ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

ANALYSIS OF PROPOSITION 8

THE CRIMINAL JUSTICE INITIATIVE

TERRY GOGGIN, Chairman
ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

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March 24, 1982

Honorable Willie L. Brown, Jr.
Speaker of the Assembly
Room 219, State Capitol
Sacramento, CA 95814

Dear Mr. Speaker:

Enclosed herewith is an analysis by the staff of the Assembly Criminal Justice Committee on Proposition 8, the "Criminal Justice" Initiative, which will be on the June 8, 1982 ballot. Since the passage of this complex and wide-ranging measure will have a serious impact on our criminal justice system and on state and local budgets, it is essential that the public be able to make an informed voting decision.

This analysis highlights many of the readily discernible effects of the Initiative. However, as noted by staff, the language of Proposition 8 is in many instances unclear and susceptible to several different interpretations. Nonetheless, some conclusions can be drawn. Of particular concern to policy-makers is the likelihood that, if enacted, Proposition 8 will:

-- Hamper criminal prosecutions by limiting prosecutors' ability to get needed accomplice testimony, throwing out settled rules of evidence, and creating many new avenues of appeal for convicted criminals.

-- Frustrate victims of crime by allowing defense attorneys to put the victim on trial (opening, in almost all cases, the victim's past life to endless cross-examination), and by promising victims a new right to restitution (apart from civil suit) which cannot be enforced if the offender has no money.

-- Impose nearly three-quarters of a billion dollars a year in new uncompensated costs on local government, mainly for more probation officers, longer court hearings, and expansion of jail facilities.

-- Consume all of the money from the proposed prison bond (Proposition 1 on the June ballot). If both measures pass, prisons will become even more overcrowded despite the expenditure of over $1 billion to finance the bond.

-- Increase court backlog by adding "restitution" hearings (possibly before a jury) in most criminal cases and mandatory special sentencing hearings in misdemeanor cases. More judges will also be needed to preside over bail hearings in every case as bail schedules may be unconstitutional under the Initiative.

-- Swamp appellate courts with protracted appeals over the meaning of the Initiative. The courts will have to resolve the many ambiguities and contradictions of the measure and fashion new rules for use of evidence at trial, insanity and diminished capacity defenses, bail, criminal sentencing, juvenile hearings, and the enforcement of constitutional rights.

-- Allow the use of wiretap, polygraph, and other questionable evidence in court despite legislative and judicial declarations to the contrary.

-- Give the courts unprecedented authority over public schools by empowering them to do whatever is necessary to assure "peaceful" campuses.

The provisions of this Initiative will, with one exception, become effective immediately upon enactment. It is imperative, therefore, that State and local decisionmakers become aware of the implications of this measure and prepare to make the necessary fiscal adjustments as the Initiative contains no revenue source or other means to pay for its mandates.

Very truly yours,

TERRY GOGGIN
Chairman
Assembly Criminal Justice Committee

TG:df

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

ANALYSIS

OF

PROPOSITION 8

The Criminal Justice Initiative

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STAFF ANALYSIS OF THE GANN CRIMINAL JUSTICE INITIATIVE

INTRODUCTION

In June of this year, the electors of California will be asked to consider Proposition 8, the "Criminal Justice" initiative sponsored by Paul Gann. This initiative proposes major changes in both the Constitution and the statutes of California. Because of the extensive nature of the initiative, volumes could be written on the potential effects if the measure were approved. This staff analysis will attempt to digest the distinct provisions and comment on the readily discernable implications of the measure. It is not meant to be an exhaustive review.

Mention should be made of a potential defect that could void the initiative if enacted. Article 2, Section 8, Subdivision (d) of the California Constitution provides "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." The courts have adopted a "reasonably germane" test to determine if the single-subject requirement is violated. An initiative measure will not violate the constitutional requirement of single subject matter if, despite its varied collateral effects, all of its parts are reasonably germane to each other. The Gann initiative may violate this requirement in that few of its provisions relate directly to victims of crime and that at least one of its provisions does not relate to "criminal justice," the subject heading given to the initiative by the Attorney General. There is a thorough discussion of this potential defect in "Analysis of the Gann Initiative by the Appellate Division of the Los Angeles District Attorney's Office."

As will become clear in reading this analysis, the implications and meaning of the Gann initiative are not readily apparent. Protracted litigation will be necessary to define its provisions. Although this analysis attempts to discuss fiscal implications of the initiative, the uncertainty of its meaning makes authoritative state and local cost estimates impossible. The Department of Corrections has prepared an analysis of some of the potential state costs. This analysis is reproduced in Appendix "A".

Estimates of the costs for local government are even more uncertain. The estimates of one county (Riverside) with a statewide extrapolation appear in Appendix "B". It should be noted that the Gann initiative of 1979 required that the State reimburse local governments for the cost of new mandated programs. However, the previous Gann initiative (embodied in Section 6, Article XIII B of the State Constitution) does not require such reimbursement when the local cost mandate comes by way of the initiative process. Unless funding for some of the local costs is forthcoming from the State, local government will have to assume the costs of the new burdens mandated under the initiative.

TITLE AND PREAMBLE

TEXT:

Sec. 1. This amendment shall be known as "The Victims' Bill of Rights".

Subdivision (a) of Section 28 is added to Article I of the Constitution, to read:

> SEC. 28. (a) The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.
>
> 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 that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.
>
> Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.
>
> To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.

RESTITUTION

TEXT:

Subdivision (b) of Section 28 is added to Article I of the Constitution, to read:

> (b) Restitution. It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.
>
> Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.

DIGEST:

Under current law, as a condition of probation, the court may provide for restitution in proper cases. If the victim has received state financial assistance from the Victims of Violent Crime Indemnity Fund, the court must consider whether, as a condition of probation, the defendant shall make restitution to the victim or the Indemnity Fund (Penal Code Section 1203.1). If probation is granted in an automobile theft case and there was pecuniary loss to the owner of the vehicle, restitution must be ordered (Penal Code Section 1202.5). In vandalism cases, restitution shall be ordered as a condition of probation unless such condition would be inappropriate (Penal Code Section 594). There is no authority for a court to order restitution or reparation when there is not a grant of probation.

The initiative would provide in the Constitution that all persons who suffer a loss "as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer." Restitution shall be ordered from convicted persons regardless of sentence or disposition imposed in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The initiative requires the Legislature to adopt implementing legislation in the calendar year following the adoption of this provision.

ANALYSIS:

1. Existing Right to Civil Recovery. Under current law, an injured party has a right to recover damages from the responsible party through a civil action. A felony conviction may be used by the injured party to establish the defendant's civil liability (Evidence Code Sec. 1300).

2. Recovery From Indigent Defendants. Most convicted criminals are indigent. A newly created right to restitution would not appear to permit a victim to recover from such persons with greater success than under existing civil proceedings.

3. Enforcement. The initiative does not state how restitution orders are to be enforced when the defendant is sentenced to state prison. Long-standing constitutional law prohibits imprisonment for debt and prohibits jail as a means of enforcing fines from indigents. Enforcement of a restitution order may thus be impossible or be dependent on existing methods to enforce civil judgments.

4. Loophole. The initiative requires the court to order restitution "unless compelling and extraordinary reasons exist to the contrary." The initiative does not define what circumstances would constitute such compelling and extraordinary reasons. Absent any guidance in this area, the initiative would appear to leave courts free to order restitution only in those cases in which they would be inclined to do so under current law.

5. Constitutional Defects. The right to a trial by jury in all civil disputes is guaranteed by Section 16 of Article I of the California Constitution. In addition to the right to a jury trial, guarantees of due process require proper notice through pleadings, the opportunity to assert defenses, and proof in open court by testimony under oath and subject to cross-examination.

   A criminal conviction generally will establish that the perpetrator of the crime is civilly liable to the victim for losses suffered. However, other issues necessary for determination of a civil action are not resolved in a criminal case. The most prominent of these is the amount of damages the victim should be awarded as a result of the injuries inflicted by the defendant.

   To the extent the initiative intends to provide a civil recovery from the defendant in a criminal action, it would probably be unconstitutional unless the defendant were afforded proper notice and a full and fair hearing, including a jury trial on the issue of damages.

   These constitutional problems do not exist with the current practice of ordering restitution as a condition of probation. The amount of restitution in such cases need only approximate the loss of the victim and is ordered on the theory that making the defendant responsible for his or her actions will aid in rehabilitation. The defendant, however, may avoid the restitution order by refusing the conditions of probation. By taking away that choice, the initiative raises serious constitutional concerns.

6. Practical Problems. Assuming the court could constitutionally mandate the defendant to pay an amount to the victim upon imposing sentence, the initiative would create mini-civil trials within the sentencing hearing. This prospect raises a number of practical problems:

   a. Right to Public Defender for Civil Claims. Other provisions of the initiative allow the victim and counsel to attend the sentencing hearing and assert damage claims. The defendant would be entitled to present and challenge evidence on the validity of the claim. In theory, the defendant should have the right to discovery and investigation of the victim's allegations. The defendant normally has appointed counsel and at public expense. Since the damage claims would be part of the criminal sentencing process, the public defender would be obligated to provide representation on these civil issues. In addition, public defender investigators would be needed to research the validity of damage claims. The initiative would have the effect, therefore, of providing personal injury defense at public expense.

   b. Determining the Amount of Restitution. The initiative uses the term "restitution" rather than the term "reparation." Reparation generally encompasses compensation for loss, damage, or injury done to another. Restitution, on the other hand, is a narrower concept (People v. Williams, [1966] 247 Cal. App.2d 394). In other states, the term restitution has been used to mean the return of specific property, or its value, which has been taken from another. The initiative does not define what it means by the term restitution. Several questions are raised in this regard: Would the amount in dispute include pain and suffering and other issues normally resolved in a civil case? May spouses recover for loss of consortium? Is recovery limited to compensation for medical bills or would it include loss of wages or other consequential damages?

   c. Effect on Other Actions. Existing doctrines of res judicata and collateral estoppel provide that a point once litigated and decided cannot be heard again.

This may prevent a victim who obtains restitution in a criminal case from bringing a civil case. This might be prejudicial to victims in that civil juries are likely to be more generous to the victim than would a criminal court judge in assessing damages against the defendant.

d. Non-Victim Claims. The initiative states that all persons who "suffer losses as a result of criminal activity" have the right to restitution and that restitution shall be ordered in every case in which a "crime victim suffers a loss." The initiative does not appear to restrict restitution awards to the direct victim of the criminal act. Under this broad language, family members may have the right to recover loss of support if the victim were murdered or incapacitated. As the law generally defines "persons" to include corporations, the initiative may authorize insurance companies to seek restitution in criminal cases where they have paid the direct victim.

7. Legislative Implementation. The initiative orders the Legislature to implement the restitution section "during the calendar year following adoption" of the measure. Given the uncertainty of this provision's meaning and intent, and given the practical problems involved, it is unclear precisely what the Legislature is expected or required to do.

8. Legislation.

a. Two bills are pending which attempt to assist crime victims in gaining recovery in civil cases. One would grant crime victims priority in the civil court calendar (AB 3509, Goggin). The other would permit felony convictions to be used to establish liability in civil cases, whether or not the conviction was based upon a plea of nolo contendre (AB 3510, Goggin).

b. AB 251 (Vasconcellos, Chapter 102, Stats. of 1981) raised penalty assessments on fines to adequately fund the Victims of Violent Crime Indemnity Fund.

c. AB 656 (Martinez, pending) increases amounts for victim indemnification.

d. AB 2571 (Elder, pending) would require restitution in all felony probation dispositions where the defendant is able to pay.

SAFE SCHOOLS

TEXT:

Subdivision (c) of Section 28 is added to Article I of the Constitution, to read:

> (c) Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

DIGEST:

The initiative adds to the Constitution the inalienable right of all students and staff of public schools to attend campuses which are safe, secure and peaceful.

ANALYSIS:

1. New Rights. Under Article I, Section I, of the State Constitution, all people have the inalienable right to enjoy and defend life and liberty and to pursue and obtain safety, happiness, and privacy. Unless the new amendment is intended to be meaningless, it would give students and staff in public schools greater rights to safety than other citizens enjoy.

2. Compulsory Education Laws. Under current statutes, a child could be declared a ward of the juvenile court for failing to attend school; a parent may be convicted of a misdemeanor for failing to send his or her child to school. The initiative, by giving students new constitutional rights, would render compulsory education laws unconstitutional insofar as they require students to attend schools that may not be safe, secure and peaceful. If this provision is enacted, a student may have the constitutional right to refuse to attend school.

3. Role of Courts. The initiative does not define what would constitute a safe, secure and peaceful campus. Courts will be called upon to define the scope of this newly created right and to enforce it. This will necessarily involve the courts in major educational and social policy decisions.

   For instance, to enforce the right to safe schools, the courts may need to order stronger security measures. A school district may be required to reallocate resources to pay more for security and less for education programs. Courts may order deployment of municipal police to protect schools at the expense of protection of the public outside of the schools.

A court could order an unsafe school closed and order the busing of its students to other schools. Courts may be able to look beyond school district boundaries to spread tax bases from different districts to insure all schools are safe (i.e., use Beverly Hills School District funds to insure safety in the neighboring Los Angeles City schools). The full impact of this provision is unknowab.e.

4. Civil Liability of Taxpayers. One implication of the safe schools provision is that any injury at school resulting from a breach of the peace would be a denial of constitutional rights. Even if there is no negligence on the part of school authorities, the injured party may be able to sue the school district or municipality merely because the injury took place on campus. Thus, a school may be liable for fights between students or between staff, or for any other incident that could be construed as jeopardizing the safety, security or peacefulness of the campus.

5. Legislation. Legislation has been enacted or is still pending which promotes school safety.

   a. AB 1587 (Imbrecht, Chapter 746, Stats. of 1981) tightens up laws on school disruption.

   b. AB 1641 (La Follette, pending) creates the crime of being on a school campus without permission.

   c. SB 589 (Rains, Chapter 566, Stats. of 1981) eases the law of arrest for campus assaults.

RELEVANT EVIDENCE (Truth-in-Evidence)

TEXT:

Subdivision (d) of Section 28 is added to Article I of the Constitution, to read:

> (d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, [sic] Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

DIGEST:

The "exclusionary rule" is the common name given to a series of legal doctrines which hold that evidence obtained through a violation of constitutional rights may not be introduced in court. Federal and state courts use the exclusionary rule as the main enforcement tool against violations of the rights of individuals by government agents. Thus, a forced confession is inadmissible on the basis that use of such evidence would violate the person's Fifth (right against self-incrimination) and Sixth (right to a fair trial) Amendment rights. Evidence seized by police who have broken into a home without a warrant is excluded in order to protect that person's Fourth Amendment right to be free from unreasonable search and seizure.

Under California law, the admission of evidence is also regulated by statute. In addition, evidence obtained in violation of the California Constitution can be excluded even when a Federal constitutional right has not been infringed.

The initiative would provide that no relevant evidence may be excluded in a criminal or juvenile court hearing unless admission of such evidence would violate a constitutional or statutory right of "the press." In addition, this provision sets forth five exceptions:

1. Existing statutes relating to privilege.

2. Existing statutes relating to hearsay.

3. Existing Evidence Code section regulating evidence of prior sexual conduct of a sex crime victim to attack the credibility of the victim.

4. Existing Evidence Code section regulating character evidence against the victim of a sex crime.

5. Evidence Code Section 352: the court in its discretion may exclude evidence if the probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusion of the issues, or of misleading the jury.

ANALYSIS:

1. Unconstitutional On Its Face. While this provision is the most far reaching part of the initiative, it is the most ambiguous and least understood section. A literal reading of its language would suggest that all relevant evidence (except for the specified, limited exceptions) may be introduced at trial even if the evidence was obtained through violation of rights guaranteed by the United States Constitution.

   Beginning in the early part of this Century, the United States Supreme Court required, as a matter of constitutional law, that evidence obtained in violation of the Fourth Amendment be excluded from trial (Weeks v. United States, [1914] 232 U.S. 383). In 1961, the U.S. Supreme Court applied this doctrine to the states (Mapp v. Ohio, 367 U.S. 643). The initiative appears to contravene this longstanding line of cases and, to that extent, is void as unconstitutional on its face.

   Not all of the initiative's supporters interpret this section as repealing the exclusionary rule but, instead, see its language directed only toward California constitutional "extensions" of the rule. Several factors argue against this non-literal reading of the section. Primary among these is the language itself.

   The authors of the initiative did not make exceptions for violations of the Federal Constitution. The failure of purportedly knowledgeable experts to include "except as required under the United States Constitution" in the initiative's text is a fairly clear expression of their intent to make no such exception. Some of the drafters of the initiative have stated that their intent was to repeal the exclusionary rule as applied to the states by forcing a test case of the issue before the United States Supreme Court.

