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THE IMPACT OF PROPOSITION 8 ON PRIOR MISCONDUCT IMPEACHMENT EVIDENCE IN CALIFORNIA CRIMINAL CASES

Hank M. Goldberg*

I. INTRODUCTION

On June 8, 1982, California voters amended the California Constitution by passing Proposition 8, popularly known as the Victims' Bill of Rights,1 thereby creating potentially the most dramatic change in the rules of evidence in the history of this state. Prior to Proposition 8, California rules of evidence protected criminal defendants by restricting the admissibility of prior misconduct impeachment evidence to felonies.2 The public, "perceiving an imbalance in favor of defendants in the rules regarding the admissibility of evidence,"3 voted for relaxing the rules of evidence.4

This Article discusses the two provisions of Proposition 8 added to the constitution which have expanded the statutory rules governing admissibility of prior misconduct evidence to impeach the credibility of witnesses in criminal trials.5 First, section 28(f) of article 1 now allows the admission into evidence of any prior felony "without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."6 Second, and much more sweeping, section 28(d) of article 1, 

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1. Proposition 8 added section 28 to article 1 of the state constitution. See CAL. CONST. art. I, § 28. Its preamble provides:
   (a) The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern. The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance . . . .
   Id. § 28(a).

6. CAL. CONST. art. I, § 28(f). The entire section reads:
the "Right to Truth-in-Evidence" provision, purports to make all relevant evidence admissible in criminal proceedings, subject to certain enumerated exceptions.7

This Article examines how Proposition 8 changed the rules regarding impeachment with prior convictions. It then discusses the more dramatic impact of Proposition 8: judicial interpretations indicating that now even misconduct which has not resulted in a conviction (uncharged misconduct) is also admissible for impeachment in criminal proceedings. Finally, the author concludes that Proposition 8 has effectively brought California evidence law into conformity with that of most other jurisdictions.

II. BACKGROUND

A. Pre-Proposition 8 Law

Under the traditional pre-Proposition 8 rules of evidence, in criminal proceedings prior misconduct evidence was limited to prior felony convictions,8 and could be used solely for impeachment purposes.9 In other words, before the passage of Proposition 8, if a criminal defendant chose to testify, in certain instances, he or she could be questioned about a prior felony conviction. This questioning was not to prove that the defendant was a "bad person," and therefore probably guilty, but only to prove that he or she was not credible as a witness, and that his or her testimony should be distrusted.

1. Felony convictions

Section 788 of the California Evidence Code provides that the credi-
bility of a witness may be attacked by both cross-examining the witness about his or her prior felony convictions and introducing records of such convictions. Before 1972, this rule was interpreted as requiring the admission of convictions for impeachment purposes, and trial courts had no discretion to exclude them. The 1972 case of People v. Beagle significantly changed this rule of liberal admissibility. In Beagle, the California Supreme Court held that section 352 of the California Evidence Code required trial courts to exercise discretion by weighing the unfair prejudicial impact of allowing impeachment evidence of a prior felony against the probative value of such evidence. The court fashioned a flexible balancing test to aid a trial court’s determination of the prior conviction’s admissibility. The four factors to be considered in the test were: (1) whether the conviction related to the defendant’s credibility; (2) the age of the conviction; (3) whether, in the case of impeaching the defendant, the prior conviction was for the same offense for which the defendant was currently charged; and, (4) the impact on the trial if the defendant did not testify out of fear of being impeached with his prior conviction.

In a series of cases known as the “Antick line,” the California

10. Id. In pertinent part, section 788 provides that “[f]or the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he had been convicted of a felony.” Id.

When a witness is impeached with a felony conviction, the jury is instructed that the conviction can be considered only for evaluating the witness’s credibility. See People v. Mayfield, 23 Cal. App. 3d 236, 245, 100 Cal. Rptr. 104, 109 (1972). An exemplary limiting instruction provides as follows:

The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you [jurors] only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair the witness’s believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

CALIFORNIA JURY INSTRUCTIONS—CRIMINAL CALJIC No. 2.23 (5th ed. 1988).


12. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).


15. Id. at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320-21.

16. See People v. Barrick, 33 Cal. 3d 115, 122-30, 654 P.2d 1243, 1246-53, 187 Cal. Rptr. 716, 719-26 (1982) (trial court improperly allowed defendant to be impeached with a prior conviction identical to offense for which he was on trial, even though prior was “sanitized” by calling it “felony involving theft”); People v. Spearman, 25 Cal. 3d 107, 113-19, 599 P.2d 74, 76-80, 157 Cal. Rptr. 883, 885-90 (1979) (defendant charged with narcotics, improperly impeached with narcotics prior conviction which did not necessarily involve dishonesty); People v. Fries, 24 Cal. 3d 222, 226-34, 594 P.2d 19, 22-27, 155 Cal. Rptr. 194, 197-202 (1979) (trial court erred in allowing introduction of prior identical to offense for which accused was
Supreme Court replaced the flexible balancing test announced in *Beagle* with a rigid set of rules that greatly restricted the admissibility of prior convictions for impeachment. First, a prosecutor could not impeach a defendant with a prior conviction for the same or similar offense for which he or she was currently on trial. The rationale for this rule was that if the jury learned that the defendant had previously been convicted of the same or similar type of offense, it might unjustifiably assume the defendant to be guilty of the current charge.

A second restrictive rule prohibited the admissibility of a prior conviction unless it involved dishonesty as a necessary element of the offense. In other words, the conviction had to involve an "intent to lie, defraud, deceive, [or] steal" as part of the statutory definition of the crime. The justification for this rule was the theory that only offenses involving dishonesty reflect on a witness' credibility. Therefore, before Proposition 8, a prior felony conviction was admissible evidence of a witness's credibility only if such conviction was not of a similar type of offense as the current charge, and the convicted offense involved dishonesty.

2. Misdemeanor convictions

Before Proposition 8, section 788 of the California Evidence Code, allowing impeachment with prior felony convictions, was the sole statu-
tory exception to the general rule codified in section 787 precluding admissibility of specific instances of conduct to attack or support credibility. Thus, except for felony convictions, all evidence of specific instances of conduct, including misdemeanor convictions, was inadmissible.

3. Uncharged misconduct

Prior to Proposition 8, California followed the rule of a small minority of jurisdictions that specified instances of conduct could not be used to impeach or bolster a witness’s credibility unless such conduct resulted in a felony conviction. Such cross-examination was improper even where the defendant was the first to raise the subject of his or her character, thereby “opening the door” to cross-examination about bad character traits. This rule was codified in section 787 of the California Evidence Code.

B. Proposition 8

Proposition 8 has had a major impact on the rules regarding admissibility of felony and misdemeanor convictions, as well as the rules regarding the scope of cross-examination on prior convictions. Both section 23(f) and section 23(d) of article 1 dramatically affect the admissibility of prior misconduct evidence on the issue of witness credibility. Specifically, section 28(d) effects a pro tanto repeal of all statutorily and judicially created rules of evidence which would limit the admissibility of relevant evidence except those provisions which are expressly preserved.

1. Text of Proposition 8

Proposition 8 is “[d]esigned as an omnibus package of criminal justice legislation covering areas including insanity, plea bargaining procedures, school safety, habitual felon statutes, bail practices and the

24. CAL. EVID. CODE § 787 (West 1966). This section provides: “Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.” Id.
25. Antick, 15 Cal. 3d at 96-100, 539 P.2d at 54-56, 123 Cal. Rptr. at 486-88.
26. See infra notes 135-36 and accompanying text.
29. CAL. CONST. art. I, § 28(d).
This Article focuses on two provisions expanding the rules of evidence.

Section 28(d), the "Right to Truth-in-Evidence" provision, states that "[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court."31

Section 28(f) of Proposition 8 makes "[a]ny prior felony conviction . . . 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."32

2. Procedural implementation of Proposition 8

The right of voters to propose statutes and amendments to the California Constitution and to adopt or reject them is expressed in the California Constitution.33 A proposition is a proposed initiative which allows the electorate to amend the California Constitution.34 It may only contain a single subject.35 The Secretary then submits the proposition at the next general election or at any special statewide election that may be held prior to the general election.36 The Governor has the authority to call a special statewide election for the proposition.37

3. Purpose of Proposition 8

Proposition 8, suggesting major changes in both the constitution and the statutes of California, was proposed by Paul Gann in 1982.38 One purpose of Proposition 8, "The Victims' Bill of Rights," is to protect the victims of crimes by ensuring "that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in cus-

30. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON VICTIMS' RIGHTS viii (1988).
31. CAL. CONST. art I, § 28(d).
32. Id. § 28(f).
33. Id. art. II, § 8.
34. Id. § 8(b).
35. Id. § 8(d).
36. Id. § 8(e).
37. Id.
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tody, tried by the courts, and sufficiently punished . . . "39 Section 28(d) ensures this end by relaxing previous restrictions on the admissibility of relevant evidence.40 Accordingly, Proposition 8 purports to require the use of prior felony convictions against a criminal defendant if he or she chooses to testify.41

Additionally, Proposition 8 promotes placing all relevant evidence before the jury.42 Specifically, California voters sought to "overcome some of the adverse decisions of [the] higher courts."43 For instance, evidentiary rules creating rights for the criminally accused and placing restrictions on law enforcement officers no longer compel exclusion of unlawfully seized evidence from a criminal trial.44

