
Brosnahan v. Eu:

HOW CALIFORNIA LAW TURNED IN 1982 TO FACE CRIME VICTIMS AT DEFENDANTS' EXPENSE

BY JIM BROSNAHAN*

MY FRIEND EPHRAIM MARGOLIN had a difficult task as he faced the California Supreme Court. He wanted to stop an initiative called the Victim's Bill of Rights, Proposition 8, before the voters could express their will. A nationally recognized civil rights lawyer, Ephraim was talking directly into the winds of jurisprudential change. It was the spring of 1982. On the bench were Chief Justice Rose Bird and Justices Stanley Mosk, Frank Richardson, Otto Kaus, Allan Broussard, Cruz Reynoso, and Frank Newman. Outside the court, the American people had decided that the time had come for law and order. At the national level, the U.S. Supreme Court featured strict construction of defendants' rights, their decisions dovetailing President Ronald Reagan's thoughts on law enforcement.



Jim Brosnahan

By the time of the Prop. 8 cases, the love, freedom, and anti-establishment thinking of the 1960s had disappeared into society's rear-view mirror. Those who had screamed from the barricades, "Never trust anyone over 30," were now 35. Handsome, well-educated but ineffective, Mayor John Lindsey of New York City symbolized a needed transition from wildly libertarian self-discovery to the return of conformist structure. There were riots in the New York City jail known as "The Tombs." Violent gangs seemed much too numerous, uncontrolled, and frightening. Earlier, as California's governor, Ronald Reagan had promised a tougher law and order approach for police and the courts and judges who would carry out that new, conservative attitude. In May 1969, UC Berkeley students took over People's Park near Telegraph Avenue. When authorities tried to take the park back, a rally of 3,000 turned into a riot. That day became known as Bloody Sunday. Reagan declared a state of emergency and sent 2,200 troops to Berkeley. One thousand citizens were arrested, many taken to the Santa Rita Jail and beaten. One man was shot and died four days later. Tear gas floated over the campus as scholars tried to teach amid the bedlam. The violence was a national news story with TV images of students clashing with

soldiers. One student who joined the rally was called up to the National Guard. Madness reigned and my town of Berkeley has never been what you could call orderly.

Reagan's firmness eventually made him president. As Ephraim was arguing against allowing voters to decide on Prop. 8, Ronald Reagan had become our 40th president. He delivered what America wanted: strong law enforcement and the reduction of criminal defense procedural "tricks," never mind that some of those "tricks" were in the U.S. Constitution. He had brought to the White House his tested California conservative political themes. Four years before his Iran-Contra scandal broke, Reagan was very popular. Personally, he seemed candid and likable. My partner Bob Raven saw the president's charm up close when Bob went to the White House to meet with him as chair of the ABA's committee on judicial selection. As Bob was leaving, the president stood by the door.

"Bob, are you going back to California?" he asked.

Bob said, "I am, Mr. President."

"I wish I was," said the leader of the free world.

Reagan was masterful at conveying a national message that turned the stomachs of every California criminal defense lawyer. As though to tell the nation what had changed, Fleetwood Mac issued an album named *Law and Order*.

THE PROBLEMS WITH PROPOSITION 8

Feeling a conservative wind at their back, the drafters of Prop. 8 put into one document many, quite different, conservative criminal favorites. The central legal question was whether the initiative violated article II, section 8 of the California Constitution which commands that, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Seems simple enough. Prop. 8 covered diverse subjects.

One section of the initiative contained seven separate subdivisions. It repealed article I, section 12, relating to bail. It also added five new sections to the Penal Code and three separate sections to the Welfare and Institutions Code.

The constitutional provision in the proposed initiative, section 3, added section 28 to article I, declaring that victims of crime have a right to restitution from wrongdoers for financial losses and the right to expect that wrongdoers will be punished.¹

Among the sections were provisions specifying that:

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- Students and staff of schools from elementary to high school have the right to be safe on school campuses.²
- Relevant evidence in criminal proceedings shall not be excluded (with certain exceptions) unless the Legislature provides otherwise in a statute enacted by a two-thirds vote.³ This section was clearly unconstitutional.
- Limited procedures for release of suspects on bail or own recognizance.⁴
- Permitted the greater use of prior felony convictions for impeachment or for enhancement of a sentence.⁵
- Abolished the defense of diminished capacity.⁶
- Increased the punishment of persons convicted of specified felonies who have been previously convicted of such crimes.⁷
- Allowed victims of crime to attend juvenile sentencing and parole proceedings and be heard, and required the judge or parole board to state whether the criminal would pose a threat to public safety if granted parole or probation.⁸
- Forbade plea bargaining to specified crimes except under certain circumstances.⁹
- Rendered provisions of the Welfare and Institutions Code relating to the commitment and treatment of mentally disordered sex offenders “inoperative.”¹⁰

THE FIRST DECISION

On March 11, 1982, a majority of the court voted to allow the initiative to proceed with a vote of the people. In six paragraphs the opinion declared what the court was doing was “customary.” The court did not reach the single-subject issue. Justices Newman, Mosk and Chief Justice Bird dissented.¹¹

On June 8, 1982, the voters passed Prop. 8 by 56 percent of the vote.