2. Wipes Out Rules of Evidence.

   a. Non-Constitutional Rules of Exclusion. The law of evidence contains many rules that exclude relevant evidence which is not related to the manner in which the evidence was obtained by the police. While the foundation of the California Evidence Code is that "except as otherwise provided by statute all relevant evidence is admissible" (Evidence Code Section 351), a substantial part of the Code contains statutory exceptions to this principle which reflect legislative and judicial policy judgments. For example, the Code provides that, even if relevant, a rape victim need not give her address and telephone number in open court (Section 352.1) and that evidence of a person's religious belief or lack thereof is inadmissible to attack or support credibility (Section 789). [For a more detailed list, see "Attachment I" at the end of this section.] Certain judicially developed rules exclude evidence of dubious reliability (e.g., evidence of polygraph results).

   b. Consequences of "Truth-in-Evidence" Provision. The "truth-in-evidence" provision would repeal all existing statutory rules of exclusion not specifically saved by its terms.

   Consequences include:

   (1) Lets in Evidence From Unlawful Wiretaps. Penal Code Section 631 prohibits wiretapping in California. The section provides for criminal penalties and for the exclusion of wiretap evidence in any judicial, administrative, legislative or other proceeding. The initiative will not alter the criminal violations but would repeal the statutory exclusion of evidence gained from an illegal wiretap.

   (2) May Restore Diminished Capacity Defense. Current law and a statutory provision of this initiative disallow diminished capacity defenses. The constitutional "all relevant evidence" provision should override these statutes. The constitutional section of the initiative thus would operate to repeal the statutory diminished capacity part of the initiative. Curiously, the authors did not make exception for their own enactments.

   (3) Quacks and Charlatans. Current law restricts the use of opinion testimony. Expert testimony is permitted only when based on generally accepted scientific principles (Evidence Code Sections 800-804), and is helpful

to the jury. The court is also specifically authorized to restrict the number of experts called by each side (Evidence Code Section 723).

The initiative eliminates these restrictions. So-called experts from various unscientific disciplines could be called to give their opinions on the defendant's guilt or innocence, including astrologers, palm readers and psychics.

(4) Polygraph and Voiceprint Results. A subset of expert testimony likely to be made admissible by the initiative involves polygraphs and voiceprints. Results of these tests are currently inadmissible (People v. Jones, 52 Cal.2d 636; People v. Kelly, 17 Cal.3d 24). Under the initiative a defendant could take one of these tests and, if favorable, offer its results at trial. The prosecution could also attempt to offer such evidence.

(5) Character Assassination of Prosecution Witnesses. Current law prohibits the use of specific instances of conduct, other than a prior felony conviction, to attack the credibility of a witness (Evidence Code Section 787). The purpose of this restriction is to avoid trying past acts in the current case. By eliminating this restriction, the initiative permits attorneys to cross-examine police officers about the truthfulness of testimony given in cases other than the one being tried. The initiative would also permit attorneys to attack the "bad character" of police and other prosecution witnesses claiming, for example, that an officer was a drunk or a womanizer, in an attempt to have the jury disbelieve his testimony (Evidence Code Section 786).

(6) Permits Use of Unauthenticated Copies of Documents. By eliminating the "best evidence" rule (Evidence Code Section 1500) and the authentication requirements for documentary evidence (Evidence Code Section 1401), the initiative may permit the introduction of unreliable evidence. This may be especially troublesome in major fraud cases and in cases where the defendant offers documentary support for an alibi, such as hotel receipts.

(7) Limits Statutory Protections of Sexual Assault Victims. The initiative repeals the statute that prevents questioning a rape victim about her address and telephone number in open court (Evidence Code Section 352.1). It may also undercut the legislative prohibition on court-ordered psychiatric examination of rape victims (Penal Code Section 1112). If the

victim refuses to submit to psychiatric testing, the defense could use that refusal against her. Moreover, if all relevant evidence is constitutionally permissible, legislation precluding the obtainment of such evidence would be constitutionally suspect.

(8) Harms Prosecution But Not Defense. The "all relevant evidence" provision may operate to promote the use of highly inflammatory evidence against the prosecution but not against the defendant. For example, Evidence Code Section 1101 precludes the use of character evidence to prove the defendant had the disposition to commit the crime. The admission of such evidence against the defendant will likely violate due process on the ground that he may be convicted by a jury because of his past acts rather than because of evidence suggesting he committed the crime. In Michelson v. U.S., (1948) 335 U.S. 469, the Supreme Court required the exclusion of this otherwise relevant evidence against the accused to protect his right to a fair trial:

> "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

On the other hand, these due process considerations will not operate when the character evidence is offered against other witnesses, especially victims and other witnesses for the prosecution. This provision may therefore result in hampering prosecution efforts.

(9) Evidence Code Section 352. The initiative maintains the court's ability to exclude evidence if it finds the probative value of the evidence to be substantially outweighed by its undue prejudicial effect or undue consumption of time. It could be argued that much of the evidence discussed in the preceding section could be excluded under this authority. It is not clear, however, that individual judges will agree. The sections repealed by the initiative

contained legislative policy as to what should be admissible evidence in judicial proceedings. There is no guarantee that individual judges making determinations in particular cases will reflect those policies. Many judges may find the "truth-in-evidence" provision to require admission of even questionable evidence that is currently excluded by the repealed sections, and that their power to exclude evidence under Section 352 should be exercised with restraint. In any event, it is certain that enormous amounts of litigation will be needed to work out new "rules of evidence" and to re-establish some sense of uniformity in court rules following passage of the initiative.

3. May End Exclusion Based Upon Violations of California Constitution. California has long provided for the exclusion of evidence in criminal proceedings based upon violations of important rights in the California Constitution. Occasionally, under the State Constitution, evidence is excluded which would not have been excluded under the United States Constitution. One interpretation of the initiative's evidence provision is that it intends to preserve the Federal exclusionary rule while repealing State independent grounds for exclusion of evidence.

Such an interpretation is certainly not clear based on the wording of the initiative. The initiative contains no specific reference to Article I, Section 13, of the California Constitution, which establishes the right to be free from unreasonable searches and seizures. To the extent the intent of the initiative was to limit judicial power to enforce Art. I, Sec. 13, the initiative would properly have so stated. In establishing a different system of bail release, the drafters did not merely add a bail provision assuming some limitation of the existing right to bail -- the initiative specifically repealed the existing right to bail. They further demonstrated an awareness that existing law would continue in force unless specifically restricted in their use of the phrase "notwithstanding any other provision of law" in Section 8 of the initiative which changes the law regarding Youth Authority commitments. The fact that a phrase such as "notwithstanding any other provision of this Constitution" was not used is persuasive evidence that the drafters did not intend the "truth-in-evidence" provision to operate as a restriction on constitutional doctrine. Another argument suggesting that the "all relevant evidence" provision does not intend to abrogate the "exclusionary rule" is its retention of the statutory privilege against self-incrimination (Evidence Code Section 940). Under this retained provision, evidence can be excluded that would have been excluded under Section 15 of Article I of the

State Constitution. This means that state court extensions of the Miranda case and the right against self-incrimination are exempt from the initiative. The initiative would not have made this exception if the drafters want such evidence excluded.

Assuming the court does interpret the initiative to eliminate independent state constitutional grounds for excluding evidence, the effect is difficult to ascertain. Many of the California Supreme Court decisions are based upon both Federal and State grounds without any corresponding Federal decision to the contrary. One can only speculate whether the United States Supreme Court would agree or disagree with these decisions. Additionally, some decisions of the California court do not indicate upon which constitution they are based. Clearly, where there are differences between Federal and State decisions, the Federal standard will prevail. The following is a list of some of the cases and issues that are likely to be overturned by this interpretation of the initiative:

-- Phone Records: Privacy.

Federal: No right to privacy; upholds the use of "pen registers" by law enforcement. Smith v. Maryland, (1979) 422 U.S.

California: Telephone user has a reasonable expectation of privacy in records of phone calls made and credit card user has a reasonable expectation of privacy of the record of his credit card transactions. People v. Blair, (1979) 25 Cal.3d.

-- Bank Records: Privacy.

Federal: Police may obtain bank records without a search warrant. United States v. Miller, (1976) 425 U.S. 435.

California: Bank customer has a reasonable expectation of privacy in his checks and bank statements which cannot be given to police absent a warrant. Burrows v. Superior Court, (1974) 13 Cal.3d 238.

-- Public Restroom Surveillance.

Federal: No certain federal decisions. In the Ninth Circuit, there is no expectation of privacy in the Federal Constitution in public restrooms. Smayda v. United States, 352 F.2d 251 (9th Cir. 1965).

California: Clandestine police restroom observations violate State reasonable expectation of privacy. People v. Triggs, (1973) 8 Cal.3d 884; Britt v. Superior Court, (1962) 58 Cal.2d 469; Bielicki v. Superior Court, (1962) 57 Cal.2d 602.

-- Trash Can Searches.

Federal: No reasonable expectation of privacy in trash or garbage. Abel v. U.S., (1960) 362 U.S. 217.

California: There exists a reasonable expectation of privacy in the contents of trash cans a residential householder placed at the curb for collection; evidence seized is inadmissible absent a warrant. People v. Krivda, (1971) 5 Cal.3d 357.

-- Vicarious Standing: Search and Seizure.

Federal: Only those persons whose expectations of privacy were invaded by a police officer may object to the introduction of evidence gathered. Rakas v. Illinois, 439 U.S. 128 (1978).

California: Defendants may object to evidence gathered illegally even though they were not the victim of the unlawful activity. People v. Johnson, (1969) 70 Cal.2d 541 (Press may not be affected -- see #6 following).

-- Strip Searches.

Federal: Full body search permissible whenever "custodial" arrest is made. "Custodial" arrests include any situation where the suspect is taken into police custody to be transported to a police station. Gustafson v. Florida, (1973) 414 U.S. 260.

California: Body search of motorist after arrest for traffic violation is not permissible if actual incarceration is improbable. People v. Superior Court (Simon), (1972) 7 Cal.3d 186.

-- Lies In Affidavit for Search Warrant.

Federal: Untrue statement excised from affidavit; if warrant still states probable cause, evidence seized is admissible. Franks v. Delaware, (1978) 438 U.S. 154.

California: Intentional untruths in affidavit for search warrant invalidates the warrant entirely; all evidence seized excluded. People v. Cook, (1978) 22 Cal.3d 67.

-- Use of Invalid Confessions for Impeachment.

Federal: Although a confession obtained in violation of Miranda is not admissible, it can be used to impeach if defendant takes the stand. Harris v. New York, (1970) 40 U.S. 222.

California: Unlawfully obtained confessions cannot be used for impeachment purposes. People v. Disbrow, (1976) 16 Cal.3d 101.

-- Private Security Searches.

Federal: Generally, only action of government is covered by the Constitutional protections. A violation by a private citizen would not result in suppression of evidence.

California: Evidence must be suppressed if acquired by an unlawful search conducted during an arrest or detention by a private security guard. People v. Zelinski, (1979) 24 Cal.3d 357.

4. No Remedy For Violations of Rights. If this provision of the initiative operates to prohibit exclusion of evidence obtained in violation of the California Constitution, then police may be free to violate these rights without fear of sanction. Curiously, the initiative would not repeal any existing State right, but would repeal the remedy for violation of these rights. The California Bill of Rights would have little purpose if there were no remedy for violation of those rights.

5. Courts May Dismiss Cases Involving Violations of Rights. If courts were unable to exclude illegally obtained evidence under the initiative, they may resort to more drastic alternatives such as dismissing cases, or precluding challenged witnesses from testifying. For example, evidence is sometimes excluded because physical evidence has been improperly preserved or was destroyed (People v. Hitch, 12 Cal.3d 641). Hitch involved breath test ampules that, if properly preserved, would have permitted the defendant to conduct another test to determine the accuracy of the breath test results. Failure to preserve the ampules made this impossible and denied the defendant effective cross examination concerning the test results. If the "all relevant evidence" provision were enacted, courts would be left only with the more drastic alternative of dismissing the case.

6. Only the Media Unaffected. This section of the initiative, by its terms, would not affect "any existing statutory or constitutional right of the press." This exemption would retain the law that police may not, even with a search warrant, search newsrooms (see Penal Code Section 1524).

The press, and the press alone, would retain vicarious (third party) standing to block introduction of evidence obtained by illegal police seizure of their work product. Other professional groups (doctors, lawyers, and psychiatrists) would not have standing under the initiative to suppress files illegally seized from their offices. It is unclear why the authors of the initiative took special care to preserve the rights of the press but did not choose to maintain similar protections for other professional groups.

7. Legislation. No legislation has been introduced to repeal the Evidence Code.

Legislation pending on the exclusionary rule:

a. SCA 7 and SB 1092 (Presley) would, with specified exceptions, eliminate independent state grounds as a basis for exclusion of evidence;

b. ACA 31 (Goggin) would allow the introduction of certain illegally seized evidence at trial when the seizing police agency had applied other appropriate sanctions to remedy such constitutional violations.

ATTACHMENT I

RULES OF EVIDENCE FOR CRIMINAL TRIALS REPEALED BY INITIATIVE

EC 352.1 - Rape victim's address and telephone number need not be given in open court.

EC 701 - Witness is disqualified to testify if incapable of expressing himself concerning the matter so as to be understood or is incapable of understanding the duty of a witness to tell the truth. This provision precludes young children incapable of understanding the duty to tell the truth and lunatics from testifying in court. Although their evidence may be relevant, it would be unreliable.

EC 702 - Witness may not testify about matters unless he had personal knowledge of the matters. This provision is clearly designed to require reliability in testimony. The initiative would require admissibility of second hand knowledge.

EC 703 - Judge at trial may not testify (upon objection of one party).

EC 703.5 - Judge may not testify at future hearings about statements or conduct occurring at prior proceeding. This is to protect judges from being endlessly subpoenaed for future hearings.

EC 704 - Juror may not testify.

EC 723 - Court may limit the number of expert witnesses to be called by any party.

EC 786 - Evidence of traits of character other than honesty or veracity is inadmissible to attack or support the credibility of a witness.

EC 787 - Evidence of instances of conduct relevant to prove a trait of character is inadmissible to attack or support credibility. This section governs the use of evidence against police officers and other prosecution witnesses. Without it (and under the initiative) the defendant could show that a police officer "lied" in another case to attack the officer's credibility. Current law only allows prior felony convictions to be used for this purpose. Under the initiative, any lie or evidence

of specific conduct that shows a tendency for dishonesty could be used against a witness. Constitutionally, this may not be applicable to criminal defendants.

EC 789 - Evidence of religious belief or lack thereof is inadmissible to attack or support credibility.

EC 790 - Evidence of the good character of a witness is inadmissible unless evidence of his bad character has been admitted to attack credibility -- this provision prevents each side from lining up 100 bishops to attest to good character.

EC 791 - Prior inconsistent statements are inadmissible except as provided -- the initiative would authorize these statements for all purposes.

EC 800 - Non-expert opinion evidence is limited to an opinion rationally based upon the perception of the witness and helpful to a clear understanding of his testimony. This provision prevents defense witnesses from offering opinions on the character of prosecution witnesses, et cetera.

EC 801-804- Limits expert opinion testimony; cannot be based upon improper matter.

EC 1101 - Character evidence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is inadmissible to prove conduct on an occasion.

EC 1104 - Character evidence with respect to care or skill is inadmissible to prove the quality of conduct on an occasion.

EC 1153 - Offer by a criminal defendant to plead guilty is inadmissible. Current law promotes compromise. A defendant is free to negotiate a disposition by offering to plead guilty knowing that such offer cannot be used in a subsequent trial.

EC 1401 - Writing must be authenticated before it may be received in evidence.

EC 1500 - [Best Evidence Rule] -- No evidence other than the original of a writing is admissible to prove the content of the writing.

PC 631 - Unauthorized wiretaps inadmissible.

PC 1538.5 - Precludes the use of unlawfull seized evidence at hearings other than trials (i.e., sentencing hearings.

Govt. C. 7489 - Precludes use of evidence obtained in violation of the "California Right to Financial Privacy Act."

PRETRIAL RELEASE: BAIL AND OWN RECOGNIZANCE RELEASE

TEXT:

Section 12 of Article I of the Constitution is repealed.

~~SEC. 12. A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required.~~

~~A person may be released on his or her own recognizance in the court's discretion.~~

Subdivisions (e) and (g) of Section 28 of the Constitution are added, to read:

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(g) As used in this article, the term "serious felony" is any crime defined in Penal Code Section 1192.7(c).

DIGEST:

Under current constitutional and statutory law, a person has a right to be released on bail, except in capital cases where bail is optional. The purpose of bail is to assure the defendant's attendance in court when required. To that end, in fixing the amount of bail, the court is directed by statute to take into consideration the seriousness of the offense charged, the previous criminal record of the accused, and the probability of his or her appearing in court. A person may be released on his or her own recognizance in the court's discretion.

The initiative would repeal the constitutional right to bail and instead provide that bail is discretionary in all cases, except in capital cases where release on bail is prohibited. The initiative provides that in setting, reducing or denying bail, the court should take into consideration the seriousness of the offense charged, the previous criminal record of the accused, the probability of appearing in court and the protection of the public. The initiative states that public safety shall be the primary consideration. No other standards to guide the exercise of the court's discretion are provided.

The initiative provides that in all cases the reasons for granting or denying bail or an own recognizance release must be stated in the record and included in the court's minutes.

A person charged with a specified "serious felony" may not be released on his or her own recognizance. Before such a person may be released on bail, a hearing may be held and the prosecution shall be given notice and a reasonable opportunity to be heard on the matter.

