

# **CALIFORNIA INITIATIVE REVIEW**

## **Proposition 5: Nonviolent Offenders Rehabilitation Act of 2008**

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## **I. Executive Summary**

Prison overcrowding is a problem that states are facing across the nation. California has tried to deal with this problem by creating alternative drug treatment programs for offenders convicted of non-violent drug possession offenses. These programs were created by Proposition 36, an initiative passed by the voters in 2000. *See infra* II b. The funding for Proposition 36 expired in 2006 and the Governor has yet to renew it.

On November 4, 2008, Californians will have the chance to vote on Proposition 5, entitled the “Nonviolent Offenders Rehabilitation Act of 2008.” Proposition 5 is a statutory initiative that essentially modifies and expands Proposition 36. Specifically, Proposition 5 will decrease the consequences of non-violent drug offenses by creating a three-track probation treatment program for offenders convicted of non-violent drug possession charges. In addition, this initiative will change the parole requirements and make the charges for certain marijuana possession crimes less severe. It also adds several new divisions, boards, commissions and reporting requirements for drug treatment and rehabilitation programs. *See infra* III.

Noted billionaire George Soros financed the signature gathering campaign for Proposition 5. Peter Schrag, *Propositions 5 and 8 Will Make Waves Nationally*, SAC. BEE, September 2, 2008, at A17. Soros’s group also financed Proposition 36, as well as Proposition 215 which legalized medical marijuana in California. *Id.* This same group also supported a 1996 Arizona ballot measure, Proposition 200, which was similar to Proposition 36 in that it also diverted drug offenders from prison into drug treatment programs. *Id.*

Proposition 5 has already generated a lot of attention. Supporters and opponents strongly disagree about the effectiveness of drug treatment programs. Supporters of Proposition 5 argue that Proposition 36 was successful and that its programs need to be expanded to help solve both the problem of prison overcrowding and drug addiction. *Yes on Proposition 5*, <http://www.prop5yes.com> (accessed on September 14, 2008). Opponents argue that the programs are likely to be costly and will do little to help lower the crime rate. *People Against Proposition 5: Facts*, <http://www.noonProposition5.com/facts.html> (accessed on September 14, 2008). Proposition 5 is a reaction to prison overcrowding and drug addiction, both of which are problems that deserve the electorate’s attention and careful consideration.

## **II. Existing Law**

### **a. Relevant Law**

In California, it is generally a crime to possess, use, or be under the influence of specified drugs, including marijuana, cocaine, heroin, methamphetamine and certain medicines obtained without a physician's prescription. *See* CAL. HEALTH & SAFETY CODE § 11350 (West 2008). These offenses are generally characterized as either misdemeanors or felonies. *See id.* Both the classification of an offense as a felony or a misdemeanor and the punishment depend on the particular substance and the quantity found in the offender’s possession. *Id.*

Drug treatment may be part of an offender's sentence in several situations. *See* CAL. PENAL CODE § 1203.096 (West 2008). When an offender is convicted of a drug related offense, the court may recommend that the offender undergo substance abuse counseling or participate in an education program while incarcerated. *Id.* In addition, the court can make it a requirement of an offender's probation that they not use any controlled substance and require the offender to undergo periodic drug testing. *Id.* § 1203.1(a)(b).

When an offender is released from incarceration, most are required to serve a parole period. CAL. HEALTH & SAFETY CODE § 11370 (West 2008). The parole period is three years for offenders who have not committed a violent crime. However, this period can be reduced to one year if the offender does not commit any infractions during the first year *Id.* If an offender on parole commits a new crime, they are either prosecuted on the new charges and returned to prison to serve their new sentence or their parole is revoked and they are returned to prison for up to a year. *Id.*

### **b. Proposition 36 Passed in November 2000**

Proposition 5 is essentially an expansion and modification of Proposition 36. Proposition 36 was approved by the voters in November 2000 and became effective on July 1, 2001. California Proposition 36, About Proposition 36, <http://www.prop36.org/about.html> (last visited September 14, 2008). The purpose of Proposition 36 was to treat the problem of addiction itself and thereby reduce the drug addiction and crime rates. *Id.* Proposition 36 modified the state sentencing laws in order to allow a first or second time offender, who had been convicted of a non-violent drug possession offense, to be sentenced to county probation supervision and participation in a drug treatment program in lieu of incarceration. *Id.*

Specifically, Proposition 36 allowed up to eighteen months of drug treatment in lieu of incarceration in felony or misdemeanor cases where the charges were being under the influence, possession or transportation for personal use of any controlled substance. *Id.* One of the biggest changes made by Proposition 36 was creating a condition of automatic probation for any person convicted of a non-violent drug possession offense. *Id.* As a condition of the probation, the offenders are required to participate in and complete a drug treatment program. *Id.* If an offender does not complete the treatment program or commits a new crime, the offender would be sanctioned by the court and possibly re-incarcerated. *Id.* If an offender completes the treatment program and the other conditions of their probation, the charges and the arrest could be removed from their criminal record completely. *Id.*

### **c. Effectiveness of Proposition 36**

The efficacy of Proposition 36 is difficult to assess. Supporters and opponents have both used statistics to demonstrate how Proposition 36 has, or has not been, effective.

