was precluded by the California Constitution.⁶⁵ Statements obtained in violation of *Miranda* could not be used as affirmative or impeachment evidence.⁶⁶ By adopting the rule in *Disbrow*, the California Supreme Court imposed a stricter standard of exclusion upon *Miranda* violative statements than required by the United States Constitution.⁶⁷

The principle concern of the court in *Disbrow* was the potential harm that admitting the statements obtained in violation of *Miranda* might cause.⁶⁸ The *Disbrow* court held that a jury may view the prior inconsistent statements as substantive evidence of guilt, even with the benefit of a limiting instruction explaining to the jury that the evidence may only be used for impeachment purposes.⁶⁹ In addition, the court found that, faced with the prospect of jury misuse of the evidence, a defendant might forego the right to testify.⁷⁰ The court held *Miranda* certainly did not envision this result.⁷¹

The result in *Disbrow* was also supported by the underlying purpose of *Miranda*.⁷² Because *Miranda* was designed to deter police misconduct, the court felt the purpose of *Miranda* would be defeated if the evidence were used for purposes of impeachment.⁷³ The *Disbrow* court felt that admitting prior inconsistent statements obtained in violation of *Miranda* for impeachment purposes would encourage police misconduct.⁷⁴ Little or no incentive would exist for police to comply with *Miranda* if the statements elicited in violation of *Miranda* could nevertheless be introduced at trial for impeachment.⁷⁵

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

64. *See Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Disbrow*, 16 Cal. 3d at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367.

73. *Id.*

74. *Id.*

75. *Id.*

The California Supreme Court in *Disbrow* rejected as persuasive authority the reasoning of the United States Supreme Court in *Harris v. New York*.⁷⁶ The policy behind *Harris* has gained importance, however, following the passage of section 28(d).⁷⁷ If section 28(d) has overruled *Disbrow*, the federal standard enunciated in *Harris* will be established in California.⁷⁸

Harris, THE FEDERAL STANDARD

In *Harris*, the United States Supreme Court held that prior inconsistent statements obtained in violation of *Miranda* were admissible for impeachment purposes.⁷⁹ *Miranda* had required that evidence obtained in violation of the procedural safeguards be excluded as substantive evidence of guilt.⁸⁰ The *Miranda* Court did not, however, address whether the statements could be used for impeachment purposes.⁸¹

In contrast to *Disbrow*, the Court in *Harris* considered the source of the *Miranda* exclusionary rule as a factor weighing in favor of admitting statements obtained in violation of *Miranda* for impeachment purposes.⁸² *Harris* considered that the exclusion of evidence under *Miranda* was designed to deter police misconduct that violates the self-incrimination clause of the fifth amendment.⁸³ The *Harris* Court found that police misconduct is sufficiently deterred when the evidence in question is made unavailable to the prosecution as substantive evidence of guilt.⁸⁴ Therefore, the admission for impeachment pur-

76. *Id.* at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368; See *Harris v. New York*, 401 U.S. 222, 225 (1971). In 1974, two years before *Disbrow*, the California Supreme Court adopted the reasoning and rule of the United States Supreme Court decision in *Harris*. See *People v. Nudd*, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974) (overruled by *Disbrow*).

77. *Clark*, 171 Cal. App. 3d at 897, 217 Cal. Rptr. at 825 (Evans, Acting P.J., dissenting).

78. *Id.*

79. *Harris*, 401 U.S. at 225.

80. *Miranda*, 384 U.S. at 444.

81. *Harris*, 401 U.S. at 224. "*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case-in-chief is barred for all purposes" *Id.* But see *Miranda*, 384 U.S. at 476-77.

The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any statement.

Id.

82. *Harris*, 401 U.S. at 225.

83. *Id.*

84. *Id.*

poses of prior inconsistent statements obtained in violation of *Miranda* would not violate the deterrent rationale of *Miranda*.⁸⁵

The *Harris* Court also balanced the interest in ascertaining truth against the policy behind *Miranda*.⁸⁶ The Court found that the impeachment process aids the jury in assessing a defendant's credibility.⁸⁷ Keeping relevant and reliable evidence from the trier of fact circumscribes the search for truth at trial.⁸⁸ The exclusion of inconsistent statements permits the witness to hide behind a shield provided by the courts.⁸⁹ The *Harris* Court held that excluding prior inconsistent statements obtained in violation of *Miranda* for impeachment purposes has the potential of extending the privilege against self-incrimination to a right to commit perjury.⁹⁰ As a result, the *Harris* Court admitted for impeachment purposes the prior inconsistent statements obtained in violation of *Miranda*.⁹¹

The rule established by the California Supreme Court in *Disbrow* was relatively clear until section 28(d) was enacted.⁹² Under *Disbrow*, prior inconsistent statements obtained in violation of *Miranda* could never be admitted to trial even for the limited purpose of impeachment.⁹³ Requiring absolute exclusion of *Miranda* violative evidence, *Disbrow* imposed higher standards than required by the United States Constitution.⁹⁴ After the passage of section 28(d), imposition of higher standards than required by the United States Constitution can be accomplished only by statute.⁹⁵

PROPOSITION 8: THE VICTIM'S BILL OF RIGHTS

Proposition 8, introduced to the California voters as "The Victim's Bill of Rights,"⁹⁶ became law on June 8, 1982.⁹⁷ Section 28(d), refer-

85. *Id.*

86. *Id.*

87. *Id.*

88. *Lance*, 37 Cal. 3d at 882, 694 P.2d at 749, 210 Cal. Rptr. at 636 (citing *Rakas v. Illinois*, 439 U.S. 128, 137 (1978)).

89. *Harris*, 401 U.S. at 226.

90. *Id.* at 225.

91. *Id.* at 226.

92. *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367.