ANALYSIS:

1. Eliminates Right To Bail In All Cases.

   a. Bail and the Presumption of Innocence. Under the California Constitution, persons charged with non-capital offenses have a right to be released on bail. While reflecting the seriousness of the charged offense and the prior record of the accused, the amount of bail must be set for the purpose of assuring the defendant's presence in court when required (In re Underwood, [1973] 9 Cal.3d 345).

      The right to bail implements the presumption of innocence which characterizes our criminal justice system. Denying bail has obvious and serious consequences for a person accused, but not yet convicted of a crime (See Van Atta v. Scott, [1980] 27 Cal.3d 424, 435).

b. Initiative Makes Bail Discretionary In All Cases. By its terms, the initiative leaves up to the court in every case other than capital cases, the decision whether or not to permit release on bail.

c. Implications. Although the initiative requires public safety to be the primary consideration in setting or denying bail, it requires the court to consider other factors for denying bail: seriousness of the offense charged, previous criminal record of the defendant, and the probability of court appearances by the defendant. By its terms, the initiative allows a motorist to be detained in jail with no bail for failing to appear on a traffic ticket (improbability of appearing); allows a person charged with a non-serious misdemeanor to be committed without bail because of a prior criminal record, and provides for detention without bail on an unproven but serious charge.

The initiative does not define what is meant by public safety. If demonstrators or labor organizers were arrested for trespass, a court could deny bail on the theory that such activities harm the public safety. Without further definition, this provision introduces an enormously subjective standard by which individual judges and magistrates will be able to decide who must remain in jail before his or her guilt is proven.

2. Constitutionality. Amendment 8 of the United States Constitution provides that "excessive bail shall not be required . . ." The United States Supreme Court has yet to decide whether or not this portion of the Eighth Amendment is applicable to the states. Nonetheless, the initiative raises a number of serious constitutional questions.

There have been a number of lower court and state decisions that have upheld carefully drafted preventative detention statutes while others have been found to be unconstitutional.

In cases where preventative detention has been upheld, the statutes involved have been carefully drafted to include due process safeguards. The initiative, however, makes bail discretionary (as opposed to mandatory or presumed), has no safeguards for denial of bail, and allows such denial for reasons other than public safety. It is doubtful that such a provision could pass constitutional muster even if the concept of preventative detention is sanctioned by the U.S. Supreme Court.

Additionally, the initiative changes the bail provisions for capital offenses from "bail optional" to "mandatory no bail." It may not be constitutional to deny bail based

upon a charge alone without regard for the circumstances of the case. For example, under the initiative, an accused murderer would have to be committed without bail even though the district attorney believes, after new evidence surfaces, the person is probably innocent but needs more time to investigate.

3. Other Approaches. A preventative detention proposal is scheduled to appear on the June ballot as Proposition 4 (ACA 14, McAlister). Proposition 4 generally provides that bail may be denied certain persons accused of serious violent crimes upon a showing by clear and convincing evidence that public safety will be specifically threatened. As Proposition 4 is more directed in its approach and contains specific standards for application, it is likely to be less susceptible to constitutional attack than is the initiative's provision.

4. Public Safety Bail [illegible] Standards.

a. Amount of Bail. In addition to denying bail, the initiative requires public safety to be considered in setting the amount of bail. This language seems to place a dollar value on "danger to the public." If the defendant is dangerous when the court sets bail at $50,000, is he any less dangerous if he makes that amount? Is the court to revoke bail and set it at a higher amount?

b. Predictions of Dangerousness. The fundamental concept behind this bail provision is that the courts should or can predict future dangerousness of accused persons. There have, however, been many studies indicating that such predictions are rarely accurate (See People v. Murtishaw, [1981] 29 Cal.3d 733).

The initiative does not specify what burden of proof of future dangerousness would be necessary in order for the court to deny bail. Nor does it suggest what type of evidence would be useful on this issue.

c. Litigation. Since the initiative contains no standards which would provide uniformity throughout the state in this regard, thousands of pretrial appeals can be expected challenging the denial of bail or the amount set in the hope that the courts will establish some rules to insure equal treatment for similarly situated persons.

5. New Procedures Mandated. Under current law, release on bail is generally administered through bail schedules established by the court. Under these schedules bail is set in a standard amount for certain offenses and

circumstances unless there is a request for a lower or higher amount. Under this system, release on bail can be accomplished without direct action by the court unless such action is requested. The initiative would appear to render the system of bail schedules unconstitutional insofar as the initiative requires the judge or magistrate to take into consideration public safety, and to state on the record and enter in the minutes the reasons, whenever he or she grants or denies release on bail or on the defendant's own recognizance. As a consequence, the initiative will require substantial numbers of judges spending all of their time setting bail, rather than the current system of handling the bulk of the cases in an administrative fashion.

6. Fiscal Impact. If the initiative voids the bail schedules and current statutes which guarantee release for non-serious offenders, the fiscal impact would be enormous. There are more than 1.5 million criminal cases filed each year. Bail hearings would be conducted in all of these cases, pre-trial jail confinement would escalate, and court clerical functions would be significantly burdened.

   The initiative would increase the use of contested bail hearings and would require court time to be consumed with stating reasons for bail decisions. Clerks will be required to record in the court minutes all decisions and reasons for bail decisions.

   Assuming the constitutionality of this provision is upheld, it would result in an increased utilization of jail of persons accused of crimes. According to the Board of Corrections, 57% of the State's county jails are overcrowded. Ten counties are under court orders or consent decrees to ease overcrowding; five counties (Riverside, Sacramento, Santa Clara, Santa Cruz and San Diego) are under court orders or consent decrees to release inmates. Passage of the initiative may significantly exacerbate this problem.

7. District Attorney's Role Uncertain. The initiative clearly prohibits own recognizance release in "serious felony" cases (see Penal Code Section 1192.7 for list of offenses). However, the wording is uncertain as to how bail is set in these cases. One sentence uses the word "may" twice, yielding uncertain results. The initiative provides that before such a person may be released on bail, a hearing may be held by the court, and the district attorney shall be given notice and reasonable opportunity to be heard. This wording suggests that a person charged with a serious felony could be released on bail without a hearing, thus denying the district attorney a right to be heard on the issue.

8. Statutory Conflicts. Penal Code Section 1268a provides for a statutory right to bail except for capital cases. This statute is not repealed by the initiative but would appear to conflict with many of its provisions. There is some question as to whether this Penal Code provision will remain in force upon enactment of the initiative, thereby retaining the same right to bail that currently exists.

9. Legislation.

   a. ACA 14 (McAlister) has passed both houses of the Legislature and is on the June ballot as Proposition 4 (see #3 above).

   b. AB 692 (McAlister) and SB 635 (Vuich), which provide enhanced sentences for crimes committed while out on bail, are both pending.

USE OF PRIOR FELONY CONVICTIONS

TEXT:

Subdivision (f) of Section 28 of Article I is added to the Constitution, to read:

> (f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

DIGEST:

1. Witness Credibility. Under current law, the believeability of a person who testifies in court may be attacked by evidence that he or she has a prior felony conviction unless the court finds the probative value of such evidence to be outweighed by its undue prejudicial effect.

   The initiative would provide that a prior felony conviction, whether adult or juvenile, shall be used without limitation for purposes of attacking the credibility of a witness.

2. Enhancements. Current law provides for enhancements to a felony sentence for either prior felony convictions or for prior prison terms. Current law imposes certain restrictions on the use of these convictions. For example, convictions over 10 years old do not trigger enhancements.

   The initiative states in the Constitution that prior felony convictions, whether adult or juvenile, shall subsequently be used without limitation for purposes of enhancement.

3. Proof of Prior Convictions. A prior felony conviction is an element of some offenses. For example, it is a crime for an ex-felon to possess a concealable firearm (Penal Code Section 12021).

   The initiative would require that such prior felony conviction be proven to the trier of fact in open court.

ANALYSIS -- WITNESS CREDIBILITY:

1. Felony Convictions to Attack Credibility.

   a. Current California Rule. The California Evidence Code provides, with some restrictions, that prior felony convictions may be used to attack the credibility of a witness. The Code also declares that evidence is to be excluded if its probative value is substantially outweighed by its prejudicial effect.

      In People v. Beagle, (1972) 6 Cal.3d 441, the Supreme Court reasoned that these two Evidence Code provisions must be read together, concluding that the trial court has discretion to exclude proof of a prior felony when its probative value is outweighed by the risk of undue prejudice. Declining to establish rigid guidelines for the exclusion of prior felony convictions, the court adopted four factors propounded by Judge (now Chief Justice) Burger in Gordon v. United States, (1967) 383 F.2d 936:

      "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence . . . generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . .

      The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness. A special and even more difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe, 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly . . .

One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."

There have been many court decisions since Beagle more clearly defining the standards for utilization of prior convictions for impeachment purposes. Decisions have also extended the practice to cover use of prior convictions of prosecution witnesses.

b. Federal Rule Similar. The federal rule regarding the use of prior convictions to attack the credibility of a witness is similar to the California rule in that it balances the probative value against the prejudicial effect (see Section 609, Federal Rules of Evidence).

c. Policy Considerations. The purpose of the initiative proposal is to require use of prior felony convictions against a criminal defendant if he chooses to testify. The proposal assumes that a person convicted of a felony is not as truthful as a person who has not suffered a felony conviction. The initiative requires use of prior felony convictions no matter how remote, whether or not the crime is related to truthfulness and regardless of whether the offense has since been decriminalized or reduced to a misdemeanor. For example, the initiative would require the jury to be told of a felony drunk driving conviction, a thirty year old conviction for possession of marijuana or a conviction for oral copulation between consenting adults when that act was considered a crime.

The relevance of such evidence is questionable. Its impact would appear to be more related to establishing that the defendant is a bad person than showing that the defendant is untruthful or that he is guilty of the charged crime.

Another effect introduction of these prior convictions may have is to deter the defendant from testifying. Rather than having the jury hear that he had been convicted of a felony in the past, the defendant may

choose to remain silent. This effect would appear to be contrary to another goal of the initiative, i.e., that all relevant evidence is put before the jury.

2. Constitutionality. Requiring the introduction of evidence of felony convictions without limitation raises serious constitutional problems. The initiative would require the use of prior felony convictions for impeachment purposes even though the probative value is outweighed by the danger of substantial prejudice.

Because California and the federal government have statutory protections against the use of prejudicial evidence, there has been no definitive court decision on the constitutionality of compelling such evidence to be used against an accused. There have, however, been many decisions in other states that discuss the constitutionality of using remote prior convictions and using prior convictions which have no bearing on veracity. This provision may result in unfair trials, and subsequent reversals of countless convictions. (See the "Analysis by the Appellate Division of the Los Angeles County District Attorney's Office" for a thorough discussion of the constitutional problems surrounding this proposal.)

3. Attacks On Crime Victims and Prosecution Witnesses. Although this provision may have been motivated by a desire to have defendants impeached with prior convictions, its language would also require that victims and other witnesses who testify have prior felony convictions used against them. For example, a rape victim who had suffered a felony conviction 20 years in the past for possession of narcotics could be attacked by the defense on this ground. A victim of a brutal assault could be attacked with evidence that he had suffered a prior conviction for possession of marijuana or consensual oral copulation with an adult even though the law no longer recognizes such acts to be felonies.

ANALYSIS -- ENHANCEMENTS:

1. Effect on Existing Enhancement Provisions. Existing law provides one, three and five year enhancements for various prior felony convictions (Penal Code Sections 667.5, 667.51 and 667.6). Under each of these provisions there is a five or ten year washout period, disallowing use of stale convictions to increase sentences for recent crimes. The initiative establishes a constitutional mandate that prior convictions be used for this purpose "without limitation." This would appear to void existing washout provisions. If this is the result, prison sentences will be increased based upon prior convictions that occurred even thirty or forty years ago.

Moreover, convictions of offenses which at one time were felonies but have since been reduced or decriminalized (such as marijuana possession and oral copulation between consenting adults) would also lengthen sentences.

2. May Render Its Own Habitual Criminal Provision Unconstitutional. Section 5 of the initiative creates Section 667 of the Penal Code which provides for enhancements of prison terms for prior felony convictions. That provision, however, is limited to convictions "on charges brought and tried separately." This limitation would appear to violate the constitutional mandate added by the initiative that prior convictions shall be used without limitation to enhance sentences.

3. Juvenile "Convictions". The initiative refers to "any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile . . ." In this context the word "juvenile" is unclear in its meaning. Existing law provides that a juvenile court adjudication shall not be a conviction for any purpose (Welfare and Institutions Code Section 203). Therefore, this aspect of the provision could be found to be meaningless. On the other hand, it could be interpreted to override statutory law and require that sustained petitions in juvenile court are to be considered convictions for purposes of impeachment and enhancement. To the extent that juvenile court adjudications had these collateral criminal consequences, the right to trial by jury might have to be extended to juveniles. Because jury trials generally require significantly more court time, already overburdened juvenile courts might be crippled.

ANALYSIS -- PROOF OF PRIOR CONVICTIONS:

1. Current Law. A prior felony conviction is an element of some offenses; for example, it is a crime for an ex-felon to possess a concealable firearm (Penal Code Sec. 12021). The prosecutor may not present evidence of the prior conviction to the jury if the defendant is willing to stipulate that he has suffered the conviction outside the jury's presence unless the prosecutor can establish that its exclusion "will legitimately impair the prosecutor's case or preclude presentation of alternate theories of guilt" (People v. Hall, [1980] 28 Cal.3d 143). The reason for this rule is that the nature of the prior conviction has no relevance to the charge and may serve only to prejudice the jury against the defendant in deciding other issues.

2. Constitutional Problems. The initiative states that prior convictions shall be proven in open court. The apparent

intent is to require that the jury know the nature of the prior conviction rather than that a prior conviction was suffered. As discussed in the impeachment section of this analysis, mandating admission of irrelevant prejudicial evidence may invite constitutional challenges to a substantial number of convictions.

DIMINISHED CAPACITY

TEXT:

Subdivisions (a) and (c) of Section 25 are added to the Penal Code, to read:

> (a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.
>
> (c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

DIGEST:

Under recently passed legislation, there is no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action (SB 54, Roberti, Chapter 404, Stats. of 1981). Evidence of voluntary intoxication, mental disease, mental defect, or mental disorder is not admissible to negate the capacity to form any mental state with which the accused committed the act, but is admissible on the issue as to whether the criminal defendant actually formed any such mental state.

The initiative provides that the diminished capacity defense is abolished; that evidence of intoxication or mental disease, defect or disorder or trauma shall not be admissible to negate the capacity to form a particular intent. Evidence of diminished capacity or a mental disorder may be considered by the court only at the time of sentencing or other disposition.

ANALYSIS:

1. Mens Rea -- The Concept of Criminal Intent. All criminal violations consist of an act and an intent accompanying the act. There are basically two types of criminal intent: specific intent and general intent. Specific intent generally means the actor intended the results when he acted. Decisional law recognizes that the element of

specific intent is lacking when at the time the crime allegedly was committed, the defendant was suffering from some abnormal mental or physical condition, however caused, which prevented him from forming the specific intent or mental state essential to constitute the crime with which he is charged. The person must be acquitted of the charges if the trier of fact has reasonable doubt whether the defendant was capable of forming the specific mental state. This is referred to as "diminished capacity."

Diminished capacity defenses had been most commonly offered in prosecutions for homicide. Voluntary manslaughter, second degree murder, and first degree murder all concern the same act, but differ as to the requisite intent. If there is an intent to kill which is not accompanied by "malice aforethought," then the offense would be voluntary manslaughter. If there is "malice aforethought," the offense would be second degree murder. If additionally there is premeditation and deliberation, the offense would be first degree murder. If the person lacks the capacity due to mental defect, disease or other abnormality to formulate any of the specified intents required for these offenses, he would be not guilty of that offense and would be guilty of the lesser offense that did not require such mental state.

In 1981, the Legislature enacted SB 54 (Roberti) to abolish the diminished capacity defense. The bill prohibits evidence of psychiatric disorders to negate the capacity to formulate criminal intent. The bill did provide that the issue of lack of intent could still be litigated.

2. The Initiative Is Either Superfluous or Unconstitutional. The initiative purports to abolish the diminished capacity defense without defining it. By distinguishing between the "capacity to form intent" from "lack of intent," SB 54 implicitly defined diminished capacity to exclude cases where actual intent is lacking (due to mental disease, voluntary intoxication, et cetera). The initiative does not contain a positive statement that evidence showing the person lacked the criminal intent is admissible. If the initiative is interpreted to allow the introduction of such evidence, the initiative is duplicative of current law. If interpreted to exclude such evidence, the initiative would be unconstitutional.

In People v. Wetmore, (1978) 22 Cal.3d 318, the California Supreme Court stated ". . . we do not perceive how a defendant who has in his possession evidence which rebuts an element of the crime can logically be denied the right to present evidence merely because it will result in his acquittal." Yet subdivision (c) states "evidence of diminished capacity or of a mental disorder may be

considered by the court only at the time of sentencing or other disposition or commitment." This language seems to suggest that the initiative intends to prohibit the use of evidence of mental disorder that will establish that the defendant did not have the intent required to convict him of the crime. Such a provision would almost certainly be declared unconstitutional.

