

California Initiative Review

Proposition 9: Criminal Justice System. Victims' Rights. Parole. Initiative Constitutional Amendment and Statute.

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Analysis of Proposition 9
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I. EXECUTIVE SUMMARY

In 1982, responding to concerns that the criminal judicial system often overlooked the needs of crime victims, the people of California passed Proposition 8. The enactment of Proposition 8 amended Article I, section 28, of the California Constitution, codifying what is presently known as “The Victims’ Bill of Rights” (“VBR”). Cal. Const. art. I, § 28. Proposition 9 now seeks to amend the current VBR, and would create what is known as the “Victims’ Bill of Rights Act of 2008: Marsy’s Law.” Secretary of State, Official Voter Information Guide, *Text of Proposed Law, Proposition 9: Criminal Justice System. Victims’ Rights. Parole. Initiative Constitutional Amendment and Statute*. <http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop9> (accessed Oct. 20, 2008) [hereinafter Proposition 9].

If adopted, Proposition 9 would modify the California Constitution, amending and adding substantial provisions to Article I, section 28. It would also alter California’s statutory scheme by amending two statutes, Penal Code sections 3041.5(a) and 3043, and by adding two others, Penal Code sections 3044 and 679.026. Substantively, this initiative will place more restrictions on sentencing, limit parole proceedings, and condense the rights of criminal defendants, convicted persons, and parolees. Contemporaneously, Proposition 9 would enlarge the rights of crime victims and expand the scope of the VBR.

Ratification of Proposition 9 will have considerable impact on California’s justice system; however, some of its multifarious changes would result only in marginal changes in the law. For example, in the interest of school safety, this initiative would augment the definition of schools by incorporating “*community colleges, colleges, and universities.*” Proposition 9 § 28(a)(7) (emphasis added). Therefore, the following analysis will focus predominately on the major substantive changes proposed by Proposition 9. According to the Legislative Analyst’s Office (“LAO”), the main changes of Proposition 9 are threefold. Primarily, this measure would: “(1) expand the legal rights of victims and the payment of restitution by criminal offenders; (2) restrict the early release of inmates; and (3) change the procedures for granting and revoking parole.” LAO, *Proposition 9: Criminal Justice System, Victims’ Rights, Parole, Initiative Constitutional Amendment and Statute*. 1, http://www.lao.ca.gov/ballot/2008/9_11_2008.pdf (July 2008) [hereinafter LAO, *Proposition 9*].

If adopted, Proposition 9 is likely to be challenged on the grounds that it conflicts with both federal and state constitutional provisions. Notwithstanding conflicts with preexisting law, Proposition 9 could place significant financial burdens on the Legislature, the California Department of Corrections, California courts, and the taxpayers. Alternatively, if it succeeds in reducing parole hearings, and abolishes the right to state appointed counsel, ratification of Proposition 9 could result in significant savings.

II. THE LAW

A. Existing Law

Over the past 60 years, the law regarding victims' rights has undergone dramatic transformation, especially in California. "In 1965, California became the first state in the nation to create a crime victim compensation program." *Symposium, Leadership Issues in Criminal Justice Policy: Victims' Rights and Services: A Historical Perspective and Goals for the Twenty-First Century*, 33 McGeorge L. Rev. 673, 675 (2002). Again, in 1972, California was among three pioneering states to enact a victims' assistance program when it founded Bay Area Women Against Rape. *Id.* In 1974, Chief Probation Officer Jim Rowland, of Fresno County, successfully implemented the first "victim impact statement," providing judges with deeper insight regarding the impact of crime on victims. *Id.*

Despite apparent progress, the resounding sentiment of the State was that victims were still overlooked and mistreated by California's criminal justice system. In response to this frustration, and in order to provide more effective protection to crime victims, California lawmakers created a comprehensive set of victims' rights that could be applied across the State. Proposition 8, voted on and approved in 1982, codifies what is known as "The Victims' Bill of Rights." Cal. Const. art I, § 28. In 1990 voters passed Proposition 115, the "Crime Victims' Justice Reform Act," adding two significant provisions to the California Constitution: Article I, section 14.1, eliminating post indictment preliminary hearings; and Article I, section 29, giving the public the right to due process and a speedy trial. Cal. Const. art I, §§ 14.1, 29 (2008) (Notes of Decisions 1990).

Today, the law regarding victims' rights involves a complex amalgamation of constitutional and statutory provisions that encompass more than just the rights of victims; integrating victims' rights, public rights, the rights of the accused, the rights of the convicted, and the rights of parolees. Due to such intricacy, Proposition 9 is best parsed into the following two categories: (1) victims' rights and restitution; and (2) sentencing, parole and parole revocation.

1. Victims' Rights and Restitution

Though not constitutionally defined, the Legislature commonly provides a definition of the term "victim" within a statutory scheme. *People v. Tackett*, 144 Cal. App. 4th 445 (3d Dist. 2006). One statute describes a victim as "any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated." Cal. Pen. Code Ann. § 136(3) (Lexis 2008). Title 17 of the California Penal Code simply states, a victim is "a person against whom a crime has been committed." Cal. Pen. Code Ann. § 679.01 (Lexis 2008). Each statutory provision that incorporates the phrase, "victim of a crime," offers a slightly nuanced characterization of the term victim. Whereas some statutes rely on the specific language of a crime to define victim, most statutes in the criminal law context, such as the foregoing, rely on broad language to encompass crimes in general.

As the law stands, victims have the right to be notified, as well as the right to appear and to be heard at sentencing and parole proceedings. *E.g.* Cal. Pen. Code Ann. §§ 679.02(a)(3)-(5), 1191.1, 3043(a)-(e) (Lexis 2008). Similarly, notice requirements regarding release and re-entry

programs are regulated by California's Penal Code. *See generally* Cal. Pen. Code Ann. §§ 11155-11158 (Lexis 2008).

Victims are also entitled to have family members or representatives attend and testify at sentencing and parole hearings. By statute, parents or guardians of a victim may attend a sentencing hearing if the victim is a minor. Cal. Pen. Code Ann. § 1191.1 (Lexis 2008). If the victim is deceased, section 1191.1 grants the next of kin the right to attend a sentencing hearing. *Id.* Correspondingly, Penal Code section 3043(b) permits the victim's next of kin, two members of their immediate family, or two representatives to appear personally or by counsel at a parole hearing. Cal. Pen. Code Ann. § 3043(b) (Lexis 2008). With regard to sentencing testimony, attending parties retain a right to "reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution." Cal. Pen. Code Ann. § 1191.1 (Lexis 2008). Likewise, section 3043 also guarantees individuals attending a parole hearing an opportunity to provide a statement. Cal. Pen. Code Ann. § 3043 (Lexis 2008). In addition to the limited number of people that may attend, there are certain restrictions on the content of testimony provided at a hearing. For example, if a statement is provided by a representative or next of kin, the content of that statement is limited to comments "concerning the effect of the crime on the victim." *Id.* Not only are attendees given an opportunity to provide statements, under the current statutory scheme, courts must take into account these statements for the purposes of determining both sentencing and parole. Cal. Pen. Code Ann. §§ 1191.1, 3043(e) (Lexis 2008).

