27 Years of Truth-in-Evidence: The Expectations and Consequences of Proposition 8's Most Controversial Provision

Diana Friedland
27 Years of “Truth-in-Evidence”:
The Expectations and Consequences of
Proposition 8’s Most Controversial
Provision

Diana Friedland†

INTRODUCTION

Twenty-seven years ago, nearly three million California residents,1 disillusioned by what they perceived as an unrelenting crime rate and a state judiciary that often neglected the rights of crime victims, headed to the polls and cast their vote in support of Proposition 8, a constitutional amendment creating a “victims’ bill of rights.” The initiative delineated a series of rights giving crime victims a stronger voice within the criminal justice system, and chief among them was the “Right to Truth-in-Evidence,” which provided that with few exceptions, “relevant evidence shall not be excluded in any criminal proceeding.” 2 From the moment it was incorporated within Proposition 8, it engendered a mass of speculation. Proponents and opponents, and scholars and

† Associate, Gibson, Dunn & Crutcher, LLP, Los Angeles, CA. J.D., Boalt Hall School of Law, University of California, Berkeley; B.A., University of Southern California. Many thanks to Professor David A. Sklansky, who inspired me to write this article and who provided invaluable guidance throughout its evolution. I would also like to thank Emily Garcia for her insight and encouragement. Finally, this article would not have been published without the love and support of my parents, Victor and Yelena Friedland, and my sister, Polina Friedland Bernstein.

3. The Truth-in-Evidence Act, embodied in Article I § 28(d), provides in full: “Except as provided by statute hereafter enacted by a two-thirds vote of the membership of 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.” CAL. CONST. art. I § 28(d) (1982).
practitioners, predicted that it would cause widespread changes in the way criminal trials would subsequently be conducted.

A twenty-seven year retrospective indicates that, to a great extent, the goals behind the Truth-in-Evidence Act were accomplished, and predictions about the changes it would cause in California criminal trials held true. First, the Act abrogated numerous judicially created rules that previously excluded relevant evidence seized in violation of defendants' state constitutional rights. As a result, prosecutors can now introduce far more prejudicial evidence at trial than they could before the Act's passage. Additionally, the repeal of the rule preventing prosecutors from presenting evidence of specific instances of conduct reflecting a defendant's (or his witnesses') "moral turpitude" has offered government attorneys another tool with which to cast defendants in a negative light. This tool has become increasingly more valuable as California courts have interpreted the Truth-in-Evidence Act to allow prosecutors to admit evidence of most prior felony and misdemeanor convictions. Significantly, evidence of moral turpitude can now be introduced both for impeachment purposes and in prosecutors' cases-in-chief. Consequently, the Act caused the pool of admissible evidence to grow exponentially. In the process, it accomplished the drafters' and voters' goal of offering jurors far more "truth in evidence" than before. Moreover, the abrogation of these rules, which had previously benefited criminal defendants to the detriment of their victims, was a significant step toward giving crime victims a stronger voice within the criminal justice system.

Despite many of these changes criminal trials today are in many ways far more similar to those prosecuted prior to the Act's passage than they are different. Since the vast majority of the California Evidence Code's provisions have remained intact, trials today are generally governed by the same rules as they were before the Act's passage. For example, lay witnesses today may still only testify after swearing an oath to tell the truth and displaying their competence, and their testimony is still limited to only those opinions formed on the basis of firsthand knowledge. Likewise, experts may only offer their judgment regarding a particular scientific technique if that technique has been generally accepted as reliable by the relevant scientific community. Most

4. Id.
5. See People v. Adams, 243 Cal. Rptr. 580, 584 (Ct. App. 1988) (abrogating California Evidence Code § 787, which previously made most "specific instances" of a witness's conduct inadmissible to attack or support the witness's credibility).
6. CAL. EVI. CODE § 710 (requiring witnesses to take an oath or affirmation to tell the truth);
7. CAL. EVI. CODE § 701 (1997) (describing the foundational requirements for establishing a witness’s competence).
8. CAL. EVI. CODE § 702 (1997) (requiring a witness to testify based on personal knowledge of the matter).
Importantly, trial judges retain the same amount of discretion they had before the Act’s passage in guiding trial mechanics, including prohibiting the admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.\(^\text{10}\)

The explanation for this outcome is four-fold. First, the Act’s explicit retention of the hearsay and character evidence rules, as well as laws relating to privileges, has made the admissibility— or inadmissibility— of most of the evidence offered in today’s criminal trials depend on statutes and case law developed independently of the Act’s provisions. Second, both trial and appellate court judges have narrowly interpreted the Act’s provisions, causing it to have a weaker effect than many commentators had envisioned. Third, the legislature has on several occasions reenacted important statutory provisions thought to have been endangered by the Act, thereby preserving them from abrogation. Finally, prosecutors have often neglected to test the Act’s outer boundaries, allowing pre-1982 law to be their guide as to admissibility.

This Note traces the past twenty-seven years of California case law and analyzes the extent to which predictions regarding the Truth-in-Evidence Act became a reality. Section I provides a brief overview of the social and political atmosphere in which the Truth-in-Evidence Act was born. First, it identifies the chief catalysts behind the victims’ rights movement: a steadily increasing crime rate paired with an ostensibly pro-defendants’-rights judiciary. Next, it illustrates how activists circumvented a seemingly indifferent state legislature and took the creation of victims’ rights into their own hands by waging an impassioned public campaign and utilizing California’s initiative process to put a victims’ rights bill before voters.

In four subparts, Section II discusses the areas scholars and practitioners anticipated would be most affected by the Act. Part A describes a facial challenge to Proposition 8’s constitutionality and the unmet prediction that the California Supreme Court would render it unconstitutional. Part B examines the courts’ often reticent application of the Act to California’s exclusionary rule, and concludes that scholars correctly predicted that this area would be the most strongly impacted by the Act. Part C illustrates how, in spite of predictions that the Act would eliminate all of California’s character evidence rules, a combination of creative statutory interpretation by the judiciary and key lawmaking by the state legislature largely insulated these rules from the Act’s reach. Finally, Part D demonstrates how predictions that the Act would affect many other aspects of criminal trials and repeal the bulk of the California Evidence Code entirely missed their mark. The Note concludes by arguing that, despite the many unmet expectations, scholars and practitioners correctly predicted that the Act would cause significant changes in the prosecution of criminal offenders, and, most significantly, make it easier for prosecutors to
obtain criminal convictions.

I. THE BACKGROUND: FEAR, ANGER AND ACTIVISM

The Truth-in-Evidence Act was passed in a social and legal climate ripe for reform. During the early 1980s, television and newspaper journalists reported on dozens of local crime stories, instilling fear in California residents about their safety and the security of their homes and neighborhoods. In particular, extensive coverage was given to crimes perpetrated by violent offenders, ranging from the “Freeway Killer,” who raped and murdered fourteen teenagers on Southern California highways, to the “Original Night Stalker,” who sexually assaulted and murdered middle-class single women and couples throughout the state. These media outlets reported on what seemed to be a major crime problem in California.

A growing hyper-vigilance about “unsafe streets” paired with a general perception that state judges were more concerned with safeguarding criminal defendants’ rights than with affording victims a meaningful voice within the trial process sparked an impassioned victims’ rights movement. A broad constituency of politicians, police officers, prosecutors and activists lobbied extensively to correct what they considered a substantial imbalance between victims’ and defendants’ rights. This coalition urged the state legislature to enact reforms that prevented judges from broadly applying the exclusionary rule, which, under certain circumstances, excluded relevant evidence from trial. Fundamentally, this coalition sought to give victims the opportunity to become more active participants in the trials of their assailants. But when the activists found legislators to be indifferent to their cause, they turned instead to California’s initiative power for a solution.

13. See Smith, supra note 2, at 223.
14. See id.
15. See Swift, supra note 1, at 662.
16. See id. at 661-62.
17. Id.
18. Article II § 8 reads in relevant part: “(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election. (c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may
The Truth-in-Evidence Act was placed on the June 1982 ballot as one provision within Proposition 8, also called the “Victims’ Bill of Rights,” which provided crime victims with new rights to restitution and imposed procedural changes in the arrest and prosecution of criminal defendants. For instance, the initiative called for placing more stringent requirements on the bail release of felony offenders and for allowing prior felony convictions to be used “without limitation” for impeachment and sentence enhancement. While the initiative’s proponents promised it would bring about safer neighborhoods and more criminal convictions of violent offenders, its opponents, a small coalition of defense attorneys and civil libertarians, warned that it would lead to increased expenditures in prison construction, cause confusion in the courts, and infringe on personal liberties and privacy rights by, for example, permitting spying in public restrooms, allowing warrantless wiretapping and seizure of telephone and credit records, and authorizing strip searches of minor traffic offenders. After a widely publicized campaign, in which both supporters and critics espoused their views in newspaper, radio and television editorials and engaged in numerous public debates, Proposition 8 passed by a margin of 56 percent to 44 percent. California became the first state to have a constitutional amendment that provided crime victims with specific, enumerated rights.

II. PREDICTIONS AND REALITY

A. Initial Challenges to the Act’s Constitutionality

Though Proposition 8’s intended and likely effects received significant public attention prior to its passage, once it became a constitutional
amendment, an even broader array of individuals, including lawyers and criminal justice scholars, began closely scrutinizing the initiative’s provisions, forecasting the consequences it would have. One of the earliest predictions by attorneys and members of the American Civil Liberties Union was that the California Supreme Court would find the amendment unconstitutional. This ground was tested in the court soon after the amendment’s passage in Brosnahan v. Brown, in which three voters asserted a facial challenge to the amendment, objecting to the way in which it was drafted and presented to voters. The petitioners first argued that because Proposition 8 was a multi-provision initiative, it produced a heightened possibility of election “logrolling,” whereby a minority of voters would approve of some portions of an amendment, creating in the aggregate a majority passage rate without the amendment as a whole receiving majority support. The petitioners also argued that Proposition 8’s complexity may have engendered confusion or even deception among the voters, who the petitioners characterized as “uninformed regarding the contents of the measure.” Specifically, the petitioners pointed out that nowhere in the measure’s text were voters made aware that the Truth-in-Evidence Act potentially rendered more than two dozen statutory provisions inapplicable in criminal trials.