III. THE IMPACT OF PROPOSITION 8 ON RULES REGARDING IMPEACHMENT WITH PRIOR CONVICTIONS

A. Felony Convictions

Proposition 8 effected a major change on the rules regarding admissibility of felony and misdemeanor convictions, as well as the rules regarding the scope of cross-examination on prior convictions. Section 28(f) of Proposition 8 makes "[a]ny prior felony conviction" admissible for impeachment "without limitation."45

1. Effect of Proposition 8 on the admissibility of felony convictions

Against the backdrop of the highly restrictive pre-Proposition 8 rules limiting the admissibility of prior felonies for impeachment purposes,46 California voters passed Proposition 8 amending section 28(f)

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41. ASSEMBLY COMM. ON CRIMINAL JUSTICE, supra note 38, at 30.
42. Id. at 31; see In re Lance W., 37 Cal. 3d 873, 889, 694 P.2d 744, 754, 210 Cal. Rptr. 631, 641 (1985).
43. CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 8, 1982, 34-35 (arguments in favor of Proposition 8 and rebuttal to arguments) [hereinafter CALIFORNIA BALLOT PAMPHLET].
44. Lance W., 37 Cal. 3d at 888, 694 P.2d at 753, 210 Cal. Rptr. at 640.
45. CAL. CONST. art. I, § 28(f).
46. See supra notes 10-22 and accompanying text for a discussion of the pre-Proposition 8 rules regarding felony convictions. Ballot summary and argument materials presented to the electorate in connection with a particular measure can be used to determine the electorate's intent in passing a measure. United States v. Castro, 38 Cal. 3d 301, 310, 696 P.2d 111, 116, 211 Cal. Rptr. 719, 724 (1985). The ballot materials in connection with Proposition 8 provided: "The measure would amend the State Constitution to require that information about prior felony convictions be used without limitation to discredit the testimony of a witness, including that of a defendant. Under current law, such information may be used only under
which provides for the admission of "any felony . . . without limitation." Although this language seems absolute, the California Supreme Court interpreted it rather narrowly in the case of People v. Castro. In Castro, the defendant, charged with receiving stolen property, was impeached with prior convictions of simple possession of heroin and possession of heroin for sale.

In determining the propriety of the impeachment, the California Supreme Court placed two important limitations on section 28(f)'s mandate that all prior felonies be admitted without limitation. First, the court determined that California voters did not really intend to deprive a trial court of its discretion to exclude evidence of prior felonies under section 352 when its prejudicial effect outweighed its probative value. The court reasoned that California voters only intended to overrule the restrictive Antick line of cases, which created rigid black letter rules of admissibility, and to restore trial courts' discretion to determine the admissibility of a prior conviction. This result allegedly steered "clear of constitutional obstacles" which presumably would be created if courts had no discretion to limit prior felony impeachment. This threat of limited circumstances." California Ballot Pamphlet, supra note 43, at 54 (analysis by Legislative analyst).

The court in Castro interpreted the last sentence of the above-quoted statement in the ballot materials as constituting a "clear reference to the Antick line of cases." Castro, 38 Cal. 3d at 311, 696 P.2d at 116, 211 Cal. Rptr. at 724. Hence, the court concluded that the voters only intended to abrogate the Antick line of cases, and not eliminate trial court's discretion to exclude prior convictions under section 352 of the California Evidence Code. Id. This analysis seems absurd because it should not be presumed that the average voter even knew of the existence of the Antick line of cases. The court's analysis is also contrary to the plain language of the ballot materials stating that the measure would "require" the admission of prior felony convictions "without limitation." See California Ballot Pamphlet, supra note 43, at 54. The average voter reading such language would have probably concluded that, under subdivision (f), courts would be required to admit such evidence. Moreover, settled rules of constitutional construction "show that the primary effect of subdivision (f) is to overrule Beagle, thereby removing the discretion of the trial court to exclude evidence of prior felony convictions." Comment, Impeaching the Accused with Prior Convictions: Does Proposition 8 Put Beagle in the Doghouse, 15 Pac. L.J. 302, 310 (1984). According to the Assembly Committee on Criminal Justice, Proposition 8 requires "the use of prior felony convictions for impeachment purposes even though the probative value is outweighed by the danger of substantial prejudice." Assembly Comm. on Criminal Justice, supra note 38, at 31.

49. Id. at 302, 696 P.2d at 112, 211 Cal. Rptr. at 720.
51. Castro, 38 Cal. 3d at 313, 696 P.2d at 117, 211 Cal. Rptr. at 725.
52. Id. For a more detailed explanation of how the court determined the voters' intent, see supra notes 38-44 and accompanying text.
53. Castro, 38 Cal. 3d at 313, 696 P.2d at 117-18, 211 Cal. Rptr. at 725-26. The court noted the conflicting language in Proposition 8. While section 28(f) allowed all prior felonies
unconstitutionality, however, appears to be more fabricated than real, because the Castro plurality failed to cite a single authority for this novel proposition.\textsuperscript{54}

The Castro court placed a second limitation on section 28(f), holding that a trial court could only allow impeachment with a prior felony involving "moral turpitude" or a readiness to do evil.\textsuperscript{55} The court reasoned that felony convictions not evidencing moral turpitude bear no rational relationship to a witness's readiness to lie.\textsuperscript{56} The due process requirements of the United States Constitution\textsuperscript{57} demand that evidence admitted against a defendant be relevant.\textsuperscript{58} Consequently, the court reasoned that admitting prior felonies not involving moral turpitude would violate due process because such felonies are irrelevant.\textsuperscript{59}

Applying these limitations to the facts of the case, the Castro court found that, although possession of narcotics for sale involves moral turpitude, simple possession of narcotics does not.\textsuperscript{60} Therefore, the California Supreme Court held that the trial court erred in admitting the simple possession conviction and erred in stating that it had no discretion to determine the admissibility of the possession of narcotics for sale conviction.\textsuperscript{61} The conviction was affirmed because the error in impeaching the...
Dissenting in Castro, Justice Lucas disagreed with the plurality's two limitations on section 28(f). Lucas concluded that the California voters did intend to abrogate the trial court's discretion authorized by section 352 to exclude prior felonies. Moreover, contrary to the assertions of the plurality, removing a trial court's discretion to exclude prior felonies has passed constitutional muster in other states. Few jurisdictions outside California follow the rule announced in Castro that courts always have the discretion to exclude prior felony convictions. In fact,
most jurisdictions, by adopting Federal Rule of Evidence 609(a), explicitly deprive courts of discretion to limit impeachment with prior felony convictions in many instances. Justice Lucas also disagreed with the plurality's conclusion that only felonies involving moral turpitude can be admitted constitutionally.

FED. R. EVID. 609(a) (emphasis added).

The conference report on Rule 609(a) makes it clear that the Rule deprives trial courts of discretion to exclude crimes involving dishonesty and false statement:

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.


For a more extensive history of the enactment of Rule 609, see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 609(1)-(5) (1988).

66. E.g., I.A. CODE EVID. ANN. art. 609.1 (West 1990); N.C. GEN. STAT. ch. 8c, rule 609(a) (1983); OR. REV. STAT. § 147.405 (1989) (amending OR. R. EVID. 609(1)(a) (1987)); TEX. EVID. & APP. PROC. ANN. 609(a) (Vernon 1989); see supra note 65.

A number of jurisdictions which do not specifically follow Rule 609(a) otherwise limit a court's discretion to preclude impeachment with prior convictions. See, e.g., COLO. REV. STAT. § 13-90-101 (1987) ("conviction of any person of any felony may be shown for the purpose of affecting the credibility of such witness"); People v. Wright, 678 P.2d 1072, 1074 (Colo. Ct. App. 1984) (interpreting section 13-90-101 as depriving discretion to foreclose use of felony convictions for impeachment); D.C. CODE ANN. § 14-305 (1981) ("evidence that the witness has been convicted of a criminal offense shall be admitted if offered" if offense constitutes either felony or non-felony which involves dishonesty or false statement); MD. CTS. & JUD. PROC. CODE ANN. § 10-905 (1984) ("evidence is admissible to prove the interest of a witness in any proceeding, or the fact of his conviction of an infamous crime"); Prout v. State, 311 Md. 348, 364, 535 A.2d 445, 452-53 (1988) (court has discretion to determine admissibility of non-infamous crimes); Wicks v. Maryland, 311 Md. 376, 379, 535 A.2d 459, 460 (1988) (courts have no discretion to limit impeachment with infamous crimes); Allen, 429 Mich. at 558, 420 N.W.2d at 499 (Michigan Supreme Court used its rule-making power to amend Rule 609(a)(1) of the Michigan Rules of Evidence, which previously provided that courts had discretion to exclude any crime regardless of whether or not it involved dishonesty or false statement, to conform to federal provision that courts have no discretion to disallow impeachment with crimes containing "an element of dishonesty or false statement"); MO. ANN. STAT. § 491.050 (Vernon 1952) ("Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal conviction may be proved to affect his credibility in a civil or criminal case."); State v. Griffin, 640 S.W.2d 128, 132 (Mo. 1982) (interpreting section 491.050 as conferring absolute right to show prior convictions for impeachment); State v. Morris, 460 S.W.2d 624, 629 (Mo. 1970) (trial courts have no discretion to limit such impeachment); State v. Shisler, 752 S.W.2d 447, 451 (Mo. Ct. App. 1988) (trial courts have no discretion to limit such impeachment); R.I. GEN. LAWS § 9-17-25 (1985) ("conviction or sentence for any crime or misdemeanor may be shown to affect credibility"); State v. Moretti, 521 A.2d 1003, 1011 (R.I. 1987) (interpreting section 9-17-25 as creating right to impeach witness's credibility by showing his prior convictions "regardless of the possible prejudice" resulting from such impeachment).

