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Crimes

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Crimes

Crimes; alcoholic beverages—beer kegs

Business and Professions Code § 25659.5 (new).

AB 8 (Connolly); 1993 STAT. Ch. 270

Under existing law, it is a misdemeanor to sell, furnish, or give away any alcoholic beverage to any person under the age of twenty-one years.¹ Existing law also provides that for the purpose of preventing a violation, a licensee may refuse to sell or serve alcoholic beverages to any person who is unable to produce sufficient written evidence establishing age.² Chapter 270 requires retail licensees selling keg³ beer for consumption off

1. CAL. BUS. & PROF. CODE § 25658 (West Supp. 1993); see *Sagadin v. Ripper*, 175 Cal. App. 3d 1141, 1158, 221 Cal. Rptr. 675, 685 (1985) (stating that to furnish alcohol under California Business and Professions Code § 25658, the offender need not pour the drink, but once having control of the alcohol, need only take some affirmative step to supply it to the drinker); see also *Lacabanne Properties v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 188, 67 Cal. Rptr. 734, 739 (1968) (stating that the purpose of provisions prohibiting certain transactions with minors by liquor licensees is to protect minors from harmful influences); cf. CAL. PENAL CODE § 272 (West Supp. 1993) (providing that any person who commits any act or omits the performance of a duty that either encourages or contributes to the delinquency of a person under 18 years of age is guilty of a misdemeanor); *People v. Deibert*, 117 Cal. App. 2d 410, 417, 256 P.2d 355, 359 (1953) (stating that the Alcoholic Beverages Control Act does not affect the applicability of other provisions which punish conduct that tends to contribute to the delinquency of minors, and such acts constitute an independent offense by legislative design); *City of Dickinson v. Mueller*, 261 N.W.2d 787, 789 (N.D. 1977) (holding that intentional, knowing, or reckless conduct is not an element of the offense of selling alcoholic beverages to persons under the age of 21). See generally *Bass v. Pratt*, 177 Cal. App. 3d 129, 137, 222 Cal. Rptr. 723, 729 (1986) (holding that a social host is statutorily immunized against civil liability for furnishing alcoholic beverages to an intoxicated minor); *Maria E. Odum, Woman Arrested at Teen Party; Beer Drinking by "Several Hundred" Alleged*, WASH. POST, June 26, 1993, at D3 (stating that a 48-year old woman was arrested and charged with contributing to the delinquency of minors after police found "several hundred" juveniles drinking beer from cans and kegs).

2. CAL. BUS. & PROF. CODE § 25659 (West 1985); see *Lacabanne Properties*, 261 Cal. App. 2d at 189, 67 Cal. Rptr. at 739 (stating that the burden of proof is on the licensee to establish that documentation of identity and majority was demanded from and shown by the purchaser); see also CAL. BUS. & PROF. CODE § 25660 (West Supp. 1993) (providing that a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof which contains the following is bona fide evidence of identity and majority: (1) Name; (2) date of birth; (3) description; and (4) picture of the person); *Pastime Cafe v. Department of Alcoholic Beverage Control*, 159 Cal. App. 2d 114, 116, 323 P.2d 551, 552 (1958) (holding that a birth certificate is not bona fide documentation of identification and majority under California Business and Professions Code § 25660); *Dethlefsen v. State Bd. of Equalization*, 145 Cal. App. 2d 561, 567, 303 P.2d 7, 11-12 (1956) (stating that the purpose of California Business and Professions Code § 25660 is to provide a readily applicable standard upon which a vendor could rely as a defense if in fact a purchaser was under 21); *People v. Garrigan*, 137 Cal. App. 2d Supp. 854, 858, 289 P.2d 892, 895 (1955) (holding that California Business and Professions Code § 25660 required the demand and showing of evidence of identity and majority before each sale, even if the seller had previously examined documentary evidence of identity and age).

3. See CAL. BUS. & PROF. CODE § 25659.5(a) (enacted by Chapter 270) (defining keg as any brewery-sealed container with a liquid capacity of six gallons or greater); cf. IDAHO CODE § 23-1018(5) (Supp. 1993) (defining keg as any brewery-sealed container having a liquid capacity of seven and three-fourths gallons or

the licensed premises to attach an identification tag⁴ to the keg of beer and requires the purchaser to sign a receipt⁵ to enable the keg to be traced back to the vendor and purchaser if the contents are ultimately used in violation of the law.⁶ Additionally, Chapter 270 prohibits a retailer from

more); 1993 Neb. Laws ch. 332, (requiring labelling on beer containers with a capacity of five or more gallons); N.M. STAT. ANN. § 60-7B-12(C) (Michie Supp. 1992) (defining keg as a package of beer which contains more than six gallons when it is sold); N.D. CENT. CODE § 5-02-07.2 (1987) (requiring a distinctive marking of containers with liquid capacity greater than six gallons); 1993 Wash. Laws ch. 21, (requiring identification on malt liquor containers of four gallons or more).

4. See CAL. BUS. & PROF. CODE § 25659.5(a) (enacted by Chapter 270) (specifying that the numbered identification label which identifies the seller shall be prescribed and supplied by the department); *id.* § 25659.5(e) (enacted by Chapter 270) (specifying that the identification label shall be constructed so as to make the label easily removable for cleaning and reusing by a beer manufacturer).

5. See *id.* § 25659.5(a) (enacted by Chapter 270) (specifying that the receipt prescribed and supplied by the Department of Alcoholic Beverage Control shall include: The name and address of the purchaser, and the purchaser's driver's license number or similar identification number); see also *id.* § 25659.5(d) (enacted by Chapter 270) (specifying that it is a misdemeanor to knowingly provide false information on a receipt); *cf.* IDAHO CODE § 23-1018(4) (Supp. 1993) (providing that it is a misdemeanor to knowingly provide false information on a receipt).

6. CAL. BUS. & PROF. CODE § 25659.5(a) (enacted by Chapter 270); see SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 8, at 2 (June 15, 1993) (stating that this measure was introduced to assist law enforcement agencies in identifying individuals who purchase and supply keg beer for consumption by minors at "keg-parties"); Dana Wilkie, *New Keg Law to Tag Adults Who Buy Beer for Minors*, SAN DIEGO UNION-TRIBUNE, Aug. 3, 1993, at B3 (quoting Assemblyman Connolly as stating that although Chapter 270 will not completely solve the teen drinking problem, it will provide the police with an important enforcement tool and remind adults that it is illegal to purchase alcohol for minors); see, e.g., Kristan Metzler, *Parents of Dead Girl Sue; Action Targets Seller of Beer*, WASH. TIMES, Aug. 26, 1993, at B3 (discussing how a teenage girl was killed in a car crash after attending a keg party); *Records of Sunday, May 23, 1993*, LEWISTON MORNING TRIBUNE, May 24, 1993, at A6 (reporting the arrest of a 38-year old woman after the police found approximately 20 high school students drinking in her backyard from a keg of beer); *cf.* IDAHO CODE § 23-1018 (Supp. 1993) (setting forth provisions concerning keg beer, including: (1) Requiring numbered keg labelling which is removable or obliterated when the keg is refilled; (2) requiring the registration of the purchaser; and (3) providing for suspension of a seller's license for failure to comply with the labelling and registration requirements); 1993 Neb. Laws ch. 332 (requiring: (1) Numbered keg identification by retail alcohol licensees; (2) registration of the purchaser; (3) criminal penalties for violations; and (4) a yearly report by the commission to the legislature on the effectiveness of keg registration on deterring alcohol consumption by minors); N.M. STAT. ANN. § 60-7B-12 (Michie 1992) (providing that a retailer shall assign each keg a control number to be recorded along with specified information pertaining to the purchaser, and requiring the retailer to retain the registration forms until the keg is returned or for six months, whichever is less); N.D. CENT. CODE § 5-02-07.2 (1987) (requiring retail beverage licensees: (1) To place a unique label, approved and registered with the attorney general, on kegs of beer; (2) to register specified information pertaining to the purchaser; and (3) to store the records on the licensed premises for a period of no less than six months); 1993 Wash. Laws ch. 21 (requiring: (1) Identification labels to be placed on kegs of beer; (2) the purchaser to sign a declaration and registration form under penalty of perjury at the time of purchase; and (3) the purchaser to maintain of copy of the registration form visible from the keg and in no event at a distance greater than five feet). See generally DeNeen L. Brown, *Teen Drinkers Cited as a Serious Problem; Study Blames Lax Laws, Poor Enforcement; Area Violations Most Prevalent in N.Va.*, WASH. POST, Apr. 30, 1993, at D1 (detailing the startling results of a survey regarding alcohol consumption by minors which showed that the average age at which youths begin to drink is 14, that 72% of youths reported having been drunk at a party, and that 8 million of the 20 million Americans in grades 7 through 12 drink weekly); Howard Manly, *State Tag-a-Keg Rule Unveiled in Move on Underage Drinking*, BOSTON GLOBE, July 3, 1993, at Metro/Region 25 (reporting that the State Consumer Affairs Office announced a statewide rule requiring a metal tag to be attached to all kegs and liquor stores to register beer kegs

refunding any deposit for a returned keg that is missing the identification label and makes it a misdemeanor to knowingly possess a keg which contains beer and is not properly identified.⁷

CJK

Crimes; animal control officers and humane society officers as mandated child abuse reporters

Penal Code § 11165.16 (new); §§ 11166, 11166.5, 11172 (amended).

SB 665 (Russell); 1993 STAT. Ch. 510

Existing law requires any child¹ care custodian,² health care practitioner,³ employee of a child protective agency,⁴ child visitation monitor,⁵ or film print processor, who reasonably suspects⁶ child abuse⁷

sold); *id.* (stating that one town which adopted its own tag-a-keg policy has only collected approximately one or two kegs in two years from minors, compared to one or two per week prior to adoption of the policy); *id.* (stating that a recent survey indicated that over 20% of the deaths among 16 to 20 year-olds were a result of alcohol related automobile accidents); Dr. Antonia Novello, *Address by Dr. Antonia Novello, U.S. Surgeon General*, FEDERAL NEWS SERVICE, April 23, 1993, available in LEXIS, Nexis Library, Omni File (addressing underage drinking and including an explanation of her overall grade of C+ with respect to the efforts of various groups to reduce illegal underage drinking); Rene Sanchez, *D.C. Targets Underage Drinkers; Council Passes Bill to Discourage Sales, Punish Violators*, WASH. POST, May 5, 1993, at A1 (describing how a selected group of minors were successful in 97 out of 100 attempts to purchase alcohol in the District of Columbia, a city with some of the nation's weakest underage drinking laws).

7. CAL. BUS. & PROF. CODE § 25659.5(a),(c) (enacted by Chapter 270); cf. IDAHO CODE § 23-1018(3) (Supp. 1993) (providing that knowing possession of an unidentified keg is a misdemeanor).

1. See CAL. PENAL CODE § 11165 (West 1993) (defining child as anyone under the age of 18).

2. See *id.* § 11165.7 (West Supp. 1993) (defining child care custodian).

3. See *id.* § 11165.8 (West 1992) (defining health practitioner).

4. See *id.* § 11165.9 (West 1992) (defining child protective agency).

5. See *id.* § 11165.15 (West Supp. 1993) (defining child visitation monitor).

6. See *id.* § 11166(a) (amended by Chapter 510) (defining reasonable suspicion to mean that it is objectively reasonable for a person to entertain a suspicion, based upon facts, that could cause a reasonable person in a like professional position to suspect child abuse).

7. See *id.* § 11165.6 (West 1992) (defining child abuse as nonaccidental physical injury, sexual abuse, willful cruelty or unjustifiable punishment, unlawful corporal punishment or injury, neglect, or abuse in out-of-home care).

to report the abuse to a child protective agency.⁸ Existing law provides that persons must sign a statement when entering into such employment that they will comply with the child abuse reporting requirement.⁹ Existing law further provides that these individuals will not be criminally or civilly liable for complying with the reporting requirement.¹⁰

Chapter 510 adds animal control officers,¹¹ humane society officers,¹² and firefighters to the list of persons required to comply with

8. *Id.* § 11166 (amended by chapter 510); *see id.* § 11164(a)-(b) (West 1992) (stating that California Penal Code §§ 11164-11176.5 may be cited as the Child Abuse and Neglect Reporting Act and the purpose of the article is to protect children from abuse); *id.* § 11166(a)-(c) (amended by Chapter 510) (listing the professionals who must submit a written report of any known or suspected child abuse to a child protective agency within 36 hours); *id.* § 11172(e) (West 1992) (stating that noncompliance with the reporting requirements will result in a misdemeanor punishable by confinement in a county jail for a maximum of six months and/or a maximum fine of one thousand dollars); *see also id.* § 17(a) (West 1988) (defining misdemeanor); *DeShaney v. Winnebago County Dep't of Social Serv.* 489 U.S. 189, 197 (1989) (holding that a state's failure to protect an individual against private violence did not create a duty and, thus, did not constitute a violation of the Due Process Clause of the U.S. Constitution); *Landeros v. Flood*, 17 Cal. 3d 399, 415, 551 P.2d. 389, 397-98, 131 Cal. Rptr. 69, 77-73 (1976) (holding that a physician, as a mandated reporter of child abuse, could only be held liable for not reporting child abuse if he actually observed the injuries and believed they had been intentionally inflicted upon the child); *Troy D. v. Kelly D.*, 215 Cal. App. 3d 889, 902, 263 Cal. Rptr. 869, 876 (1989) (holding that a social worker had a reasonable suspicion of child abuse when she suspected that a new mother had used illegal drugs during the prenatal state of her pregnancy which caused her newborn child to be born under the influence of a dangerous drug); *People v. Battaglia*, 156 Cal. App. 3d 1058, 1065, 203 Cal. Rptr. 370, 375 (1984) (holding that a suspect of child abuse did not have his Fifth Amendment rights violated when he was reported to child abuse authorities without having the Miranda warnings read to him first); *People v. Younghanz*, 156 Cal. App. 3d 811, 817-18, 202 Cal. Rptr. 907, 911 (1984) (holding that a suspect of child abuse did not have his Constitutional right to privacy or against self-incrimination violated when a mandated child abuse reporter, the suspect's physician, reported suspected child abuse); *cf. IOWA CODE ANN.* § 232.69(1)-(3) (Supp. 1993) (mandating specified individuals to report child abuse within 24 hours); *MINN. STAT. ANN.* § 626.556(3) (Supp. 1993) (designating certain professionals as child abuse reporters and requiring the information to be immediately reported to the appropriate officials). *See generally* 42 U.S.C. § 5101-5107 (1988 & Supp. II 1990) (establishing the National Center for Child Abuse and Neglect); 5 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW Torts* § 283(aa) (9th ed. 1991 & Supp. 1993) (discussing the history and requirements of California's Child Abuse Reporting Act); Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 522-28 (1987) (describing the difficult balance between state intervention of family privacy rights and prosecution of child abuse cases).

9. CAL. PENAL CODE § 11166.5(a) (amended by Chapter 510); *see id.* (listing professionals who must sign an agreement to comply with child abuse reporting).

10. *Id.* § 11172(a)-(c) (amended by Chapter 510); *see Storch v. Silverman*, 186 Cal. App. 3d 671, 681, 231 Cal. Rptr. 27, 33 (1986) (holding that medical practitioners are granted absolute immunity from civil liability for reporting suspected child abuse to a protective agency).

11. *See* CAL. PENAL CODE § 11165.16(a)(1) (enacted by Chapter 510) (defining animal control officer).

12. *See id.* 11165.16(a)(2) (enacted by Chapter 510) (defining humane society officers).

the child abuse reporting measure and affords them immunity from liability arising out of such reporting.¹³

JSE

Crimes; assault

Penal Code § 245 (amended).

AB 1344 (Epple); 1993 STAT. Ch. 369

Existing law provides that any person¹ who commits an assault² upon another person with a deadly weapon or an instrument³ other than a firearm,⁴ or by any means which is likely to result in great bodily harm,⁵ may be punished by two to four years imprisonment in the state prison or one year in the county jail, or by fine not exceeding \$10,000, or both.⁶

13. CAL. PENAL CODE §§ 11166, 11166.5, 11172(a)-(b) (amended by Chapter 510); *see id.* 11165.16(b) (amended by Chapter 510) (stating that no firefighter, animal control officer, or humane society officer shall be subject to the reporting requirements of this article unless they have received training in identification and reporting of child abuse equivalent to that received by teachers and child care custodians); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 665, at 5 (Apr. 20, 1993) (providing that the amendments to sections 11166, 11166.5, and 11172 are in response to the fact that many child abuse victims are not exposed to child care custodians because they are not of school age; and, thus, animal control officers, humane officers and firefighters are public employees who have access to a child's home within the scope of their employment and can witness child abuse as it occurs). *See generally Infants and Drug Abuse*, L.A. TIMES, Aug. 23, 1989, Metro at 6 (reporting on how children are victims of child abuse through the umbilical cord when their mothers use drugs during the prenatal stage).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person).

2. *See id.* § 240 (West 1988) (defining assault as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another).

3. *See* *People v. Autry*, 232 Cal. App. 3d 365, 368, 283 Cal. Rptr. 417, 418 (1991) (holding that hypodermic needles in possession of a suspected drug user presented a possible threat and, as such, were deadly weapons); *People v. Nealis*, 232 Cal. App. 3d Supp. 1, 5, 283 Cal. Rptr. 376, 379 (1991) (defining deadly weapon or instrument as one that could and is likely to produce death or great bodily injury).

4. *See* CAL. PENAL CODE § 12001(b) (1988 & Supp. 1993) (defining firearm as any device used as a weapon which expels a projectile by the force of any explosion or other form of combustion through a barrel); *cf.* 18 U.S.C. § 921(a)(3) (1993) (including within the definition of a firearm, the frame or receiver of any explosive weapon, and firearm muffler or firearm silencer, or any destructive device, but not including antique firearms); *id.* § 921(a)(4) (1988 & Supp. 1993) (defining destructive device).

5. *See* *People v. Armstrong*, 8 Cal. App. 4th 1060, 1066, 10 Cal. Rptr. 2d 839, 841 (1992) (stating that great bodily injury as meant by the statute is bodily injury which is significant or substantial, not injury which is insignificant, trivial, or moderate).

6. CAL. PENAL CODE § 245(a)(1)-(b) (amended by Chapter 369); *see* *People v. Moore*, 178 Cal. App. 3d 898, 904, 224 Cal. Rptr. 204, 207 (1986) (recognizing that prior to the enactment of 1982 CAL. STAT. ch. 136, which amended California Penal Code § 245, assaults with firearms were covered by assault with a deadly weapon).

Under existing law, an assault with a semiautomatic rifle⁷ is a felony,⁸ punishable by three, six, or nine years in state prison, a fine not exceeding \$10,000, or both.⁹ Existing law also provides that any person who commits an assault on a peace officer¹⁰ or firefighter¹¹ with a semiautomatic rifle is guilty of a felony, punishable by five, seven, or nine years in state prison.¹²

Chapter 369 mandates that the punishment for an assault on another person with a semiautomatic firearm will be imprisonment in state prison for three, six, or nine years.¹³ Chapter 369 mandates that punishment for

7. CAL. PENAL CODE § 12276 (West Supp. 1993) (identifying and listing tradenames of prohibited semiautomatic firearms and assault weapons, and including semiautomatic rifles within this list).

8. *See id.* § 17 (West 1988) (defining felony).

9. *Id.* § 245(b) (amended by Chapter 369). *See generally* John Woolfolk, *Machine Guns Proliferating in California*, S.F. CHRON., May 10, 1993, at A1 (describing the growing numbers of automatic and semiautomatic weapons in California).

10. *See* CAL. PENAL CODE § 830-832.6 (West Supp. 1993) (defining peace officer).

11. *See id.* § 245.1 (West 1988) (defining firefighter).

12. *Id.* § 245(d)(2) (amended by Chapter 369); *see In re Cline*, 255 Cal. App. 2d 115, 123, 63 Cal. Rptr. 233, 239 (1967) (holding that an offense of assault with a deadly weapon on a police officer requires that the defendant have reasonable awareness that his victim is a police officer engaged in the performance of his duties); *People v. Baca*, 247 Cal. App. 2d 487, 496, 55 Cal. Rptr. 681, 687 (1966) (stating that an offense under this section, which provides for punishment of every person who commits an assault with a deadly weapon or instrument, or by any means likely to produce great bodily injury upon a peace officer, is created for public benefit).

13. CAL. PENAL CODE § 245(b) (amended by Chapter 369); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1344, at 2 (Apr. 13, 1993) (stating that the purpose of the bill is to impose greater penalties on those who commit assaults with semiautomatic weapons because currently crimes with .22 caliber rifles, primarily used by hunters, have stricter penalties); Mark Arax, *Gunmen Kill 7 in Fresno Bar; Crime: Shooting is the Deadliest in City's History*, L.A. TIMES, May 17, 1993, at A3 (describing how two men, toting semiautomatic weapons, opened fire on a crowded nightclub, killing seven people); Lori Olszewski, *Downtown Rampage Renews Debate on Gun Control*, S.F. CHRON., July 3, 1993, at A13 (reporting that the gunman responsible for the June 30, 1993, shooting on a San Francisco law firm which killed nine people, purchased the semi-automatic guns in Las Vegas, thereby circumventing the California ban on specified weapons and the 15-day waiting period imposed on other weapons); Jenifer Warren & Patt Morrison, *At Least 9 Die in California Shooting; They're Only Used to Kill People; Ban All Semiautomatic Guns in the State, Period*, L.A. TIMES, July 12, 1993, (Editorial) at B6 (commenting on the loophole that gun manufacturers used to bypass the assault weapons ban provided by the Assault Weapons Act of 1989); *3rd State Bans Sale of Assault Weapons*, L.A. TIMES, June 10, 1993, at A12 (stating that Connecticut has joined California and New Jersey by banning the sale of semiautomatic weapons); *Gunman Opens Fire in San Francisco Law Office, Then Kills Himself*, July 2, 1993, at A1 (describing the massacre on a San Francisco law firm by a man wielding semiautomatic weapons). *See generally* Keith R. Fafarman, *State Assault Rifle Bans and the Militia Clauses of the United States Constitution*, 67 IND. L.J. 187 (1991) (detailing the development of legislation on assault weapons).

an assault on a police officer or firefighter with a semiautomatic firearm will be imprisonment in state prison for five, seven, or nine years.¹⁴

JCB

Crimes; carjacking and drive-by shooting—first degree murder

Government Code § 6254 (amended); Penal Code §§ 209.5, 215 (new); §§ 27, 186.22, 189, 520, 653f, 653j, 666, 667.5, 667.7, 667.9, 786, 868.5, 999e, 1170.1, 1192.7, 1202.5, 1203, 1203.055, 1203.06, 1203.075, 1203.08, 1203.09, 1601, 3057, 11105.3, 12022, 12022.5, 13853 (amended); Welfare and Institutions Code §§ 676, 707, 4514, 5328.4, 6500, 8103 (amended).
SB 60 (Presley); 1993 STAT. Ch. 611

Penal Code § 190 (amended).

SB 310 (Ayala); 1993 STAT. Ch. 609

Under existing law, the felonious taking¹ of a motor vehicle² in the possession³ of another by force⁴ or fear,⁵ is robbery.⁶ Chapter 611 provides that the felonious taking of a vehicle⁷ of another with the intent⁸

14. CAL. PENAL CODE § 245(d)(2) (amended by Chapter 369).

1. See *People v. Salcido*, 186 Cal. App. 2d 684, 687, 9 Cal. Rptr. 57, 59 (1960) (stating that although some movement is required for a taking, the distance of a taking may be very small).

2. See CAL. VEH. CODE § 415 (West Supp. 1993) (defining motor vehicle); *Di Guilio v. Rice*, 27 Cal. App. 2d Supp. 775, 778, 70 P.2d 717, 719 (1937) (distinguishing between a motor vehicle and a vehicle by stating that a motor vehicle is self-propelled while a vehicle is propelled by some other force); see also *Williams v. Standard Accident Ins. Co.*, 158 Cal. App. 2d 506, 510, 322 P.2d 1026, 1029 (1958) (defining automobile as any form of self-propelled vehicle for use on the streets and highways).

3. See *People v. Miller*, 18 Cal. 3d 873, 880, 558 P.2d 552, 557, 135 Cal. Rptr. 654, 659 (1977) (recognizing that a store employee, janitor, night watchman, and a visitor of a store can be victims of a robbery in a store because they have constructive possession of the goods involved in the robbery).

4. See *People v. Roberts*, 57 Cal. App. 3d 782, 787, 129 Cal. Rptr. 529, 531 (1976) (stating that the determination of whether there is force or fear in a robbery is a factual question to be answered by the jury).

5. See CAL. PENAL CODE § 212 (West 1988) (defining fear).

6. *Id.* § 211 (West 1988); see also *id.* § 487 (West Supp. 1993) (defining grand theft to include the taking of an automobile); CAL. VEH. CODE § 10851 (West Supp. 1993) (stating that it is unlawful to take the vehicle of another without consent); *State v. Hayes*, 518 S.W.2d 40, 46 (Mo. 1975) (declining to recognize the taking of the keys of an automobile as a symbolic taking of the automobile itself).

7. See CAL. VEH. CODE § 670 (West 1987) (defining vehicle).

to deprive that person⁹ of possession of the vehicle, by fear or force, is carjacking.¹⁰

Under existing law, murder of the first degree¹¹ includes a murder committed in the perpetration¹² of, or the attempt¹³ to commit, specified felonies.¹⁴ Chapter 611 adds both carjacking and the discharging of a

8. See *People v. Butler*, 65 Cal. 2d 569, 573, 421 P.2d 703, 706, 55 Cal. Rptr. 511, 514 (1967) (stating that the intent to steal can be inferred from the taking of another's property, unless the taker has a bona fide belief, mistaken or not, that he or she has a claim to the property).

9. See CAL. HEALTH & SAFETY CODE § 11022 (West 1991) (defining person).

10. CAL. PENAL CODE § 215 (enacted by Chapter 611); cf. 18 U.S.C. § 2119 (1993) (imposing punishment for the taking of a vehicle, which has been shipped interstate, from the person of another by force while in possession of a firearm); MASS. ANN. LAWS ch. 265, § 21A (Supp. 1993); VA. CODE ANN. § 18.2-58.1 (Michie Supp. 1993) (establishing the crime of carjacking). See generally Anthony Duignan-Cabrera, *2 Convicted Under U.S. Carjacking Law*, L.A. TIMES, July 13, 1993, at B8 (describing the carjacking crime of the first two men in L.A. County convicted under the federal carjacking statute); *Man Shot to Death in Heights After 4 Carjackers Steal his Auto*, THE HOUSTON CHRON., July 23, 1993, at 38 (describing a violent carjacking resulting in the death of the victim); *Protect & Defend: Turning the Tables on Carjackers*, PR NEWswire, Apr. 1, 1993, available in LEXIS, Tran. Library, Auto File (explaining an anti-carjacking device which sounds an alarm and disables the vehicle within minutes after the carjacker has taken the car); *Safe-T-Man Auto Passenger Helps Discourage Potential Carjackings*, PR NEWswire, June 10, 1993, available in LEXIS, Tran. Library, Auto File (introducing a portable male dummy to place in the passenger seat of a vehicle to discourage carjackers by making it appear that the driver is not alone).

11. See CAL. PENAL CODE § 189 (amended by Chapter 611) (defining first and second degree murder); *id.* § 187 (West 1988) (defining murder as the unlawful killing of a human being, or a viable fetus with malice aforethought).

12. See *People v. Harrison*, 176 Cal. App. 2d 330, 332, 1 Cal. Rptr. 414, 416, (1960) (holding that perpetrate means to do or perform, to carry through or commit an offense).