Finally, restitution is compulsory under the California Constitution, "unless compelling and extraordinary reasons exist to the contrary." Cal. Const. art. I, § 28(b). This mandates restitution from the convicted person regardless of the sentence; though, under the current scheme, the court reserves discretionary power to determine whether there are circumstances that justify relieving the defendant of this obligation. Cal. Const. art. I., §§ 28(a), (b).

2. Sentencing, Parole, and Parole Revocation

Because sentencing, parole, and parole revocation hearings each involve a distinct liberty interest, it is important to distinguish the three proceedings. Sentencing typically occurs at the conclusion of a trial, and often results in imprisonment. During incarceration, a prisoner may be granted parole, which means a conditional release from prison. In contrast, a parole revocation hearing occurs when a parolee is accused of violating a condition of parole, and is thus in jeopardy of returning to prison.

Sentencing and parole guidelines are primarily controlled by constitutional and statutory authority. The Penal Code, for instance, augments the federally protected right to counsel by providing a statutory right to counsel at any hearing for the purpose "of setting, postponing, or rescinding a parole release date of a prisoner under a life sentence." Cal. Pen. Code Ann. § 3041.7 (Lexis 2008). Additionally, pursuant to statute, a prisoner retains the right to attend and participate in his or her parole hearing. Cal. Pen. Code Ann. §§ 3041.5(a)(1)-(5) (Lexis 2008). The prisoner also has the right to ask and answer questions, as well as an opportunity to speak on his or her behalf at a parole hearing. *Id.* § 3041.5(a)(2). This section also provides time

regulations regarding a prisoner's right to review files, notification of the Parole Board's decision, re-hearing, and other scheduling procedures. *Id.*

Case precedent also helps shape the law regarding parole and parole revocation hearings. One opinion, issued by the U.S. Supreme Court, establishes the following minimal due process guarantees for parolees at a parole revocation hearing:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

A recent California decision, involving a federal court order issued in response to a parolee class-action suit, also provides critical due process guidelines for parolees. LAO, *Proposition 9, supra* at 4; *accord. Valdivia v. Schwarzenegger*, 548 F. Supp. 2d 852 (E.D. Cal. 2008); *Valdivia v. Davis*, 206 F. Supp. 2d 1068 (E.D. Cal. 2002). In order to determine whether there is probable cause to detain a parolee while the issue is resolved, *Valdivia* ensures a probable cause hearing within 10 days of being charged with a parole violation. *Id.* This federal court order also mandates resolution of revocation charges within 35 days of being arrested for parole violations. *Id.* Finally, and perhaps most critical, the *Valdivia* edict requires that all parolees be provided legal counsel. *Id.*

B. Proposed Changes and Effects

1. Victims' Rights and Restitution

Under Proposition 9's amended VBR, the term "victim" would be constitutionally defined as follows:

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 victim who is deceased, a minor, or physically or psychologically incapacitated. The term "victim" does not include a person in custody for an offense, the accused. Proposition 9 § 28(e).

Broadening the definition of "victim" will make these rights available to a larger class of people. This may have considerable impact given the breadth of victims' rights under Proposition 9.

In general, Proposition 9 would: (1) protect victims from individuals accused of committing crimes against them; (2) provide the victim the right to a speedy trial; (3) provide

that the safety of the victim and the victim's family will be considered in fixing the amount of bail and release conditions for the defendant; (4) maintain that the safety of the victim, the victim's family and all members of the public shall be taken into consideration when addressing parole; (5) make restitution mandatory, repealing the section allowing discretionary exceptions; and (6) mandate that any money collected by law enforcement or courts must first be applied to restitution. *Id.* § 28; *see also* LAO, *Proposition 9, supra* at 1-2.

Among the paramount changes to victims' rights, Proposition 9 would expand the right to be notified, to attend, and to be heard at various criminal proceedings. Extinguishing previous restrictions, Proposition 9 extends these rights to all public criminal proceedings, including the following: post arrest proceedings, post conviction hearings, delinquency hearings, and "any proceeding in which a right of the victim is at issue." *Id.* Victims would also be eligible to receive notification 90 days in advance of a parole consideration hearing, as opposed to the 30 day notice presently granted. LAO, *Proposition 9, supra* at 3.

Proposition 9 would also establish an absolute right to "refuse an interview, deposition, or *discovery request* by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant." Proposition 9 § 28(b)(5) (emphasis added). Further, victims would be allowed to *prevent the disclosure of confidential information.* *Id.* § 28(b)(4) (emphasis added). A victim does not generally have to acquiesce to defense investigation requests; however, in certain instances a victim's medical records and other confidential material may be accessed at the court's discretion. *E.g.*, Cal. Evid. Code Ann. §§ 1043-47 (Lexis 2008); *see also* Noor Dawood, Prison Law Office, *Proposition 9: Summary and Analysis*, 8, 12 <http://www.prisonlaw.com/pdfs/Prop9Summary.pdf> (September 2008) [hereinafter Dawood, *Proposition 9*] (summary created "with technical input from *UnCommon Law* and *Rosen Bien and Galvan LLP*"). If there is no alternative to obtaining information, an attorney may subpoena a witness or discoverable material. Proposition 9 would abolish such rights. Some opine that, while this provision may have nominal effects on criminal proceedings, the consequences in civil proceedings could be significant. Dawood, *Proposition 9, supra* at 8. Nonetheless, legal battles are foreseeable as a result of an absolute foreclosure on discoverable information.

Proposition 9 also purports to furnish victims a constitutional right to "reasonably confer with the prosecuting agency...regarding, the arrest of the defendant...the *charges filed, the determination whether to extradite* the defendant, and upon request, to be notified of and informed before any pretrial disposition of the case." Proposition 9 § 28(b)(6) (emphasis added). This could have dramatic effect on the criminal justice system. In criminal proceedings, the prosecuting attorney represents the State. Ultimately, the State brings the charge(s) against a defendant. Requisite victim participation may complicate prosecution efforts. Coupled with a high degree of emotional investment, a victim is unlikely to have the legal sophistication required to prosecute a defendant. For example, while a more serious charge may carry a heavier penalty, thus appealing to a victim, an attorney presumably knows if the evidence is sufficient to sustain such a charge. If the prosecution pursues a more serious charge at the insistence of the victim, but lacks sufficient evidence to support the charge, a jury could acquit the defendant.

