2008 California Criminal Law Ballot Initiatives

INTRODUCTION

In the November 2008 election, Californians voted on three criminal law initiatives. Proposition 5, the "Nonviolent Offender Rehabilitation Act of 2008," was an effort to overhaul and expand the use of drug treatment programs in lieu of incarceration.[1] Proposition 6, the "Safe Neighborhoods Act," sought to increase and secure funding for law enforcement and probation departments and to enhance penalties for various gang-related offenses.[2] Proposition 9, the "Victims' Bill of Rights of 2008: Marsy's Law," aimed to augment and protect victims' interests in the criminal justice system.[3] Collectively, the three would have quite drastically reformed the state's criminal justice system. But California voters were less ambitious. While Proposition 9 passed, both Propositions 5 and 6 failed by considerable margins. This Article examines these results.

In Part I, I briefly introduce California's initiative process and its role in shaping the state's modern criminal justice policy. In Part II, I inspect the year's lone winner among criminal law initiatives. Although the results of the November 2008 election might have been far more sweeping, it is nonetheless significant that Proposition 9 passed. In Part III, I consider the losers. Propositions 5 and 6 represented important and divergent influences in California criminal law. A glance at each, and their similar fates, helps to situate the state's criminal justice system in its contemporary political context.

1. *See* Secretary of State, Official Voter Information Guide (2008), *Text of Proposed Law, Proposition 5: Nonviolent Drug Offense. Sentencing, Parole and Rehabilitation. Initiative Statute*, *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop5 (last visited May 20, 2009) [hereinafter Proposition 5].

2. *See* Secretary of State, Official Voter Information Guide (2008), *Text of Proposed Law, Proposition 6: Police and Law Enforcement Funding. Criminal Penalties and Laws. Initiative Statute.*, *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop6 (last visited May 20, 2009) [hereinafter Proposition 6].

3. Secretary of State, Official Voter Information Guide, *Text of Proposed Law, Proposition 9: Criminal Justice System. Victims' Rights. Parole. Initiative Constitutional Amendment and Statute.*, *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9 (last visited May 20, 2009) [hereafter Proposition 9].

I. THE INITIATIVE IN CALIFORNIA CRIMINAL LAW

The legislative initiative allows voters to bypass normal institutions of representative democracy and to more directly enact wide-ranging statutory and constitutional amendments.[4] Although critics emphasize its various faults,[5] others praise the initiative process as an exercise of the people's sovereign autonomy and the epitome of ideal democracy.[6] Without question, the initiative plays an important role in California politics and in setting criminal justice policy in particular.[7]

As in other states, the California initiative process originated out of socio-economic change and ensuing political inequality and dissatisfaction.[8] In the early twentieth century, many Californians perceived politics to be under the control of a corrupt "Octopus," less derisively known as the Southern Pacific Railroad.[9] As part of a grassroots effort against such corruption, Progressive Movement leaders helped bring direct democracy to California in 1911, complete with the initiative, referendum, and recall.[10] Almost immediately thereafter, Californians began to use the initiative process to address contemporary issues.[11]

In order to qualify an initiative for the ballot today, the proponent first submits a proposal to the California Attorney General (AG), who gives the initiative a short title and summary.[12] The initiative's proponent must then obtain signatures amounting to a certain percentage of the vote in the last gubernatorial election, depending on whether the initiative is a statutory or constitutional amendment.[13] If the Secretary of State verifies that the

4. CENTER FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 1 (2nd ed. 2008), *available at* http://www.cgs.org/index.php?option=com_content&view=article&id=164:PUBLICATIONS&catid=39:all_pubs&Itemid=72 [hereinafter CGS]. Beyond circumventing the legislature, initiatives can be used to tie legislators' hands by making statutory and constitutional amendments relatively permanent. Amendments to 2008's Proposition 5, for example, would have required a *four-fifths* majority in the state legislature. Proposition 5, *supra* note 1, § 54. Proposition 9 requires a three-fourths majority. Proposition 9, *supra* note 3, § 9.

5. Some contend that initiatives are often too long and complex, for example, or that they too easily amend the state constitution. CGS, *supra* note 4, at 95. *See also id.* at 8-16.

6. HAREL ARNON, A THEORY OF DIRECT LEGISLATION 21 (LFB Scholarly Publishing LLC 2008).

7. *See* generally, CGS, *supra* note 4.

8. ARNON, *supra* note 6, at 9.

9. CGS, *supra* note 4, at 3-4.

10. *Id.* at 31. Soon thereafter, Progressive leader Hiram Johnson became the governor. *Id.*

11. The initiative was used particularly frequently in California in its first three decades. During this period, there were thirty-four propositions related to morals, and fourteen propositions concerning prohibition or regulation of alcoholic beverages. *See* JOSEPH W. ZIMMERMAN, THE INITIATIVE: CITIZEN LAW-MAKING 2-3 (Praeger 1999).

12. CGS, *supra* note 4, at 4.

13. If the initiative is a statutory amendment, the proponent is required to obtain valid signatures amounting to five percent of the vote in the last gubernatorial election; if the initiative would amend the state constitution, that number increases to eight percent. *Id.* at 4.

proponent has collected the requisite number of signatures, the initiative is placed on the ballot and requires a simply majority to be enacted.[14]

As discussed below with regard to 2008's criminal law initiatives, the AG's summary can be a useful starting point for explaining an initiative's success or failure at the polls. Prior to elections, voters receive "Official Voter Information Guides" by mail.[15] These guides include initiatives' full text, analysis prepared by the Legislative Analyst Office (LAO), and arguments and rebuttal from private individuals.[16] But first, the guides include the AG's short summary, presented as an officially neutral description.[17] It is therefore not surprising that interested parties frequently scrutinize and challenge the AG's particular choice of words.[18]

The initiative plays an important role in shaping California policy across a wide range of topics, from water quality to taxation to the definition of marriage.[19] Its impact has been distinctly felt with regard to the state's modern criminal justice system. The statutory scheme governing California's current death penalty, for example, was adopted by initiative in 1978.[20] More recently, California voters enacted "Jessica's law" to increase punishment for "sexual predators" and to severely restrict where they can legally reside after release.[21] There have been several significant criminal law initiatives in between. Proposition 184 ("Three Strikes"), which passed in 1994, is particularly noteworthy, as it mandates life sentences for some habitual offenders.[22] Three Strikes is the archetype of an initiative that originated from citizens without any special power in the legislative or executive branches of state government,[23]

14. *Id.* at 5. It should be noted that circulating an initiative for signatures and qualifying it for the ballot can be very expensive and some maintain that money dominates the contemporary initiative process. "Qualifying an initiative for the statewide ballot is no longer a measure of general citizen interest as it is a test of fund-raising ability." *Id.* at 284. Professional signature-gathering firms claim they can qualify any measure for the ballot if paid enough money: "Any individual, corporation or organization with approximately $1.5 million to spend can now place any issue on the ballot and at least have a chance of enacting a state law." *Id.*

15. *See* Secretary of State, Voter Information Guide, *available at* http://www.voterguide.sos.ca.gov/ (last visited Apr. 6, 2009)

16. *See id.*

17. *See id.*

18. For a recent example, *see* Mike Swift, *Prop. 8 Supporters Sue Over Gay Marriage Ballot Language*, SAN JOSE MERCURY NEWS (Aug. 7, 2008).

19. *See* CGS, *supra* note 4, at 6-7.

20. *See* Cal. Dep't of Corrections and Rehabilitation, *History of Capital Punishment in California*, *available at* http://www.cdcr.ca.gov/Reports_Research/historyCapital.html (last visited Jan. 28, 2008).