13. See CAL. PENAL CODE § 21a (West 1988) (stating that the term "attempt" consists of two elements: A specific intent to commit the crime, and a direct but ineffectual act done toward its commission); *People v. Jentry*, 69 Cal. App. 3d 615, 629, 138 Cal. Rptr. 250, 258 (1977) (holding that a defendant who killed the victim before the act of mayhem could be committed may still be tried under the felony-murder doctrine pursuant to the crime of attempted mayhem); BLACK'S LAW DICTIONARY 979 (6th ed. 1990) (defining mayhem).

14. CAL. PENAL CODE § 189 (amended by Chapter 611); see *id.* (enumerating the specified felonies); *Usher v. Gomez*, 775 F. Supp. 1308, 1311 (N.D. Cal. 1991) (holding that malice is not an element of felony-murder and prosecution need only prove specific intent to commit a particular felony); *People v. Johnson*, 5 Cal. App. 4th 552, 559-60, 7 Cal. Rptr. 2d 23, 28 (1992) (holding that the prosecution must only prove defendant intended to commit the underlying offense for a felony-murder prosecution); cf. ALASKA STAT. § 11.41.110(a)(3) (Supp. 1993) (stating that a death caused while participating in arson, kidnapping, sexual assault, burglary, escape, robbery, or flight from a crime is murder in the second degree); ARK. CODE ANN. § 5-10-101(a)(1) (Michie 1993) (defining capital murder as a crime in which a killing occurs during the commission of rape, kidnapping, vehicular piracy, robbery, burglary, a violation of the Uniform Controlled Substance Act, or escape); *id.* § 5-10-102(a)(1) (1992) (defining felony-murder as murder in the first degree); CONN. GEN. STAT. § 53a-54c (1990) (stating the felonies that are applicable to felony-murder as robbery, burglary, kidnapping, sexual assault, and escape); GA. CODE ANN. § 16-5-1(c) (Michie 1992) (stating that when, in the commission of a felony, one causes the death of another, it is murder regardless of malice); IDAHO CODE § 18-4003(d) (Supp. 1993) (stating that murder committed in the perpetration or attempt to perpetrate aggravated battery on a child, arson, rape, robbery, burglary, kidnapping, or mayhem is murder in the first degree); ILL. REV. STAT. ch. 720, para. 5/9-1 (Michie 1993) (stating that it is first degree murder to cause a death while attempting or committing a forcible felony); MICH. COMP. LAWS § 750.316 (1991) (stating that it is murder of the first degree if murder is committed in the perpetration or attempt to perpetrate arson, criminal sexual conduct, robbery, breaking and entering of dwelling, larceny, extortion, or kidnapping); MISS. CODE ANN. § 97-3-19(e) (1991) (stating that it is capital murder to commit murder while engaged in rape, burglary, kidnapping, arson, robbery, sexual battery,

firearm¹⁵ from a motor vehicle intentionally¹⁶ at another person¹⁷ outside the vehicle with the intent to inflict death, to this list of specified felonies.¹⁸

Under existing law, a person guilty of murder in the second degree is punishable by confinement in the state prison for fifteen years to life, unless the victim is a peace officer.¹⁹ Chapter 609 provides that if a person is guilty of second degree murder for a murder perpetrated by discharging a firearm from a motor vehicle, the person must be confined in the state prison for twenty years to life.²⁰

Existing law provides that an additional term of five years must be imposed on a person convicted of a felony²¹ or an attempted felony if the person discharged a firearm at an occupied motor vehicle and caused great bodily injury²² or death.²³ Chapter 611 provides that an additional term

or unnatural intercourse with a child); NEB. REV. STAT. § 28-303(2) (1989) (stating that it is murder in the first degree to kill during the attempted or actual perpetration of sexual assault, arson, robbery, kidnapping, hijacking, or burglary).

15. See CAL. PENAL CODE § 12001(b) (West Supp. 1993) (defining firearm as any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion); cf. 18 U.S.C. § 921(3) (1983) (defining firearm as: (1) Any weapon, including starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (2) the frame or receiver of any such weapon; (3) any firearm muffler or firearm silencer; or (4) any destructive device).

16. See CAL. PENAL CODE § 12034(c) (West 1992) (stating that a person who willfully and maliciously discharges a firearm from a motor vehicle at another person, other than an occupant of a motor vehicle, is guilty of a felony).

17. See *id.* § 7 (West 1988) (defining person).

18. *Id.* § 189 (amended by Chapter 611). See generally *People v. Flores*, 7 Cal. App. 4th 1350, 1355, 9 Cal. Rptr. 2d 754, 756 (1992) (including testimony from a gang expert regarding drive-by shootings); Paul Feldman, *Gang Member Sentenced in Drive-by Slaying of Girl*, L.A. TIMES, Jan. 25, 1989, Metro, at 3 (discussing a first degree murder conviction resulting in a 27-year to life sentence for a drive-by shooting); John Makeig, *Baytown Gang Leader Gets 20 Years for Two Shootings*, HOUSTON CHRON., Jan. 30, 1993, at 26 (discussing the sentence of 20 years for attempted murder during a drive-by shooting).

19. CAL. PENAL CODE § 190(a)-(b) (amended by Chapter 609); see *id.* § 190(b) (amended by Chapter 609) (stating that if the victim was a peace officer, a person guilty of second degree murder must be confined in state prison for 25 years to life).

20. *Id.* § 190(c) (amended by Chapter 609); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 310, at 3 (1993) (stating the purpose of Chapter 609 is to reduce random killings from motor vehicles). See generally Daryl Kelley, *Crime Levels Off After Two Years of Jumps*, L.A. TIMES, VENTURA CO. ED., February 14, 1993, at B1 (reporting that during 1992 in Ventura County, gang drive-by shootings tripled from the previous year); *Crackdown on Gangs: New Laws Would Aid Law Enforcement*, SAN DIEGO UNION TRIB., May 2, 1993, at G2 (discussing drive-by shootings as a menacing problem).

21. See CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining felony).

22. See CAL. PENAL CODE § 12022.7 (West 1992) (defining great bodily injury); *id.* § 243(f)(5) (West Supp. 1993) (listing injuries severe enough to be classified as serious bodily injuries); *People v. Armstrong*, 8 Cal. App. 4th 1060, 1066, 10 Cal. Rptr. 2d 839, 841 (1992) (defining great bodily injury as bodily injury which is significant or substantial); *People v. Johnson*, 104 Cal. App. 3d 598, 609, 164 Cal. Rptr. 69, 75 (1980) (finding that a jaw fracture constituted great bodily harm); *People v. Kent*, 96 Cal. App. 3d 130, 136, 158 Cal. Rptr. 35, 38 (1979) (holding that where a victim's hand was swollen to twice its normal size after being struck,

of five years must be imposed on a person convicted of murder if the person discharged a firearm from a motor vehicle, intentionally at another person with the intent to inflict great bodily injury or death.²⁴

Existing law provides that the sentence enhancement for the use²⁵ of a firearm²⁶ in the commission of a felony is three, four, or five years.²⁷ Chapter 611 provides that the use of a firearm in the commission of a carjacking is subject to a sentence enhancement of four, five, or six years.²⁸

Under existing law, robbery of the first degree²⁹ is punishable by three, four, or six years imprisonment.³⁰ Chapter 611 provides that carjacking is punishable by imprisonment for three, five, or nine years.³¹

Existing law provides that the sentence enhancement³² for the use³³ of a deadly weapon³⁴ in the commission of a felony is one year.³⁵ Chapter 611 provides that the sentence enhancement for the use of a deadly weapon in the commission of a carjacking is one, two, or three years.³⁶

Under existing law, a person sixteen years of age or older is presumed to be unfit to be dealt with under juvenile court law for specified

the victim had suffered great bodily harm).

23. CAL. PENAL CODE § 12022.5(b)(1) (amended by Chapter 611).

24. *Id.* § 12022.5(d) (amended by Chapter 611).

25. *See* *People v. Walls*, 85 Cal. App. 3d 447, 454, 149 Cal. Rptr. 460, 465 (1978) (stating that the use of a firearm for purposes of sentence enhancement statutes includes striking someone with the weapon).

26. *See* CAL. PENAL CODE § 12001(b) (West Supp. 1993) (defining firearm); *People v. Steele*, 235 Cal. App. 3d 788, 791, 286 Cal. Rptr. 887, 889 (1991) (holding that for purposes of California Penal Code § 12022 a firearm includes one that is unloaded or even inoperable); *People v. Talkington*, 140 Cal. App. 3d 557, 562, 189 Cal. Rptr. 735, 737 (1983) (finding that a tube sealed at one end with thirty match heads in it and a hole cut in the sealed end to ignite the match heads was a firearm).

27. CAL. PENAL CODE § 12022.5(a) (amended by Chapter 611).

28. *Id.*

29. *See* CAL. PENAL CODE § 212.5(a) (West Supp. 1993) (defining robbery of the first degree).

30. *Id.* § 213 (amended by Chapter 611); *see id.* § 1168 (West 1985) (regulating criminal sentences requiring imprisonment in a state prison).

31. *Id.* § 215(b) (enacted by Chapter 611); *cf.* 18 U.S.C. § 2119 (1993) (imposing a prison sentence of 15 years, 25 years, or life for carjacking).

32. *See* CAL. R. CT. 405(c) (defining enhancement).

33. *See* *People v. Funtanilla*, 1 Cal. App. 4th 326, 331, 1 Cal. Rptr. 2d 875, 877 (1991) (stating that use of a weapon only requires that displaying the weapon produces a fear of harm in the commission of a felony, but does not require that actual harm come to the victim); *People v. James*, 88 Cal. App. 3d 150, 160, 151 Cal. Rptr. 354, 360 (1978) (finding no error in a trial court's jury instruction which defined one's use of a deadly weapon as displaying the weapon in a menacing manner).

34. *See* CAL. WELF. & INST. CODE § 8100(e) (West Supp. 1993) (defining deadly weapon); *James*, at 160, 151 Cal. Rptr. at 360 (upholding a trial court's jury instruction defining a deadly weapon as an object that is capable of being used to inflict great bodily harm).

35. *Id.* § 12022(b) (amended by Chapter 611).

36. *Id.*

crimes.³⁷ Chapter 611 adds carjacking while armed³⁸ with a dangerous and deadly weapon to the list of specified crimes.³⁹

Under existing law, plea bargaining⁴⁰ for serious felonies⁴¹ is prohibited, except under certain conditions.⁴² Chapter 611 adds carjacking to the list of serious felonies.⁴³

Under existing law, probation⁴⁴ will not be granted to persons convicted⁴⁵ of certain felonies while armed with a deadly weapon unless it would be in the best interest of justice.⁴⁶ Chapter 611 adds carjacking to the list of felonies.⁴⁷

Under existing law, probation will not be granted under any circumstance if: (1) The offender used a firearm during the commission of certain crimes; (2) there was an intentional infliction of great bodily injury during the commission of certain crimes; (3) there have been two convictions of a violent felony offense within ten years; or (4) if great bodily harm was committed upon elderly or disabled persons during the

37. CAL. WELF. & INST. CODE § 707(c) (amended by Chapter 611); *see id.* (including murder, arson of an inhabited building, and armed robbery within the list of crimes); *Sheila O. v. Superior Court*, 125 Cal. App. 3d 812, 817, 178 Cal. Rptr. 418, 421 (1981) (upholding the constitutionality of California Welfare and Institutions Code § 707).

38. *See* CAL. HEALTH & SAFETY CODE § 11370.1(a) (West Supp. 1993) (defining armed as having a weapon immediately available for offensive or defensive use); *People v. Miley*, 158 Cal. App. 3d 25, 32, 204 Cal. Rptr. 347, 351-52 (1984) (holding that a defendant was not armed during the solicitation of a crime where the defendant was only transferring the firearm to the person he was soliciting, and did not have the firearm available for immediate use).

39. CAL. WELF. & INST. CODE § 707(b)(25) (amended by Chapter 611).

40. *See* CAL. PENAL CODE § 1192.7(b) (amended by Chapter 611) (defining plea bargaining).

41. *See id.* § 1192.7(c) (amended by Chapter 611) (listing serious felonies including murder, voluntary manslaughter, and rape).

42. *Id.* § 1192.7(a) (amended by Chapter 611); *see id.* (stating that plea bargaining is allowable where the state has insufficient evidence, a material witness' testimony can not be obtained, or where there would not be a substantial change in the sentence); *People v. Arauz*, 5 Cal. App. 4th 663, 668, 7 Cal. Rptr. 2d 145, 148 (1992) (stating that the court will determine if there will be a substantial reduction in sentence in plea bargaining, for purposes of California Penal Code § 1192.7); *People v. Brown*, 177 Cal. App. 3d 537, 547 n.11, 223 Cal. Rptr. 66, 72 n.11 (1986) (finding that California Penal Code § 1192.7 did not limit plea bargaining in municipal or justice courts concerning charges contained in complaints).

43. CAL. PENAL CODE § 1192.7(c) (amended by Chapter 611).

44. *See id.* § 1203(a) (West Supp. 1993) (defining probation).

45. *See* *People v. Biggs*, 9 Cal. 2d 508, 514, 71 P.2d 214, 217 (1937) (stating that a conviction for the purposes of a second offense statute includes any prior conviction where the offender received a pardon); *cf.* *United States v. Jones*, 910 F.2d 760, 761 (11th Cir. 1990) (holding that a nolo contendere plea with adjudication withheld could be used as a conviction in classifying a defendant as a career offender); *State v. Rose*, 325 S.W.2d 485, 488 (Mo. 1959) (holding that conviction means a final determination of a person's guilt, and finding that a person's plea of guilty constituted a conviction). *But see* *State v. Weinberger*, 205 N.E.2d 306, 306 (N.Y. 1965) (affirming a lower court holding that a plea of guilty standing alone did not constitute a conviction).

46. CAL. PENAL CODE § 1203(e)(1) (amended by Chapter 611); *see id.* (including arson, robbery, burglary, murder, and kidnapping within the list of felonies).

47. *Id.*

commission of certain crimes.⁴⁸ Chapter 611 adds carjacking to the list of specified crimes in these statutes.⁴⁹

Chapter 611 provides that other statutes relating to robbery will be expanded to include carjacking.⁵⁰

AMP/TLS

Crimes; counterfeiting of registered marks

Penal Code §§ 350, 12022.6 (amended).

SB 862 (Hughes); 1993 STAT. Ch. 703

Existing law makes it a crime for a person¹ to willfully² manufacture or sell a counterfeit mark³ registered⁴ with the Secretary of State without

48. CAL. PENAL CODE §§ 1203.06, 1203.075, 1203.08, 1203.09 (amended by Chapter 611); *see id.* §§ 1203.06, 1203.075, 1203.09 (amended by Chapter 611) (including murder, robbery, and kidnapping in their lists of specified crimes).

49. *Id.* §§ 1203.06, 1203.075, 1203.08, 1203.09 (amended by Chapter 611).

50. *Id.* § 27 (amended by Chapter 611); *see id.* (including carjacking as a crime that is punishable if it is committed outside of California); *id.* § 186.22 (amended by Chapter 611) (including carjacking in the Street Terrorism Enforcement and Prevention Act); *id.* § 189 (amended by Chapter 611) (including carjacking in the felony murder rule); *id.* § 653f (amended by Chapter 611) (including carjacking in the solicitation statute); *id.* § 666 (amended by Chapter 611) (including a conviction of carjacking as a prior conviction for purposes of determining punishment for a conviction of petit theft); *id.* § 667.7 (amended by Chapter 611) (including carjacking in the habitual offender statute); *id.* § 667.9 (amended by Chapter 611) (including carjacking as a crime applicable for a sentence enhancement if it is committed against an elderly or disabled person); *id.* § 999e (amended by Chapter 611) (including carjacking in the career criminal statute).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person); *see also* CAL. BUS. & PROF. CODE § 14204 (West Supp. 1993) (defining person for the purposes of the California Trademark Law, California Business and Professions Code §§ 14200-14342).

2. *See* CAL. PENAL CODE § 7(1) (West 1988) (defining willfully).

3. *See id.* § 350(f)(2) (amended by Chapter 703) (defining counterfeit mark as a spurious mark which is identical with, or substantially indistinguishable from, a registered mark, used in connection with the same type of goods or services for which the genuine mark is registered); *see also* CAL. BUS. & PROF. CODE § 14203 (West 1987) (defining mark to include trademark and service mark); *id.* § 14206 (West 1987) (defining service mark to mean a mark used in the sale or advertising of services to distinguish the service of one person from another); *id.* § 14207 (West 1987) (defining trademark to mean any word, name, symbol, device, or any combination thereof adopted and used by a person to identify goods made or sold by that person and to distinguish them from the goods of others); *Cytanovich Reading Center v. Reading Game*, 162 Cal. App. 3d 107, 112, 208 Cal. Rptr. 412, 461 (1984) (holding that the telephone number "321-READ" could not be used as a trademark or service mark because the word "read" is too common); *Cebu Ass'n of Cal., Inc. v. Santo Nino de Cebu Ass'n of U.S.A.*, 95 Cal. App. 3d 129, 137, 157 Cal. Rptr. 102, 106 (1979) (holding that the name of a patron saint, "Santo Nino de Cebu," could not be used as a trade name or service mark); *cf.* 18 U.S.C. § 2320(d)(1) (1988) (defining counterfeit mark to mean a mark used in connection with the trafficking in goods

the consent of the registrant.⁵ Chapter 703 extends the application of existing law to offenses involving counterfeiting marks on the principal register⁶ of the United States Patent and Trademark Office, and to the knowing possession⁷ for sale⁸ at the point of sale⁹ of such marks.¹⁰

2320(d)(1) (1988) (defining counterfeit mark to mean a mark used in connection with the trafficking in goods or services, that is substantially indistinguishable from a mark registered in the United States Patent and Trademark Office and in use, whether or not the defendant knew that the mark was registered, where it is likely to cause confusion, mistake, or to deceive); *United States v. McEvoy*, 820 F.2d 1170, 1172 (11th Cir. 1987) (concluding that the evidence was sufficient to establish that watches which bore marks virtually identical to the registered trademarks of Rolex, Piaget, and Gucci, and which consumers frequently confused with the registered marks, were counterfeit), *cert. denied*, 484 U.S. 902 (1987); *United States v. Gonzalez*, 630 F. Supp. 894, 896 (S.D. Fla. 1987) (stating that because watches were sold at an excessively cheap price did not prevent a finding that the watches were counterfeit); *Dollcraft Co. v. Nancy Ann Storybook Dolls*, 94 F. Supp. 1, 4 (N.D. Cal. 1950) (stating that the purpose of a trademark is to distinguish the goods of one person from those of another, and to identify the origin or ownership of the article to which it is attached); *Morse-Starrett Products Co. v. Steccone*, 86 F. Supp. 796, 802 (N.D. Cal. 1949) (stating that a trademark must be physically attached to the good it is designed to identify).

4. See CAL. BUS. & PROF. CODE § 14270 (West 1987) (providing that the Secretary of State will keep a record of all registered marks for public examination); *id.* § 14220 (West 1987) (listing marks which are excluded from the registration requirement); *id.* §§ 14230-14280 (West 1987 & West Supp. 1993) (detailing the procedures for registering a mark).

5. CAL. PENAL CODE § 350(a) (amended by Chapter 703); see *id.* § 350(a)(1) (amended by Chapter 703) (providing that violators will be fined a maximum of \$5,000, imprisoned in the county jail for a maximum of one year, or both, and, if the violator is a corporation, it will be fined a maximum of \$100,000); CAL. BUS. & PROF. CODE § 14205 (West 1987) (defining registrant); see also *id.* § 14300 (West 1987) (providing that a person who fraudulently registers a mark is liable for damages); *id.* § 14320 (West Supp. 1993) (providing the owner of a registered mark with a right to institute a civil action against an infringer); *id.* § 14340 (West Supp. 1993) (providing the owner of a registered mark with the right to an injunction of the counterfeit goods); *cf.* 18 U.S.C. § 2320(a) (1988) (providing that a person who traffics in counterfeit goods or services and knowingly uses a counterfeit mark will be fined a maximum of \$250,000, or imprisoned for five years, or both, and that if the person is not an individual, that person shall be fined a maximum of \$1,000,000); *id.* § 2320(d)(2) (1988) (defining traffic as to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or to obtain control of, with intent to transport, transfer, or dispose of). But see CAL. BUS. & PROF. CODE § 14342 (West 1987); CAL. PENAL CODE § 350(g) (amended by Chapter 703) (providing that no action will be taken against a party who has lawfully adopted and used the same or confusingly similar mark in rendering like services, or manufacturing or selling like goods from a date prior to the effective date of registration of the service mark or trademark).

6. See 15 U.S.C. §§ 1051-1072 (1988) (providing the procedures for registering a trademark); *id.* § 1052 (1988) (providing exceptions to the registration requirement).

7. See CAL. PENAL CODE § 350(f)(3) (amended by Chapter 703) (defining knowingly possess to mean that the person possessing the article knew that the article was not genuine); see also *id.* § 7(5) (West 1988) (defining knowingly as having knowledge of the existence of the facts which bring the person's act or omission within the provisions of the Penal Code, but not necessarily knowledge of the unlawfulness of the act or omission); *United States v. Ocampo*, 937 F.2d 485, 489 (9th Cir. 1991) (defining possession as having dominion or control);

8. See CAL. PENAL CODE § 350(f)(4) (amended by Chapter 703) (defining sale to include resale).

9. See *id.* § 350(f)(1) (amended by Chapter 703) (defining "at the point of sale" to include the entire building, structure, container, or vehicle in which the sale or attempted sale of an article has occurred).

10. *Id.* § 350(a) (amended by Chapter 703); see SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 862, at 3-4 (July 2, 1993) (stating that Chapter 703 closes a loophole under existing law, through which counterfeiters escaped prosecution merely because they infringed on trademarks which were registered with the U.S. Patent and Trademark Office but were not registered with the Secretary of State, for example, Levi Strauss

Chapter 703 also imposes harsher penalties for violations involving more than 1,000 articles.¹¹

Under existing law, upon subsequent convictions for the above offenses, individuals are fined or imprisoned.¹² Chapter 703 increases the specified prison sentence for subsequent convictions to sixteen months, two years, or three years.¹³

jeans). See generally, Trish Donnally, *Fashion's Assault on Counterfeiters*, S.F. CHRON., May 20, 1992, at D3 (reporting that since January 1991, Levi Strauss seized almost two million pairs of counterfeit Levi's jeans in China); *Levi Strauss Recognizes U.S. Customs for Second-largest Counterfeit Seizure in History*, PR NEWSWIRE, February 9, 1993, available in LEXIS, Nexis Library, Currnt File (stating that between 1990 and 1991, Levi's 501 jeans were the most frequently copied U.S. apparel product, and that over two million pairs of counterfeit 501 jeans had been confiscated over the past two and one-half years).

11. CAL. PENAL CODE § 350(a)(2) (amended by Chapter 703); see *id.* (providing that if the violator is an individual, the individual will be punished by imprisonment in a county jail for a maximum term of one year, or in the state prison for 16 months, two or three years, or by a fine up to a maximum of \$250,000, or by both, and, if the violator is a corporation, the corporation will be fined a maximum of \$500,000); see also SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 862, at 2-3 (July 2, 1993) (stating that prior law had no deterrent value because it would have allowed an individual who sold one counterfeit handbag for \$45 to be charged with the same criminal offense as a person who manufactured 20,000 counterfeit shirts valued at \$200,000); *id.* at 4 (stating that the State is losing millions of dollars in tax revenue because the sales of counterfeit goods often involve cash transactions, and that the existence of a strong anti-counterfeiting statute would make California more attractive for businesses); Interview with Michael C. Ross, Consumer Advocate, Creative Card Congress, in Sacramento, Ca. (Aug. 4, 1993) (stating that the then existing law only provided for civil penalties, which were ineffective because the counterfeit products could still be sold while the counterfeiter was fighting the civil suit, and calling for criminal penalties to correct the situation) (notes on file with the *Pacific Law Journal*); Telephone Interview with Michael C. Ross, Consumer Advocate, Creative Card Congress (July 27, 1993) (stating that companies, especially sports teams, lose substantial amounts of money due to the work of counterfeiters, that low revenues from sports products will eventually drive sports teams away from California, and that counterfeit sports collectibles will be worthless in 10 or 20 years, thus hurting many people who invest in collectibles) (copy on file with the *Pacific Law Journal*). See generally *Counterfeit Software: Series of Police Raids Uncover Vast Amounts of Counterfeit Microsoft Products*, EDGE WORK-GROUP COMPUTING REP., Mar. 8, 1993, available in LEXIS, Nexis Library, Currnt File (stating that counterfeit Microsoft Products have been produced under the tradenames of OEM's, Spring Circle, and BTI, that counterfeit software often contains viruses and are defective, and that consumers should call the Microsoft Piracy Hotline at (800) NOCOPYN for information relating to counterfeit Microsoft products); Donnally, *supra* note 10, at D3 (reporting that the International Anti-Counterfeiting Coalition estimates that counterfeit goods cost the United States \$61 billion and more than 210,000 jobs every year); Jim Doyle & Don Clark, *Firms Pirated Software, U.S. Says Executives Also Indicted as Authorities Crack Down*, S.F. CHRON., July 8, 1993, at A13 (reporting that the Business Software Alliance estimates that U.S. Companies lost \$12 billion in 1992 due to counterfeiters); *L.A. Gear Joins Coalition to Support Sporting Goods Industry Anti-Counterfeiting Effort*, PR NEWSWIRE, Aug. 27, 1992, available in LEXIS, Nexis Library, Currnt File (reporting that counterfeit products look identical to genuine products, but are poorly made, and would ruin the reputation and market for legitimate brands, and reporting how the Sporting Goods Manufacturers Association (SGMA), comprised of such companies as Reebok, Prince, Wilson, and Spalding have found that industry-wide efforts are effective in stomping out international counterfeiting rings); see *id.* (stating that the SGMA can be contacted for more information at (202) 775-1762).

12. CAL. PENAL CODE § 350(b) (amended by Chapter 703); see *id.* (providing that individuals will be fined not more than \$50,000 or be imprisoned for not more than one year, or be punished by both a fine and imprisonment); cf. 18 U.S.C. § 2320(a) (1988) (providing that, upon subsequent convictions, if the person is an individual, the person will be fined a maximum of \$1,000,000, imprisoned for a maximum term of 15 years, or both, and if the person is a corporation, the corporation will be fined a maximum of \$5,000,000).

13. CAL. PENAL CODE § 350(b) (amended by Chapter 703).

Under Chapter 703, it is a public offense¹⁴ to knowingly possess a counterfeit article for sale at a place other than the point of sale.¹⁵ Chapter 703 imposes different levels of punishment, depending on whether the person possessed less than 100 counterfeit articles,¹⁶ between 100 and 1,000 articles,¹⁷ or 1,000 articles or more.¹⁸ Chapter 703 provides, however, that a person who leases or sells real property where counterfeit marks are sold, manufactured, or possessed for sale will not be subject to criminal penalty unless the person personally sells, manufactures, or possesses for sale the articles bearing the marks.¹⁹

Under prior law, once a court determined that a mark was counterfeit, it could have ordered the mark destroyed and the articles once bearing the mark transferred to the state, to a charity, or to the owner of the

14. See *id.* § 15 (West 1988) (defining public offense); *Burks v. United States*, 287 F.2d 117, 122 (9th Cir. 1961) (stating that public offense is synonymous with "crime," and a crime includes both felonies and misdemeanors), *cert. denied*, 369 U.S. 841 (1962); see also CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining felony); *id.* § 17(b) (West Supp. 1993) (defining misdemeanor).