67. See supra note 65 for a discussion of FED. R. EVID. 609(a).
ally. Lucas opined that all prior felonies are admissible "on the theory that the commission of a felony offense necessarily bears on one's credibility regardless of the nature of that offense." Since most jurisdictions have adopted Federal Rule of Evidence 609(a), evidence of all felony convictions is admissible in most jurisdictions. The plurality did not

68. Castro, 38 Cal. 3d at 323, 896 P.2d at 125, 211 Cal. Rptr. at 732-33 (Lucas, J., dissenting).
69. Id. Indeed, Lucas's position is well taken. In fact, it is supported by the behavioral sciences.

The behavioral sciences support the view that any criminal conviction is relevant to credibility. For example, according to the American Psychiatric Association, the diagnostic criteria for a person with an anti-social (criminal) personality disorder include:

- failing to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing anti-social acts that are grounds for arrest (whether arrested or not), e.g. destroying property, harassing others, stealing, pursuing an illegal occupation . . . [having] no regard for the truth, as indicated by repeated lying, use of aliases, or "conning" others for personal profit or pleasure . . . .

AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 345 (3d ed. 1987); see also Allen, 429 Mich. at 677 n.10, 420 N.W.2d at 553 n.10 (Boyle, J., dissenting) (discussing behavioral literature).

70. See supra note 65.
71. Under the Federal Rules of Evidence, any felony is potentially admissible for impeachment. FED. R. EVID. 609(a). However, unlike the inflexible approach taken by the Castro plurality, under Rule 609(a) courts do have discretion to exclude felonies which do not involve dishonesty or false statement. Id. 609(a)(2); H.R. REP. No. 1597, supra note 65, at 9, reprinted in U.S. CODE CONG. & ADMIN. NEWS. For example, courts in jurisdictions following Rule 609(a) have allowed impeachment with priors involving simple possession of narcotics. See, e.g., United States v. Barnes, 622 F.2d 107, 108-09 (5th Cir. 1980) (possession of heroin admissible for impeachment); State v. Jackson, 139 Ariz. 213, 215, 677 P.2d 1321, 1323 (Ariz. Ct. App. 1983) (possession of dangerous drugs admissible for impeachment); People v. Martin, 150 Mich. App. 630, 635-37, 389 N.W.2d 713, 715-16 (1986) (possession of heroin admissible for impeachment). These cases are directly contrary to the Castro court's holding that simple possession of narcotics does not involve moral turpitude and is, therefore, constitutionally inadmissible for impeachment. See Castro, 38 Cal. 3d at 313-17, 696 P.2d at 118-21, 211 Cal. Rptr. at 725-29.

The advisory committee's note to the Proposed Federal Rule of Evidence 609 for the United States District Courts and Magistrates provides:

While it may be argued that considerations of relevancy should limit provable convictions to those of crimes of untruthfulness, acts are constituted major crimes because they entail substantial injury to and disregard of the rights of other persons or the public. A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into a willingness to give false testimony.


Moreover, a number of jurisdictions which do not follow the federal rule allow impeachment with prior convictions that do not involve moral turpitude. See, e.g., COLO. REV. STAT. § 13-90-101 (1990) ("any felony" admissible for impeachment); D.C. CODE ANN. § 14-305(b)(B) (1990) (all felonies and misdemeanors involving "dishonesty and false statement" admissible for impeachment); Thompson v. United States, 546 A.2d 414, 425 n.21 (D.C. 1988) ("dishonesty and false statement" broadly construed to include all misdemeanors not resulting
citing a single authority for its assertion that the United States Constitution limits the admissibility of prior felonies for impeachment to those involving moral turpitude. In fact, authorities are solidly to the contrary—there is no constitutional requirement that only felonies involving moral turpitude be admissible.

Because of the major change in the California Supreme Court’s composition since Castro, the plurality position in Castro may no longer represent the court’s majority opinion and Lucas’s position may soon become the law. As the California Supreme Court recently stated: “Our Castro decision . . . rejected the overwhelming weight of appellate authority and consciously declined to accept the apparent plain meaning from passion or short temper); Ross v. United States, 520 A.2d 1064, 1065 (D.C. 1987) (“dishonesty and false statement” broadly construed to exclude only crimes involving passion and short temper); LA. CODE CRIM. PROC. ANN. art. 609.1(A) (West 1990) (“criminal convictions” admissible for impeachment); MD. CODE ANN. § 10-905 (all crimes admissible); MASS. ANN. LAWS ch. 233, § 21 (Law. Co-op. 1986) (“The conviction of a witness of a crime may be shown to affect his credibility.”); Commonwealth v. Scallely, 17 Mass. App. 224, 231-32, 437 N.E.2d 298, 303 (1983) (defendant properly impeached with driving-under-the-influence prior); MO. ANN. STAT. § 491.050 (Vernon 1989) (“any prior criminal convictions” admissible for impeachment); N.H. REV. STAT. ANN. § 516:33 (1974) (“No person shall be incompetent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credit as a witness.”); State v. Brooks, 126 N.H. 618, 625, 495 A.2d 1258, 1263 (1985) (crimes admissible even if they do not involve lack of veracity); State v. Duke, 100 N.H. 292, 123 A.2d 745 (1956) (defendant can be impeached with convictions of drunkenness, disorderly conduct, driving under the influence, and escape from house of corrections); N.Y. CRIM. PROC. LAW § 400.40 (McKinney 1990) (crimes not necessarily involving moral turpitude admissible); N.C. GEN. STAT. ch. 8c, rule 609(a) (defendant can be impeached with “conviction of a crime punishable by more than 60 days confinement”); OR. REV. STAT. § 40.355(1)(b), Rule 609 (1989) (all felonies and those misdemeanors involving false statement or dishonesty admissible); R.I. GEN. LAWS § 9-17-15 (1985) (“any crime or misdemeanor” admissible); TEX. EVID. & APP. PROC. ANN. 609(a) (Vernon 1989) (allowing impeachment “if the crime was a felony or involved moral turpitude, regardless of punishment”).

72. See Castro, 38 Cal. 3d at 313-14, 696 P.2d at 118-19, 211 Cal. Rptr. at 726-27.

74. When Castro was decided, the court was composed of Chief Justice Bird and Justices Mosk, Kaus, Broussard, Reynoso, Grodan and Lucas. The court is now composed of Chief Justice Lucas and Justices Mosk, Broussard, Panelli, Eagleson, Arabian and Kennard.
of the constitutional language [of Proposition 8].” For now, however, under Castro, a prior conviction is not admissible for impeachment unless it involves moral turpitude, and the trial court retains discretion to determine whether such evidence should be admitted.

B. Misdemeanor Convictions

With regard to misdemeanor convictions, section 28(d), like section 28(f) for felony convictions, entirely changed California law regarding impeachment with prior misdemeanor convictions.

1. Effect of Proposition 8 on the admissibility of misdemeanor convictions

The California Supreme Court, in People v. Harris, held that the “Right to Truth-in-Evidence” provision nullifies section 787 of the California Evidence Code in criminal cases. In Harris, the defendant was charged with special circumstance felony murder. As part of its case, the prosecution called as a witness a paid informant, who had worked for the police in narcotics cases in the past. The informant testified that the defendant had confessed to him. To bolster the informant’s credibility, a narcotics detective was called to testify that the informant was reliable in past cases. Moreover, the prosecution offered specific instances of the informant’s prior conduct to bolster his credibility as a witness. Prior to Proposition 8, such evidence would have violated section 787, which prohibited the introduction of evidence of specific instances of conduct to attack or support a witness’s credibility. The Harris court, however, held that “section 28(d) effected a pro tanto repeal” of section 787. The court also noted that “section 28(d) contains no... exception that would preserve the exclusionary rule of Evidence Code sections 786 [to] 790.” Rather, the court explained that section

77. CAL. EVID. CODE § 787 (West 1966).
78. Harris, 47 Cal. 3d at 1080, 767 P.2d at 640-41, 255 Cal. Rptr. at 373-74.
79. Id. at 1055, 767 P.2d at 623, 255 Cal. Rptr. at 356 (murder was committed in preparation of robbery and kidnapping).
80. Id. at 1059-60, 767 P.2d at 626, 255 Cal. Rptr. at 359.
81. Id.
82. Id. at 1068, 767 P.2d at 640, 255 Cal. Rptr. at 373.
83. Id.
84. See CAL. EVID. CODE § 787 (West 1966).
85. Harris, 47 Cal. 3d at 1081-82, 767 P.2d at 640, 255 Cal. Rptr. at 373.
86. Id. at 1081, 767 P.2d at 640, 255 Cal. Rptr. at 373.
28(d) expresses the electorate's intent that "both judicially created and statutory rules restraining admission of relevant evidence in criminal cases be repealed except insofar as 28(d) expressly preserves them."87