Finally, it is worth noting that specific to the proposed Constitutional amendments, ratification of Proposition 9 would add a provision stating that "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.” Proposition 9 § 28(c)(1). Those rights under subsection (b) include, but are not limited to, the right to be reasonably protected from the defendant or others acting on the defendants behalf, the right to a speedy trial, the right to refuse discovery, the right to confer with the prosecution, and the right to restitution. While it does not provide for compensatory damages, Proposition 9 clearly sets forth a legal remedy in order for victims of crime to enforce subsection (b) of the amended VBR.

2. Sentencing, Parole, and Parole Revocation

With respect to sentencing, Proposition 9 establishes that victims have a right to “expect that persons convicted...are *sufficiently punished in both the manner and the length of the sentences.*” Proposition 9 § 28(a)(5) (emphasis added). Under Proposition 9, “*punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this state.*” *Id.* (emphasis added). In conjunction with this provision, Proposition 9 incorporates a subsection decreeing that sentences “shall be carried out in compliance with the courts’ sentencing orders, and *shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities.*” *Id.* § 28(f)(5) (emphasis added). Under this provision, the “legislative branch shall ensure sufficient funding to adequately house inmates for the full terms of their sentences, except for statutorily authorized credits which reduce those sentences.” *Id.* The effects of these sentencing provisions would limit courts’ discretionary power to determine the length and severity of a sentence, and restrict its ability to consider mitigating circumstances that may lessen a sentence. As a result of Proposition 9, sentences may increase, while parole and release opportunities become less frequent. This could in turn increase costs and compound prison overcrowding.

Of the changes envisaged by the proponents of Proposition 9, adjustments to parole and parole revocation hearings are critical. Presently, individuals facing life sentences typically wait between 1 and 5 years for another parole hearing. Proposition 9 would extend the time between hearings from between 3 to 15 years. However, inmates would be able to periodically request that the board advance the hearing date. LAO, *Proposition 9, supra* at 3-4. In terms of general parole revocation procedures, parolees are presently entitled to a probable cause hearing within 10 business days after being charged with violation of parole, this initiative would extend that to 15 days. *Id.* at 4. Parolees are also entitled to a hearing to resolve revocation charges within 35 days and this measure would extend that to 45 days. *Id.*

While there is currently a cap on the number of people allowed to testify at various hearings, Proposition 9 would alleviate most of these restrictions. Proposition 9 § 3043(b)(1) (emphasis added). Proposition 9 alters various provisions to accord victims, family, representatives, or their counsel the right to appear and provide statements at parole hearings. *Id.* § 3043. The measure also includes a provision permitting the court, in its discretion, to allow any person harmed by the defendant/offender to be heard at sentencing and parole hearings. *Id.* § 28(d). Proposition 9 thereby forestalls potential limits on the number of attendees that may be heard at parole and opens the door to virtually anyone willing to testify.

Proposition 9 would also broaden the content of statements made at parole hearings. For example, this initiative would allow those attending a parole hearing to express their views with respect to “the prisoner and the case, including, but not limited to the commitment crimes, determinate term commitment crimes for which the prisoner has been paroled...the person responsible...and the suitability of the prisoner for parole.” *Id.* § 3043(b)(2). This provision excludes any qualifying language before the phrase, “the person responsible,” which suggests that an individual may discuss anything remotely related to the prisoner. Effectively, Proposition 9 would grant wide latitude regarding the content of parole hearing testimony.

Furthermore, this initiative would explicitly prohibit the prisoner and his or her attorney, from asking questions of any person at a parole hearing pursuant to subdivision (b) of section 3043. *Id.* § 3041.5. Proposition 9 would also proscribe any interruption of testimony given by the victim(s), next of kin, immediate family members, and the representative of the victim. *Id.* § 3043(d). In effect, Proposition 9 would allow innumerable, unrestricted statements to be made at parole hearings, while simultaneously barring the prisoner and her attorney from asking questions or interrupting this testimony. *Id.* § 3041.5. While victims are entitled to provide the last statement at a parole hearing, the person in charge of the hearing has the discretion to redress objectionable testimony. Cal. Pen. Code Ann. § 3043.6 (Lexis 2008). Consequently, Proposition 9 would preclude discretionary objections or rebuttal to any statements made. Dawood, *Proposition 9, supra* at 5, 12.

Proposition 9 would also implement various restrictions on parole revocation hearings by adding Penal Code section 3044, purporting to eradicate all other procedural rights except those provided in section 3044. This provision states in pertinent part:

[a] parolee shall, upon request be entitled to counsel at state expense *only if*, considering the request on a case-by-case basis, the board or its hearing officers determine: (A) the parolee *is indigent*; and (B) considering the *complexity of the charges...defense...mental or educational capacity, he or she appears incapable of speaking effectively* in his or her own defense.” Proposition 9 §3044(a)(3) (emphasis added).

Section 3044 would also stipulate that “admission of...recorded or hearsay evidence of a victim or percipient witness shall not be construed to create a right to confront the witness at the hearing.” *Id.* § 3044(a)(6). Thus, Proposition 9 imposes a restraint on courts’ interpretive powers to construe the constitutional right to confront a witness.

III. DRAFTING ISSUES

A. Ambiguity in Language

Normally, courts will apply the same method to determine the meaning of an initiative as they would when interpreting statutes. *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016, 1037 (2007). The court must “turn first to the language of the [initiative], giving the words their ordinary meaning.” *Id.* *Kempton* further asserted,

“[t]he...language must also be construed in the context of the statute as a whole,” taking into account the overall scheme. *Id.* at 1037 (citing *People v. Rizo*, 22 Cal. 4th 681, 685 (2000)). Where there is ambiguity in the language of the measure, “[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.” *Id.* (citing *Legislature v. Deukmejian* 34 Cal. 3d 658, 673 (1983)). The California Supreme Court further asserts that, when dealing with ambiguity of language, “we consider extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative.” *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 4th 431, 445 (2008).

The expansive definition of “victim” could present a challenge with respect to interpretation. It is particularly significant because, should Proposition 9 pass, the status as victim would guarantee substantial procedural rights. Proposition 9 defines victim as “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.” Proposition 9 § 28(e) (emphasis added). Arguably, the phrase can be read narrowly, limiting its scope to individuals contemporaneously affected by the commission of a crime, or broadly, including tangentially affected parties that are far removed from the actual crime. More importantly, however, what constitutes “threatened” under the proposed scheme is not readily apparent. It is difficult to extrapolate how a court would construe the term “threatened,” given what little is discussed about it in the text, arguments, and analysis of Proposition 9. “Threatened” is ostensibly akin to the term “attempted,” implying possibility or potential. Given the breadth of Proposition 9, this definition of victim could potentially apply to anyone possibly affected by a crime, irrespective of how remote the impact.