15. CAL. PENAL CODE § 350(d) (amended by Chapter 703); see SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 862, at 3 (July 2, 1993) (stating that since prior law only addressed the sale or manufacture of counterfeit goods, it made law enforcement very difficult because the criminal had to be caught in the act of manufacturing or selling, and that by prohibiting possession for the sale or resale of counterfeit goods, large distributors of counterfeit products would be able to be prosecuted). But see *id.* at 4 (stating that the ACLU opposes this portion of Chapter 703 because it imposes severe penalties for the mere possession for sale of a counterfeit good, for example, a t-shirt).

16. See CAL. PENAL CODE § 350(d)(1) (amended by Chapter 703) (providing that a person who possesses fewer than 100 counterfeit articles will be punished by imprisonment in a county jail for a maximum term of six months, by a maximum fine of \$5,000, or by both, and if the person has been previously convicted of this offense, the person will be punished by imprisonment in the county jail for a maximum term of one year, or in the state prison for 16 months, or two or three years, by a maximum fine of \$25,000, or by both).

17. See *id.* § 350(d)(2) (amended by Chapter 703) (providing that a person who possesses between 100 and 1,000 articles will be punished by imprisonment in a county jail for a maximum term of one year, by a maximum fine of \$10,000, or by both, and if the person has been previously convicted of this offense, the person will be punished by imprisonment in the county jail for a maximum term of one year, or in the state prison for 16 months, or two or three years, by a maximum fine of \$25,000, or by both).

18. *Id.* § 350(d) (amended by Chapter 703); see *id.* § 350(d)(3) (amended by Chapter 703) (providing that a person who possesses over 1,000 articles will be punished by imprisonment in a county jail for a maximum term of one year, or in the state prison for 16 months, or two or three years, by a maximum fine of \$100,000, or by both).

19. *Id.* § 350(h) (amended by Chapter 703); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 862, at 4 (July 13, 1993) (stating that it would be unfair to require property owners, such as the owners and operators of swap meets, to check the authenticity of every item being sold on their premises). But see Interview with Michael C. Ross, Consumer Advocate, Creative Card Congress, in Sacramento, Ca. (Aug. 4, 1993) (stating that many swap meet merchants run "fly-by-night" operations and cannot be caught after they depart, and that technology is making it easier for counterfeiters to manufacture unauthorized products) (notes on file with the *Pacific Law Journal*). See generally *Glendale Police Seize Bootleg Compact Discs*, UPI, Oct. 16, 1992, available in LEXIS, Nexis Library, Currnt File (stating that many counterfeit compact discs are sold in swap meets and music stores); John Woolfolk, *8 Arrested on Counterfeit Apparel Charges*, S.F. CHRON., May 4, 1993, at A12 (reporting that police seized over 4,000 articles of counterfeit sports apparel from seven booths at flea markets in San Jose).

trademark.²⁰ Chapter 703 instead provides that, in an action involving violations of Chapter 703 resulting in a conviction or a plea of *nolo contendere*,²¹ the court must order the forfeiture and destruction of all the marks, the goods bearing the marks, the means of making the marks, and all electric, mechanical, or other devices for manufacturing, reproducing, transporting, or assembling these marks.²² Chapter 703 exempts from this forfeiture certain specified vehicles.²³

Existing law provides that a person who takes, damages, or destroys any property in the commission of a felony, with the intent to cause the taking, damage, or destruction, will be punished by an additional term of imprisonment consecutive to the punishment for the felony or attempted felony, depending on the amount of the loss.²⁴ Chapter 703 makes existing law applicable to prosecutions for the manufacture or sale of counterfeit marks,²⁵ the misappropriation of recorded music,²⁶ the

20. 1987 Cal. Stat. ch. 828, sec. 23.3, at 2585 (amending CAL. PENAL CODE § 350).

21. See CAL. PENAL CODE § 1016(3) (West 1985) (providing that the legal effect of a plea of *nolo contendere* to a felony is the same as a plea of guilty).

22. *Id.* § 350(e) (amended by Chapter 703).

23. *Id.*; see *id.* § 350(e)(1)-(3) (amended by Chapter 703) (prohibiting the forfeiture of class 3 or class 4 vehicles that are any of the following: (1) Community property of a person other than the defendant; (2) the sole vehicle available to the immediate family of the defendant; or (3) reasonably necessary for the defendant to earn a living or to use for any other reasonable and lawful purpose); see also CAL. VEH. CODE § 12804(b)(3) (West Supp. 1993) (defining Class 3 vehicles); *id.* § 12804(b)(4) (West Supp. 1993) (defining Class 4 vehicles).

24. CAL. PENAL CODE § 12022.6 (amended by Chapter 703); see *id.* § 12022.6(a) (amended by Chapter 703) (providing that if the loss exceeds \$50,000, the person will be punished by an additional year of imprisonment); *id.* § 12022.6(b) (amended by Chapter 703) (providing that if the loss exceeds \$150,000, the person will be punished by two additional years of imprisonment); *id.* § 12022.6(c) (amended by Chapter 703) (providing that if the loss exceeds \$1,000,000, the person will be punished by three additional years of imprisonment); *id.* § 12022.6(d) (amended by Chapter 703) (providing that if the loss exceeds \$2,500,000, the person will be punished by four additional years of imprisonment).

25. See CAL. PENAL CODE § 350 (amended by Chapter 703) (describing the offense of manufacturing or selling counterfeit marks).

26. See *id.* § 653h (West Supp. 1993) (describing the offense of the misappropriation of recorded music for commercial advantage of private financial gain).

transportation of unauthorized recordings of live performances,²⁷ and the failure to disclose the origin of a recording or audiovisual work.²⁸

MDL

Crimes; criminal street gangs

Penal Code § 186.26 (new).

AB 514 (Gotch); 1993 STAT. Ch. 557

Under existing law, any person convicted of a public offense punishable as a misdemeanor or felony that is committed for the benefit of, at the direction of, or in association with, any criminal street gang¹ will be punished by imprisonment.² Chapter 557 provides that any adult who uses physical violence, or threatens to use physical violence on two

27. See *id.* § 653s (West Supp. 1993) (describing the offense of transporting unauthorized recordings of live performances); *id.* (defining live performances).

28. *Id.* § 12022.6(d) (amended by Chapter 703); see *id.* § 653w (West Supp. 1993) (describing the offense of failing to disclose the origin of a recording or an audiovisual work). But see *id.* § 12022.6(d) (amended by Chapter 703) (providing that California Penal Code § 12022.6 is not limited to property taken, damaged, or destroyed in violation of Penal Code §§ 502, 350, 653h, 653s, or 653w).

1. See CAL. PENAL CODE § 186.22(f) (West Supp. 1993) (defining criminal street gang as an ongoing organization, or group of three or more persons that has as one of its primary activities any of the acts enumerated in § 186.22(e), and has a common name, sign, or symbol); see also *id.* § 186.22(e) (West Supp. 1993) (defining pattern of criminal gang activity as the commission or solicitation of two or more of the following offenses: (1) Assault with a deadly weapon or means likely to produce great bodily harm; (2) robbery; (3) unlawful homicide or manslaughter; (4) sale, possession, transportation, or manufacture of controlled substances; (5) shooting at an inhabited dwelling or occupied motor vehicle; (6) arson; or (7) the intimidation of witnesses and victims).

2. *Id.* § 186.22(c) (West Supp. 1993); see *id.* (mandating that the imprisonment be in the county jail for up to one year, or in the state prison for one, two, or three years); *In re Nathaniel C.*, 228 Cal. App. 3d 990, 1002, 279 Cal. Rptr. 236, 244 (1991) (stating that the statute does not require two different offenses to the exclusion of proof of two instances of the same offense); *In re Lincoln J.*, 223 Cal. App. 3d 322, 328, 272 Cal. Rptr. 852, 855 (1990) (holding that the defendant could not be found in violation of § 186.22 without evidence showing that the offense enumerated in § 186.22(e) occurred within three years after a prior offense); *In re Leland D.*, 223 Cal. App. 3d 251, 258, 272 Cal. Rptr. 709, 713 (1990) (maintaining that evidence that the defendant had been arrested for an offense, without more, was not sufficient to show that the act had been committed); see also *In re Alberto R.*, 235 Cal. App. 3d 1309, 1322, 1 Cal. Rptr. 2d 348, 356 (1991) (holding that the phrase "in benefit of" as used in § 186.22(b) is not overbroad or unconstitutional); *People v. Green*, 227 Cal. App. 3d 692, 701-03, 278 Cal. Rptr. 140, 146-48 (1991) (holding that the terms gang, as defined by § 186.22(f), and criminal gang activity, as defined by § 186.22(e), are not overbroad or unconstitutional); cf. FLA. STAT. ANN. § 874.04 (West Supp. 1993); GA. CODE ANN. §§ 16-15-4(b)(1), 16-15-5 (1992 & Supp. 1993); IND. CODE § 35-45-9-3 (West Supp. 1993); IOWA CODE ANN. § 723A.2 (West 1993); LA. REV. STAT. ANN. § 15:1403 (West 1992); S.D. CODIFIED LAWS ANN. § 22-10-15 (1993) (increasing the penalty when the offense is gang related).

or more separate occasions in a thirty day period, in order to coerce a minor to participate in criminal gang activity, will be punished by imprisonment.³ Chapter 557 further provides that a minor who is sixteen years or older and commits an offense as provided above is guilty of a misdemeanor.⁴

SVB

Crimes; diversion—disclosure of arrests

Penal Code §§ 1000.5, 1000.91, 1001.9, 1001.33, 1001.55, 1001.75, 13203, 13300 (amended).
SB 1206 (Hurt); 1993 STAT. Ch. 785

Existing law sets forth procedures for the diversion¹ of certain offenses including specified controlled substance offenses,² misdemeanor domestic

3. CAL. PENAL CODE § 186.26(a)-(b) (enacted by Chapter 557); *see id.* (providing that the person shall be imprisoned in the state prison or county jail for one, two, or three years); *id.* § 186.26(e) (enacted by Chapter 557) (clarifying that speech alone is not enough to convict a person pursuant to this section, unless the speech itself threatens violence against a specific person, the defendant has the apparent ability to carry out the threat, and the likelihood of physical harm is imminent); *see also* SENATE FLOOR ANALYSIS OF AB 514, at 3 (Aug. 16, 1993) (quoting the bill's author in explaining that the purpose of Chapter 557 is to disrupt the methods of intimidation and coercion that are most commonly used by gangs to recruit new members); Doris Sue Wong, *Witness: Harbour Defendant Coerced*, BOSTON GLOBE, Dec. 18, 1991, at 59 (reporting that a man accused of rape, robbery, and murder claimed that he was coerced by gang members into participating in the crimes).

4. CAL. PENAL CODE § 186.26(c) (enacted by Chapter 557).

1. *See* CAL. PENAL CODE § 1001.1 (West 1985) (defining pretrial diversion in misdemeanor cases as the procedure of postponing prosecution of an offense filed either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication). *See generally* United States v. Richardson, 856 F.2d 644, 647 (4th Cir. 1988) (stating that U.S. Attorneys are authorized to use the diversion alternative in their districts under Department of Justice guidelines and that the government has broad discretion in determining which defendants are best suited for pretrial diversion); John R. Duree, Jr., *Diversion and the Judicial Function*, 5 PAC. L.J. 764 (1974) (discussing generally California Penal Code §§ 1000-1000.5, the diversion program with respect to drug-related offenses and the prosecutorial power of the district attorney in the diversion process); Geoffrey Pope, *California's Experience with Pretrial Diversion*, 7 SW. U. L. REV. 418 (1975) (discussing some of the problems that have arisen in the implementation of pretrial diversion programs); Debra T. Landis, J.D., Annotation: *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R.4TH 147 (1981 & Supp. 1993) (discussing state and federal cases in which courts have discussed or determined the validity, construction, or application of a statute or court rule authorizing pretrial diversion programs subject to the defendant's consent to treatment, rehabilitation, restitution, or other noncriminal alternative).

2. *See* CAL. PENAL CODE §§ 1000-1000.5 (West 1985, Supp. 1993 & amended by Chapter 785) (setting forth the diversion program in narcotics and drug abuse cases); *id.* § 1000(a) (West Supp. 1993) (specifying certain controlled substance offenses which may be diverted including: California Health and Safety Code §§

violence offenses,³ specified offenses filed as misdemeanors,⁴ offenses of

11350, 11357, 11364, 11365, 11377, or 11358 if the marijuana planted, cultivated, harvested, dried or processed is for personal use, § 11368 if the narcotic drug was secured by fictitious prescription, was for personal use, and was not sold or furnished to another; § 11370.1 if the amount possessed is less than the specified amount of the substances; § 653f(d) if the solicitation was for acts directed to personal use only; California Penal Code §§ 381 and 647(f) if the offense is being under the influence of a controlled substance; or California Business and Professions Code § 4320; *id.* § 1000(a)(1)-(6) (West Supp. 1993) (specifying that the defendant must meet all of the listed requirements, including: (1) The defendant has no convictions involving controlled substances prior to the divertible offense; (2) the offense charged did not involve a crime of violence or threatened violence; (3) there is no evidence of a violation of sections other than those listed in § 1000; (4) the defendant's record does not show that probation or parole was ever revoked without being completed or that the defendant was diverted within five years of the present offense; and (5) the defendant has no prior felony convictions within five years of the charged divertible offense); *People v. Superior Court*, 11 Cal. 3d 59, 61-62, 520 P.2d 405, 407, 113 Cal. Rptr. 21, 23 (1974) (stating that the two-fold purpose of California Penal Code §§ 1000-1000.4 is: (1) To identify the experimental user before the user becomes deeply involved with drugs, to educate the person and to restore the person to productive citizenship without the lasting stigma of a criminal conviction; and (2) to reduce the clogging of the criminal justice system); *see also* *People v. Paz*, 217 Cal. App. 3d 1209, 1217, 266 Cal. Rptr. 468, 472 (1990) (stating that the defendant's exclusion from the diversion program is automatic if a district attorney determines that the defendant has a prior conviction for an offense involving a controlled substance); *People v. Martinsen*, 193 Cal. App. 3d 843, 850, 238 Cal. Rptr. 530, 534 (1987) (holding that a defendant who had not successfully completed probation was ineligible for diversion following his arrest for cocaine possession); *People v. Venghiattis*, 185 Cal. App. 3d 326, 332-33, 229 Cal. Rptr. 636, 639 (1986) (upholding the denial of diversion where evidence supported the finding that defendant's marijuana was not being cultivated for personal use); *cf.* 21 U.S.C. § 844a(j) (1988) (providing that the Attorney General will dismiss proceedings regarding possession of small amounts of controlled substances at any time after three years if the individual: (1) Has not been previously assessed a civil penalty under § 844a; (2) has paid the assessment; (3) has complied with any conditions imposed by the Attorney General; (4) has not been convicted of a federal or state offense related to a controlled substance; and (5) submits to a drug test and is proven to be drug free).

3. *See* CAL. PENAL CODE §§ 1000.6-1000.11 (West 1985 & Supp. 1993) (setting forth the diversion program in cases involving domestic violence); *id.* § 1000.6(a)(1)-(3) (West 1985) (stating that diversion may be granted whenever a case is before the court upon an accusatory pleading for an act of domestic violence which is charged as or reduced to a misdemeanor and requiring that: (1) The defendant has not been convicted for any offense involving violence within seven years prior to the divertible offense; (2) the defendant's record does not show that probation or parole has been revoked without being completed; and (3) the defendant has not been diverted within five years prior to the divertible offense); *County of Orange v. State Bd. of Control*, 167 Cal. App. 3d 660, 662-63, 213 Cal. Rptr. 440, 441 (1985) (holding that the domestic violence program creates an alternative to criminal prosecution and conviction rather than changing the penalty). *See generally* Hallye Jordan, *Report Criticizes Domestic Violence Diversion Program*, L.A. DAILY J., Jan. 5, 1990, at 3, col. 2 (stating that critics of the domestic violence diversion program say it allows criminals a "free pass" because probation departments do not have the resources to adequately monitor diverted defendants and discussing the problem of defendants who are not eligible for the program being diverted).

4. *See* CAL. PENAL CODE §§ 1001-1001.9 (West 1985 & Supp. 1993) (setting forth the provisions of the misdemeanor diversion program); *id.* § 1001.2(a) (West 1985) (stating that diversion shall not apply to any pretrial diversion or posttrial program for the treatment of problem drinking or alcoholism utilized for persons convicted of one or more offenses under California Vehicle Code §§ 23152, 23153 or former § 23102, or to programs established pursuant to California Health and Safety Code § 1000, nor shall the chapter be deemed to authorize pretrial diversions for persons alleged to have violated California Vehicle Code §§ 23152 or 23153); *id.* §§ 1001.50-1001.55 (West 1985 & amended by Chapter 785) (setting forth the provisions regarding diversion of misdemeanor offenders); *id.* § 1001.51 (West 1985) (specifying that the diversion of misdemeanor offenders shall apply whenever a case is before any court concerning a misdemeanor, except for violations of California Vehicle Code §§ 23152 or 23153, and setting forth the requirements that the defendant must meet, including: (1) The defendant's record does not show that probation or parole has ever been revoked without being completed; (2) the defendant has not been diverted within five years of the filing of the accusatory pleading; and

a parent or legal guardian with respect to his or her minor child,⁵ and offenses committed by a developmentally disabled person.⁶ Existing law further specifies that once the person successfully completes the diversion program, the arrest will be considered as having never occurred, and the person may reply to any question regarding his or her prior record as if he or she was never arrested or diverted for the offense.⁷

Under Chapter 785, the person arrested must be advised that even if that person successfully completes a diversion program, the arrest on which the diversion was based may be disclosed by the Department of

(3) the defendant has never been convicted of a felony, and has not been convicted of a misdemeanor within five years prior to the filing of pleadings regarding the divertible offense); *Davis v. Municipal Court*, 46 Cal. 3d 64, 78, 757 P.2d 11, 19, 249 Cal. Rptr. 300, 307 (1988) (finding that California Penal Code § 1000.2, which gives the local district attorney the authority to approve or disapprove a pretrial diversion program for misdemeanants, does not constitute an unconstitutional delegation of legislative authority to the district attorney); *People v. Superior Court*, 195 Cal. App. 3d 1209, 1218, 241 Cal. Rptr. 322, 329 (1987) (holding that a defendant in a county which has not established a diversion program for misdemeanor offenders was not denied equal protection by the county's decision not to adopt such a program).

5. See CAL. PENAL CODE §§ 1001.70-1001.75 (West Supp. 1993 & amended by Chapter 785) (setting forth the provisions of the parental diversion program); *id.* § 1001.71 (West Supp. 1993) (stating that parental diversion shall apply whenever a case is before any court alleging the parent or legal guardian to have violated § 272 with respect to the parent's or legal guardian's minor child and if the defendant's record shows that probation or parole has never been revoked without being completed and that the defendant has not been previously diverted).

6. *Id.* §§ 1000(a) (West Supp. 1993), 1000.6(a) (West 1985), 1001.21 (West 1985), 1001.51 (West 1985), 1001.71 (West Supp. 1993); see *id.* §§ 1001.20-1001.34 (West 1985) (setting forth the provisions of the Developmentally Disabled Persons Program); see also *id.* § 667.9(e)(1)-(3) (West Supp. 1993) (defining developmentally disabled as a severe, chronic disability which is attributable to a mental or physical impairment or a combination of mental or physical impairments, that is likely to continue indefinitely and results in substantial functional limitations in three or more of the following areas of life activity: self-care, receptive/expressive language, learning, mobility, self-direction, capacity for independent living or economic self-sufficiency); *id.* § 1001.21 (West 1985) (stating that diversion of mentally retarded defendants shall apply whenever a case is before any court upon an accusatory pleading at any stage in criminal proceedings, for any person who has been evaluated and is determined to be developmentally disabled and stating that this applies to any misdemeanor offense, except if the defendant has been diverted within two years prior to the present proceeding); *People v. Weatherill*, 215 Cal. App. 3d 1569, 1580, 264 Cal. Rptr. 298, 305 (1989) (holding that a developmentally disabled defendant charged with driving under the influence is ineligible for diversion).

7. CAL. PENAL CODE §§ 1000.5(a) (amended by Chapter 785), 1000.10 (West 1985), 1001.9(a) (amended by Chapter 785), 1001.33(a) (amended by Chapter 785), 1001.55(a) (amended by Chapter 785), 1001.75(a) (amended by Chapter 785); see, e.g., COLO. REV. STAT. § 16-7-401 (1986); CONN. GEN. STAT. § 54-56e (Supp. 1993); FLA. STAT. ANN. § 948.08 (West Supp. 1993); GA. CODE ANN. § 42-8-80 (Michie 1993); HAW. REV. STAT. § 853-1 (1985 & Supp. 1992); IOWA CODE § 907.1 (Supp. 1993); KAN. STAT. ANN. § 22-2907 (1988); MICH. COMP. LAWS § 769.4a (1982); MONT. CODE ANN. § 46-16-130 (1993); NEB. REV. STAT. §§ 29-3601 to -3604 (1989); N.J. STAT. ANN. § 2C:43-12 (West Supp. 1993); N.M. STAT. ANN. §§ 31-16a-1 to -8 (Michie 1987 & Supp. 1993); OHIO REV. CODE ANN. § 2935.36 (1993); OR. REV. STAT. § 135.886 (1990); TENN. CODE ANN. §§ 40-15-101 to -105 (1990 & Supp. 1993); TEX. GOV'T CODE ANN. § 54.745 (Vernon Supp. 1993); UTAH CODE ANN. § 77-2-5 (1990); WASH. REV. CODE ANN. § 10.05.010 (West 1990) (providing examples of diversion programs adopted in other states).

Justice⁸ if the person applies for a position as a peace officer⁹ within five years of the arrest.¹⁰ Additionally, the person will be obliged to disclose the arrest if a direct question to that effect appears on an application for a position as a peace officer.¹¹

Under existing law, any criminal justice agency¹² or local criminal justice agency is authorized to release information regarding an arrest or detention of a peace officer to a government agency employer of that peace officer even if a conviction did not result.¹³ Information regarding either a referral to, or participation in, a diversion program may also be released.¹⁴ Chapter 785 specifies that such information may be released

8. See CAL. GOV'T CODE § 15000 (West 1992) (stating that the Department of Justice operates under the direction of the Attorney General). See generally *id.* §§ 15000-15204 (West 1992 & Supp. 1993) (setting forth the functions and duties of the Department of Justice).

9. See CAL. PENAL CODE § 830 (West Supp. 1993) (defining peace officer).

10. *Id.* §§ 1000.5(b), 1000.91(b), 1001.9(b), 1001.33(b), 1001.55(b), 1001.75(b) (amended by Chapter 785).

11. *Id.* See generally Charles Austermühl, *Criminal Law—Pretrial Intervention—The Admittance of a Police Officer to a Pretrial Intervention Program May be Conditioned on His Resignation from the Police Force*, 19 RUTGERS L.J. 1147 (1988) (discussing *State v. DeMarco*, 527 A.2d 417 (1987), which held that a prosecutor may condition a police officer's admittance to a diversion program on his resignation from the police force).

12. See CAL. PENAL CODE § 13101 (West 1992) (defining criminal justice agencies).

13. *Id.* §§ 13203(a), 13300(b)(2) (amended by Chapter 785); see CAL. LAB. CODE § 432.7(a) (West Supp. 1993) (stating that no employer shall ask an applicant for employment to disclose information concerning an arrest or detention that did not result in a conviction, or concerning a referral to, or participation in, any diversion program); *id.* § 432.7(b) (West Supp. 1993) (stating that nothing in § 432.7 shall prohibit disclosure under California Penal Code §§ 13203, 13300 to a government agency employing a peace officer); *id.* § 432.7(e) (West Supp. 1993) (stating that persons seeking employment or persons already employed as peace officers are not covered under § 432.7); *Central Valley Chapter of the 7th Step Found. v. Younger*, 214 Cal. App. 3d 145, 165, 262 Cal. Rptr. 496, 508 (1989) (holding that the dissemination of nonconviction information to nonexempt employers and licensing agencies is violative of the California constitutional privacy guarantee of Article I, Section 1); see also CAL. PENAL CODE § 1000.5(a) (amended by Chapter 785) (stating that a record pertaining to an arrest resulting in successful completion of a diversion program shall not be used in any way which could result in the denial of any employment, benefit, license, or certificate); *Sandoval v. State Personnel Bd.*, 225 Cal. App. 3d 1498, 1504, 275 Cal. Rptr. 702, 706 (1990) (stating that § 1000.5 should be given prospective application only from the time that defendants successfully complete diversion, and holding that § 1000.5 was inapplicable to correctional officers' dismissals for possession of drugs and paraphernalia when they were dismissed before they entered diversion programs); *B.W. v. Board of Medical Quality Assurance*, 169 Cal. App. 3d 219, 234, 215 Cal. Rptr. 130, 138 (1985) (holding that the use of information from a person's arrest records in disciplinary proceedings after the defendant had completed a pretrial diversion program was prohibited); *id.* at 229, 215 Cal. Rptr. at 135 (stating that nothing in § 1000.5 bars an agency or other entity from properly using information in a divertee's arrest record either before or during diversion, and concluding that § 1000.5 only goes into effect upon the successful completion of diversion). But see *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1046, 243 Cal. Rptr. 306, 311 (1988) (holding that a plaintiff seeking to state a privacy cause of action for damages based on dissemination and utilization of arrest data must plead and prove that the arrest did not result in a conviction); *id.* at 1042, 243 Cal. Rptr. at 308 (stating that where the plaintiff's arrest later resulted in a conviction, disclosure and use of the information did not violate California Labor Code § 432.7). See generally CAL. CONST. art. I, § 1 (providing that the right to privacy is an inalienable right).

14. CAL. PENAL CODE §§ 13203(a), 13300(k) (amended by Chapter 785).

to a government agency employer of a peace officer or applicant for a position of peace officer, but places limits on disclosure to within five years of the arrest.¹⁵

LTE

Crimes; domestic violence—noncohabiting relationships and subsequent offenses

Penal Code § 243 (amended).

AB 2066 (B. Friedman); 1993 STAT. Ch. 421

Under existing law, a battery¹ against a noncohabiting² ex-husband, ex-wife, fiancé, fiancée, or a person³ with whom the defendant was or is dating⁴ constitutes a misdemeanor.⁵ Existing law provides that if a person

15. *Id.* §§ 13203(a), 13300(k) (amended by Chapter 785); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1206, at 2 (July 6, 1993) (stating that information regarding the disposition of cases diverted should be made available to police agencies so that the background of potential peace officer candidates can be thoroughly checked, and stating that police officers need to be held to the highest standard and that any history must be investigated); *see also* CAL. PENAL CODE §§ 13203(b)(1)-(3), 13300(1)-(3) (amended by Chapter 785) (stating that a criminal justice agency shall not release information under the following circumstances: (1) Information regarding an arrest for which diversion has been ordered without attempting to determine whether the diversion was successfully completed; (2) information regarding an arrest or detention followed by a release without attempting to determine whether the individual was exonerated; (3) information concerning an arrest without a disposition without attempting to determine whether diversion was successfully completed or the individual was exonerated).

1. *See* CAL. PENAL CODE § 242 (West 1988) (defining a battery as an intentional use of force or violence against another person which is against the law); *id.* § 243(a) (amended by Chapter 421) (stating that a person convicted of a battery will be punished by a fine of up to \$2,000, a jail term of up to six months, or both).

2. *See* CAL. CIV. PROC. CODE § 542(c) (West Supp. 1993) (defining a cohabitant as a regular resident of the home).

3. *See* CAL. PENAL CODE § 7 (West 1988) (defining person).

4. *See id.* § 243(f)(11) (amended by Chapter 421) (defining a dating relationship as a relationship where the parties share intimate relations, especially affectionate or sexual relations, independent of financial considerations).

