

**California Public Defenders Association**  
**Position Paper on**  
**Proposition 9 (Nov. 4, 2008 General Election Ballot),**  
**The “Victims’ Bill of Rights Act of 2008: Marsy’s Law.”**

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***Overview of Proposition 9***

The California Public Defenders Association (CPDA) opposes Proposition 9.

Proposition 9 is concerned with the rights of victims at the trial level, and at the parole–hearing level.

It falls into three main parts. The first main part is a portion that explains findings, declarations, purposes and reasons. This first part is found both at Prop 9’s Section 3, titled “Statement of Purposes and Intent,” and is also spread through various portions of the other two parts.

The second main part of Proposition 9, its Sections 4 and 4.1 (there is no Section 4.2) concerns the rights of victims at the trial level.

The third part of Proposition 9, its Sections 5, and 5.1 to 5.3, concerns the rights of victims in the parole process; this third part also substantially alters the parole process, generally making it more difficult for inmates to gain parole.

The one other substantive part of Proposition 9 is its Section 6, titled “Notice of Victims’ Bill of Rights, concerns notifying victims of their rights.

### ***Proposition 9’s Purposes and Intent.***

The first part of Proposition 9 is hortatory in nature, that is, language intended to encourage or incite. Thus, much of Section 3, “... Purposes and Intent,” is devoted to reciting the terrible history of the parents of a murder victim, Marsy, the highlight being that her parents thought the murderer was in jail only to encounter him in a grocery store. Part of the rest is devoted to pointing out that members of the infamous “Manson family” are seeking parole.

The rest of the Purposes and Intent section, and much of the language throughout Proposition 9 is devoted to discussing the importance of observing victim’s rights, and much of the rhetoric used is less inflammatory.

CPDA well–knows that crime victims have important rights. Many public defender clients, at other times in their lives, have been crime victims; we

sometimes even represent people who are defendants in one case but victims in another. Also, some public defenders are themselves, unfortunately, sometimes victims of crime. CPDA does not belittle victim's rights.

However, of the types of provisions in Proposition 9's Purposes and Intent section, and of similar language found throughout Proposition 9,, the California Supreme Court has said in *Dix v. Superior Court* (1991) 53 Cal.3d 442, 452, the following:

“... [I]t is obvious that many recent legislative declarations about the ‘rights’ of felony victims have been intended primarily as moral and philosophical abstractions supporting reform of the substantive criminal law. Such abstract references do not suggest an intent to alter criminal *practice* fundamentally by giving individual victims standing to intervene in ongoing criminal cases.”

### ***Proposition 9's Statement of Victims' Rights at the Trial Level.***

Such moral and philosophical abstractions, or exhortations as referred to in the *Dix* case just above, are mixed in with Prop 9's Section 4.1 which sets out amendments to Subdivision (a) of California Constitution article 1, section 28.

One of those provisions, however, is more than an abstraction. That provision in Section 4.1 of Proposition 9 is the proposed amendment to Cal. Const. art. I, § 28, subd. (a), that would be numbered Paragraph (3):

The rights of victims pervade the criminal justice system,  
~~encompassing not only the right to restitution from the wrongdoers  
for financial losses suffered as a result of criminal acts, but also the~~

~~more basic expectation.~~ *These rights include personally held and enforceable rights described in paragraphs (1) through (17) of subdivision (b).*

This is repeated in far more explicit terms later in that same Section 4.1 at proposed new Cal. Const. art. 28, § (c), Para. (1):

*(c) (1) A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.*

Of course, as mentioned, CPDA agrees that victims have important rights, and some of them are, and should be, personally enforceable.

But an examination of “paragraphs (1) through (17) of subdivision (b)” of Cal. Const. art. I, sec. 28, as it would be amended by Prop. 9, shows that much of what is described in those paragraphs our Constitution and Statutes currently assigns exclusively to County District Attorneys, or to the courts.

Here are some examples from the proposed amended Cal. Const. art. I, §28, subdivision (b):

*(b) ... [A] victim shall be entitled to the following rights:*

....