3. Wholesale Reversals. This potential constitutional defect may have most serious repercussions. If a defendant offers evidence of lack of intent due to mental disorder and the court denies such evidence, a resulting conviction will likely be reversed on appeal. It is anticipated that such evidence will be tendered in all death penalty cases, thus causing wholesale reversals. As SB 54 was going through the legislative process, this concern was expressed by the California District Attorneys Association who prompted amendments to the bill to insure its constitutionality. Unconstitutional laws should not be enacted lightly. In a previous criminal justice measure adopted by initiative, the 1978 Death Penalty Law, one sentence was placed into the measure that required the court to instruct the jury in a highly questionable manner. This instruction has been declared unconstitutional, People v. Ramos (1982) 30 Cal.3d 553, and it is anticipated that at least 30 death sentences will be reversed. Costly retrials (at taxpayers' expense) are expected to ensue and, due to the passage of time and loss of witnesses, may result in lesser verdicts.

4. Another Part of the Initiative May Restore the Defense of Diminished Capacity. Another provision of the initiative adds subdivision (d) of Section 28 to the California Constitution and prohibits with certain specified exceptions the exclusion of relevant evidence in a criminal proceeding. None of the exceptions concern diminished capacity. It appears that the diminished capacity "repeal" provision is in conflict with, and would violate, this constitutional amendment and would therefore have no effect. Additionally, the "all relevant evidence" provision would appear to repeal current law which precludes the diminished capacity defense and places other limitations on psychiatric testimony.

5. Involuntary Intoxication. Current law provides that voluntary intoxication cannot be utilized to negate intent whereas the initiative would disallow evidence of both voluntary and involuntary intoxication. Under the initiative, an unwilling victim of punch spiked with LSD would be precluded from showing lack of capacity to formulate intent; under current law the defense would be available. There is no apparent purpose for criminalizing acts resulting from involuntary intoxication.

INSANITY

TEXT:

Subdivision (b) of Section 25 is added to the Penal Code, to read:

> (b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

DIGEST:

Under current law, persons found insane at the time of the commission of a crime may not be held criminally responsible. A defendant found not guilty by reason of insanity is not free to walk out of court. Penal Code Section 1026, et seq., provides for a commitment procedure to the state hospital after a finding of insanity. The current procedure normally results in confinement and treatment in the mental health system rather than the state prison system. Under these commitments, however, upon approval of the court, a person may be released to community outpatient care sooner than he would have been released from prison. A person who is considered dangerous may be confined until the maximum term that he could have spent in prison and thereafter be committed to the state hospital on extended term petitions.

Presently, a person is legally insane if at the time of the crime as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The initiative would instead define legal insanity to mean that the defendant was incapable of knowing or understanding the nature and quality of the act and of distinguishing right from wrong at the time of the commission of the offense.

ANALYSIS:

1. Background: M'Naghten Test vs. American Law Institute's Model Proposal. The California law has always provided that lunatics, insane persons, and idiots are incapable of

committing crimes (former Penal Code Sec. 26). The Legislature has never defined these terms. In 1864, the California Supreme Court in People v. Coffman, 24 Cal. 230, adopted the then prevalent definition of insanity. This definition was derived from the standard in England based on the celebrated M'Naghten case. As formulated last century, for a "defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

The California courts maintained the M'Naghten test over the past 100 years with little modification. During the last 40 years, the M'Naghten test, which focused entirely on the defendant's capacity to think and know and not on his capacity to control his action, has been subject to much criticism. In 1954, the federal circuit court in Washington, D.C., abandoned the M'Naghten test for the Durham rule which provided that a person is not responsible for a criminal act if the act was the product of mental disease or mental defect.

In 1962, after nine years of research and debate by leading legal and medical minds in the United States, the American Law Institute (ALI) approved the Model Penal Code that contained a new formulation for insanity. It specifies that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform to the requirements of law."

The ALI formulation differs from the M'Naghten test in two ways:

a. The M'Naghten test requires a determination as to whether the person appreciates the wrongfulness of his conduct and does not allow for gradations of capacity for such appreciation. The ALI test permits an insanity determination if the defendant lacks substantial capacity for such appreciation.

b. The M'Naghten test focuses entirely on the cognitive state of the defendant. The ALI formulation additionally considers the volitional element, i.e., whether the defendant could control his conduct.

By 1978, the ALI test had been adopted in every federal circuit except the first circuit and by 15 states. In People v. Drew, (1978) 22 Cal.3d 333, the California Supreme Court rejected the previous M'Naghten test for California and adopted the ALI formulation.

2. The Initiative Standard. A standard that had been used prior to the 19th Century adoption of M'Naghten was the "wild beast" test: did the defendant behave like a wild beast? The M'Naghten test reflected 19th Century psychological knowledge and concentrated instead on cognitive capacity. Although worded similarly to the M'Naghten test, the initiative is significantly different.

   In focusing on cognitive capacity under M'Naghten, a person is insane if he either did not know what he was doing or did not know what he was doing was wrong. The initiative instead requires that the person both not know what he was doing and not know that the conduct was wrongful. No state in the United States has such a standard. The implications of such a rigid standard are uncertain. Some critics claim it is closer to the "wild beast" test than the M'Naghten standard.

   Under M'Naghten, a person with a deranged mind is considered legally insane if he chokes a person but believes he is squeezing a melon. Under the initiative that person may be considered legally sane if it can be shown he knows that choking a person is wrong, even though he was not aware he was choking a person.

3. Constitutional Concerns. California has always had a court defined insanity test and constitutional issues have never been raised. However, in other states there have been rulings that a person may not be constitutionally convicted of a crime if he were insane at the time of its commission (State v. Strasburg [Was. 1910] 110 P.1020; Ingles v. People [Colo. 1933] 22 P.2d 1109). The wording of the initiative may raise serious constitutional questions in that it may permit convictions of truly insane persons.

4. Experience Under the ALI Standard. On December 15, 1981, the Assembly Committee on Criminal Justice conducted an extensive investigatory hearing on the issues surrounding the different insanity standards. On a panel before the Committee were representatives of the Attorney General's office, the California District Attorneys Association, criminal defense attorneys, law professors, and psychiatrists and psychologists with different points of view. All members of the panel had strong preference between the ALI and M'Naghten standards, but generally agreed that the two standards did not cause a significant difference in the amount of successful insanity defenses.

   Table I (page 41), prepared by the State Department of Mental Health, reflects the amount of insanity acquittals between 1971 and 1980 and makes comparisons with the FBI

crime indices and felony convictions. The M'Naghten standard was generally used in this State through 1978, the ALI standard thereafter. The chart indicates that there have been small variations over the decade on the amount and percentage of insanity findings, but no significant difference between the M'Naghten and ALI experience.

5. Legislation.

   a. SB 538 (Holmdahl, pending) would adopt the M'Naghten standard.

   b. SB 590 (Rains, Chapter 787, Stats. of 1981) allows limitations on psychiatric opinions regarding insanity.

TABLE I

RATE OF CALIFORNIA NOT GUILTY BY REASON OF INSANITY FINDINGS BY VARIOUS CRIME INDICES

1971 - 1980

Year	Not Guilty by Reason of Insanity Findings[1]	FBI Crime Index[2]	Rate of NGI Findings Compared to FBI Crime Index	Reported Seven Major Offenses[3]	Rate of NGI Findings Compared to Seven Major Offenses	Adult Felony Arrests[4]	Rate of NGI Findings Compared to Adult Felony Arrests	Superior Court Convictions in Adult Felony Cases[5]	Rate of NGI Findings Compared to Superior Court Convictions in Adult Felony Cases
1971	169	1,350,455	0.0001	714,685	0.0002	229,476	0.0007	56,016	0.0030
1972	256	1,311,104	0.0002	723,936	0.0004	240,231	0.0011	49,024	0.0052
1973	253	1,298,267	0.0002	740,157	0.0003	239,395	0.0011	42,672	0.0059
1974	213	1,427,007	0.0001	802,945	0.0003	267,904	0.0008	38,007	0.0056
1975	211	1,522,829	0.0001	876,288	0.0002	265,816	0.0008	35,418	0.0060
1976	209	1,548,314	0.0001	907,898	0.0002	224,532	0.0009	33,539	0.0062
1977	188	1,516,842	0.0001	917,358	0.0002	224,961	0.0008	N/A	N/A
1978	212	1,575,182	0.0001	977,985	0.0002	233,957	0.0009	29,899	0.0071
1979	297	1,689,152	0.0002	1,060,631	0.0003	256,467	0.0012	34,899	0.0085
1980	259	1,838,417	0.0001	1,192,489	0.0002	274,814	0.0009	38,957	0.0066

[1]These data represent number of defendants found Not Guilty by Reason of Insanity and either committed to state hospital or directly committed to community mental health programs. Although data are for fiscal-year periods, they are comparable to calendar-year criminal justice data.

[2]Criminal Justice Profile — 1980. Bureau of Criminal Statistics, California Department of Justice.

[3]Ibid. The seven major offenses are willful homicide, forcible rape, robbery, aggravated assault, burglary, theft of $200 or more, and motor vehicle theft.

[4]Ibid.

[5]Ibid. Data for 1971 through 1974 obtained from Department of Justice compilation of reports submitted by district attorneys and courts. Data for 1975 through 1980 from Department of Justice Offender-Based Transaction Statistics System. Department of Justice estimates 30% underreporting of court disposition information.

HABITUAL OFFENDER

TEXT:

Section 667 is added to the Penal Code, to read:

667. (a) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(b) This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this section to apply.

(c) The Legislature may increase the length of the enhancement of sentence provided in this section by a statute passed by majority vote of each house thereof.

(d) As used in this section "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(e) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

DIGEST:

Under current law, the prison sentence may be enhanced for prior felony convictions or for prior prison terms under the following circumstances:

1. If charged with any felony, one year for each prior prison term served for a felony (5 year washout period). (Penal Code Section 667.5.)

2. If charged with a specified violent felony, three years for each prior prison term for a violent felony (10 year washout period); twenty years to life for two or more prior prison terms for violent felonies. (Penal Code Section 667.5.)

3. If charged with child molestation, five years for each prior sexual assault conviction (10 year washout period); fifteen years to life for two or more prior prison terms. (Penal Code Section 667.51.)

4. If charged with a violent sexual assault, five years for each prior felony conviction for violent sexual assault (10 year washout period); ten years for each prior prison term if two or more prior terms. (Penal Code Section 667.6.)

The initiative would additionally provide that if the person were charged with a specified serious felony, he would receive an enhancement of 5 years for each prior conviction of a specified felony on charges brought and tried separately. This provision shall not apply when the punishment under other provisions of law results in longer prison terms. The length of the enhancement may be increased by the Legislature on a majority vote; all other changes must be by two-thirds vote.

ANALYSIS:

1. Significantly Longer Sentences Will Result. The main effect of this section of the initiative will be to change the present three year serious felony enhancement to a five year enhancement, except for repeat rapists and child molesters who already have 5 year enhancements. (The current 5 year enhancements for rape and child molestation do not require separate charging and therefore would probably yield higher terms than the terms provided in the initiative.)

   Thus, for example, under existing law, a person who has been convicted of ten previous rapes will receive a 50 year enhancement for the prior convictions, plus the term for the current offense. The initiative would, by extending this provision, require a 50 year enhancement for a person who has 10 prior home burglary convictions. This burglar would have a stiffer sentence than a person convicted of first degree murder (25 years to life).

   The initiative would further lengthen sentences over the present system by removing two term restrictions in current law.

a. Initiative Counts Old or "Stale" Convictions. The initiative does not have the "washout" feature (convictions over 10 years old do not count for purposes of enhancement) that exist in current law. Under the initiative, a person who had been convicted of burglaries 40 years ago would have to serve 5 years for each prior conviction even though he led an exemplary life since that time. If this person kills someone in a barroom brawl (voluntary manslaughter), the 40 year old burglaries would be used to enhance the sentence, even though these stale convictions have nothing to do with the current offense.

b. No Striking In the Interests of Justice. Under decisional law, Section 1385 of the Penal Code has been construed to provide judicial power to dismiss or strike -- in the interests of justice -- allegations which, if proven, would enhance punishment for alleged criminal conduct (People v. Burke, [1956] 47 Cal.2d 44). In later decisions, the court has held that this power exists unless there is explicit or implicit legislative intent to the contrary. In addition, the Penal Code specifically permits the court to strike certain prior convictions if it finds circumstances in mitigation of punishment [Penal Code Section 1170.1, subdivision (g)].

Another part of the initiative [Article I, Section 28(f)] provides that "any prior felony conviction . . . shall subsequently be used without limitation for purposes of . . . enhancement." This constitutional amendment would likely be interpreted to override both judicial and statutory authority to strike prior convictions.

Thus, the initiative allows no mitigation of its sentencing provision no matter how extreme the result.

2. Initiative Would Consume All of the Money In the Prison Bond (Proposition 1). The sentence enhancement provisions of the initiative entail substantial costs. According to the California Department of Corrections, the minimum capital outlay expected for these provisions is $490 million while the maximum capital outlay is $3.2 billion. The total state budget is under $27 billion. (See Appendix "A" for a detailed analysis.)

Proposition 1 on the June ballot contains a $495 million general obligation bond for prison capital outlay (construction and improvement). If both measures pass, the State Treasury will pay $1.1 billion to finance the bond and prisons will be more overcrowded than they are now because of the longer sentences required by the initiative.

These capital outlay estimates do not include the hundreds of millions of dollars required to maintain these additional prisons.

3. Inefficient Use of Prison Cells. By lengthening sentences for offenders who already have long sentences, the initiative would take up more available prison space with old men whose prime crime years are far behind them. Violent crime tends to be perpetrated most often by younger men. This is especially true of crimes for which some amount of agility or dexterity is required, for example, burglary and armed robbery.

Several commentators have suggested that, given a limited number of prison cells, crime prevention through incapacitation would be better served by incarcerating more young offenders in their peak crime years at the front end of the system rather than extending the terms of older offenders at the back end.

4. All or Nothing Sentencing Choices. Most of the offenses on the "serious felony" list in the initiative are offenses for which probation is possible. A problem with extremely high sentences in cases where the person is eligible for probation is that it puts the sentencing judge in the position of choosing between two unrealistic alternatives: an unduly harsh sentence or too lenient treatment by a grant of probation. If the court is faced with imposing 30 years for an offense that should be punished at 5 years, it may choose instead the route of granting probation conditioned upon one year in the county jail. If the enhancements provided by the initiative are meant to be mandatory, an overly lenient alternative could result.

5. Initiative May Encourage A Greater Number of Separate Trials. By allowing higher sentences based upon filing decisions of the prosecutors, the provision may encourage multiple filings and trials rather than single filings. Current law encourages consolidation of the criminal charges for courtroom efficiency. The initiative encourages separate trials.

A question arises as to whether a separate conviction could cause a separate five year enhancement if the charges could have been joined. For instance, if the district attorney files two separate felony pleadings alleging two robberies, the convictions may count as two prior convictions for enhancements. The discretionary decision of a prosecutor may thus become even more determinative of the amount of punishment that results.

6. Drafting Error. This provision applies to convictions for "burglary of a residence." There is no such crime in the Penal Code. Section 460 and Section 462 contain special punishment provisions for burglary of an "inhabited dwelling house." By definition, this term does not include other forms of residences. Present law makes distinction between day and night-time burglaries of inhabited dwelling houses; burglaries of recreational vehicles and commercial property are also treated differently. It is unclear what the initiative intends to cover compared to current law.

7. Conflicting Laws. By its terms, this enhancement provision will not apply if another law yields a higher sentence. It is uncertain what effect the provision will have if other laws yield a higher maximum sentence but a lower minimum sentence. For example, under the habitual offender law enacted last year by the Legislature, some third term violent offenders will receive sentences of 20 years to life. Under the initiative, a 25 year or longer sentence may result. It is unclear which sentence is the longer sentence.

8. Serious Felony List. The list of serious felonies affected by the initiative omits several violent offenses of equal gravity. For a more thorough discussion of this issue, please refer to the analysis of the "plea bargaining" section.

9. Legislation.

   a. AB 383 (Cramer, Chapter 1108, Stats. of 1981) was enacted to provide 20 year to life terms for habitual violent offenders.

   b. SB 586 (Chapter 1064, Stats. of 1981) provides for 15 years to life for repeat sex offenders.

   c. SB 332 (Stiern, pending) would count an adult court commitment to the Youth Authority as a prior prison term for purpose of sentence enhancements.

SENTENCING HEARING

TEXT:

Section 1191.1 is added to the Penal Code, to read:

> 1191.1. The victim of any crime, or the next of kin of the victim if the victim has died, has the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.
>
> The victim or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation.

DIGEST:

Under current law, after a finding of guilt, the court may pronounce judgment. The judgment may consist of a sentence or it may be suspended and probation granted.

Generally, prior to sentencing for a felony, the court refers the matter to the probation officer for an investigation and recommendations on sentencing. Where a probation officer's investigation is ordered, the officer must obtain and include in the report the victim's comments (unless otherwise ordered by the court). The probation officer must also include in his report recommendations on restitution.

For misdemeanors, sentencing is generally imposed without a probation report or probation officer involvement.