21. *See* Proposed Text of Proposition 83, *reprinted in* CALIFORNIA SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE 127-38 (2006), *available at* http://vote2006.sos.ca.gov/voterguide/pdf/English.pdf (last visited Jan. 28, 2008).

22. The substantive provisions of Proposition 184 are codified in California Penal Code sections 667(e)(2)(A)(ii) and 1170.12(c)(2)(A)(ii).

23. FRANK ZIMRING, GORDON HAWKINS, SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 3-4 (Oxford University Press 2001). More specifically, it originated from Mike Reynolds, a Fresno resident and father of a murder victim.

but that set policy of potentially enormous consequence.[24]

Although Propositions 5 and 6 did not pass, Proposition 9's success made 2008 yet another important year in the initiative's history of reforming criminal justice in California.

II. PROPOSITION 9

In November 2008, California voters passed Proposition 9,[25] thereby enacting the "Victims' Bill of Rights of 2008: Marsy's Law."[26] According to its text, the initiative's purpose is to "[p]rovide victims with rights to justice and due process" and to "[i]nvoke the rights of families of homicide victims to be spared the ordeal of prolonged and unnecessary suffering . . ."[27] In this Part, I explain how Proposition 9 amends California's constitutional and statutory law regarding victims' rights and parole. I also consider its likely practical impact – fiscal and otherwise – as well as possible legal challenges.

A. Background

Enacting Proposition 9 was not the first time California voters attempted to protect the interests of crime victims with a legislative initiative. In 1982, voters passed Proposition 8 (also known as a "Victims' Bill of Rights").[28] Among its sweeping provisions, Proposition 8 amended the California Constitution to explicitly provide that the rights of victims "pervade the criminal justice system" and include the right to restitution, safety in public schools, and "truth-in-evidence."[29] In addition to these constitutional rights, Proposition 8 provided victims with statutory rights to be notified of, and to

Id. Mike Reynolds has remained actively involved with the initiative process in California criminal law. In 2008, he backed Proposition 6 and hosted on-line informational videos in its favor. *See* Safe Neighborhoods Act: Yes on Prop 6, Video, http://www.safeneighborhoodsact.com/Multimedia/Video/tabid/65/-Default.aspx (last visited Apr. 6 2009)

24. During the first ten years after the law was enacted, a total of 80,087 convicted felons in California had their prison sentences doubled (from, on average, two and one-half years to five years) because of their having been convicted of one prior serious or violent felony; in the same period, 7,332 three-strike defendants (i.e., defendants who were convicted of a new felony while having been convicted previously of two or more serious or violent felonies) were admitted to state prison. CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S THREE STRIKES LAW 16-17 (2004), *available at* http://www.threestrikes.org/cdaa/ThreeStrikes_0.pdf (last visited Mar. 16, 2009.)

25. Proposition 9 passed with 53.9% in favor and 46.1%. *See* SECRETARY OF STATE, STATEMENT OF VOTE, NOV. 4, 2008, GENERAL ELECTION 13, *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf (last visited Apr. 6, 2009).

26. Proposition 9, *supra* note 3.

27. *Id.* § 3.

28. 1 B.E. WITKIN ET. AL., CAL. CRIM. LAW § 102 (3d ed. 2008).

29. *See id*. at § 103. The provision regarding "truth-in-evidence," which survives Proposition 9's reforms fully intact, provides: "Except as provided by statute hereafter enacted by two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding… ." *Id.* at § 8.

appear and be heard at, both sentencing and parole hearings.[30]

In 1990, Proposition 115, or the "Crime Victims Justice Reform Act," also won voter approval.[31] Like Proposition 8, Proposition 115 represented an attempt to limit the rights of criminal defendants and prisoners in favor of victims and the public at large.[32] Among other reforms, it amended the state constitution to read: "In a criminal case, the People of the State of California have the right to due process of law and to a speedy and public trial."[33]

In addition to 1982's Proposition 8 and 1990's Proposition 115, state lawmakers have addressed crime victims' rights through the traditional legislative process. In 1986, legislators enacted Penal Code section 679.02, which provides a list of the rights victims enjoy, including those created by Proposition 8, noted above, and several others created by legislation.[34] The statutory scheme concerning victims' rights is explicitly intended to "ensure that all victims. . .are treated with dignity, respect, courtesy, and sensitivity."[35]

However, according to Proposition 9's findings and declarations, "Victims of crime continue to be denied rights to justice and due process."[36] During their campaign, for example, Proposition 9 proponents frequently invoked the initiative's namesake, Marsy Nicholas, who was murdered by her boyfriend when she was twenty-one-years-old. Days after Marsy's murderer was arrested, Marsy's mother saw him in the grocery store; Marsy's killer was free on bail, but Marsy's family was not even notified, let alone consulted.[37]

A federal court order stemming from *Valdivia v. Davis*, [38] a parolee class action suit regarding parole revocation proceedings, also motivated Proposition 9 supporters. Pursuant to a settlement of the class action suit, an injunction mandates a probable cause hearing within ten days of an alleged parole violation and resolution of revocation hearings within thirty-five days of the

30. *See* CAL. PENAL CODE § 1191.1 and CAL. PENAL CODE § 3043, respectively.

31. 1 B.E. WITKIN ET. AL., CAL. CRIM. LAW § 106 (3d ed. 2008)

32. *See id.* ("Perhaps the most important change that the initiative sought to effect was its declaration that constitutional rights of defendants in criminal cases must be construed in accordance with the United States Constitution rather than the Constitution of California."). This provision was declared unconstitutional in Raven v. Deukmejin, 52 Cal.3d 336 (1990).

33. CAL. CONST. art. I, § 29.

34. Other statutory rights listed in Penal Code section 679.02 include, for example, the right to be informed by the prosecuting attorney of the final disposition of the case, provided by Penal Code section 11116.10, and, upon request by the victim or the next of kin of the victim if the crime was a homicide, to be notified of an inmate's placement in a reentry or work furlough program, or notified of the inmate's escape as provided by Penal Code section 11155.

35. CAL. PENAL CODE § 679.

36. Proposition 9, *supra* note 3, § 2.

37. Official Voter Information Guide, *Arguments in Favor of Proposition 9* [hereinafter "Arguments in Favor of Proposition 9"], *available at* http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt9.htm (last visited May 20, 2009). It was Marsy's brother, Henry T. Nicholas III who financed most of the Yes on Proposition 9 campaign, with a contribution of just under $5 million. Secretary of State, Campaign Finance: Proposition 009, *available at* http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1304168&-session=2007.

38. 206 F. Supp. 2d 1068 (E.D. Cal. 2002).

charge.[39] Moreover, the injunction requires that parolees have legal counsel at such hearings.[40] As discussed below, Proposition 9 at least purports to change all of this.

B. The Law

Although Proposition 9 is unified by its design to protect the rights and interests of victims of crime, it is helpful to divide its major provisions into two parts. First, the initiative amends section 28 of Article I of the California Constitution to further protect and expand victims' rights. Second, Proposition 9 amends two Penal Code sections that govern the timing of, and victims' role at, parole consideration hearings, while adding one to limit the rights of parolees at parole revocation hearings. I examine these two categories in turn.

1. Section 28

Proposition 9 divides victims' constitutional rights into two categories. Subdivision (b) of section 28 is a list of seventeen rights that are "personally held and enforceable" by the victim.[41] Some of these rights are rather vague such as the right "to be treated with fairness and respect. . ." and the right "to be reasonably protected from the defendant," while others, like those considered in more detail, *infra*, are more specific and potentially more consequential. Before Proposition 9 passed, section 28 contained no such provision. Meanwhile, subdivision (f) lists rights that are "held in common with all of the People of the State of California."[42] These are enforceable only "through the enactment of law and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials."[43] In other words, neither victims nor anyone else is authorized to actually bring suit to force prosecutors and judges to respect them. Both categories include some rights that were already conferred to victims, and others that are altogether new.