B. Severability

Proposition 9 includes a severability clause providing that if any section, or the application of any provision, is determined to be invalid or unconstitutional, the remaining provisions that can “be given effect without the invalid or unconstitutional provision...shall remain in full force and effect.” Proposition 9 Section 8.

The inclusion of a severability clause is not alone dispositive. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821 (1989). Instead, courts consistently apply a three-part test to determine whether an invalid provision in a given measure may permissively be severed from the initiative. Severance is permissible if it is “grammatically, functionally, and volitionally separable.” *Gerken v. Fair Political Practices Comm.*, 6 Cal. 4th 707, 714 (1993). In order to satisfy the grammatically severable prong, the “*language of the statute* [must be] *mechanically severable*, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words.” *Peoples Advocate v. Superior Court*, 181 Cal. App. 3d 316, 330 (3rd Dist. 1986) (italics original). Concomitant to the severable section being “grammatically complete and distinct,” the functional test requires that removal of any such section must not impair the integrity of the remaining text. As *Peoples Advocate* explains, the remaining text must be capable of being given full effect without the omitted portion; the remaining portion must not be “rendered vague” by the removal of a section, nor be “inextricably connected to them by policy.” *Id.* at 331-32. Finally, the remaining initiative must be that which

the legislative body would have adopted without the omitted portions. Relying on *People's Advocate*, the Court in *Gerken* articulated this test to mean: "whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." *Gerken, supra*, 6 Cal. 4th at 714-15. Without the omitted portion, the measure must still achieve its original intended purpose. Because Proposition 9 includes a severability clause, the analysis established under *Deukmejian*, *People's Advocate*, and *Gerken*, will apply.

If the sections susceptible to challenge were omitted, it is unlikely that their deletion would vitiate the initiative to the extent that credence could not be given to the remaining portions. The majority of Proposition 9 is separated into distinct sections, so omitting one section would not compromise the integrity of surrounding sections. For instance, if the portion providing the victims absolute right to refuse all discovery requests of the defendant was invalidated and subsequently omitted, the remainder of Proposition 9 would not be, under *Gerken*, rendered grammatically incoherent, functionally ineffective, or contrary to the purpose(s) for which it was originally enacted. Because of the voluminous changes proposed in Proposition 9, it is difficult to account for every provision that could potentially be invalidated. For the most part, those portions vulnerable to challenges are likely to be severable on their own. However, if in the aggregate each provision susceptible to challenge was invalidated, the remaining portion of Proposition 9 would be unable to meet the three part test espoused in *Gerken*.

C. Conflicts with Concurrent Ballot Measures

A conflict may arise when the ratification of one initiative inhibits the enforcement of provisions in another initiative that is approved during the same election. The efficacy of the provisions that are in conflict are analyzed under *Gerken*, which explains, as between two competing initiatives on the ballot, "only the provisions of the measure receiving the highest number of affirmative votes [can] be enforced." *Gerken, supra*, 6 Cal. 4th at 710; Cal. Const. art II, § 10(b).

Currently there are two other initiatives on the November ballot that implicate the criminal justice system. Proposition 5 expands drug treatment programs, and provides early release provisions in order to promote rehabilitation programs. It significantly modifies parole and prison release programs, extending more parole opportunities for certain non-violent offenses. *Proposition 5, Nonviolent Drug Offenses: Sentencing, Parole and Rehabilitation. Initiative Statute*, Analysis by the Legislative Analyst <http://www.voterguide.sos.ca.gov/analysis/prop5-analysis.htm> (2008). Similarly, Proposition 6 contains a number of sentence enhancing provisions and modifications to criminal law. *Proposition 6, Police and Law enforcement Funding. Criminal Penalties and Laws. Initiative Statute.*, Analysis by the Legislative Analyst (2008), <http://www.voterguide.sos.ca.gov/analysis/prop5-analysis.htm>. Proposition 6 is more aligned with Proposition 9, and there is unlikely to be extensive conflict between the two. However, Proposition 5 contains provisions that, if ratified, are antithetical to the intended purpose of Proposition 9. The more frequent opportunity for parole, and shortened periods of incarceration contradict Proposition 9's explicit edict that sentences not be cut short, and parole opportunities

be less frequent. *See* Proposition 9 §§ 28(a)(5), (f)(5). Thus, if a court is unable to harmonize provisions within the two statutes, the provisions of the statute with the most votes will prevail.

D. Conflicts with Preexisting Law

If Proposition 9 passes, courts will be confronted with two countervailing interests, the enumerated rights in the amended VBR and the rights already infused in federal and state laws. As between two irreconcilable provisions covering the rights of victims, Proposition 9 expressly provides: “It is the intent of the People of the State of California in enacting this act that if any provision in this act conflicts with an existing provision of law which provides for greater rights of victims of crime, the latter provision shall apply.” Proposition 9 Section 7. A more difficult conundrum arises when the victims’ rights conflict with concurrent rights provided to defendants or parolees. Proposition 9 is silent on that issue.

It is well settled that courts must try to harmonize conflicting laws so as to avoid trumping one in favor of the other. *E.g. City and County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 563, 570-571, fn. 8 (1995). In the case of two conflicting laws, “[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision.” *San Francisco Taxpayers Assn. v. Board of Supervisors*, 2 Cal. 4th 571, 577 (1992). In contrast, “two statutes dealing with the same subject are given concurrent effect if they can be harmonized, even though one is specific and the other general.” *People v. Price*, 1 Cal. 4th 324, 385 (1991). In determining which statute prevails, courts also look to which was last in time; the more recently enacted statutes trump prior statutes. *People v. Moody*, 96 Cal. App. 4th 987, 993 (3d Dist. 2002) (citing *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 310 (2000)).

Under the current statutory scheme the prosecution is compelled to disclose to the defendant, “all relevant real evidence seized or obtained as part of the investigation of the offense charged...[and] any exculpatory evidence.” Cal. Pen. Code Ann. §§ 1054.1(c), (e) (Lexis 2008); *see also* Cal. Pen. Code Ann. § 1054.9(a) (Lexis 2008) (establishing the right to discovery for materials for a post-conviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or life in prison without parole have been imposed). Additionally, certain confidential materials, such as medical records, may be subpoenaed and could potentially be discoverable under the present scheme. California’s Evidence Code allows certain violent character traits of a victim to be introduced as evidence in criminal cases. Cal. Evid. Code Ann. § 1103 (Lexis 2008). Likewise, the Evidence Code also permits information from confidential police files to be admitted in certain instances. *Id.* §§ 1043-47. Proposition 9 would immunize victims from any discovery request, and would prevent the disclosure of confidential information. *E.g.* Proposition 9 §§ 28(b)(4), (b)(5). While the blanket right to refuse discovery, interview requests, or depositions, may violate basic constitutional rights to confront witnesses, it also conflicts with the foregoing statutory provisions. Consider a defendant who is accused of resisting arrest and battery on an officer. If his defense is self-defense, under Proposition 9, he would be unable to bring into evidence the officer’s propensity for violence or his violent record, as provided by the Evidence Code, because the officer in this instance would also be a victim. The defense is therefore eviscerated.