5. *Id.* § 243(e) (amended by Chapter 421); *see id.* § 17(a) (West Supp. 1993) (defining misdemeanor); *cf. Smith v. Arkansas*, 824 S.W.2d 838, 839 (Ark. 1992) (affirming a conviction of second degree battery against the defendant where the defendant hit his ex-wife over the head with a pistol); Mike Truppa, *Protection Orders Flood Lake County*, CHICAGO D. L. BULL., May 6, 1993, at 3 (stating that there have been numerous protective orders filed in Lake County, and that the Illinois Domestic Violence Act has been amended to include assaults within significant dating relationships). *See generally* Bella English, *Campus Crime Deters Student*, BOSTON GLOBE, May 10, 1993, at 17 (quoting the head of the Domestic Violence Unit for the Suffolk District Attorney's Office as claiming that dating violence is under-reported to authorities outside the school campuses); Sandy Shore, *First, the Chickens Died; Then Denver Woman's Life Careered to Horror*, L.A. TIMES, May 16, 1993,

is convicted⁶ of such an offense and the defendant is given probation,⁷ or the defendant's sentence is suspended,⁸ the defendant must, for a minimum of one year, take part in, and finish, a treatment program for batterers,⁹ or a court-designated counseling program¹⁰ if a batterer's

at A4 (reporting that a former live-in boyfriend, who repeatedly abused and harassed his ex-girlfriend, shot her as she fled to a police station, clutching a restraining order that she had obtained against the assailant).

6. See CAL. PENAL CODE § 689 (West 1985) (providing that a conviction will only be sustained upon a jury's verdict, a court's ruling where a defendant has waived his right to a trial by jury, or by a guilty plea); *In re Brown*, 68 Cal. 176, 178, 8 P. 829, 830 (1885) (defining a conviction as a jury's verdict of guilty, or a court's final judgment); see also *People v. Lapin*, 138 Cal. 2d 251, 264, 291 P.2d 575, 583 (1956) (compelling a court to ensure that a defendant is fairly convicted); cf. *Smith*, 824 S.W.2d at 839 (stating that a conviction is supported where the evidence is of a sufficient force and nature that it will, with reasonable and material certainty and precision, require a conclusion one way or another).

7. See CAL. PENAL CODE § 243(e)(2)(A)-(B) (amended by Chapter 421) (stating that if a convicted batterer is given probation, the terms may include that the defendant pay up to \$1,000 to a battered women's shelter, pay the victim for the victim's counseling expenses resulting from the defendant's crime, or both); *id.* § 1000.7(b) (West 1985) (providing that once defendants agree to waive their right to a speedy trial, the court will transfer their cases to the probation department to determine their eligibility for diversion, and the probation department will report its findings to the court when it has completed its investigation of the defendants); see also *id.* § 1001.50(c) (West 1985) (defining pre-trial diversion as the procedure by which the defendant's prosecution is temporarily or permanently postponed sometime during the judicial process); cf. ARIZ. REV. STAT. ANN. § 13-3601(H) (Supp. 1993) (providing that the court, without entering a guilty judgment and with the parties' consent, may place a domestic violence offender on probation, and require the defendant to participate in a counseling or diversionary program); *Arizona v. Aguilar*, 831 P.2d 443, 447 (Ariz. Ct. App. 1992) (holding that a court may not enter a judgment of guilt when a defendant is put on probation under the Domestic Violence Diversion Program); *Arizona v. Sirny*, 772 P.2d 1145, 1146 (Ariz. Ct. App. 1989) (holding that a jail term is inappropriate once a defendant has been assigned probation and diverted under the Domestic Violence Diversion Program).

8. See *People v. Atwood*, 221 Cal. 2d 216, 219, 34 Cal. Rptr. 361, 362 (1963) (stating that the legal effect of a suspended sentence, without allowing probation, is to void the suspension, while the sentence and judgment remain valid).

9. See CAL. FAM. CODE § 5754(c) (West Special Pamphlet 1993) (noting that the court may require the participant in a batterer's treatment program to bear whatever cost the court deems to be reasonable for the program); see also CAL. CIV. PROC. CODE § 547(d) (West Supp. 1993) (providing that the court must find that the defendant's cost for participating in a batterer's treatment program does not otherwise jeopardize the defendant's other financial obligations before ordering the defendant to bear all or some of the cost of the program); cf. ALASKA STAT. § 18.66.900(4) (1991) (defining a domestic violence program as a program providing services to victims, families, or perpetrators of domestic violence); COLO. REV. STAT. ANN. § 18-6-802(1)(a) (Supp. 1993) (granting the chief judge in each judicial district the power to appoint a local board to certify and monitor domestic violence treatment programs); IND. CODE ANN. § 33-19-5-1(c)(1) to (2) (West Supp. 1993) (stating that a defendant directed to a diversion program is required to pay a \$50 initial user's fee and \$10 each month, thereafter, while in the program); MASS. ANN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993) (providing that a supervisor of a batterer's treatment program must certify a participant's attendance, and keep the probation department apprised of the defendant's compliance or non-compliance with the requirements); N.Y. EXEC. LAW § 576(1)(a) (Consol. 1993) (defining a batterer's program as a program which provides battering prevention and educational services to participants to help them discontinue their abusive behavior); *People v. Wallace*, 837 P.2d 1223, 1223 (Colo. 1992) (characterizing Abusive Men Exploring New Directions as a treatment program for batterers).

10. See CAL. FAM. CODE § 1816(a) (West Special Pamphlet 1993) (requiring that supervising counselors of domestic violence programs participate in continuing education programs for domestic violence); CAL. PENAL CODE § 1000.8(a) (West Supp. 1993) (providing that the court has the power to order the diveree to pay for some or all of the counseling costs, depending on the defendant's ability to pay).

program is unavailable.¹¹ Chapter 421 provides that where a defendant with a prior conviction¹² for domestic violence¹³ is granted probation or the defendant's sentence is suspended, the defendant must be imprisoned for a minimum of forty-eight hours in addition to any other sentence

11. CAL. PENAL CODE § 243(e)(1) (amended by Chapter 421); *see id.* § 1000.6-1000.11 (West 1985 & Supp. 1993) (setting forth diversion procedures for domestic violence cases); *id.* § 1000.8(a) (West Supp. 1993) (providing that, once the defendant consents to further proceedings and waives the right to a speedy trial, the court will review the pertinent information regarding the defendant, including the probation department's report, to determine if the defendant qualifies for diversion); *Davis v. Municipal Court*, 46 Cal. 3d 64, 78, 757 P.2d 11, 19, 249 Cal. Rptr. 300, 307 (1988) (noting that the Legislature has implemented the eligibility criteria for domestic violence diversion, without leaving policy questions regarding the program's design to the discretion of the district attorney); *People v. Weatherill*, 215 Cal. App. 3d 1569, 1582, 264 Cal. Rptr. 298, 306 (1989) (noting that domestic violence diversion programs focus on the offense charged, unlike diversion programs for the mentally retarded which focus on the status of the offender); *County of Orange v. State Bd. of Control*, 167 Cal. App. 3d 660, 662-63, 213 Cal. Rptr. 440, 441 (1985) (holding that diversion is an alternative to prosecution and punishment, and not a type of punishment for the diverted offense); *People v. Denman*, 145 Cal. App. Supp. 3d 40, 49, 193 Cal. Rptr. 863, 869 (1983) (stating that where a defendant has been considered for the domestic violence diversion program, and then subsequently denied diversion, the state will be given an additional 30 days to prepare for trial, and such an extension does not deny the defendant's right to a speedy trial); *cf. IND. CODE ANN.* § 33-19-5-1(c)(1) to (2) (West Supp. 1993) (stating that a divertee is required to pay a \$50 initial user's fee and \$10 each month, thereafter, while the defendant participates in the diversion program); *KAN. STAT. ANN.* § 22-2907(1) (1988) (providing that the district attorney, after considering various factors, may recommend that the defendant be diverted in the interest of justice and for the benefit of the defendant and the community); *Arizona v. Larson*, 764 P.2d 749, 752 (Ariz. 1988) (holding that the trial court has the power to grant a misdemeanor compromise in a domestic violence case based on the power given to it by the legislature, despite the fact that the prosecutor has not recommended such a compromise). *But see Martell v. County Ct. of Summit*, 854 P.2d 1327, 1330-31 (Colo. Ct. App. 1992) (commenting that, although mandatory counseling may be appropriate in domestic violence situations, it is not appropriate before a defendant has been convicted since such a mandate violates an accused's Fifth Amendment privilege against self-incrimination and the assumption of innocence).

12. *See People v. Biggs*, 9 Cal. 2d 508, 514, 71 P.2d 214, 217 (1937) (explaining that a prior conviction includes any previous conviction where the defendant was pardoned); *cf. United States v. Jones*, 910 F.2d 760, 761 (11th Cir. 1990) (stating that a nolo contendere plea, where adjudication has been withheld, is considered a conviction for purposes of classifying a person as a career offender); *State v. Rose*, 325 S.W.2d 485, 488 (Mo. 1959) (equating a guilty plea with a conviction). *But see State v. Weinberger*, 205 N.E.2d 306, 306 (N.Y. 1965) (maintaining a lower court's finding that a guilty plea by itself does not constitute a conviction).

13. *See CAL. CIV. PROC. CODE* § 542(a), (b)(1)-(2) (West Supp. 1993) (defining domestic violence as intentionally causing bodily harm, sexually assaulting, or putting any of the following persons in imminent apprehension of harm: a wife, a husband, an ex-wife, an ex-husband, a cohabitant, a former cohabitant, a blood-related adult, a person with whom the defendant has been engaged or dated, or a person who is the parent of a child); *see also id.* § 13519(a), (b)(1)-(16) (West 1992) (designating training courses and procedures for law enforcement officers in order to effectively handle domestic violence complaints); *cf. WASH. REV. CODE ANN.* § 70.123.130 (1992) (providing that the Social and Health Services Department will be responsible for establishing a technical assistance grant program to help communities in learning how to deal with domestic violence, and setting forth the goals of the program). *See generally* Michael C. Griffaton, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 588 (1993) (reporting that a Minneapolis study found that women who called the police to report domestic violence incidents were less likely to experience a second assault than women who did not report such an incident); Deborah Rhode, *Justice and Gender*, 79 CAL. L. REV. 577, 585 (1991) (indicating that most states have adopted domestic violence legislation, protecting women and imposing sanctions for violations).

imposed.¹⁴ Chapter 421 further gives the court the discretion, upon a showing of good cause, to refrain from imposing the minimum forty-eight hour prison sentence, and instead grant the defendant probation, or suspend the sentence.¹⁵

APW

Crimes; domestic violence—diversion

Penal Code § 1001.15 (amended).
AB 1165 (Polanco); 1993 STAT. Ch. 850

Penal Code § 1000.6 (amended).
AB 2211 (Goldsmith); 1993 STAT. Ch. 589

Penal Code §§ 1000.93, 1000.94, 1000.95, 1000.96 (new); §§ 1000.7, 1000.8, 1000.9 (amended); § 1000.11 (amended and renumbered).
AB 226 (Burton); 1993 STAT. Ch. 221

Under existing law, defendants who have committed domestic violence¹ misdemeanors² are eligible for diversion.³ Existing law also

14. CAL. PENAL CODE § 243(e)(3) (amended by Chapter 421).

15. *Id.*; see *In re Mills*, 55 Cal. 2d 646, 653, 361 P.2d 15, 20, 12 Cal. Rptr. 483, 488 (1961) (stating that, under the indeterminate sentence law, each term is for the maximum, unless the Adult Authority affixes a shorter term); *Olney v. Municipal Ct.*, 133 Cal. App. 455, 462, 184 Cal. Rptr. 78, 82 (1982) (stating that the court has the power to independently review the facts of a particular case and exercise its discretion in determining whether good cause exists for imposing the mandatory sentence); cf. ALASKA STAT. § 12.55.080 (1990) (providing that a court has the power to suspend the balance or portion of the defendant's sentence, and place the defendant on probation, if the court believes that doing so would be in the best interest of the public and the defendant).

1. See CAL. PENAL CODE § 1000.6(d), (e) (amended by Chapter 589) (defining domestic violence as intentionally or recklessly attempting to, or causing bodily harm to a wife, husband, parent, a permanent resident of the home, or a person related by blood to the abuser, or putting any one of the aforementioned persons in imminent apprehension of bodily harm); see also *id.* § 273.88(a)-(b) (West Supp. 1993) (providing that the Criminal Justice Planning Office will set up pilot projects in Sacramento, Los Angeles, and Humboldt counties, which have established vertical prosecution programs for spousal abusers, in order to gather data on domestic violence prosecutions); *id.* § 13519(a), (b)(1)-(16) (West 1992) (designating training courses and procedures for law enforcement officers in order to effectively handle domestic violence complaints). See generally Michael C. Griffaton, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 588 (1993) (reporting that a Minneapolis study found that women who called the police to report domestic violence incidents were less likely

requires that after ordering the defendant to be diverted, the court must determine the defendant's financial condition.⁴ Under prior law, upon

to experience a second assault than women who did not report such an incident); Deborah Rhode, *Justice and Gender*, 79 CAL. L. REV. 577, 585 (1991) (indicating that most states have adopted domestic violence legislation, protecting women and imposing sanctions for violations); Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 733 (1988) (commenting that prosecutors routinely decline to bring charges against a husband for domestic violence, choosing instead not to intervene in such disputes); Sandy Shore, *First, the Chickens Died; Then Denver Woman's Life Careered to Horror*, L.A. TIMES, May 16, 1993, at A4 (reporting that a former live-in boyfriend, who repeatedly abused and harassed his ex-girlfriend, shot her as she fled to a police station, clutching a restraining order against the assailant).

2. See CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining misdemeanor).

3. *Id.* § 1000.8(a)-(c) (amended by Chapter 221); see *id.* §§ 1000.7-1000.11 (amended by Chapter 221) (setting forth the diversion procedures); *id.* § 1000.6 (amended by Chapter 589) (stating additional diversion procedures); see also *id.* § 1000.8(a) (amended by Chapter 221) (explaining that once the defendant consents to further proceedings and waives his right to a speedy trial, the court will review the relevant information regarding the defendant, including the probation department's report, to determine if the defendant is eligible for the diversion program); *id.* § 1001.50(c) (West 1985) (defining pretrial diversion as the procedure by which the prosecution of a defendant is temporarily or permanently postponed, between the time that the charges are brought against the defendant until adjudication); *People v. Weatherill*, 215 Cal. App. 3d 1569, 1582, 264 Cal. Rptr. 298, 306 (1989) (noting that domestic violence diversion programs focus on the offense charged, unlike mentally retarded diversion programs which focus on the status of the offender); *Davis v. Municipal Court*, 46 Cal. 3d 64, 78, 757 P.2d 11, 18, 249 Cal. Rptr. 300, 307 (1988) (noting that the Legislature has implemented the eligibility criteria for domestic violence diversion and has not left policy questions regarding the program's design to the discretion of the district attorney); *County of Orange v. State Bd. of Control*, 167 Cal. App. 3d 660, 663, 213 Cal. Rptr. 440, 441 (1985) (holding that diversion is an alternative to prosecution and punishment, and not a type of punishment for the diverted offense); *People v. Denman*, 145 Cal. App. 3d Supp. 40, 50, 193 Cal. Rptr. 863, 869-70 (1983) (holding that where a defendant has been considered for the domestic violence diversion program, and then subsequently denied diversion, the state will be given an additional 30 days to prepare for trial, and such an extension does not deny a defendant his right to a speedy trial); cf. ARIZ. REV. STAT. ANN. § 13-3601(H) (Supp. 1993) (providing that the court, without entering a judgment of guilty and with the consent of the prosecuting attorney and the defendant, may place a defendant, who is found guilty of a domestic violence offense, on probation, incorporating the terms necessary to protect the victim, such as requiring that the defendant enter into a counseling or diversionary program); KAN. STAT. ANN. § 22-2907(1) (1988) (providing that the district attorney, after considering various factors, may recommend that the defendant be diverted in the interest of justice and for the benefit of the defendant and the community); WASH. REV. CODE ANN. § 70.123.130 (West 1992) (providing that the Social and Health Services Department will be responsible for establishing a technical assistance grant program to help communities in learning how to deal with domestic violence, and setting forth the goals of the program); *Arizona v. Larson*, 764 P.2d 749, 752 (Ariz. 1988) (holding that the trial court has the power to grant a misdemeanor compromise in a domestic violence case based on the power given to it by the Legislature, despite the fact that the prosecutor has not recommended such a compromise); *Arizona v. Aguilar*, 831 P.2d 443, 447 (Ariz. Ct. App. 1992) (holding that a court may not enter a judgment of guilt when a defendant is put on probation under the Domestic Violence Diversion Program); *Arizona v. Sirny*, 772 P.2d 1145, 1146 (Ariz. Ct. App. 1989) (holding that a jail term is inappropriate once a defendant has been assigned probation and diverted under the Domestic Violence Diversion Program); *Martell v. County Court*, 854 P.2d 1327, 1330-31 (Colo. Ct. App. 1992) (commenting that, although mandatory counseling may be appropriate in domestic violence situations, it is not appropriate before a defendant has been convicted since such a mandate violates an accused's Fifth Amendment privilege against self-incrimination and the assumption of innocence).

4. CAL. PENAL CODE § 1000.8(a) (amended by Chapter 221); see *id.* (noting that the purpose of the inquiry is to determine whether or not the defendant can pay for some or all of the costs of the batterer's program).

discovering the defendant's ability to pay for counseling, the court had the discretion to order the defendant to pay, in whole or in part, for the counseling.⁵ Under Chapter 221, the court must order the offender to pay for some or all of the fees to attend a batterer's program,⁶ as long as the defendant is able to do so.⁷

Prior law required that the defendant participate in the diversion program for no less than six months, but no longer than two years.⁸ Chapter 221 increases the minimum period of participation to one year.⁹ Chapter 221 also requires the court to order a diverted defendant to do a certain amount of community service work.¹⁰

Under prior law, if the defendant had been convicted of a violent offense, criminal proceedings could be reinstated upon a hearing initiated by the prosecutor, court, or probation officer.¹¹ Chapter 221 permits the proceedings to be reinstated whenever it is evident that the defendant has engaged in criminal conduct, thus rendering him unfit for the diversion program.¹²

Chapter 221 requires that, beginning July 1, 1994, the probation department (Department)¹³ must refer offenders only to batterer's

5. 1979 Cal. Stat. ch. 913, sec. 1, at 3141 (amending CAL. PENAL CODE § 1000.8).

6. See, e.g., ALASKA STAT. § 18.66.900(4) (1991) (defining a domestic violence program as a program providing services to victims, families, or perpetrators of domestic violence); *People v. Wallace*, 837 P.2d 1223, 1223 (Colo. 1992) (classifying Abusive Men Exploring New Directions as a treatment program for batterers).

7. CAL. PENAL CODE § 1000.8(a) (amended by Chapter 221); see CAL. CIV. PROC. CODE § 547(d) (West Supp. 1993) (providing that the court must find that the defendant's cost for participating in a batterer's treatment program does not otherwise jeopardize the defendant's other financial obligations before ordering the defendant to bear all or some of the cost of the program); CAL. FAM. CODE § 5754(c) (West Special Pamphlet 1993) (noting that the court may require the participant of a batterer's treatment counseling program to bear whatever cost the court deems to be reasonable for the program); see also *Bearden v. Georgia*, 461 U.S. 660, 661 (1983) (holding that a state may terminate a preprosecution diversion arrangement because of a defendant's nonwillful failure to make restitution, as long as there are no reasonable alternatives to termination which will satisfy the state's legitimate penal objectives); cf. IND. CODE ANN. § 33-19-5-1(c)(1)-(2) (West Supp. 1993) (stating that a defendant directed to the diversion program will be required to pay a \$50 initial user's fee and \$10 each month, thereafter, while in the program).

8. 1979 Cal. Stat. ch. 913, sec. 1, at 3141 (amending CAL. PENAL CODE § 1000.8).

9. CAL. PENAL CODE § 1000.8(c) (amended by Chapter 221).

10. *Id.* § 1205.3 (West Supp. 1993); see *id.* (stating that the court must specify the number of hours of community service work to be performed when a defendant is convicted of a crime and given probation).

11. 1979 Cal. Stat. ch. 913, sec. 1, at 3141 (amending CAL. PENAL CODE § 1000.8).

12. CAL. PENAL CODE § 1000.9 (amended by Chapter 221); cf. *Aguilar*, 831 P.2d at 447 (Ariz. Ct. App. 1992) (stating that upon violation of a term of probation, including failure to attend a diversionary program, the court may enter an adjudication of guilt, and proceed as if the defendant's probation had been revoked).

13. See CAL. CIV. PROC. CODE § 131.3 (West 1982) (listing the duties of a probation officer, including investigating into the character, history, and family life of the offender when called upon to do so by the court); CAL. PENAL CODE § 1203c (West Supp. 1993) (stating that a probation officer is responsible for sending a report to the Department of Corrections regarding the circumstances surrounding the offense and the defendant's prior record and history).

programs which comply with certain specifications.¹⁴ Under Chapter 221, only the Department is authorized to approve a batterer's treatment program, and to renew the program's approval annually.¹⁵ In addition, the Department is authorized to charge nongovernmental treatment programs an annual fee of up to \$250 in order to reimburse the Department for its expenses in administering the approval process.¹⁶

Under prior law, a judge had the authority to order the defendant, charged with a felony,¹⁷ to pay an administrative fee of up to \$150 to cover the cost of any criminalistic laboratory¹⁸ analysis, or to process the diversion request or application.¹⁹ Under Chapter 850, the judge may order the defendant to pay an administrative fee of up to \$500.²⁰ Under Chapter 850, a judge also has the authority to require the defendant, whose

14. CAL. PENAL CODE § 1000.93(a) (enacted by Chapter 221); *see id.* § 1000.93(b)(1)-(16) (enacted by Chapter 221) (providing that the goal of the batterer's program should be to discontinue the domestic violence, and the program must provide the following: (1) Strategies for holding the defendant accountable for the domestic violence; (2) a requirement that the offender attend group sessions comprised of people of the same gender; (3) definitions given to the defendant, describing the various types of abuse and the techniques available for discontinuing them; (4) methods of apprising the victim about the requirements for the defendant's participation in the program, plus the availability of victim resources; (5) a requirement that the offender attend sessions without being under the influence of chemicals; (6) educational programs discussing matters, such as the effects of abuse on children and others, and the nature of violence; (7) a requirement that prohibits any family or partner counseling; (8) procedures for assessing whether the program will be beneficial to the defendant; (9) staff members who are knowledgeable about various types of abuses, violence, and the legal system; (10) staff members who are encouraged to obtain assistance from domestic violence centers; (11) a requirement that the offender enter into a written agreement with the program, outlining the program's content and requirements; (12) a requirement that the defendant enter into a confidentiality agreement; (13) a program that is sensitive to various cultural and ethnic backgrounds; (14) a requirement of a written referral from the authorities in the legal system, allowing the defendant to attend the program; (15) procedures for reporting the defendant's enrollment, progress, and evaluation in the program; and (16) a sliding fee scale).

15. *Id.* §§ 1000.93(c)-(e), 1000.94(a) (enacted by Chapter 221); *see id.* § 1000.94(b)(1)-(4) (enacted by Chapter 221) (setting forth the procedures to be followed by the probation department for approving a new or existing batterer's program); *id.* § 1000.94(d)(1)-(2) (enacted by Chapter 221) (authorizing the probation department to revoke its approval of a program for various reasons, including a program's violation of the specified requirements, or for a program's failure to accurately represent any material fact in obtaining approval); *cf. id.* § 1001.50(b) (West 1985) (providing that the county district attorney, who is responsible for annually reviewing other misdemeanor diversion programs, must approve such programs before an offender can be diverted to the program); COLO. REV. STAT. ANN. § 18-6-802(1)(a) (Supp. 1993) (granting the chief judge in each judicial district the power to appoint a local board to certify and monitor domestic violence treatment programs).

16. CAL. PENAL CODE § 1000.94(c) (enacted by Chapter 221); *cf. Browning v. Corbett*, 734 P.2d 1030, 1032 (Ariz. Ct. App. 1986) (noting that, since victims of domestic violence originate from broken homes, it is reasonable to raise funds for domestic violence programs by requiring parties to a divorce action to pay an additional fee at the time of filing).

17. *See* CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining felony).

18. *See id.* § 1001.15(b) (amended by Chapter 850) (defining criminalistic laboratory as a laboratory under the supervision of a public agency which employs at least one forensic scientist and which is registered with the U.S. Drug Enforcement Administration).

19. 1987 Cal. Stat. ch. 375, sec. 1, at 1503 (amending CAL. PENAL CODE § 1001.15(a)).

20. CAL. PENAL CODE § 1001.15(a) (amended by Chapter 850).

charges either constitute, or have been reduced to a misdemeanor, to pay an administrative fee of up to \$300 to cover the expense of: (1) Reporting to the court on the applicant's eligibility and suitability²¹ for the diversion program; (2) supervising²² the defendant upon entering the program; and (3) for any responsibilities having to do with the reinstatement of criminal proceedings.²³

APW

Crimes; firearms control

Penal Code §§ 12070, 12076, 12078 (repealed and new); §§ 12001, 12001.6, 12026.2, 12072, 12073, 12077, 12081, 12084, 12276, 12601, 12809, 13511.5 (amended); Welfare and Institutions Code § 8102 (amended).

AB 166 (Hauser); 1993 STAT. Ch. 606
(Effective September 29, 1993)

Existing law defines a wholesaler as a person¹ who is a licensed dealer² pursuant to federal law, not including persons dealing exclusively

21. See *People v. Denman*, 145 Cal. App. Supp. 3d 40, 43, 193 Cal. Rptr. 863, 865 (1983) (stating that the court will evaluate the following factors in order to decide whether an offender qualifies for a diversion program: (1) The nature and magnitude of the victim's injury; (2) the defendant's prior history of domestic violence; and (3) any additional considerations which might adversely affect the defendant's chances of completing the program successfully).

22. See CAL. FAM. CODE § 1816(a) (West Special Pamphlet 1993) (requiring that supervising counselors of domestic violence programs participate in continuing education programs for domestic violence); cf. MASS. ANN. LAWS ANN. ch. 209A, § 7 (West Supp. 1993) (providing that a supervisor of a batterer's treatment program must certify a participant's attendance, and keep the probation department apprised of whether or not the defendant is complying with the requirements).

23. CAL. PENAL CODE § 1001.15(c) (amended by Chapter 850).

1. See CAL. PENAL CODE § 7 (West 1988) (defining person).

2. See 18 U.S.C. § 921(a)(11) (1988) (defining dealer); *United States v. Schumann*, 861 F.2d 1234, 1237 (11th Cir. 1988) (defining a dealer as a person who devotes time, attention, and labor to dealing in firearms as the regular course of business with the principal object of making a profit); *United States v. Redus*, 469 F.2d 185, 187 (9th Cir. 1972) (stating that § 922(a)(1) is directed at two classes of conduct: (1) The shipping, transporting, or receiving of firearms or ammunition in the course of interstate commerce; and (2) the importing, manufacturing, or dealing in firearms or ammunition without a license, whether interstate or intrastate); *United States v. Gross*, 451 F.2d 1355, 1357-58 (7th Cir. 1971) (identifying a person who has sold 11 weapons in a short period of time as a dealer for the purpose of § 921(a)(11)).

in grips, stocks, and other nonmetal parts of firearms.³ Under Chapter 606, a person dealing exclusively in parts of firearms that are not frames or receivers⁴ is not a wholesaler.⁵

Existing law provides specified exemptions to the prohibition on carrying a concealed firearm,⁶ including an exemption for persons going directly to, or coming directly from, a gun show⁷ for the purpose of displaying that firearm, or a recognized sporting event⁸ involving that firearm; or persons possessing a concealed firearm at a place of residence;⁹ or persons transporting a firearm to a place of business for the purpose of a lawful transfer or repair.¹⁰ Chapter 606 expands these

3. CAL. PENAL CODE § 12001(h) (amended by Chapter 606); *see id.* § 12001(b)-(e), (g) (amended by Chapter 606) (defining firearm); *People v. Hale*, 43 Cal. App. 3d 353, 356, 117 Cal. Rptr. 697, 698 (1974) (stating that a disassembled firearm can still constitute an operable weapon for the purpose of the Dangerous Weapons Control Law, California Penal Code §§ 12000-12101); *see also* 18 U.S.C. § 921(a)(3) (1988) (defining firearm); *United States v. Morris*, 904 F.2d 518, 519 (9th Cir. 1990) (identifying a derringer pistol as a firearm for the purposes of § 921(a)(3)); *United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2nd Cir. 1971) (holding that a starter gun, which could be converted to shoot live ammunition within three to twelve minutes, constitutes a firearm for the purposes of § 921(a)); *cf.* LA. REV. STAT. ANN. § 40:1731(1) (West 1992) (defining dealers as including wholesalers and other persons dealing in used goods).