In another section of the Harris opinion, the court specifically discussed misdemeanor convictions.88 The trial court had refused to allow the defense to impeach a prosecution witness by reference to his misdemeanor probation.89 The court recognized that under former law, impeachment with misdemeanor convictions was improper.90 It observed, however, that "because section 28(d) now makes all relevant evidence admissible in criminal proceedings except as provided in that section, the evidence is not inadmissible unless it is excluded pursuant to Evidence Code section 352."91 The court, however, found that the trial judge did not abuse his discretion in excluding such impeachment under section 352 of the California Evidence Code.92 The clear implication of Harris, nevertheless, is that trial courts can now use their discretion to allow impeachment with evidence of misdemeanor convictions.93

After Proposition 8, no prohibition on the introduction of misdemeanor convictions remains because section 28(d) repealed section 787.94 However, since section 28(d), which makes misdemeanor convictions admissible, expressly preserved section 352 of the Evidence Code,95 a trial court may exclude a misdemeanor conviction if its probative value is exceeded by its prejudicial effect.96 Therefore, even if the California Supreme Court overturns Castro and interprets section 28(f) as making felony convictions admissible "without limitation," trial courts will still be able to exclude misdemeanor convictions pursuant to section 352 of the Evidence Code.97

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87. Id. at 1082, 767 P.2d at 641, 255 Cal. Rptr. 374.
88. Id. at 1090-92, 767 P.2d at 646-48, 255 Cal. Rptr. 379-81.
89. Id. at 1090, 767 P.2d at 646, 255 Cal. Rptr. 379.
90. Id., 767 P.2d at 646, 255 Cal. Rptr. at 379-80.
91. Id. at 1090-91 n.22, 767 P.2d at 647 n.22, 255 Cal. Rptr. at 380 n.22 (referring to CAL. EVID. CODE § 352 (West 1966)).
92. Id. at 1081, 767 P.2d at 640, 255 Cal. Rptr. at 373; CAL. EVID. CODE § 352 (West 1966).
94. See Harris, 47 Cal. 3d at 1081-82, 767 P.2d at 640, 255 Cal. Rptr. at 373.
95. CAL. CONST. art. I, § 28(d).
96. See CAL. EVID. CODE § 352 (West 1966).
97. See Harris, 47 Cal. 3d at 1081, 767 P.2d at 640, 255 Cal. Rptr. at 373. Because California had not previously allowed misdemeanors to be admitted for impeachment purposes,
2. Effect of *People v. Castro* on the admissibility of misdemeanor convictions

Assuming that the plurality’s assertion in *People v. Castro*\(^9\) that admission of prior felony convictions not evidencing “moral turpitude” would violate due process is still good law,\(^9\) it follows that only misdemeanors evidencing “moral turpitude” currently are admissible in California.\(^10\) If, however, Justice Lucas’s dissenting opinion in *Castro*—noting that due process does not limit admissibility of prior convictions to offenses involving moral turpitude\(^101\)—becomes law, it is unclear the extent to which misdemeanors will become admissible. Several possibilities, however, are evidenced by the laws of other states.

For example, the North Carolina Supreme Court has ruled that all crimes are relevant to credibility.\(^102\) Even traffic offenses, such as exceeding the speed limit or disregarding a stop sign, are considered to be related to credibility.\(^103\) The North Carolina Supreme Court rationalized there is an absence of California authorities defining which misdemeanors involve moral turpitude and which do not.

The problem of determining which misdemeanors involve moral turpitude is not as great as it may seem. Crimes which involve dishonesty as a necessary element of the crime are more relevant to credibility than those crimes which do not necessarily involve dishonesty. *People v. Castro*, 38 Cal. 3d 301, 315, 696 P.2d 111, 119, 211 Cal. Rptr. 719, 727 (1985). Therefore, misdemeanors involving dishonesty or false statement would clearly be admissible. See, e.g., CAL. PENAL CODE § 148.5(a) (West 1988) (filing false police report); *id.* § 148.9(a) (false representation of identity to police officer); CAL. VEH. CODE § 20 (West 1987) (false statement to Department of Motor Vehicles).

The determination of whether a crime involves moral turpitude is based solely upon an analysis of the legal elements of the offense. *Castro*, 38 Cal. 3d at 317, 696 P.2d at 120, 211 Cal. Rptr. at 728. A number of offenses, commonly known as “wobblers” by California criminal practitioners, can be filed either as felonies or misdemeanors in the discretion of the prosecutor. CAL. PENAL CODE § 17(b)(4) (West 1988). The legal elements of such offenses are the same whether they are filed as felonies or misdemeanors. *Id.* Thus, a wobbler offense filed as a felony, which has been held to involve moral turpitude, also involves moral turpitude if filed as a misdemeanor.

99. *Id.* at 322-23, 696 P.2d at 124-25, 211 Cal. Rptr. at 732-33 (Lucas, J., concurring and dissenting).
100. The court in *Castro* based its conclusion on the concept that crimes of moral turpitude evidence a general “readiness to do evil” from which the jury may infer a readiness to lie. *Id.* at 314, 696 P.2d at 118, 211 Cal. Rptr. at 726. Therefore, the argument would apply equally to misdemeanor offenses as the focus is not on the severity of the crime but on the “readiness to do evil” of a crime evidencing moral turpitude.
101. *Id.* at 323, 696 P.2d at 125, 211 Cal. Rptr. at 733 (Lucas, J., concurring and dissenting). Justice Lucas recognized that there “may exist some federal due process restriction upon the kind of prior convictions deemed relevant for impeachment purposes.” *Id.* (Lucas, J., concurring and dissenting).
103. *Id.*
the relevance of such violations by commenting that no one "who consistently violates motor vehicle laws designed to protect life and property on the highway can claim an unblemished general character."\textsuperscript{104}

New York's approach concerning the admissibility of prior convictions can be characterized as a middle ground between those jurisdictions allowing any crime whatsoever to be admitted,\textsuperscript{105} and those jurisdictions which allow only crimes involving moral turpitude to be admitted.\textsuperscript{106} New York's highest court has ruled that a prior crime is admissible if it shows a "willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his [or her] individual self-interest ahead of principle or of the interests of society."\textsuperscript{107} Under this standard, a wide variety of misdemeanor and infraction offenses are admissible. For example, although driving under the influence of alcohol or drugs is not a crime of moral turpitude in California,\textsuperscript{108} a New York defendant's credibility can be impeached with a misdemeanor conviction of driving under the influence.\textsuperscript{109} Other examples of crimes unlikely to constitute moral turpitude in California, but which are admissible in New York under the "individual self-interest" standard, include misdemeanor convictions of criminal mischief,\textsuperscript{110} resisting arrest,\textsuperscript{111} trespass,\textsuperscript{112} disorderly conduct\textsuperscript{113} and prostitution.\textsuperscript{114} If \textit{Castro} is overruled, California may adopt the New York approach as a compromise between

\begin{itemize}
\item \textsuperscript{104} \textit{Id.}; \textit{see also} People v. Stein, 97 A.D.2d 859, 859, 469 N.Y.S.2d 243, 245 (1983) (defendant properly questioned about traffic offenses).
\item \textsuperscript{105} \textit{See supra} notes 102-04 and accompanying text.
\item \textsuperscript{106} \textit{See supra} note 100 and accompanying text.
\item \textsuperscript{107} People v. Sandoval, 34 N.Y.2d 371, 377, 314 N.E.2d 413, 417, 357 N.Y.S.2d 849, 855 (1974).
\item \textsuperscript{108} \textit{Castro}, 38 Cal. 3d at 315-16 n.10, 696 P.2d at 119-20 n.10, 211 Cal. Rptr. at 727-28 n.10; \textit{see Pinkins}, 223 Cal. App. 3d at 69d.
\item \textsuperscript{109} People v. Galvin, 104 A.D.2d 527, 529, 479 N.Y.S.2d 896, 899 (1984). In People v. McAleavey, the defendant was charged with driving under the influence (DUI). 133 Misc. 2d 987, 991-94, 509 N.Y.S.2d 278, 281-83 (N.Y. App. Term. 1986). The trial court allowed defendant to be impeached with three DUI convictions, one of which was over seven years old. \textit{Id.} at 993-94, 509 N.Y.S.2d at 282-83. The appellate court held that DUI "bears logically and reasonably on this issue of credibility . . . since it readily demonstrates a willingness to place one's self interest ahead of the interests of society." \textit{Id.} at 992, 509 N.Y.S.2d at 282. In California, DUI convictions probably are inadmissible for impeachment. \textit{See supra} note 108 and accompanying text.
\item \textsuperscript{110} \textit{See} People v. Magee, 126 A.D.2d 573, 573-74, 510 N.Y.S.2d 690, 691 (1987).
\item \textsuperscript{111} \textit{See} People v. Dare, 137 A.D.2d 866, 868, 524 N.Y.S.2d 547, 549 (1988); Magee, 126 A.D.2d at 573-74, 570 N.Y.S.2d at 691.
\item \textsuperscript{113} \textit{See} People v. Guarino, 131 A.D.2d 875, 875, 517 N.Y.S.2d 231, 232 (1987).
\item \textsuperscript{114} \textit{See} People v. Rhodes, 96 A.D.2d 565, 567, 465 N.Y.S.2d 249, 251-52 (1983).
\end{itemize}
C. Extent of Cross-Examination About Prior Criminal Convictions