93. *Id.*

94. See *supra* notes 63-66 and accompanying text.

95. See *infra* notes 99-100 and accompanying text.

96. Gorman, *Proposition 8 Comes of Age*, 13 W. ST. U.L. REV. 1, 1 (1985); see also CAL. CONST. art. I, §28.

97. CAL. CONST. art. I, §28, subd. (d); see also Letter from George Deukmejian, Attorney General, to all California District Attorneys, Sheriffs, and Chief Probation Officers (June 9, 1982) (on file at *Pacific Law Journal*) (the letter was prepared as a cover letter for the Attorney General's Guide to Proposition 8, California Department of Justice).

red to as the "Right to Truth-In-Evidence"⁹⁸ section, requires that all relevant evidence be admitted in a criminal trial.⁹⁹ Section 28(d) is, however, subject to two exceptions. First, section 28(d) implicitly excludes all relevant evidence that must be excluded under the standards of the United States Constitution.¹⁰⁰ Secondly, section 28(d) expressly excludes from the general rule of admissibility all evidence excluded by California statutory rules of evidence relating to privilege, hearsay, or Evidence Code sections 352, 782, or 1103.¹⁰¹ *Disbrow* is overruled by section 28(d) unless the rule in *Disbrow* falls within one of the two exceptions to the general rule of admissibility.¹⁰²

1. Constitutionally Compelled Exclusion

Implicit in section 28(d) as the first exception to the general rule of admissibility is the exclusion of evidence mandated by the United States Constitution.¹⁰³ The United States Supreme Court has required certain types of evidence obtained in violation of the United States Constitution excluded from trial.¹⁰⁴ In addition, the United States Supreme Court has limited admission of evidence in some situations for specific purposes.¹⁰⁵ The United States Constitution, however, does not mandate the exclusion of prior inconsistent statements obtained

98. CAL. CONST. art. I, §28, subd. (d).

99. *Id.* Registered voters each were mailed an election pamphlet containing the language of the proposed bill and a summary prepared by the Attorney General. *Clark*, 171 Cal. App. 3d at 896, 217 Cal. Rptr. at 824 (Evans, Acting P.J., dissenting). The election pamphlet also contained a detailed analysis prepared and made available by the state legislative analyst. *Id.* The voters were made aware that certain relevant evidence was not permitted to be presented in a criminal trial or hearing. CALIFORNIA ELECTION PAMPHLET, PROPOSITION 8, Primary Election, June 1982 (on file at *Pacific Law Journal*). The analyst indicated that section 28(d) would change this and permit all relevant evidence that did not violate federal standards, or was not encompassed within existing statutory language into trial. *Id.*

100. *Malloy*, 378 U.S. at 10.

101. CAL. CONST. art. I, §28, subd. (d).

102. See *Lance*, 37 Cal. 3d at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634 (section 28(d) overruled two exclusionary rules based upon independent state grounds, which did not fall within any exception to section 28(d)).

103. *Malloy*, 378 U.S. at 10.

104. B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §833, 12 (1985 supp., part II). The United States Supreme Court, for example, has required these four types of evidence excluded from trial. B. WITKIN, CALIFORNIA EVIDENCE 2d, §480 et. seq. (improperly coerced confessions are excluded as a violation of due process); *Rochin v. California*, 342 U.S. 165, 172-74 (1952) (self-incriminating evidence obtained by brutality is excluded as a violation of due process); *Miranda*, 384 U.S. at 476-77 (statements obtained in violation of the procedural safeguards enunciated in *Miranda* must be excluded as a violation of the fifth amendment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (evidence obtained by unreasonable search and seizure must be excluded as a violation of the fourth amendment).

105. See, e.g., *Harris*, 401 U.S. at 226 (statements obtained in violation of *Miranda* may be used for impeachment purposes); *Walder v. U.S.*, 347 U.S. 62, 65 (1954) (evidence obtained by unreasonable search and seizure may be admitted for impeachment).

in violation of *Miranda* as evidence “for impeachment purposes.”¹⁰⁶ The *Harris* Court held statements obtained in violation of *Miranda* may be used for impeachment purposes.¹⁰⁷ The rule excluding evidence in *Disbrow*, therefore, does not survive section 28(d) on the basis of the first exception to the general rule of admissibility.

2. California Rules of Evidence

The general rule of admissibility in section 28(d) has no effect on any existing rule of evidence relating to privilege, hearsay, or Evidence Code sections 352, 782, or 1103.¹⁰⁸ While no statutory rule of evidence in California expressly excludes prior inconsistent statements obtained in violation of *Miranda*, the rule in *Disbrow* may have been implicitly codified in Evidence Code section 940.¹⁰⁹ If encompassed within a statutory rule of evidence relating to privilege, the *Disbrow* rule would fall within the express exception to the general rule of admissibility of section 28(d).¹¹⁰

SCOPE OF EVIDENCE CODE SECTION 940

Evidence Code section 940 is a codification of the United States and California constitutional privileges against self-incrimination.¹¹¹ The scope of the privilege in Evidence Code section 940 is an important factor in determining whether the *Disbrow* rule is encompassed within the privilege. Evidence Code section 940 does not define the scope of the privilege.¹¹² Since the legislature did not provide guidance, the scope of the privilege must be determined by pertinent provisions of the California or United States Constitutions as interpreted by the courts.¹¹³

The holding in *Disbrow* was expressly based upon the privilege against self-incrimination of article 1, section 15 of the California

106. *Harris*, 401 U.S. at 225.

107. *Id.*

108. CAL. CONST. art. I, §28, subd. (d).

109. See CAL. EVID. CODE §940.

110. CAL. CONST. art. I, §28, subd. (d).

111. CAL. EVID. CODE §940. Section 940 states: “To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.” *Id.*

112. *People v. Ramona*, 37 Cal. 3d 802, 808, 693 P.2d 789, 793, 210 Cal. Rptr. 204, 208 (1985); see also California Law Revision Commission, *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)* 7 CAL. L. REVISION COMM’N, REP., REC. & STUDIES, 157, 170 (1965) [hereinafter cited as CAL. L. REVISION COMM’N].