In a 4-to-3 decision, the California Supreme Court upheld Proposition 8’s constitutionality. The court first rejected the petitioners’ logrolling concerns, holding that “such a risk is inherent in any initiative containing more than one sentence or even an ‘and’ in a single sentence.” The court further stated that “almost all laws whether enacted by a legislature or adopted directly by the people through an initiative contain both benefits and burdens. The decision to enact laws, whether directly by the people or through their representatives, involves the weighing of pros and cons.” The court next dismissed the petitioners’ argument regarding Proposition 8’s complexity, ruling that “[i]t is equally arguable that, faced with startling crime statistics and frustrated by the perceived inability of the criminal justice system to protect them, the people knew exactly what they were doing.” Despite vigorous arguments from the dissenting justices that the majority’s decision thwarted the will of the people because it upheld an initiative supported by a false majority of voters, many of whom were confused or misled, Proposition 8’s constitutionality was never again seriously tested in the courts.

30. See Lindsey, supra note 28.
31. See Brosnahan, 651 P.2d at 276.
32. Id. at 250.
33. Id. at 251.
34. Id. at 304 (Bird, C.J., dissenting).
35. Id. at 311-12.
36. Id. at 304 (Bird, C.J., dissenting).
37. Id. at 282 (internal quotation marks omitted).
38. Id. at 304 (Bird, C.J., dissenting).
B. Including the Excluded: Reformulating California’s Exclusionary Rule

Once Proposition 8’s constitutionality was established, the courts began to examine the full reach and effect of the Truth-In-Evidence Act’s provisions. From the outset, the most heavily litigated issue was the Act’s impact on California’s exclusionary rule, since the Act was meant to allow all relevant evidence to be admissible in criminal trials. The following two sections of this Note (1) analyze and explain why the Act’s impact on the exclusionary rule was less pronounced than it could have been, and (2) describe the new categories of prejudicial evidence and inculpatory statements that are now admissible.

1. Limiting the Act’s Reach in the Exclusionary Rule Context

Before 1982, California’s exclusionary rule prevented prosecutors from introducing evidence obtained by state officials or police officers in violation of the California constitution. The rule functioned as a judicially created remedy aimed at protecting citizens’ constitutional rights by eliminating the government’s incentive to obtain evidence illegally. If evidence acquired through violating a defendant’s constitutional rights would be inadmissible at trial, law enforcement officials would be deterred from engaging in such unlawful conduct.

After the Truth-in-Evidence Act was passed, however, California courts were forced to grapple with the extent to which the Act would displace nearly twenty years of exclusionary rule development. During that time, state judges utilized the doctrine of independent state grounds to formulate an exclusionary rule jurisprudence that afforded defendants rights beyond those minimally required by the federal constitution. As a result, former California Attorney General George Deukmejian predicted that cases involving

42. See John L. Segal, Proposition 8 and the California Supreme Court: Interpretation Run Riot?, 60 S. CAL. L. REV. 539, 541 (1987).
43. See Philip Hager, Victims Bill of Rights Case May Signal Change of Court Direction, L.A. TIMES, July 6, 1987, at A3. The doctrine of independent state grounds allows courts to impose higher standards on searches and seizures than that required by the federal Constitution. See Cooper v. California, 386 U.S. 58, 62 (1967); see also Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 491 (1965) (“even though a state court’s opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment”).
exclusionary rule matters would feel the “principal impact” of the Act because California courts would no longer be able to rely as heavily upon the doctrine of independent state grounds to exclude illegally obtained evidence. 44

Although nearly three years passed before the California Supreme Court addressed the issue, the Court definitively resolved the Act’s impact on the exclusionary rule in In re Lance W., in which the court held that the Act abrogated the state exclusionary rule.45 In that case, the court considered how the Act affected prior California decisions that excluded evidence obtained in violation of the state constitution under circumstances in which the evidence would have been deemed admissible under the federal constitution.46 Specifically, the court addressed whether the exclusionary rule and the vicarious exclusionary rule, which granted standing to a defendant to object to the introduction of evidence obtained in violation of another person’s constitutional rights,47 survived after the Act’s passage.48

The court initially recognized the important role the exclusionary rule played in criminal cases, largely because other remedies “completely failed” to secure law enforcement’s compliance with the relevant constitutional provisions.49 Thus, the rule was seen as necessary “to give substance to the rights conferred” by those constitutional provisions,50 because those rights would effectively be meaningless without an established mechanism to ensure compliance by law enforcement. The court also expressed its concern that without the rule, the judiciary would have been “constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers” because the court would be forced to allow illegally seized evidence to be admitted during trial.51

However, the court also recognized that “[e]ach time the exclusionary rule is applied it exacts a substantial social cost ... [r]elevant and reliable evidence is kept from the trier of fact and the search for truth at trial deflected.”52 Moreover, the court found that in voting for Proposition 8, California citizens “apparently decided that the exclusion of evidence is not an acceptable means of implementing [constitutional] rights, except as required by the Constitution of the United States.”53 As a result, the court held that the Act eliminated judicially created remedies that had previously excluded evidence obtained in

46. Id. at 747.
47. Id.
48. Id.
49. Id. at 750, quoting People v. Cahan, 282 P.2d 905, 911-12 (Cal. 1955).
50. Id. at 752 (internal quotation marks omitted).
51. Id. at 750.
52. Id. at 882 (internal quotation marks omitted).
53. Id. at 888.
violation of the search-and-seizure provisions of either the state or federal constitutions; such evidence would be admissible unless the federal constitution mandated its exclusion.\footnote{Id.; see also id. at 881 (citing Mapp v. Ohio, 367 U.S. 643 (1960)).} In this manner, the court in \textit{In re Lance W.} both abrogated California’s vicarious exclusionary rule and severely limited defendants’ rights to seek suppression of evidence obtained in violation of the California (but not the federal) constitution.\footnote{Id. at 879; see also Hank M. Goldberg, \textit{Proposition 8: A Prosecutor’s Perspective}, 23 \textit{PAC. L.J.} 947, 961 (1992).}

Scholars and practitioners expected the repeal of the exclusionary rule to significantly change the way in which prosecutors would try criminal cases.\footnote{\textit{See California’s Backfire on Crime}, N.Y. \textit{TIMES}, June 21, 1982, at A18; see also Robert Lindsey, \textit{California Voting on Criminal Laws}, N.Y. \textit{TIMES}, May 23, 1982, at A11.} By giving prosecutors an additional avenue for introducing prejudicial evidence, prosecutors purportedly inherited a powerful tool with which they could more easily convict criminal defendants.\footnote{See Hager, \textit{supra} note 43.} As a result, practitioners who opposed the repeal of the exclusionary rule highlighted the potentially negative ramifications of the rule’s repeal, since it threatened to circumscribe the civil liberties that California courts had granted to criminal defendants for nearly three decades.\footnote{See Philip Hager, \textit{Police Questioning Issue Upheld by High Court}, L.A. \textit{TIMES}, Dec. 9, 1988, at p.43; see also People v. Cahan, 282 P.2d 905 (Cal. 1955) (holding that evidence obtained in violation of the state constitution was inadmissible).} One attorney warned that eliminating independent state grounds for excluding evidence and binding exclusionary principles to those articulated under federal law would be dangerous because “federal rulings are far more conservative and protective of the so-called rights of police than they are of civil liberties.”\footnote{Id.}

In retrospect, however, the repeal of the exclusionary rule did not affect criminal trials as severely as expected. First, despite predictions that repealing the exclusionary rule would strategically benefit prosecutors, prosecutors generally did not take advantage of the opportunity to introduce evidence previously considered inadmissible.\footnote{Robert Lindsey, \textit{Victims’ Rights Bill Draws Mixed Reviews in California}, N.Y. \textit{TIMES}, Apr. 1, 1983, at A13.} Because the Act’s plain language did not specifically address its effect on the exclusionary rule, or in any way guide the courts in rendering decisions, the full extent of evidence made admissible after its passage could have only been determined on a case-by-case basis. Thus, it was prosecutors’ duty to test the boundaries of the Act by seeking to introduce evidence that was previously considered inadmissible. But, prosecutors were “reluctant to use previously excluded relevant evidence because they fear[ed] convictions resulting from the use of such evidence [would] be overturned.”\footnote{Id. See also Goldberg, \textit{supra} note 55, at 970; Smith, \textit{supra} note 2, at 229-230.} And even after the exclusionary rule’s repeal had

\textit{27 YEARS OF TRUTH-IN-EVIDENCE}

Published by Berkeley Law Scholarship Repository, 2009
been firmly established, criminal practitioners still frequently failed to introduce evidence likely admissible under the new formulation of the rule.\textsuperscript{62}

Additionally, California courts substantially limited the effect the Act could have had on exclusionary rule jurisprudence. In \textit{People v. Rooney}, for example, the court effectively held that the Act's provisions would apply only if the United States Supreme Court had already ruled on a particular exclusionary rule issue.\textsuperscript{63} In \textit{Rooney}, the court considered whether a warrantless search of the trash bin in the defendant's apartment building constituted an unreasonable search.\textsuperscript{64} Police officers had suspected that the defendant was conducting an illegal betting operation out of his apartment.\textsuperscript{65} In order to obtain probable cause for a warrant, police searched the apartment's communal trash deposit and found a bag addressed to the defendant that contained a tally sheet of wagers on professional football teams.\textsuperscript{66} Prosecutors attempted to present both the bag and additional information indicating that the defendant was engaged in illegal activity. However, the court suppressed the evidence, finding that the warrantless search constituted an unreasonable search and seizure.\textsuperscript{67} Having little other solid evidence, the prosecution dismissed the case.\textsuperscript{68}