Supporters point out that by July 2006, when the funding for Proposition 36 ran out, it had provided treatment to an average of 36,000 offenders per year, totaling over 150,000 offenders during the five years the program was funded. *Id.* According to a report published by UCLA on July 22, 2005, since the program's inception, between 69.2% and 72.6% of people recommended

to the program accepted the drug treatment alternative. DOUGLAS LONGSHORE ET AL., EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT, Mar. 13, 2006, available at [http://www.uclaisap.org/prop36/documents/SACPA\\_COSTANALYSIS.pdf](http://www.uclaisap.org/prop36/documents/SACPA_COSTANALYSIS.pdf). Of these individuals, approximately one-third actually completed the treatment. *Id.* Supporters also claim that Proposition 36 has saved the taxpayers over \$1.3 billion due to the fact that the rough cost of treating each person under a drug treatment program is \$3,333, whereas the cost of imprisoning a single person for a year is now \$30,929. *Id.* Supporter's claim that Proposition 36 is not only saving money but is also effectively treating the addiction problems of ten of thousands of people per year through drug treatment. *California Proposition 36*.

Opponents of Proposition 36 are more skeptical about how effective Proposition 36 was for the five years it received funding. They focus on the fact that drug offenders who are given drug treatment instead of incarceration are more likely to commit a new drug related offense than those who were incarcerated before the program began. Jack Leonard, *Drug Use Rearrests Up After Proposition 36*, L.A. TIMES, April 14, 2007 at A1. According to a study conducted by UCLA, about half of offenders were arrested again within thirty months following their treatment programs, whereas only thirty-eight percent of those who were incarcerated for their crime committed a new crime within that period. *Id.* In addition, opponents argue that the treatment programs are not effective because they are not being completed. They point out that about one-third of the people assigned to the program never report to treatment and of those who do report two-thirds do not complete the program. *Id.*

Regardless of how one views the effectiveness of Proposition 36, the reality is that the funding of Proposition 36 has not been renewed since it ran out in July 2006. Proposition 5 is an expansion and modification of Proposition 36 and voters' opinions of Proposition 5 will likely reflect how they viewed the effectiveness or ineffectiveness of Proposition 36.

### **III. Changes Proposed by Proposition 5**

In general, Proposition 5 requires California to expand and increase funding for individualized treatment and rehabilitation programs for non-violent drug offenders and parolees. Specifically, this initiative will decrease the consequences of non-violent drug offenses by creating a new three-track probation treatment program for drug offenders. In addition, this initiative will change the parole requirements and lower the penalties for marijuana possession. It also adds several new divisions, boards, commissions and reporting requirements for drug treatment and rehabilitation programs. The full text of the initiative can be found at: [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i751\\_07-0081\\_initiative.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i751_07-0081_initiative.pdf).

The highlights of this initiative include:

#### **a. Titles, Findings & Declarations, Purpose & Intent**

The first three sections of the initiative describe the purpose and intent of the "Nonviolent Offenders Rehabilitation Act of 2008." This initiative intends to "[p]revent crime, promote addiction recovery, provide rehabilitation services and restorative judicial programs and heighten accountability for youth and non-violent offenders." Secretary of State, California Official Voter

Information Guide, Proposition 5 § 3(a), <http://voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop5> (last accessed September 14, 2008) [hereinafter *Initiative*].

In essence, the purpose behind this initiative is to expand the funding and oversight for programs that treat an offender's addiction to drugs by providing them with effective treatment and rehabilitation in lieu of jail time. *See generally Initiative* at § 3. In addition, this initiative intends to limit the criminal consequences of non-violent drug offenses. *Id.*

## **b. Expansion of Drug Treatment Diversion Programs**

### **i. Adult Programs**

Proposition 5 creates a new three-track program for non-violent drug offenders which will expand and replace the current system. *Initiative* § 12. Under the first track, offenders charged with one or more non-violent drug possession offenses would be eligible for a six to eighteen month diversion program instead of incarceration. *Id.* § 14. Offenders who have a current or prior conviction for a violent or serious offense or a prior conviction for any felony in the last five years would not be eligible for this track. *Id.*

Under the second track, offenders convicted of a non-violent drug possession offense and sentenced to treatment and probation would be eligible for a twelve to twenty-four month diversion program. *Id.* § 17. Offenders who have been convicted of a serious or violent crime, possessed drugs while armed with a deadly weapon, have five or more convictions in the last thirty months or have been convicted of other felonies or misdemeanors at the same time as a new drug charge are not eligible for this track. *Id.*

Under the third track, an offender who committed a non-violent drug possession offense, but was not eligible for Track II or an offender who committed any other type of nonviolent offense would be eligible for an eighteen to twenty-four month diversion program. *Id.* § 18. Offenders who have committed a violent or serious felony will not be eligible for any diversion program. *Id.* § 18(d).