113. *Ramona*, 37 Cal. 3d at 808, 693 P.2d at 793, 210 Cal. Rptr. at 208; see also CAL. L. REVISION COMM’N., *supra* note 112.

Constitution.¹¹⁴ The holding precluded the use by prosecution of any extrajudicial statement made by the defendant either as affirmative evidence or for purposes of impeachment, when the statement was obtained in violation of *Miranda*.¹¹⁵ Viewed as a judicial interpretation of the privilege against self-incrimination, the rule in *Disbrow* is encompassed within the scope of Evidence Code section 940.¹¹⁶ The argument that *Disbrow* is a judicial interpretation of the California constitutional privilege against self-incrimination and, therefore, encompassed within section 940 is supported by *Ramona R. v. Superior Court*.¹¹⁷

1. *Ramona R. v. Superior Court*

In 1985, the California Supreme Court in *Ramona* addressed the issue of whether a California law providing for certain use immunities was nullified by the enactment of section 28(d) of the California Constitution.¹¹⁸ "Use immunity" is a term that refers to an order of the court compelling a witness to give testimony of a self-incriminating nature on condition that the resulting self-incriminating testimony is not used as evidence in subsequent prosecution of the witness.¹¹⁹ The use immunities involved in *Ramona* required that statements made by a juvenile to a court or a probation officer at a fitness hearing be inadmissible as substantive evidence of guilt in a subsequent criminal proceeding against the minor.¹²⁰ The use immunities involved in *Ramona* have been deemed essential to the privilege against self-incrimination of the California Constitution by the California Supreme Court in *Bryan v. Superior Court*.¹²¹

The California Supreme Court in *Ramona* held that Evidence Code section 940 was "existing statutory language," bringing the use immunities within the exception of the general rule of admissibility of section 28(d).¹²² The court held that section 940 includes use immunities although section 940 does not explicitly refer to them.¹²³ The statute

114. *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

115. *Id.*

116. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 741-43, 212 Cal. Rptr. at 649-50.

117. 37 Cal. 3d 802, 804, 693 P.2d 789, 790, 210 Cal. Rptr. 204, 205 (1985).

118. *Id.*

119. BLACK'S LAW DICTIONARY 1383 (5th ed. 1981).

120. See *Bryan*, 7 Cal. 3d at 587, 498 P.2d at 1087, 102 Cal. Rptr. at 839.

121. *Id.*

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

123. *Id.*

was interpreted by the court as having been purposefully broad to include judicial decisions relating to the privilege against self-incrimination.¹²⁴

The use immunities involved in *Ramona* were deemed fundamental to the California privilege against self-incrimination.¹²⁵ *Ramona* involved a situation in which two of the underlying policies of the privilege against self-incrimination would not be served by denying the defendant the use immunity.¹²⁶ The juvenile defendant in *Ramona* was required to rebut a statutory presumption that she was unfit for juvenile court treatment.¹²⁷ Faced with the presumption, the juvenile defendant had three choices.¹²⁸ First, she could testify at the fitness hearing defending her claim that she was fit for juvenile treatment.¹²⁹ Testifying at the fitness hearing, however, may have resulted in self-incrimination.¹³⁰ Faced with the prospect of having the testimony of the fitness hearing used as substantive evidence against her at the subsequent criminal proceeding, the juvenile's second choice would be to remain silent.¹³¹ Foregoing the right to testify jeopardizes the juvenile's chance of being declared fit for juvenile court treatment.¹³² Lastly, the juvenile might have been tempted to give false testimony at the fitness hearing to avoid damaging her position at a subsequent criminal proceeding.¹³³ The *Bryan* Court held the solution to this problem was to grant the witness a use immunity for their testimony at the fitness hearing.¹³⁴ In addition, the court held the use immunity was essential to California's constitutional privilege against self-incrimination because subjecting a defendant to choose between one of three unpalatable alternatives runs counter to the historic policies of the privilege against self-incrimination.¹³⁵ Since the use immunities were designed to protect the privilege against self-incrimination, *Ramona* held the use immunities were encompassed within Evidence Code section 940.¹³⁶

The *Ramona* Court expressly left open the question of whether the testimony given by a juvenile would be admissible for impeachment

124. *Id.*

125. *Bryan*, 7 Cal. 3d at 587, 498 P.2d at 1087, 102 Cal. Rptr. at 839.

126. *Ramona*, 37 Cal. 3d at 809, 693 P.2d at 794, 210 Cal. Rptr. at 209.

127. *Id.* at 805, 693 P.2d at 791, 210 Cal. Rptr. at 206.

128. *Id.* at 809, 693 P.2d at 794, 210 Cal. Rptr. at 209.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

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

135. *Id.*

136. *Id.*

purposes.¹³⁷ *Ramona* thereby left unresolved the issue of whether section 28(d) overruled *Disbrow*.¹³⁸ *Ramona*, however, is support for the proposition that *Disbrow*, a judicial interpretation of the privilege against self-incrimination, is encompassed within Evidence Code section 940.¹³⁹

The issue presented in *Ramona* is very similar to the issue of whether the rule in *Disbrow* was overruled by section 28(d). Both situations involve rules deemed essential to the California constitutional privilege against self-incrimination, and the issue of whether those rules exist after section 28(d).¹⁴⁰ The issue in both situations is essentially whether section 940 is "existing statutory language relating to privilege" for the rule at issue. *Ramona* held that section 940 was existing statutory language to sustain the continued viability of the use immunities.¹⁴¹ The use immunities in *Ramona* and the rule in *Disbrow* are both embedded in the California constitutional privilege against self-incrimination.¹⁴² Therefore, the use immunities in *Ramona* should not be used as a basis to distinguish the holding in *Ramona* from the rule in *Disbrow*.¹⁴³

The rule in *Disbrow* is essential to the California privilege against self-incrimination. The underlying policy of the privilege against self-incrimination as expressed in *Disbrow* is that the jury may improperly use the inconsistent statements as substantive evidence of guilt.¹⁴⁴ A defendant might forego the constitutional right to testify if faced with the prospect of the jury misusing the statements.¹⁴⁵ Foregoing the due process right to testify was a significant concern of the court in *Ramona*.¹⁴⁶ *Disbrow* and *Ramona* are similar in that each rule attempts to avoid a situation in which a defendant might forego their right to testify.