On appeal from the dismissal order, the appellate court affirmed the trial court, holding that trash placed in a communal bin was protected by the Fourth Amendment.\textsuperscript{69} The court considered whether the defendant had a reasonable expectation of privacy in items placed in the communal trash bin, and looked to a similar 1971 California Supreme Court case holding that the defendant did have a reasonable expectation of privacy in such circumstances.\textsuperscript{70} In holding that the evidence was inadmissible, the \textit{Rooney} court disregarded the prosecution's argument that the Act rendered the search valid and the evidence obtained admissible.\textsuperscript{71} The court determined that although "various federal courts have held that trash placed in an area where it can be collected . . . is not protected by the Fourth Amendment, those decisions are not binding on this court since the United States Supreme Court has never squarely ruled on the issue."\textsuperscript{72}

The \textit{Rooney} court's refusal to broadly interpret the Act's provisions exemplifies judges' general reluctance to support a voter-passed initiative that

\textsuperscript{62} See Goldberg, \textit{supra} note 55, at 970; see also Smith, \textit{supra} note 2, at 229-230.
\textsuperscript{63} 221 Cal. Rptr. 49, 55 (Ct. App. 1985).
\textsuperscript{64} \textit{Id.} at 51.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.} at 55.
\textsuperscript{70} \textit{See id.} at 54.
\textsuperscript{71} \textit{See id.} at 52.
\textsuperscript{72} \textit{Id.} at 55.
would displace the courts' carefully crafted and systematically applied exclusionary rule jurisprudence.\textsuperscript{73} Rooney presented the court with an opportunity to give effect to the Act's provisions regardless of how the United States Supreme Court would have resolved the issue—particularly because several federal courts had refused to extend Fourth Amendment protection to this type of evidence. Moreover, the court's unwillingness to reconsider and overturn its previous decisions on this issue to comport with the Act is particularly interesting for an additional reason: three years later, the United States Supreme Court squarely held that defendants do not have a reasonable expectation of privacy protected by the Fourth Amendment in garbage placed in opaque bags on the curbs outside their houses.\textsuperscript{74} Thus, the United States Supreme Court effectively overruled Rooney, and the Truth-in-Evidence Act now renders evidence found in warrantless trash searches admissible in California criminal trials.\textsuperscript{75}

Similarly, in People v. Neer, a state appellate court held that because there was no United States Supreme Court precedent permitting the introduction of evidence obtained in violation of the knock-and-announce rule, the court could apply the rules in previous California cases that required the exclusion of such evidence.\textsuperscript{76} The court stated that the California Supreme Court "is powerless to mandate the exclusion of evidence because of Fourth Amendment violations only when the United States Supreme Court has held otherwise."\textsuperscript{77} In the process, the court distinguished the decision in In re Lance W., stating that whereas that case "involved a situation where the holdings of the California and United States Supreme Court were in direct conflict,"\textsuperscript{78} in this case the United States Supreme Court had not yet addressed the issue.

Subsequently, in People v. Camacho, the California Supreme Court affirmed the reasoning in both Neer and Rooney, holding that notwithstanding the Truth-in-Evidence Act, the court was "not bound by lower federal courts' decisions in this area."\textsuperscript{79} However, just as in the garbage-search context, the United States Supreme Court later held in Hudson v. Michigan that the exclusionary rule does not apply to evidence seized as a result of a knock-and-

\textsuperscript{73} See Trask and Seawright, supra note 39, at 1121.
\textsuperscript{74} California v. Greenwood, 486 U.S. 35 (1988).
\textsuperscript{75} Trask and Seawright, supra note 39, at 1121; see also GEORGE BRUNN, CALIFORNIA JUDGE'S BENCHBOOK: SEARCH AND SEIZURE 6 (Continuing Education of the Bar 1991) (2002).
\textsuperscript{76} 223 Cal Rptr. 555 (Ct. App. 1986). The knock-and-announce rule requires police officers to announce their presence and allow residents to open the door to their home before breaking inside. Four reasons have been given for continued application of the rule, including (1) protecting the privacy of the individual inside his home, (2) protecting innocent third parties on the premises, (3) preventing situations conducive to violent confrontations between residents and police, and (4) protecting police who might be injured by "a startled and fearful householder." People v. Hoag, 100 Cal. Rptr. 2d 556, 559 (Ct. App. 2000).
\textsuperscript{77} Neer, 223 Cal. Rptr. at 560 (emphasis in original).
\textsuperscript{78} Id.
\textsuperscript{79} People v. Camacho, 3 P.3d 878 n.1 (Cal. 2000).
announce violation. As a result, the Truth-in-Evidence Act should now render such evidence admissible as well.

Most recently, in *People v. Rodriguez*, the California Court of Appeal held that evidence seized during a search subsequent to a lawful arrest based on an outstanding arrest warrant should be suppressed if the police fabricated the ground for the initial traffic stop. In *Rodriguez*, police officers pulled over the defendant's car because of an allegedly "burnt out" brake light. After running a warrant check, they discovered an outstanding warrant for the defendant's arrest. The police detained the defendant, searched his car, and found a bag containing methamphetamine.

At the suppression hearing, the defendant's employer testified "without contradiction" that when he picked up the defendant's car at the impound lot three days after the arrest, the brake lights were fully operational. Nevertheless, the trial court declined to determine whether the car's lights were working when the police stopped the defendant; instead, it found that the outstanding warrant was a sufficient basis to support the search. The court then denied the defendant's motion to suppress, and the defendant pleaded no contest.

On appeal, the California Court of Appeal acknowledged that "not all evidence discovered after an illegal arrest or detention must be suppressed." Instead, in *Wong Sun v. United States* the United States Supreme Court directed courts to consider "whether, granting establishment of the primary illegality, the evidence to which [an] objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." To determine whether the primary taint has been "purged," the United States Supreme Court has stated that various factors should be considered, including "the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances and the flagrancy of the official misconduct." The *Rodriguez* court placed significant emphasis on the third factor and found strong evidence suggesting that the police officers invented the justification for the stop because: (1) the brake lights were fully functional three days after the defendant's arrest, (2) the officers never issued the

81. 49 Cal. Rptr. 3d 811, 819 (Ct. App. 2006).
82. Id. at 814.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id. (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).
89. Id. (citing *Wong Sun*, 371 U.S. at 487-88 (internal quotations omitted)).
90. Id. at 815 (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (internal quotation marks omitted)).
defendant a traffic citation for the burnt out light, and (3) the officers were not patrol officers, whose duties normally included enforcing traffic laws; rather, they were detectives assigned to the gang and narcotics unit, and their duties would not have normally included issuing citations for traffic violations. As a result, the court remanded the case, holding that "if the trial court finds the officers' justification for stopping defendant's car was a ruse[,] it must suppress the evidence of drugs obtained in the subsequent search."92

As recognized by the dissent, however, the Rodriguez court could have more closely complied with the spirit of the Truth-in-Evidence Act by focusing on the "presence of intervening circumstances" — namely, the discovery of a valid, outstanding arrest warrant — and thereby finding that the primary taint was purged.93 Specifically, under the reasoning of People v. Mcgaughran, which held that the arrest on a warrant discovered after an improperly prolonged traffic stop did not bar the prosecution of the underlying offense,94 the police in Rodriguez would have been permitted to arrest and charge the defendant, regardless of the validity of the traffic stop itself. Having established that the officers lawfully arrested the defendant, the majority could have then looked to several United States Supreme Court cases indicating that the officers were "entitled to conduct a properly limited search incident to that arrest, which includes a search of the passenger compartment of [the defendant's] automobile."95 Consequently, the dissent argued, if the police officers "were authorized to search the passenger compartment of Rodriguez's automobile," no legitimate interest could have been served by requiring the suppression of the drugs discovered.96

The majority's unwillingness to read pertinent case law in a manner that would give full effect to the spirit—if not the actual mandate—of the Act exemplifies how California courts rendered the Act far less effective than its drafters intended. Rodriguez also demonstrates the significant authority retained by California courts to apply United States Supreme Court precedents in a manner that favors defendants by allowing for the suppression of relevant evidence unlawfully obtained by law enforcement. While such interpretations of federal law may place the California courts at risk of reversal by the United States Supreme Court, the High Court's limited docket sharply constrains its ability to apply this form of error-correction. Accordingly, California courts' interpretations of the Act may well be allowed to stand indefinitely.

91. Id.
92. Id. at 819 (emphasis in original).
93. See id. at 821 (Perluss, P.J., dissenting).
96. Id.
2. Breaking Ground

a. Physical Evidence

Although the Truth-in-Evidence Act has not realized its full potential in the exclusionary rule context, it is indisputable that in the last twenty-seven years, prosecutors have been able to introduce more physical evidence than before the Act was passed. Beginning with *In re Lance W.* in 1985, the California Supreme Court allowed prosecutors to admit drugs seized by police without a warrant from a third party’s truck after officers observed the defendant drop a plastic bag inside it.97 Under California’s vicarious exclusionary rule as articulated in *People v. Martin,*98 the evidence would have been excluded because it was seized in violation of the third party’s Fourth Amendment rights.99 However, because the United States Supreme Court had refused to recognize the vicarious exclusionary rule,100 the court in *In re Lance W.* held that the rule was abrogated by the Truth-in-Evidence Act and affirmed the court’s disposition.101