Another issue raised by the "Right to Truth-in-Evidence" provision is the extent to which a defendant can be cross-examined respecting a prior felony or misdemeanor conviction. Prior to Proposition 8, a witness could not be asked about the details of a prior crime.\textsuperscript{115} A witness, however, could be asked the name of the conviction, the general nature or elements of the conviction, the date of the conviction and the place of the conviction.\textsuperscript{116} A witness could also probably be asked about the sentence he or she received as a result of the conviction.\textsuperscript{117}

It should be noted, however, that there is no statute in California which governs the scope of cross-examination as to a prior conviction. Therefore, all limitations on the extent of cross-examination about prior convictions are judicially created rules.\textsuperscript{118} The "Right to Truth-in-Evidence" provision abrogates "judicially created . . . rules restricting the admission of relevant evidence in criminal cases."\textsuperscript{119} Although no California case conclusively resolves this issue, it would appear that judicially created rules limiting the extent of cross-examination about prior convictions have been repealed.\textsuperscript{120} This position is supported by a somewhat

\textsuperscript{115} People v. Terry, 38 Cal. App. 3d 432, 447, 113 Cal. Rptr. 233, 242 (1974) (improper for prosecution to have asked finance company robbery defendant on cross whether two prior robberies involved finance companies).

\textsuperscript{116} Id. The witness could be asked "about anything which would appear on the face of the record of judgment since the record could itself be introduced into evidence for impeachment." People v. McClellan, 71 Cal. 2d 793, 809, 457 P.2d 871, 882, 80 Cal. Rptr. 31, 42 (1969).

\textsuperscript{117} People v. Rodrigo, 69 Cal. 601, 605, 11 P. 481, 484 (1886) ("we entertain no doubt that a party may ask a witness with respect to the fact of a judgment and sentence against him for a felony"). This rule in Rodrigo is consistent with the national majority view under which the witness can be asked about "the name of the crime committed . . . and the punishment awarded." McCORMICK ON EVIDENCE § 43, at 98 (E. Cleary 3d ed. 1984); accord United States v. Wolf, 561 F.2d 1376, 1381 (10th Cir. 1977) (dictum); United States v. Tumblin, 551 F.2d 1001, 1004 (5th Cir. 1977). But see People v. Smith, 63 Cal. 2d 779, 790-91, 409 P.2d 222, 230, 48 Cal. Rptr. 382, 390 (1966) (implying that witness can properly be cross-examined about whether he served term of imprisonment, but not length of term). A good argument could be made that the "Right to Truth-in-Evidence" provision overrules Smith, and brings California law into conformity with the national majority view. See supra text accompanying notes 38-44.

\textsuperscript{118} See 2 B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 28.8, at 924 (2d ed. 1982).


\textsuperscript{120} Proposition 8 affects common law rules of evidence and evidentiary rules created by
oblique discussion of this issue in dicta in *People v. Thomas*.\textsuperscript{121} In *Thomas*, the court addressed the issue of whether a defendant should be allowed to present evidence regarding facts underlying his or her criminal conviction in order to explain or minimize the conviction.\textsuperscript{122} The court observed:

>[A]rguably any such explanation in the past would have contravened Evidence Code section 787, rendering inadmissible evidence of specific instances of conduct to support as well as to attack the credibility of a witness. However, section 787 was invalidated in criminal cases by another provision of the same [Proposition 8] that broadened the use of prior convictions for impeachment.\textsuperscript{123}

*Thomas* supports the conclusion that the “Right to Truth-in-Evidence” provision brings California law into conformity with the law of sister jurisdictions which allow a witness to be asked about the underlying details of a prior conviction, subject to the court’s discretion to exclude such evidence if its prejudicial impact outweighs its probative value.\textsuperscript{124}

For example, Louisiana recently enacted article 609.1 of its evidence code,\textsuperscript{125} providing that a witness can be impeached with his prior convictions.\textsuperscript{126} Article 609.1 also provides that the “details of the offense may become admissible to show the true nature of the offense . . . [w]hen the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.”\textsuperscript{127} The rationale for this rule

\textsuperscript{121} J. CHRISTIANSEN, PROPOSITION 8: A THREE-YEAR RETROSPECTIVE 27-35 (1985).
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{125} LA. CODE EVID. ANN. art. 609.1 (West 1989).
\textsuperscript{126} Id.
\textsuperscript{127} Id.
was explained in the case of *State v. Tatum*.\textsuperscript{128} The defendant in *Tatum* admitted a prior conviction for possession of marijuana.\textsuperscript{129} The prosecutor probed further and asked, "[W]ere you initially charged with intent to distribute marijuana . . . and you got yours reduced to simple possession?"\textsuperscript{130} The defense claimed that this question was improper.\textsuperscript{131} The court, however, ruled that "[s]ince it is the bad act and not the conviction which is relevant to credibility, details of the bad act are also relevant."\textsuperscript{132} Thus, cross-examination about the details of the prior conviction in order to establish its true nature were proper.\textsuperscript{133}

Other jurisdictions have allowed cross-examination about the details of a prior conviction under the theory that a witness can be asked about the underlying details of a prior conviction to the same extent he or she can be cross-examined about uncharged misconduct evidencing lack of credibility.\textsuperscript{134} The next section discusses the extent to which a witness can be impeached with prior uncharged misconduct.

### IV. THE IMPACT OF PROPOSITION 8 ON RULES REGARDING IMPEACHMENT WITH UNCHARGED MISCONDUCT

One of the most significant impacts of Proposition 8 has been its effect on the rules regarding impeachment of a witness with uncharged misconduct. Prior to Proposition 8, California followed the rule of a small minority of jurisdictions that specific instances of conduct could not be used to impeach a witness's credibility unless such conduct resulted in a felony conviction.\textsuperscript{135} This rule was codified in section 787 of the Evidence Code.\textsuperscript{136} The California Supreme Court and a small

\begin{itemize}
  \item \textsuperscript{128} 506 So. 2d 584 (La. Ct. App. 1987).
  \item \textsuperscript{129} Id. at 590.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} See, e.g., *State v. Murray*, 310 N.C. 541, 551, 313 S.E.2d 523, 530 (1984) ("rather than phrasing questions only in terms of convictions, the prosecutor may ask about the circumstances of a prior conviction in the same way he would ask about any specific misconduct"); *People v. Jefferson*, 136 A.D. 2d 655, 656, 523 N.Y.S.2d 887, 888 (1988) (questioning defendant about the facts underlying prior conviction allowable "for the purpose of determining, at least in general terms, what conduct gave rise to the conviction").
  \item \textsuperscript{135} CAL. EVID. CODE § 787 (West 1966), repealed by People v. Harris, 47 Cal. 3d 1047, 1081, 767 P.2d 619, 640, 255 Cal. Rptr. 352, 373 (1985).
  \item \textsuperscript{136} Id. Under the "Right to Truth-in-Evidence" provision, "evidence that a witness has lied on an employment application, has cheated on school examinations, or has been unfaithful to a spouse, and other similar evidence would be admissible." Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1019 (1984).\
\end{itemize}
number of appellate courts have made it clear that the “Right to Truth-in-Evidence” provision repeals section 787 in criminal cases, however, unresolved questions remain regarding what types of uncharged misconduct are admissible for impeachment and whether extrinsic evidence of uncharged misconduct is admissible if the witness denies the conduct on cross-examination.

A. The California Cases

People v. Harris stands for the proposition that the repeal of section 787 of the California Evidence Code now permits the use of specific instances of conduct to bolster a witness’s credibility. Three appellate court cases clarify that the repeal of section 787 also permits the use of specific instances of conduct to attack a witness’s credibility.

In People v. Lankford, the defendant was allowed to be cross-examined about uncharged misconduct. There, the defendant was charged with being an ex-felon in possession of a gun. On direct examination the defendant testified that since leaving state prison, he had “no incident yet since I’ve been out.” By “incident,” the defendant meant conviction. On cross-examination, the prosecutor asked the defendant about pending charges against him for robbery and assault. The prosecutor asked, “Isn’t it true, sir, that on the [second] day of September of this year, seven days from now, you are scheduled to stand trial in this county for five counts of armed robbery and one count of assault with a deadly weapon?” The defendant answered in the affirmative.