137. *Id.* at 807 n.2, 693 P.2d at 792 n.2, 210 Cal. Rptr. at 207 n.2.

138. *See id.*

139. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 741-43, 212 Cal. Rptr. at 649-50.

140. *Ramona*, 37 Cal. 3d at 804, 693 P.2d at 790, 210 Cal. Rptr. at 205 (use immunities providing that statements made by a juvenile to a court or a probation officer at a fitness hearing be inadmissible as substantive evidence of guilt in a subsequent criminal proceeding against the minor were deemed essential to the privilege against self-incrimination); *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368 (the rule deemed essential to the privilege against self-incrimination was that extrajudicial statements obtained in violation of *Miranda* may not be admitted to trial for impeachment purposes).

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

142. *Id.* at 809, 693 P.2d at 790, 210 Cal. Rptr. at 209; *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

143. *See infra* notes 144-50 and accompanying text.

144. *Disbrow*, 16 Cal. 3d at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367; *see also supra* notes 67-70 and accompanying text.

145. *Disbrow*, 13 Cal. 3d at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367.

146. *Ramona*, 37 Cal. 3d at 809, 693 P.2d at 794, 210 Cal. Rptr. at 209.

The opposition to the argument that the rule in *Disbrow* is embedded in the privilege against self-incrimination might be that a “mere” *Miranda* violation does not threaten the underlying policies of the privilege against self-incrimination in the way that the use immunities do. Support exists for the proposition at the federal level.¹⁴⁷ The United States Supreme Court has referred to the safeguards in *Miranda* as “prophylactic factors,” rather than as constitutional rights.¹⁴⁸ The proposition that *Miranda* is not essential to the privilege against self-incrimination, however, cannot be supported by the California Constitution. As the California Supreme Court declared in *Disbrow*, and more recently in *People v. Rucker*,¹⁴⁹ the admission of *Miranda* violative statements, inculpatory or exculpatory, for impeachment purposes violates the California constitutional privilege against self-incrimination.¹⁵⁰ Therefore, in California, a *Miranda* violation is embedded in the privilege against self-incrimination as are the use immunities involved in *Ramona*.

Ramona is strong support for the proposition that the rule in *Disbrow* is encompassed within Evidence Code section 940.¹⁵¹ *Ramona* held that Evidence Code section 940 should be interpreted broadly to include judicial decisions relating to the privilege against self-incrimination.¹⁵² *Disbrow* was a judicial interpretation of the privilege.¹⁵³ Further, the legislative history of section 940 does not contradict the proposition that *Disbrow* is encompassed within Evidence Code section 940.

2. Legislative History of Section 940

The comments of the Law Revision Commission for section 940 recognize the privilege of a person to refuse, *when testifying*, to give information that might be self-incriminatory.¹⁵⁴ A literal reading of

147. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

148. *Id.*; see also C. McCORMICK, ON EVIDENCE §163, at 438 n.1 (1984).

There is widespread perception that the [United States] Supreme Court has become increasingly disenchanted with *Miranda*. [citation] Evidence can be found in *Michigan v. Tucker* in which the court distinguished between Fifth Amendment privilege against self-incrimination itself and *Miranda*'s “prophylactic rules” developed to protect that right. [citation] *Tucker* appeared to hold that a more rigorous or rigid exclusionary sanction applied to the privilege itself than applied to the prophylactic rules.

Id.

149. *People v. Rucker*, 26 Cal. 3d 368, 390, 605 P.2d 843, 856, 162 Cal. Rptr. 13, 26 (1980).

150. *Id.*

151. See *supra* notes 119-50 and accompanying text.

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

153. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 741-43, 212 Cal. Rptr. at 649-50; see *supra* notes 139-50 and accompanying text.

154. 6 CAL. L. REVISION COMM'N, *infra* note 160, at 215-18.

the comments would limit the privilege to a testimonial privilege.¹⁵⁵ Moreover, section 940, if interpreted literally, would only provide an accused protection from incriminating statements the accused might give while on the witness stand.¹⁵⁶ Therefore, any extrajudicial statement made by a witness would not be privileged under Evidence Code section 940.¹⁵⁷ Accordingly, to the extent prior inconsistent statements involve extrajudicial statements, the testimonial privilege of Evidence Code section 940 would not seem to be applicable to prior inconsistent statements.¹⁵⁸ Under this reading, *Disbrow*, involving only "extrajudicial" statements, would not be within the scope of the testimonial privilege protected by Evidence Code section 940.¹⁵⁹

Section 940 was derived from the Uniform Rules of Evidence, Revised Rule 25.¹⁶⁰ The privilege against self-incrimination as originally drafted in the Revised Rule extended a privilege to refuse, while testifying or responding to a public official or agent, to disclose information that could be self-incriminating.¹⁶¹ However, in the official comment to Evidence Code section 940, the California Law Revision Commission stated the privilege of section 940 refers only to a privilege to refuse to disclose when testifying.¹⁶² Therefore, the legislature adopted a modified version of the Uniform Rule.¹⁶³

Although the foregoing legislative history suggests section 940 is a testimonial privilege, that limited interpretation runs counter to the purpose of the privilege against self-incrimination.¹⁶⁴ At common law, the constitutional privilege against self-incrimination was interpreted to apply exclusively to situations in which the witness had a duty of disclosure.¹⁶⁵ For example, a person has a duty to disclose testimony if that person is served with a subpoena.¹⁶⁶ A witness is only allowed

155. *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650.