Before examining the substantive constitutional rights that Proposition 9 either modifies or creates, however, it is important to note *who* will enjoy these rights. The word "victim" does not have any fixed meaning; although the legislature provides a definition within various statutory schemes, the meaning

39. *See* Stipulated Order of Permanent Injunctive Relief at 3-4, Valdivia v. Schwarzenegger, No. S-94-0671 LKK/GGH (E.D. Cal. Mar. 9, 2004), *available at* http://www.prisonlaw.com/pdfs/Val.pdf (last visited Mar. 16, 2009).

40. *Id.* at 3.

41. Proposition 9, *supra* note 3, § 4. Although it remains to be seen precisely how victims will proceed in attempting to enforce their rights (and how frequently), Proposition 9 does provide some specifics: "A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request." *Id.*

42. *Id.*

43. *Id.*

can be limited or expansive depending on its purpose.[44] Section 28 did not previously include a definition for this crucial term, but Proposition 9 is explicit:

> As used in this section, a "victim" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime.[45]

It is apparent that Proposition 9's drafters intended its protections to cover a group well beyond a narrow category of "technical" victims of realized crimes. Of course, this broad definition of "victim" is also somewhat ambiguous and may therefore be difficult for courts to interpret.

Given its expansive definition of "victim," the breadth of rights it confers to victims, and the explicitly authorized enforceability of these rights, Proposition 9's constitutional amendments regarding victims' rights may well have a meaningful impact on the justice system's everyday operations.

i. Right to Be Notified of, and Present and Heard at, Criminal Justice Proceedings

Although 1982's Proposition 8 already gave victims the statutory rights to be notified of and to be present and heard at sentencing and parole hearings, Proposition 9 places these rights explicitly in the California Constitution.[46] Moreover, pursuant to Proposition 9, victims have a constitutional right "to reasonable notice of *all* public proceedings . . . at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at *all* such proceedings."[47] Further, victims now have the constitutional right "to be heard . . . at *any* proceeding . . . involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue."[48]

These provisions are significant for at least two reasons. First, this set of rights is significantly expanded. With regard to the rights to be notified and to be present, they now apply to nearly every criminal justice proceeding reasonably imaginable. Furthermore, victims now have a constitutional right to be both present and heard at proceedings that take place well before conviction. As a result, it is conceivable that courts will have to cope with "victims"

44. *See* Travis Leete, *Proposition 9: Criminal Justice System. Victims' Rights. Parole. Initiative Constitutional Amendment and Statute*, CAL. INITIATIVE REV. 5, (Fall 2008), *available at* http://www.mcgeorge.edu/Documents/centers/government/Prop_9_2008.pdf (citing People v. Tackett, 144 Cal. App. 4th 445 (Cal. Ct. App. 2006)).

45. Proposition 9, *supra* note 3, § 4.

46. *Id.*

47. *Id.* (emphasis added).

48. *Id.* (emphasis added).

asserting their rights at proceedings that concern the merely accused. As a critical position paper published by the California Public Defenders Association points out, "Many of [the rights conferred by Proposition 9] accrue at a stage that must, in effect, assume as true what is yet to be proven: whether the person *is* a victim at all; indeed, often, whether a crime even occurred."[49] Proposition 9 offers no guidance as to how to determine who qualifies as a "victim" at early stages in the criminal justice process, without the benefit of a conviction, or even evidence for that matter.

In any event, expanding crime victims' rights to participate in and receive notification of these proceedings will likely increase administrative costs. Specifically, according to the LAO, these costs could result from lengthier court and parole consideration proceedings and additional notification of victims about these proceedings.[50]

Second, by elevating some existing victims' rights to the state constitutional level, Proposition 9 at least symbolically "levels the playing field" between victims' and defendants' rights.[51] On the other hand, of course, to the extent that the rights of criminal defendants are protected by the U.S. Constitution, these victims' rights must still give way pursuant to the Supremacy Clause.[52]

ii. Right to Refuse Discovery Requests

Next, Proposition 9 provides victims with a constitutional right "to prevent the disclosure of confidential information or records to the defendant . . . "[53] and the right "to refuse an interview, deposition, or discovery request by the defendant . . ."[54] Although victims are not generally required to acquiesce to defense investigation requests, there are instances where medical records and other confidential material may be accessed at the court's discretion.[55]

49. CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, POSITION PAPER ON PROPOSITION 9 (NOV. 3, 2008 ELECTION BALLOT), THE "VICTIMS' BILL OF RIGHTS ACT OF 2008: MARSY'S LAW" 7 (2008), *available at* http://www.cpda.org/Initiatives/Prop-9-Info/CPDA-PROP-9%20Sept-16-2008-9-30-am.pdf (last visited Mar. 16, 2009) [hereinafter Public Defenders Position Paper].

50. LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 9: CRIMINAL JUSTICE SYSTEM, VICTIMS' RIGHTS, PAROLE, INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE 6 (2008), *available at* http://www.lao.ca.gov/ballot/2008/9_11_2008.pdf (last visited Jan. 28, 2008) [hereinafter LAO, Proposition 9].

51. The Official Voter Information Guide's arguments in favor of Proposition 9 included the following in all capital letters: "California's Constitution guarantees rights for rapists, murderers, child molesters, and dangerous criminals. Proposition 9 levels the playing field, guaranteeing crime victims the right to justice and due process." Arguments in Favor of Proposition 9, *supra* note 37.

52. U.S. CONST. art. VI.

53. Proposition 9, *supra* note 3, § 4.

54. *Id.* § 4.1.

55. Leete, *supra* note 44, at 844 (citing CAL. EVID. CODE §§ 1043-47); *see also* NOOR DAWOOD, PRISON LAW OFFICE, PROPOSITION 9: SUMMARY AND ANALYSIS, 8 (2008), *available at* http://prisonlaw.com/pdfs/Prop9SummaryNov08.pdf (last visited Apr. 6, 2008) [hereinafter

Furthermore, if there is no alternative, an attorney may subpoena a witness in order to obtain discoverable information.[56] Proposition 9 purportedly abolishes such rights.

To the extent that these provisions will impact a criminal defendant's ability to try his or her case, they are significant. However, to the same extent that they do, these provisions may run counter to a defendant's constitutional rights. First, the blanket right to deny discovery, interview requests, or depositions, may violate basic constitutional rights to confront witnesses pursuant to the Sixth Amendment of the U.S. Constitution.[57] Second, an unequivocal right to refuse discovery, or to prevent the disclosure of confidential information, could be challenged on the basis that it contravenes the U.S. Supreme Court decision, *Brady v. Maryland*, which provides that the Due Process Clause of the Fourteenth Amendment requires the State to disclose evidence that is material either to guilt or punishment.[58] It remains to be seen whether Proposition 9's discovery provisions will withstand such challenges.[59]

iii. Right to Confer with Prosecutors

Among the rights newly created by Proposition 9 is the right to be kept informed by, and to confer with, a prosecuting agency regarding the arrest of a defendant, the charges filed, and any pretrial disposition of the case.[60] Although even absent this right, prosecutors may consider crime victims' views – or at least hear them – it is noteworthy that Proposition 9 provides victims with a *constitutional right* to such treatment. Moreover, prior to Proposition 9 the California Supreme Court had held that "neither a victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another."[61] This provision ostensibly changes that.