Long before Proposition 8, the California Supreme Court prohibited the type of cross-examination employed in Lankford under section 787,

139. Id. at 1080-81, 767 P.2d at 640, 255 Cal. Rptr. at 373. But, see supra notes 76-97 and accompanying text for a discussion of the repeal of section 787.
142. Id. at 232, 258 Cal. Rptr. at 324.
143. Id. at 231, 258 Cal. Rptr. at 323.
144. Id.
145. Id.
146. Id.
147. Id. at 232-33, 258 Cal. Rptr. at 324.
148. Id.
making specific acts of misconduct inadmissible to attack or support credibility.149 Such cross-examination was improper even where defendants were the first to raise the subject of their character, thereby "opening the door" to cross-examination about bad character traits.150 Nevertheless, the Lankford court reasoned that, under the "Right to Truth-in-Evidence" provision, the old law disallowing such impeachment evidence was no longer in effect, and the prosecutor's cross-examination was proper.151 Prosecutors, however, should not interpret Lankford so broadly as to suggest that they may always question a defendant about pending charges, as opposed to the underlying conduct which gave rise to those charges. In Lankford, the defendant "opened the door" to cross-examination about his character by stating that he had "no incident" since he had been out of prison.152 Alternatively, the court might have prohibited the prosecutor's subsequent questioning on this point if the defendant had not opened the door to that line of questioning.153

In People v. Adams,154 it was the defense which sought to cross-examine a witness on prior uncharged misconduct.155 In Adams, the defendant, charged with rape, alleged that the victim had consented to the sexual acts in exchange for cocaine.156 The defendant sought to show that the victim had falsely accused others of rape in the past.157 The trial court refused to allow such cross-examination, ruling that such evidence was precluded by section 787.158 The appellate court overturned the conviction, ruling that such evidence was made admissible by the "Right to Truth-in-Evidence" provision.159 The court held that, because credibility of the victim was the sole issue in the case, failure to admit the evidence had resulted in a miscarriage of justice.160

150. See id. at 618-19, 532 P.2d at 108, 119 Cal. Rptr. at 460 (1975) (prosecutor's cross-examination of defendant about unconvicted acts concerning narcotics sales violated section 787 even after defendant testified at length as to his good character). The Lankford court pointed out that Wagner is no longer good law because it predated Proposition 8. Lankford, 210 Cal. App. 3d at 235-36, 258 Cal. Rptr. at 326.
151. Lankford, 210 Cal. App. 3d at 240, 258 Cal. Rptr. at 329.
152. Id. at 232, 258 Cal. Rptr. at 324.
153. See id. at 239-40, 258 Cal. Rptr. at 329.
155. Id. at 16, 243 Cal. Rptr. at 583.
156. Id. at 14-15, 243 Cal. Rptr. at 582.
157. Id. at 16, 243 Cal. Rptr. at 583.
158. Id. at 18-19, 243 Cal. Rptr. at 585.
159. Id. at 17-18, 243 Cal. Rptr. at 584.
160. Id. at 19, 243 Cal. Rptr. at 585. But see People v. Bittaker, 48 Cal. 3d 1046, 1097-98,
In People v. Bergschneider, a prosecution witness introduced evidence of prior uncharged misconduct, but the impeachment was properly disallowed. In Bergschneider, a mother and stepfather were charged with forcibly raping their fourteen-year old mentally retarded daughter. The prosecution called the daughter's boyfriend, who testified that the mother had made incriminating statements to him. Although the appellate court assumed that such evidence would be admissible under the “Right to Truth-in-Evidence” provision, it also ruled that the trial court properly exercised its discretion under section 352 of the California Evidence Code to exclude such evidence on the ground that its probative value was outweighed by its unduly prejudicial effect.

Harris, Lankford, Adams and Bergschneider make it clear that evidence of uncharged misconduct is admissible to impeach the credibility of a witness, subject to the trial court's discretion to disallow overly prejudicial evidence under section 352. This rule probably allows cross-examination of a witness who takes the stand to testify in his or her own behalf. But see McCormick on Evidence, supra note 117, § 42, at 92 (witness may be able to avoid answering questions about uncharged misconduct by invoking fifth amendment privilege). California would undoubtedly follow the authorities holding that witnesses cannot invoke the privilege against self-incrimination to avoid answering questions about uncharged misconduct. In People v. Thornton, the California Supreme Court addressed the issue of whether a defendant can claim a fifth amendment privilege when asked questions about uncharged misconduct when asked questions about uncharged misconduct. 11 Cal. 3d 738, 760, 523 P.2d 267, 281-82, 114 Cal. Rptr. 467, 481-82 (1974), cert. denied, 420 U.S. 924 (1975). There, the defendant was charged with several sex offenses and was cross-examined about uncharged acts for the purpose of establishing his identity as the perpetrator of the charged acts. Id. at 755, 523 P.2d at 272, 114 Cal. Rptr. at 472. The court held that:

A defendant who takes the stand to testify in his [or her] own behalf waives the privilege against self-incrimination to the extent of the scope of relevant cross-examination. "It matters not that the defendant's answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted."
examination on uncharged misconduct which resulted in acquittal, and acts which only resulted in a juvenile conviction. A more difficult question posed by these four decisions, however, is the issue of the type of uncharged misconduct which is admissible.

**B. Types of Uncharged Misconduct Admissible**

Under pre-Proposition 8 law, section 786 of the California Evidence Code provided, "Evidence of traits of character other than honesty or veracity or their opposites, is inadmissible to attack or support the credibility of a witness." In dicta, the court in *People v. Harris* included section 786 as one of the provisions of the evidence code that has been repealed. If specific instances of uncharged misconduct are admissible to attack credibility, and if section 786 has been repealed, then misconduct not involving honesty or dishonesty would be admissible. But how far may cross-examination about uncharged misconduct go? Other jurisdictions may provide guidance to California courts regarding the types of uncharged misconduct which are admissible for impeachment. There are three possible approaches that could be adopted in California.

1. **Common-law approach**

Under the traditional common-law approach followed by many jurisdictions, "on cross-examination a witness may, for the purposes of im-

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*Id.* at 760-61, 523 P.2d at 282, 114 Cal. Rptr. at 482 (quoting Johnson v. United States, 318 U.S. 189, 192 (1943)). The Court also noted that, if the defendant refuses to answer, the jury may be instructed to draw adverse inferences from this refusal. *Id.; accord Air Et Chaleur v. Janeway, 757 F.2d 489, 496 (2d Cir. 1985)* (may be proper for jury to draw adverse inference from a witness' refusal to answer particular question, claiming fifth amendment privilege).

169. Defendants can be impeached with an offense for which they were not convicted. *See, e.g., State v. Royal, 300 N.C. 515, 525, 268 S.E.2d 517, 527 (1980).* The "law is settled that evidence of a prior offense, if otherwise relevant, is admissible against a defendant even though he was tried and acquitted of the offense." *2 B. JEFFERSON, supra note 118, § 33.6, at 1201; accord G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.13, at 151 (1987)* (use of evidence of other crime in present trial should not be precluded by terms of result in unsuccessful collateral prosecution).

170. It is proper to question a witness about the facts underlying a youthful offender adjudication, although the adjudication itself may not be used for impeachment. *People v. Damon, 150 A.D.2d 479, 479-80, 541 N.Y.S.2d 82, 83 (1989); People v. Jackson, 79 Misc. 2d 814, 817-18, 361 N.Y.S.2d 258, 262-63, (N.Y. Crim. Ct. 1974).* In California, it is not clear whether Proposition 8 made juvenile convictions, as opposed to the facts underlying the convictions, admissible for impeachment. *See People v. Pitts, 223 Cal. App. 3d 1547, 1555, 273 Cal. Rptr. 389, 393-94 (1990).*

171. *CAL. EVID. CODE § 786 (West 1966).*

172. *Id.*


174. *Id.* at 1081-82, 767 P.2d at 640, 255 Cal. Rptr. at 373.
peachment, be asked [about] any particular or specific matter, act, or thing which may affect his [or her] character and tend to show he [or she] is unworthy of belief." 175 This extremely liberal rule of cross-examination was justified under the theory that a witness's "general character" is relevant to credibility. 176 Before Proposition 8, California law had rejected the common-law approach and had limited character evidence to attack or support credibility to the traits of "honesty or veracity, or their opposites." 177

For example, under the common-law approach, a witness may be cross-examined about a wide variety of sexual misconduct which does not directly relate to honesty or veracity, such as adultery, 178 living together out of wedlock, 179 and visiting houses of prostitution. 180 A witness can be cross-examined about sexually assaultive or brutal behavior. 181 A witness can be cross-examined about his or her personal associations such as knowingly associating with criminals 182 and about his or her residences and occupations. 183 A witness can also be cross-

175. 98 C.J.S. Witnesses § 515 (1957); accord State v. Pittman, 731 S.W.2d 43, 48 (Mo. Ct. App. 1987) (specific acts of either misconduct or immorality, which may or may not have been basis of conviction, may be shown if specific misconduct discredits veracity of witness). Some courts permit an attack upon character by fairly wide-open cross-examination about acts of misconduct which show bad moral character and have only an attenuated relationship to credibility. McCORMICK ON EVIDENCE, supra note 117, § 42, at 90; see, e.g., Kelley v. State, 226 Ind. 148, 78 N.E.2d 547 (1948); People v. Sorge, 301 N.Y. 198, 93 N.E. 2d 637 (1950); People v. Johnston, 228 N.Y. 332, 127 N.E. 186 (1920); State v. Jones, 215 Tenn. 206, 385 S.W.2d 80 (1964).