In essence what the new three-track program does is expand the treatment options for non-violent drug possession offenders. Offenders in all three tracks would receive the same type of drug treatment but the punishments for violating the treatment rules are more severe with each track. *See generally id.* §§ 12-18. Those who do not follow the treatment requirements of one track can be moved up to the next track where the punishments and sanctions are more severe. *Id.* The program would also require the offender to attend hearings if the treatment requirements are not being met.

This program would be funded out of the Substance Abuse Treatment Trust Fund (SATTF), which was initially created under Proposition 36. *See id.* § 36(a). The fund was allotted a monetary sum to be taken from the General Fund starting in 2001. *See CAL. HEALTH & SAFETY CODE* § 11999.5 (West 2008). In 2001, SATTF received \$60,000. From 2002-2006 it received \$120,000. *Id.* The allotted funding for the SATTF ended in 2006 and has not been renewed. *Id.* Proposition 5 renews the funding for the SATTF and calls for an additional \$150 million from

the General Fund to be allotted to the SATTF for the second half of 2008–09 and \$460 million in 2009–10, with this amount increasing annually starting in 2011. Specifically this initiative assigns fifteen percent of what is left after administrative costs for Track I, sixty percent for Track II, and ten percent for Track III. *Initiative* § 36(a).

## **ii. Youth Programs**

Proposition 5 would also create a new program for children under the age of eighteen who are determined to be at risk of committing a drug related offense. These programs would be run at the county level and would be funded by the remaining fifteen percent of the SATTF. *See id.* § 39(c)(1). The program would provide at risk children with a myriad of services including: drug treatment, mental health medication, counseling, family therapy, educational stipends for higher education, employment stipends and transportation services. *Id.* § 11(n).

### **c. Parole Modifications**

#### **i. State Parole**

This initiative would both shorten and lengthen the parole period for people convicted of certain offenses. For those offenders convicted of a drug or non-violent property crime, who do not have a serious, violent, street gang related or sex crime on their record, parole time would only be six months but the court would be able to extend the parole status for an additional six months if the offender failed to complete the treatment requirements. *Id.* § 20. For those offenders convicted of a violent or serious felony, the parole sentence would be increased from three to five years. *Id.*

This initiative would also change the rules regarding the revocation of parole for offenders. It allows the revocation of parole when an offender commits a felony violation of their parole but does not allow revocation if the offender only commits a technical or misdemeanor violation. *Id.* § 11. Other consequences for violating parole could include more frequent drug testing, community work assignments, jail time or attendance at rehabilitation programs. *Id.*

In addition, Proposition 5 also creates a Parole Reform Oversight and Accountability Board consisting of twenty-one members. *See id.* § 6(c). The board's main functions would be to review, direct and approve the rehabilitation programs and to set state parole policies. *Id.* The board will be headed by a chief who will be appointed by the Secretary of Probation and Parole. *Id.* The chief will serve a five year term and can be reappointed at the Secretary's discretion. *Id.* *See id.* § 23(b). Of the twenty-one board members, nineteen will be voting members and must each meet specific criteria and be appointed by different bodies of law. *Id.* The remaining two members will be non-voting members also appointed by the Secretary of Probation and Parole. *Id.*

#### **ii. Rehabilitation Programs for Parolees**

This initiative would expand the rehabilitation programs available to offenders that have been released from parole and modify how those programs are administered. *Id.* § 11. These programs would be made available to offenders at least ninety days before they are scheduled to be

released from prison. The exact services provided will depend on the needs of each offender and can be available to the offender for up to a year after their date of discharge from prison. *Id.*

Proposition 5 also creates a Board of Parole Hearings consisting of twenty-nine commissioners who would be appointed by the Governor after a recommendation by the Secretary of Rehabilitation and Parole. *Id.* § 7. The commissioners would each serve a three year term. *Id.*

Proposition 5 would also increase the amount of credit that inmates are allowed to earn if they have been sentenced to prison for drug or non-violent property crimes. *See id.* § 19. Each credit that an inmate earns reduces their sentence. *Id.* The Board of Parole Hearings would be allowed to give additional credits if an inmate shows progress in completing a rehabilitation program. *Id.* The credits, however, cannot be given to any inmate convicted of a violent or serious felony, as well as certain sex crimes. *Id.*

#### **d. Reduction of Criminal Penalties**

This initiative would make it a minor infraction, instead of a misdemeanor, to possess less than twenty-eight and a half grams of marijuana. *Id.* § 31. *Id.* People under the age of eighteen would not be fined for their first offense but would instead be required to complete a drug education program. *Id.* The money collected from this program would be re-invested in youth drug education programs. *Id.* § 31(f).