156. *Id.*; see also Respondent's Brief at 27, *People v. May*, 172 Cal. App. 3d 194, 218 Cal. Rptr. 152 (on file at Pacific Law Journal), California Supreme Court granted hearing November 27, 1985, *People v. May*, Crim. 24991.

157. *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650; Respondent's Brief at 27, *People v. May*, 172 Cal. App. 3d 194, 218 Cal. Rptr. 152 (on file at Pacific Law Journal), California Supreme Court granted hearing on November 27, 1985, Crim. 24991.

158. *Id.*

159. *Id.*

160. Law Revision Commission, *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence*, 6 CAL. L. REVISION COMM'N, REP., REC. & STUDIES 201, 215-18 (1964).

161. *Id.*

162. CAL. L. REVISION COMM'N, *supra* note 112, at 170.

163. 6 CAL. L. REVISION COMM'N, *supra* note 160, at 216.

164. See *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650.

165. 8 J. WIGMORE, EVIDENCE §2252, 327-29 (McNaughton rev. 1961).

166. B. WITKIN, CALIFORNIA EVIDENCE §761, 710-711 (1966, 2d ed.).

to refuse to testify under the exercise of an evidentiary privilege.¹⁶⁷ Many states, and the federal government, have extended the constitutional privilege against self-incrimination to situations in which a witness does not have a duty to disclose.¹⁶⁸ Responding to a police officer, for instance, does not involve a duty to disclose.¹⁶⁹ The modern trend, reversing the common law rule, holds that a person refusing to answer a question asked by a police officer *is* exercising an evidentiary privilege.¹⁷⁰ California extended the state constitutional privilege against self-incrimination to situations involving police interrogations in 1946.¹⁷¹ Therefore, in California, when a person refuses to answer a question or accusation by a police officer the person *is* exercising an evidentiary privilege.¹⁷²

A literal reading of section 940 would create an inconsistency in the application of the privilege against self-incrimination.¹⁷³ Although the California constitutional privilege against self-incrimination extends beyond trial testimony, the section 940 privilege would be limited to testimony.¹⁷⁴ This result might suggest, for example, that a person under arrest would have to assert the constitutional right to remain silent rather than the right against self-incrimination under Evidence Code section 940.¹⁷⁵ Recognizing, however, that Evidence Code section 940 was written in light of the constitutional privilege against self-incrimination and subject to judicial interpretation of that privilege, a literal reading of the section does not comport with the purpose of the section.¹⁷⁶ The scope of section 940 must include subsequent interpretations of the privilege against self-incrimination. Therefore, section 940 should not be interpreted as a mere testimonial privilege.¹⁷⁷

167. *Id.*; see 6 CAL. L. REVISION COMM'N, *supra* note 160, at 215-18.

Rules of evidence cannot speak in terms of a privilege not to disclose in those situations where there is no duty to disclose; evidentiary privileges exist only when a person would, but for the exercise of a privilege be under a duty to speak. For example, such rules are not concerned with inquiries by a police officer regarding a crime nor with the rights, duties, or privileges that a person may have at the police station. Thus the person who refuses to answer a question or accusation by a police officer is not exercising an evidentiary privilege because he is under no legal duty to talk to the police officer.

Id.

168. 8 J. WIGMORE, *supra* note 165, §2252 at 328- 29 n.27.

169. *Id.*

170. See *supra* note 167 and accompanying text.

171. *People v. Simmons*, 28 Cal. 2d 699, 716, 719-20, 172 P.2d 18, 27, 29-30 (1946).

172. 8 J. WIGMORE, *supra* note 165, §2252 at 329 n.27.

173. *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 650.

174. *Id.*

175. *Id.*

176. 7 CAL. L. REVISION COMM'N., *supra* note 112, at 170.

177. See *Barrios*, 166 Cal. App. 3d at 744, 212 Cal. Rptr. at 650.

Evidence Code section 940 is an existing statutory rule of evidence relating to privilege, the expressed exception to section 28(d).¹⁷⁸ *Disbrow* will survive section 28(d) if encompassed within Evidence Code section 940.¹⁷⁹ *Ramona* and the legislative history of section 940 lend support to the argument that *Disbrow* is encompassed within section 940. Furthermore, courts in two California cases¹⁸⁰ have held that *Disbrow* is encompassed within Evidence Code section 940 and that section 28(d) of the California Constitution did not abrogate *Disbrow*.¹⁸¹

3. California Cases

In *People v. Clark*¹⁸² and *People v. Barrios*¹⁸³ the courts held that the rule in *Disbrow* was implicitly encompassed within Evidence Code section 940.¹⁸⁴ The courts in *Clark* and *Barrios* reached this conclusion by utilizing *Disbrow* as an interpretation of the scope of the privilege against self-incrimination of the California Constitution.¹⁸⁵ The courts held *Disbrow* survived section 28(d) by being encompassed within the scope of an existing statutory rule of evidence relating to privilege.¹⁸⁶

Clark involved prior inconsistent statements obtained in violation of *Miranda* that were admitted to trial for impeachment purposes.¹⁸⁷ The statements were vital to the position of the prosecution.¹⁸⁸ *Clark*

178. CAL. CONST. art. I, §28, subd. (d).

179. See *id.*; see also *supra* notes 108-10 and accompanying text.

180. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 823; *Barrios* 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 649-50.

181. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 823; *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 649-50.

182. 171 Cal. App. 3d 889, 894, 217 Cal. Rptr. 819, 823 (1985).

183. 166 Cal. App. 3d 732, 743, 212 Cal. Rptr. 644, 649-50 (1985).

184. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 741-43, 212 Cal. Rptr. at 649-50.

185. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 741-43, 212 Cal. Rptr. at 649-50.

186. *Clark*, 171 Cal. App. at 894, 217 Cal. Rptr. at 823; *Barrios*, 166 Cal. App. 3d at 741, 212 Cal. Rptr. at 649.

187. *Clark*, 171 Cal. App. 3d at 892, 217 Cal. Rptr. at 821.

188. Appellant's Opening Brief at 13, *People v. Clark*, 171 Cal. App. 3d 889, 217 Cal. Rptr. 819 (on file at Pacific Law Journal). Police officers followed a car believed to contain the fleeing robbers until the car crashed into a tree. *Clark*, 171 Cal. App. 3d at 891-92, 217 Cal. Rptr. at 821. When the police arrived the two occupants ran from the car and climbed a fence. *Id.* *Clark* was arrested in the vicinity of the fence. *Id.* Without the statements, the prosecution's evidence only placed defendant in the vehicle chased by the officers. See Appellant's Opening Brief at 13, *People v. Clark*, 171 Cal. App. 3d 889, 217 Cal. Rptr. 819 (on file at Pacific Law Journal). The prosecution could not link the chased car to the car that left the scene of the crime without the use of the prior inconsistent statements obtained in violation of *Miranda*. See *id.*

was convicted of robbery.¹⁸⁹ The court of appeals reversed the conviction, holding that the prior inconsistent statements should not have been admitted to trial for impeachment purposes because the statements were obtained in violation of *Miranda*.¹⁹⁰

Barrios also involved prior inconsistent statements obtained in violation of *Miranda* that were admitted into trial for purposes of impeachment.¹⁹¹ The trial court convicted *Barrios* of murder,¹⁹² but the court of appeal reversed the conviction.¹⁹³ On direct examination, *Barrios* testified that he carried a gun because of the victim's violent temper and reputation for always being armed.¹⁹⁴ A police officer testified, however, that *Barrios* made postarrest statements inconsistent with *Barrios*' direct testimony.¹⁹⁵ *Barrios* told the officer he took the gun with him because he was prepared to use the gun.¹⁹⁶ The court held the prior inconsistent statements should not have been admitted to trial even for the limited purpose of impeachment.¹⁹⁷

Barrios and *Clark* utilized Evidence Code section 940 to find *Disbrow* within an existing statutory rule of evidence relating to privilege.¹⁹⁸ The courts relied upon the reasoning that the scope of Evidence Code section 940 was interpreted in *Disbrow*.¹⁹⁹ *Barrios* and *Clark* used the language in *Ramona* stating that Evidence Code section 940 was purposefully broad to include judicial decisions relating to the privilege against self-incrimination to support the proposition that *Disbrow* was encompassed within section 940.²⁰⁰ Although *Clark* did not address the legislative history of section 940, *Barrios* utilized the legislative history to further support the proposition that *Disbrow* was encompassed within section 940.²⁰¹ Accordingly, *Barrios* and *Clark* held that *Disbrow* was encompassed within a statutory rule of evidence relating to privilege, thus satisfying an expressed exception to section

189. *Clark*, 171 Cal. App. 3d at 891, 217 Cal. Rptr. at 820.

190. *Id.* at 894-95, 217 Cal. Rptr. at 823.

191. *Barrios*, 166 Cal. App. 3d at 736-37, 212 Cal. Rptr. at 646.

192. *Id.* at 734, 212 Cal. Rptr. at 644.

193. *Id.* at 748, 212 Cal. Rptr. at 653.

194. *Id.* at 736-37, 212 Cal. Rptr. at 646-48.

195. *Id.*

196. *Id.*

197. *Id.* at 743, 212 Cal. Rptr. at 650.

198. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 741-43, 212 Cal. Rptr. at 649-650; see also *supra* notes 184-86 and accompanying text.

199. *Id.*

200. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 822; *Barrios*, 166 Cal. App. 3d at 747, 212 Cal. Rptr. at 653.

201. *Barrios*, 166 Cal. App. 3d at 743-46, 212 Cal. Rptr. at 649-52.

28(d).²⁰² Upon that basis, the courts held that *Disbrow* survived the enactment of section 28(d).²⁰³

Ramona and the legislative history of Evidence Code section 940 support the proposition that *Disbrow* is encompassed within the privilege in Evidence Code section 940.²⁰⁴ *Disbrow* will survive section 28(d) based upon the exception for exclusions encompassed within "an existing statutory rule of evidence relating to privilege."²⁰⁵ Furthermore, the intent of the electorate in passing section 28(d) is not defeated by the rule in *Disbrow*.²⁰⁶ The intent behind section 28(d) was addressed by the California Supreme Court in *In re Lance*.²⁰⁷

Lance: INTENT BEHIND SECTION 28(d)

In 1985, the California Supreme Court in *Lance* held that section 28(d) of the California Constitution had the practical effect of eliminating the vicarious and independent exclusionary rules for violations of the search and seizure provision of the California Constitution.²⁰⁸ The vicarious exclusionary rule provides that evidence obtained by means of an unlawful search and seizure of article I, section 13 of the California Constitution shall be excluded from trial whether or not the defendant was the victim of the unlawful search.²⁰⁹ The *Lance* court, however, expressly left unresolved the issue of whether section 28(d) had the effect of requiring the admission of evidence obtained in violation of other constitutional guarantees.²¹⁰ Although *Lance* pertained to the search and seizure provision, the interpretation by the court of the intent of the electorate in passing section 28(d) must be reconciled with *Disbrow*.