176. For example, in North Carolina a witness could be "impeached by evidence that his general character is bad or it may be corroborated by evidence that it is good." Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 279, 156 S.E.2d 265, 268 (1967). Such impeachment was not limited to acts involving moral turpitude or bad acts resulting in convictions. Id. at 280, 156 S.E.2d at 268-69; Manning, Impeachment: The Dilemma of the Defendant-Witness in North Carolina, 13 N.C. CENT. L.J. 35, 37 (1981). North Carolina has since adopted Federal Rule of Evidence 608, FED. R. EVID. 608, which limits cross-examination concerning acts of misconduct as an attack upon character to acts which have some relation to the truthfulness or untruthfulness of the witness. See N.C. GEN. STAT. ch. 8c, rule 608 (1990).

177. See CAL. EVID. CODE § 786 (West 1966).


179. State v. Blocker, 278 S.W. 1014, 1015-16 (Mo. 1925).


183. E.g., Jutson v. State, 213 Ark. 884, 196, 209 S.W.2d 681, 682 (1948) (cross-examina-
examined about his or her political associations, such as Communist Party membership, or lack of loyalty to the government. Although most jurisdictions have abandoned the common-law approach in favor of the federal approach, one notable exception is New York. In New York, the law regarding the admissibility of prior convictions for impeachment is identical to the law regarding the admissibility of uncharged misconduct for impeachment. Under New York law, uncharged misconduct is admissible evidence of credibility if it shows a defendant’s propensity to place his or her own interest above those of society. This rule allows a wide range of cross-examination of a witness on a variety of uncharged misconduct.

For example, in People v. Calvin of Oakknoll, the defendant was charged with second-degree murder. Specifically, he was charged with shooting a hunter after questioning him about hunting on private property. The court permitted the prosecutor to cross-examine the defendant on two completely unrelated incidents. In one incident, the defendant brandished a rifle, blocking the path of a woman and her children who were returning home from church. In the second situation, the defendant fired shots at two hunters as they were driving past his house.

The appellate court ruled that both incidents "revealed a willingness or disposition on the part of the defendant to place the advancement of his self-interest ahead of principle and the interests of society." Therefore, the court held that the incidents were properly admitted for im-

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186. Under this approach only misconduct relating to honesty or veracity is admissible. MCCORMICK ON EVIDENCE, supra note 117, § 42, at 90; see supra note 186.

187. Under the federal approach, only misconduct relating to the credibility of the witness is admissible. MCCORMICK ON EVIDENCE, supra note 117, § 42, at 90.


189. Sandoval, 34 N.Y.2d at 377, 357 N.Y.S.2d at 855, 314 N.E.2d at 417.


191. Id. at 1045, 489 N.Y.S.2d at 133.

192. Id.

193. Id.

194. Id.

195. Id.

196. Id., 489 N.Y.S.2d at 133-34.
peachment even though they involved conduct similar to that for which the defendant stood trial.\textsuperscript{197}

A witness in New York can be questioned about uncharged misconduct involving vicious acts such as threats to use violence\textsuperscript{198} or giving an elderly woman a drink containing five valium tablets.\textsuperscript{199} A witness can be questioned about immoral conduct such as his or her lascivious disposition,\textsuperscript{200} adultery,\textsuperscript{201} management of a brothel\textsuperscript{202} or selling drugs to children.\textsuperscript{203} A witness can also be cross-examined about dishonest conduct such as paying employees "off the books," non-payment of income taxes\textsuperscript{204} or illegal entry into the country.\textsuperscript{205}

The common-law approach, as applied in New York, of broad admissibility and wide-open cross-examination appears consistent with the purpose of Proposition 8 in California. Proposition 8 intended to make all relevant evidence admissible to the greatest extent possible.\textsuperscript{206} Consequently, the common-law approach should be followed in California because it is concurrent with the intent of Proposition 8.\textsuperscript{207}

2. Federal approach

The federal approach on cross-examination with uncharged misconduct is codified in section 608(b) of the Federal Rules of Evidence, which provides:

Specific instances of the conduct of a witness for the purposes of attacking or supporting the witness' credibility, other than conviction of a crime as provided for in [section] 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or un-

\begin{itemize}
\item \textsuperscript{197} Id., 489 N.Y.S.2d at 134.
\item \textsuperscript{199} See People v. Dukett, 110 A.D.2d 940, 941, 487 N.Y.S.2d 875, 876 (1987).
\item \textsuperscript{200} See People v. Weeks, 126 A.D.2d 857, 860, 510 N.Y.S.2d 920, 922-23 (1987).
\item \textsuperscript{201} People v. Rouse, 142 A.D.2d 788, 789, 530 N.Y.S.2d 333, 334 (1988).
\item \textsuperscript{202} People v. Roth, 139 A.D.2d 605, 608, 527 N.Y.S.2d 97, 101 (1988).
\item \textsuperscript{203} See People v. Stewart, 92 A.D.2d 226, 229, 459 N.Y.S.2d 853, 855 (1983).
\item \textsuperscript{204} See People v. Charkow, 142 A.D.2d 734, 734-35, 531 N.Y.S.2d 120, 121 (1988).
\item \textsuperscript{205} See People v. Codner, 134 A.D.2d 272, 273, 520 N.Y.S.2d 605, 606 (1987).
\item \textsuperscript{206} CAL. CONST. art. I, \S 28(d).
\item \textsuperscript{207} This view was shared by the Assembly Committee on Criminal Justice, which concluded that Proposition 8 would permit attorneys to attack the character of a witness by claiming, for example, that the witness "was a drunk or a womanizer, in an attempt to have the jury disbelieve his testimony." ASSEMBLY COMM. ON CRIMINAL JUSTICE, supra note 38, at 12.
\end{itemize}
truthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.\textsuperscript{208}

The federal approach is considerably more restrictive than the common-law approach because it limits the admissibility of evidence of uncharged misconduct to acts relating to "truthfulness or untruthfulness."\textsuperscript{209} The federal approach is also consistent with the pre-Proposition 8 rule codified in section 786 of the California Evidence Code which limited admissibility of character evidence to traits of character involving "honesty or veracity, or their opposites."\textsuperscript{210} Nevertheless, even under the federal approach, a wide range of misconduct is admissible for impeachment.

Under the federal approach, a witness can be asked about his or her disbarment from the practice of law,\textsuperscript{211} and the attendant disciplinary proceedings.\textsuperscript{212} Similarly, a witness can be cross-examined about suspension of his or her chiropractor's license.\textsuperscript{213} Even evidence that police officers, who were defense witnesses, had been suspended from the police force for misconduct on an unrelated occasion was admissible for impeachment.\textsuperscript{214}

Misconduct involving theft or fraud is also admissible.\textsuperscript{215} For example, a defendant judge's misuse of judicial defendant-bond funds was a permissible topic for cross-examination.\textsuperscript{216} The misappropriation of

\begin{itemize}
\item \textsuperscript{208} FED. R. EVID. 608(b).
\item \textsuperscript{209} See id.
\item \textsuperscript{210} CAL. EVID. CODE § 786 (West 1966).
\item \textsuperscript{211} United States v. Weichert, 783 F.2d 23, 25 (2d Cir.) (disbarment 12 years before trial admissible), cert. denied, 479 U.S. 831 (1986).
\item \textsuperscript{212} United States v. Whitehead, 618 F.2d 523, 528-29 (4th Cir. 1980).
\item \textsuperscript{213} United States v. Fulk, 816 F.2d 1202, 1206 (7th Cir. 1987).
\item \textsuperscript{214} United States v. Rios Ruiz, 579 F.2d 670, 672-74 (1st Cir. 1978).
\item \textsuperscript{215} United States v. Qaoud, 777 F.2d 1105, 1112-13 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).
\item \textsuperscript{216} Id. Similarly, the prosecution properly impeached the defendant, a disbarred attorney, by cross-examining him about uncharged acts of misappropriation of clients funds 14 years earlier. Id. at 1112. Moreover, impeaching the defendant with his signed statement admitting such misconduct was proper and did not violate the rule against impeachment with extrinsic evidence on collateral issues. Id. at 1448-49; accord State v. Martin, 201 Conn. 74, 83-89, 513 A.2d 116, 123-24 (1986) (trial court erred in failing to consider admissibility of uncharged misconduct involving theft). See infra notes 235-47 and accompanying text for a discussion of the admissibility of extrinsic evidence.
\end{itemize}
stock in a private placement was admissible,\(^\text{217}\) as was evidence of uncharged acts of insurance fraud.\(^\text{218}\)

A wide variety of misconduct involving false statements is admissi-
ble. Courts have allowed cross-examination on falsely filling out an applic-
ation for a credit card\(^\text{219}\) and a car dealership license.\(^\text{220}\) One court
even allowed impeachment evidence regarding a witness giving his em-
ployer a false excuse for his absence from work.\(^\text{221}\) Another court held it
was proper to cross-examine a witness about his concealment of the true
reasons his girlfriend left him.\(^\text{222}\)

Parole generally involves the release of a prisoner from confinement
upon his or her promise to observe certain terms and conditions. There-
fore, a violation of parole constitutes a failure to keep one’s word, and “is
almost always ‘probative of truthfulness or untruthfulness.’”\(^\text{223}\) Inasmuch
as the use of false names is probative of a lack of veracity, a witness
can be questioned on the use of aliases.\(^\text{224}\)

A witness may also be cross-examined about dishonesty in connec-
tion with prior judicial proceedings. A prosecutor properly cross-ex-
amined a defense expert about whether on a prior occasion his testimony
was criticized by the trial judge.\(^\text{225}\) A prosecutor properly asked a de-
fendant whether a judge in a deportation hearing had found his testi-
mony not credible.\(^\text{226}\) A defendant’s admission that he faked insanity at
an earlier unrelated trial was also held admissible.\(^\text{227}\)

\(^\text{217}\) United States v. Smith, 727 F.2d 214, 221 (2d Cir. 1984).