Some contend that this should be shocking. According to a *Los Angeles Times* editorial, for example:

> [Proposition 9] constitutionally upends the criminal justice system by involving victims' families in prosecutions . . . The American legal system intentionally and properly distances families from

Dawood].

56. Leete, *supra* note 44, at 8.

57. *Id.* at 14.

58. 373 U.S. 83, 87 (1963).

59. It is important to note, however, that Proposition 9 includes a severability clause: "If any provision of this act…is for any reason to be held invalid or unconstitutional, the remaining provisions which can be given effect without the invalid or unconstitutional provision…shall remain in full force and effect." Proposition 9, *supra* note 3, § 8. Therefore, even if the these discovery provisions are stricken altogether, Proposition 9's other amendments could still survive. This clause similarly applies, of course, to the other provisions that are subject to potential legal challenges, discussed below.

60. Proposition 9, *supra* note 3, § 4.

61. Dix v. Superior Court, 53 Cal. 3d. 442, 450 (1991).

> prosecutions; the goal is evenhanded justice. The level of punishment a criminal receives should not depend on how persistent a particular family is in pleading for punishment or blocking parole. Civilized justice rejects vendetta and instead places retribution in the hands of the entire society. It may seem depersonalizing, but that's a goal, not a defect, of our system.[62]

Of course, Proposition 9 supporters recognize that the legal system intentionally distances victims from the prosecutions; but it is part of the initiative's evident purpose to transform the victim's fundamental role in the criminal justice system.

This provision is also significant because it undercuts prosecutorial discretion, a hallmark of criminal procedure in the U.S. and California. A central task for prosecutors is to choose whom to prosecute by weighing the value of particular convictions, whether for purposes of deterrence, incapacitation, retribution, etc., against inevitably scarce resources, the strength of the case, and other considerations. Normally, and to the chagrin of some, such discretion is normally not reviewed, or even reviewable.[63] Courts are reluctant to get involved and prosecutors do not usually reveal the specifics of their thought processes. But this provision at least purports to allow one victim's voice to impact, and at least to some extent, *limit* prosecutorial discretion. Regardless of the practical impact of this provision, its aim is fairly radical.

According to Deputy District Attorney Michael O' Connor, head of the Law and Motions Division of the Alameda County District Attorney's Office, however, this provision will not change his office's existing practice of keeping victims informed and taking their opinions into account.[64] It is at least theoretically possible, however, that the provision will have an impact in other jurisdictions where prosecutors do not keep as informed.

iv. Right to Restitution

As noted above, one of the victims' rights already created by 1982's Proposition 8 was the right to restitution. Before Proposition 9, the law provided that courts should order restitution from convicted persons in every case in which a crime victim suffered a loss "*unless* compelling and

62. Editorial, *No on Proposition 9*, L.A. TIMES, Sept. 26, 2008, at 28.

63. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

64. Telephone Interview with Michael O' Connor, Deputy District Attorney and Head of the Law and Motions Division, Alameda County District Attorney's Office, in Berkeley, Cal. (Mar. 18, 2009).

extraordinary reasons exist to the contrary."[65] Proposition 9 removes the language that allows a court to use a measure of discretion in deciding whether to order restitution.[66] In other words, the California Constitution now provides that courts shall order restitution in *every* case in which a victim has suffered a loss, period. In addition, Proposition 9 prioritizes victim restitution. Money collected from a person ordered to pay restitution goes to the victim first, before it is applied toward other debts and penalties.[67]

These provisions are significant for at least two reasons. First, eliminating discretionary exceptions even where there are "compelling and extraordinary" reasons not to order restitution will obviously impact those newly ordered to pay and those who receive their restitution. According to Noor Dawood, the Juvenile Justice Policy Advocate at the Prison Law Office,[68] courts might otherwise choose not to order restitution, for example, if a defendant supports a disabled family member, or is personally disabled and unable to work.[69]

Second, these provisions may have significant fiscal consequences. Many state and local agencies receive funding from the fine and penalties collected from criminal offenders.[70] Because this initiative requires that all monies collected from a defendant first be applied to pay restitution, such funding could decline.[71] However, the LAO suggests such losses might be offset by the increase in the amount of restitution received directly by victims; more restitution payments means victims will need less assistance from health and social services programs, for example.[72]

v. Right to be Informed of Rights

Next, Proposition 9 amends section 28 to require that victims be informed of those rights enumerated in subsection (b), paragraphs (1) through (16).[73] It also creates a new Penal Code section that requires law enforcement agencies to provide victims with pamphlets describing their various "Marsy's Rights."[74] The Office of Victims Services has already made these available online through its website.[75]

There will of course be some minor administrative costs incurred by state

65. CAL. CONST. art. I, § 28(b) (prior to Proposition 9) (emphasis added).
66. Proposition 9, *supra* note 3, § 4.
67. *Id.*
68. The Prison Law Office is a non-profit prisoners' rights law firm that provides free legal services to California state prisoners, usually regarding conditions of confinement. *See* Prison Law Office, http://www.prisonlaw.com/about.html (last visited Apr. 5 2009).
69. Dawood, *supra* note 55, at 12.
70. LAO, Proposition 9, *supra* note 50, at 5.
71. *Id.*
72. *Id.* at 6.
73. Proposition 9, *supra* note 3, § 4.
74. *Id.* at § 6.
75. *See* Office of the Attorney General, Victim's Services, Marsy's Card, http://ag.ca.gov/victimservices/marsy.php (last visited Apr. 5, 2009).

and local governments in order to print and keep such pamphlets. Moreover, victims will likely invoke these rights with greater frequency as a result of being notified of them. Therefore, this seemingly trivial right, to simply be informed of one's rights, may turn out to be highly significant to the extent that it amplifies the effect of all the other rights conferred to victims. At least some crime victims, it is fair to speculate, would not otherwise be aware that they have a right to be heard at various proceedings, for example, or to confer with prosecutors, or that such rights are enforceable in court.

Like the right to confer with prosecutors, the right to be informed of one's rights is also significant for its symbolic value. For many victims' rights advocates and Proposition 9 supporters, it is absurd that criminal defendants receive notice of *their* constitutional rights, when victims do not at least receive similar treatment. Again, Proposition 9 is in part an attempt to "level[] the playing field . . . "[76]

vi. The People's Right to "Truth-in-sentencing"

One of Proposition 9's most important amendments adds a constitutional right that is not personally enforceable by individual victims, but "shared with all of the People of the State of California." In addition to a right to "truth-in-evidence," created by 1982's Proposition 8, 2008's Proposition 9 provides victims and the people of California with a right to "truth in sentencing."[77] Accordingly, sentences are to be carried out as ordered by courts, "and shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities." [78] Proposition 9 further directs the legislature to ensure sufficient funding to adequately house inmates for their full sentences.[79] This provision may therefore interfere with efforts to alleviate the severe overcrowding in state prisons.[80]

This provision is also likely to provoke legal challenges. In fact, just three months after the enactment of Proposition 9, a federal three-judge panel in San Francisco issued a tentative ruling ordering the California prison system to reduce the inmate population by up to 58,000 to facilitate the ongoing effort to raise the level of inmate healthcare to constitutional standards.[81] Although the state has vowed to appeal the ruling if it becomes final,[82] legal challenges are likely to ensue if the Supreme Court affirms the inmate population cap, since this would run directly against Propospition 9's prohibition on releasing

76. Arguments in Favor of Proposition 9, *supra* note 37.
77. Proposition 9, *supra* note 3, § 4.
78. *Id.*
79. *Id.*
80. Leete, *supra* 44, at 18.
81. Bob Egelko & Wyatt Buchanan, *Judges Tell State to Free Thousands in Crowded Prisons*, S.F. CHRON. (Feb. 10, 2009), at A1.
82. *Id.*

inmates early.