That same year, in *People v. Truer,* the California Court of Appeal denied the defendant’s motion to suppress evidence seized by police officers pursuant to a search warrant, even though the officers presented intentionally false affidavits in support of the warrant.102 In doing so, the court found that the Act abrogated all of California’s independent exclusionary rules,103 and rejected the defendant’s arguments that the Act did not apply to evidence obtained via illegitimate search warrants.104 The defendant argued that if the Act abrogated the rule mandating the quashing of search warrants obtained through intentional misrepresentations, police officers would be encouraged to lie in their affidavits since they “would be placed in the tempting position of having nothing to lose and everything to gain.”105 The court, however, rejected this argument, expressing its belief that “the great majority of police officers are law abiding and will continue to honestly disclose the relevant facts to the magistrate as they understand them to be.”106 The court further stated that remedies other than the exclusion of evidence could adequately deter and punish such misconduct, such as prosecutions for perjury, administrative discipline or discharge, being held in contempt of court, and, in particularly egregious cases,
the trial court could still dismiss the case "in the interests of justice."\textsuperscript{107} Ultimately, the court held that because the evidence seized was relevant to proving an essential element of the crime charged, and since the search warrant affidavit would have supported a finding of probable cause absent the intentional misrepresentations, the evidence was admissible.\textsuperscript{108}

Four years later, in \textit{People v. Trotman}, the California Court of Appeal admitted the lab results of a blood sample seized pursuant to the warrantless search of an intoxicated driver who did not consent to the blood test and who was not formally placed under arrest at the time.\textsuperscript{109} The court held that the Truth-in-Evidence Act abrogated the rule of \textit{People v. Hawkins}, which held that a lawful arrest is necessary prior to conducting a blood test,\textsuperscript{110} because the Fourth Amendment requires only that there be probable cause to place the defendant under arrest before a blood sample is taken.\textsuperscript{111} The court recognized that the Act "limited the ability of the [California courts] to create non-statutory rules for the exclusion of unlawfully seized evidence if those rules afford greater protection to a criminal defendant than does the Fourth Amendment."\textsuperscript{112} Consequently, because the court found that police had probable cause to believe that the defendant was driving while intoxicated and that a blood analysis would provide evidence of that crime, the sample was deemed admissible.\textsuperscript{113}

Finally, in \textit{People v. Hunter}, a California appellate court held that the Truth-in-Evidence Act nullified the state's exclusionary rule handed down in \textit{Wimberly v. Superior Court}. \textit{Wimberly} held that police officers need "specific articulable facts" giving them reasonable cause to believe that additional contraband materials were concealed in the trunk of a car before they could search the trunk.\textsuperscript{114} In \textit{Hunter}, after police officers pulled over a car because of its "very loud muffler," they found marijuana on the backseat and in a dashboard ashtray, and identified one of the passengers as a "street drug dealer."\textsuperscript{115} Having found the contraband, the officers searched the rest of the car for more drugs; in the trunk, they found fourteen more bags of marijuana, a semi-automatic handgun and a hockey mask.\textsuperscript{116}

The defendant moved to suppress the evidence based on \textit{Wimberly}. The court, however, held that the Truth-in-Evidence Act nullified the rule in \textit{Wimberly} because it conflicted with the United States Supreme Court's

\textsuperscript{107} \textit{Id.} at 871, 873.
\textsuperscript{108} \textit{Id.} at 873.
\textsuperscript{110} \textit{Id.} at 641.
\textsuperscript{111} \textit{Id.} at 644.
\textsuperscript{112} \textit{Id.} at 643.
\textsuperscript{113} \textit{Id.} at 645-46.
\textsuperscript{114} \textit{People v. Hunter}, 34 Cal. Rptr. 3d 818 (Ct. App. 2005).
\textsuperscript{115} \textit{Id.} at 820.
\textsuperscript{116} \textit{Id.} at 820-21.
decision in United States v. Ross. The appellate court reasoned that "probable cause to search an automobile extends to every part of the vehicle and its contents that might conceal the object of the search."\(^{117}\) The court found that the presence of a known drug dealer in the car, together with the officers finding marijuana inside the car, provided more than probable cause to search the trunk.\(^{118}\) Consequently, evidence obtained from the trunk was deemed admissible.

These cases demonstrate a general rule: under California’s Truth-in-Evidence Act jurisprudence, prosecutors can successfully invoke the Truth-in-Evidence Act only when they can point to a United States Supreme Court case directly on point, mandating the admissibility of evidence that California courts previously held inadmissible. Comparing the courts’ decisions in In re Lance W., Trotman, Hoag, and Hunter with those in Rooney, Neer, and Camacho, it is evident that in the absence of a United States Supreme Court holding to the contrary, California courts will apply pre-Truth-in-Evidence-Act law and exclude relevant physical evidence seized in violation of defendants’ constitutional rights, even if prosecutors can identify authority from federal circuit courts that suggest otherwise.

At the same time, as exemplified in Truer, a defense argument that exclusion of illegally obtained evidence is necessary to deter police misconduct will likely fail. California courts will likely regard the exclusion of evidence as a less effective deterrent than criminal prosecutions for perjury, being held in contempt,\(^{119}\) departmental discipline, or civil damage actions under 42U.S.C. §1983. Indeed, in 2002, the California Supreme Court cited with approval the proposition that “[a] direct sanction imposed on individual officers—internal police discipline, for example—is likely to channel police behavior into patterns of legal conduct far more effectively than does the indirect sanction of exclusion.”\(^{120}\) The court recognized that because these remedial avenues were still available to those defendants whose constitutional rights were violated, admitting evidence previously excluded under California law did not render state citizens powerless to confront “a wayward officer.”\(^{121}\) The court also stated that “by removing the threat that relevant evidence will be excluded . . . our decision today may have the salutary effect of encouraging state and local governments as well as individual police departments . . . to craft careful and detailed regulations governing the ability of officers to arrest for minor offenses.”\(^{122}\)

117. Id. at 822.
118. Id. at 824.
119. See Truer, 214 Cal Rptr. at 872-73.
121. Id.
122. Id.
Despite the theoretical availability of such alternative remedial measures, however, in practice, defendants whose constitutional rights have been violated generally have few avenues for redress. Two significant impediments have prevented the assertion of successful claims under 28 U.S.C. § 1983. First, police officers may defend against such claims by asserting the defense of good faith or showing probable cause. Second, because collateral estoppel principles apply to these suits, "a defendant who has fully litigated a Fourth Amendment claim in state court and received an adverse decision may be barred from filing" such an action.

Moreover, according to California practice materials, "it has long been recognized that . . . criminal sanctions will almost never be used." In *People v. Cahan*, the 1955 California Supreme Court case that first rendered evidence obtained in violation of the state constitution inadmissible, this view was shared by the majority, who articulated that

> there is but one alternative to the rule of exclusion. That is no sanction at all. The difficulty with (other remedies) is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other . . . Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions . . . and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer.

By eliminating the primary deterrent for violations of state constitutional rights, the Truth-in-Evidence Act may have effectively given law enforcement a license to engage in behavior that risks violating defendants' state constitutional rights with impunity.

In the same vein, there may be reason to believe that the development of California criminal procedure has been stunted, since both justices and practitioners are now aware that finding a violation of state constitutional law will not result in the exclusion of the evidence unlawfully obtained unless the United States Supreme Court has so held. Thus, practitioners have recognized that although the California constitution may still have an "independent status," it has become far less important to criminal practitioners since the passage of Proposition 8—"[e]xcept in those circumstances where a viable remedy other than the exclusionary rule exists, a ruling that a search or seizure violates the

124. See id.
125. Id.
126. Id. at 20-74.
Constitution is of little meaning to the defendant unless the conduct also violates the federal constitution as interpreted by the United States Supreme Court."\textsuperscript{128} As a result, in line with the Act’s central purpose, the pool of admissible, relevant evidence has greatly expanded and will likely continue to expand.

Consequently, in spite of the various limitations California courts placed on the potentially broad reach of the Truth-in-Evidence Act, the primary purpose behind the Act—admitting relevant evidence that was previously inadmissible under the exclusionary rule—has been well served. As illustrated by \textit{In re Lance W.}, \textit{Hunter} and \textit{Trotman}, criminal defendants today stand on far weaker footing than they did twenty-seven years ago when they object to the admission of evidence seized in violation of their—or a third party’s—state constitutional rights. Moreover, as long as courts follow the lead of \textit{Truer} and admit evidence seized even as a result of intentionally falsified police affidavits, the scope of evidence available for use by the prosecution promises to expand. Thus, as the Act’s supporters hoped, significant headway has been made in addressing the perceived imbalance favoring criminal defendants within California’s justice system.

\textit{b. Prejudicial Statements: Expected (and Unexpected) Applications of the Act}

Like the increased willingness of California courts to admit relevant physical evidence seized in violation of defendants’ state constitutional rights, the courts have enabled prosecutors to admit far more prejudicial statements made by defendants than pre-Truth-in-Evidence Act decisions would have allowed. Moreover, the courts have, for the most part, permitted prosecutors to admit such statements for use not only in impeachment, but also in their cases-in-chief. In the process, witness testimony has become another area in which prosecutors have been able to make strategic use of the Truth-in-Evidence Act’s provisions.

Beginning with \textit{People v. Warner} in 1988, California courts systematically applied \textit{In re Lance W.}’s reformulation of the exclusionary rule to cases involving inculpatory statements made to police that would have been excluded under pre-Act law. In \textit{Warner}, the court considered the Act’s effect on the decisions in \textit{People v. Pettingill} and \textit{People v. Fioritto}, which held that once a suspect invokes his \textit{Miranda} right to remain silent,\textsuperscript{129} any subsequent police-initiated interrogation violated the suspect’s state constitutional privilege against self-incrimination.\textsuperscript{130} In \textit{Warner}, after police arrested the defendant for unlawful sexual intercourse and lewd conduct with his adopted daughter, the officers read him his \textit{Miranda} rights, and the defendant invoked his right to

\textsuperscript{128} MILLMAN, \textit{supra} note 123, at 20-29.
\textsuperscript{130} People v. Warner, 250 Cal. Rptr. 462 (Ct. App. 1988).
The following day, a different officer, unaware that the defendant had previously invoked his right, told the defendant that he wished to speak with him about the arrest and the charges. The defendant agreed to waive his rights and speak with the officer about the charges, at which time he made several inculpatory statements. At trial, the statements were admitted and the defendant was convicted; he then appealed the admission of those statements.