4. *See* WEBSTER'S INTERNATIONAL DICTIONARY 902 (3d. ed. 1966) (defining a frame as a basic unit of a handgun, which serves as a mounting for the barrel and operating parts of the arm); *id.* at 1894 (defining receiver as the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached); *see also* *People v. Osterman*, 4 Cal. App. 3d 763, 765, 84 Cal. Rptr. 769, 770 (1970) (utilizing Webster's Dictionary to define gun parts as specified in the Penal Code).

5. CAL. PENAL CODE § 12001(h) (amended by Chapter 606).

6. *See id.* § 12001(a) (amended by Chapter 606) (defining pistol, revolver, and "firearm capable of being concealed upon the person").

7. *See* 27 C.F.R. § 178.100(b) (1993) (defining gun show).

8. *See id.* (defining event).

9. *See* *People v. Foley*, 149 Cal. App. 3d Supp. 33, 39, 197 Cal. Rptr. 533, 539 (1983) (stating that the purpose of the Weapons Control Law would be frustrated if "place of residence" were interpreted to include any motor vehicle while in transit, and that a practical construction should be given to language employed by draftsmen of the legislation).

10. CAL. PENAL CODE § 12026.2(a)(1)-(12) (amended by Chapter 606); *see id.* (specifying exemptions from the prohibition against carrying firearms without a license including possession of a concealed firearm by an authorized participant in a motion picture, possession of a firearm in a locked container by a member of a club organized for the purpose of collecting firearms, transportation of a firearm by a participant in a safety or hunting class, transportation of a firearm pursuant to California Penal Code § 12026, transportation of a firearm for repair, transportation of a firearm relating to a gun show, transportation of a firearm by an authorized employee of a firearms supplier when going to or coming from a motion picture, transportation of a firearm by a person going to or coming from a target range, transportation of a firearm to the issuing agency of licenses to carry concealed firearms, transportation of a firearm to a law enforcement agency for purposes of a lawful transfer pursuant to California Penal Code § 12084, and transportation of a firearm to or from a camping facility); *cf.* ME. REV. STAT. ANN. tit. 25, § 2001 (West Supp. 1992) (permitting law enforcement officers, private investigators, and licensed hunters to carry concealed firearms without holding a permit to do so); R.I. GEN. LAWS §§ 11-47-8, 11-47-9 (Supp. 1993) (providing that no person may, without a permit, carry a pistol or revolver, visible or concealed, within a vehicle or on his or her person, unless that person is on his or her property, is a member of the police force, or has a license issued by another state).

exemptions to include transportation of a firearm by a person who takes title to a firearm by operation of law;¹¹ transportation of a firearm by a person when going directly to, or coming from, a gun show or event for the purpose of lawfully transferring¹² that firearm; and transportation of a firearm while moving out of this state.¹³

Under existing law, a person must be licensed in order to transfer a firearm, with specified exceptions.¹⁴ Chapter 606 exempts the transfer of firearms by persons licensed under federal law and who reside outside the state, and transfers between wholesalers.¹⁵

Existing law requires that, after a certain date, a purchaser present a basic firearm safety certificate¹⁶ before delivery of a firearm capable of being concealed upon the person.¹⁷ Chapter 606 delays the operative date for this provision to apply to April 1, 1994.¹⁸

11. See CAL. PENAL CODE § 12070(c)(2) (enacted by Chapter 606) (defining persons taking title by operation of law as including, but not limited to: (1) The executor of an estate, if the estate includes firearms; (2) a secured creditor, when firearms are used as collateral; (3) a levying officer or receiver; (4) a receiver performing his or her functions as a receiver if the receivership estate includes firearms; (5) a trustee for a bankruptcy estate, which includes firearms; (6) an assignee for the benefit of creditors, which includes firearms; or (7) spouses when a transmutation of property has taken place between them).

12. See *id.* § 12072(d) (amended by Chapter 606) (listing requirements for lawful transfer of a firearm where neither party to the transactions has a dealer's license).

13. *Id.* § 12026.2(a)(13)-(15) (amended by Chapter 606); see *id.* § 12026.2(a)(1)-(5) (amended by Chapter 606) (setting forth conditions under which a person may carry a concealed firearm without holding a license to do so).

14. *Id.* § 12070(a) (enacted by Chapter 606); see *id.* (stating that a person not licensed pursuant to California Penal Code § 12071, who sells, leases, or transfers a firearm without a license, is guilty of a misdemeanor); *id.* § 12070(b) (enacted by Chapter 606) (specifying that such transactions as: the liquidation of a personal firearm collection to satisfy a court judgment; or the obtaining of a firearm by intestate succession and subsequently transferring it; the infrequent transfer of a firearm; the loan of a firearm while at a target facility; and the transfer of a firearm to a dealer by a wholesaler, among others, are exempt from California licensure requirements); see also *id.* § 17(a) (West Supp. 1993) (defining misdemeanor).

15. *Id.* § 12070(b)(15)-(16) (enacted by Chapter 606); see 18 U.S.C. § 923 (1988 & Supp. II 1990) (regulating licensure of federal firearms dealers).

16. See *id.* § 12801 (West 1992) (defining "a basic firearm safety certificate" as a certificate issued to the transferee by the Department in compliance with §§ 12800-12809, encompassing Article 8 of Chapter 6 of the California Penal Code).

17. *Id.* § 12072 (c)(5) (amended by Chapter 606); see *id.* § 12802(a) (West 1992) (regulating the issuance of basic safety certificates); *id.* § 12803 (West Supp. 1993) (describing course and testing requirements prior to issuance of the certificate); *id.* § 12805 (West 1992) (governing basic firearm safety instructors); *id.* § 12809 (amended by Chapter 606) (setting forth standards for the objective test to be administered prior to the issuance of the certificate in lieu of taking the safety course); 1992 Cal. Legis. Serv. ch. 1326, sec. 6, at 5537 (amending CAL. PENAL CODE § 12072)) (specifying October 1, 1993 as the date on which the presentation of a basic firearm safety certificate was required prior to delivery).

18. CAL. PENAL CODE § 12072(c)(5) (amended by Chapter 606).

Existing law requires that every licensed dealer keep records of certain firearm transactions.¹⁹ Chapter 606 excludes from this provision the transfer, from the dealer to himself or herself, of a firearm that is not capable of being concealed upon the person.²⁰

Existing law permits the Department of Justice to charge the dealer a fee for processing the transfer of any number of firearms on the same date.²¹ Chapter 606 requires the Department to charge a reduced fee for second and subsequent transfers on the same date.²²

Under prior law, transfers of firearms to or between licensed dealers were exempted from the usual fifteen day waiting period.²³ Chapter 606 deletes this provision and subjects licensed dealers to the fifteen day waiting period for delivery of firearms capable of being concealed upon the person.²⁴

Existing law states that certain transfer restrictions do not apply in specified situations.²⁵ Chapter 606 restricts the specified situations to those not involving firearms capable of being concealed upon the person.²⁶ Chapter 606 further provides that certain transfer restrictions do

19. *Id.* § 12073 (amended by Chapter 606); *see id.* (requiring a licensed dealer to keep a register of the sale or transfer of firearms, but providing that no entry need be made for the transfer of an unloaded firearm that is not capable of being concealed upon the person by a dealer to another dealer, the transfer of an unloaded firearm by a dealer to an importer or manufacturer, the transfer of an unloaded firearm to a person licensed as a dealer under federal law and who resides outside the state, or the transfer of a firearm by a dealer to a wholesaler); *see also id.* § 12073(c) (amended by Chapter 606) (providing that a violation of California Penal Code § 12073 is a misdemeanor); *id.* § 12077 (amended by Chapter 606) (detailing the information to be included in the register).

20. *Id.* § 12073(b)(6) (amended by Chapter 606).

21. *Id.* § 12076(d) (enacted by Chapter 606); *see id.* § 12076(g) (enacted by Chapter 606) (directing the Department to charge fees for a single firearms transaction on the same date); *cf.* MASS. GEN. LAWS ANN. ch. 140, § 131A (West 1991) (prescribing a fee of \$2.00 for the issuance of a permit to purchase a firearm); WIS. STAT. ANN. § 175.35(2i) (West Supp. 1993) (providing for a fee of \$5.00 to be charged by the Department for each criminal history record search requested by the dealer). *But cf.* HAW. REV. STAT. § 134-2(h) (Supp. 1992) (stating that no fee is to be charged for a permit to acquire ownership of a handgun).

22. CAL. PENAL CODE § 12076(g)(2) (enacted by Chapter 606).

23. 1982 Cal. Stat. ch. 954, sec. 1, at 3445 (amending CAL. PENAL CODE § 12078); *see* CAL. PENAL CODE § 12072(c) (amended by Chapter 606) (prohibiting delivery of a firearm to a transferee under certain conditions, including prior to a fifteen day waiting period); *id.* § 12072(d) (amended by Chapter 606) (designating lawful transfers of firearms where neither party is a licensed dealer); *cf.* FLA. STAT. ANN. ch. 790.0655(2) (West Supp. 1993) (exempting persons holding concealed weapons permits from a three-day waiting period before delivery of a handgun); WIS. STAT. ANN. § 175.35(2i)(b) (West Supp. 1993) (exempting transactions between dealers from a 48 hour waiting period).

24. CAL. PENAL CODE § 12078(k)(1) (enacted by Chapter 606).

25. *Id.* § 12078(k)(1)-(3) (enacted by Chapter 606); *see id.* (providing that certain transfer restrictions do not apply to the transfer of a firearm not capable of being concealed upon the person, the transfer of a firearm by a dealer licensed under federal law to a person who resides outside of the state, or the transfer of firearms to a wholesaler if the firearms are being returned to the wholesaler and are intended as merchandise in the wholesaler's business).

26. *Id.* § 12078(g)(2) (enacted by Chapter 606).

not apply to: (1) The transfer of a firearm by a licensed dealer to himself or herself; (2) the transfer of firearms to a wholesaler, if the firearms are used as merchandise in the wholesaler's business or if that transfer is made in accordance with federal law; (3) transfers of firearms, capable of being concealed upon the person, between dealers if they are not intended as merchandise; or (4) transfers of assault weapons.²⁷

Existing law permits the transfer of firearms to be completed through a sheriff's department in a county of less than 200,000 persons upon the completion of a Law Enforcement Firearms Transfer Form for each transaction.²⁸ Chapter 606 states that a single transfer of any number of firearms that are not capable of being concealed upon the person between the same two persons may be reported on a single Law Enforcement Firearms Transfer Form.²⁹

Under existing law, a peace officer³⁰ may purchase any "less lethal weapon"³¹ for official use in the discharge of that officer's official duties.³² Chapter 606 specifies that "less lethal weapons" do not include assault weapons.³³

Under prior law, if a licensed dealer was certified as a basic firearm safety course instructor, the dealer could not deliver a firearm capable of being concealed upon the person unless that dealer provided written

27. *Id.* § 12078(m), (n)(1)-(2), (o) (enacted by Chapter 606); *see* 18 U.S.C. § 926A (1988) (regulating interstate transfers of firearms); CAL. PENAL CODE § 12276 (amended by Chapter 606) (designating certain semiautomatic firearms as assault weapons); *cf.* FLA. STAT. ANN. ch. 790.33(d)(5) (West 1992) (exempting transactions between federally licensed dealers from a three-day waiting period); P.R. LAWS ANN. tit. 25, § 432(c) (1979) (requiring that each transaction between dealers be reported to the Secretary of Justice and the Superintendent of Police of Puerto Rico); V.I. CODE ANN. tit. 23, § 461(b) (1993) (setting forth reporting requirements for transactions between licensed dealers).

28. CAL. PENAL CODE § 12084 (amended by Chapter 606); *see id.* § 12084(c),(d) (amended by Chapter 606) (describing the procedure to be followed by the sheriff's department and setting forth the requirements relating to the completion of the Law Enforcement Firearms Transfer Form).

29. *Id.* § 12084(c)(6) (amended by Chapter 606).

30. *See id.* §§ 830-832.9 (West Supp. 1993) (designating certain persons as peace officers and defining the appropriate scopes of authority for various peace officers).

31. *See id.* § 12601(a) (amended by Chapter 606) (defining less lethal weapon as a device which expels less lethal ammunition by any mechanism for the purpose of incapacitating a human being, including physical pain or discomfort); *id.* § 12601(b) (amended by Chapter 606) (excluding certain weapons from inclusion in the definition of "less lethal weapons"); *see also id.* § 12601(c) (amended by Chapter 606) (defining less lethal ammunition).

32. *Id.* § 12600 (West 1992).

33. *Id.* § 12601(b)(12) (amended by Chapter 606); *see id.* § 12276 (amended by Chapter 606) (defining assault weapon).

instructions on the use of the firearm.³⁴ Chapter 606 deletes this provision.³⁵

Prior law required applicants, for admission to a basic course of training certified by the Commission on Peace Officer Standards and Training, to certify that they did not have a criminal background³⁶ which would prevent them from owning a firearm capable of being concealed upon the person.³⁷ Chapter 606 requires certification that the applicants do not have a criminal background which would prevent them from owning any firearm.³⁸

Under existing law, if a weapon is confiscated from a person who has been detained for mental examination,³⁹ it must be returned to the person

34. 1991 Cal. Stat. ch. 950, sec. 20 at 3803 (amending CAL. PENAL CODE § 12809); *see* CAL. PENAL CODE § 12803(a)(2)-(3) (West Supp. 1993) (directing the Department to develop an instructional manual to be distributed to instructors, to designate a minimum level of skill to be required of instructors, and to develop guidelines to be utilized for the certification of instructors); *id.* § 12805(a) (West 1992) (stating that the Department must designate any person, certified by a nationally recognized organization which fosters safety in firearms, or any person found to be competent to give instruction, as a basic firearms safety instructor); *id.* § 12805(b) (West 1992) (providing that the Department must designate a licensed firearms dealer as a basic firearms safety instructor).

35. CAL. PENAL CODE § 12809 (amended by Chapter 606).

36. *See id.* § 13511.5 (amended by Chapter 606) (defining criminal background as a criminal record that would disqualify the person from possessing a firearm pursuant to California Penal Code § 12021); *see also id.* § 12021 (West Supp. 1993) (disqualifying any person who has been convicted of a felony, addicted to a narcotic drug, or other specified offenses from possessing a firearm).

37. 1984 Cal. Stat. ch. 785, sec. 1, at 2779 (enacting CAL. PENAL CODE § 13511.5).

38. CAL. PENAL CODE § 13511.5 (amended by Chapter 606); *see id.* § 12021.1(a) (West 1992) (prohibiting ownership or possession of any firearm if the person has been convicted of specified offenses); *id.* § 12021.1(b) (West 1992) (specifying certain violent offenses including murder, mayhem, rape, felonies punishable by death or life imprisonment, robbery, and kidnapping among others as violent offenses); *see id.* § 13511.5 (amended by Chapter 606) (requiring certification by the applicant that the applicant does not have a criminal history which would prohibit ownership of any firearm in accordance with California Penal Code §§ 12021, 12021.1 or California Welfare and Institution Code §§ 8100, 8103); *see also* CAL. WELF. & INST. CODE § 8100(a) (West Supp. 1993) (prohibiting possession of a firearm by a person determined to be a danger to himself or others); *id.* § 8103 (West Supp. 1993) (stating that any person, who has been adjudicated as a danger to others or as a mentally disordered sex offender, or has been found not guilty of certain crimes by reason of insanity, can not have possession or custody of a firearm).

39. *See* CAL. WELF. & INST. CODE § 5150 (West 1984) (setting forth grounds for involuntary detention in a facility approved by the State Department of Mental Health for treatment and evaluation).

upon that person's release without judicial commitment.⁴⁰ Chapter 606 provides for return of the weapon upon release of the person.⁴¹

RMC

Crimes; fraud—telephone services

Penal Code § 502.7 (amended).

AB 1656 (Polanco); 1993 STAT. Ch. 1014

Under existing law a person who avoids or attempts to avoid lawful telephone or telegraph charges through specified means is guilty of a crime.¹ Chapter 1014 adds conspiracy and the fraudulent use of altered or stolen identification to the list of means for which a person can be punished for theft of telephone services.²

Prior law made the theft of telephone services a misdemeanor or felony if the total value of the services exceeded \$400 for a period of twelve consecutive months during the three years prior to indictment.³ Chapter 1014 mandates a felony conviction if a person has had a prior

40. *Id.* § 8102(a)-(b) (amended by Chapter 606); *see id.* § 5152 (West Supp. 1993) (providing for the release of a person within 72 hours of the original detention, if a psychiatrist believes that the person no longer requires evaluation and treatment).

41. *Id.* § 8102(b) (amended by Chapter 606).

1. CAL. PENAL CODE § 502.7(a)-(e) (amended by Chapter 1014); *see id.* (describing the various penalties available for telephone or telegraph fraud). A person will be guilty of theft of telephone services if that person used deception, false pretense, trick, scheme, or device in order to avoid lawful telephone charges. *Id.* § 502.7(a)(5) (amended by Ch. 1014); *see also id.* § 591 (West 1992) (stating that a person who makes any unauthorized connection with a telephone line will be guilty of a crime). *See generally* *People v. Dingle*, 174 Cal. App. 3d 21, 30, 219 Cal. Rptr. 707, 713 (1985) (stating that in order to be guilty of theft of telephone services you must first show an intent to deprive a person of property); *People v. Rousseau*, 129 Cal. App. 3d 526, 535, 179 Cal. Rptr. 892, 896 (1982) (stating that § 502.7 does not apply to fraud in directory listings); *People v. Kreiling*, 259 Cal. App. 2d 699, 704, 66 Cal. Rptr. 582, 585 (1968) (stating that a person can be guilty of violations of both § 509 and § 502.7 if that person uses unauthorized means to tap into a telephone line or service and use it for free).

2. CAL. PENAL CODE § 502.7(a)(5) (amended by Chapter 1014); *cf.* *State v. Tansey*, 593 N.Y.S.2d 426, 428 (1992) (detailing how the identification codes of state employees were used to obtain free long distance services); John Eckhouse, *Organized Crime Gets Into Phone Fraud*, S.F. CHRON., Apr. 7, 1993, at D1 (stating that organized crime has conspired to defraud telephone companies and businesses of about \$4 billion worth of long distance calls annually); James M. Gomez, *Two Youths Accused of Computer Data Thievery*, L.A. TIMES, Jan. 10, 1991, at B1 (detailing how two youths shared access codes with hundreds of computer users in order to obtain telephone services valued at \$1.5 million).

3. 1993 Cal. Stat. ch. 1110, sec. 6, at 4017 (amending CAL. PENAL CODE § 502.7).

misdeemeanor or felony conviction for theft of telephone services within the past five years.⁴

Existing law prohibits the publishing⁵ of credit card or calling card numbers for the purposes of avoiding lawful telephone charges.⁶ Under Chapter 1014, publication of credit card or calling card numbers on a computer bulletin board system also constitutes a crime.⁷ Additionally, Chapter 1014 makes it a crime for a person to receive something of value in exchange for furnishing a calling card or credit card number to someone who is planning to use the information to fraudulently obtain free telephone services.⁸

ELG

Crimes; graffiti

Penal Code §§ 594.2, 594.6, 640.7 (new); §§ 550, 594, 594.1, 640.5, 640.6, 1203.1, 4024.2 (amended); Vehicle Code § 13202.6 (amended).

AB 1179 (Epple); 1993 STAT. Ch. 605

Penal Code § 594.7 (new).

SB 1011 (Watson); 1993 STAT. Ch. 715

Existing law provides that any person¹ who maliciously² defaces³

4. CAL. PENAL CODE § 502.7(g) (amended by Chapter 1014); *see* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1656, at 2 (July 13, 1993) (stating that the author of Chapter 1014 contends that mandating a felony conviction for repeat offenders will greatly reduce theft of telephone services).

5. CAL. PENAL CODE § 502.7(c) (amended by Chapter 1014) (defining publishing as the communication of information to one or more persons). Publishing can be accomplished either through oral, written, or electronic communications. *Id.*

6. *Id.*

7. *Id.*; *see* Eckhouse, *supra* note 2, at D1 (stating that victims of telephone long distance theft believe that computer hackers are responsible for 58% of all losses); Gomez, *supra* note 2, at B1 (chronicling the tale of two young computer hackers who published long distance access numbers over computer bulletin board systems for use by other hackers); Paul Wallich, *Digital Desperadoes*, SCI. AM., Sept. 1990, at 34 (warning that prior restraint on the publishing of articles detailing methods of hacking and obtaining free telephone services could be unconstitutional).

8. CAL. PENAL CODE 502.7(d) (amended by Chapter 1014); *cf.* State v. Tansey, 593 N.Y.S.2d 426, 428 (1992) (holding that telephone calling card numbers are not considered to be property).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person).

2. *See id.* § 7(4) (West 1988) (defining maliciously as importing a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law).

with paint or any other liquid, damages, or destroys any real⁴ or personal⁵ property not the person's own, is guilty of vandalism.⁶ Chapter 605 expands the definition of vandalism to include any act of malicious spraying, scratching, writing on, or otherwise defacing, damaging or destroying any real or personal property not a person's own.⁷ Chapter 605 also creates a permissive inference that real property belonging to any public entity,⁸ or to the federal government, is neither owned by the offender nor was the offender permitted by the owner to deface, damage, or destroy the property.⁹ Chapter 715 makes it either a misdemeanor¹⁰ or felony¹¹ for a person, having been previously convicted for vandalism under Penal Code § 594 on two separate occasions and having been incarcerated¹² for at least one of the convictions, to be subsequently convicted of vandalism.¹³

3. See *People v. Brumley*, 242 Cal. App. 2d 124, 128, 51 Cal. Rptr. 131, 134 (1966) (stating that to deface does not necessarily mean to obliterate and to alter does not mean to change beyond recognition); cf. *State v. Kasnett*, 283 N.E.2d 636, 638 (Ohio Ct. App. 1972) (defining deface as meaning to mar, injure, or spoil), *rev'd*, 297 N.E.2d 537 (Ohio 1973).

4. See CAL. PENAL CODE § 7(11) (West 1988) (defining real property).

5. See *id.* § 7(12) (West 1988) (defining personal property).

6. *Id.* § 594(a) (amended by Chapter 605); see *id.* § 594(b)(1)-(4) (amended by Chapter 605) (specifying that vandalism is punishable as a misdemeanor if the amount of damage caused is less than \$5,000 and is punishable as a felony or misdemeanor if the amount of damage is \$5,000 or more); *id.* § 594(c) (amended by Chapter 605) (providing that for a vandalism conviction consisting of writing graffiti, the court may order the defendant to either clean up or repair the damaged property himself or to pay for the work to be done); *People v. Kahanic*, 196 Cal. App. 3d 461, 466, 241 Cal. Rptr. 722, 725 (1987) (stating that each community property owner has an equal and undivided ownership interest; thus, a spouse can be found guilty of vandalism for destroying or damaging community property); see also CAL. EVID. CODE § 1410.5(b) (West Supp. 1993) (providing that graffiti is admissible evidence of writing in an action for vandalism, for the purpose of proving the writing was made by the defendant); CAL. PENAL CODE §§ 640.5(f), 640.6(f) (amended by Chapter 605) (defining graffiti). See generally D.E. Evins, Annotation, *What Constitutes "Vandalism" or "Malicious Mischief" within Coverage of Property Insurance Policy*, 23 A.L.R. 3d 1259, § 3 (1969 & Supp. 1993) (discussing cases from other jurisdictions that establish the definitions of vandalism and malicious mischief).

7. CAL. PENAL CODE § 594(a) (amended by Chapter 605); see *id.* § 594.6 (enacted by Chapter 605) (providing that any person convicted of specified graffiti or vandalism offenses, pursuant to California Penal Code §§ 594, 640.5, 640.6, or 640.7 on two separate occasions, after incarceration for at least one of the convictions, and after a subsequent conviction of vandalism, may be ordered by the court, as a condition of probation, to perform up to 300 hours of community service).

8. See CAL. GOV'T CODE § 811.2 (West 1980) (defining public entity).

9. CAL. PENAL CODE § 594(a) (amended by Chapter 605).

10. See *id.* § 17(b) (West Supp. 1993) (defining misdemeanor as those crimes, excluding infractions, which are not punishable with death or imprisonment in the state prison).

11. See *id.* § 17(a) (West Supp. 1993) (defining felony as a crime which is punishable by death or imprisonment in the state prison).

12. See *id.* § 594.7 (enacted by Chapter 715) specifying that the incarceration must be pursuant to a sentence, a conditional sentence, or a grant of probation); see also *id.* § 1203(a) (West Supp. 1993) (defining probation).

13. *Id.* § 594.7 (enacted by Chapter 715).

Existing law also provides that it is a misdemeanor for any person under the age of eighteen to possess¹⁴ an aerosol container of paint on public property or in a public place for the purpose of defacing any property.¹⁵ Under existing law, it is proper and constitutional to treat people under the age of eighteen differently from those over that age.¹⁶ Chapter 605 authorizes the court to order the defendant to perform community service as a condition of probation.¹⁷

Existing law provides that every person who possesses specified burglar tools¹⁸ with the intent to feloniously break and enter into any building¹⁹ is guilty of a misdemeanor.²⁰ Chapter 605 provides that every

14. See CAL. EVID. CODE § 637 (West 1966) (specifying that the things which a person possesses are presumed to be owned by him); cf. *United States v. Ocampo*, 937 F.2d 485, 489 (9th Cir. 1991) (stating, in a case involving cocaine possession, that possession means dominion and control, and may be proved circumstantially by proof of exclusive dominion or of some special relationship, and it is not enough to show mere proximity or a defendant's presence on the property where it is found); *People v. Mijares*, 6 Cal. 3d 415, 423, 491 P.2d 1115, 1120, 99 Cal. Rptr. 139, 144 (1971) (holding that handling a narcotic for the sole purpose of disposal does not constitute possession within the meaning of California Health & Safety Code § 11500); *People v. Gory*, 28 Cal. 2d 450, 454-55, 170 P.2d 433, 436 (1946) (holding that the term possession means an immediate and exclusive possession under the dominion and control, and a defendant having such control must have knowledge of the presence of the forbidden item). But cf. *People v. King*, 22 Cal. 3d 12, 24, 582 P.2d 1000, 1007, 148 Cal. Rptr. 409, 416 (1978) (stating that a felon's temporary possession of a firearm for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, and its use without a preconceived plan or design on the part of the felon, does not constitute possession within the terms of California Penal Code § 12021).