IV. CONSTITUTIONAL ISSUES

A. Federal

In addition to the Sixth Amendment's Confrontation Clause, it is well established that "[t]he *Due Process Clause of the Fourteenth Amendment* requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or punishment." *California v. Trombetta*, 467 U.S. 479, 480-81 (1984) (italics original) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). Furthermore, *In Re Sassounian*, 9 Cal. 4th 535, 544 (1995), stands for the proposition that material is favorable if it "helps the defendant, or hurts the prosecution." Under the Supreme Court's interpretation, if there is reason to believe the material requested would have altered the outcome of the trial, then it is "material" for the purposes of *Brady* discovery. Charles M. Denton, *26 Things I Wish I'd Known My First Year as a Public Defender* (2000) <http://www.cpsda.org/claraweb/Files/Misc/26Things.htm> (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). An unequivocal right to refuse discovery, or to prevent the disclosure of confidential information, as proposed by Proposition 9, could be challenged on the grounds that it contravenes *Brady* and its progeny. See Proposition 9 §§ 28(b)(5), (4).

It is well established that "California's parole scheme gives rise to a cognizable liberty interest in release on parole." *E.g. McQuillion v. Duncan*, 306 F. 3d 895, 904 (9th Cir. 2002). Having established this, the proper due process analysis requires a court to "examine whether the deprivation of that interest lacked adequate procedural protections and therefore violated due process. *Id.* at 903. The court in *Morrissey* established minimum due process requirements that must be satisfied at parole revocation hearings, including, but not limited to: disclosure of evidence against the parolee; an opportunity to be heard, to present witnesses and documentary evidence; and the right to "confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). Proposition 9 abridges a parolee's right to counsel and expressly provides that, "admission of recorded or hearsay statement[s]...shall not be construed to create a right to confront the witness at the hearing." Proposition 9 § 3044(a)(3), (6). If ratified, this provision is likely to be challenged for failure to comport with the holding in *Morrissey* and fails to satisfy due process rights of the Fourteenth Amendment as interpreted by the Supreme Court.

B. California

1. Due Process

Complementing the U.S. Supreme Court's decision in *Morrissey*, the recent court order issued in *Valdivia* mandates certain scheduling procedures and time-lines guiding parole and parole revocation hearings. LAO, *Proposition 9, supra* at 4 (noting *Valdivia, supra*, 548 F. Supp. 2d 852). This initiative seeks to modify these procedural deadlines. As a result, if Proposition 9 was ratified, courts would be forced to reconcile these provisions with the *Valdivia*

decree. *Id.* Moreover, Proposition 9 will also have to square with the *Valdivia* edict that parolees are entitled to legal counsel at parole revocation hearings. *Id.*

Further, the addition of section 3044 would stipulate that “admission of...recorded or hearsay evidence of a victim or percipient witness shall not be construed to create a right to confront the witness at the hearing.” *Id.* § 3055(a)(6). Not only does this provision run counter to the U.S. Supreme Court’s ruling in *Morrissey*, it may be challenged for failure to square with California’s right to confront witnesses. Such a mandate would deprive the courts of their interpretive power to determine what may or may not be construed as creating a right to confront a witness.

Finally, Proposition 9 imposes virtually no limit to how many people may testify at hearings, and further purports to abdicate any restrictions on the subject matter of their statements. Proposition 9 § 3043 et seq. Simultaneously, Proposition 9 purports to amend Penal Code Section 3041.5 to obviate the right of either the parolee or her attorney to question any of those individuals allowed to attend under section 3043. *Id.* § 3041.5. Presently, the victim, or attendees authorized to appear pursuant to statute, are accorded the right to speak last before the board. Cal. Pen. Code Ann. § 3043.6 (Lexis 2008). Currently, the person presiding at a hearing has the discretion to ensure that only “accurate and relevant statements are considered in determining parole suitability... including, but not limited to, the rebuttal of inaccurate statements made by any party.” *Id.* Thus Proposition 9 would erode procedural safeguards employed to thwart irrelevant or fabricated testimony. Dawood, *Proposition 9, supra* at 5, 12.

2. Single-Subject Rule

Section 8, Article II, of the California Constitution provides that “an initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” Cal. Const. art II, §8(d). Courts have developed what is known as the “reasonably germane” test in order to determine whether a statute satisfies this provision. *Brosnahan v. Brown*, 32 Cal. 3d 236, 245 (1982) (citing *Amador Valley Joint Union High Sch. Dist. V. State Bd. Of Equalization*, 22 Cal. 3d 208, 230 (1978)). The court in *Senate v. Jones* articulated the standard this way: “[a]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are ‘reasonably germane’* to each other, and to the general purpose or object of the initiative.” *Senate v. Jones*, 21 Cal. 4th 1142, 1157 (1999) (citing *Legislature v. Eu*, 54 Cal. 3d 492, 512 (1991) (italics original)). *Jones* goes on to clarify that this does not mandate that each provision in an initiative be interconnected in a “functional relationship.” Rather, “it is enough that the various provisions are reasonably related to a common theme or purpose.” *Id.* (citing *Eu, supra*, 54 Cal. 3d at 513). The important criterion established in *Jones* requires “a reasonable and common sense relationship among their various components in furtherance of a common purpose.” *Id.* at 512.

Jurisprudence regarding the single-subject rule reflects a very flexible interpretation and application of the rule, indicative, as one law review article points out, of “an exceedingly expansive reach afforded to criminal justice initiatives.” *Symposium, Leadership Issues in Criminal Justice Policy: Something for Everyone? The Future of Comprehensive Criminal Justice Initiatives After Senate v. Jones and Manduley v. Superior Court*, 33 McGeorge L. Rev.

779, 779 (2002). Among four major criminal justice initiatives in the last twenty years, three have been challenged on the grounds that they violated the single-subject rule. Despite the challenges, “California courts have never struck down a criminal justice initiative for violation of the single-subject rule.” *Id.* at 782-83.