The appellate court affirmed, holding that because the Pettingill-Fioritto rule was a judicially created remedy for Miranda violations, based entirely on independent state grounds, it was abrogated by the Truth-in-Evidence Act insofar as it conflicted with the United States Supreme Court’s holding in Michigan v. Mosley. In Mosley, the Court held that Miranda’s requirement that police interrogation cease once the detained suspect expressed a desire to remain silent did not impose a “blanket prohibition” against taking any additional voluntary statements. The court further held that the admissibility of statements obtained after the suspect invoked his right depended on “whether the suspect’s Miranda right to cut off the questioning was respected in the totality of the circumstances.” Recognizing that the Truth-in-Evidence Act replaced the Pettingill-Fioritto rule with the less-stringent standard of Mosley, the Warner court held that because the police officers respected the defendant’s right to remain silent each time he invoked it, and because they did not engage in any misconduct, the statements were properly admitted.

In People v. Hall, the trial court, applying the Warner rationale, admitted evidence that the defendant was uncooperative and initially refused to tell an arresting officer his name. The defendant argued that this testimony was inadmissible under the California Supreme Court’s rule in People v. Rucker, which held that although police could obtain an arrestee’s basic, neutral information such as his name and address, the state could not use the arrestee’s responses “in any manner in a subsequent criminal proceeding.” Nevertheless, the court in Hall rejected the defendant’s position and held that like the Pettingill-Fioritto rule, Rucker established a judicially created remedial right, and the Truth-in-Evidence Act abrogated all such “judicially declared

131. Id. at 463-64.
132. Id. at 464.
133. Id.
134. Id. at 463.
135. Id. at 465-66.
136. Id. at 467 (quoting Michigan v. Mosley, 423 U.S. 96 (1975) (internal quotations omitted)).
137. Id.
138. Id.
140. Id. (discussing People v. Rucker, 605 P.2d 843 (Cal. 1980)).
exclusionary remedies." Interestingly, in contrast to the California courts' unwillingness to rely on lower federal court opinions when considering the admissibility of physical evidence, the court in Hall highlighted the fact that "a majority of the federal circuit courts have held that incriminating evidence derived from a routine booking interview is admissible" under these circumstances. Thus, Hall demonstrates that while California courts have not always considered lower federal court decisions controlling, they have been more inclined to do so when the majority of circuits have reached a consensus.

Later, in People v. Coffman, the California Supreme Court again demonstrated its commitment to upholding the Truth-in-Evidence Act's provisions in the context of inculpatory statements. In that case, one of the defendants, who was charged with several offenses, including murder, kidnapping and robbery, alleged that the trial court erred in admitting statements he made to a probation officer describing previous robberies he had participated in. The defendant cited the California rule in People v. Hicks for the proposition that statements made on the advice of a probation officer could not be later used against a defendant in court. The court, however, rejected the defendant's argument, holding that the Truth-in-Evidence Act invalidated Hicks because the Act was "intended to abrogate judicially created rules requiring the exclusion of otherwise admissible evidence, such as voluntary admissions." Because the United States Supreme Court had held that the federal constitution did not require the exclusion of a defendant's statement to a probation officer, the court found that the Truth-in-Evidence Act mandated the application of the weaker federal rule.

Like the courts' favorable treatment of the statements made in the cases above, in which the prosecution sought to have the statements admitted in their cases-in-chief, the California Supreme Court has been similarly disposed to allowing prosecutors to use statements obtained from defendants in violation of their constitutional rights for purposes of impeachment. Starting with People v. May, the California Supreme Court held that the Truth-in-Evidence Act abrogated the rule in People v. Disbrow that extrajudicial statements elicited from defendants in violation of their Miranda rights were inadmissible for impeachment purposes. The defendant in May was suspected of committing several offenses, including rape, robbery, and assault with a deadly weapon. After police advised him of his Miranda rights, the defendant refused to answer

141. See id. at 461.
142. Id. at 462.
143. See BRUNN, supra note 75, at 6.
145. Id. at 117-18.
146. Id. at 117.
148. Id.
any questions. Nevertheless, the officers continued to interrogate him and elicited multiple statements indicating he was the perpetrator. The statements were admitted at trial, and the defendant was convicted.

On appeal, the California Supreme Court affirmed the admission of the statements, stating that the Truth-in-Evidence Act nullified Disbrow because that opinion rested on independent state grounds. In doing so, the court found that California voters had intended that the Act (1) "abrogate[e] judicial decisions which had required the exclusion of relevant evidence solely to deter police misconduct in violation of a suspect's [state] constitutional rights. . .while (2) preserving legislatively created rules of privilege insulating particular communications, such as the attorney-client or physician-patient privilege." Because Disbrow afforded defendants more procedural rights than what was required under the United States Supreme Court's holding in Harris v. New York, which held such statements properly usable for impeachment, the court found that Disbrow was no longer good law.

In People v. O'Sullivan, the California appellate court extended May's ruling when it held that the Act also rendered evidence of a defendant's pre-Miranda silence admissible for impeachment. In that case, the trial court admitted testimony from a police officer indicating that the defendant did not deny that a container of methamphetamine belonged to her. On appeal, the defendant contended that the court erred in admitting the testimony and relied on (1) People v. Free, which held that post-arrest silence could not be commented upon even in the absence of a Miranda warning, and (2) People v. Jacobs, which held that defendants have a right not to be cross-examined regarding their silence, either during or after their arrest. The court, however, drawing from the decision in May, found that both Free and Jacobs were abrogated by the Truth-in-Evidence Act because federal law did not compel exclusion in this context. In Fletcher v. Weir, the United States Supreme Court held that if a defendant had not been given a Miranda warning, evidence of his silence was admissible for impeachment. Consequently, the O'Sullivan court found the defendant's silence properly admissible.

As illustrated by the cases above, prosecutors today can generally assume that illegally obtained, incriminatory statements will be admitted at trial,

149. Id.
150. Id.
151. Id. at 309.
152. Id. (emphasis in original).
153. Id. at 313 (discussing Harris v. New York, 401 U.S. 222 (1971)).
155. Id. at 787.
156. See id. at 788 (citing People v. Free, 182 Cal. Rptr. 259 (Ct. App. 1982) and People v. Jacobs, 204 Cal. Rptr. 849 (Ct. App. 1984)).
157. See id.
158. See id. at 787 (citing Fletcher v. Weir, 455 U.S. 603, 605-07 (1982)).
especially if they can support their arguments for admission by referencing analogous United States Supreme Court rulings. As a result, practitioners' fears that eliminating independent state grounds in this area would endanger civil liberties may have become a reality; federal law in this context is much less protective than California law had been, and far more statements have been admitted since the Truth-in-Evidence Act's passage.\(^{159}\) Moreover, even in the absence of a United States Supreme Court decision mandating the admissibility of this type of evidence, California courts have demonstrated their willingness to apply the provisions of the Truth-in-Evidence Act to abrogate pre-Act exclusionary rules. Although the court was initially reluctant to do so, as demonstrated by Jacobs, a 1984 case that precluded prosecutors from cross-examining defendants about their post-arrest silence, the decisions in Hall in 1988 and Rodriguez in 2006 may symbolize the courts' growing adherence to the Act's provisions.\(^{160}\) Though it remains to be seen how far the court will go in this direction, it is clear that the Act has increasingly become a significant obstacle for defense attorneys to overcome, forcing them to craft new strategies to respond to the additional prejudicial evidence now admissible at trial.

C. The New Contours of the Character Evidence Rules

Although the Truth-in-Evidence Act was expected to have the greatest effect on cases interpreting the exclusionary rule, critics presaged early on that the Act's impact would extend far beyond exclusionary rule cases.\(^{160}\) Specifically, practitioners and scholars predicted a "radical transformation" in the way prosecutors and defense attorneys would use character evidence during trial.\(^{161}\) In fact, two years after the Act's passage, an evidence law expert predicted "the almost total abolition of the common law rules of character evidence and the replacement of those rules with a grant of broad judicial discretion to admit or exclude character evidence" under California Evidence Code § 352.\(^{162}\) This speculation was based on the assumption that the Act would repeal Evidence Code § 1101(a), which prevented trial attorneys from admitting evidence of a person's character to prove his or her conduct in conformity on a specific occasion.\(^{163}\) Commentators anticipated that as a

---

159. See Hager, supra note 58.
160. See Crisera, supra note 44, at 1584.
161. Swift, supra note 1, at 650.
162. Miguel Angel Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies, 31 UCLA L. REV. 1003, 1003 (1984); see also Edward J. Imwinkelried and Miguel Angel Mendez, Resurrecting California's Old Law on Character Evidence, 23 PAC. L.J. 1005, 1010 (1992). California Evidence Code § 352 grants trial judges significant discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (2009).
163. California Evidence Code § 1101(a) provides in full: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or
result, § 352 would acquire an entirely new significance in criminal trials; since per se rules regarding the inadmissibility of character evidence would be abrogated, judges would inherit the power of determining whether the probative value of a particular piece of character evidence outweighed its prejudicial effect, thereby rendering it admissible.\textsuperscript{164} Scholars warned that giving judges such unbridled discretion would not only "cause a dangerous lack of uniformity in criminal trials across the state,"\textsuperscript{165} but also create additional uncertainties for practitioners in an area that was "formerly characterized by comparative certainty."\textsuperscript{166}

In reality, however, much of the law in this area remains unchanged. In 1994, the California Supreme Court held in \textit{People v. Ewoldt} that even if the Truth-in-Evidence Act eliminated the character evidence rule embodied in § 1101(a), the legislature subsequently reenacted the statute by more than a two-thirds majority vote, saving it from abrogation.\textsuperscript{167} Specifically, four years after the Act's passage, the California legislature added a clause into §1101(b), which exempted some types of prior bad acts from the character evidence ban, thereby allowing prosecutors to admit evidence suggesting that a defendant in a prosecution for a sexual offense "did not reasonably and in good faith believe that the victim consented."\textsuperscript{168} The \textit{Ewoldt} court held that because the California constitution stated that "[a] section of a statute may not be amended unless the section is reenacted as amended," the legislature reenacted § 1101 in its entirety.\textsuperscript{169} Thus, because the amended statute was passed by a unanimous vote of the legislature, it overrode any effect the Truth-in-Evidence Act may have had.\textsuperscript{170} Consequently, scholars' predictions that § 352 would cause radical changes in the admissibility of character evidence to prove conduct in conformity were unrealized.