2. Parole

Proposition 9's second general category of reforms appears in a section entitled "Victims' Rights in Parole Proceedings."[83] The three major changes are as follows: first, Proposition 9 drastically increases the time period that lifers must wait for their next parole consideration hearing after a denial. Second, Proposition 9 expands victims' roles at such hearings. Third, Proposition 9 limits parolees' rights at parole revocation hearings, which will affect both lifers and non-lifers who are accused of violating a condition of their parole. I discuss each of these reforms in turn.

i. Length of Time Between Parole Consideration Hearings

Prior to Proposition 9, prisoners waited between one and five years for their next parole hearing.[84] After a denial, the Board scheduled the next hearing one year later by default, but could set it two to five years later if it found that it was not reasonable to expect parole would be granted in the intervening years.[85]

Proposition 9 amends Penal Code section 3041.5(b*)* and dictates that lifers can now expect to wait between three and *fifteen* years before their next hearing.[86] It also increases the default length of time between hearings from the one year minimum in the old scheme, to the fifteen-year maximum in the new one.[87] For those inmates serving life sentences, this is one of Proposition 9's most devastating provisions. Pursuant to Proposition 9, following a denial, the Board sets the next hearing fifteen years later, unless it finds "by clear and convincing evidence that the [relevant criteria] are such that consideration of the public and the victim's safety does not require a more lengthy period of incarceration for the prisoner than the additional years."[88] In that case, the Board sets the next hearing ten years later unless it finds, again by "clear and convincing evidence," that three, five or seven years will be sufficient.[89]

Besides the drastic change to these lengths of time, a few other details are noteworthy. First, Proposition 9 is explicit that the next hearing should be set fifteen years later unless no more than *ten* years is required. The Board may not choose eleven or twelve, for example. However, the Board may "in its discretion," after considering the views of the victim, advance the hearing to an earlier date if "a change in circumstances or new information establishes a

83. Proposition 9, *supra* note 3, § 5.
84. CAL. PENAL CODE § 3041.5(b) (prior to Proposition 9).
85. *Id.*
86. Proposition 9, *supra* note 3, § 5.
87. *Id.*
88. *Id.*
89. *Id.*

reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration."[90] It is unlikely that the Board would do this on its own. More likely, however, "an inmate may request that the board exercise its discretion to advance a hearing." [91] To do so, inmates must submit a written request to the board, and a copy to the victim, describing the change in circumstance or new information establishing that further incarceration is unnecessary.[92]

Also particularly noteworthy is the new standard by which the Board may deviate from the fifteen-year default. Prior to Proposition 9, the Board set hearings one year later unless "it was not reasonable to expect that parole would be granted." But pursuant to Proposition 9, the Board sets the next parole consideration hearing fifteen years later unless it finds "*by clear and convincing evidence*" that ten years or less would be sufficient.[93] Proposition 9 opponents believe that this higher standard makes it implausible that the Board will decrease the lapse between hearings below the fifteen-year default. As Dawood explains:

> With a current backlog of overdue parole consideration hearings already at nearly 1,500 cases, as well as growing pressure from prosecutors and victims' rights groups to increase the period between hearings, there is little likelihood that commissioners will significantly cut back denials below 15 years.[94]

To make matters worse for lifers, Proposition 9 applies the new rules even when the Board schedules a hearing following a reversal of a granted parole date by the Governor.[95] Prior to Proposition 9, after the Governor reversed a grant of parole, the Board was required to set the next hearing twelve months later. Now, under Proposition 9, the Board may not set a subsequent hearing any sooner than three years later *despite having already deemed the prisoner fit for parole*.[96]

The practical and fiscal impact of these provisions is disputed. Opponents to Proposition 9 maintain that it will be expensive to keep would-be parolees incarcerated for longer periods of time. Moreover, the population that these provisions affect is much older than the rest of the prison population. Keeping these older inmates incarcerated longer means even higher costs due to their

90. *Id.*

91. *Id.*

92. *Id.* However, prisoners may only make these requests once during a three-year period. *Id.*

93. *Id.*

94. Dawood, *supra* note 55, at 11.

95. The Governor has authority to reverse parole decisions pursuant to CAL. CONST. art. V, § 8; *See* Note, *In Re Lawrence and Hayward v. Marshall: Reexamining the Due Process Proectsions of California Lifers Seeking Parole*, 14 BERKELEY J. CRIM. L. 251 (2009), for a detailed discussion of the constitutional issues implicated in this process.

96. Proposition 9, *supra* note 3, § 5.

greater use of medical services.[97]

However, it is unlikely such costs would be substantial given how few lifers receive parole each year. Instead, Proposition 9 proponents argued that taxpayers spend millions on hearings for criminals who have no chance of release. For example, "Helter Skelter" inmates Bruce Davis and Leslie Van Houten, followers of Charles Manson, convicted of multiple brutal murders, have had 38 parole hearings in 30 years.[98]

The LAO agrees that these reforms may produce significant savings. It projects that the reduction in the number of parole hearings for lifers could save the state millions of dollars each year.[99]

ii. Victims' Role at Parole Consideration Hearings

As stated above, 1982's Proposition 8 gave crime victims the statutory right to be notified of, and to be present and heard at, parole consideration hearings. Proposition 9 places those rights explicitly in the California Constitution. However, Penal Code section 3043 continues to control the details of the implementation of those rights. Proposition 9 makes several reforms to this section of the Penal Code as well.

Before the passage of Proposition 9, the following parties had the right to appear and be heard at parole hearings: the victim, the victim's next of kin if the victim was deceased, and two members of the victim's immediate family, *or* two victim representatives.[100] The right to be heard included the right "to adequately and reasonably express their views concerning the crime and the person responsible."[101] Representatives were required to be either a family or a household member of the victim, but were not permitted to provide testimony if the victim or family members who were present or already providing statements. Any statement by a representative was to be limited to comments concerning the effect of the crime on the victim.[102]

Proposition 9 removes virtually all the limitations from the prior scheme. The following now have the right to appear: the victim, the victim's next of kin regardless of whether the victim had died, members of the victims' family (no longer limited to two immediate family members), *as well as* two representatives.[103] All of those who appear at a hearing, again including representatives, may express their views concerning "the prisoner and the case, including, but not limited to the commitment crimes, determine term commitment crimes for which the prisoner has been paroled, any other felony

97. Dawood, *supra* note 55, at 11.
98. Arguments in Favor of Proposition 9, *supra* note 37.
99. *See* LAO, Proposition 9, *supra* note 50, at 5.
100. CAL. PENAL CODE § 3043 (prior to Proposition 9).
101. *Id.*
102. Proposition 9, *supra* note 3, § 5.
103. *Id.*

crimes or crimes against the person for which the prisoner has been convicted, the effect of the crimes on the victim and the family, and the suitability of the prisoner for parole."[104]

Although the Board was already required to consider the victims' statements, Proposition 9 adds new language that explicitly requires the Board to consider the victims' "entire and uninterrupted statements." In a related provision, Proposition 9 amends section 3041.5(a), which provides that a prisoner is permitted to be present and to ask and answer questions, to include: "Neither the prisoner nor the attorney for the prisoner shall be entitled to ask questions of any person appearing at the hearing pursuant to subdivision (b) of section 3043."[105]