15. CAL. PENAL CODE § 594.1(e), (f) (amended by Chapter 605); see *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 906, 844 P.2d 534, 542, 16 Cal. Rptr. 2d 215, 223 (1993) (holding that a local ordinance, which prohibited retailers from displaying aerosol paint containers where they would be accessible by the public, was not preempted by California Penal Code § 594.1, because the express preemption provision in the statute when originally enacted was not carried over into its later amendment). See generally Jennifer Kerr, *Graffiti Vandals to Lose Right to Drive—New Law Allows Courts to Suspend Licenses of Teens Caught Defacing Public Places*, S.F. CHRON., Dec. 26, 1990, at C21 (declaring that San Francisco spent over two million dollars and the city of Los Angeles over nine million dollars to clean up graffiti last year and that an 18-year old was accused of painting the word "Chaka" on 10,000 traffic signs and various other objects in Southern California, causing approximately \$500,000 in damage).

16. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (holding that the Fourteenth Amendment gives the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others, and "the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective"); *Hernandez v. DMV*, 30 Cal. 3d 70, 79, 634 P.2d 917, 922, 177 Cal. Rptr. 566, 571 (1981) (stating that the law need not be logically consistent in its aim in every respect to be constitutional and that it is enough that there is an evil at hand for correction, and that the particular legislative measure might be thought a rational way to correct it); *In re Arthur W.*, 171 Cal. App. 3d 179, 186, 217 Cal. Rptr. 183, 186-87 (1985) (stating that age is not recognized under either the California or the federal Constitution as a suspect classification).

17. CAL. PENAL CODE § 594.1(e)(2)(A)-(C) (amended by Chapter 605); see *id.* (authorizing the court to order, as a condition of probation, a defendant to perform 100 hours of community service for the first conviction, 200 hours for a second conviction under this section, and 300 hours for any subsequent convictions).

18. See *id.* § 466 (West 1988) (defining burglars' tools as a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water-pump pliers, slide-hammer, slimjim, tension bar, lock pick gun, tubular lock pick, floor-safe door puller, master key, or other instrument or tool).

19. See *id.* (defining building as also including railroad car, aircraft, vessel, trailer coach, or vehicle).

person who possesses a masonry, glass, or carbide drill bit, a glass cutter, a grinding stone, an awl, a chisel, or a carbide scribe, with the intent to commit vandalism or graffiti, is guilty of a misdemeanor.²¹

Under existing law, any person who writes, sprays, scratches, or affixes graffiti on property not the person's own, or on government facilities or vehicles, is guilty of an infraction.²² Chapter 605 increases the community service to be performed for a first conviction, and increases the punishment for subsequent convictions for affixing graffiti when the defendant has prior, separate convictions for vandalism or graffiti.²³ Chapter 605 also provides that any person who commits graffiti or vandalism offenses²⁴ on or within 100 feet of a highway or appurtenance²⁵ is guilty of a misdemeanor.²⁶

20. *Id.*

21. *Id.* § 594.2(a) (enacted by Chapter 605); *see id.* § 594.2(b) (specifying that, as a condition of probation for any violation of this provision, the court may order the defendant to perform community service not to exceed 90 hours).

22. *Id.* §§ 640.5(a), 640.6(a) (amended by Chapter 605); *see id.* § 640.5(a) (amended by Chapter 605) (stating that any person who affixes graffiti on the facilities or vehicles of governmental agencies, causing less than \$250 damage, is guilty of an infraction, punishable by a fine not to exceed \$250 and also by up to 48 hours of community service); *id.* § 640.6(a)-(b)(1) (amended by Chapter 605) (stating that any person who affixes graffiti to real or personal property not the person's own, causing less than \$250 damage, is guilty of an infraction, punishable by a fine not to exceed \$250 and community service not to exceed 48 hours for the first conviction and not to exceed 96 hours for subsequent convictions); *see also id.* § 19.6 (West Supp. 1993) (providing that infractions are not punishable by imprisonment, that a person charged with an infraction is not entitled to a jury trial or have the public defender or other counsel at public expense represent him, unless the person is arrested and not released); *id.* § 19.8 (West Supp. 1993) (stating that an infraction is punishable by a fine not exceeding \$250).

23. *Id.* §§ 640.5(a)-(c), 640.6(a)-(c) (amended by Chapter 605); *see id.* §§ 640.5(a)-(c) (amended by Chapter 605) (making the sentence for a first conviction an infraction with a fine not to exceed \$500 and a minimum of 24 and a maximum of 100 hours of community service; a second conviction a misdemeanor, with imprisonment in a county jail not to exceed six months, a fine up to \$1000, and, as a condition of probation, a minimum of 48 and a maximum of 200 hours of community service; a third conviction a misdemeanor, with imprisonment in a county jail not to exceed one year, and, as a condition of probation, community service of up to 300 hours); *id.* § 640.6(a)-(c) (amended by Chapter 605) (making the sentence for a first conviction an infraction with a fine not to exceed \$250 and up to 100 hours of community service; a second conviction a misdemeanor, with imprisonment in a county jail not to exceed six months, and, as a condition of probation, up to 200 hours of community service; a third conviction a misdemeanor, with imprisonment in a county jail not to exceed one year, and as a condition of probation, community service of up to 300 hours).

24. *See id.* § 640.7(a) (enacted by Chapter 605) (specifying that violations of California Penal Code §§ 594, 640.5, and 640.6 are punishable as vandalism and graffiti offenses).

25. *See id.* (providing that appurtenances include, but are not limited to, guard rails, signs, traffic signals, snow poles, or similar facilities, but excludes signs naming streets).

26. *Id.*; *see id.* (providing that a violation of this provision is a misdemeanor, punishable by a fine not to exceed \$1000 and to six months imprisonment in a county jail, and on the second conviction, by a fine not to exceed \$1000 and up to one year imprisonment in a county jail); *id.* § 640.7(b) (enacted by Chapter 605) (specifying that as a condition of probation, the court may order the defendant to perform 100 hours of community service; on the second conviction for this offense, 200 hours of community service; and for the third or subsequent convictions, 300 hours of community service).

Existing law authorizes a court to impose and require any or all of specified terms of imprisonment, fines, and other reasonable conditions of probation upon a defendant convicted of a crime.²⁷ Chapter 605 requires a court to consider, except as specified, whether any defendant, who has been convicted of a nonviolent and nonserious offense and ordered to participate in community service as a condition of probation, will be required to engage in graffiti removal to satisfy that service.²⁸

Existing law authorizes any county correctional facility to offer a work release program, consisting of specified manual labor, under which a person may voluntarily participate and each day of participation will be in lieu of one day of confinement.²⁹ Chapter 605 authorizes a work release

27. *Id.* § 1203.1 (amended by Chapter 605); *see* *People v. Lent*, 15 Cal. 3d 481, 486, 541 P.2d 545, 548, 124 Cal. Rptr. 905, 908 (1975) (holding that a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality); *People v. Fritchey*, 2 Cal. App. 4th 829, 835-36, 3 Cal. Rptr. 2d 585, 589 (1992) (stating that once a court grants probation, it has broad discretion to prescribe reasonable probation conditions to foster rehabilitation and to protect the public, but that an imposed condition must serve a purpose specified in California Penal Code § 1203.1, which has as its major goal the rehabilitation of the criminal, and thus limits the measure of authority the court may exercise); *People v. Dailey*, 235 Cal. App. 3d Supp. 13, 19, 286 Cal. Rptr. 772, 776 (1991) (stating that probation conditions not specifically authorized by statute are generally authorized by California Penal Code § 1203.1, which allows imposition of any reasonable conditions which the court may determine are fitting and proper, and should be sustained if they are reasonable under all the circumstances of the case, unless precluded by either the federal or state constitution or a federal or state statute); *People v. Gilchrist*, 133 Cal. App. 3d 38, 44, 183 Cal. Rptr. 709, 712 (1982) (holding that the power of the court with regard to probation is entirely statutory, and the court cannot impose a probation period which extends beyond the maximum allowed by statute); *see also* 32 Op. Cal. Att'y Gen. 48, 49 (1958) (providing that a court may not remand a probationer directly to an industrial farm or road camp, but must be remanded into the custody of the sheriff to be committed to the facility). *See generally* Richard J. Hanscom, *Probation—The Quiet Revolution*, 50 CAL. ST. B.J. 182, 184 (1975) (discussing the general rules for determining reasonable probation conditions under California Penal Code § 1203.1); Thomas F. McBride & George W. McClure, *The Conditions of Probation*, 29 CAL. ST. B.J. 44, 44 (1954) (discussing conditions of probation and whether they are reasonable within the meaning of California Penal Code § 1203.1).

28. CAL. PENAL CODE § 1203.1(g)(1) (amended by Chapter 605); *see id.* § 1203.1(g)(1)(A)-(D) (amended by Chapter 605) (providing that a nonserious offense shall not include offenses in violation of the Dangerous Weapons' Control Law, California Penal Code § 12000; offenses involving the use of a dangerous or deadly weapon, including all violations of California Penal Code § 417; offenses involving the use or attempted use of violence against the person of another or involving injury to a victim; and offenses involving the annoying or molesting of children); *id.* § 1203.1(g)(2)(A)-(B) (amended by Chapter 605) (stating that the court and the prosecuting attorney need not consider a defendant eligible for graffiti removal if he or she was convicted of a violent felony under California Penal Code § 667.5(c) or a serious felony under California Penal Code § 1192.7(c) or the judge believes the defendant may pose a danger to the community).

29. *Id.* § 4024.2(a) (amended by Chapter 605); *see id.* § 4024.2(b)(1)-(2) (authorizing that the work release program shall consist of manual labor to improve or maintain public facilities or levees, manual labor in support of nonprofit organizations, or participation in education, vocational, or substance abuse programs, but at a minimum, at least one-half of the total work release hours must consist of manual labor); *id.* § 4024.2(b)(1)(D) (amended by Chapter 605) (providing that any person not able to perform manual labor because of a medical condition, physical disability, or age, may participate in a work release program involving any other type of designated and approved public sector work); *see also* 66 Op. Cal. Att'y Gen. 27, 27 (1983) (stating that a person sentenced to jail for drunk driving may, if authorized by the county under California Penal Code §

program to include the performance of graffiti cleanup for local government entities.³⁰

Existing law authorizes, for each conviction of a person for violations involving vandalism, the court to suspend or delay issuance of the person's driving privilege for one year.³¹ Chapter 605 would also extend this provision to apply to vandalism involving spraying, scratching, or writing on a surface.³²

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4024.2, perform 10 hours of labor on public works in lieu of one day of confinement or if serving a term of 48 or 96 hours for drunk driving, may satisfy his or her sentence by performing public labor of 20 or 40 hours, respectively).

30. CAL. PENAL CODE § 4024.2(b)(1)(C) (amended by Chapter 605).

31. CAL. VEH. CODE § 13202.6(a)(1) (amended by Chapter 605); *see also New Law: Do Graffiti, Lose License*, SEATTLE TIMES, Jan. 6, 1991, at A11 (noting that California is the first state to punish graffiti vandals by suspending driving privileges, but that at least 15 states, including California, suspend driver's licenses for underage drinking, and that some states have suspended licenses of high school dropouts and truants). *See generally* Greg Lucas, *Check Identification, Graffiti Bills Signed*, S.F. CHRON., Sept. 13, 1990, at A13 (stating that Senator Quentin Kopp, the bill's author, feels that there are few things as important to teenagers as their driving privilege and that threatening to revoke it for one year will serve as a powerful deterrent to writing graffiti, while opponents object to the lack of relationship between graffiti and driving).

32. CAL. VEH. CODE § 13202.6(d) (amended by Chapter 605).

Crimes; habitual sexual offenders

Penal Code § 667.71 (new).

SB 41 (Presley); 1993 STAT. Ch. 590

Existing law defines and establishes punishments for sex crimes against the person, including but not limited to rape,¹ penetration with a foreign object,² sodomy,³ and oral copulation.⁴

Chapter 590 establishes the definition of "habitual sexual offender."⁵

1. See CAL. PENAL CODE § 261 (West Supp. 1993) (defining rape); *id.* § 264 (West Supp. 1993) (providing the punishment for the crime of rape); see also *People v. Kelley*, 1 Cal. 4th 495, 524, 822 P.2d 385, 399, 3 Cal. Rptr. 2d 677, 691 (1992) (holding that rape requires the victim to be alive; however, a person who attempts to rape a live victim, kills the victim and then has intercourse with the body has committed an attempted rape), *cert. denied*, 121 L. Ed. 2d 168 (1992); *People v. Jeff*, 204 Cal. App. 3d 309, 328-29, 251 Cal. Rptr. 135, 145-47 (1988) (holding that it must be established that the intercourse was against the victim's will and that the victim must fear immediate and unlawful bodily injury or that the rape was completed through force, violence, menace, or duress); *People v. Burnham*, 176 Cal. App. 3d 1134, 1140, 222 Cal. Rptr. 630, 635 (1986) (holding that rape requires only a general criminal intent); *People v. Vela*, 172 Cal. App. 3d 237, 243, 218 Cal. Rptr. 161, 165 (1985) (holding that each act of non-consensual sexual penetration of a victim constitutes a separate rape offense). See generally 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* §§ 768-778 at 869-78 (2d ed. 1988) (discussing the crime of rape and its elements).

2. See CAL. PENAL CODE § 289 (West Supp. 1993) (defining rape by a foreign object); *id.* § 264.1 (West 1988) (providing the punishment for the crime of rape or object rape while acting in concert with another person); see also *People v. Harrison*, 48 Cal. 3d 321, 329, 768 P.2d 1078, 1082, 256 Cal. Rptr. 401, 405 (1989) (holding that, under California Penal Code § 289, a separate violation is committed each time a new and separate penetration, however slight, occurs); *People v. Wilcox*, 177 Cal. App. 3d 715, 717, 223 Cal. Rptr. 170, 171 (1986) (establishing that a finger is a foreign object). See generally 2 WITKIN & EPSTEIN *supra* note 1, § 792 at 894-96 (discussing the crime of penetration with a foreign object).

3. See CAL. PENAL CODE § 286(a) (West Supp. 1993) (defining sodomy); see also *People v. Thompson*, 50 Cal. 3d 134, 172, 785 P.2d 857, 878, 266 Cal. Rptr. 309, 330 (1990) (stating that a person who commits an act of sodomy on a child may be convicted of both sodomy and lewd and lascivious conduct with a child), *cert. denied*, 498 U.S. 881 (1988); *People v. Martinez*, 188 Cal. App. 3d 19, 24, 232 Cal. Rptr. 736, 739 (1986) (holding that any sexual penetration, however slight, is sufficient to complete the crime of sodomy); *People v. Thornton*, 11 Cal. 3d 738, 765, 523 P.2d 267, 285, 114 Cal. Rptr. 467, 485 (1974) (establishing that only general intent is required in offenses of sexual perversion). See generally 2 WITKIN & EPSTEIN, *supra* note 1, §§ 782-783 at 881-85 (discussing the crime of sodomy and its elements).

4. CAL. PENAL CODE §§ 261-266 (West 1992 & Supp. 1993); see *id.* § 288(a) (West Supp. 1993) (defining oral copulation); *People v. Muniz*, 213 Cal. App. 3d 1508, 1517, 262 Cal. Rptr. 743, 747 (1989) (holding that forcible oral copulation does not require a specific intent or purpose). See generally 2 WITKIN & EPSTEIN, *supra* note 1, §§ 784-785 at 885-89 (discussing the crime of oral copulation and its elements).

5. CAL. PENAL CODE § 667.71 (enacted by Chapter 590); see *id.* § 667(a) (West Supp. 1993) (establishing the definition for habitual criminal as being a person who has previously served at least one prison term for one or more of the offenses listed in paragraph (2) of § 261(a), § 264.1, § 289(a) of the California Penal Code, or of committing sodomy or oral copulation in violation of § 286 or § 288(a) by force, violence, duress, menace, or fear of unlawful and immediate bodily injury on the victim or another person and is convicted in the present proceeding of at least two of the specified offenses against at least two separate victims or is convicted of at least three of the delineated offenses against at least three separate victims); see also *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (holding that recidivist statutes authorizing heavier or enhanced sentences for subsequent offenses do not violate the Eighth Amendment prohibiting cruel and unusual

Chapter 590 further provides that a habitual sexual offender who is, in one proceeding, convicted of two separate offenses against at least two separate victims may be sentenced to twenty-five years in prison.⁶ Additionally, Chapter 590 provides that a habitual sexual offender who is convicted in one proceeding of at least three separate offenses against at least three separate victims may be subject to imprisonment for twenty-five years to life.⁷

punishment); *People v. Crocket*, 222 Cal. App. 3d 258, 265, 271 Cal. Rptr. 500, 504 (1990) (holding that enhancements for prior convictions are intended to increase penalties for repeat offenders in the hope of deterring recidivism); cf. COLO. REV. STAT. § 18-3-412 (1986) (defining habitual sexual offender against children); OHIO REV. CODE ANN. § 2950.01(a) (Baldwin 1993) (defining habitual sexual offender to include any person who is convicted two or more times, in separate criminal actions of specified sex offenses); UTAH CODE ANN. § 76-3-407 (1990) (establishing additional prison time for repeat and habitual sexual offenders); *Hendking v. Smith*, 781 F.2d 850, 852 (11th Cir. 1986) (stating that sex offenders are subject to a continually recurring physiological urge and therefore require the imposition of effective restraint); *Funk v. State*, 427 N.E.2d 1081, 1086 (Ind. 1981) (holding that the Indiana habitual offender statute is not unconstitutional for punishing one convicted under it for a status); *Rolack v. Commonwealth*, 514 S.W.2d 47, 49, (Ky. 1974) (holding that the imposition of a life sentence under Kentucky's habitual criminal statute is neither cruel nor unusual punishment).

6. CAL. PENAL CODE § 667.71(b) (enacted by Chapter 590); *see id.* (stating that Article 2.5 of Chapter 7 of Title 1 of Part 3 of the California Penal Code shall apply to reduce the prison term imposed by Chapter 590; however, no habitual offender sentenced under the provisions of Chapter 590 may be paroled unless at least 20 years of incarceration has transpired); *id.* § 667.71(d) (enacted by Chapter 590) (stating that in lieu of the punishments specified in (b) and (c), the court shall order, at the request of the prosecutor, that the defendant be punished pursuant to California Penal Code §§ 1170.1, 667.6, or 667.7 if applicable); *Minnesota v. Ramsey County*, 309 U.S. 270, 273-74 (1940) (upholding a sentencing statute that allowed commitment procedures to be brought against habitual sexual offenders and finding that the law does not deny equal protection of the laws); *People v. Warner*, 20 Cal. 3d 678, 689, 574 P.2d 1237, 1243, 143 Cal. Rptr. 885, 891 (1978) (stating the paramount concern in sentencing must be the protection of society); *People v. Preciado*, 116 Cal. App. 3d 409, 412, 172 Cal. Rptr. 107, 108-09 (1981) (holding that the severity of the defendant's sentence was directly proportionate to the number and violence of his crimes and further holding that the mandatory imposition of consecutive sentences for violent rapes does not constitute cruel and unusual punishment); cf. UTAH CODE ANN. § 76-3-407 (1990) (establishing additional prison terms for repeat and habitual sexual offenders); *People v. Carmickle*, 360 N.E.2d 794, 797 (Ill. 1977) (stating that the Illinois Constitution requires penalties to be decided according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship which requires the sentencing judge to look at the circumstances attending the offense); *Johnson v. State*, 537 N.E.2d 1191, 1193 (Ind. 1989) (stating that aggravating circumstances may serve as guidelines, however, they do not limit the matters which the judge may consider in determining the proper sentence to proscribe). *See generally* *People v. Valencia*, 207 Cal. App. 3d 1042, 1046, 255 Cal. Rptr. 180, 183 (1989) (stating that the court should not have discretion to order enhancement terms to be concurrent of one another); *People v. Wallace*, 169 Cal. App. 3d 406, 410, 215 Cal. Rptr. 203, 205 (1985) (holding that, where two sentencing enhancement statutes overlap, no federal equal protection violation necessarily occurs when a defendant is charged under the more harsh statute); *People v. Weaver*, 161 Cal. App. 3d 119, 126, 207 Cal. Rptr. 419, 424 (1984) (holding that, where a sentenced was enhanced 15 years because of three prior serious felony convictions, it was not unconstitutional as constituting cruel and unusual punishment); Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need To Bar Unreliable Psychiatric Predictions of Dangerousness From Civil Commitment Proceedings*, 39 UCLA L. REV. 213 (discussing Washington's violent sexual predator law and whether it may be successfully challenged under the United States Constitution); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes*, 106 HARV. L. REV. 1314 (1993) (discussing the constitutionality of penalty enhancements for hate crimes); Robb London, *Strategy on Sex Crimes Is Prison, Then Prison*, N.Y. TIMES, Feb. 8, 1991, at B16 (discussing the civil commitment of habitual sexual offenders).

7. CAL. PENAL CODE § 667.71(c) (enacted by Chapter 590).

For the purposes of Chapter 590, prosecutorial jurisdiction is authorized in any county where at least one of the offenses occurred.⁸ Chapter 590 shall apply if the defendant's habitual sexual offender status is alleged in the information and is either admitted by the defendant in court or found by the jury to be true, or established by a plea of guilty or nolo contendere or by trial by a court without a jury.⁹

DMB/JVE

Crimes; kidnapping—habitual child molesters

Penal Code § 667.72 (new).

AB 526 (Brown, V.); 1993 STAT. Ch. 558

Under existing law, a person who commits the offenses of sodomy,¹ lewd and lascivious acts,² or oral copulation,³ when the victim is under

8. *Id.* § 667.71(f) (enacted by Chapter 590).

9. *Id.* § 667.71(g) (enacted by Chapter 590).

1. *See* CAL. PENAL CODE § 286(a) (West Supp. 1993) (defining sodomy); *id.* § 286(c) (West Supp. 1993) (specifying that any person who participates in an act of sodomy with another person who is under 14 years old and who is more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or another person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished in the state prison for three, six, or eight years); *People v. Thompson*, 50 Cal. 3d 134, 171, 785 P.2d 857, 877, 266 Cal. Rptr. 309, 329 (1990) (finding that evidence of sperm in the boy victim's body is in itself sufficient evidence of sodomy).

2. *See* CAL. PENAL CODE § 288(a) (West Supp. 1993) (stating that any person who willfully commits lewd or lascivious acts upon or with the body, or any part or member thereof, of a child under the age of 14 with the intent of arousing, appealing to or gratifying the lust, passions, or sexual desires of that person or child, shall be guilty of a felony and shall be imprisoned in the state prison for three, six, or eight years); *id.* § 288(b) (West Supp. 1993) (specifying that any person who commits an act described in § 288(a) by use of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person is punishable by imprisonment in the state prison for three, six, or eight years); *People v. Jones*, 51 Cal. 3d 294, 316, 792 P.2d 643, 655, 270 Cal. Rptr. 611, 623-24 (1990) (stating that in determining the sufficiency of a victim's testimony, the court must not focus on the youth of the victim, but the victim must describe: (1) The kind of acts committed with sufficient specificity to assure that the conduct has occurred and to differentiate between the various types of conduct; (2) the number of acts with sufficient certainty; and (3) the general time period in which the acts occurred); *People v. Gilbert*, 5 Cal. App. 4th 1372, 1380, 7 Cal. Rptr. 2d 660, 664 (1992) (stating that the lewd and lascivious act need not be inherently sexual in nature, nor must it be shown that the offender touched the child's private parts); *id.* (stating that the crime is committed by any touching of the child with the requisite intent and that the purpose of the perpetrator in touching the child is the controlling factor to be considered); *People v. Newlun*, 227 Cal. App. 3d 1590, 1601, 278 Cal. Rptr. 550, 555 (1991) (holding that the defendant's convictions on 15 counts of lewd and lascivious acts with a child under 14 were supported by sufficient evidence despite the defendant's contention that the victim failed to establish with

fourteen years old and is more than ten years younger than the person, has committed a felony⁴ and is punishable by imprisonment in the state prison for three, six, or eight years.⁵

Chapter 558 defines a habitual child molester as a person who has previously served a prison term for sodomy, lewd and lascivious acts, or oral copulation, who kidnapped⁶ a victim under the age of fourteen at the time of the offense, for the purpose of committing that sexual offense, and is convicted in a present proceeding of that same offense against two or more separate victims.⁷

specificity the kind or number of acts the defendant committed).

3. See CAL. PENAL CODE § 288a(a) (West Supp. 1993) (defining oral copulation); *id.* § 288a(c) (West Supp. 1993) (stating the punishment of imprisonment in the state prison for three, six, or eight years shall be given to any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, or by threatening to retaliate in the future against the victim or any other person and there is a reasonable possibility that the perpetrator will execute the threat).

4. See *id.* § 17(a) (West Supp. 1993) (defining felony).

5. *Id.* §§ 286(c), 288(b), 288a(a) (West Supp. 1993).

6. See *id.* § 207(b) (West Supp. 1993) (providing that any person who, for the purpose of committing any act defined in § 288, hires, persuades, entices, decoys or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state or county, or into another part of the same county is guilty of kidnapping); *People v. Daly*, 8 Cal. App. 4th 47, 56-7, 10 Cal. Rptr. 2d 21, 26-7 (1992) (stating that movement or asportation must be substantial to satisfy the element of kidnapping and finding that moving the victim forty feet in an unsuccessful effort to get her into a van was legally insufficient to support a conviction for kidnapping); *People v. Magana*, 230 Cal. App. 3d 1117, 1121, 281 Cal. Rptr. 338, 340 (1991) (finding that the victim's testimony that the defendant forced her to walk at least half a mile was sufficient movement to sustain a kidnapping conviction); *cf.* 18 U.S.C. § 1201 (1988 & Supp. II 1990) (setting forth the Federal Kidnapping Act); *United States v. Peden*, 961 F.2d 517, 523 (5th Cir. 1992) (finding that the victim's testimony in combination with the defendant's admission that he had sex with the victim was sufficient to support the finding that sexual gratification was the defendant's object in the asportation which was sufficient to support a conviction for kidnapping); *United States v. Duncan*, 855 F.2d 1528, 1536 (11th Cir. 1988) (finding that the defendant's motivation of rape was admissible to show that the defendant kidnapped for a benefit, a required element of an offense under title 18, section 1201 of the United States Code).