Lance was arrested for the possession of marijuana for purposes of sale.²¹¹ Although the marijuana was seized unlawfully, the marijuana was admitted at the juvenile hearing.²¹² Lance had no standing

202. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 823; *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 644.

203. *Clark*, 171 Cal. App. 3d at 894, 217 Cal. Rptr. at 823; *Barrios*, 166 Cal. App. 3d at 743, 212 Cal. Rptr. at 644.

204. See *infra* notes 118-77 and accompanying text.

205. CAL. CONST. art. I, §28, subd. (d).

206. But see ATTORNEY GENERAL'S GUIDE TO PROPOSITION 8, *supra* note 14, at 4-44 (the clear intent of section 28(d) was to limit exclusion of evidence to federal law or to existing statutes, the self-incrimination privilege of art. I, §15 of the California Constitution should be construed to provide no greater protection than does the analogous federal privilege).

207. 37 Cal. 3d 873, 888, 694 P.2d 744, 753, 210 Cal. Rptr. 631, 640 (1985).

208. *Lance*, 37 Cal.3d at 887, 694 P.2d at 753, 210 Cal. Rptr. at 639.

209. *Martin*, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955).

210. *Lance*, 37 Cal. 3d at 885 n.4, 210 Cal. Rptr. at 638 n.4, 694 P.2d at 751 n.4.

211. *Lance*, 37 Cal. 3d at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634.

212. *Id.*

to object to the unlawful search.²¹³ Had the court interpreted section 28(d) as not abrogating the vicarious exclusionary rule, the vicarious exclusionary rule would have suppressed the evidence.²¹⁴

Lance abrogated the independent and vicarious exclusionary rules relating to search and seizure on the basis that the express intent of section 28(d) was to ensure that all relevant evidence would be admitted to trial.²¹⁵ The *Lance* Court held, the purpose of ensuring all relevant evidence admitted to trial would be defeated if the judiciary were free to adopt exclusionary rules for search and seizure violations that were neither authorized by statute nor mandated by the United States Constitution.²¹⁶ The independent exclusionary rules in *Lance* did not survive section 28(d) as being federally mandated exclusions.²¹⁷ The United States Constitution does not require the evidence to be excluded in either case.²¹⁸ Furthermore, the exclusionary rules in *Lance* did not survive section 28(d) on the basis that they were supported by statutory authority.²¹⁹

At first glance the rule in *Disbrow* appears similar to the rules abrogated by *Lance*. *Disbrow* is an exclusion not mandated by the United States Constitution.²²⁰ The exclusion originates from the California Constitution independently of the United States Constitution.²²¹

213. *Id.*

214. *Id.*

215. *Id.* at 889, 694 P.2d at 754, 210 Cal. Rptr. at 641. One independent exclusionary rule overruled by section 28(d) in *Lance* was enunciated in *People v. Martin*. *Lance*, 37 Cal. 3d at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634. See also *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). The California Supreme Court in *Martin* held that evidence obtained in violation of article I, section 13 of the California Constitution must be excluded as evidence from trial whether or not the defendant was the victim of an unlawful search. *Id.* at 761, 290 P.2d at 857. The United States Supreme Court, however, has confined the exclusion of evidence obtained in violation of the fourth amendment to situations in which the illegally obtained evidence would be used to incriminate the victim of the unlawful search. *Brown v. U.S.*, 411 U.S. 223, 229, (1973); *Alderman v. U.S.*, 394 U.S. 165, 171 (1969); *Wong Sun v. U.S.*, 371 U.S. 471, 492 (1963). In *Martin* independent California constitutional grounds were used as the basis for the more stringent exclusionary rule. Another exclusionary rule abrogated by section 28(d) in *Lance* was derived in *People v. Brisendine*. *Lance*, 37 Cal. 3d at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634. In *Brisendine* the California Supreme Court held that the defendant's contraband had been seized in violation of the search and seizure clause of the California Constitution. *Brisendine*, 13 Cal. 3d at 545, 531 P.2d at 1109, 119 Cal. Rptr. at 325. The court held in cases of warrantless weapon searches the police must be able to point to specific and articulable facts that reasonably justify a belief that the suspect was armed. *Id.* at 544-45, 531 P.2d at 1109, 119 Cal. Rptr. at 325. The holding in *Brisendine* was based upon the "independent vitality" of the California Constitution. *Id.* at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328.

216. *Lance*, 37 Cal. 3d at 889, 694 P.2d at 754, 210 Cal. Rptr. at 641.

217. *Lance*, 37 Cal. 3d at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639; see also *supra* note 216 and accompanying text.

218. *Lance*, 37 Cal. 3d at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639.

219. *Id.*

220. *Harris*, 401 U.S. at 225-26.

221. *Disbrow*, 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

The similarities of *Disbrow* to the rules abrogated in *Lance*, however, are outweighed by the dissimilarities.