However, although the Act did not affect the admissibility of character evidence (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." \textit{CAL. EVID. CODE} § 1101 (1996).

\begin{itemize}
  \item \textsuperscript{164} \textit{See Mendez, supra} note 165, at 1008-09.
  \item \textsuperscript{165} \textit{Id.} at 1039.
  \item \textsuperscript{166} \textit{Id.} at 1059.
  \item \textsuperscript{167} \textit{People v. Ewoldt}, 867 P.2d 757, 759 (Cal. 1994); \textit{see also supra} note 3 (stating that the Truth-in-Evidence Act provides in relevant part that "[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership of each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . .") (emphasis added).
  \item \textsuperscript{168} \textit{California Evidence Code} § 1101(b) provides in full: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." \textit{CAL. EVID. CODE} § 1101 (1996).
  \item \textsuperscript{169} \textit{Ewoldt}, 867 P.2d at 762.
  \item \textsuperscript{170} \textit{Id.}
\end{itemize}
evidence to prove conduct in conformity on a specific occasion, it did eliminate several other evidentiary statutes that limited the type of credibility evidence admissible at trial. Prior to the Act’s passage, Cal. Evid. Code §§ 786 through 790 ensured that criminal proceedings did not become trials of the witness’s character, as portrayed through examples of his behavior throughout his life. After the Act was ratified, however, California courts systematically interpreted its language and intent as nullifying these rules.

First, in People v. Taylor, the appellate court considered the Act’s effect on §790, which made evidence of the good character of a witness inadmissible to support his credibility unless evidence of his bad character had already been introduced to attack his credibility. In Taylor, the defendant argued that the trial court erroneously refused to allow him to present evidence of his reputation in the community for veracity. Relying on In re Lance W., the appellate court found that because the Truth-in-Evidence Act sought to ensure that all relevant evidence be admitted, it was impossible to reconcile the Act’s provisions with the continued viability of §790. Accordingly, the court held that the defendant’s proffered testimony was admissible notwithstanding the fact that the prosecution did not first introduce evidence impeaching his character.

Next, in People v. Adams, the appellate court considered whether the Act preserved Evidence Code § 787, which made evidence of specific instances of conduct inadmissible when used solely to attack or support the credibility of a witness. In that case, the defendant argued that the trial court erred in excluding evidence that the rape victim had on two previous occasions falsely accused others of rape. Persuaded by the reasoning in Taylor, the court held that the Act “was not designed to liberalize the rules of admissibility only for evidence favorable to the prosecution while retaining restrictions on the admissibility of evidence tending to prove a defendant’s innocence.” Rather, the Act was intended to “ensure that those who are actually guilty do not escape conviction through restrictions on the admissibility of relevant evidence.” As a result, the court held that the Act invalidated § 787 and that the

171. See Brown, supra note 23, at 897.
173. CAL. EVID. CODE § 790 (1967).
174. Taylor, 225 Cal. Rptr. at 736.
175. Id.
176. Id. at 737.
177. Id. at 738.
180. Adams, 243 Cal. Rptr. at 581.
181. Id. at 584.
182. Id.
defendant’s evidence should have been admitted.

One year later, in People v. Lankford, the court applied this reasoning to prosecutorial efforts to introduce character evidence. The court held that although the defendants in Taylor and Adams successfully utilized the Act’s provisions to overcome the prohibition of §§ 790 and 787, which restricted the admissibility of proffered defense evidence, “nothing in those cases or in [the Act] itself warrants different treatment of evidence proffered by the prosecution.”\(^{183}\) The prosecution was therefore permitted to impeach the defendant’s testimony that he had not engaged in any misconduct since he was last released from prison with evidence that he was about to be tried for armed robbery and assault with a deadly weapon.\(^{184}\)

That same year, in People v. Harris, the California Supreme Court resolved the extent to which the Act affected the character evidence bans in §§ 786, 787, and 790.\(^{185}\) The defendant in that case argued that the purpose of the Act was limited to “conforming California search and seizure law to the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment.”\(^{186}\) He argued that, as a result, the character evidence rules in §§ 786-790 and 1101-1103 were left intact.\(^{187}\)

The court, however, dismissed these arguments. First, the court held that the Act was meant to affect far more than just the rules governing unlawful searches and seizures; otherwise, there would have been no reason for the Act’s drafters to expressly preserve, for example, the rules relating to privilege and hearsay.\(^{188}\) Second, the court held that “[a]lthough the nature of the evidence that is the subject of Evidence Code sections 786-790 is similar to that in Evidence Code sections 1101-1103, the purpose for which [evidence under the former sections] is to be admitted is not to prove conduct.”\(^{189}\) The Act’s explicit preservation of section 1103 was therefore distinguishable from any intent to preserve the rules in sections 786-790, which relate to a witness’s conduct but only insofar as it attacks or supports the witness’s credibility.\(^{190}\) Consequently, the court found that the admission of specific instances of a witness’s past reliability as an informant, and the prosecutor’s reference to it in closing argument, did not constitute error or misconduct.\(^{191}\)

In People v. Wheeler, the California Supreme Court took its final step in delineating the Act’s impact on this kind of character evidence when it considered the Act’s effect on Evidence Code § 788, provided that prior felony

---

184. Id. at 239.
186. Id. at 640-41.
187. Id.
188. Id. at 641 (internal quotation marks omitted).
189. Id. at 640.
190. See id. at 640-41.
191. Id. at 641.
convictions were admissible for the purpose of attacking a witness’s credibility. At trial, the prosecution argued that the Act abrogated §788, making evidence of prior misdemeanor conduct also admissible for impeachment. The trial court admitted the evidence of the witness’s recent misdemeanor conviction for grand theft, and the California Supreme Court held that the admission was proper. The court reasoned that the Truth-in-Evidence Act superseded “all California restrictions on the admission of relevant evidence except those preserved or permitted by the express words of [the Act] itself.” Since §788 was not expressly preserved, the court held that it was abrogated, eliminating the felony-convictions-only rule.

Although Wheeler rendered misdemeanor conduct admissible for impeachment in criminal trials, the court narrowed the reach of its ruling in two important ways. First, the court limited the kind of admissible misdemeanor evidence to that involving “moral turpitude,” since it determined that only acts involving “depravity” or a “readiness to do evil” are relevant to credibility. Applying this rule to the facts, the court held that grand theft reflects dishonesty, making it a crime involving moral turpitude. In doing so, the court relied on its earlier decision in People v. Castro, which held that the U.S. Constitution allows only those felony convictions involving moral turpitude to be admissible for impeachment.

Interestingly, the Wheeler court was not persuaded by the prosecution’s argument that the United States Supreme Court had just three years earlier cast doubt upon the rule in Castro. In Green v. Bock Laundry Machine Co., the United States Supreme Court held that Federal Rule of Evidence 609(a) generally allowed any conviction of a crime punishable by imprisonment for more than one year to be admissible for impeachment. Nevertheless, the Wheeler court interpreted Castro to mean that misdemeanor evidence was irrelevant unless the defendant was guilty of a crime of moral turpitude.

As

193. Id. at 940.
194. Id. at 945.
195. Id. at 942.
196. Id. at 942-43.
197. Id. at 945 n.6.
198. Id. at 941. Although the court determined that the prosecution could inquire into the witness’s conduct that had involved moral turpitude, the court refused to allow the prosecution to introduce evidence of the witness’s conviction, namely, the court record itself. The court found that such evidence was inadmissible hearsay. Id. at 939-940. However, because the defendant did not make a hearsay objection to the introduction of that evidence, the court held that the hearsay claim was waived and the evidence was properly admitted. Id.
199. See id. (citing People v. Castro, 696 P.2d 111, 120 (Cal. 1985)).
200. Wheeler, 841 P.2d at 945.
202. California Evidence Code § 210 defines relevant evidence as that evidence which has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” CAL. EVID. CODE § 210 (2009); Wheeler, 841 P.2d at 945 n.6.
a result, the court limited the reach of the Truth-in-Evidence Act in the character evidence context and demonstrated that, as in the exclusionary rule context, California courts retain significant ability to interpret the federal constitution more expansively than federal courts. At the same time, the court also recognized the heightened role § 352 would play in this area, empowering courts to "prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues" by excluding evidence whose probative value did not outweigh its prejudicial effect. 203

This collection of cases demonstrates that, to a certain extent, predictions that the Truth-in-Evidence Act would cause radical changes in the prosecution of criminal trials were correct. There is no dispute that today, both prosecutors and defense attorneys can introduce far more character evidence for impeachment purposes than before the Act’s passage, when bright-line rules created a per se ban on its admission. As a result, prosecutors today confront additional challenges, since defense attorneys can probe deeper into the previous misconduct of police officers and more easily attack the credibility of prosecution witnesses. 204 In more sensitive areas of the law, such as domestic violence and sexual abuse cases, the abrogation of these character evidence provisions may have had particularly damaging effects. Because witnesses know that the defendant can inquire into potentially damaging character evidence about them, they often refuse to come forward at all. 205 As a result, fewer witnesses today are reporting crimes. For example, rape crisis counselors have submitted affidavits stating that they “know of rape victims who, before Proposition 8 was enacted, intended to testify against their assailants, but who now have decided not to bring charges against alleged rapists because of the passage of Proposition 8.” 206 This consequence is particularly troubling in light of the attorney general’s claim to California voters that one of the Proposition’s main purposes was to assist in the conviction of rapists. 207

For defendants, the Act has made the decision to testify far more risky, 208 forcing them and their attorneys to make difficult strategic choices. The elimination of a blanket prohibition on character evidence undoubtedly influences defendants’ decisions regarding whether to testify. Even the California Supreme Court has recognized that, other than a confession, evidence of the defendant’s bad character is “the most prejudicial evidence

203. Id. at 945.
204. See Brown, supra note 23, at 898.
205. See Brosnaham, 651 P.2d at 295 n.9 (Bird, C.J., dissenting).
206. Id.
207. See id. at 305 (citing Ballot Pamphlet, Proposed amend.s to Cal. Const. with arguments to voters, Primary Election (Jun. 8, 1982)); see also Bridget A. Clarke, Making the Woman’s Experience Relevant to Rape: The Admissibility of Rape Trauma, 39 UCLA L. REV. 251, 268 (1991).
208. Swift, supra note 1, at 656.
Some scholars have highlighted the constitutional concerns that the Truth-in-Evidence Act might raise in this context, when a criminal defendant’s choice to take the stand has been so infringed. The advisory committee notes to Fed. R. Evid. § 608, which governs the admissibility of character and conduct evidence of witnesses in federal court, state that “[w]hile no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or a substantial infringement upon it would surely be of due process dimensions.” Consequently, the Truth-in-Evidence Act has not only presented many new obstacles for criminal practitioners, it has also raised difficult issues that remain unaddressed by the courts, even twenty-seven years after its passage.