As with Proposition 9's constitutional amendment to expand victims' rights regarding a variety of criminal justice proceedings, this collection of provisions will likely mean state and local agencies incur additional administrative costs because hearings will be longer and more participants will require notification. But potentially more important will be the change in dynamic at parole hearings, particularly from an inmate's point of view. Victims and their representatives are now allowed to make innumerable and unrestricted statements while the prisoner and her attorney are barred from asking questions or interrupting this testimony. Furthermore, independently of Proposition 9, victims are already entitled by statute to provide the last statement at a parole hearing.[106] Proposition 9 thus precludes discretionary objections or rebuttal of any kind to such statements. According to the California Public Defender's Association, this provision constitutes an "obvious" due process violation because it leaves a parole applicant without recourse to correct a victim's mistake, exaggeration, or outright lie.[107]

iii. Parolees' Rights Regarding Parole Revocation

Finally, as a result of Proposition 9, there is an entirely new section of the Penal Code – section 3044.[108] This section provides that in order to "protect victims from harassment and abuse during the parole process," parolees who have their parole revoked shall not be entitled to any procedural rights beyond those listed in the section. These rights include: a probable cause hearing within fifteen days following his arrest, an evidentiary revocation hearing within forty-five days following his arrest, and the right to counsel at a revocation hearing *only if* the parolee is indigent *and* the circumstances (e.g., the complexity of the charges) render the parolee incapable of speaking

104. *Id.*
105. *Id.*
106. CAL. PENAL CODE § 3043.6.
107. Public Defenders Position Statement, *supra* note 49, at 8.
108. Proposition 9, *supra* note 3, § 5.

effectively in his own defense.[109] These provisions are particularly remarkable because all of them run counter to the *Valdivia* court order, described *supra*, Part II.A.

The *Valdivia* injunction requires a probable cause hearing within ten days of arrest,[110] but Proposition 9 allows fifteen. Where *Valdivia* requires a hearing to resolve revocation charges within thirty-five days after arrest,[111] Proposition 9 extends the timeline to forty-five days. And rather than providing an attorney at all parole revocation hearings,[112] Proposition 9 makes a parolee's right to counsel conditional on his indigence and other circumstances. Therefore, many critical commentators, as well as the Legislative Analyst's Office, have anticipated legal challenges to these provisions in the event that Proposition 9 passed.[113]

As predicted, just ten days after the election, the attorneys representing the parolees in *Valdivia* filed a motion challenging these provisions and claiming that Proposition 9 "purports to eliminate nearly all due process rights of parolees and directly conflicts with the protections put in place by the injunction and established constitutional law."[114] In response, Alberto Roldan, chief deputy general counsel of the Department of Corrections and Rehabilitation, said the will of the people should be enforced.[115] U.S. District Judge Lawrence K. Karlton has blocked enforcement of the provisions in question until there is a decision on the motion.[116]

C. Proposition 9's Success

As mentioned above, and discussed below with respect to the failures of Proposition 5 and Proposition 6, a look at the AG's official summary can often be useful to explain an initiative's success or defeat at the polls. In a time of economic turmoil and budget crises, it is worth noting that Proposition 9 did not *directly* spend or allocate funds. Thus, the AG's summary merely included, for example, that Proposition 9 "[r]equires notification to victim and opportunity for input during phases of criminal justice process, including bail, pleas, sentencing and parole" and "[r]educes the number of parole hearings to

109. *Id.*

110. *See* Stipulated Order of Permanent Injunctive Relief at 3-4, Valdivia v. Schwarzenegger, No. S-94-0671 LKK/GGH (E.D. Cal. Mar. 9, 2004), *available at* http://www.prisonlaw.com/pdfs/Val.pdf (last visited Mar. 16, 2009).

111. *Id.* at 4.

112. *See id.*

113. LAO, Proposition 9, *supra* note 50, at 4. *See also, e.g.*, Editorial, *No on Prop 9: Measure is Poorly Drafted and Wrongheaded*, SAN DIEGO UNION-TRIB., Sept. 25, 2008, at B6 ("Those who want to sock it to crooks no matter what the federal courts say need a reality check.").

114. Denny Walsh, *Prop. 9 Parole Limits Frozen After Legal Challenge*, SAC. BEE, Dec. 13, 2008, at 3A.

115. *Id.*

116. *Id.*

which prisoners are entitled."[117] In any event, however, it is likely that Proposition 9's success cannot be explained entirely by its fiscal effects or lack thereof. Rather, Proposition 9, like its precursors, represents California voters' concern and empathy for the victims of crime.

III. PROPOSITIONS 5 AND 6

In 2008, Californians soundly rejected both Proposition 5, the "Nonviolent Offender Rehabilitation Act of 2008," and Proposition 6, the "Safe Neighborhoods Act: Stop Gang, Gun, and Street Crime").[118] These initiatives were similar for their enormous ambition, but were otherwise poles apart. Proposition 5 would have expanded drug treatment programs and restructured the state's criminal justice bureaucracy by creating a new Secretary of Rehabilitation and Parole.[119] Proposition 6 would have increased and secured funding for law enforcement statewide, and also stiffened penalties for various gang-related offenses.[120] In this Part, I briefly describe each initiative and suggest explanations for their respective failures at the polls.

A. Proposition 5

i. Background and Summary

The primary aim of Proposition 5 was to reform California's policies toward nonviolent drug offenders.[121] However, the initiative was also an attempt to provide a partial solution to the severe congestion in California's prisons; according to its supporters, Proposition 5 was a "commonsense" way of reducing overcrowding because it would prevent nonviolent low-risk offenders from being incarcerated in the first place.[122]

Proposition 5 aside, California does provide some drug treatment for offenders that would otherwise be sent to jail or prison. Under Penal Code section 1000, for example, low level possession offenders who have no priors

117. For Proposition 9's official title and summary, see Secretary of State, Voter Information Guide 2008, Proposition 9 – Title and Summary, *available at* http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop9-title-sum.htm (last visited Apr. 6, 2009). It should also be noted, where the AG summary summarized the LAO's estimate of fiscal effects, it included the potential loss of hundreds of millions of dollars, but suggested that loss would be entirely "due to restricting the early release of inmates to reduce facility overcrowding." *Id.*

118. Proposition 5 failed with nearly 60 percent of voters opposed. Proposition 6 fared even worse, with nearly 70 percent opposed. *See* SECRETARY OF STATE, STATEMENT OF VOTE, NOV. 4, 2008, GENERAL ELECTION 13, *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf (last visited Apr. 6, 2009).

119. *See generally*, Proposition 5, *supra* note 1.

120. *See generally*, Proposition 6, *supra* note 2.

121. *See generally*, Proposition 5, *supra* note 1.

122. *See* Yes On Prop 5, Fact Sheets, http://www.prop5yes.com/category/facts/fact-sheets (last visited February 1, 2009).

can be diverted to treatment under a deferred entry of sentence arrangement.[123] For more serious offenders, there are drug courts which place participants in treatment and subject them to monitoring by specialized judges.[124] For the many offenders in between, Proposition 36 applies. Pursuant to the "Substance Abuse and Crime Prevention Act of 2000," first- and second-time possession offenders go to treatment instead of prison.[125] One of the chief aims of Proposition 5 was to build on Proposition 36's success.[126]

Proposition 5 would have created a three-track system to incorporate and systematize Penal Code section 1000, drug courts, and Proposition 36.[127] In other words, depending on factors including the seriousness of the offense and the offender's record, a defendant would be placed in one of three treatment diversionary systems, or "tracks." The tracks would have varied in eligibility requirements, period of participation, and when and how sanctions could be imposed on offenders who violate drug treatment program rules or commit new drug-related offenses.[128] Generally, the new tracks would have considerably expanded currently available services and significantly increased their funding.[129] For example, Proposition 5 would have removed the requirement that participants in Penal Code section 1000 programs pay for their own treatment and would have funded currently non-existent youth treatment programs.[130]

But Proposition 5 would have gone far beyond creating and funding drug treatment programs. Indeed, the initiative's far-reaching set of "purposes and intents" included preventing crime, promoting recovery, reducing prison overcrowding, and even "transform[ing] the culture of our state corrections system by elevating the mission of rehabilitation of prisoners and former inmates . . . "[131] With regard to the latter, Proposition 5 would have created a new Secretary of Rehabilitation and Parole. This new position would have been appointed by the Governor, placed alongside the Secretary of Corrections,

123. CAL. PENAL CODE § 1000; *See also* LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 5: NONVIOLENT DRUG OFFENSE. SENTENCING, PAROLE AND REHABILITATION. INITIATIVE STATUTE 2, *available at* http://www.lao.ca.gov/ballot/2008/5_11_2008.pdf (last visited Jan. 28, 2008) [hereinafter LAO, Proposition 5].