Brosnahan is likely to control the outcome of a challenge based on the single-subject rule. *Brosnahan, supra*, 32 Cal. 3d 236. There, the Court upheld the purpose as being reasonably germane to the general subject, or object, as was articulated in the title, i.e., “promoting the rights of actual or potential crime victims.” *Id.* at 247. In *Brosnahan*, the harsher punishments and collateral effects on the criminal justice system, sentences, etc., were deemed to function in direct relation to the aimed purpose of protecting potential victims and the public. *Id.* *Brosnahan* demonstrates that the rights of victims, the public, the accused, and the incarcerated are inextricably bound to one another. Based on precedent, the likelihood of invalidating Proposition 9 on the grounds that it violates the single-subject rule is highly improbable.

3. Revision Versus Amendment

The people of the state of California are vested the power to amend constitutional provisions through the initiative process. Cal. Const., art. XVIII, § 3. However, this provision only permits “amendment” and does not contemplate “revision” of the Constitution. “A ‘revision’ may only be accomplished by convening a constitutional convention and obtaining popular ratification...or by legislative submission of the measure to the voters.” *Raven v. Deukmejian*, 52 Cal. 3d 336, 349 (1990) (citing Cal. Const., art. XVIII, §§ 1, 2). Courts have developed a two-prong test in order to differentiate amendment from revision. Explicating the revision/amendment analysis, *Raven* establishes the following: “[it] has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision.” *Id.* at 350.

The quantitative effect analyzes whether the initiative consists of extensive provisions that result in numerous deletions or alterations of the existing laws, such that it directly changes the “substantial entirety of the Constitution.” *Amador, supra*, 22 Cal. 3d at 223; *see also* Julia Anne Guizan, Student Author, *Notes and Comment: Is The California Civil Rights Initiative a Wolf In Sheep’s Clothing?: Distinguishing Constitutional Amendment From Revision in California’s Initiative Process*, 31 Loy. L.A. L. Rev. 261, 267 (1997). A provision that changes voluminous portions of constitutional doctrine could be rendered invalid. In one case, for example, the court invalidated an initiative that contained 12 sections, 208 subsections, more than 21,000 words, and would have repealed at least 15 of 25 articles. Guizan, *supra*, 31 Loy. L.A. L. Rev. 261, 267 (citing *McFadden v. Jordan*, 32 Cal. 2d 330, 334 (1948)). Though Proposition 9 contains numerous changes, based on quantity alone, it is improbable that a court would conclude that it rises to the level of an impermissible revision. In *Raven*, for example, the initiative at issue, a provision in Proposition 115, altered only a few provisions and was therefore distinguishable from cases like *McFadden*. Ultimately, it failed to satisfy the quantitative standard in the two-pronged test. *Raven, supra*, 52 Cal. 3d at 351. Proposition 9 involves more significant modifications than Proposition 115, nonetheless it is distinguishable from cases like *McFadden*.

Conducting a qualitative analysis, however, the Court in *Raven* observed that Proposition 115 divested the judicial branch of all “interpretive power,” particularly with respect to criminal defense rights, and turned that power over to the U.S. Supreme Court. *Id.* at 352. Proposition 115 attempted to restrict the courts’ ability to provide more protection to criminal defendants than the federal Constitution. *Id.* at 352. *Raven* concluded that the portion of the initiative that abdicated California courts’ interpretive power and vested it in the federal courts was a substantial alteration of “the preexisting constitutional scheme.” *Id.* at 354. According to *Raven*, this impermissible alteration rose to the level of “an invalid revision of the California Constitution.” *Id.* at 355. However, relying on the severability clause, *Raven* determined that the provision of Proposition 115 that was rendered invalid could properly be severed from the remaining portions of the initiative. Thus, only that portion the court ruled invalid was stricken from the initiative.

Distinguishable from *Raven*, the petitioners in *Brosnahan* challenged Proposition 8 on similar grounds, but were ultimately unsuccessful. *Brosnahan, supra*, 32 Cal. 3d 236. There, the court determined that, while the scope of Proposition 8 would substantially change the criminal justice system, it would not constitute “such far reaching changes in the nature of *our basic governmental plan* as to amount to a revision.” *Id.* at 260 (citing *McFadden, supra*, at 348) (*italics original*). Therefore, *Raven* and *Brosnahan* represent two possible ends of the spectrum.

In contrast to the Proposition 8 addressed in *Brosnahan*, Proposition 9 contains expansive modification to the justice system, including a more explicit restriction on the courts’ discretionary powers. For example, Proposition 9 states that, during a parole revocation hearing, recorded or hearsay statements of a victim or witness will not be “construed as a right to confront the witness at the hearing.” Proposition 9 § 3044(a)(6). A court will have to reconcile this limiting instruction in order to square it with the courts’ exclusive function to interpret constitutional rights. It is hard to predict whether a court would find the provisions of Proposition 9 insufficient to warrant invalidation under *Brosnahan*, or whether it would determine the provisions of Proposition 9 rise to the level of divestment as in *Raven*. Regardless, under *Raven*, if a court were to invalidate a portion of Proposition 9 on the grounds that it constituted an impermissible revision to the constitution, it is likely that the invalid portion would be severable.

It is also possible that the foregoing issues could be challenged as a violation of the separation of powers doctrine or as an impermissible infringement on an essential government function, both of which are described below.

4. Essential Government Function

The petitioners in *Brosnahan* also challenged Proposition 8 on the grounds that it was “invalid as an impermissible impairment of ‘essential government functions.’” *Brosnahan v. Brown, supra*, 32 Cal. 3d at 258 (citing *Simpson v. Hite*, 26 Cal. 2d 125, 134 (1950)). The proposition under *Simpson* explains that an initiative may be inapplicable if its effect greatly impairs or destroys the “efficacy of some other governmental power, the practical application of which is essential.” *Id.* In *Brosnahan* the petitioners challenged Proposition 8 because it placed

certain restrictions on plea bargaining, granted crime victims an opportunity to appear in both felony and misdemeanor cases, and imposed greater punishments of defendants whose multiple offenses are tried separately. *Id.* at 258-59. The Court concluded that restrictions on plea bargaining are “not an *essential* prerequisite to the administration of justice” under *Simpson*. *Id.* Further, the Court determined that objections to more severe sentences and the victim’s right to be heard in various proceedings also failed the *Simpson* standard; petitioners’ argument relied largely on speculation and conjecture that it would erode the justice system. *Id.* In contrast to Proposition 8, however, Proposition 9 involves more pronounced constraints on the judiciary and the Legislature. Proposition 9’s unequivocal constraints on courts with respect to sentencing, parole, and parole revocation are more profound than in the previous VBR. The standard articulated in *Simpson* is more aptly satisfied because Proposition 9 more directly impinges on essential elements of the administration of justice.