*(3) “To have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions of the defendant.”*

*(4) ... [T]o prevent disclosure of confidential information ... to the ... defendant's attorney ... which could be used to locate ... the victim ... or which ... were made in the course of medical ... treatment...."*

....

*(6) To ... reasonably confer with the prosecuting agency ... regarding[ ] the arrest of the defendant ... [and] the charges filed....*

....

*(9) To a speedy trial ....*

Regarding proposed paragraph (b)(3), the California Constitution, at Article I, section 12, already sets the criteria for release on bail, and requires the court to consider the likelihood that the defendant's release "would result in great bodily harm to others."<sup>1</sup> The proposed new paragraph would change that.

Regarding proposed new paragraph (b)(4), reciprocal discovery is already established in California's Constitution at Article I, section 30, subdivision (c), and implemented by Penal Code sections 1054 to 1054.9. The proposed new paragraph would change that. Sometimes, under present law, disclosure of "confidential" information, such as medical matters, is required under the reciprocal discovery laws. Under those present laws, only the defense attorney can receive that type of information. To now deny that also to the defense attorney would often deprive the defense attorney the ability to properly

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<sup>1</sup> Cal. Const. art. I, sec. 12 apparently takes precedence over Cal. Const. art. I, sec. 28, subd. (c), a similar bail provision, because, according to the Historical Notes in West's Annotated Code for this Section, Section 12 was enacted by Proposition 14 at the same election that enacted Sec. 28 as part of Prop 8, and Prop. 14 received more votes than Prop. 8.

investigate the case; that would deprive the defendant of U.S. Const. 6th Amendment's guarantee of effective assistance of counsel.

Regarding proposed paragraph (b)(6), the California Supreme Court has long held, e.g., at *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450, that "neither a crime victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another." This paragraph would change that.

Regarding proposed paragraph (b)(9), our state constitution (and the federal constitution), has long accorded this right only to the defendant, and more recently extended it also to the People. Cal. Const. art. I, § 15, and, more recently § 29. This paragraph would change that.

This series of amendments (and more examples could be given) shows that this Initiative is not just an amendment, but is, in fact, a revision of California's constitution. Although our constitution can be amended by initiative, it cannot be revised by initiative. A constitutional revision requires a constitutional convention, or popular ratification, or legislative submission of the measure to the voters. Cal. Const. art. XVIII, sections 1, 2, and 3; see *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349.

Thus, *Raven* overturned a portion of 1990's Proposition 115 because that portion "would be so far reaching as to amount to a constitutional revision beyond the scope of the initiative process." *Raven, supra*, 52 Cal.3d at 351. This fact, that Proposition 9 is an improper constitutional revision, is noted in the Ballot Pamphlet's Argument against Proposition 9. The third paragraph of that argument notes that this Proposition "rewrites California's constitution."<sup>2</sup>

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<sup>2</sup> The arguments for and against Proposition 9 that are in the Secretary of State's Official Voter Information Guide are at <http://voterguide.sos.ca.gov/title-sum/prop9-title-sum.htm> (accessed Sept. 15, 2008).

Freezing such sweeping victims' rights into our constitution also gives rise to serious practical concerns that are also of constitutional dimension. Many of these rights accrue at a stage that must, in effect, assume as true what is yet to be proven: whether the person *is* a victim at all; indeed, often, whether a crime even occurred.

Two examples have already been given. Proposed new Cal. Const. art. I, §28, subd. (b), paragraph (3) gives victims enforceable rights concerning bail. And proposed new Cal. Const. art. I, §28, subd. (b), paragraph (6) gives victims the right to confer with the district attorney regarding the defendant's "arrest."

This Proposition thus invites a series of mini-trials, in which the "plaintiff" is not the District Attorney, but is the alleged victim. These mini-trials that will precede the actual trial, will be over whether a crime did occur, and over whether the Plaintiff is the victim, or was the aggressor, and so forth. Perhaps, to be cynical, some defendants would like all this extra opportunity for discovery, but the whole process is unseemly, unwieldy, and currently unconstitutional.

In addition to those problems, some of the new "rights" given to "victims" seem plain violations of equal protection.