The initiative would provide that the victim (or next of kin) be notified by the probation officer of a sentencing hearing before it may take place, may attend the hearing either personally or through counsel, and may reasonably express his or her views concerning the crime, the person responsible and the need for restitution.

The initiative requires the court to consider these statements when pronouncing sentence and to state on the record its conclusion concerning whether the defendant would pose a threat to public safety if granted probation.

ANALYSIS:

1. More Probation Officers for Misdemeanor Cases. In most felony convictions, a probation officer is assigned to investigate the issues concerning sentencing. In misdemeanor cases, probation officers are rarely utilized. Most misdemeanants plead guilty at the arraignment and face immediate sentencing. This measure would require the employing of probation officers to contact the victims prior to sentence. For example, for every shoplifting offense, a probation officer would have to contact the retailer to notify him of the sentencing hearing. There are approximately one million misdemeanor filings each year. If only 25% concern crimes with victims, this measure would require probation officers to be hired to contact victims in 250,000 cases each year. Although the initiative appears to be concerned with serious felonies in other provisions, this "mandatory notification of victims provision" would apply to all crimes.

2. Court Delays. The initiative would preclude immediate sentencing after a plea or finding of guilt if there is a victim involved. The victim must be notified and given the opportunity to be present and testify at the sentencing hearing. For felony matters, this requirement would add a slight burden in the length of sentencing hearings. For misdemeanors, it could undermine already precarious court calendaring efforts.

   To effectuate these provisions, it would appear that formal sentencing hearings be had in countless misdemeanor cases which are currently being handled in a summary fashion. There could no longer be immediate sentencing if a victim is involved. The court would have to conduct later hearings after the victim had been contacted. Again, this could have devastating results in the municipal and justice courts. The mandatory sentencing hearings and the utilization of probation officers to contact victims of misdemeanors could be one of the most costly aspects of the initiative.

3. Counsel for Victims. The initiative provides that a victim may appear at a sentencing hearing either personally or through counsel. The introduction of a third attorney at a sentencing hearing would likely exacerbate the problems of delay and court time discussed above. Additionally, problems are also raised as to whether the victim's attorney would have standing to request a continuance because he or she has to be in another court on another

matter. It is difficult to get agreement on a particular sentencing date with two attorneys; it would be a greater problem with three.

4. Duplication of Effort. Conscientious district attorneys establish a close rapport with crime victims, represent the victims' viewpoint at sentencing and advise the victims of the time and place of sentencing. The prosecutor will often ask the victim to appear at sentencing for the purpose of stating his or her views. By requiring the probation officer to make separate notification, the initiative creates a duplication of effort in this regard.

5. Cost. Riverside County, which includes just 2½ percent of the state's population, estimates that this provision alone will cost it an additional one-half million dollars a year (see Appendix "B").

6. Court Finding on "Threat to Public Safety". The initiative requires the judge in every felony and misdemeanor case to state on the record whether the defendant would pose a threat to public safety if granted probation. Besides covering cases in which probation is not an issue (minor misdemeanor matters), this provision asks courts to make findings based on human speculation. In order to make this finding, the court may have to order a probation investigation in all cases to have as much background information on the defendant as possible.

   It is unclear whether forcing the court to make such a finding will change sentencing practices. A probation disposition is now an implicit determination on the part of the court that the defendant is not a threat to public safety.

7. Initiative Does Not Cover Juvenile Cases. Since juvenile court hearings are not criminal proceedings, and juvenile commitments are not considered "sentences," the initiative does not appear to cover victims of crimes committed by juveniles unless tried in "adult" court.

   Recent legislation, however, requires probation officers to obtain statements from victims concerning the offense for inclusion in the juvenile court background report (AB 1190, Katz, Chapter 332, Stats. of 1981). In addition, victims now have the right to be notified of juvenile court case dispositions and restitution orders (AB 1148, McAlister, Chapter 447, Stats. of 1981).

8. Legislation.

   a. Two bills are pending which in felony cases would require that the victim's written statement concerning

sentencing be appended to the probation report or, in the discretion of the court, would permit the victim to make an oral statement at the sentencing hearing. Notice of these options must be given to the victim (SB 243, Carpenter, and AB 398, Leonard).

b. AB 1383 (Levine, pending) would give victims the right, upon request, to make an oral statement at felony sentencing hearings in order to comment upon the appropriateness of any plea bargain made and what the proper sentence should be.

PAROLE HEARINGS

TEXT:

Section 3043 is added to the Penal Code, to read:

> 3043. Upon request, notice of any hearing to review or consider the parole eligibility or the setting of a parole date for any prisoner in a state prison shall be sent by the Board of Prison Terms at least 30 days before the hearing to any victim of a crime committed by the prisoner, or to the next of kin of the victim if the victim has died. The requesting party shall keep the board apprised of his or her current mailing address.
>
> The victim or next of kin has the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his or her views concerning the crime and the person responsible. The board, in deciding whether to release the person on parole, shall consider the statements of victims and next of kin made pursuant to this section and shall include in its report a statement of whether the person would pose a threat to public safety if released on parole.

Section 1767 is added to the Welfare and Institutions Code, to read:

> 1767. Upon request, written notice of any hearing to consider the release on parole of any person under the control of the Youth Authority for the commission of a crime or committed to the authority as a person described in Section 602 shall be sent by the Youthful Offender Parole Board at least 30 days before the hearing to any victim of a crime committed by the person, or to the next of kin of the victim if the victim has died. The requesting party shall keep the board apprised of his or her current mailing address.
>
> The victim or next of kin has the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his or her views concerning the crime and the person responsible. The board, in deciding whether to release the person on parole, shall consider the statements of victims and next of kin made pursuant to this section and shall include in its report a statement of whether the person would pose a threat to public safety if released on parole.

DIGEST:

1. Parole Hearings: State Prisoners. Under current law, most felons are released upon completion of a fixed sentence. Parole hearings are held only for prisoners serving life terms (for such crimes as murder and kidnapping for ransom). At parole hearings, the prosecuting attorney may attend as the sole representative of the people. In addition, notice is sent to, and statements are solicited from, the sentencing judge, and the investigating law enforcement agency. In first degree murder cases, the next of kin receives notice of the parole hearing and may send a written statement that must be considered at the hearing. The initiative would recodify these requirements for first degree murder cases and would make the provisions applicable to victims of offenses other than murder where the release is by a parole decision. The measure also provides that the victim or next of kin has the right to appear personally or by counsel and to express his or her views. The Board shall consider these statements and include in its report a statement of whether the person would pose a threat to public safety if released on parole.

2. Parole Hearings: California Youth Authority. Under current law, youthful offenders may be committed to the Department of Youth Authority after a petition is sustained in the juvenile court, if the person was under 21 years of age at the time of the arrest. The person can be released on parole by the Youthful Offender Parole Board. A person may not be held in Youth Authority confinement for a period longer than an adult could have been committed to jail or prison.

   Under current law (legislation enacted in 1981), if the person was committed to the Youth Authority for a specified serious felony, the victim (or next of kin) must be notified upon request of forthcoming parole hearings. He or she may submit a written statement for the Board to consider at such hearing.

   The initiative would again codify these requirements and would make the provisions applicable to all cases. The measure provides that the victim or next of kin has the right to appear personally or by counsel and to express his or her views. The Board shall consider these statements and include in its report a statement of whether the person would pose a threat to public safety if released on parole.

ANALYSIS:

1. Covers A Small Percentage of Adult Felons. Under the determinate sentencing law, 84% of prisoners do not have parole hearings. They are sentenced for a fixed period and are released by operation of law after they have served that period of time.

   Indeterminate sentences apply for murders and some other offenses such as kidnapping for ransom and trainwrecking. The coverage of the initiative provision would be only for these indeterminate sentences. Current law requires victim notification in murder cases only. AB 847 (Robinson) which is pending in the Legislature would extend current law to other indeterminate life sentences.

2. Impact of Victim's Absence At Hearing. When legislation was pending in 1981 in this area, many bills provided, as does the initiative, that victims have the right to attend and testify at parole hearings. Concern was expressed by many groups representing victims of crime over the desirability of this feature. They were afraid that the lack of appearance would create the negative inference that the victim did not care about the person's prospective release. The proposal would have strained the financial resources of victims in order to attend annual parole hearings around the state in different prisons. These groups successfully advocated that the victim input should be in writing rather than by personal appearance.

3. Role of Prosecuting Attorney. For considerations such as parole release, normally the district attorney's interests coincide with those of the victim of the crime. Under current law, the district attorney appears at these parole hearings as the peoples' representative.

4. The Initiative May Require Defense Counsel At Youthful Offender Hearings. Currently, youthful offender parole hearings are conducted without the benefit of counsel for the ward or the people. There are at least 6,000 parole hearings conducted annually. The initiative would introduce the concept of counsel for one side at the parole hearing while not making allowances for representation of the offender. It is not unlikely that presence of counsel advocating for denial of parole release without the corresponding allowance of counsel advocating for the offender would be a denial of equal protection. If this proposal amounts to establishing a right to counsel for the offender at state expense, the fiscal consequences would be substantial. Besides requiring many more hearing representatives to hear the longer parole hearings, hiring 6,000 attorneys at $200 per hearing would cost at least $1 million a year.

5. Protection of the Public. The initiative requires all parole boards to include in their reports on parole decisions a statement of whether the person would pose

a threat to public safety if released on parole. Implicit in current parole decisions is a determination that the offender in question can be safely released. Protection of the public is already part of the statutory purpose for both adult and juvenile systems.

6. Legislation. Much of what is intended by these provisions has been accomplished by enactments of 1981. Other bills are still pending in the Legislature in this area.

   a. Youthful Offenders. AB 13 (Moorhead, Chapter 591, Stats. of 1981) and AB 1401 (Baker, Chapter 645, Stats. of 1981) provide for notification of the victim and for input in Youthful Offender Parole Board hearings for serious offenders.

   b. Adult Offenders. SB 39 (Marks, Chapter 588, Stats. of 1981) and AB 847 (Robinson, pending) provide for victim notification and input in adult parole hearings.

PLEA BARGAINING

TEXT:

Section 1192.7 is added to the Penal Code, to read:

1192.7. (a) Plea bargaining in any case in which the indictment or information charges any serious felony or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.

(b) As used in this section, "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

(c) As used in this section "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a non-inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of a residence; (19) robbery; (20) kidnapping; (21) taking of a hostage by an inmate of a state prison; (22) attempt to commit a

felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering or providing heroin, cocaine, or phencyclidine (PCP) to a minor; (25) any attempt to commit a crime listed in this subdivision other than an assault.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

DIGEST:

Current law permits pleas of guilty in felony cases conditioned on specified punishment or a specific exercise of court powers. For certain sexual offenses, such a conditional plea is not authorized. Current law also requires that the reasons for any reduction or dismissal of a felony charge, or a sentence recommendation by a prosecutor in a felony case, be stated in open court and placed on the court record (AB 632, Papan, Chapter 759, Statutes of 1981). Similar disclosure requirements also apply in misdemeanor drunk driving cases (driving under the influence of an intoxicant or driving with a .10% blood-alcohol level). Restrictions also exist on reducing drunk driving charges to avoid enhanced penalties on subsequent convictions (AB 348, Levine, Chapter 941, Statutes of 1981).

The initiative would prohibit plea bargaining in the superior court for specified "serious felony" cases and for felony driving under the influence of intoxicants or alcohol. The measure defines "plea bargaining" to include discussions in exchange for considerations by the prosecutor or judge relating to charges or sentencing.

The initiative would permit three exceptions to the "no plea bargaining" provision:

1. There is insufficient evidence to prove the people's case;

2. Testimony of a material witness cannot be obtained; or

3. A reduction or dismissal would not result in a substantial change in sentence.

ANALYSIS:

1. "Plea Bargaining": Prosecutor's Viewpoint. Prosecutors contend that case settlement is an important part of the justice system and is needed to insure proper charges and resolution of both criminal and civil cases. They argue that "plea bargaining" most frequently does not result in lighter sentences; it results in disposition certainty. For example, if a case merits a two year sentence but the court could impose a four year sentence, the opportunity to discuss the disposition with the defense counsel and the prosecutor entitles all parties to be informed of the probable disposition and could avoid unnecessary trials. The defendant may be willing to plead guilty if he knew that the sentence would be two years, but may insist on trial if there was a possibility of a four year sentence. The opportunity to discuss the matter ahead of time and to accept a plea based upon a specified sentence enables cases such as this to be resolved without the necessity of trial. Judges and prosecutors indicate that so-called "plea bargains" represent dispositions based upon the merits of the case rather than merely giving lighter sentences in order to dispose of cases.

2. Exceptions Not In the Initiative. The initiative permits only three reasons for a negotiated plea (lack of evidence, material witness, or no change in sentence). Exceptions not allowed by the initiative include:

   a. To Obtain Needed Accomplice Testimony. Prosecutions frequently depend on accomplice testimony in order to secure convictions. This testimony is used often in murder cases, organized crime prosecutions, and gang violence cases. In Los Angeles, the "Freeway Killer" was convicted in part on the testimony of his accomplice. One of the accused "Hillside Stranglers" is being prosecuted chiefly on the testimony of his accomplice. In Yolo County, Luis Rodriguez was convicted of murdering two Highway Patrolmen and received the death penalty because of the testimony of an accomplice. In all of these cases, the accomplice was given a plea bargain in exchange for his or her testimony. In all of the cases, the plea bargain resulted in substantial prison time for the accomplice. The initiative would prohibit these plea bargains. Prosecutors would be faced with two unsatisfactory options: grant the accomplice complete immunity from prosecution or try for a conviction without this testimony. Should the Hillside Strangler be given immunity and freedom in order to convict his accomplice? In proposed legislation on the issue of plea bargaining, exception is made for cases in which testimony of a co-defendant is needed to convict others. The initiative, by its terms, eliminates this law enforcement tool.

b. To Protect Victims and Witnesses. Under current law, in order to spare the victim of child molestation or other sexual assaults the pain of court testimony and cross-examination, the district attorney can negotiate a disposition with the accused. Frequently these dispositions result in substantial time in prison although below the amount of time the person could have received if all charges were proved. The initiative would prohibit this type of case disposition resulting in the victim being forced to testify in court.

c. To Cure Procedural Problems. The initiative allows plea bargaining based on grounds of insufficient evidence or lack of a material witness. It does not allow plea bargaining based upon other weaknesses in the case. For example, if a prosecutor feels that a motion to dismiss for denial of a right to speedy trial may have merit, he is precluded from accepting a plea to a lesser charge to avoid this legal ruling. The initiative puts him in an all or nothing situation. Shouldn't the prosecutor be able to obtain some punishment for a guilty person, even though full punishment is prevented by procedural obstacles?

3. Forces the Prosecutor To Show Hand. The exceptions contained in the initiative generally allow plea bargaining if the prosecutor cannot gain a conviction at trial. If the prosecutor attempts to comply with the initiative, disclosure of weaknesses in the case would operate to inform the defendant that the prosecutor will lose if there is a trial. The initiative, in effect, forces the prosecutor to tell the defense counsel all of the weaknesses in the case in order to settle a case without trial. A defendant is unlikely to plead guilty if he knows he would not be found guilty.

4. No Enforcement. The initiative does not contain an enforcement mechanism nor does it specify the consequences of a plea bargain in violation of its provision. In contrast, most legislative proposals concerning plea bargaining provide that an impermissible plea shall be deemed withdrawn. The absence of any enforcing mechanism in the initiative may render meaningless the purported plea bargaining prohibition.

   a. Secret "Bargains". Before 1971, there was no statute specifically authorizing pleas with specified dispositions. The practice in the courts was to indicate the sentence but go through the public charade that nothing was promised in exchange for the plea. Enactment of Penal Code Section 1192.5 in 1971 ended the practice of secret bargains and put them on the record for public scrutiny. One of the dangers of a "no plea

bargaining" provision is that it may cause secret dispositions as opposed to public dispositions. Although the initiative precludes discussion between the judge and the parties to the criminal action where the defendant agrees to plead guilty in exchange for some benefit, it would not stop discussions with indications of "what the judge has done in previous similar cases." The current plea bargaining statute has the protection that the court may void the bargain after further consideration of the matter and allows the person to withdraw the plea and enter a not guilty plea. The "informal" system of "indicated sentences" does not provide for this protection. The court may have to go through with the indicated sentence to preserve credibility for future cases.

   b. Two-Thirds Vote Requirement May Preclude Stronger Laws. The initiative's plea bargaining provision may not be amended except by a two-thirds roll call vote in both houses of the Legislature. This means that fourteen legislators in the upper house could, by themselves, stymie any effort to strengthen the plea bargaining "prohibition" by adding enforcing language.