A NUMERICAL PUZZLE FOR VOTERS

The people had spoken. But what had they said? What was the law now? Prop. 8 had so many sections that any voter could be confused, befuddled, or angry. A voter could favor parts 1, 4, 6, and 9, and not favor 3, 7, and 8. Victims of crime deserve protection, but not the repeal of constitutional rights. When the courts or the Legislature attempt to discern the meaning of Prop. 8, how would they do that, given its complexity? But voters are allowed to express their will. Voters had legitimate concern for personal safety. Legislators are also limited to passing legislation embracing only one subject.¹² What does it mean that a California initiative is limited to a single subject?

THE SECOND ROUND

After the election Ephraim asked me to argue the second case with him. We did our homework. We pulled down the dictionary.

“Single = one and no more; only one.”

“Subject = something thought about, discussed, studied.”

We were up a dark alley of questions and confronting a brick wall of uncertainty. No help from the dictionary.

The California history of the single-subject rule required that the provisions must be reasonably germane to each other. Voters are allowed to deal comprehensively with a subject. The single-subject rule required that an initiative be construed liberally. One initiative had been upheld although it enacted a wide spectrum of provisions amending the probate law. Our Morrison & Foerster team was composed of Linda Shostak, Andy Monach, and me. Linda took the lead on the brief. We stressed the difficulty any voter would have in deciding on how to vote. The rule was there to protect the voter from complex initiatives with smuggled provisions. We argued that Prop. 8 was not an allowable amendment. It was an impermissible revision. We counted heads. The court had split three-to-three the first time. The deciding fourth vote was Broussard’s concurring opinion providing that there was not enough time to consider the complexities and adding that after passage an initiative could be held to not have any effect. He said his concurrence did not preclude later review.¹³

THE SECOND ARGUMENT

The courtroom was packed. The importance of the case was palpable. The seven justices filed in solemnly, sat down, and looked out at us. We made four arguments. First, Prop. 8 was void because it repealed by implication various statutes not identified, in violation of article IV, section 9 of the state Constitution. Second, the bail amendment was void because it did not set out the text of what was repealed. Third, changes are not valid to the extent they will severely curtail basic governmental functions, including court procedures. And fourth, this proposition was so vast that it was an impermissible revision, not an allowable amendment. The matter was submitted. The justices filed out. Our team retreated to the basement for coffee and discussion. We felt good. We saw four favorable votes, Chief Justice Bird, and Justices Mosk, Broussard, and Newman who had spent his whole teaching life supporting civil rights.

THE SECOND DECISION

On September 2, 1982, in a decision by Richardson, the court upheld Prop. 8.¹⁴ Newman joined the majority. Chief Justice Bird, and Justices Mosk and Broussard dissented. Bird’s dissent ran 17 pages. Mosk, the former attorney general of California, ended his dissent this way:

“The goddess of justice is wearing a black arm-band today, as she weeps for the Constitution of California.”¹⁵

LOOKING BACK

As a former federal prosecutor, I agree that the victim’s right to be heard was overdue.

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But the curtailment of constitutional rights and mental defenses was a mistake because it obstructed truth finding. In every criminal case the question is: what happened here?

Restitution is often an absurd and illusory remedy unless the defendant still has money.

The harsh increasing of sentences that swept the state for so long eventually created such expense that cries for reform were heard in our Legislature.

What happened when later courts reviewed all these provisions is a proper subject for another article.

ONE LAST THING

Why is my name on this case? One Saturday morning, 50 criminal defense lawyers gathered from all over the state for a meeting of the board of directors of the California Attorneys for Criminal Justice. They are heroic, feisty lawyers, contrarian, and outspoken people who devote their professional lives to keeping the justice system honest. It has always been hard for me to imagine our democracy without them. We, as a group, signed up to be plaintiffs to stop Prop. 8. “Oh, I did that,” my friend Ephraim answered when I asked him why I was listed as

the lead plaintiff. On August 24, 2017, in *Briggs v. Edmund G. Brown*,¹⁶ the court cited *Brosnahan v. Eu* and upheld Prop. 66, which expedites judicial review of death penalty cases. Be careful what you sign. Your name may end up supporting things you strongly disagree with. ★

ENDNOTES

1. § 28, subd. (a).
2. Subds. (a), (c).
3. Subd. (d).
4. Subd. (e).
5. Subd. (f).
6. § 4 [adding § 25, subd. (a)].
7. § 5 [adding § 667, subd. (a)].
8. § 6 [adding §§ 1191.1, 3043].
9. § 7 [adding § 1192.7].
10. § 9 [adding § 6331].
11. *Brosnahan v. Eu* (1982) 31 Cal.3d 1.
12. Calif. Const., art. IV, § 9.
13. 31 Cal.3d at pp. 4–5.
14. *Brosnahan v. Eu* (1982) 32 Cal.3d 226.
15. 32 Cal.3d at p. 299.
16. (2017) 3 Cal. 5th 808.

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