#### **e. Other Changes to State Law Relating to Administration**

This initiative would also create several new administrative bodies. It would change the way rehabilitation and parole programs are administered and add a second secretary and a chief deputy warden for rehabilitation at each prison. *See id.* § 29. It would also increase the Board of Parole Hearings from seventeen to twenty-nine commissioners. *Id.* § 7.

This initiative would also change some of the information provided to offenders. It would force county jails to hand out materials and information on drug overdose awareness and prevention to every inmate before they are released. *See id.* § 49. It also requires that all adults in drug treatment programs get mental health services using funding from Proposition 63, a 2004 ballot measure approved by voters that expanded community mental health services. *Id.*

#### **f. Fiscal Effects**

Proposition 5 will likely cost the State over \$1 billion annually. The State will have to spend this money on the new three-track drug diversion program and the expansion of the rehabilitation programs. However, Proposition 5 also will likely save the State at least \$1 billion annually by diverting offenders from state prison to drug treatment programs, excluding certain parole violators from prison, increasing the credits certain inmates receive and reducing the parole periods for certain offenses. There will also be a one-time savings that could exceed \$2.5 billion due to the decrease in the prison population. However, this savings will likely be offset by the cost of the rehabilitation programs. Secretary of State, Proposition 5, Analysis by the Legislative

Analyst, <http://voterguide.sos.ca.gov/analysis/prop5-analysis.htm> (last accessed September 14, 2008).

The counties will also be affected and will suffer increased costs for new diversion programs, the youth programs and housing for those on parole. However, these costs will likely be paid for through state funding. There will also likely be unknown effects of this proposition that may cause increases in costs and savings that are uncertain at this point. Opponents and Proponents are split on whether Proposition 5 will have a net savings or cost.

#### **g. Effective Date & Amendments**

The initiative, if passed, will become effective on July 1, 2009, and its provisions will apply prospectively. *Id.* § 53. Any amendments to the proposition after it has passed will have to be approved by the electorate or by a statute that has been approved by four-fifths of both houses of the legislature, which is expressly allowed by the initiative. *Id.* § 54.

### **IV. Drafting Issues**

#### **a. Pre-Election Litigation**

In an effort to remove Proposition 5 from the ballot, former Governors Gray Davis and Pete Wilson, as well as thirty-two district attorneys, petitioned to the California Supreme Court to issue a peremptory writ of mandate. No on Proposition 5 Campaign Files with State Supreme Court to Remove It from the Ballot, PR Newswire, July 17, 2008, [http://findarticles.com/p/articles/mi\\_m4PRN/is\\_/ai\\_n27927082](http://findarticles.com/p/articles/mi_m4PRN/is_/ai_n27927082) [hereinafter PR Newswire]; Petition for Writ of Mandate, *Wilson v. Bowen* S165180, at 1-12 (July 17, 2008). The writ would have required the Secretary of State to remove the Proposition from the ballot. *Id.* at 15-16. Proponents of Proposition 5 claimed those involved in bringing the suit were aware of the strong public support of Proposition 5 and sought to keep it off the ballot for that reason. *See* Proposition 5 Fights Back, Drugpolicy.org, August 8, 2008, <http://www.drugpolicy.org/news/080808prop5.cfm>.

It was argued that Proposition 5 unconstitutionally infringed upon the powers of the Governor and the Judiciary. *See* Petitioners Memorandum of Points and Authorities, *Wilson v. Bowen* S165180, at 25-34 (July 17, 2008). Petitioner stated that the California Constitution enumerates certain powers and authority to the Governor and the Judiciary, which includes the Governor's power to appoint parole board members. *See id.* at 29-31. Thus, the initiative would, in effect, amend the State Constitution. In order for the State Constitution to be amended, the law requires the change by way of a Constitutional Amendment, and not a statutory initiative. *Id.* The California Supreme Court ultimately rejected the challenge made by the petitioners. *See* Proposition 5 Fights Back.

Proponents of Proposition 5 claimed that the Governor's power to appoint parole board members is not being unconstitutionally fettered, because instead of allowing the Governor to nominate board members and have them confirmed by the Senate (as stated under existing law), CAL. GOVERNMENT CODE 12838.4 (West 2008), the Governor will actually *appoint* board members

upon recommendation of the Secretary of Rehabilitation and Parole. Thus, they argue that “[t]he net effect of these changes is to *enhance* the Governor’s Power.” Preliminary Opposition to the Petition for Writ of Mandate, *Wilson v. Bowen* S165180, at 14 (July 25, 2008). Furthermore,

Because Proposition 5 contains scores of provisions that would have “independent life” even if Petitioners’ challenge to a few of the measure’s provisions were successful, the only course consistent with the hallowed place of the initiative process in our system of government is to permit the electoral process to go forward and let the courts grapple with issues of interpretation, constitutionality and (if necessary) *severability* after the election.