5. Loopholes and Circumvention. Although the initiative purports to end plea bargaining in serious felony cases and felony drunk driving cases, it is drafted in a way that allows circumvention of its intent.

   a. Bargains Only Prohibited In Superior Court. The initiative only prohibits bargains in cases in which an indictment or information is the accusatory pleading. Almost all felonies are prosecuted first by complaint in the municipal court and then by information in the superior court after the defendant has been bound over for trial. The initiative does not prohibit plea bargaining at the preliminary stage in the municipal court.

   b. Drunk Driving. Although the drafters of the initiative may have intended the plea bargaining ban to apply to misdemeanor drunk driving cases, it clearly will not apply. The provision applies only to information or indictments which are felony accusatory pleadings. As drafted, the plea bargaining provision will only cover felony drunk driving. Additionally, it will not cover felony charges alleging driving with a .10% blood-alcohol level.

   c. Not All "Serious" Felonies Covered. There are many inconsistencies in the list of "serious felonies" covered by the plea bargaining section. For example, if the charge were assault with intent to commit rape,

there could be no bargain; if the charge were assault with intent to commit oral copulation, there could be a bargain. Rape by intercourse is covered while rape with a foreign object is not. Crimes for which probation may be granted (such as burglary of a residence) are covered while crimes for which probation must be denied (such as selling PCP or heroin) are not covered.

d. Vague Exceptions. The initiative allows plea bargaining if there is insufficient evidence to prove the people's case or if a material witness is unavailable. However, the initiative contains no requirement that insufficiency or unavailability be established in open court. Prosecutors, therefore, may be free to continue current practices by basing all negotiated pleas upon these exceptions.

e. Charge Bargaining. A prosecutor can circumvent the provision by filing "light." By filing only the charges that he intends to bargain for, he will avoid the necessity of dismissing charges at the plea. If there is no bargain, the prosecutor could seek leave of the court to amend the accusatory pleading to reflect all charges.

f. "Mock" Trials. The initiative provides for a ban on pleas with specified dispositions. There are other ways to find guilt without a plea. For example, there could be a trial on the transcript of the preliminary hearing. The parties could informally stipulate to the result of the trial. There could be a mock trial where the district attorney chooses to present evidence of a lesser charge (or not all of the charges) in order to effect a case settlement agreement. In other words, the results of a plea bargain can still be accomplished in a circuitous manner.

6. Death Penalty Cases. The current California Death Penalty statute is broad in its coverage. For example, murders committed during the perpetration of specified felonies are punishable either by death or life imprisonment without the possibility of parole. Even accomplices who participate in the felony (i.e., the driver of the robbery getaway vehicle) are covered under this penalty. If the district attorney feels that the death sentence is inappropriate for an accomplice, the initiative appears to preclude an agreed disposition to life without possibility of parole. It appears to require a special death penalty trial even though the jury is expected to impose the lesser sentence. Much court time could be wasted by mandatory pursuit of an inappropriate penalty.

7. Plea Bargain Disclosure: Another Approach. Because it perceived bans on plea bargains to be ineffective in curbing abuses (due to loopholes and the variety of ways to circumvent the intent of the ban), the Legislature decided that public disclosure of plea bargains was a better way to curb abuses. Thus, the Legislature last year required the court and district attorneys to file written reasons for all dismissals or reductions of felony counts in a pleading. Since district attorneys are elected officials, it was felt that the possibility of adverse publicity resulting from the disclosure of an inappropriate plea bargain would, by itself, be sufficient incentive for the district attorney to restrain his or her deputies.

8. Legislation. AB 2730 (Goggin) would require the district attorney to report the number of plea bargains entered into each quarter.

YOUTH AUTHORITY COMMITMENTS

TEXT:

Section 1732.5 is added to the Welfare and Institutions Code, to read:

> 1732.5. Notwithstanding any other provision of law, no person convicted of murder, rape or any other serious felony, as defined in Section 1192.7 of the Penal Code, committed while he or she was 18 years of age or older shall be committed to Youth Authority.
>
> The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

DIGEST:

Under current law a person convicted of a felony in adult court may be committed to the Youth Authority if under 21 years of age at the time of arrest. Generally, a person convicted of a felony may be sent to state prison for a specified term, or be placed on probation and given up to one year in county jail. A Youth Authority commitment represents a middle ground alternative for young offenders. It is an indeterminate sentence that may not exceed the maximum prison term that could have been received, but it generally exceeds the one year in county jail that may be imposed as a condition of felony probation. Currently, persons convicted of first degree murder committed when over 18 years of age are ineligible for Youth Authority.

The initiative would expand the offenses for which a person is ineligible for Youth Authority to all specified "serious felonies" committed when over 18 years of age.

ANALYSIS:

1. Shorter Sentences May Result. The initiative eliminates the middle ground sentencing alternative for young offenders convicted of crimes designated as "serious felonies." Probation may be granted upon conviction of most of these crimes. Rendering a person ineligible for commitment to Youth Authority, therefore, will not necessarily result in a state prison sentence. In fact, some persons may spend less time in custody than if they were sent to the Youth Authority. For example, an 18 year old convicted of burglarizing a residence in the daytime

is eligible for a county jail sentence, probation, commitment to Youth Authority, and commitment to state prison. Given the age and background, a prison sentence may be inappropriate. Given the serious nature of the offense, jail or probation may be too lenient. This proposal would eliminate an appropriate middle ground -- a commitment to Youth Authority. If enacted, the court may decide to sentence the offender to county jail or grant probation, even though the stricter Youth Authority commitment would be in order.

2. Restricts Tougher Laws. The initiative will hamper legislative attempts to strengthen its provisions. The initiative provides that the Youth Authority restriction may not be amended except by two-thirds vote of each house of the Legislature. Yet the initiative does not restrict Youth Authority commitments for persons convicted of many serious offenses (i.e., rape by foreign object, assault with intent to commit sodomy, etc.) nor does it apply to persons who committed crimes when they were 16 or 17 years old and were tried in adult court. AB 961 (Goggin) would exclude violent felons from Youth Authority even if they were 16 or 17 years old, so long as they were tried in adult court. The initiative's two-thirds vote requirement would permit a minority of legislators to block this and other legislation which would strengthen the law in this area.

3. Cost. According to the Department of Corrections, there would be substantial cost to the State if this provision were enacted. The operating and contracted cost would be $127,815,500 and the capital outlay costs would be $160,930,000 (see Appendix "A" for full fiscal analysis). However, it should be noted that the increased costs to Corrections may be partially offset by decreased costs to the Youth Authority. While per capita Youth Authority costs are substantially higher than per capita prison costs, the sentence length of prison stays are generally longer than Youth Authority commitments.

   Another factor that must be considered is that many of these young offenders may not be sent to prison (see paragraph #1 above).

4. Legislation.

   a. AB 961 (Goggin, pending) would exclude persons 16 years of age and older from the Youth Authority if convicted of specified violent crimes; the measure contains an exception in extremely unusual cases where the interest of justice would best be served by a Youth Authority commitment.

b. SB 332 (Stiern, pending) requires exclusion from the Youth Authority of 18 year olds who are convicted of specified violent felonies who had been previously committed to the Youth Authority.

MENTALLY DISORDERED SEX OFFENDERS

TEXT:

Section 6331 is added to the Welfare and Institutions Code, to read:

> 6331. This article shall become inoperative the day after the election at which the electors adopt this section, except that the article shall continue to apply in all respects to those already committed under its provisions.
>
> The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

DIGEST:

In 1981, legislation was enacted which repealed the Mentally Disordered Sex Offender law (MDSO). Under that law, a person convicted of a sex offense could have been committed civilly to a state hospital or local county mental health facility. The law contained provisions for outpatient release after certain court hearings. A MDSO could not be held under this commitment for a period longer than the maximum possible prison sentence unless committed under an "extension" petition. The extensions would be for two additional years. SB 278 (Rains, Chapter 928, Stats. of 1981) repealed the MDSO law while retaining its provisions for those persons previously committed.

The initiative would also repeal the MDSO law while retaining its provisions for persons previously committed. It would disallow amendments unless approved by 2/3 of each House of the Legislature.

ANALYSIS:

1. Already Repealed. The purpose of this provision is to repeal the MDSO law for future sex offenders. This has already been accomplished legislatively.

2. Freezes Current Law. Although the MDSO law has been repealed, the commitment and the laws concerning MDSO's still exist for persons committed prior to the effective date of SB 278. The Legislature can amend this provision to insure public safety. For example, the Legislature

considered measures in 1981 to require the district attorney to determine whether or not extended term petitions should be filed and to limit outpatient release of MDSO's. If these measures are again before the Legislature, they may be enacted with a simple majority vote. If the initiative passes, these public safety measures would require a two-thirds vote, a requirement which could preclude their passage.

SEVERABILITY CLAUSE

TEXT:

> Sec. 10. If any section, party, [sic] clause, or phrase of this measure or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

ANALYSIS:

1. Purpose. The purpose for this clause is to indicate intent that unconstitutional provisions in the initiative should not invalidate the entire initiative.

2. Limits of Severability Clause. A severability clause does not guarantee that constitutional provisions or applications would be unaffected by unconstitutional ones. The test of severability is whether the invalid parts of the measure can be severed from the otherwise valid parts without destroying the utility or meaning of the remaining provisions:

> "It is settled that [a severability clause], even if broadly drawn, does not deprive the judiciary of its normal power and duty to construe the statute and determine whether the unconstitutional part so materially affects the balance as to render the entire enactment void [citation]. In other words, the presence of a severability clause does not change the rule that an unconstitutional enactment will be upheld in part only if it can be said that that part is complete in itself and would have been adopted even if the legislative body had foreseen the partial invalidation of the statute." (Verner, Hilby & Dunn v. City of Monte Sereno, [1966] 245 Cal. App.2d 29, 35.)

Thus, under the court's severability test, it is problematic whether the initiative's exclusionary rule, bail, diminished capacity, or insanity sections will survive, even in part, if elements of these sections are found to be unconstitutional.

CONCLUSIONS

The broad purposes of the initiative set forth in the preamble (protecting public safety and promoting victim's rights) are indeed laudable. However, because of the manner in which it is written, it is highly questionable whether the initiative will further these laudable goals.

Unconstitutional, misdrafted, or vaguely worded provisions are scattered throughout the initiative. Thus, the actual effect of the measure may be far different from its original intent.

1. Constitutional Defects. In enacting public safety legislation, a lawmaker should be concerned that the measure will effectively result in protecting the public. If there is general agreement that the measure will not pass constitutional scrutiny, the measure will likely be void, offering no public protection. Additionally, substantial social and economic costs may result. Convictions stemming from unconstitutional measures are likely to be reversed on appeal. The reversals will cause expensive retrials and frequently yield different results. Convictions are more difficult to obtain in retrials conducted years after the crime occurred. For example, a retrial of a defendant accused of the Marcus Foster SLA murder resulted in an acquittal after the first trial's verdict of guilty. Evidence becomes stale, memories fade, and witnesses disappear.

The dangers of passing initiatives containing unconstitutional provisions are graphically demonstrated by the recent decision of the Supreme Court in People v. Ramos, 30 Cal.3d 553. In 1978 a death penalty initiative was passed which superceded a legislatively enacted death penalty statute. Most observers believed the initiative contained an unconstitutional instruction which misinformed the jury as to the effect of a death verdict. The legislative statute did not contain this provision and has since been upheld as constitutional. As anticipated, in the Ramos case the instruction required by the death penalty initiative was found to be unconstitutional. Thirty death verdicts are expected to be overturned as a result. The cost of retrying these cases will be substantial, not to mention the emotional strain on the victims, witnesses and participants. In many of the cases, the defendant may avoid the death penalty because the prosecutor decides the cost of retrial is too great. Lawmakers should be aware that enacting measures with similar constitutional defects is likely to bring similar results.

While it is difficult to draft measures in a manner which will guarantee favorable court interpretation, careful drafting can eliminate most grounds for attack. The initiative appears to have been formulated with little regard for the fact that unconstitutional provisions must be struck down by the courts. Many of the initiative's provisions are constitutionally suspect. These provisions cover almost all aspects of criminal cases.

On its face, the "all relevant evidence" provision violates the Federal Constitution. Every case in which evidence obtained by the police is introduced could be affected by a ruling that this provision is unconstitutional. The number of potential appeals in such cases is staggering.

The diminished capacity provision suggests that evidence of mental disease is inadmissible on the issue of criminal intent. Until an appellate court rules, as is likely, that this provision is unconstitutional, defense attorneys could create reversible error merely by offering such evidence knowing that a trial court won't admit it. Reversible error could be built into every death penalty case through this device.

Many other provisions invite constitutional challenge. For example, elimination of the right to bail in non-serious misdemeanors and the unlimited use of prior felony convictions in criminal cases raise serious constitutional questions.

2. Contradictions and Sloppy Drafting. Although it is difficult to write a statute so precisely that there are no ambiguities, care in drafting can reduce the number of differing interpretations of a given set of words or phrases. Such care in drafting is largely absent in the initiative which is so loosely worded as to defy clear interpretation.

For example, the "all relevant evidence" section is cited as the proponents' response to the exclusionary rule. Yet this provision makes no specific reference to the rule. Moreover, if the authors' intent was to limit exclusion of evidence obtained through police misconduct, it is hard to understand why it was written in a manner which operates to repeal the bulk of the California Evidence Code, thus wiping out criminal court rules ranging from authentication of documents to qualifications of expert witnesses.

The bail provision eliminates the right to bail but substitutes no clear standards to guide a judge in deciding who should be released before trial.

The "safe schools" provision has no one meaning but a myriad of possible interpretations and applications.

The ambiguities of the initiative are further compounded by its internal inconsistencies. For example, its constitutional declaration that no relevant evidence shall be excluded (with specified exceptions) must somehow be read together with a statutory exclusion of evidence of diminished capacity. Similarly, a constitutional mandate that prior felony convictions shall be used "without limitation" to enhance sentences must be contrasted with a statutory enhancement section which, by its terms, contains various limitations. By attempting to go in so many directions at once, the initiative, if enacted, may end up pulling itself apart.

Finally, it should be noted that the editors of the initiative failed to correct several grammatical errors, misspellings, and misplaced phrases.

3. Litigation Explosion and Other Unintended Consequences. The initiative may have many results that were probably unintended by the authors. The sentencing hearing provision requires probation officers to be hired to contact retailers in minor shoplifting cases. The "plea bargaining" provision would prohibit negotiated pleas with criminals to get them to testify against accomplices. The "use of prior convictions" provision requires that felony convictions be used against victims of crime. The "all relevant evidence" provision would repeal the current provision protecting rape victims from their addresses and phone numbers being given in open court. The two-thirds vote provisions would make it more difficult for the Legislature to pass measures designed to protect the public safety.

The initiative may cause other unintended results because of its constitutional ramifications. For example, permitting the victim or his or her counsel at youthful offender parole hearings might require appointing a special counsel for the offender. Requiring restitution in all but extraordinary criminal cases may result in state-paid attorneys defending criminals on civil claims and in having jury trials on the amount of damages being "piggybacked" onto criminal proceedings. The right to safe schools may cause the unintended result of court-ordered busing.

Every major change in the law spawns increased litigation in an attempt to iron out wrinkles. This was true with the passage of the determinate sentence law in 1976 (a substantial number of appeals are still traceable to that change) and the new drunken driving laws that just passed.

At no time in recent history, however, has there been as sweeping and as loosely worded a change as that proposed by the initiative. Whatever their ultimate interpretation, and whether or not certain provisions are declared unconstitutional, it is certain that the passage of the initiative will provoke a storm of litigation which could overwhelm our appellate courts and substantially disrupt the criminal justice system. It will be several years before the dust settles and some sense of certainty returns to the halls of justice.

4. Fiscal Priorities. While the public may want to commit more tax dollars to pay for public protection, it is uncertain that the public would want to spend enormous sums of money on some of the items required by the initiative. For example, counties will have to hire probation officers to handle countless misdemeanor cases. Courts will not be able to immediately sentence many minor offenders; added costs of delayed hearings will result. The bail provision may end up requiring judges to be on duty in police stations if bail schedules are outlawed. Court clerks will have to be hired statewide due to the increased ministerial functions called for by the initiative. Attorneys may have to be provided for Youth Authority wards at over 6,000 annual parole hearings.

The initiative does not provide any money to pay for these and other costs occasioned by it. These new costs, which would be mandated on state and local governments, will most likely have to be financed by cutting other important public services.

A definitive fiscal analysis of the initiative is impossible because no one really knows what the measure means or what effects it may have. Certain costs can, however, be estimated with a fair degree of confidence. At a time when our prisons are overcrowded and a more than 50 percent increase in population is forecast for this decade, the initiative would increase sentence terms at an additional cost of several billion dollars over that same time period. Moreover, it is not at all clear that increasing sentence lengths for those already serving long terms is the best use of limited prison space.

Our city and county jails are also bursting at the seams. The initiative, through its bail provisions, may put many more presumptively innocent people (pre-trial detainees) behind bars when there are few enough cells for convicted criminals to serve there.

The provisions of the initiative, with the exception of the restitution section, would become effective immediately

upon adoption. The June election date is less than one month away from the start of a new fiscal year for state and local governments. Budget-makers at both levels should be prepared to make immediate and major adjustments in the event that the initiative does become law.

APPENDIX "A"

DEPARTMENT OF CORRECTIONS COST ESTIMATES

APPENDIX "A"

California Legislature
Assembly Committee
on
Criminal Justice

TERRY GOGGIN
CHAIRMAN

STATE CAPITOL
SACRAMENTO 95814
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COMMITTEE SECRETARY:
Darlene E. Fridley

February 12, 1982

MEMORANDUM

TO: Geoffrey Goodman, Consultant

FROM: Deborah Agata, Analyst

The following estimates are based on extrapolations from figures provided by Walter Barkdull of the California Department of Corrections on persons affected and costs incurred as a result of the Gann Initiative.