7. CAL. PENAL CODE § 667.72(a) (enacted by Chapter 558); see SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 526, at 2, (June 22, 1993) (indicating that there is a small class of criminals who are responsible for a large number of violent repeat attacks, which continues to prey on vulnerable and innocent children and stating that criminals who kidnap and sexually assault young children usually repeat the offense, if given the chance); *cf.* COLO. REV. STAT. § 18-3-412 (1986) (setting forth the punishment for habitual sex offenders against children); MO. ANN. STAT. § 558.018 (Vernon Supp. 1993) (defining "persistent sexual offender" and specifying that the term of imprisonment for one found to be a persistent sexual offender shall be not less than 30 years without probation or parole); *People v. Harper*, 796 P.2d 4, 6 (Colo. Ct. App. 1989) (holding that Colorado Revised Statutes § 18-3-412 did not apply to a defendant convicted of sexual assault on a child who also had a prior conviction for the same offense where the defendant was not charged under the provisions of that statute); *State v. Nevels*, 712 S.W.2d 688, 690-91 (Mo. Ct. App. 1986) (stating that a defendant must raise the issue of whether the persistent sexual offender statute is constitutional at the first available opportunity and that if the issue is not raised, it will not be preserved for appellate review); *State v. Williams*, 700 S.W.2d 451, 453-54 (Mo. banc. 1985) (holding that the state's persistent sexual offender statute is constitutionally valid despite its failure to specify precise procedural rules for the trial court's guidance); *State v. Davis*, 663 S.W.2d 301, 306 (Mo. Ct. App. 1983) (stating that an enhanced sentence imposed upon a

Under Chapter 558, habitual child molesters are punishable by twenty-five years in the state prison, which may be reduced under certain provisions of the Penal Code.⁸ However, a habitual child molester will not be released on parole until he or she has served at least twenty years in the state prison.⁹ Chapter 558 provides that the prosecutor may request that the court order the defendant to be punished in various other specified manners¹⁰ in lieu of the twenty-five year prison sentence.¹¹

Chapter 558 specifies that the allegations of the defendant's status as a habitual child molester must be alleged in the information,¹² and either admitted by the defendant in open court, found to be true by the jury or

defendant as a persistent sexual offender was a valid exercise of judicial authority). Most other states have enacted statutes which prescribe enhanced punishment for habitual offenders, although not specifically habitual sex offenders. *See, e.g.*, ALA. CODE § 13A-5-9 (1982); ARK. CODE ANN. § 5-4-501 (Michie Supp. 1993); D.C. CODE ANN. § 22-104 (1989); IDAHO CODE § 19-2514 (1987); IND. CODE ANN. § 35-50-2-8 (West Supp. 1993); KY. REV. STAT. ANN. § 532.080 (Baldwin 1993); MASS. GEN. L. ANN. ch. 279, § 25 (West 1993); NEB. REV. STAT. § 29-2221 (1989); NEV. REV. STAT. § 207.010 (1991); N.M. STAT. ANN. § 31-18-17 (Michie Supp. 1993); N.Y. PENAL LAW § 70.10 (Consol. 1987); R.I. GEN. LAWS § 12-19-21 (Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 22-7-7, 22-7-8 (1988 & Supp. 1993); VT. STAT. ANN. tit. 13, § 11 (1974); W. VA. CODE § 61-11-18 (1992); WYO. STAT. § 6-10-201 (1988).

8. CAL. PENAL CODE § 667.72(b) (enacted by Chapter 558); *see id.* §§ 2930-2935 (West Supp. 1993) (setting forth circumstances under which a prison term may be reduced, including good behavior and participation, worktime credits, and performance of heroic or exceptional assistance); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 526, at 2, (June 22, 1993) (stating that Chapter 558 would assure that repeat offenders who kidnap and rape young children will be sentenced to suitably long terms of imprisonment and have diminished opportunities to re-offend). *See generally* U.S. CONST. amend. VIII, § 1 (stating that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted); State v. Katura, 837 S.W.2d 547, 550-51 (Mo. Ct. App. 1992) (holding that a 30-year sentence under the persistent sexual offender statute did not constitute cruel and unusual punishment); Virgin v. State, 792 P.2d 1186, 1186-88 (Okla. Crim. App. 1990) (holding that sentences of 150 years imprisonment for each count of forcible oral sodomy and lewd or indecent acts with a child under the age of 16 were not excessive considering the nature of the offenses and defendant's two prior convictions, one of which was for child molestation); State v. Koonce, 731 S.W.2d 431, 444 (Mo. Ct. App. 1987) (holding that defendant's consecutive sentences of 30 years each, based on defendant's stipulation that he had previously been convicted of rape and was a persistent sexual offender, were mandated by § 558.018 and were not disproportionate to the offenses).

9. CAL. PENAL CODE § 667.72(b) (enacted by Chapter 558). *See generally* Jim Zook, *Longer Terms for Felons Keeping Jails Crowded*, HOUSTON CHRON., Dec. 13, 1991, at A1 (discussing the shortage of county jail and state prison space in Texas as a result of state-mandated enhanced prison sentences for habitual offenders).

10. *See* CAL. PENAL CODE § 667.6(a) (West Supp. 1993) (providing for sentence enhancement for prior sex offenses and for the imposition of a \$20,000 fine); *id.* § 667.7 (West 1988) (setting forth punishment for habitual offenders who use force likely to cause great bodily harm); *id.* § 667.8 (West 1988) (providing sentence enhancements for any person convicted of §§ 286, 288 or 288a who, for the purpose of committing that sexual offense, kidnapped the victim who was younger than 14 years at the time); *id.* § 1170.1 (West Supp. 1993) (setting forth punishment for two or more felony convictions); *see also* People v. Hernandez, 46 Cal. 3d 194, 197, 757 P.2d 1013, 1013, 249 Cal. Rptr. 850, 850 (1988) (holding that a rape defendant could not be sentenced to an additional three-year term under § 667.8 where a violation of that section was not pled or proven at trial).

11. CAL. PENAL CODE § 667.72(c) (enacted by Chapter 558).

12. *See generally* State v. Stapleton, 661 S.W.2d 620, 621-622 (Mo. Ct. App. 1983) (finding that where the second amended information pled that the defendant was a persistent offender, there was no error in the prosecutor's waiting until final disposition to raise the persistent sexual offender act as a basis for enhanced punishment).

a court sitting without a jury, or found to be true where guilt is established by a plea of guilty or nolo contendere.¹³

LTE

Crimes; licenses to carry concealed firearms

Penal Code § 12053 (repealed, new, and amended); §§ 11106, 12050, 12051, 12054 (amended).

AB 155 (Connolly); 1993 STAT. Ch. 1167

Under existing law, the sheriff¹ or head of a municipal police department² may issue a license to carry a concealed firearm³ upon the person.⁴ Chapter 1167 prohibits issuance of the license if the Department

13. CAL. PENAL CODE § 667.72(e) (enacted by Chapter 558).

1. See CAL. CIV. PROC. CODE § 17 (West 1982) (defining sheriff as including constables and marshals); CAL. PENAL CODE § 832.3 (West Supp. 1993) (setting forth training standards for sheriffs).

2. See CAL. HEALTH & SAFETY CODE §§ 20000-20332 (West 1992) (regulating the establishment of police protection districts).

3. See CAL. PENAL CODE § 12001(a) (West Supp. 1993) (defining pistol, revolver, and firearm capable of being concealed upon the person as including any device designed to be used as a weapon which propels a projectile by force of combustion and which has a barrel less than 16 inches in length); 58 Op. Cal. Att'y Gen. 777, 777 (1975) (declaring that a Taser TF-1 weapon is a firearm capable of being concealed upon the person); cf. D.C. CODE ANN. § 22-3201(a) (1981) (defining pistol); MD. ANN. CODE art. 27, § 36F(b) (1992) (defining handgun as any pistol, revolver, or other firearm capable of being concealed on the person); ORE. REV. STAT. § 166.210(4) (1991) (defining handgun as any conventional pistol or revolver which: (1) Uses a fixed cartridge and contains a propellant charge, primer, and projectile; (2) is designed to be fired otherwise than from the shoulder; and (3) fires only a single shot for each pull of the trigger); S.D. CODIFIED LAWS ANN. § 22-1-2(32) (1988) (defining pistol as any firearm with a barrel less than 16 inches and is designed to expel a projectile by action of an explosive); Strong v. United States, 581 A.2d 383, 385 (D.C. 1990) (stating that an air pistol does not constitute a pistol for purposes of a statute prohibiting carrying dangerous weapons).

4. CAL. PENAL CODE § 12050(a) (amended by Chapter 1167); see *id.* § 7 (West 1988) (defining person); *id.* § 12050 (a)(1)-(2) (amended by Chapter 1167) (authorizing the issuance of a license to carry concealed firearms upon proof that the applicant is of good moral character, good cause exists to issue the license, and the applicant is a resident of the county); *id.* § 12050 (amended by Chapter 1167) (regulating the issuance of licenses to carry concealed firearms capable of being concealed upon the person); *id.* § 12054(a) (amended by Chapter 1167) (permitting the Department to charge a fee not to exceed three dollars for processing a renewal application or an application for a new license); *id.* § 12025 (West Supp. 1993) (describing the criteria and punishment for the crime of carrying a concealed firearm); Salute v. Pitchess, 61 Cal. App. 3d 557, 560-61, 132 Cal. Rptr. 345, 347 (1976) (stating that the duty of the sheriff is to make a determination of good cause on an individual basis for every application of licensed private investigators seeking a permit to carry concealed weapons); 62 Op. Att'y Gen. 508, 508 (1979) (declaring that a reserve police officer is ineligible to receive a concealed firearm permit if that officer does not reside in the county in which the city is located); cf. COLO. REV. STAT. §§ 30-10-523, 31-4-112.1 (1992) (authorizing the chief of police and the sheriff of each county to issue permits to carry concealed weapons); FLA. STAT. ANN. § 790.06(2) (West Supp. 1993) (requiring the Department

of Justice (Department) determines that the person is within a prohibited class of persons.⁵ If, at any time, the licensing authority is notified by the Department, or determines that a licensee is within the prohibited class of persons, Chapter 1167 requires the licensing authority to revoke the license.⁶ Chapter 1167 additionally permits a licensee, under certain circumstances, to apply for an amendment to a license to carry a concealed firearm.⁷

of State to issue a license to carry a concealed weapon upon the applicant meeting specified criteria); ME. REV. STAT. tit. 25, § 2003 (1992) (setting forth specific criteria for issuance of a permit to carry a concealed firearm); 18 PA. CONS. STAT. ANN. § 6109(B) (1993) (stating that applications to carry concealed firearms are to be filed with the county sheriff or with the chief of police); *MacNutt v. Police Comm'r of Boston*, 572 N.E.2d 577, 579 (Mass. App. Ct. 1991) (holding that a statute, which permits issuance of a license to carry a concealed weapon to "suitable persons" for a "proper purpose" does not infringe on any protected liberty or property right).

5. CAL. PENAL CODE § 12050(d) (amended by Chapter 1167); *see id.* § 17(a) (West Supp. 1993) (defining felony); *id.* § 12050(d) (amended by Chapter 1167) (prohibiting the issuance of a license to carry a concealed pistol if the Department determines that the applicant is within the class of persons described in California Penal Code §§ 12021, 12021.1 or California Welfare and Institutions Code §§ 8100, 8103); *see also id.* § 12021 (West Supp. 1993) (prohibiting any person who has been convicted of a felony from owning or possessing a firearm); *id.* § 12021.1 (West 1992) (providing that persons convicted of specified violent offenses, who own or possess any firearm, are guilty of a felony); *id.* § 12021(b)(1)-(26) (West 1992) (enumerating the specific violent offenses); CAL. WELF. & INST. CODE § 8100 (West Supp. 1993) (prohibiting possession or ownership of a firearm by a person determined to be a danger to himself or others and certain mentally disordered persons); *id.* § 8103 (West Supp. 1993) (stating that any person, who has been adjudicated as a danger to others or as a mentally disordered sex offender, or has been found not guilty by reason of insanity of certain crimes, must not have possession or custody of a firearm); *Dickerson v. State*, 517 So. 2d 625, 627 (Ala. Crim. App. 1986) (declaring that a statute which prohibits owning or possessing a pistol after having been convicted if a felony is not unconstitutional); *State v. Ortiz*, 546 A.2d 338, 339 (Conn. App. Ct. 1988) (stating that a statute prohibiting possession of a pistol by a person previously convicted of a crime does not violate due process).

6. CAL. PENAL CODE § 12050(e)(1) (amended by Chapter 1167); *see id.* (authorizing the licensing authority to revoke a license to carry a concealed pistol upon the person if either the Department or the licensing authority determine that the licensee is within the class of persons described in California Penal Code §§ 12021, 12021.1 or California Welfare and Institutions Code §§ 8100, 8103); *id.* § 12050(2) (amended by Chapter 1167) (requiring the Department to notify the licensing authority if, at any time, it determines that a licensee is within a prohibited class of persons); *id.* § 12050(3) (amended by Chapter 1167) (requiring the licensing authority to notify the licensee and the Department of the revocation of a license); *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1244, 273 Cal. Rptr. 84, 89 (1990) (stating that the privilege to carry a concealed firearm is not such a significant property right so as to require a hearing prior to the revocation of the license under the Due Process Clause of the Constitution); *id.* at 1243, 273 Cal. Rptr. at 88 (declaring the sheriffs' decision to revoke a license to carry a concealed firearm highly discretionary); *id.* at 1244-45, 273 Cal. Rptr. at 89 (upholding a sheriff's revocation of a license to carry a concealed firearm where the licensee displayed a poor attitude towards police while under the influence of alcohol); *cf.* ALA. CODE § 13A-11-75 (1992) (permitting the sheriff to revoke a license upon proof that the licensee is not a proper person to be licensed); FLA. STAT. ANN. § 790.06(10) (West Supp. 1992) (setting forth conditions under which a license to carry a concealed weapon may be suspended or revoked); 18 PA. CONS. STAT. ANN. § 6109(I) (1993) (stating that, for good cause, a license to carry a firearm may be revoked by the issuing authority).

7. CAL. PENAL CODE § 12050(f)(1)(A)-(D) (amended by Chapter 1167); *see id.* (allowing a licensee to apply for an amendment to the license in order to add or delete authority to carry a particular firearm, to authorize the licensee to carry a concealed pistol, or to change any restrictions on the license); *id.* § 12050(f)(2), (4) (amended by Chapter 1167) (stating that, when licensees change their address, new licenses will be issued reflecting the changes, and providing that a license may not be revoked solely because the licensee changed

Existing law requires the Attorney General to keep and file specified forms and records, including applications for licenses to carry concealable firearms upon the person.⁸ Chapter 1167 additionally requires the Attorney General to keep records of all issued, amended, or revoked licenses to carry a concealed firearm capable of being concealed upon the person.⁹

Under existing law, the licensing authority¹⁰ is required to keep records of any licenses issued and to file copies of those licenses with the Department.¹¹ With the enactment of Chapter 1167, the licensing authority must also maintain records of any licenses which are issued, amended, revoked, or denied, and file copies of those records with the Department.¹²

Existing law provides that any person who knowingly¹³ makes false statements, concerning specific circumstances, on an application regarding the denial or revocation of a license to carry a concealed firearm, is guilty of a felony.¹⁴ Chapter 1167 mandates that any person who knowingly makes false statements, concerning the same specific circumstances, on an

residences without applying for an amendment to that license); *id.* § 12050(f)(3) (amended by Chapter 1167) (requiring the licensing authority to issue a new license if the original license has been amended); *id.* § 12051(b) (amended by Chapter 1167) (providing that any person, who files an application to carry a concealed weapon, while knowing that the information provided is false, is guilty of a misdemeanor); *see also id.* § 17(a) (West Supp. 1993) (defining misdemeanor); *id.* § 12054(b) (amended by Chapter 1167) (permitting any city or county to charge a fee not to exceed three dollars for processing an amended license).

8. *Id.* § 11106(a) (amended by Chapter 1167); *see id.* (directing the Attorney General to maintain records of fingerprints, applications to carry firearms which are capable of being concealed upon the person, dealers' records of sales of firearms, reports filed by peace officers relating to the transfer of firearms, Law Enforcement Firearms Transfer Forms, and reports of stolen, lost, found, pledged, or pawned property).

9. *Id.* § 11106(a) (amended by Chapter 1167); *see id.* (mandating that the Attorney General maintain records of specified documents, including information supplied to the Department pursuant to California Penal Code § 12053); *id.* § 12053(b) (repealed and enacted by Chapter 1167) (specifying records relating to licenses which must be provided to the Department by the issuing authority).

10. *See id.* § 12050(a)(1)(A) (amended by Chapter 1167) (authorizing the sheriff of a county, the chief, or other head of a municipal police department to issue licenses to carry concealed weapons).

11. *Id.* § 12053(a)(3), (b)(3) (enacted by Chapter 1167); *cf.* PA. CONS. STAT. § 6109(e)(3) (1993) (directing the issuing authority to retain, for six years, a copy of the original license to carry a firearm).

12. CAL. PENAL CODE § 12053(a)-(b) (enacted by Chapter 1167).

13. *See United States v. Hester*, 880 F.2d 799, 802-03 (4th Cir. 1989) (stating that the term "knowingly," in a statute which prohibits knowingly making false statements in connection with the transfer or acquisition of a firearm, includes deliberate disregard for the truth, falsity with conscious purpose to avoid learning the truth, as well as actual knowledge).

14. CAL. PENAL CODE § 12051(c)(1)-(7) (amended by Chapter 1167); *see id.* (providing that any person, who makes a false statement regarding a criminal conviction, a finding of not guilty by reason of insanity, the use of a controlled substance, a dishonorable discharge from military service, a commitment to a mental institution, or a renunciation of United States citizenship, on an application concerning the denial or revocation of a license to carry a concealed firearm is guilty of a felony); *see also United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir. 1990) (stating that providing false information on an ATF Form 4473 is a violation of the statute prohibiting false statements in connection with the purchase of a firearm).

application, regarding the denial of an amendment to a license, is also guilty of a felony.¹⁵

RMC

Crimes; parolee supervision

Penal Code § 11177.2 (new).
AB 2399 (Burton); 1993 STAT. Ch. 824
(Effective October 5, 1993)

Under existing law, the court responsible for granting probation or release on parole¹ has the power to condition a prisoner's early release upon payment of restitution² to the victim.³ Existing law authorizes the Department of Corrections (DOC) to enter into a compact with another state for the purpose of admitting parolees to a participating state

15. CAL. PENAL CODE § 12051(c)(1)-(7) (amended by Chapter 1167).

1. See CAL. PENAL CODE § 3040 (West 1982) (authorizing the Board of Prison Terms to allow the release of state prisoners on parole outside the prison walls and enclosures).

2. See *id.* § 1203.04(d) (West Supp. 1993) (defining restitution as full or partial payment to cover the value of stolen property, medical expenses, and wages or profits lost because of an injury or for time spent as a witness or in assisting the police resulting from the commission of a crime for which the defendant is convicted).

3. *Id.* § 1203.1 (West Supp. 1993); see CAL. CONST. art. I, § 28(b) (establishing the right of every victim to receive restitution, to be paid by the person convicted of committing the crime); 42 U.S.C. §§ 10601-10607 (1988 & Supp. II 1990) (authorizing the federal courts to order defendants to pay restitution to the victims of the crime); CAL. PENAL CODE § 1203.1c (West Supp. 1993) (authorizing the court to charge a parolee the reasonable cost of parole supervision, taking into account the amount of restitution the parolee has been ordered to pay); *id.* § 1203.1g (West Supp. 1993) (requiring restitution, as a condition of probation, to victims of sexual assault for the costs of medical and psychological treatment); *id.* § 1203.1j (West Supp. 1993) (ordering that restitution be paid, as a condition of probation, to victims of assault, battery, or assault with a deadly weapon, who are 65 years or older, for the costs of any necessary psychological or medical treatment); *id.* § 11165.1(a)-(b)(5) (West 1992) (defining sexual assault); *People v. Friscia*, 93 Daily Journal D.A.R. 11469, 11471 (filed Sept. 9, 1993) (ruling that trial courts do not have the discretion to order victim restitution for what amounts to civil damages); *People v. Broussard*, 93 Daily Journal D.A.R. 11389, 11392 (filed Sept. 2, 1993) (holding that trial courts are authorized to order restitution in cases involving economic loss as well as in those involving physical injury); cf. ARIZ. REV. STAT. ANN. § 31-412(c) (West Supp. 1993); FLA. STAT. ANN. § 947.181 (West Supp. 1993); NEV. REV. STAT. ANN. § 213.126 (Michie 1992); TEX. CRIM. PROC. CODE ANN. §§ 42.12(11)(a)(8), 11(a)(14) (West Supp. 1993); WASH. REV. CODE § 9A.05.210(2) (West Supp. 1993) (conditioning probation upon payment of restitution to the aggrieved victim). See generally Thomas M. Kelly, Note, *Where Offenders Pay For Their Crimes: Victim Restitution And Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 694-704 (1984) (discussing the constitutionality of victim restitution and the Victim and Witness Protection Act of 1982); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 931-32 (1984) (advocating the appropriateness of restitution as a sentencing tool in criminal proceedings).

following their release from prison.⁴ Chapter 824 prevents parolees, who have been ordered to make restitution to a victim, from leaving the state unless the parolee posts a bond for the amount of restitution or the court determines that justice requires their release.⁵

SMK

Crimes; possession and manufacture of false compartments to conceal or smuggle controlled substances

Health and Safety Code § 11366.8 (new).
AB 1760 (Cannella); 1993 STAT. Ch. 562

Existing law prohibits the sale of any chemical, drug, or laboratory apparatus¹ or device with the knowledge or intent that it will be used for the unlawful manufacture, processing, or preparation of a controlled substance.² Chapter 562 makes it a crime for any person to use a false

4. CAL. PENAL CODE § 11176 (West 1992); *see* U.S. CONST. art. 1, § 10 (forbidding any state to enter into a compact with another state without the consent of Congress); 4 U.S.C. § 112 (1988) (providing congressional consent for states to enter into compacts with one another for the purpose of assisting one another in crime prevention); CAL. PENAL CODE § 11176 (West 1992) (granting the Governor the authority to enter into compacts with any of the United States which have joined in a compact authorized by Congress for the prevention of crime); *id.* § 11177 (West 1992) (providing the guidelines governing the form of the compact); *id.* § 11177(1)(a)-(b) (West 1992) (allowing release of a parolee to a participating state if the parolee has family or job opportunities therein, or upon consent of the receiving state); *In re Joseph Tenner*, 20 Cal. 2d 670, 674-78, 128 P.2d 338, 341-43 (1942) (holding that the Uniform Act for Out-of-State Parole Supervision is not in conflict with the federal extradition clause found in article IV, § 2 of the United States Constitution, and is thus constitutional); *cf.* FLA. STAT. ANN. ch. § 949.07(1) (West 1985); TEX. CRIM. PROC. CODE ANN. § 42.11(1) Sec. 2 (West 1979) (authorizing the Governor to enter into compacts with other states for the purpose of allowing parolees to reside in receiving states).

5. CAL. PENAL CODE § 11177.2 (enacted by Chapter 824).

1. *See* CAL. HEALTH & SAFETY CODE § 11364.5(d)(1)-(12), (e)(1)-(10) (West 1991) (defining drug paraphernalia as all equipment, products, and materials of any kind which are intended for use or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance).

2. *Id.* § 11366.8 (West 1991) (amended by Chapter 562); *id.* §§ 11054-11057 (West 1991) (listing all the known controlled substances); *see id.* § 11017 (West 1992) (stating that the definition of manufacturer for the purposes of the Health & Safety Code is the same as § 4034 of the Business and Professions Code); CAL. BUS. & PROF. CODE § 4034 (West 1988) (defining manufacturer as every person who prepares, derives, produces, compounds, or repackages any drug or device excepting a pharmacy which manufactures on the immediate premises where the drug or device is to be sold to the ultimate consumer); *cf.* *United States v. Poole*, 878 F.2d 1389, 1391 (11th Cir. 1989) (holding that to convict a defendant of possession of cocaine to distribute, the federal government has to prove knowledge, possession, and intent to distribute); *Stewart v. State*, 580 So.

compartment³ with the intent to store, conceal, smuggle, or transport a controlled substance.⁴ Chapter 562 also makes it a crime for any person to design, construct, or fabricate a false compartment with the intent to store, conceal, smuggle, or transport a controlled substance.⁵

PLJ

Crimes; possession and use of tear gas

Penal Code § 12460 (new); §§ 12403.7, 12403.8, 12450 (amended).
AB 581 (Speier); 1993 STAT. Ch. 954

2d 27, 28 (Ala. Crim. App. 1990) (stating that knowledge was an essential element of an offense of trafficking in cocaine that had to be alleged in an indictment). *But see* United States v. Kelly, 888 F.2d 732, 735 (11th Cir. 1989) (holding that defendant, a criminal defense attorney, could not be convicted of aiding, abetting, and counseling possession with intent to distribute one kilogram of cocaine on a theory that, by refusing to aid or abet transfer of cocaine out of client's possession, he thereby criminally aided and abetted client's continued possession thereof); Baldwin v. State, 498 So. 2d 1385, 1386 (Fla. Dist. Ct. App. 1986) (holding that the use or possession of drug paraphernalia did not require that a defendant unequivocally knew of illicit purpose for use, but only required that a defendant knew or reasonably should have known about illicit purposes for use of paraphernalia). *See generally* Comprehensive Drug Abuse Prevention and Control Act of 1970, § 410(a)(1), 21 U.S.C.S. § 841(a)(1) (West 1992) (stating that to prove a charge of aiding and abetting possession of drugs with intent to distribute, the government must connect a defendant to possession and intent to distribute).

3. *See* CAL. HEALTH & SAFETY CODE § 11366.8(d)(1)-(3) (enacted by Chapter 562) (defining false compartment as any box, container, space, or enclosure that is intended for use or designed for use to conceal, hide, or otherwise prevent discovery of any controlled substance within or attached to a vehicle, including: (1) False, altered, or modified fuel tanks; (2) original factory equipment of a vehicle that is modified, altered or changed; and (3) a compartment, space, or box that is added to, or fabricated, made, or created from, existing compartments, spaces, or boxes within a vehicle).

4. *Id.* § 11366.8 (enacted by Chapter 562); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1760, at 1 (May 28, 1993) (stating that the use of false compartments has become an integral part of major drug smuggling operations both across the border between Mexico and the United States and within California). Since no prior law targeted the construction or use of such secret compartments as illegal when intended for the sole purpose of trafficking drugs, Chapter 562 makes it unlawful to construct or use a false compartment for trafficking drugs. *Id.* *But see* CAL. HEALTH & SAFETY CODE § 11379 (a)-(b) (West Supp. 1993) (stating that anyone who transports or furnishes to transport or attempts to transport controlled substances shall be punished by imprisonment for a period of two, three, or four years). *See generally* Pat Fenner, *Top Cocaine Bust Was \$130 Million*, ST. PETERSBURGH TIMES, Aug. 6, 1987, at 2 (pointing out that the record cocaine bust in the United States was a 6,900-pound seizure concealed in false compartments of two furniture containers); Joseph B. Treaster, *A More Potent Heroin Makes a Comeback in a New, Needless Form*, N.Y. TIMES, Apr. 28, 1991, at 4 (stating that the largest shipments of heroin are mixed in sealed containers that arrive by ship from Southeast Asia, and also, that scores of individuals smuggle packets of heroin in false compartments in suitcases); Joseph B. Treaster, *Months of Surveillance Lead Agents to \$13 Million Tied to Drugs*, N.Y. TIMES, Oct. 11, 1990, at 3 (describing how drug traffickers use false compartments under the floorboards of trucks to transport cocaine and money from one state to another).

5. CAL. HEALTH & SAFETY CODE § 11366.8(b) (enacted by Chapter 562).

Under prior law, a person¹ was prohibited from purchasing tear gas² or a tear gas weapon³ unless that person had completed a training course certified by the Department of Justice (Department), pursuant to which a card was issued identifying that person.⁴ Chapter 954 requires the person to first obtain a tear gas identification card issued by the Department before purchasing, possessing,⁵ or using any tear gas or tear gas weapon.⁶ Under prior law, any course taken in an institution approved by the Department to offer tear gas training was sufficient.⁷ Under Chapter 954, an identification card may only be obtained by participating in a training course which has been certified by the Department, passing an objective test⁸ evaluating the applicant's knowledge of tear gas, or completing a point-of-sale instruction.⁹

Existing law permits certified tear gas training institutions to charge reimbursement fees.¹⁰ Chapter 954 authorizes the Department to charge various administrative fees relating to the issuance of tear gas instruction

1. See CAL. PENAL CODE § 7 (West 1988) (defining person).

2. See *id.* § 12401 (West 1992) (defining tear gas as including substances intended to cause physical discomfort or permanent injury by being vaporized or dispersed in the air); 63 Op. Cal. Att'y Gen. 209, 209 (1980) (stating that a vile-smelling liquid which is sprayed from its container and is manufactured and sold for use as a self-defense weapon against humans is "tear gas"); *People v. Horner*, 9 Cal. App. 3d 23, 27, 87 Cal. Rptr. 917, 920 (1970) (specifying that the statutory definition of tear gas expands the meaning of that term so as to include substances not ordinarily understood to be tear gas); *Cook v. Superior Court*, 4 Cal. App. 3d 822, 828, 84 Cal. Rptr. 664, 669 (1970) (stating that chemical mace is within the statutory definition of tear gas).