124. *See* LAO, Proposition 5, *supra* note 123, at 2.

125. Secretary of State, Official Voter Information Guide (2000), Proposition 36, *available at* http://vote2000.sos.ca.gov/VoterGuide/text/text_proposed_law_36.htm (last visited Feb. 1, 2009) [hereinafter Proposition 36].

126. *See* Yes On Prop 5, Fact Sheets, http://www.prop5yes.com/category/facts/fact-sheets (last visited February 1, 2009). According to supporters, Proposition 36 successfully expanded treatment capacity, placed about 36,000 people per year in treatment, achieved a treatment completion rate of about one-third, sharply reduced the number of drug offenders in prison, and saved almost two billion dollars. *Id.*

127. LAO, Proposition 5, *supra* note 123, at 2-4.

128. *Id.*

129. *Id.* at 5.

130. *Id.* at 6.

131. Proposition 5, *supra* note 1, § 3.

and charged with "primary responsibility for parole policies and rehabilitation programs, including all such programs operated by the department, whether inside prison or outside."[132] Currently, the California Department of Corrections and Rehabilitation has only one Secretary, who is responsible for overseeing the entire department including parole and—to the extent that they already exist—rehabilitation and diversionary programs. The addition of a new Secretary of Rehabilitation and Parole, who would be a hierarchical *equal* to the existing Secretary, therefore represented a substantial transformation of the state's corrections bureaucracy.

ii. Proposition 5's Failure at the Polls

To explain Proposition 5's defeat, it is particularly illuminating to compare its official summary[133] with that of 2000's Proposition 36. The latter's summary began: "Requires probation and drug treatment programs, not incarceration, for [various drug offenses]."[134] Only the last bullet point even mentioned that the initiative would "[a]ppropriate[] treatment funds through 2005-2006."[135] The AG did not include a dollar figure in terms of costs, despite the fact that Proposition 36 unequivocally appropriated sixty million dollars for the first year following its enactment and one-hundred-twenty million dollars thereafter during the identified period.[136] The summary of likely fiscal effects *only* mentioned the considerable savings that would result from decreased prison populations.[137]

Proposition 5's official summary, on the other hand, began as follows: "Allocates $460,000,000 annually to improve and expand treatment programs . . . "[138] Making matters much worse for Proposition 5 supporters was the AG's summary of the Legislative Analyst's estimate of fiscal effects; the first line said: "Increased state costs over time potentially exceeding $1 billion annually. . .."[139] These dollar figures were particularly likely to worry potential supporters given the nation's economic woes and California's budget crisis. Therefore, the fact that the AG's language emphasized the fiscal effects may have played a large part in Proposition 5's failure at the polls.

But there likely is more to the story of Proposition 5's defeat. Regardless

132. *Id.* at § 4.

133. For Proposition 5's official title and summary, see Secretary of State, Voter Information Guide, Proposition 5 – Title and Summary, *available at* http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop5-title-sum.htm (last visited Apr. 6, 2009) [hereinafter Official Summary, Proposition 5].

134. *Id.*

135. *Id.*

136. *Id.*; Proposition 36, *supra* note 125, § 7.

137. Secretary of State, Official Title and Summary, Proposition 36: Drugs. Probation and Treatment Program, *available at* http://vote2000.sos.ca.gov/VoterGuide/text/text_title_summ_36.htm (last visited Feb. 1, 2009).

138. Official summary, Proposition 5, *supra* note 133.

139. *Id.*

of how Proposition 9 and its predecessor, Proposition 36, were summarized by the AG, the fact is that Proposition 5 *would* have been much more expensive than Proposition 36.[140] Moreover, although the two initiatives were motivated by similar goals and supported by some of the very same organizations, Proposition 5 was much more than a simple extension or expansion of Proposition 36. Proposition 5 was considerably more bold. Indeed, according to the Drug Policy Alliance Network, a primary sponsor, Proposition 5 would have been "the most ambitious sentencing and prison reform in U.S. history."[141] The initiative's great ambition, and resultant complexity, may have contributed to its failure.[142]

Meanwhile, in addition to its ambitious sentencing and prison reform provisions, Proposition 5 would have considerably restructured the state's corrections bureaucracy. In this way, Proposition 5 affected more players with a stake in the status quo and met with substantial opposition as a result.[143] According to Margaret Dooley-Sammuli, the Drug Policy Alliance Network's deputy campaign manager for Proposition 5, the opposition of California's powerful correctional officer's union, the California Correctional Peace Officers Association (CCPOA), was particularly influential.[144] In short, the successful mobilization and efforts by Proposition 5 opponents likely played an important part in its defeat.

140. As stated above, Proposition 36 would have allocated 60 million dollars for the first year after its enactment, and 120 million for five years thereafter. Proposition 36, *supra* note 125, § 7. 125 Proposition 5, on the other hand, would have cost 460 million annually. Proposition 5, *supra* note 1, § 36. 1

141. *See* Michael Rothfeld, *Prop. 5 Would Overhaul Drug Offender Sentencing*, L.A. TIMES, Oct. 2, 2008, at 1.

142. An editorial written by two judges, for example, said "the complex proposal" had defects "too numerous to detail." David Rosenberg & Janet Gaard, Op-Ed, *Judges Believe Proposition 5's Flaws are Fatal*, SAC. BEE, Oct. 3, 2008, at A17. Later, even a sympathetic commentator agreed that Proposition 5's complexity may have been its downfall: "It…may be that the very conscientiousness of proponents worked against them. They constructed a careful and responsible initiative specifying various levels of treatment and punishment and careful mechanisms to ensure accountability. The result was a complex proposal that many voters undoubtedly did not understand completely, and voters tend to reject initiatives they don't understand." Editorial, *Drug Law Reform Progress*, ORANGE COUNTY REG., Nov. 7, 2008.

143. Particularly noteworthy persons who opposed Proposition 5 included, for example, Senator Dianne Feinstein, Senator Barbara Boxer, Attorney General Jerry Brown, and Former Governors Gray Davis, Pete Wilson, and George Deukmejian. No on Proposition 5, People Against Proposition 5, *available at* http://www.noonproposition5.com/endorsements.html (last visited February 1, 2009); *see also* Kimberly Edds, *Unusual Allies Combat Drug Offense Measure*, ORANGE COUNTY REG., Nov. 3, 2008 (noting the "unexpected alliance of elected officials teaming up with the state prison guards union to try to defeat the initiative").