CDC estimated additional costs from the Gann Initiative based on a minimum application of Sections 3 (f) and 5 (enhancements) and Section 8 (sentencing). If Sections 3 (f) and 5 were applied broadly in every possible case and with maximum enhancements, prison operation costs and capital outlay would be substantially higher. Under minimum inmate/year estimates, CDC predicted additional operating costs of $46.9 million in FY 86, stabilizing to a yearly cost of $75.6 million by FY 93. Capital outlay necessary for housing the minimum additional inmates was $438.9 million. AT $77,000/bed, the maximum estimates call for additional capital outlay over the current needs of $2.03 billion. Total contracted costs would range from a minimum of $340 million from FY 82 to FY 86 to a maximum of $1.46 billion over the same period. All of these estimates are in FY 82 constant dollars.

Table I summarizes the total additional costs over the 5-year period from FY 82 to FY 86.

To put these estimates into a larger context, compare them to the CDC cost estimates for predicted expenses and capital outlay without the Gann additions. If we assume that operating costs in FY 89 will

be the average of the FY 86 and FY 93 projections (i.e., that inmates will increase at a steady rate), additional operating costs will range from a minimum of $61.3 million to a maximum of $241 million. CDC has already estimated a prison population of 46,500 by FY 89. At constant 1982 dollars, this represents operating costs of $607.3 million. Similarly, capital outlay necessary to provide for the 46,500 inmates is estimated at $1.3 billion. Additional costs of $438.9 million to $1.8 billion would be necessary. Table II summarizes the total prison operating and building costs by the end of the decade.

TABLE I

5-Year Costs of the Gann Initiative

Contracted Costs FY 82 Through FY 86

Under Section 3 (f) & 5 (Enhancements)	
Minimum Additional Costs	$ 212,138,300
Maximum Additional Costs	1,331,700,000
Under Section 8 (Sentences)	
Additional Costs	127,815,500
Total Additional Costs	
Minimum Additional Costs	339,953,800
Maximum Additional Costs	1,459,515,500

Capital Outlay Costs

Under Sections 3 (f) & 5 (Enhancements)	
Minimum Additional Costs	277,970,000
Maximum Additional Costs	1,869,100,000
Under Section 8 (Sentencing)	
Additional Costs	160,930,000
Total Additional Capital Outlay	
Minimum Additional Costs	438,900,000
Maximum Additional Costs	2,030,000,000

Total Costs

Under Sections 3 (f) & 5 (Enhancements)	
Minimum Additional Costs	490,108,300
Maximum Additional Costs	3,200,800,000

Under Section 8 (Sentencing)	288,745,500
Grand Total	
Minimum Additional Costs	778,853,800
Maximum Additional Costs	3,489,515,500

TABLE II

PROJECTED PRISON COSTS BY FY 89-90 IN MILLIONS OF DOLLARS*

Operating Costs		
Present Estimates		607.3
Minimum Gann Additions		61.3
Maximum Gann Additions		241
	Minimum Total	668.6
	Maximum Total	848.3
Capital Outlay		
Present Estimates		1300
Minimum Additions		438.9
Maximum Additions		1800
	Minimum Total	1738.9
	Maximum Total	3100

*Estimates in constant FY 82 dollars.

CONTINUED

1 OF 2

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF CORRECTIONS
SACRAMENTO, CA 95814 (916) 445-4737
630 K Street
P. O. Box 714

January 29, 1982

Mr. Geoffrey A. Goodman, Consultant
Assembly Criminal Justice Committee
Room 2136, State Capitol
Sacramento, California 95814

Dear Mr. Goodman: RE: GANN INITIATIVE RE-ESTIMATES

Attached are revised estimates of the Gann Initiative, as amended July 6, 1981. Attachment 1 contains the departmental estimate, revised to reflect major changes in the methodology used by the Department of Corrections to estimate all legislative measures and initiatives. Details of the changes, which were effective January 1, 1982, are given in the METHODOLOGY section. One major revision is in operating costs, estimated for FY 1982-83 through FY 1986-87; the prior estimate reflected operating costs anticipated between FY 1981-82 through FY 1985-86 using a lower per capita cost. In addition, the estimated population impact has been increased over that provided in the November 4, 1981, analysis, for reasons which are also explained in the METHODOLOGY section.

Attachment 2 contains a revision of the special estimate you requested for Sections 3(f) and 5 of the Gann Initiative. The estimated population impact has been revised upward in accordance with our change in methodology.

Please call me if you have any questions on the attachments.

Sincerely,

WALTER L. BARKDULL
Assistant Director
Legislative Liaison

Attachments

cc: Brian Taugher, Deputy Secretary
Legislation and Legal Affairs
Youth and Adult Correctional Agency

Larry Wilson, Consultant
Office of the Legislative Analyst

Bob Aguallo
Principal Program Budget Analyst
Department of Finance

ATTACHMENT 1

Department of Corrections
Offender Information Services Branch

Estimates and Statistical Analysis Section
November 4, 1981
Revised January 29, 1982

GANN INITIATIVE
(As amended July 6, 1981)

Summary of Revised Estimates
Section 3(f), 5, 8, and 9

Section Estimated	Description	Reason for Revised Estimate
3(f) - Use of Prior Convictions	Would provide that prior felony convictions shall be used without limitation for purposes of enhancement of sentence	(1) Reflects major assumption changes which became effective January 1, 1982 (e.g. full per capita cost, constant FY 1982-83 dollars) (See METHODOLOGY)
5 - Habitual Criminals	Would enhance sentence for a serious felony by 5 years for each prior conviction of a serious felony, as defined	
8 - Sentencing	Would prohibit committing to the California Youth Authority any person who commits a serious felony, as defined, when the person was age 18 or over	(2) Population impact changes
9 - Mentally Disordered Sex Offenders	Would repeal the Mentally Disordered Sex Offender (MDSO) program; current MDSO's would remain in the State hospital	An estimate is not being provided because recently passed legislation, Chapter 928, Statutes of 1981 (SB 278, Rains), repeals the MDSO program, effective January 1, 1982.

	Number of Felons Per Year	Current Time Served (months)	Proposed Time Served (months)	Additional Time to be Served (months)
Sections 3(f) and 5				
Minimum Estimate a/				
Violent felony				
- PPT & prior CYA	10	58	117	59
- PPT & no prior CYA	105	58	77	19
- Prior CYA & no PPT	65	58	98	40
Other serious felony				
- PPT & prior CYA	100	30	102	72
- PPT & no prior CYA	785	30	62	32
- Prior CYA & no PPT	145	30	70	40
TOTAL	1,210			
Section 8				
Murder	20	-0-	116	116
Other serious felony	775	-0-	29	29
TOTAL	795			

a/ Minimum estimate - excludes persons with prior convictions for which no prison term or CYA commitment was served and reflects prior prison terms (PPT) and CYA commitments charged and proved.

INMATE-YEARS

	Sections 3(f) and 5 a/	Section 8	Total
1982-83	-0-	105	105
1983-84	-0-	820	820
1984-85	-0-	1,615	1,615
1985-86	515	1,945	2,460
1986-87	1,545	1,965	3,510
Plateau - level	3,610	2,090	5,700
- year	1993-94	1993-94	1993-94

OPERATING COSTS AND CONTRACTED COST*

	Sections 3(f) & 5 a/	Section 8	Total
Contracted Cost	$212,138,300	$127,815,500	$339,953,800
Operating Costs			
1982-83	-0-	$ 1,371,500	$ 1,371,500
1983-84	-0-	10,710,800	10,710,800
1984-85	-0-	21,108,200	21,108,200
1985-86	$ 6,726,900	26,000,800	32,727,700
1986-87	20,167,700	26,761,500	46,929,200
Full Year (1994-95)	47,140,800	28,411,600	75,552,400

a/ Minimum estimate - excludes persons with prior convictions for which no prison term or CYA commitment was served and reflects prior prison terms and CYA commitments charged and proved.

* In constant FY 1982-83 dollars.

CAPITAL OUTLAY COSTS**

	Sections 3(f) and 5[a/]	Section 8	Total
1982-83	$ 39,655,000	$149,765,000	$189,420,000
1983-84	79,310,000	1,540,000	80,850,000
1984-85 through 1990-91	159,005,000	9,625,000	168,630,000
Total	$277,970,000	160,930,000	$438,900,000

a/ Minimum estimate - excludes persons with prior convictions for which no prison term or CYA commitment was served and reflects prior prison terms and CYA commitments charged and proved.

** In 1982 construction dollars.

Sections 3(f) and 5: Prior Convictions and Habitual Offenders

SUMMARY:

The Gann initiative would provide that (1) any person convicted of a serious felony, as defined, who previously has been convicted of such a felony shall receive a 5-year enhancement per prior conviction, and (2) any prior felony conviction of any person in any criminal proceeding shall be used without limitation for purposes of enhancing a sentence in any criminal proceeding. This revised estimate reflects recently passed legislation and projected increases in admissions.

SPECIFIC FINDINGS:

Section 667.5 of the Penal Code provides that 3-year and 1-year enhancements shall be imposed on any person who has been previously imprisoned for a felony. A 3-year enhancement is imposed on any person convicted of a violent felony (murder or voluntary manslaughter, mayhem, forcible rape, forcible sodomy, forcible oral copulation, lewd acts on children under 14, any felony punishable by death or life imprisonment, or any felony involving great bodily injury or use of a firearm) for each prior prison term served for a violent felony. When the 3-year enhancement provision does not apply, a 1-year enhancement is imposed for each prior prison term. These enhancements may not be imposed for any prison term served prior to 10 years (for 3-year enhancements) or 5 years (for 1-year enhancements) in which the defendant remained free of both prison custody and the commission of any felony offense.

Generally, current law (P.C. Section 1170.(f)) also provides that the term of imprisonment shall not exceed twice the number of years imposed as the base term unless (1) the defendant stands convicted of a violent felony as defined in Section 667.6, (2) a consecutive sentence is being imposed on any person convicted of a felony while confined in a State prison, (3) an enhancement is imposed for using or being armed with a weapon, (4) taking, damaging or destroying property, the loss for which exceeds $25,000, (5) inflicting great bodily injury, or (6) the defendant stands convicted of felony escape from an institution.

The Gann initiative would expand and increase the enhancement for past offenses. Any person convicted of a serious felony as defined in proposed Section 1192.7 - which includes the violent felonies listed in Section 667.5 and adds many other serious offenses (e.g., attempted murder, assault with intent to commit rape or robbery) - shall receive a 5-year enhancement for each such prior conviction (not limited to prior prison terms served for serious felonies). In addition, the initiative would provide that any prior felony conviction of any person in any criminal proceeding shall be used without limitation for the purpose of enhancement of sentence in any criminal proceeding. (The prior version provided that "any prior felony conviction ... may be used ...") Legal staff interpretation of the change from "may" to "shall" is that this would require the judge to impose a 5-year enhancement for

each prior conviction charged and proved. In addition, the 5-year and 10-year limitation applying to enhancements for prior prison terms and the "twice the base term" limitation would no longer limit the sentences received by persons convicted of serious felonies who have been previously convicted of serious felonies, as defined.

ANALYSIS:

As mentioned previously, the 5-year enhancements would apply to prior convictions for committing serious felonies. However, this estimate does not include those persons who were convicted of a serious felony, as defined, and who received a non-prison sentence (e.g., probation) for such a prior conviction because probation data relating to prior convictions is limited. This estimate is also based on prior prison terms and prior CYA commitments charged and proved as discussed under Specific Findings. These 2 factors produce a minimum estimate of the impact of Sections 3(f) and 5.

These provisions would result in at least 1,210 felons receiving longer sentences. Felons who have prior prison terms (PPT) charged and proved and who do not receive a PPT enhancement would receive an additional 5 years for each such PPT; felons who currently receive 3-year enhancements for any PPT charged and proved for violent felonies would receive an additional 2 years for each such PPT; felons who currently receive 1-year enhancements for any PPT charged and proved for one of the other serious felonies listed in proposed Section 1192.7 would receive an additional 4 years for each such PPT. In addition, felons who under current law would not receive an enhancement for a prior California Youth Authority (CYA) commitment (from criminal court only) charged and proved for serious felonies as defined in proposed Section 1192.7 would receive an additional 5 years for each such commitment. (Under current law, a prior CYA commitment is not considered a "prior prison term" for purposes of sentence enhancement.)

Assuming a July 1, 1982 effective date, followed by a six-month lag before an impact is seen on intakes, the impact in inmate-years of the additional time served is estimated to be:

1982-83	0
1983-84	0
1984-85	0
1985-86	515
1986-87	1,545

This group of 1,210 felons would stabilize at 3,610 inmate-years in FY 1993-94.

FISCAL FINDINGS:

The contracted costs* for at least 1,210 felons entering prison between January 1, 1983, the assumed date the impact would first be seen on intakes, and June 30, 1987 is estimated to be $212,138,300. Of this amount, operating costs* required between FY 1982-83 and FY 1986-87 is estimated to be:

1982-83	0
1983-84	0
1984-85	0
1985-86	$ 6,726,900
1986-87	20,167,700
Full Year (1993-94)	$47,140,800

* In constant FY 1982-83 dollars.

Capital outlay required is estimated to be (in 1982 construction dollars):

1982-83	$ 39,655,000
1983-84	79,310,000
1984-85 through 1990-91	159,005,000
Total	$277,970,000

METHODOLOGY:

1. The estimate is based on the projected institution population for FY 1982-83 and the impact of recently passed legislation. The previous estimate dated August 5, 1981, was based on CY 1979 and 1980 data and did not reflect recently passed legislation.

   The estimated population impact is higher than the impact provided in the November 4, 1981 analysis. This is primarily because the base year from which to project population at a FY 1982-83 level was changed from FY 1980-81 to FY 1979-80.

2. Board of Prison Terms (BPT) data over a 21-month period provided the following: the percentage of felons convicted of serious felonies (60%) (includes the violent felonies specified in current law plus other serious felonies specified in proposed Section 1192.7), and the number of felons who did (prior prison terms served, charged, proved, and enhancements imposed) and did not (prior prison terms served, charged, and proved, but enhancements not imposed) receive 3-year and 1-year enhancements for prior prison terms according to Section 667.5 of the Penal Code.

3. The percentage of felons with prior California Youth Authority commitments (39%) is based on 1979 AdStats data. The percentage of felons who are sent to California Youth Authority from criminal court (47%) is based on FY 1980-81 data provided by CYA staff. The percentage of CYA commitments from criminal court that are for serious felonies (60%) is based on data provided in the 1979 CYA Annual Report.

4. The average sentence and time to be served in prison is based on 1980 OBIS data.

5. Since prior CYA commitments are currently not enhanceable as a PPT, it was assumed the percentage of prior CYA commitments that would be charged and and proved would be the same as PPT's charged and proved (23.5% of those with prior prison terms have their priors charged and proved). The percentage is based on PPT information (for February 1979 - January 1980) provided in the BPT publication, Sentencing Practices.

6. The estimated total number of felons convicted of serious felonies with only prior CYA commitments for serious felonies was adjusted downward in the estimate provided in the November 4, 1981 analysis to reflect only those felons whose instant offense is a serious felony. The estimate provided in the August 5, 1981 analysis did not reflect this adjustment, thus it represented felons whose instant offense is a serious or non-serious felony.

7. Major assumptions used in bill analyses include: (1) FY 1982-83 population impact was based on population increases from the September 1981 Population Projections, applied to historical data. Impact was then assumed to be constant for each year thereafter. (2) All 1982 legislative bills are assumed to become effective January 1, 1983, unless the bill is an urgency measure or another effective date is specified in the bill. (Since this initiative would take effect immediately upon approval by the voters, it was assumed that it would take effect July 1, 1982.) A six-month lag is assumed before actual impact on prison intake. (3) Because of overcrowding, the per capita cost reflects the cost of maintaining an inmate in a new institution, as opposed to an existing facility. This cost includes staffing necessary to open a new facility. (4) All costs are stated in constant FY 1982-83 dollars. (5) Contracted costs represent total operating costs for felons entering prison between FY 1982-83 and FY 1986-87, regardless of when those costs would be incurred.

8. Capital outlay costs are based on the following: (1) because the population now exceeds capacity, any population increase is assumed to require new construction; (2) all costs are stated in 1982 construction dollars; (3) a weighted average of construction costs for different custody levels is used, assuming inmate classification custody levels remain constant at current levels; and (4) capital outlay costs reflect the need to plan and appropriate funds three years before the expected population increase. Thus, the capital outlay costs shown for FY 1982-83 reflects capital outlay that would be required for FY 1982-83 through 1985-86, and the FY 1983-84 capital outlay cost reflects the population increase expected in FY 1986-87. When the population increase stabilizes after FY 1986-87, any remaining capital outlay costs are shown as one figure.

COMMENT:

Related bill: SB 1285 (Davis et al.)