5. Separation of Powers

In *Manduley v. Superior Court*, 27 Cal. 4th 537, petitioners challenged existing law on the grounds that “the legislative branch unconstitutionally...conferred upon the executive branch (that is the prosecutor) an exclusively judicial function of choosing the appropriate dispositions for certain minors convicted of specified crimes.” *Id.* at 552-53. The Court first explained that “the separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to a court.” *Id.* at 553 (emphasis original). Reiterating this, the Court asserted that “[w]hen the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.” *Id.* at 553 (2002) (citing *People v. Tenorio* 3 Cal. 3d 89 (1970)). However, as *Manduley* points out, while sentencing options are generally a function of the judiciary under legislative direction, the power to “choose a particular sentencing option may be eliminated.” *Id.*

Post conviction, Proposition 9 would prohibit convicted individuals from being granted any rights and privileges “not required by any provision of the United States Constitution or by the laws of this state.” Proposition 9 § 28(a)(5). Concomitantly, it prohibits lessening sentences through “early release policies intended to alleviate overcrowding in custodial facilities.” *Id.* § 28(f)(5). Determining sentencing and adjudicating cases after a charge has been brought is a function of the judiciary. While courts may be confined to sentencing limits, within that continuum judges are entitled to use their discretion to impose an appropriate punishment. The language of this provision does not describe potential options, rather, it states what may not be taken into account or considered. Looking to the language of the provision, it appears as though the intent is to eliminate some of the judiciary’s discretionary power.

V. POLICY AND FISCAL IMPACT

A. Prison Overcrowding

The adult inmate population was estimated at 171,000 as of May 2008. LAO, *Proposition 9, supra* at 2-3. The state prison system is currently experiencing overcrowding because there are not enough permanent beds available for all inmates. The state operates

roughly 33 state prisons and other facilities. Gymnasiums and other rooms in state prisons have been converted to accommodate for the influx of inmates. *Id.* Currently, courts and the Legislature are considering various proposals that would reduce overcrowding, including the early release of inmates from state prison. *Id.* According to the LAO, the 58 counties of the state currently spend “over \$2.4 billion on county jails, which have a population in excess of 80,000.” *Id.* at 2. An estimated 20 counties have an inmate population cap imposed by the federal courts, and 12 other counties observe self-imposed population caps. *Id.* at 2-3. Inmates in these counties are sometimes released early to comport with these caps, while other areas use various methods, including house arrest systems, in order to reduce jail populations. *Id.*

Though state prisons do not generally release inmates early, Proposition 9 could present significant impediments should it become necessary to enact legislation to address prison overcrowding issues. *Id.* at 4. Proposition 9 would prohibit early release, and expressly precludes consideration of overcrowding issues. Jails that are forced to deal with prison overcrowding will likely face significant financial burdens, as well as housing dilemmas, should Proposition 9’s restrictions on early release pass. *Id.* at 4-5. According to the LAO, restrictions on early release could cost the state a considerable amount in continued housing of prisoners as well as potential restructuring of facilities to accommodate more prisoners. *Id.* at 4-5.

B. Fiscal Impact

According to the second quarter 2008 facts and figures for the Department of Corrections, the 2007-08 budget is \$9.7 billion. http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html. The total amount of offenders, both in and out of custody, that fall under the supervision of the California Department of Corrections is around 318,411 people. *Id.* Cost to support jobs related to inmates and parolees, including prison staff, various institutional officers, those supervising parolees, and those in administration, are \$62,961. *Id.* Moreover, the average yearly cost per inmate is \$35,587 while the cost per parolee is \$4,338. *Id.* The LAO estimates the “costs to operate the California Department of Corrections and Rehabilitation in 2008-09 are estimated to be approximately \$10 billion, [while] the average annual cost to incarcerate an inmate is estimated to be about \$46,000. LAO, *Proposition 9, supra* at 2-3.

Ultimately, Proposition 9 could result in “unknown potential increases in state prison and county jail operating costs due to provisions restricting early release of inmates.” LAO, *Initiatives Fiscal Analysis, Victims’ Bill of Rights Act of 2008: Marsy’s Law, Amdt. #1-NS* (A.G. File No. 07-0100) 5, <http://www.lao.ca.gov/ballot/2007/070977.pdf> (4 February 2008) [hereinafter LAO, *Fiscal Analysis*]. As previously mentioned, state prisons do not generally release inmates early. Thus, according to the LAO’s Fiscal Analysis, “under current law, the proposed constitutional amendments would probably have no fiscal effect on the state prison system.” *Id.* at 3. However, Proposition 9 could result in serious fiscal consequences should the voters or Legislature choose to adopt early release programs to address overcrowding issues. *Id.* at 3-4. Such costs could “amount to hundreds of millions of dollars annually.” *Id.*

In terms of jails, some counties do have early release programs. The effects of Proposition 9 are less certain under these circumstances, and will likely depend on the particular

situation of each county. The LAO theorizes that counties will probably respond either by “(1) increasing the pretrial release of offenders, thereby making more room for sentenced offenders to serve their full terms in jail, or (2) expanding jail operations within new or existing facilities.” *Id.* at 4. This in turn may amount to increased cost for various counties.

Likewise, the potential administrative costs are unknown. With Proposition 9’s extensive notification requirements, the expansive class of people that must receive notice, and the added procedures that would trigger this notification mandate, the costs could be high. LAO, *Proposition 9, supra* at 6. For instance, the expanded rights related to parole and sentencing hearings, including the amount of people able to testify, could result in prolonged hearings and lengthy proceedings, thus increasing court costs. *Id.*

In terms of savings, however, the fiscal analysis points out that the reduction in parole hearings, as well as the restrictions and prohibition on state provided counsel could potentially save millions of dollars. LAO, *Fiscal Analysis, supra* at 4. The fiscal analysis estimates that “tens of millions of dollars annually in savings could result from the provisions changing parole revocation procedures, such as by limiting when counsel was provided by the state.” *Id.* However, as the LAO analysis acknowledges, some of these changes are likely to be subject to legal challenges. *Id.*; LAO, *Proposition 9, supra* at 5.

Furthermore, under current law, courts retain discretion when determining whether to impose restitution. Proposition 9, however, will make it mandatory. Further, it will require that any money collected first go to pay restitution, not recover any court costs. Currently courts collect certain penalty fees and fines. These contribute to local funds and agencies, including the Traumatic Brain Injury Fund and the Restitution Fund. Through these, victims receive revenues collected from offenders. With the mandate that the money first go to restitution, these funds, including the Restitution Fund, may receive much less. LAO, *Proposition 9, supra* at 5-6. This, however, could be counterbalanced in light of possible savings that these state or local agencies may realize as a result of the victims being paid restitution directly from the wrongdoers, rather than having to come to those agencies themselves for aid. *Id.* at 6.