*Id.* at 9 (emphasis added). This raises the important issue of Severability.

### **b. Severability**

Severability becomes important when portions of an initiative are found to be invalid. When this occurs, the other portions may be found to be valid if they are sufficiently severed from the valid sections. *Gerken v. Fair Policy Practices*, 6 Cal. 4th 707, 714 (1993).

Proposition 5, like many other propositions, contains a severability section that states:

If any provision of this Act or the Application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this initiative which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this initiative are severable.

Proposition 5 § 57. Although the initiative provides for severability, the courts must deem the portions to be severable. “[T]he invalid provision must be grammatically, functionally, and volitionally severable.” *Gerken*, 6 Cal. 4th at 714 (citing *Calfarm v. Deukmejian*, 48 Cal.3d 805, 821 (1989)). As to the first and second requirement, the remaining valid provisions must be able to be read and function independently of the invalid sections. As for the third requirement, “[t]he test is 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.” *Id.* at 714-15 (citing *People’s Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316 (1986) (emphasis removed)).

As described above in “Pre-Election Litigation,” it is possible that some portions of the initiative may be unconstitutional. One reason the California courts are reluctant to prevent a Proposition from appearing on the ballot is because in *Independent Energy Producers Association v. McPherson*, 38 Cal. 4th 1020, 1025 (2006), it was stated that “a court should take into consideration the availability of postelection relief in deciding whether it is preferable to resolve the issue [before the election].”

The sections of Proposition 5 that can potentially be deemed to be unconstitutional include Section Four (creating the Secretary of Rehabilitation and Parole) and Section Seven (allowing

the Governor to make appointments to the Board of Parole Hearings after the candidate has been recommended by the Secretary of Rehabilitation and Parole). *See* Petition for Writ of Mandate (arguing that the aforementioned sections violate the California Constitution).

When reviewing these sections in light of *Gerken*, it is clear that they are grammatically severable, in that the “provisions amount to a dozen or so isolated sentences in [the] measure . . . .” Preliminary Opposition to the Petition for Writ of Mandate, at 2. As for the functionally and volitionally severable prongs of the test, the sections represent a small portion of the entire proposition. It can be said with confidence that it is likely the electorate’s attention would be on the sentencing reform proposed by the proposition and not on the restructuring of a parole oversight body. Furthermore, the parole oversight section of the proposition is not intertwined with the sentencing portion of the proposition, leaving the other sections functional in the absence of the potentially invalid provisions.

### **c. Conflicting Ballot Measures**

Proposition 5 contains a provision that attempts to address potential conflicts with other initiatives that may appear on the ballot. Proposition 5 § 56. It provides that in the event that Proposition 5 and another similar criminal justice initiative both pass with a majority of votes in the same election *and* Proposition 5 receives more votes, “[Proposition 5] shall control in its entirety and conflicting provisions in the other measure or measures shall be void and without legal effect.” *Id.* In the alternate, if both pass and the other conflicting measure receives more votes, “[Proposition 5] shall take effect to the extent permitted by law.” *Id.* The only other similar criminal justice initiative is Proposition 6, which involves increasing sentences for certain offenders. Secretary of State, California Official Voter Information Guide, Proposition 6, Official Title and Summary, (2008) <http://voterguide.sos.ca.gov/title-sum/prop6-title-sum.htm>.

While perhaps occupying opposite ends of the ideological spectrum, Propositions 5 and 6 will likely not be deemed to conflict with each other. Among other things, Proposition 6 provides for sentence enhancements for certain violent and gang-related offenses. Again, Proposition 5 focuses on nonviolent offenders. Furthermore, being that both Propositions are separately anchored in different ideological camps, it is likely that only one (if any) of the propositions will pass. Although both propositions relate to criminal justice, there do not appear to be any conflicting provisions.

## **V. Constitutional Issues**

### **a. Due Process**

Due Process is a Constitutional right that seeks to ensure that “[n]o State shall deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV. Even though Proposition 5 seeks to provide *more* liberty than would otherwise be allotted by current sentencing guidelines it is important to ensure that any revocation of parole or probation status is conducted with due process.