144. Telephone Interview with Margaret Dooley-Sammuli, Proposition 5, Deputy Campaign Manager, Drug Policy Alliance Network, in Berkeley, Cal. (Mar. 18, 2009). Indeed, the CCPOA spent $1.8 million in opposing Proposition 5. *See* Secretary of State, Campaign Finance: People Against the Proposition 5 Deception, http://cal- access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1308198&session=2007&view=late1 (last visited Apr. 6, 2009).

B. Proposition 6

i. Proposition 6- Background and Summary

Proposition 6 originated within the normal legislative process. In February, 2007, Senators George Runner and Tom Harman introduced Senate Bill 657,[145] the "Safe Neighborhoods Act: Protect Victims, Stop Gang and Street Crime." The bill included the major provisions that were later incorporated into Proposition 6, described below.[146] However, the authors cancelled the very first hearing on the bill and Senator George Runner later submitted the same substance to the AG in the form of an initiative.[147]

According to its proponents, Proposition 6 was a "comprehensive anti-gang and crime reduction measure [to] bring more cops and increased safety to our streets and greater efficiency and accountability to public safety programs and agencies that spend taxpayer money."[148] To its opponents, Proposition 6 was essentially a money grab for law enforcement and probation departments.[149]

From any perspective, Proposition 6 was largely about funding. In total, the measure would have required state spending of at least $965 million for specified criminal justice programs beginning in 2009-10.[150] This would have amounted to a $365 million increase in the amount of money spent on criminal justice programs in the 2007-2008 budget.[151] Most of this additional funding would have been for local law enforcement activities, directed primarily to police, sheriffs, district attorneys, jails, and probation offices, in particular.[152] The rest of the new funds would have provided for local juvenile programs, offender rehabilitation, crime victim assistance, and other state criminal justice programs.[153]

A second significant set of Proposition 6 provisions targeted criminal behavior associated with gangs, primarily through increasing penalties for

145. See S.B. 657, 2007-2008 Leg., Reg. Sess. (Cal. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0651-0700/sb_657_bill_20080107_amended_sen_v98.pdf (last visited Mar. 17, 2009).

146. *See generally*, *id.*

147. *See* SB 657 Senate Bill – Status, http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0651-0700/sb_657_bill_20080204_status.html (last visited Mar. 17, 2009).

148. *See* Safe Neighborhoods Act, Yes on Proposition 6, http://www.safeneighborhoodsact.com (last visited Apr. 5 2009).

149. *See* No on Prop 6, The Facts, http://www.votenoprop6.com/facts_facts.html (last visited Apr. 5, 2009)

150. LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 6: CRIMINAL PENALTIES AND LAWS. PUBLIC SAFETY FUNDING. STATUTE 2, *available at* http://www.lao.ca.gov/ballot/2008/6_11_2008.pdf (last visited Jan. 28, 2008) [hereinafter LAO, Proposition 6].

151. *Id.*

152. *Id.* at 2-3.

153. *Id.*

various gang-related offenses.[154] These include crimes related to gang participation and recruitment, and intimidation of individuals involved in court proceedings.[155] The initiative also would have made it easier to prosecute juveniles as adults for various gang-related crimes.[156] Furthermore, Proposition 6 would have changed legal procedures to make it easier for local law enforcement agencies to bring lawsuits against members of street gangs in order to prevent them from engaging in criminal activities and make violation of such court-ordered injunctions a new and separate crime punishable by fines, prison, or jail.[157]

Like Proposition 5, Proposition 6 also would have made changes to California's criminal justice bureaucracy. For example, the initiative would have created a new Office of Public Safety Education and Information, which would have been charged with deterring crime, supporting victims, and encouraging public cooperation with law enforcement.[158] This office would have fulfilled these goals in part by disseminating public service announcements and running a website with information about crimes and victim information and safety.[159] In addition, the initiative would have established the California Early Intervention, Rehabilitation, and Accountability Commission, which would have had the responsibility of evaluating programs designed to deter crime through early intervention and to reduce recidivism through rehabilitation.[160]

ii. Proposition 6's Failure at the Polls

Proposition 6's failure was likely all about money. Once more, the AG's official title and summary is telling. Although Proposition 6 contained several provisions unrelated to its funding components, the summary began: "*Requires minimum of $965,000,000 each year to be allocated from state General Fund* for police, sheriffs, district attorneys, adult probation, jails and juvenile probation facilities."[161] Further, as stated above, not all of this money represented new spending, but the official summary, at least at first impression, was not entirely clear in this regard.

In any event, and apart from of the AG's summary, Proposition 6 *did* have an enormous price tag. When combined with the failure of the U.S. economy and California's budget crisis, it is likely that an explanation for Proposition 6's defeat begins and ends with voters' financial concerns.

154. Proposition 6, *supra* note 2, § 6.
155. LAO, Proposition 6, *supra* note 150, at 3.
156. *Id.* at 6.
157. *Id.* at 5.
158. Proposition 6, *supra* note 2, § 4.
159. *Id.*
160. *Id.*
161. Secretary of State, Proposition 6 – Title and Summary, *available at* http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop6-title-sum.htm (last visited Apr. 6, 2009)

Proposition 6's defeat is particularly interesting, however, because law enforcement and "tough on crime" policies usually fare well with voters. However, previous initiatives that fit this category did not directly allocate money from the general fund. Neither Proposition 184, for example, nor Jessica's Law, had funding components. Of course, they had fiscal effects including significant costs, but they had no *direct* allocation of funds. In this way, Proposition 6 was a different brand from the usual law-enforcement-friendly initiative.

As a result, organizations that observers would not expect to take a stand against a law enforcement initiative, such as teachers and firefighters, came out in opposition.[162] More money from the general fund allocated to law enforcement would mean less funding for schools and fire departments. The success of initiatives like Three Strikes and the very recent Jessica's Law indicate that contemporary Californian voters are eager to support law enforcement and efforts to get "tough on crime." But the defeat of Proposition 6 suggests they are less enthusiastic when there is a significant cost to schools and other important services, at least not when those costs are explicit and direct, and at least not in the present dire economic climate.

CONCLUSION

Proposition 9 made 2008 yet another year in which the initiative process significantly reformed California's criminal justice system. Its enactment is part of a pattern of shifting views in California concerning the victims' proper role in the criminal justice system and its proceedings. Voters expressed this shift through the initiative process with 1982's Proposition 8, 1990's Proposition 115, and now with 2008's Proposition 9.

The question going forward is whether several of Proposition 9's provisions will face legal challenges and whether those challenges will succeed. As described *supra*, several provisions—those that conflict with the *Validivia* court order—are already facing opposition in court, and several others are likely to be similarly tested in the future. As Los Angeles County District Attorney Steve Cooley remarked, "huge chunks" of it might be found unconstitutional.[163] As a result, the Marsy's Law of the future may be significantly pared down from the Marsy's Law actually enacted by 2008's Proposition 9.

Meanwhile, Propositions 5 and 6 provided glimpses of the divergent directions in which political interests are seeking to take California criminal law. Groups like the Drug Policy Alliance Network want to build on the

162. *See* No on Prop 6, Our Coalition, *available at* http://www.votenoprop6.com/coalition_main.html (last visited Feb. 1, 2009).

163. Eric Bailey & Michael Rothfeld, *Election 2008: California Elections*, L.A. TIMES, Nov. 6, 2008, at 1.

ostensible successes of Proposition 36 and continue their efforts to drastically reform the way the state prosecutes and sentences drug offenders. Meanwhile, Senator George Runner and others aim to direct huge sums to law enforcement and to deter gang-related crime by threatening offenders with harsher sentences. Both camps see room for improvement in the state's criminal justice bureaucracy. Their respective failures at the polls, however, suggest such sizeable ambitions are effectively on hold until the economy improves.