Section 8: Sentencing

SUMMARY:

Section 8 of the Gann initiative would prevent offenders convicted of various felonies committed at age 18 or older from being sent to the California Youth Authority (CYA). This revised estimate reflects recently passed legislation and projected increases in admissions

SPECIFIC FINDINGS:

Section 1732.5 would be added to the W&I Code stating no person could be committed to CYA if convicted of a serious felony, as defined in the proposed Penal Code Section 1192.7, committed on or after the persons's 18th birthday. Serious felonies would include murder, manslaughter, assault, robbery, burglary, rape, and child molestation, among other offenses.

ANALYSIS:

Assuming a July 1, 1982 implementation date and a six-month lag before impact, an estimated 795 persons affected annually would begin entering State prison, rather than CYA, in January 1983. The average sentence for 775 of these felons would be 50 months; for the remaining 20 offenders, 180 months (for second degree murder). The mean time served by each of these groups, after deducting preconfinement credits and good time credits, would be 29 months and 116 months, respectively. The population impact through FY 1986-87 is estimated to be:

	Inmate-Years
1982-83	105
1983-84	820
1984-85	1,615
1985-86	1,945
1986-87	1,965
Full Year (1993-94)	2,090

The group of 775 felons would stabilize at 1,875 inmate-years in FY 1985-86, while the group of 20 murderers would stabilize at 215 inmate-years in FY 1993-94.

FISCAL FINDINGS:

The total contracted cost* is estimated to be $127,815,500. Of this cost, $122,872,600 would be for inmate care and treatment, and $4,942,900 is estimated for parole costs.

The operating cost estimated through FY 1986-87 would be as follows:

	Institution	Parole	Total Operating Cost*
1982-83	$ 1,371,500	0	$ 1,371,500
1983-84	10,710,800	0	10,710,800
1984-85	21,108,200	Negligible	21,108,200
1985-86	25,405,600	$ 595,200	26,000,800
1986-87	25,693,000	1,068,500	26,761,500
Full Year (1994-95)	$27,312,600	$1,099,000	$28,411,600

* In constant FY 1982-83 dollars.

Capital outlay required is estimated to be (in 1982 construction dollars):

1982-83	$149,765,000
1983-84	1,540,000
1984-85 through 1990-91	9,625,000
Total	$160,930,000

METHODOLOGY:

1. The number of 1980 CYA admissions from criminal court for applicable offenses was obtained from CYA. This number was reduced by 5% to exclude that proportion of criminal court convictions in which the offender is under age 18 (based on CYA data). Projected intake was calculated by using CYA estimates of annual admissions increases.

2. The number of youths estimated to be affected by the initiative each year has been changed from 1,155 to 795. This change was due to the assumption the CYA rejection policy will remain in effect at least through FY 1986-87.

3. 1980 OBIS data was used in conjunction with CYA data to estimate average sentence length and time served. For the estimated 30 persons convicted of second degree murder, the assumption was made that a 15 years to life sentence would be imposed. After applying preconfinement and good time credits, actual time served reduces to 9 2/3 years.

4. Major assumptions used in bill analyses include: (1) FY 1982-83 population impact was based on population increases from California Youth Authority projections, applied to historical data. Impact was then assumed to be constant for each year thereafter. (2) All 1982 legislative bills are assumed to become effective January 1, 1983, unless the bill is an urgency measure or another effective date is specified in the bill. (Since this initiative would take effect immediately upon approval by the voters, it was assumed that it would take effect July 1, 1982.) A six-month lag is assumed before actual impact on prison intake. (3) Because of overcrowding, the per capita cost reflects the cost of maintaining an inmate in a new institution, as opposed to an existing facility. This cost includes staffing necessary to open a new facility. (4) All costs are stated in constant FY 1982-83 dollars. (5) Contracted costs represent total operating costs for felons entering prison between FY 1982-83 and FY 1986-87, regardless of when those costs would be incurred.

5. Capital outlay costs are based on the following: (1) because the population now exceeds capacity, any population increase is assumed to require new construction; (2) all costs are stated in 1982 construction dollars; (3) a weighted average of construction costs for different custody levels is used, assuming inmate classification custody levels remain constant at current levels; and (4) capital outlay costs reflect the need to plan and appropriate funds three years before the expected population increase. Thus, the capital outlay cost shown for FY 1982-83 reflects capital outlay that would be required for FY 1982-83 through 1985-86, and the FY 1983-84 capital outlay cost reflects the population increase expected in FY 1986-87. When the population increase stabilizes after FY 1986-87, any remaining capital outlay costs are shown as one figure.

COMMENTS:

1. CYA has implemented a policy of rejecting about 30% of the commitments from criminal court. This policy reduces the number of youths who could be affected by the Gann initiative because these youths would already be coming to prison under CYA policy. This estimate assumes the CYA rejection policy will remain in effect throughout the period covered by this analysis.

2. Recently passed legislation which are reflected in this estimate include: AB 66 (Chapter 476, Statutes of 1981)and SB 586 (Chapter 1064, Statutes of 1981).

3. Related bill: AB 961 (Goggin)

ATTACHMENT 2

Department of Corrections
Offender Information Services Branch

Estimates & Statistical Analysis Section
November 4, 1981
Revised January 29, 1982

GANN INITIATIVE
(As amended July 6, 1981)

Maximum Estimate of Sections 3(f) and 5

SPECIFIC FINDINGS:

Sections 3(f) and 5 of the Gann Initiative would provide that (1) any person convicted of a serious felony, as defined, who previously has been convicted of such a felony shall receive a 5-year enhancement per prior conviction, and (2) any prior felony conviction of any person in any criminal proceeding shall be used without limitation for purposes of enhancing a sentence in any criminal proceeding.

One interpretation of this proposed change is that all prior convictions (including adult and juvenile convictions from criminal court) for serious felonies would be subject to a 5-year enhancement, and not just those prior convictions charged and proved as CDC legal staff advises. The "all prior convictions" interpretation produces a maximum estimate of the impact of Sections 3(f) and 5 on the State prison system.

ANALYSIS:

This maximum estimate reflects additional time being added to the sentences of those felons convicted of serious felonies and who either served prior prison terms and/or CYA commitments (from criminal court only), or received a non-prison sentence (e.g. probation) for prior convictions of serious felonies.

The following chart indicates that approximately 6,950 felons convicted of serious felonies would serve additional time in prison ranging from an estimated 38 months to 78 months.

MAXIMUM ESTIMATE [a]	Number of felons per year	Current time served (months)	Proposed time served (months)	Additional time to be served (months)
Violent felony				
- Prior adult & prior juvenile	120	58	136	78
- Prior adult only	945	58	96	38
- Prior juvenile only	285	58	98	40
Other serious felony				
- Prior adult & prior juvenile	490	30	108	78
- Prior adult only	3,915	30	68	38
- Prior juvenile only	1,195	30	70	40
TOTAL	6,950			

[a] Maximum estimate - reflects prior adult convictions for serious felonies and prior juvenile convictions originating from criminal court for serious felonies.

Assuming a July 1, 1982 effective date, followed by a six-month lag before an impact is seen on intakes, the maximum impact in inmate-years of the additional time to be served by approximately 6,950 felons per year is estimated to be:

1982-83	0
1983-84	0
1984-85	0
1985-86	2,800
1986-87	8,400

For this group of 6,950 felons, inmate-years would stabilize at approximately 24,275 in FY 1994/95.

METHODOLOGY:

1. The estimate is based on the projected prison population for FY 1982-83 and the impact of recently passed legislation.

   The estimated population impact is higher than the impact provided in the November 4, 1981 analysis. This is primarily because the base year from which to project population at a FY 1982-83 level was changed from FY 1980-81 to FY 1979-80.

2. Board of Prison Terms (BPT) provided the following data:

   a. Percentage of serious felonies, as defined in the Initiative, to total felonies (60%) (based on 21 months of data).

   b. Number of felons convicted of serious felonies with prior adult and juvenile convictions for violent (felonies listed in Section 667.5(c) of the Penal Code) and nonviolent offenses (nonviolent offenses include felony and misdemeanor offenses). The BPT data do not identify the specific offense for prior convictions.

3. Prior adult convictions for nonviolent offenses were reduced to identify only prior convictions for other serious felonies (violent felonies were separately identified) by the following percentages:

   a. 23% to identify felonies only -- Data provided in the 1980 Crime and Delinquency indicates that adult felony arrests represent 23% of total adult arrests (felonies and misdemeanors).

   b. 44% to identify other serious felonies -- BPT data provides that 44% of the felons sent to prison were for committing other serious felonies.

4. Prior juvenile convictions for nonviolent offenses were reduced to identify only prior convictions for other serious felonies by the following percentages:

   a. 34% to identify felonies only -- Data provided in the 1980 Crime and Delinquency indicates that juvenile felony-level arrests represent 34% of total juvenile arrests (felonies and misdemeanors).

   b. 44% to identify other serious felonies -- see 3.b. above.

   It is assumed that the cases involving serious felonies committed by juveniles would be sent to criminal court.

5. To determine the number of felons with prior adult convictions and prior juvenile convictions for serious felonies, the following percentages were applied to the total number of felons with prior adult convictions for serious felonies:

   a. 39% to identify the number of felons with prior juvenile convictions -- 1979 CDC data indicates that 39% of felons sent to prison had a prior CYA commitment.

   b. 47% to identify the number of convictions originating from criminal court -- FY 1980-81 data provided by CYA staff indicates that 47% of CYA commitments originated from criminal court.

   c. 60% to identify the number of criminal court convictions that are serious felony convictions -- 1979 CYA Annual Report provides that 60% of CYA commitments originating from criminal court were for serious felony convictions.

APPENDIX "B"

LOCAL COST ESTIMATES

APPENDIX "B"

County Supervisors
Association of California

February 22, 1982

Mr. Geoffrey Goodman
Consultant, Assembly Criminal Justice Committee
Room 2136, State Capitol
Sacramento, California 95814

Dear Mr. Goodman:

Attached is a copy of an analysis of the "Victims' Bill of Rights" initiative that was done by staff in Riverside County.

The analysis indicates that the initiative would have an $18 million annual operational impact upon Riverside County. While it is difficult to draw statistically valid extrapolations from a single analysis, if the Riverside County figures were extrapolated statewide, the annual cost to counties of the "Victims' Bill of Rights" would be $720 million. Because Riverside County represents only about two and a half percent of California's population, any statewide projections should be accompanied by caveats explaining that the total is derived from a single estimate.

I do hope that the attached is useful to your research effort.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

M. Steven Zehner
General Counsel

MSZ:aw

attachment

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Council on Criminal Justice
Region S

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MICROWAVE 2311

December 2, 1981

M. Steven Zehner, General Counsel
County Supervisors Association
11th and L Building, Suite 201
Sacramento, California 95814

Dear Steve:

Re: Analysis of Impact of Victims' Bill of Rights Upon Riverside County Government

Several weeks ago I advised you that I would meet with representatives of Riverside County government, particularly those who have justice system responsibilities, and attempt to provide you with some measure of the impact that the proposed Constitutional amendment - the Victims' Bill of Rights - would have in this county. Those meetings are now concluded, and observations that have been made will be reflected below.

The initiative is extremely vague in a number of areas. In order to be able to deal with this problem, I contacted the Citizens Committee to Stop Crime in Sacramento, and inquired as to what was intended in specific sections of the initiative. I will reflect the Committee's intentions as each items is discussed.

The first observation to be made is that there should not be a Constitutional amendment to implement these programs, or laws. The Constitutional amendments will require new laws to be enacted by the legislature. The frustration has been with the legislature in the past, particularly with the Assembly Criminal Justice Committee. This committee will still have to pass out legislation, and it will be difficult to control language that counties, and the justice system, can live with. In this instance, the initiative process used to change the California Constitution is no panacea. It likely will raise expectations of the citizens of the State, and also increase their lack of confidence in both local government, and the legislature.

The initiative is silent as to where funds will come to support the new programs, or changed programs. As you will see in the following pages, the initiative would impose a great many new and identifiable costs upon counties. There are also more cost implications that cannot be measured at this time.

Restitution:

This provision in the initiative does not change the practice for ordering restitution in this county. It does raise false expectations that restitution can be effected in most cases. Today restitution is ordered unless there are compelling and extraordinary reasons why it cannot, i.e., the defendant is indigent, or is sent to state prison.

I am advised that many victims of crime do not seek restitution, even when it is offered to them. This may be because they are awarded claims by insurance companies, they are not interested, or do not understand the process.

This provision would require an additional $100,000 per year in the Probation Department budget to carry out.

Right to Safe Schools:

This section is extremely vague. The Committee indicated that it was intended to specifically require schools to be safe, secure and peaceful. These conditions will be difficult to define, and will place school districts in the position of being sued if a student is assaulted on campus. That is the Committee's intention.

We have 150 such campuses in this county. Assuming that two peace officers could insure safe, secure and peaceful campuses, that would cost local government at least $9,000,000 per year in additional law enforcement personnel.

It is pointed out that the security system for the Los Angeles public school system is the second largest law enforcement agency in that county. Are these campuses safe, secure and peaceful?

Right to Truth in Evidence:

It is expected that this provision would increase the number of jury trials conducted each year in this county, but probably would not change the manner in which attorneys conduct their business in court. No cost estimates are made in this instance.

Public Safety Bail:

The Committee proposes a new Penal Code section - 1192.7, which specifies certain offenses for which public safety bail would be a consideration. Currently, most such defendants cannot be released on bail because they cannot afford bail. This provision would increase jail populations somewhat. The extent is not known.

Use of Prior Convictions:

It is reported that under existing practice, most defense attorneys "stipulate" prior convictions, however it is estimated that this provision in the initiative could increase court time for trials up to about 20-25 minutes. This would further congest the courts, and require the addition of judges, and court support personnel. No estimate is made regarding costs to implement this section.

Diminished Capacity; Insanity:

This section is made moot by the diminished capacity law which goes into effect on January 1, 1982. It is projected that the cost impact of this provision would be minimal, because there are few such cases occurring now.

Habitual Criminals:

There are two major areas for potential impact in implementing this provision of the initiative. The first is increases in sentences to state institutions. Currently these institutions are bursting at the seams, and this section would aggravate the situation. Resulting tension upon inmates and staff could result in increased assaultive behavior, disorders, and/or riots. The costs could be devastating in terms of life, health, safety, and in replacement of institutions.

The second area is consideration for the existing limitations on committments to participation in the AB 90 program. Unless there were further exclusions, counties would exceed their limits the first year, and stand to lose this source of revenue. This county's loss because of this provision would be up to $1.7 million per year.

Victim's Statements; Public Safety Determination:

Existing practice in this county is for the District Attorney to maintain close liaison with victims of crime during the course of any trial. Notice is sent to victims, and the opportunity is extended for victims to attend any portion of the proceedings.

This section would create a duplicate function in the course of the proceedings, and require the Probation Department to maintain that liaison as well. It is estimated that this duplicate function would cost an additional $500,000 per year.

Limitation of Plea Bargaining:

It is our opinion that the outright elimination of plea negotiations would congest our courts further, and cause the dismissal of a large number of cases for failure to comply with the State's speedy trial rules. Our experience, by tightening the acceptance of negotiated pleas, has been an increased felony case backlog. This also impacts the county jails because many of these defendants are in custody and will be forced to be housed in those facilities for longer periods of time pending their prosecution.

Another area of concern is the abolition of plea negotiations for offenses involving driving under the influence. Many of these cases would be dismissed for lack of speedy prosecution, ultimately affecting county revenue by way of fines. It would also result in a necessity for additional trial judges, prosecutors, and public defenders, and necessary court attaches. These additions would have a significant impact on the county budget, but they cannot be estimated at this time.

Sentencing:

This section prohibits certain convicted felons from being sentenced to the Youth Authority. It is our belief that the courts, stripped of this sentencing option, may prefer to sentence the youthful offenders over 18 years of age to county jail, rather than expose them to the elements within the state prison system. Such action would further overcrowd the already congested jails.

Mentally Disordered Sex Offenders:

No estimated fiscal impact

Summary:

The passage of this initiative will have serious and negative impacts upon both county and state government. Increased costs have already been discussed in many areas.

Both adult and juvenile institutions in this county are already exceeding their rated capacities, and this measure would aggravate that problem. The county would have to escalate its capital construction plans, for which there are no funds to carry out. Presently, $40 million is needed to construct a new jail to meet existing population levels. Another would be needed by 1985, and it could cost up to $80 million to construct. Both initiatives, and legislation can be passed within a year, but it takes 5 years to design and construct new jails and prisons.

The initiative probably will raise expectations of the public that the crime problem will change overnight, when neither state nor local government is fiscally prepared to meet the increased

workloads that the initiative would create, nor accomodate the increased institutional populations.

The costs projected in this paper are only estimated, based upon discussions with local officials. The total annual costs to the county would be higher than these estimates, because of the need for additional courtrooms, judges, support personnel, etc. Additional staff to the County Counsel would also probably be needed to handle the increased lawsuits against the county for conditions within the jails and juvenile halls, failure to prosecute offenses on school campuses, etc.

At current prices, the annual operational costs to implement this initiative in this county are estimated at $18,300,000. The ten-year cost could well exceed $300 million, with inflation considered.

The ten-year capital construction demands on the county, which would include construction of two year jails, and two new juvenile institutions, would exceed $200 million.

I hope this information will be of assistance to you. If you, or others, have questions regarding this analysis, please contact me.

Sincerely yours,

Richard J. Kenyon
Regional Planning Director

END