Exactly how much of a toll the addition of this evidence has taken on our justice system is less clear. Some commentators have cautioned that admitting character evidence would distract jurors from the central issues of the case and consume too much time. For this reason, some strongly criticized the Act, asserting that it “so confuses questions of evidence that it threatens prolonged delays in courtrooms as judges take hours to make decisions that should take minutes.” However, such predictions seem overblown. Without question, jurors deciding criminal cases today are presented with a number of issues to consider before reaching a verdict, such as, for example, how much weight to give to evidence regarding the prior acts and reputations of both defendants and witnesses. Nonetheless, since trial judges today retain the same discretion under § 352 to exclude evidence that is cumulative or not probative as they did before the Act’s passage, it is unlikely that they have allowed practitioners to flood criminal trials with such collateral material. Likewise, there is little doubt that trial judges today “exercise their discretion to exclude overly prejudicial evidence of specific acts, reputation, and opinion with vigor and concern for fundamental fairness at trial,” just as they did before the Act was passed.

For the same reason, predictions that abrogating sections 787 and 788 would cause practitioners to look beyond admitting evidence of “moral turpitude” to admitting evidence of “immoral acts,” such as lying on an

209. Mendez and Imwinkelried, supra note 162, at 1012.
211. FED. R. EVID. 608 advisory committee’s note.
212. See Mendez and Imwinkelried, supra note 162, at 1007.
213. California’s Backfire on Crime, supra note 56.
214. See Brown, supra note 23, at 899.
215. Ring, supra note 210, at 263.
216. See id. at 267.
employment application, cheating on school exams, or having an affair, have not transpired. No reported California decision has yet considered these issues. Instead, a retrospective reveals that although the realm of permissible misconduct evidence has expanded, "limited use has yet been made of these broad impeachment weapons." In part, this may be the result of practitioners restricting themselves, using pre-Truth-in-Evidence Act law as a guide to predicting how successful they will be in convincing trial judges to admit a piece of evidence. Even more likely, the limited introduction of such evidence is probably also a product of trial judges utilizing their discretionary power under §352 to admit only that evidence particularly probative of credibility.

Several other predictions of dramatic negative effects also did not entirely materialize. First, both practitioners and judges were apprehensive that abrogating the character evidence rules would dissuade prosecution witnesses from testifying due to fear of public humiliation. This fear was compounded by the understanding that "the American criminal justice system is absolutely dependent on victims to cooperate. Without the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable." Nevertheless, trial judges largely prevented this perceived threat to our justice system from being realized. Courts frequently protected non-defense witnesses by limiting the type and scope of impeachment evidence proffered by defendants, often using pre-Truth-in-Evidence Act decisions as a guide.

However, while trial judges may have shielded testifying witnesses from answering embarrassing questions having little probative value, anecdotal evidence, the possibility still remains, as discussed above in the context of rape cases, that fewer victims have been willing to come forward and report criminal offenses, especially those involving sexual abuse or domestic violence. Moreover, it is also possible that the full ramifications of the Act in this context could be compounded by the United States Supreme Court’s recent decision in *Crawford v. Washington*. In that case, the court held that out-of-court, testimonial statements by witnesses are inadmissible under the Confrontation Clause of the United States Constitution unless the witness is unavailable.

---

217. See Mendez, supra note 162, at 1019.
218. See Ring, supra note 210, at 261; see also Goldberg, supra note 55, at 970.
219. See Goldberg, supra note 55, at 961.
220. See Ring, supra note 210, at 267; see also Wheeler, 841 P.2d at 951 (Arabian, J., dissenting).
221. See Stearman, supra note 29, at 45.
222. See Ring, supra note 210, at 267.
223. See id.
225. The Confrontation Clause of the Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.
and the defendant had an earlier opportunity to cross-examine the witness. Before *Crawford*, prosecutors were able to admit testimonial statements implicating criminal defendants without requiring the witness to testify at trial. For example, the prosecution could introduce statements made to 911 operators or to police officers who arrived at the crime scene. Accordingly, victims may have been less deterred from reporting crimes because they could avoid the fear of having to confront their assailants in the courtroom. After *Crawford*, however, and after the passage of the Truth-in-Evidence Act, it is plausible that victims in the future may be less willing to report crimes and participate in the criminal trials of their assailants.

Second, the cases presented above illustrate that the Act’s provisions did not always work to prosecutors’ advantage. Both *Taylor* and *Adams* show how defendants have effectively used the Act’s provisions for their benefit. Such decisions corroborated the fears of police officers, who anticipated that defense attorneys would utilize their new impeachment tools to scrutinize officers’ “personnel records and personal lives for evidence of misconduct.” Former San Francisco Public Defender Jeff Brown observed that the Act gave defense counsel “greater latitude to attack policemen with instances of brutality on their service record, as well as to attack professional informants.” Additionally, scholars have noted that although the primary purpose of the Act was to correct a perceived imbalance favoring defendants in criminal proceedings, in those cases interpreting Proposition 8’s impact on the California Evidence Code, “it was often the defense which argued that a particular evidentiary provision had been repealed.”

Finally, in some ways, the Act may have ironically operated to the benefit of criminal defendants, expanding the pool of evidence they can utilize to strengthen their cases. Effectively, the Act has allowed criminal defendants to not only introduce more evidence of their own good character, it has also given them a greater range of evidence with which to attack the credibility of both their accusers and arresting officers. Thus, at the same time as the Act helped restore the balance between victims’ and defendants’ rights by increasing the scope of evidence prosecutors can admit, the Act often tipped the scales back in favor of defendants, contrary to its central purpose.

D. Judicial and Legislative Protectionism over the California Evidence Code

Although legal scholars and practitioners focused mainly on evaluating the Truth-in-Evidence Act’s potential effects on the exclusionary and character evidence rules, many commentators envisioned that the Act would have a much

226. *Crawford*, 541 U.S. at 36.
229. See *Taylor*, *supra* note 172, at 632.
broader impact. In fact, before the Act was placed on the ballot, the Assembly Committee on Criminal Justice published an analysis of Proposition 8 in which the committee predicted that the Act would "repeal the bulk of the California Evidence Code." Likewise, the San Francisco Bar Association considered it a "dangerous challenge to our system of due process" that "threatens the fairness and orderliness of the constitutional process." Beyond scholars and attorneys, several California Supreme Court justices anticipated that it would substantially change state criminal proceedings, causing consequences as broad as permitting testimony from individuals unable to understand the duty to tell the truth and allowing witnesses to testify about information as to which they had no personal knowledge.

In reality, however, the Act has had little impact in areas outside of the exclusionary rule and character evidence contexts. First, several Evidence Code sections thought to have been abrogated by the Act were subsequently reenacted by more than a two-thirds majority vote of the legislature. For instance, the reenactment of §1101 calmed fears that the Act eliminated dozens of carefully crafted character evidence rules, which protected both defendants and witnesses in criminal proceedings from being subjected to embarrassment on the witness stand. Additionally, several scholars suggested that the Act may have repealed rules that previously restricted the admissibility of polygraph tests (to the extent that results from those tests were relevant and more probative than prejudicial). But in 1983, the California legislature passed Evidence Code § 351.1, which expressly prohibited the admissibility of polygraph evidence, and the California Supreme Court later held that as a result, §351.1 was unaffected by the Act.

Second, most of the evidentiary provisions many feared would be eliminated have continued to operate unchallenged. For example, despite the predictions of several California Supreme Court justices that the Act would (1) permit testimony from "children and mentally incompetent persons who are

231. See Crisera, supra note 44, at 1585.
232. Lindsey, supra note 56.
233. See Brosnahan, 651 P.2d at 300 (Bird, C.J., dissenting).
235. Cal. Evid. Code § 702 provides in relevant part that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." Cal. Evid. Code § 702 (1967).
237. Cal. Evid. Code § 351.1 provides in relevant part: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." Cal. Evid. Code § 351.1 (1983).
238. See People v. Wilkinson, 94 P.3d 551 (Cal. 2004).
239. Brown, supra note 23, at 896.
incapable of understanding the duty. . . to tell the truth;” (2)”authorize witnesses to testify to matters about which they have no personal knowledge; and (3)”repeal the rule that evidence of [a witness’s] religious belief or lack thereof is inadmissible to attack or support [his credibility].” A look at decisions of California appellate courts over the last twenty-seven years demonstrates that attorneys did not bring such proposed changes before the courts. Although this result may be attributed either to prosecutors being reluctant to test the admissibility of this evidence — since it was previously inadmissible under the Evidence Code — or to trial judges using §352 to prevent the introduction of such evidence, or a combination of the two, the fact remains that in today’s criminal trials the majority of the Evidence Code operates just as it did before the Act’s passage. In large part, this result may also be attributed to the Act’s express reservation of rules relating to hearsay, privileges, character evidence, and trial judges’ discretion under §352.