For example, again at Proposition 9's Section 4.1, proposed new Subd. (e) of Cal. Cons. Art. I, sec. 28, defines "victim" in a way that patently denies equal protection. The last sentence states "The term 'victim' does not include ... a person in custody for an offense...."

But what possible interest could society have for denying the rights of victims to a person who is victimized while in custody, whether the criminal is a correctional officer or is another inmate? Even worse, what possible interest could society have in denying the rights of all victims to a person who is the victim of a major crime on the outside, but also then becomes locked up for a minor offense. In both cases the answer is "none legitimate interest at all." So the very definition of "victim" in Proposition 9 is an unconstitutional equal protection violation.

### ***Proposition 9's Statement of Victims' Rights at the Parole Level.***

The third part of Proposition 9, has some blatant due process violations, and other fatal flaws.

Proposition 9 sets forth "Victims' Rights in Parole Proceedings" at its Section 5, and 5.1 to 5.3.

Section 5.1 would add to Penal Code section 3041.5, a new Subdivision (a)(2), with the following sentence: "*Neither the prisoner nor the attorney for the prisoner shall be entitled to ask questions of any person appearing at the hearing pursuant to subdivision (b) of Section 3043 [i.e., the victim, next of kin, or their representatives or their counsel].*"

That provision is an obvious due process violation: what if the victim, or representative, or counsel makes a simple mistake: the parole applicant would often, as a practical matter, be unable to correct it by asking a simple question. And what if it was more than a simple mistake, but an exaggeration, or even a lie. Surely, the parolee is deprived of due process of law by being unable to ask even a simple question that may lead to a quick correction. It is not enough to say that the parole applicant could give his or her version; that leaves a disputed fact that the victim, if asked, might have been happy to correct.

Another provision that is an obvious denial of due process, or of equal protection, is found at Prop 9's Section 5.1 at its proposed amendment to Penal Code section 3041.5, adopting new Subdivision (c) as follows:

*(c) The board shall conduct a parole hearing pursuant to this section as a de novo hearing.... [T]he board shall admit the prior recorded or memorialized testimony or statement of a victim or witness, upon*

*request of the victim or if the victim or witness has died or become unavailable.*

Thus, Prop 9 provides that a subsequent parole hearing is “de novo” except for the victim’s testimony. This does make sense if the victim or witness has died (provided, as stated above, there was some right to question this person), but it makes no sense, otherwise, why only the victim’s testimony, but none other, can be admitted from the prior hearing. What if the parole applicant had a good-character witness at the last hearing, or an impeachment witness? Under this proposed new Subdivision, the witness or victim, but not the impeachment witness, would be heard at the new hearing.

Proposition 9 contains another legal problems. At its Section 5.3, Prop 9 would add new Penal Code section 3044. Subdivision (a)(3) of that new Section would restrict the parolee’s right to counsel, as follows:

*(3) 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... determine[s]:*

*(A) The parolee is indigent; and*

*(B) Considering the complexity of the charges, the defense, or because the parolee’s mental or educational capacity, he or she appears incapable of speaking effectively in his or her own defense.*

This provision would violate the *Valdivia injunction*, a permanent injunction agreed to by California in *Valdivia v. Davis* (E.D.Cal.2002) 206 F.Supp.2d 1068. The *Valdivia* injunction is set out in full as Exhibit A to *Valdivia v. Schwarzenegger* (E.D. Cal. 2008) 548 F.Supp.2d 852, and is discussed at *In re*

*Marquez* (2007) 153 Cal.App.4th 1, and also *In re Miller* (2007) 145 Cal.App.4th 1228, 1237. *Marquez* at 153 Cal.App.4th at 5, fn 1 states “The Valdivia remedial plan policy outline states that counsel shall be appointed for all parolees beginning at the return to custody assessment (RTCA).”

***The Legal Problems of Proposition 9, Alone, Make This a Proposition that Must Receive a “No” Vote***

It is not surprising that CPDA also finds unreasonable the many provisions of Proposition 9 that make parole more difficult to obtain, particularly those provisions that provide for up to 15 years between parole hearings.

But the legal problems that Proposition 9 presents are so grave that, because of those alone, CPDA believes Proposition 9 should receive a resounding vote of “No.”

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