\(^\text{218}\) United States v. Amahia, 825 F.2d 177, 180-81 (8th Cir. 1987).


\(^\text{221}\) United States v. Cole, 617 F.2d 151, 153-54 (5th Cir.), cert. denied, 452 U.S. 918 (1980).

\(^\text{222}\) State v. Estrada, 69 Haw. 204, 214, 738 P.2d 812, 823 (1987). The Hawaii Supreme Court also ruled that the witness could properly be cross-examined about deceptive statements he placed on an employment application. \(\text{Id.}\)

\(^\text{223}\) State v. Greer, 39 Ohio St. 3d 236, 243, 530 N.E.2d 382, 393-94 (1988).

\(^\text{224}\) McKinnon v. State, 287 Ark. 1, 2-3, 695 S.W.2d 826, 826 (1985) ("If a man [or woman] lies about his [or her] own name, might he [or she] not tell other lies?" (quoting Lyda v. United States, 321 F.2d 788 (9th Cir. 1963))); State v. Dolphin, 195 Conn. 444, 458-59, 488 A.2d 812, 821 (cross examination, under rule identical to federal approach, of defense witness about use of aliases, having been wanted by police, and “having once been erroneously reported as dead after swimming in the Connecticut River,” was proper), cert. denied, 474 U.S. 833 (1985).

\(^\text{225}\) United States v. Terry, 702 F.2d 299, 316 (2d Cir. 1983) (previous court finding that defense expert “guessed under oath” was permissible topic for cross examination under rule 608(b)).


\(^\text{227}\) United States v. Covelli, 738 F.2d 847, 856 (7th Cir.), cert. denied, 469 U.S. 867 (1984).
The federal approach is more restrictive than the common-law approach. If California follows this approach, federal cases which allow impeachment using uncharged misconduct would become persuasive authority for California courts. Federal cases which have held that certain misconduct was inadmissible may not, however, necessarily be persuasive authority in California because California's standard for admissibility is more liberal than the federal standard.  

3. Moral turpitude approach

As a possible compromise between the liberal common-law approach and the more restrictive federal approach, California could adopt a rule that only misconduct evidencing moral turpitude is admissible. While no California case law on the issue exists, a plausible argument could be made to support this approach.

In People v. Castro, the California Supreme Court ruled that the due process clause of the fourteenth amendment restricts the admissibility of impeachment evidence to conduct demonstrating "moral turpitude." Although Castro dealt with prior convictions and not uncharged misconduct, its reasoning should apply equally to uncharged misconduct. Overwhelming authority in other jurisdictions, however, holds that due process does not restrict states from deciding their own rules of evidence, and no constitutional considerations limit the type of impeachment evidence. Therefore, not only is it unlikely that the California Supreme Court would extend Castro's ruling to cover the admissibility of uncharged misconduct, but Castro itself may soon be overturned. Hence, the court might adopt the common-law approach for California.

C. Admissibility of Extrinsic Evidence

Currently, California follows the national majority view under which a witness can be cross-examined about specific instances of un-
charged misconduct to attack his or her credibility. It is unclear, however, the extent to which California courts will apply the traditional common-law rule prohibiting the admission of extrinsic evidence to prove uncharged misconduct.

Jurisdictions that allow a witness to be examined about specific acts to attack credibility impose the restriction on such evidence codified in Federal Rule of Evidence 608(b). That rule provides, in pertinent part, that “specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of a crime . . . may not be proved by extrinsic evidence.” In other words, a witness may be examined about specific acts to support or attack his or her credibility, but, if the witness denies such acts, the examiner must “take his [or her] answer,” and no other witnesses can be called to prove such acts.

The California Supreme Court’s decision in People v. Harris implies that the prohibition on extrinsic evidence may not be followed in California. In Harris, the prosecution offered specific instances of a witness’s past reliability to support his credibility. This was done, however, through the use of extrinsic evidence—the testimony of a police officer who worked with the informant in prior cases. Such extrinsic evidence clearly would have been inadmissible under Federal Rule of Evidence 608(b). The California Supreme Court, however, held that the evidence was admissible under the “Right to Truth-in-Evidence” provision. Thus, the ratio decidendi of Harris is that the extrinsic evidence

235. See supra notes 135-70 and accompanying text.
236. This rule against extrinsic evidence of specific acts to attack or support credibility is traceable to the early eighteenth century. 3 B. WITKIN, CALIFORNIA PROCEDURE § 1982, at 139 (3d ed. 1986). The policies justifying the rule are the avoidance of unfair surprise and confusion of issues. People v. Castro, 38 Cal. 3d 301, 316, 696 P.2d 111, 120, 211 Cal. Rptr. 719, 728 (1985). These policies have no effect in forbidding cross-examination about specific acts because (1) there is no danger of confusion of the issues, as the matter stops with question and answer, and (2) there is no danger of unfair surprise, as the impeached witness is not obliged to be ready with other witnesses to answer the extrinsic evidence since there is none to be answered, and the witness can be expected to know and answer his own deeds. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 979-981, at 823-38 (J. Chadbourn rev. ed. 1970).
237. See Fed. R. Evid. 608(b); supra note 209 and accompanying text.
238. Fed. R. Evid. 608(b).
239. MCCORMICK ON EVIDENCE, supra note 117, § 42, at 92.
241. Id. at 1080, 767 P.2d at 640, 255 Cal. Rptr. at 373.
242. Id.
243. See supra note 208 and accompanying text.
244. Harris, 47 Cal. 3d at 1080-83, 767 P.2d at 640-41, 255 Cal. Rptr. at 372-75; CAL. CONST. art. I, § 28(d).
prohibition is inapplicable in California, and that extrinsic evidence is admissible subject to the trial court's discretion to limit such evidence under section 352 of the California Evidence Code. Unlike the other evidentiary prohibitions eliminated by Proposition 8, this change represents a slight departure from the laws of other common-law jurisdictions.

V. CONCLUSION

The pre-Proposition 8 rule regarding admissibility of prior misconduct evidence for impeachment has been replaced with Proposition 8, allowing broad trial court discretion to admit virtually any prior misconduct evidence under section 352 of the California Evidence Code. Under this approach, both moral turpitude felony and misdemeanor convictions are admissible. Uncharged misconduct is also admissible as long as it is relevant to credibility. However, the exact approach which California appellate courts will adopt governing the admissibility of uncharged misconduct evidence is not yet clear. Fortunately, California can turn to the laws of other jurisdictions for guidance. Although California criminal law practitioners may regard the changes brought about by Proposition 8 as revolutionary, in reality, the most revolutionary impact of Proposition 8 is simply to bring California law into conformity with that of most other jurisdictions.

245. Harris, 47 Cal. 3d at 1081, 767 P.2d at 640, 255 Cal. Rptr. at 373.
246. CAL. EVID. CODE § 352 (West 1966). Prior to the enactment of the California Evidence Code, California did follow an extrinsic evidence rule prohibiting the introduction of extrinsic evidence to prove that a witness testified falsely as to a collateral matter. See People v. Dye, 75 Cal. 108, 112 (1888); People v. Webb, 70 Cal. 120, 121 (1886); 3 B. Witkin, supra note 236, § 1982, at 1939. Witkin, however, concludes that this rule was abolished when the California Evidence Code was enacted in favor of a rule allowing extrinsic evidence subject to the trial court's discretion. Id. § 1983, at 1939-41.

No other jurisdiction follows the rule, which now appears to be the law in California, that extrinsic evidence of specific acts of conduct is admissible to attack or support credibility. See supra notes 244-45 and accompanying text. Nevertheless, it is possible to fashion a test for courts to use in determining the admissibility of extrinsic evidence under section 352. Courts should consider: (1) the danger of confusing the issues and consumption of time; (2) the extent to which the party whose witness is being impeached either knew or reasonably should have known about the evidence of the prior specific acts; (3) the degree to which the act relates to credibility; (4) how long ago the act occurred; (5) whether, in the case of impeaching the defendant, the act was for the same offense for which defendant was charged; and (6) whether the admission of the act would discourage defendant from testifying. The first two prongs of this test are based on the policies justifying the rule excluding extrinsic evidence. See supra note 140. The remaining prongs to the test are based on People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972). See supra notes 235-47 and accompanying text for a discussion of admissibility of extrinsic evidence.

247. See supra notes 244-46.
When California voters enacted Proposition 8, they intended to correct "a perceived imbalance in favor of defendants in the rules regarding the admissibility of evidence."\textsuperscript{248} Whether Proposition 8, as interpreted by appellate courts, will fulfill this goal while preserving a defendant's right to a fair trial, however, remains to be seen.