Although individuals already subject to parole and probation are not afforded the same rights as defendants yet to be convicted, there is still a minimum level of due process that must be satisfied. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Individuals on parole or probation must be given a hearing before revocation of such status. *See id.* at 485; *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). While Proposition 5 does provide guidelines for rehabilitation for individuals on parole and probation, it leaves existing statutory language that states, “[t]he sole authority to issue warrants for the return to actual custody of any state prisoner released on parole rests with the Board of Parole Hearings . . . .” Proposition 5 § 11. The Board of Parole Hearings is a board already in existence; it also provides the requisite level of due process required by federal law. Furthermore, Proposition 5 provides that “parole shall not be suspended or revoked . . . for a technical violation of parole.” *Id.* § 21(c)(3). It further explains that a technical violation is one that would otherwise not constitute a felony or a misdemeanor but for the individuals status as a parolee. *See id.* Given that the nature of the proposition involves the granting of more liberties and not the deprivation thereof, it seems that Due Process will not be an issue with Proposition 5.

### **b. Equal Protection**

Equal Protection essentially provides that those in similarly situated positions must be treated equally by the law. *See* U.S. CONST. amend. XIV. This becomes an issue when individuals are eligible for rehabilitation treatment but the prosecuting attorney or the judge decides to seek/impose incarceration. It is this sort of discretion that has prompted equal protection scrutiny. *See generally* JOHN CLARK, PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS (2006). When making an equal protection claim, the burden is on the defendant to establish certain elements. In *Fedorov v. United States*, 600 A.2d 370, 377 (1991), the court held that the “defendant must make a prima facie showing that: ‘(1) others similarly situated were not prosecuted, and (2) the selective prosecution being complained of was improperly motivated . . . .’” (*quoting* *Smith v. United States*, 460 A.2d 576, 578 (1983)) (emphasis removed). The court further explained that both claims must be clearly and separately established. *Id.*

This was also an issue raised when the voters accepted Proposition 36. *See* Lisa Rettig Ryan, Proposition 36: *Drug Treatment Diversion Program Rehabilitation or Decriminalization of Drug Offenses in California?*, CAL. INITIATIVE REV. (Nov. 2000). Proposition 36 gave the court the option of providing rehabilitation to offenders. *Id.* Once courts have the ability to divert *some* offenders away from incarceration, others who are similarly situated will be given different treatment. The drafting of Proposition 5 ensures that the rehabilitation aspect of Proposition 36 remains, while making it equally applied throughout the state.

Proposition 5 is unique in that it requires the court to provide rehabilitation treatment to eligible offenders. *See* Proposition 5 § 14. “Notwithstanding any other provision of law, drug treatment *shall* be provided to eligible defendants.” *Id.* (emphasis added). The proposition then goes on to list the criteria required for eligibility. *See id.* By uniformly providing rehabilitation treatment to all eligible offenders, equal protection will likely not be at issue.

## **VI. Public Policy Considerations**

### a. Proponents

Supporters of this initiative argue that is necessary to combat both the problems of widespread drug addiction and prison overcrowding. They argue the initiative is necessary for several reasons.

First, Proposition 5 will provide drug treatment for youth offenders, which does not exist under the current law. *Yes on Proposition 5*. There is currently no system in place for at risk youth or their families to turn to for help. *California Official Voter Information Guide*, Arguments and Rebuttals, Secretary of State, 2006, <http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt5.htm> (accessed September 14, 2008). Proposition 5 will solve this problem by instituting treatment options for children with drug problems. *Id.*; see Corey Ordoñez, *Anti-gang Violence Parenting Classes: Early Parental Involvement Versus Career Criminals*, 39 McGeorge L. Rev. 671, 674 (“Interventional at early ages facilitates the process of reducing juvenile deviation.”). It will give family members, school counselors and physicians somewhere to refer young drug user to so that they can get treatment for their addiction and get steered away from a lifestyle that often includes crime. *California Official Voter Information Guide*.

Second, the initiative will improve and expand the treatment for non-violent offenders created by Proposition 36 and institute greater accountability for those involved in the program. *Yes on Proposition 5*. It allows judges to send nonviolent offenders who do not follow the treatment requirements back to jail and also allows judges to increase the sentences of repeat offenders. *California Official Voter Information Guide*. It holds non-violent parolees accountable for their actions while they are receiving treatment. *Id.* Minor parole violations will be sanctioned with punishments that include community service, drug treatment or jail time and serious violations will cause them to be returned to state prison. *Id.* Parolees who have a history of violent crimes, gang related crimes or sex offenses will be returned to prison for any violation of their parole conditions. *Id.* Proposition 5 also creates greater accountability because it forces participants to pay for a portion of their treatment costs. *Id.*