Disbrow, unlike the rules abrogated in *Lance*, is supported by statutory authority.²²² The result in *Lance* is not compelled when a rule, like *Disbrow*, falls within an exception to section 28(d). The *Lance* Court held the intent behind section 28(d) would *only* be defeated by a judicial exclusionary rule that was neither federally mandated nor supported by statute.²²³

PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Although *Disbrow* falls within an expressed exception to section 28(d) and does not defeat the intent behind section 28(d), the rule may be abrogated on another basis. Two arguments based upon general principles of Constitutional interpretation may continue to threaten *Disbrow*.²²⁴ These arguments, however, are not persuasive.²²⁵

The first argument relates to the general rule requiring reconciliation of inconsistent constitutional provisions.²²⁶ In this case, the two inconsistent provisions are the privilege against self-incrimination in article I, section 15 used to exclude evidence in *Disbrow*, and article I, section 28(d) requiring that all relevant evidence be admitted to trial. The fallacy in the argument requiring reconciliation of two inconsistent constitutional provisions results from the exception within section 28(d) for existing statutory rules of evidence relating to privilege.²²⁷ The California Evidence Code defines "statute" to include treaties and constitutional provisions.²²⁸ Therefore, notwithstanding section 940, section 28(d) does not abrogate the privilege against self-incrimination because section 15 is a constitutional provision relating to privilege.²²⁹ Therefore, section 28(d) and section 15 are not inconsistent, and need not be reconciled.²³⁰

222. See *supra* notes 111-207 and accompanying text.

223. *Lance*, 37 Cal. 3d at 889, 694 P.2d at 754, 210 Cal. Rptr. at 641.

224. *Barrios*, 166 Cal. App. 3d at 746, 212 Cal. Rptr. at 652.

225. *Id.*

226. Section 28(d) was enacted subsequent to California's self-incrimination clause. Any doubt or ambiguity in attempts to reasonably reconcile two provisions should be resolved in favor of the subsequent enactment. *Wright v. Jordan*, 192 Cal. 704, 713 (1923) (well-established principle that certain provisions of a constitution or of a statute may be repealed or abrogated by implication arising out of the adoption of changes or in other provisions thereof, rendering obnoxious or ineffective the provisions thereof).

227. See CAL. CONST. art. I, §28, subd. (d).

228. CAL. EVID. CODE §230. Section 230 states, "Statute includes a treaty and a constitutional provision." *Id.*

229. CAL. CONST. art. I, §15.

230. "Repealing a constitutional provision by implication is disfavored. They are recogniz-

The second argument that *Disbrow* is overruled by section 28(d), notwithstanding section 940, involves the premise that a more recent constitutional enactment controls earlier constitutional enactments.²³¹ In order for this argument to succeed, the two enactments must address the same subject matter.²³² Section 15 involves a constitutional privilege against self-incrimination,²³³ while section 28(d) does not.²³⁴ Instead, section 28(d) merely requires all relevant evidence to be admitted to trial, and does not attempt to relate to rules of privilege.²³⁵ Because the two sections address different subject matter, the argument that section 28(d) controls section 15 fails.²³⁶

Disbrow has survived the passage of section 28(d) by falling within one of the exceptions to section 28(d).²³⁷ *Disbrow* does not fall within the first exception to section 28(d)²³⁸ because the exclusion of prior inconsistent statements obtained in violation of *Miranda* is not mandated by the United States Constitution.²³⁹ *Disbrow*, however, does fall within the second exception to the general rule of admissibility of section 28(d).²⁴⁰ *Disbrow* is encompassed within an existing statutory rule of evidence relating to privilege.²⁴¹ Evidence Code section 940 utilizes judicial interpretations to define the scope of the privilege against self-incrimination.²⁴² *Disbrow*, a judicial interpretation relating to the privilege against self-incrimination, is encompassed within the scope of section 940.²⁴³ The legislative history of section 940 and the holding in *Ramona* support the proposition that *Disbrow* is within the scope of Evidence Code section 940.²⁴⁴ Since *Disbrow* is encompassed within an exception to section 28(d), and because *Lance* involved the fourth amendment, the ruling of *Lance* does not control the result here.²⁴⁵ Furthermore, *Lance* only involved rules that were

ed only when two potentially conflicting laws cannot be harmonized [citation]. A repeal by implication is particularly disfavored where the provision in question is a basic, long-standing constitutional right such as the privilege against self-incrimination." *Barrios*, 166 Cal. App. 3d at 746, 212 Cal. Rptr. at 652.

231. *Id.*

232. *Id.*

233. CAL. CONST. art. I, §15.

234. CAL. CONST. art. I, §28, subd. (d).

235. *Id.*

236. *Barrios*, 166 Cal. App. 3d at 746, 212 Cal. Rptr. at 652.

237. See *supra* notes 110-236 and accompanying text.

238. *Malloy*, 378 U.S. at 10; see also *supra* note 103 and accompanying text.

239. *Harris*, 410 U.S. at 225.

240. See *supra* notes 110-207 and accompanying text.

241. See *supra* notes 110-207 and accompanying text.

242. 7 CAL. L. REVISION COMM'N., *supra* note 112, at 170.

243. See *supra* notes 110-207 and accompanying text.

244. See *supra* notes 118-81 and accompanying text.

245. See *supra* notes 208-23 and accompanying text.

not encompassed within any exception to section 28(d).²⁴⁶ Therefore, *Disbrow* survived the enactment of section 28(d).

CONCLUSION

This comment has analyzed the impact of Proposition 8, section 28(d) upon the rule excluding evidence enunciated in *Disbrow*. A conflict appears to exist between section 28(d) requiring all relevant evidence to be admitted to trial, and the rule in *Disbrow* excluding relevant evidence. Had a conflict between section 28(d) and *Disbrow* in fact existed, *Disbrow* would have been overruled by section 28(d). This comment, however, has established that this conflict does not exist. The conflict does not exist because *Disbrow* falls within the express exception to the general rule of admissibility of section 28(d).

This comment has examined the exceptions to the general rule of admissibility of section 28(d). Several California cases and the legislative history of section 940 support the argument that Evidence Code section 940 is an existing statutory rule of evidence relating to privilege encompassing the rule in *Disbrow*. Supported by statutory authority relating to privilege, the rule in *Disbrow* falls within the express exception to section 28(d). The rule in *Disbrow* is not one of the many independent exclusionary rules intended to be overruled by section 28(d). The rule in *Disbrow* survives the enactment of section 28(d).

Katharine Martin

246. See *supra* notes 208-23 and accompanying text.