Furthermore, the California Supreme Court has interpreted Proposition 8 in such a way as to preserve much of the case law decided before the Act’s passage. For instance, in People v. Castro, the court considered the extent to which the Act’s express reservation of §352 affected another provision within Proposition 8 allowing any prior felony convictions to be used “without limitation for purposes of impeachment.” Despite the provision’s express language, the court limited the type of prior felony convictions that could be admitted to only those involving moral turpitude. The court reasoned that this construction was necessary to save the provision from a possible Fourteenth Amendment violation: “[s]ince impeachment with felony convictions which do not involve [moral turpitude] bears no rational relation to the witness’ readiness to lie, the due process clause of the Fourteenth Amendment necessarily cuts into the ‘without limitation’ language of [that provision].” In doing so, the court effectively redrafted the provision in a way that not only sharply contradicted its own plain meaning, but also went against the intent of the Truth-in-Evidence Act — to admit all relevant evidence — since a prior felony conviction is certainly probative, relevant evidence.

In addition to preserving codified evidentiary provisions, the court has also preserved several judicially created rules that both directly and indirectly exclude relevant evidence from criminal trials. For instance, for more than a

240. Brosnahan, 651 P.2d at 299 (Bird, C.J., dissenting) (internal quotation marks omitted).
241. See Lindsey, supra note 61.
243. Art. I, § 28(t) provides in full: “Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.” Art. I, § 28(f)(4) (1982).
244. See Castro, 696 P.2d at 118.
245. Id.
decade, attorneys and academics predicted that the Act would repeal the California common law rule governing the admissibility of scientific evidence.\textsuperscript{246} Specifically, they argued that the Act would do away with the long-accepted \textit{Kelly-Frye} rule,\textsuperscript{247} which rendered inadmissible expert opinion testimony regarding a scientific technique unless that technique's reliability was "generally accepted" by the relevant scientific community.\textsuperscript{248} Scholars noted that insofar as the rule imposed "a standard of admissibility higher than mere relevance," it was in direct conflict with the Act.\textsuperscript{249} Moreover, since the California Supreme Court had previously acknowledged that the rule often excluded relevant evidence,\textsuperscript{250} scholars asserted that the Act clearly required "the abandonment of the \textit{Frye} test in form if not in practice."\textsuperscript{251}

Nevertheless, in \textit{People v. Leahy}, the California Supreme Court held that the \textit{Kelly-Frye} test was compatible with the Truth-in-Evidence Act.\textsuperscript{252} In its decision, the court relied on \textit{People v. Harris}, which held that the Act did not "abrogate generally accepted rules by which the reliability and thus the relevance of scientific evidence is determined."\textsuperscript{253} The court then reasoned that because unreliable evidence is irrelevant, the \textit{Kelly-Frye} test was not susceptible to abrogation since the Act abrogated only those rules that restricted the admissibility of "relevant" evidence.\textsuperscript{254}

However, as the dissent pointed out, the fact that the scientific community has not generally accepted a scientific technique does not necessarily mean that the evidence discovered through that technique is irrelevant.\textsuperscript{255} The dissent persuasively argued that "[w]hile the rule is lauded as promoting uniformity in the admission of evidence, that uniformity will be of no benefit to the defendant who is convicted and sentenced to death when probative and even crucial evidence is excluded because the scientific technique through which it was developed is new, and although the developer may be well-respected in the field, the technique has not yet attracted enough attention to achieve a 'consensus' among members of the 'relevant' scientific community."\textsuperscript{256} The dissent thereby highlighted the very real potential ramifications of the majority's holding, which operated in contravention of the Act's purpose by indirectly excluding relevant evidence from criminal trials.

\begin{itemize}
\item \textsuperscript{246} Goldberg, \textit{supra} note 55, at 963.
\item \textsuperscript{247} Brown, \textit{supra} note 23, at 895.
\item \textsuperscript{248} See People v. Kelly, 549 P.2d 1240 (Cal. 1976); see also \textit{Frye v. United States}, 293 F. 1013 (D.C. Cir. 1923).
\item \textsuperscript{249} Carter, \textit{supra} note 236, at 1144.
\item \textsuperscript{250} Mendez, \textit{supra} note 165, at 1035 (citing \textit{Kelly}, 549 P.2d at 1244); see also People v. Leahy, 882 P.2d 321, 345 (Cal. 1994) (Baxter, J., dissenting).
\item \textsuperscript{251} Mendez, \textit{supra} note 165, at 1035.
\item \textsuperscript{252} \textit{Leahy}, 882 P.2d at 337.
\item \textsuperscript{253} \textit{Harris}, 767 P.2d at 649.
\item \textsuperscript{254} See \textit{Leahy}, 882 P.2d at 326.
\item \textsuperscript{255} See \textit{id.} at 346 (Baxter, J., dissenting).
\item \textsuperscript{256} \textit{Id.} at 345 (Baxter, J., dissenting).
\end{itemize}
These decisions, when compared with those developed in the exclusionary rule context, further demonstrate a pronounced dichotomy in the court’s application of the Act, on one hand, to rules that go to the fairness and efficiency of trial procedure, and, on the other, to rules that go to the fairness of law enforcement procedure. In the exclusionary rule context, the courts generally interpreted the Act as its supporters had envisioned and generated the results its opponents had feared. Specifically, the courts, for the most part, applied the Act in a straightforward manner when it abrogated rules limiting prosecutors’ ability to introduce illegally obtained evidence. The courts’ willingness to do so may in part have been a result of their view that the exclusionary rule does not function as a rule of trial fairness. In fact, the perception that the rule benefits only criminals seeking to suppress their criminal records is not uncommon. In contrast, when interpreting rules aimed at the fairness of trials, rather than the fairness of police investigations, the decisions in Leahy, Castro, and Wheeler illustrate how the courts have been much more imaginative in limiting the Act, making its impact far less significant than what its supporters and opponents predicted. The lesson may therefore be that courts are less easily persuaded to change rules that strike at the heart of what they view as their bailiwick – the fairness and efficiency of trial procedures.

CONCLUSION

In the past twenty-seven years, the Truth-in-Evidence Act has come a long way. Although the courts were slow to implement its provisions in a manner that would enable it to realize its full potential – and, in some ways, have continued to do so – the Act has come far beyond opponents’ initial prediction that the Supreme Court would render it unconstitutional, preventing it from having any impact at all. Indeed, the Act plays a vital role in many criminal trials today.

As anticipated by numerous scholars and practitioners, the Act has by far made the strongest impact in the area it intended to target most – the deconstruction of the California courts’ liberal exclusionary rule jurisprudence. As foreseen by former Attorney General George Deukmejian, it was precisely these cases that felt the principal impact of the Act because of the considerable body of case law the courts had made in developing and safeguarding criminal defendants’ rights against law enforcement transgressions. Today, prosecutors have access to a much greater range of evidence that was previously considered off-limits. And they can use this evidence not only for purposes of impeachment but also in their cases-in-chief. Consequently, the Act has, as expected, served as a powerful tool prosecutors can use to present more

convincing cases to juries; it is indisputable that, over the last twenty-seven years, its provisions have often helped make the difference between an acquittal and a conviction. In all likelihood, it has also provided prosecutors with a stronger bargaining chip in negotiating plea agreements and making other deals with defendants.

In other areas, however, the Act made less of an impact than predicted, often as a result of the judiciary’s creative interpretations of existing law. For example, far from allowing the “total abolition of the common law rules of character evidence,” California courts read the incorporation of an additional provision within §1101(b), which actually enlarged the scope of admissible character evidence, as reenacting §1101 in its entirety, thereby preserving the rules prohibiting the admission of character evidence. Similarly, in spite of the expectation that the Act would abrogate the Kelly-Frye rule, the California Supreme Court safeguarded the test in criminal trials by characterizing unreliable evidence as irrelevant and then holding that the Act did not affect rules that determined the reliability and thus the relevance of scientific evidence. Furthermore, even in the exclusionary rule context, the court prevented the Act from having as broad of an impact as it might have had by refusing to abrogate pre-1982 rules calling for the exclusion of unlawfully seized evidence unless the United States Supreme Court had expressly held otherwise. As a result, the Act did not live up to expectations that it would “repeal the bulk of the California Evidence Code,” despite its power to do so. Instead, for the most part, the Evidence Code operates today just as it did twenty-seven years ago.

Nevertheless, the new jurisprudence that has developed under the Truth-in-Evidence Act reflects that, for both the drafters and the voters, the initiative was, in many ways, a success. As hoped for, the articulation of new rules allowing the introduction of evidence that was previously inadmissible resulted in significant steps toward correcting the “substantial imbalance” between victims’ and defendants’ rights. Moreover, the promises that the Act would lead to more criminal convictions were kept – in 2006 and 2007, Governor Arnold Schwarzenegger declared an emergency in California’s overcrowded prisons and transferred inmates to other states in an effort to alleviate the strain. And just this year, federal district courts in the northern and eastern districts of California signaled their intention to address California’s severe overcrowding problem by capping the number of prisoners at about 101,000, a

258. Mendez, supra note 162, at 1003; see also Imwinkelried and Mendez, supra note 165, at 1010.
259. See Harris, 767 P.2d at 649.
260. See Crisera, supra note 44, at 1585.
reduction of 55,000. Ultimately, though it remains to be seen how far the courts will continue to extend the Act's mandate, there is no doubt that California voters caused significant changes in the prosecution of state criminal trials. Most importantly, the main goal behind the initiative has been accomplished – California criminal trials today contain far more evidence – and, presumptively, far more “truth in evidence” – than before.