Third, proponents argue that Proposition 5 will provide a safe solution to the problem of overcrowding of prisons. *Yes on Proposition 5*. There are currently 175,000 inmates in facilities that were designed to house 100,000. Proposition 5 § 2. The legislature has been unable to solve the problem of prison overcrowding. Proponents believe it is time for the people to step in and take action to solve the problem themselves. *California Official Voter Information Guide*. By providing alternative treatment for convicts who have committed non-violent drug related crimes, this initiative would free up room in prison for the more violent offenders who are more of a danger to society. *Id.* Proposition 5 would also help reduce crime rates by heightening the parole requirements for violent offenders, which would force them to serve more of their sentences. *Id.*

Fourth, proponents stress that the initiative is needed because it commits the State to devote more resources to the rehabilitation of prisoners and parolees. *Yes on Proposition 5*. In California, over \$10 billion is spent yearly on the prison system but not much is spent on the rehabilitation process. *California Official Voter Information Guide*. Proponents of this initiative argue that this system is short sighted and does not address the underlying problems of addiction. *Id.* According

to former San Diego and Seattle Police Chief Norm Stamper over “eighty percent of the people in California prisons have a problem with substance abuse. Most get no treatment. After prison, many go back to drugs and return to prison.” *Id.* This means that tens of thousands of people enter and are released from the prison system without any treatment for addiction, which only serves to perpetuate the cycle. *Id.* Stamper believes that Proposition 5 “separates violent offenders from non-violent offenders. It gives non-violent offenders who are ready to change an opportunity, and a reason, to do so.” *Id.*

Finally, proponents believe that Proposition 5 should be passed because it will save taxpayer money. According to the legislative analyst, this initiative will save over \$2.5 billion of taxpayer’s money by keeping offenders out of prison and in drug treatment programs. *Yes on Proposition 5.*

Proponents of Proposition 5 include: California Society of Addiction Medicine, California Association of Addiction Recovery Resources, California Association of Alcoholism and Drug Abuse Counselors, Coalition of Alcohol and Drug Associations, National Association on Alcohol, Drugs and Disability, League of Women Voters of California, California Democratic Party, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, California Public Defenders Association, George Shultz, chairman of Governor Schwarzenegger’s Council of Economic Advisers, John DiIulio, former director, White House Office of Faith-Based and Community Initiatives, Senate Majority Leader Gloria Romero, and Assembly Members Jim Beall, Mark Leno and Curren Price, Jr. *Id.*

## **b. Opponents**

Opponents of this initiative argue that Proposition 5 is a deceptive measure and will not actually solve the problems that it purports to address. Jeffrey Thomas, the public defender of Solano County, went as far as to say that Proposition 5 “‘is based on misunderstanding and misinformation’ and was adopted ‘using heavy-handed tactics.’” *Schrag*, at A17.

First, opponents argue that Proposition 5 does not actually serve to keep first time non-violent drug offenders out of prison because, according to Los Angeles County District Attorney Steve Cooley, “these offenders would not actually be sentenced to prison time to start with.” *California Official Voter Information Guide*. According to opponents, the real effect of this initiative is to give a “get-out-of-jail-free” card to defendants accused of crimes like domestic violence, child abuse, mortgage fraud, identity theft, vehicular manslaughter, insurance fraud and auto theft who claim that drugs were the underlying cause of the offense. *People Against Proposition 5: Facts*. When the defendant makes a “drug defense” claim the burden of proof shifts to the prosecution and requires them to prove that the defendant should still be held liable for the crime regardless of whether drugs were involved or not. *Id.* Opponents argue that the real people this initiative will benefit are those convicted of other crimes while under the influence drugs and therefore that public safety will suffer due more criminals escaping incarceration. *Id.*

Second, opponents argue that, in addition to letting criminals who commit crimes to escape incarceration, this proposition serves to lessen the punishment for drug dealers. *California Official Voter Information Guide*. For example, Proposition 5 decreases the sentence for

methamphetamine dealer caught with up to \$50,000 worth of methamphetamine from three years to only six months. *Id.* Having these dealers back on the streets will also be detrimental to the young people that this initiative claims to protect by increasing the amount of drugs on the streets and therefore making it easier for children to get access to them.

Third, opponents argue that this initiative will not actually save taxpayers any money. Funding the program will cost over \$1 billion annually with built in increases. *Id.* This initiative also creates two new bureaucracies with no accountability, which will cost hundreds of millions of dollars. *Id.* Both the Parole Reform Oversight and Accountability Board and the Parole Reform Board created by the initiative function independently with no built in oversight. The boards would be allowed to use their funding as they see fit and there is nothing to stop them from overspending on one part of the program to the detriment of the other. While the state may save taxpayer money because it does not have to pay for the incarceration of as many offenders, the costs will just be passed along to the counties who could be forced to raise taxes to meet the costs of the new programs. *People Against Proposition 5: Facts.* Specifically, at least twenty counties would be forced to build new jails since their current jails are already at capacity. *California Official Voter Information Guide.* Opponents also worry that other programs such as education and other important services may have to be cut back in order to meet these funding needs. *Id.* Not only does Proposition 5 not save the taxpayers any money but the cost to society could be great as well. By releasing 45,000 criminals back into society, Proposition 5 could actually serve to increase the crime rates. *Id.* Those criminals who complete the treatment program are actually more likely to commit new crimes than any other group of released felons. *Id.* Opponents worry that there is no way to calculate what the increased costs of the drug related crimes, identity theft and consumer fraud committed by nonviolent offenders while they are in treatment instead of incarceration will be. *Id.*