C. Policy Issues

1. Proponents

Proponents argue that Proposition 9 would provide victims with more rights, thereby alleviating unnecessary suffering that victims have had to endure. Proponents contend that this simply evens the playing field, elevating certain rights from statutory provisions to the constitutional level. The Constitution currently provides certain rights for criminals, and victims should be afforded at least equal guarantees. *Argument in Favor of Proposition 9* <http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt9.htm> (2008).

Proposition 9 supporters also assert that this will save money in the long run by increasing the number of years between parole hearings and truncating already extensive parole process. Proponents point out that “taxpayers spend millions on hearings for dangerous criminals that have virtually no chance of release.” *Id.* To underscore this point, supporters of

Proposition 9 highlight the fact that two of Charles Manson’s followers, both convicted of multiple brutal murders, have had 38 parole hearings in 30 years. *Id.* The injustice here is punctuated by the fact that families involved have been forced to “relieve the painful crime and pat their own expenses to attend the hearings,” as well as the fact that taxpayers have had to subsidize these hearings. *Id.*

2. Opponents

Opponents argue that Proposition 9 replicates laws that currently exist in statute and under the California Constitution. According to the opponents, “many of the components in Proposition 9 – including the requirements that victims be notified of critical points in an offender’s legal process as well as the rights for victims to be heard throughout the legal process – were already approved by voters in Proposition 8 in 1982, the Victims’ Bill of Rights.” *Argument Against Proposition 9* <http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt9.htm> (2008) [hereinafter *Argument Against 9*]. Additionally, there currently exists a state-funded Victims of Crime Resource Center to educate victims about their rights and help them through the process. *Rebuttal to Argument in Favor of Proposition 9*, <http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt9.htm> (2008) [hereinafter *Rebuttal to Proposition 9*].

Additionally, opponents argue that the State does not generally release inmates early from prison, and that “California’s parole system is already among the strictest in the United States.” *Argument Against 9, supra*. Emphasizing this, opponents of Proposition 9 point out that “[t]he actual annual parole rate for those convicted of second degree murder or manslaughter has been less than 1% of those eligible for 20 years.” *Id.* Given this, opponents contend that Proposition 9’s “tremendously costly changes to existing parole policy” is unjustified and simply not needed. *Id.*

Furthermore, according to one critique, the amendments are “antithetical to parole consideration hearings’ stated purpose: to determine whether a prisoner poses an actual risk to society.” Dawood, *Proposition 9, supra* at 8. According to Dawood’s summary, those testifying at hearings rarely present actual evidence relating to the prisoner’s “current threat (which the California Supreme Court...made clear is the only relevant issue in a parole hearing) and thus this measure is intended to ‘play on the Board’s sympathy.’” *Id.* Moreover, victims are entitled to speak last at a parole hearing. *Id.* at 12. Should the testimony be fabricated or invalid, the only procedural guard is to allow questions or objections. Should Proposition 9 be ratified, victims would be permitted to provide uninterrupted, unquestioned testimony. The end result, as Dawood posits, is that “unproved allegations by victims would be taken as true.” *Id.*

Critics also highlight the point that Proposition 9 will result in legal battles because it would “curtail parolees’ due process rights in parole revocation proceedings.” *Id.* In particular, Proposition 9 would violate due process rights “required by the U.S. Constitution as interpreted by the Supreme Court.” *Id.* Those violations include the following: (1) parolees would spend longer periods in custody awaiting a hearing to determine whether a parole violation had even occurred; (2) hearsay evidence would be admitted without cross-examination of adverse witnesses; and (3) parolees would no longer be entitled to State-appointed counsel. *Id.*

VI. FINANCIAL SUPPORT AND BACKING

The majority of funds received in support of Proposition 9 come from Henry T. Nicholas III, the brother of murder victim Marsy Nicholas, for whom the initiative is named. Secretary of State, *Campaign Finance: Proposition 009 – Criminal Justice System. Victims’ Rights. Parole. Initiative Constitutional Amendment and Statute.*, <http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1304168&session=2007>. He has contributed just under \$5 million. The Yes on Proposition 9 group of contributors and their estimated contributions include: Friends of Todd Spitzer 2006, \$100; Crime Victims United of California, \$100,000; PK Executive Transportation, \$500; VIP Limousines & Coaches Inc., \$1,000; Thomas Dale and Associates, \$1,500; Peace Officers Research Association of California Political Issues Committee, \$3,000; Crime Victims United of California, \$100,000. *Id.*

Registered opponents garner their support from a wide range of organizations and individuals. The contributors and estimated contributions include: Ella Baker Center for Human Rights, \$33,667.62; ACLU of Northern Ca., \$2,500; Pace of California Schools Employees Association – Issues, \$50,000; Coalition for an informed California/No on 54, \$4,000; CA Federation of Teachers Cope Prop/Ballot Committee, \$100,000; CA State Council of Service Employees Issue PAC, 247,805; Northern California District Council, ILWU, \$100; M. Quinn Delaney, \$15,000; Lillian Henegar, \$100; Sacramento Friends Meeting, \$50; Labor/Community Strategy Center, \$100; California Teachers Association Issues PAC, \$72,006.54; Joseph D. Ossmann, \$100; Michael W. Bien, \$500; Glenn Backes, \$500; American Friends Service Committee, \$1,000; Robert Shapazian, \$100; Elena J. Morris, \$150; and California Professional Firefighters Ballot Issues, \$6,006. *Id.*

VI. CONCLUSION

The main thrust of this initiative is to enhance current victims’ rights. Proposition 9 will provide more expansive rights pertaining to, inter alia, notification of, attendance and the right to be heard at sentencing and parole hearings. In large part, Proposition 9 elevates already existing rights to the constitutional level. Notwithstanding the reaffirmation of preexisting laws, this measure also adds significant provisions to the current VBR and to present statutes. Proposition 9 significantly broadens the privileges of victims, particularly with regard to the right to refuse discovery requests, as well as to confer with prosecutors. Contemporaneously, Proposition 9 would unequivocally curtail the rights criminal defendants and parolees. In certain situations, Proposition 9 would abridge the right to counsel, the right to confront witnesses, and the right to discovery. It may also prolong sentences and the period in which parolees are in custody awaiting a parole violation hearing.

Abrogating the right to a State appointed attorney for a parole revocation hearing, as well as reducing parole hearings could result in significant savings. However, additional administrative costs expended to comply with notice requirements and to house inmates for longer periods may counteract such savings. Furthermore, Proposition 9 could result in

voluminous litigation as a result of various challenges brought on the basis that this initiative violates federal and state constitutional provisions, and because it conflicts with preexisting laws.