Finally, opponents argue that this initiative will not have the effect it intends. They claim that this initiative will actually undermine the successful rehabilitation of drug addicts. Successful rehabilitation requires a treatment plan that includes both goals and consequences. – both of which are included under the current rehabilitation and drug court programs. *Id.* In addition opponents claim that instead of fixing the flaws in the system this initiative will actually exaggerate them. *No on 5*, September 8, 2008, [http://www.pe.com/elections/2008/oped/editorials/stories/PE\\_OpEd\\_Opinion\\_E\\_op\\_09\\_ed\\_prop5\\_1\\_elx.189ae46.html#](http://www.pe.com/elections/2008/oped/editorials/stories/PE_OpEd_Opinion_E_op_09_ed_prop5_1_elx.189ae46.html#) (accessed September 14, 2008). By creating a three-tier system, with the first level being even more lenient than Proposition 36, and allowing people in the third tier to have five prior convictions, Proposition 5 is not harsh enough to provide any incentive for offenders to change their behavior. *Id.*

Proposition 5 opponents include: Mothers Against Drunk Driving (MADD), California League of United Latin American Citizens, National Association of Drug Court Professionals, California Police Chiefs Association, California District Attorneys Association, California State Sheriffs Association, Chief Probation Officers of California, Drug Free America Foundation, Martin Sheen, General Barry McCaffery, former Director of the Office of National Drug Control Policy under President Bill Clinton, Former Governors Gray Davis and Pete Wilson, Judges Tara Reilly, Joy Markman, and Wendy Lindley, and Dan Lungren, Congressman 3rd District. *People Against Proposition 5: Facts.*

## **VII. Financial Support**

### **a. Proponents**

Proponents of Proposition 5 are listed under the NORA Campaign - Yes On 5, Sponsored by Campaign For New Drug Policies And Drug Policy Alliance Network. <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1302707&session=2007&view=received>. The following individuals have contributed over \$15,000 to support Proposition 5: Thomas Benningson (\$15,000), Shawn Hailey (\$20,000) Campaign For New Drug Policies (\$25,000), M. Quinn Delaney (\$25,000), Irwin Mark Jacobs (\$50,000), The Center for Policy Reform DBA Drug Policy Alliance Network (\$400,000), John D. Sperling (\$500,000) Jacob D. Goldfield (\$700,000) Bob Wilson (\$700,000) and George Soros (\$1,000,000). *Id.*

### **b. Opponents**

Opponents of Proposition 5 are organized under The People Against Proposition 5 Deception. <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1308198&session=2007&view=received>. The following individuals contributed over \$5,000 to support the campaign against Proposition 5: Long Beach Police Officers Association Independent Expenditure Committee (\$5000). Peace Officer Association Of Los Angeles County Foundation (\$5000), Popa Inc (\$5000), California District Attorney Investigators' Association (\$5000), California Police Chiefs Association (\$5000), San Diegans Against Crime Pac (\$5000) Alliance For California's Renewal (\$6000), California Correctional Supervisors Organization Pac (\$7500), Sweeney and Greene LLP (\$37,860), The California Narcotics Officers' Association (\$60,000), and The Sycuan Band of the Kumeyaay (\$175,000). *Id.*

## **VIII. Conclusion**

Proposition 5 is an extension and modification of Proposition 36 which took effect in 2000. Proposition 5 seeks to increase funding for programs that support treatment of drug addiction instead of incarceration. It proposes several big changes including a new three-track drug diversion program for adult offenders and a youth program for at risk people under the age of eighteen. Proposition 5 also changes the structure of the parole and rehabilitation programs in addition to reducing the criminal charges for possessing marijuana.

The public will have a chance to vote on Proposition 5 on November 4, 2008. If the initiative is passed there will undoubtedly be more questions about how the financing of all the programs will be accomplished when it is executed, especially what the balance will be between the SATFF and the state costs for each part of the program. It is unknown just how much money will be saved by programs the initiative creates, so the total cost of the initiative is uncertain. Proponents and opponents have different opinions on the financial impacts of the initiative so the actual affects will be unknown until it is enacted.

Whether or not Proposition 5 will pass in November ultimately depends on the voter's feeling about the effectiveness of keeping non-violent drug possession offenders out of prison and in drug treatment programs instead.