3. See CAL. PENAL CODE § 12402 (West 1992) (defining a tear gas weapon as a device capable of the emission of tear gases).

4. 1976 Cal. Stat. ch. 1340, sec. 2, at 6079 (enacting CAL. PENAL CODE § 12403.7(a)(6)(A)).

5. See *People v. Scheib*, 98 Cal. App. 3d 820, 828, 159 Cal. Rptr. 665, 669 (1979) (declaring that the existence of elements of possession of contraband is a question of fact); *People v. Prochnau*, 251 Cal. App. 2d 22, 30, 59 Cal. Rptr. 265, 268 (1967) (stating that, in order to establish the elements unlawful possession of contraband, it must be shown, by at least circumstantial evidence, that the person exercised dominion and control over the object and had knowledge of its contraband character).

6. CAL. PENAL CODE § 12403.7(a)(7)(A) (amended by Chapter 954).

7. 1976 Cal. Stat. ch. 1340, sec. 2, at 6079 (enacting CAL. PENAL CODE § 12403.7(a)(6)(A)).

8. See CAL. PENAL CODE § 12403.7(a)(7)(ii) (amended by Chapter 954) (requiring the Department to issue a tear gas identification card to an applicant, who has responded correctly to at least 75% of a 20 to 30 question objective exam, administered by a licensed point-of-sale retailer or a certified training institution, and correctly sprayed a test canister of tear gas containing inert ingredients).

9. *Id.* § 12403.7(a)(7)(A) (amended by Chapter 954); see *id.* § 12403(a)(7)(A)(i) (amended by Chapter 954) (directing the Department to issue a tear gas instruction card to an applicant who has completed a certified course in the use of tear gas and tear gas weapons); *id.* § 12403.7(a)(7)(A)(iii) (amended by Chapter 954) (directing the Department to issue a tear gas identification card to an applicant who has participated in point-of-sale instruction by a licensed retailer or certified training institution, which includes watching an approved informational videotape of less than 30 minutes in duration and requires the participant to test spray a canister of tear gas containing inert ingredients); see also *id.* § 12403.7(a)(7)(B) (amended by Chapter 954) (stating that the tear gas identification card must be carried upon the person who is carrying tear gas or tear gas weapons and must be presented to a retailer if that person is purchasing tear gas or tear gas weapons).

10. *Id.* § 12403.7(a)(7)(C)(v) (amended by Chapter 954); see *id.* (permitting institutions to charge fees to cover the actual cost of the training).

cards not to exceed \$10, and permits fees to be charged for administration of the objective test.¹¹

Existing law requires every tear gas container and weapon to be labelled with a specific warning.¹² Chapter 954 requires every tear gas container and weapon to be accompanied by an insert containing specified information, including directions for use, first aid information, safety and storage information, and an explanation of legal ramifications of improper use.¹³

Prior law permitted a minor, sixteen years of age or older, to purchase tear gas after completing a certified training course and obtaining written consent from a parent or guardian.¹⁴ Chapter 954 allows the minor to purchase tear gas after presentation of a signed affidavit stating, under penalty of perjury,¹⁵ the minor's intent to use the tear gas or tear gas weapon solely for the purpose of self-defense, as well as written consent from a parent or guardian.¹⁶ Chapter 954 also imposes civil liability, arising out of a minor's use of tear gas, upon the person who signed the statement of consent.¹⁷

11. *Id.* § 12403.7(a)(7)(C)(i)-(v) (amended by Chapter 954); *see id.* § 12403.7(a)(7)(C)(i)-(ii) (amended by Chapter 954) (authorizing the Department to charge an applicant, for a tear gas instruction card, a fee not to exceed \$10, and to charge each person requesting a replacement certificate a fee not to exceed \$5); *id.* § 12403.7(a)(7)(C)(iii) (amended by Chapter 954) (authorizing the point-of-sale retailer or certified tear gas training institution to charge a fee, not to exceed \$10, to an applicant for the objective test).

12. *Id.* § 12403.7(a)(5)(C) (amended by Chapter 954); *see id.* (stating that every tear gas or tear gas weapon must have a label which states: "WARNING: The use of this substance or device for any purpose other than self-defense is a felony under the law. The contents are dangerous - use with care.").

13. *Id.* § 12403.7(a)(6) (amended by Chapter 954); *see id.* (requiring the informational material to accompany every tear gas container or weapon as of March 1, 1994 and permitting the Department to establish minimum standard guidelines as to the information contained in that material); *see also* CAL. BUS. & PROF. CODE § 17533.9 (West 1987) (providing that it is unlawful for any person to advertise tear gas unless that advertisement contains a statement that the possession and use of tear gas is regulated by law); *cf.* MINN. STAT. ANN. § 624.731(2) (West Supp. 1993) (stating that use of a tear gas compound is permitted only under certain circumstances, such as when the tear gas is propelled from an aerosol container which is labeled or accompanied by instructions relating to the use and dangers of tear gas compounds and dated to indicate its anticipated useful life); NEV. REV. STAT. § 202.390(1) (1991) (mandating that every tear gas weapon bear the name of the manufacturer and a serial number).

14. 1982 Cal. Stat. ch. 1324, sec. 1, at 4886 (amending CAL. PENAL CODE § 12403.8); *cf.* MINN. STAT. ANN. § 624.731(3)(a) (West Supp. 1993) (prohibiting persons under the age of 16 from possessing or using tear gas except by written permission of a parent or guardian).

15. *See* CAL. PENAL CODE § 118(a) (defining perjury as false statements made while under oath).

16. *Id.* § 12403.8(a)-(b) (amended by Chapter 954).

17. *Id.* § 12403.8(c) (West 1992); *see* CAL. CIV. CODE § 1714.1 (West 1985) (holding parents civilly liable for the willful misconduct of a minor); *cf. id.* § 1714.3 (West Supp. 1993) (imputing liability to the parent for the discharge of a firearm by a minor under the age of 18); CAL. PENAL CODE § 502(e)(1) (West Supp. 1993) (imputing conduct of a minor who commits a computer crime to that minor's parent or legal guardian); CAL. VEH. CODE § 17708 (West 1971) (imposing liability on the parent or guardian for acts arising out of a minor's permissive use of a motor vehicle).

Under existing law, no person can purchase tear gas unless the Department has certified, as acceptable,¹⁸ that particular type and brand of tear gas.¹⁹ Chapter 954 provides that a qualified purchaser may acquire tear gas in which the active ingredient is oleoresin capsicum, of a particular brand or type that has been certified by the Department.²⁰ Under Chapter 954, any person, who possesses a tear gas certificate prior to March 1, 1994, must obtain oleoresin capsicum certification to purchase, possess, or use a tear gas containing oleoresin capsicum as its active ingredient.²¹

Under existing law, any person who uses tear gas, except for the purpose of self-defense,²² is guilty of a public offense.²³ Prior law also permitted the use of tear gas while participating in an approved training course.²⁴ Under Chapter 954, the use of tear gas for any purpose other than self-defense is a public offense.²⁵

Chapter 954 provides that any person who uses, purchases, or possesses, for the purpose of self-defense, tear gas or a tear gas weapon which has not been certified by the Department is guilty of a

18. See CAL. PENAL CODE § 12451 (West 1992) (defining acceptable as meaning that the tear gas is reasonably free from any undue hazard and setting forth factors to be considered by the Department when determining acceptability).

19. *Id.* § 12450 (amended by Chapter 954); see *id.* §§ 12453-12456 (West 1992) (regulating certification requirements); cf. MINN. STAT. ANN. § 624.731(3)(d) (West Supp. 1993) (prohibiting persons from possessing or using an unauthorized tear gas or tear gas compound).

20. CAL. PENAL CODE § 12460 (enacted by Chapter 954).

21. *Id.* § 12403.7(a)(7)(A) (amended by Chapter 954); see *id.* § 12403.7(7)(C)(iv) (amended by Chapter 954) (authorizing the Department to charge each person, who possesses a tear gas certificate prior to March 1, 1994 and requests oleoresin capsicum certification, a fee not exceeding five dollars).

22. See *id.* § 693 (West 1985) (permitting a person, about to be injured, to put forth resistance sufficient to prevent an offense against his person or family, or an illegal forcible attempt to take or injure property in his lawful possession).

23. *Id.* § 12403.7(a)(8) (amended by Chapter 954); see *id.* (mandating punishment of 16 months, two years, or three years imprisonment in state prison; or in a county jail for a duration not to exceed one year, a fine not to exceed \$1,000, or both); *id.* (providing that if the use is against a peace officer while in the course of that officer's official duties, and the person knows or has reason to know that the victim is a peace officer, the offense is punishable by imprisonment in the state prison for 16 months, two years, or three years, or a fine not to exceed \$1,000, or both).

24. 1976 Cal. Stat. ch. 1340, sec. 2, at 6079 (enacting CAL. PENAL CODE § 12403.7(a)(8)).

25. CAL. PENAL CODE § 12403.7(a)(8) (amended by Chapter 954); see *id.* (mandating punishment of imprisonment, a fine not to exceed \$1,000, or both); *id.* § 15 (West 1988) (defining public offense as an act committed or omitted in violation of a law forbidding or commanding it and which is punishable by either: death, imprisonment, fine, removal from office or disqualification to hold any office in the state); cf. MINN. STAT. § 624.731(8)(b)-(c) (1992) (providing that the unlawful use of tear gas is a misdemeanor); S.C. CODE ANN. § 16-23-470 (Law. Co-op. 1991) (permitting possession, use, purchase, or sale of tear gas for self-defense purposes only); VA. CODE ANN. § 18.2-312 (Michie 1992) (stating that a person is guilty of a Class 3 felony if that person maliciously releases noxious gas).

misdemeanor.²⁶ Chapter 954 further provides that any person who has not received a tear gas instruction card issued by the Department, and who uses certified tear gas in self-defense, is guilty of an infraction.²⁷

RMC

Crimes; prison inmates—weapons

Penal Code § 4502 (amended).
AB 146 (Richter); 1993 STAT. Ch. 554

Under existing law a person who is confined in a state prison¹ or under the custody² of prison personnel and who possesses, carries upon his or her person, or has under his or her custody or control specified instruments or weapons³ is guilty of a felony.⁴ Chapter 554 provides that

26. CAL. PENAL CODE § 12403.7(b) (amended by Chapter 954); *see id.* (mandating punishment by imprisonment in a county jail not to exceed one year, or by a fine not exceeding \$2,000, or both); *see also id.* § 17(a) (West Supp. 1993) (defining misdemeanor).

27. *Id.* § 12403.7(b) (amended by Chapter 954); *see id.* § 19.6 (West Supp. 1993) (specifying punishment for an infraction); *id.* § 12403.7(b) (amended by Chapter 954) (mandating punishment by a fine not to exceed \$100).

1. *See* CAL. PENAL CODE § 4504 (West 1982) (defining “confined in a state prison” and including within the definition individuals who are temporarily outside the prison walls serving on work detail).

2. *See id.* § 4502 (amended by Chapter 554) (specifying individuals who come within the purview of California Penal Code § 4502 as those who are: (1) Being conveyed to or from any state prison; (2) located at any prison road camp, forestry camp, other prison camps, or prison farms; (3) being conveyed to or from any of those places; or (4) under the custody of prison officials, officers, or employees).

3. *See id.* § 4502(a) (amended by Chapter 554) (specifying as an instrument or weapon anything commonly known as a blackjack, slingshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance or fixed ammunition, any dirk, dagger, or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon).

4. *Id.* § 4502(a) (amended by Chapter 554); *see id.* (specifying that each violation is a felony punishable by imprisonment for two, three, or four years to be served consecutively); *see also* *People v. Elguera*, 8 Cal. App. 4th 1214, 1224, 10 Cal. Rptr. 2d 910, 915-16 (1992) (holding that jury instructions on the elements of the crime of possession of a weapon by an inmate were proper where it was not reasonably likely that the jury would convict the defendant unless the defendant knowingly possessed a weapon or sharp instrument), *review denied* 1992 Cal. LEXIS 5622; *People v. Reynolds*, 205 Cal. App. 3d 776, 779, 252 Cal. Rptr. 637, 639 (1988) (discussing that while California Penal Code § 4502 requires the defendant to knowingly possess the prohibited object, the prosecution does not need to prove a purpose or intent for which the instrument was possessed); *People v. Wells*, 261 Cal. App. 2d 468, 478-79, 68 Cal. Rptr. 400, 406 (1968) (stating that California Penal Code § 4502 serves an objective demanding relative inflexibility, and is one of the most stringent statutes governing prison safety); *cf.* *Culbertson v. State*, 386 S.E.2d 894, 896 (Ga. Ct. App. 1989) (holding that a water-bug, a device used to heat liquid, was a weapon under the statute specifying that it is unlawful for an inmate to be in possession of a weapon); *People v. Gazelle*, 595 N.E.2d 214, 217 (Ill. App. Ct. 1992) (providing a detailed review of the statute prohibiting contraband in a penal institution and holding that small scissors are

a person who manufactures or attempts to manufacture the same specified instruments or weapons is also guilty of a felony.⁵ CJK

not a weapon within the definition of the statute); *People v. Morissette*, 589 N.E.2d 144, 148 (Ill. App. Ct. 1992) (holding that a hacksaw blade is not a per se dangerous weapon under the statute prohibiting possession of a weapon by a person within the custody of a correctional facility, as the statute was not intended to prohibit the possession of every tool, implement, or sporting device which might inflict serious bodily harm); *State v. Guirlando*, 491 So. 2d 38, 40 (La. Ct. App. 1986) (stating that, to sustain a conviction for the crime of possession of contraband by an inmate based upon constructive possession, something more than mere presence or association with the person in actual custody of the contraband must be established).

5. CAL. PENAL CODE § 4502(b) (amended by Chapter 554); *see id.* (specifying that each violation is a felony punishable by imprisonment for 16 months, two years, or three years, to be served consecutively); *People v. Evans*, 2 Cal. App. 3d 877, 881, 82 Cal. Rptr. 877, 880 (1969) (stating that knowing possession of a prohibited instrument is sufficient to support a conviction for possession of a weapon by an inmate, and specifying that the prosecution is not required to prove any intent for which the instrument is possessed); SENATE FLOOR COMMITTEE, COMMITTEE ANALYSIS OF AB 146, at 2 (Aug. 25, 1993) (stating that Chapter 554 was initiated in an attempt to close a loophole whereby an inmate might be in the process of making a shank, but as the instrument was not sufficiently honed, it would not yet constitute a device for which possession is prohibited); *cf.* 18 U.S.C. § 1791(a) (1988) (providing that it is an offense for an inmate to make, possess, obtain, or attempt to obtain a prohibited object such as a firearm, destructive device, ammunition, weapon, any object intended to be used as a weapon, or any object that threatens the security of the prison or an individual); ALA. CODE § 13A-10-36 (1982) (providing that a person confined in a detention facility is guilty of a first degree felony if he intentionally and unlawfully makes, obtains, or possesses any deadly weapon); ARIZ. REV. STAT. ANN. § 13-2505(A)(3),(C) (Supp. 1992) (providing that anyone who is confined in a correctional facility or is being moved incident to such confinement, and knowingly makes, obtains, or possesses a deadly weapon, dangerous instrument, or explosive is guilty of a class two felony); FLA. STAT. ANN. § 944.47(1)(a)(5),(c) (West Supp. 1993) (providing that it is a felony in the second degree for any inmate of a state correctional institution to be in actual or constructive possession of any contraband such as a firearm, weapon, or explosive substance); ILL. ANN. STAT. ch. 720, para. 5/24-1.1(b) (Smith-Hurd 1993) (providing that the possession of any weapon, firearm, or firearm ammunition by a person confined in a penal institution is a felony, regardless of the intent with which it is possessed); LA. REV. STAT. ANN. § 402(B) (West Supp. 1993) (providing that it is unlawful for any person to possess contraband on the grounds of a correctional facility); *id.* § 402(D)(4) (including within the definition of contraband any dangerous weapon, explosive, combustible, or plans for the making or manufacturing of a dangerous weapon or other instrumentality customarily used as a dangerous weapon); N.Y. PENAL LAW § 205.25(2) (McKinney 1988) (providing that any person confined in a detention facility who knowingly and unlawfully makes, obtains, or possesses any dangerous contraband is guilty of a first degree felony); TEX. PENAL CODE ANN. § 46.11 (West 1989) (providing that anyone confined in a penal institution who possesses, carries upon his person, or conceals within the institution any deadly weapon is guilty of a felony in the third degree); *United States v. Fox*, 845 F.2d 152, 156 (7th Cir. 1988) (holding that the intended use of a sharpened nail was immaterial to the determination of guilt for the crime of possession of a weapon by a federal inmate and the trial court did not commit error by excluding such testimony), *cert. denied*, 488 U.S. 1012 (1989); *United States v. Perceval*, 803 F.2d 601, 603 (10th Cir. 1986) (concluding that a federal inmate must knowingly possess a weapon in order to be convicted under 18 U.S.C. § 1791, which prohibits a federal inmate from possessing a weapon); *Jackson v. State*, 566 So. 2d 752, 755 (Ala. Crim. App. 1987) (upholding a conviction for possession of a deadly weapon by an inmate for possession of the components the combination of which clearly formed a deadly weapon), *cert. denied*, 566 So. 2d 757 (1988); *Dennison v. Oregon State Penitentiary*, 715 P.2d 88, 89 (Or. 1986) (holding that possession by an inmate of detailed plans depicting how to make a gun was not sufficient evidence to support a conviction for attempting to manufacture a weapon). *See generally* *People v. Kite*, 605 N.E.2d 563, 565 (Ill. 1992) (stating that although possession of a prohibited weapon by a person confined in a penal institution is a strict liability offense, an inmate so charged may assert necessity as an affirmative defense); *id.* at 566 (holding that a "continuing threat" is not a specific and immediate threat entitling one to jury instructions on the necessity defense); *People v. Johns*, 581 N.E.2d 403, 406 (Ill. Ct. App. 1991) (providing three factors to consider to determine if an inmate is entitled to a necessity defense: (1) Whether the defendant is faced with a specific threat of death, forcible sexual attack, or immediate and

Crimes; probation of child sex offenders

Penal Code §§ 1203.066 (amended).

AB 2009 (Snyder); 1993 STAT. Ch. 587

Existing law provides that any person who willfully¹ and lewdly commits a lewd or lascivious act with a child under fourteen years of age with the intent of arousing, appealing to, or gratifying the sexual desires of the person, or by using force or fear of immediate and unlawful bodily injury on the child victim or another person, is guilty of a felony.²

substantial bodily injury; (2) whether there is time to complain to the authorities or if there was a history of futile prior complaints; and (3) whether there exists time or opportunity to resort to the courts), *appeal denied*, 587 N.E.2d 1020 (1992); *People v. Rau*, 436 N.W.2d 409, 411 (Mich. Ct. App. 1989) (refusing to extend the defense of duress to the crime of possession of a weapon by a prison inmate, absent exceptional circumstances), *appeal denied*, 1989 Mich. LEXIS 2008 (1989); *State v. Baca*, 845 P.2d 762, 767 (N.M. 1992) (stating that a duress defense is available for the crime of possession of a deadly weapon by a prisoner); *January v. State*, 811 S.W.2d 631, 634 (Tex. Crim. App. 1991) (providing that necessity was not an available defense in prosecutions for possession of a deadly weapon in a penal institution as a matter of law); *California in Brief; San Quentin; Weapons Prompt Lock-Down*, L.A. TIMES, June 14, 1990, at A41 (stating how prison officials ordered a lock-down after discovering a dozen "inmate-manufactured" stabbing devices that were up to 11 inches in length); *Class Action Filed Against Pelican Bay State Prison*, CNN TRANSCRIPT, Aug. 16, 1993, available in LEXIS, Nexis Library, OMNI File (stating that the inmates in Pelican Bay State Prison are considered so dangerous that anyone who enters is required to wear a stab-proof vest); *Gabriel Escobar, Lorton Inmate is Stabbed to Death; Another Prisoner Cut by Homemade Knives in Youth Center Brawl*, WASH. POST, Jan. 19, 1992, at B4 (stating that although inmates at the youth center are searched periodically, the inmates often make another shank the next day); *Judge Bars Prison Confiscations*, LEGAL INTELLIGENCER, Apr. 28, 1993, at 5 (describing how the Michigan State Corrections Director vowed to appeal a court ruling barring the confiscation of certain items allegedly being used to make weapons); *id.* (stating that prison tensions are heightened as a result of the stabbings of four prison guards); *Latest Con Among Cons: Shoot Self and Sue*, UPI, Jan. 19, 1993, available in LEXIS, Nexis Library, OMNI File (discussing how inmates were smuggling in weapons in order sue the city for negligence based upon self-inflicted wounds); *Possible Drugs and Weapons are Found in Maryland Prison*, WASH. POST, Feb. 28, 1991, at C3 (describing how 53 homemade weapons were confiscated during shakedown at a Maryland correction institution).

1. See CAL. PENAL CODE § 7(1) (West 1988) (defining willfully, when applied to the intent with which an act is done, as simply a purpose or willingness to commit the act).

2. *Id.* § 288(b) (West Supp. 1993).

Existing law also provides that a person convicted of committing a lewd or lascivious act³ with a child cannot receive probation⁴ or a suspended sentence if the person: (1) Used force or fear of immediate and unlawful bodily injury on the victim or another person; (2) caused bodily injury⁵ on the child during the molestation; (3) befriended the child for the purpose of molestation;⁶ (4) used a weapon during the molestation; (5) molested more than one victim; (6) has had substantial sexual conduct⁷ with a victim under eleven years old; (7) had been previously convicted of rape,⁸ rape with a foreign object,⁹ abduction of a child for the purposes of prostitution,¹⁰ incest,¹¹ child molestation,¹² penetration with a foreign

3. See *People v. O'Connor*, 8 Cal. App. 4th 941, 947-48, 10 Cal. Rptr. 2d 530, 533-34 (1992) (acknowledging that the defendant's act of directing a child to remove all his clothes except underwear was sufficient for lewd and lascivious conduct under California Penal Code § 288(a)); *People v. Catelli*, 227 Cal. App. 3d 1434, 1447-48, 278 Cal. Rptr. 452, 461 (1991) (holding defendant's act of forcing the victim to lick the defendant's scrotum was lewd and lascivious); cf. *People v. Gilbert*, 5 Cal. App. 4th 1372, 1380, 7 Cal. Rptr. 2d 660, 664 (1992) (noting that the lewd and lascivious act need not be inherently sexual in nature); *id.* (stating that a crime is committed by any touching of a child with the requisite intent).

4. See CAL. PENAL CODE § 1203(a) (West Supp. 1993) (defining probation as the suspension or execution of a sentence and the order of conditional and revocable release in the community under the supervision of the probation officer); see also *id.* § 1203(e) (West Supp. 1993) (providing the circumstances under which probation is not granted); *id.* § 1203.066(c)(1)-(4) (West Supp. 1993) (stating the circumstances under which denial of probation to a person convicted of child molestation shall not apply).

5. See *People v. Superior Court*, 198 Cal. App. 3d 1121, 1132, 244 Cal. Rptr. 522, 528 (1988) (finding that the victim's pregnancy as a result of unlawful sexual intercourse constituted great bodily injury); *People v. Villarreal*, 173 Cal. App. 3d 1136, 1141, 219 Cal. Rptr. 371, 374 (1985) (concluding that the fracture of nasal bones during an assault constituted great bodily injury); *People v. Johnson*, 104 Cal. App. 3d 598, 609, 164 Cal. Rptr. 69, 75 (1980) (stating that a jaw fracture was a significant bodily injury).

6. See CAL. PENAL CODE § 1203.066(a)(3) (amended by Chapter 587) (providing an exception to this circumstance if the defendant honestly and reasonably believed that the child was more than 14 years old); see also *People v. Thompson*, 205 Cal. App. 3d 871, 876-78, 252 Cal. Rptr. 698, 699-701 (1988) (stating that California Penal Code § 1203.066(a)(3) is not unconstitutionally vague).

7. See CAL. PENAL CODE § 1203.066(b) (amended by Chapter 587) (redefining "substantial sexual conduct" as penetration of the vagina or rectum by the penis of the offender or by any foreign object, oral copulation, or masturbation of either the victim or the offender).

8. See *id.* § 261 (West Supp. 1993) (defining rape).

9. See *id.* § 264.1 (West 1988) (providing the punishment for rape with a foreign object).

10. See *id.* § 267 (West 1988) (specifying the punishment for abducting a minor for the purposes of prostitution).

11. See *id.* § 285 (West 1988) (stating the punishment for committing incest).

12. See CAL. PENAL CODE § 288 (West Supp. 1993) (providing the punishment for child molestation); cf. *A.L. v. Commonwealth*, 521 N.E.2d 1017, 1023-25 (Mass. 1988) (holding the Commonwealth liable for negligent failure of a probation officer to verify the place of employment for a three time convicted child molester who was employed as a teacher); *id.* (providing that this occupation was a violation of the terms of his probation, and that the molester sexually molested two students during the term of his probation). But see *People v. Wardlow*, 227 Cal. App. 3d 360, 367, 278 Cal. Rptr. 1, 4 (1991) (stating that the court conditioned a convicted child molester's probation on his not associating with other known child molesters); *Debra L. Dailey, Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761, 778 (1993) (stating that under Minnesota law, it is likely that the child sexual abuser who does not go to prison will receive a heavy dose of intermediate sanctions including a full year in jail, 10 years probation, and a requirement to successfully complete a lengthy sex offender treatment program).

object,¹³ or kidnapping¹⁴ a child for the purpose of molestation and ransom;¹⁵ or (8) assaulted another with intent to commit a crime specified in this paragraph.¹⁶

Chapter 587 provides additional circumstances under which a person convicted of committing a lewd or lascivious act cannot receive probation or a suspended sentence, including a previous conviction for: (1) Raping one's spouse;¹⁷ (2) enticing an unmarried female under eighteen into prostitution;¹⁸ or (3) continuous sexual abuse.¹⁹

In addition, Chapter 587 provides that a person who commits sodomy²⁰ or oral copulation with a child under eighteen²¹ by force, violence, duress, menace, or fear of immediate and unlawful bodily injury

13. See CAL. PENAL CODE § 289 (West Supp. 1993) (stating the punishment for penetration with a foreign object).

14. See *id.* § 207 (West Supp. 1993) (defining kidnapping).

15. See *id.* § 209 (West Supp. 1993) (defining kidnapping for ransom).

16. *Id.* § 1203.066 (amended by Chapter 587); see *id.* § 220 (West 1988) (listing the various crimes under which this provision applies including assault with intent to commit mayhem, rape, sodomy, oral copulation, rape in concert with another, lascivious acts upon a child, or penetration of the genitals or anus with a foreign object). Other states have statutes regulating probation for sex offenders. See COL. REV. STAT. § 16-11-204 (Supp. 1993) (providing the conditions of probation that the court may require); ILL. ANN. STAT. ch. 730, para. 150/5 (Smith-Hurd 1993) (providing that sex offenders who are granted probation are required to register with the specified authorities). But see *State v. Bateman*, 771 P.2d 314, 316 (Or. 1989) (stating that the court suspended two consecutive five-year sentences and placed the defendant on probation with the condition that he post signs with letters at least three inches high on his residence and vehicle doors that read: DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED); Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 434 (1991) (citing *United States v. Sadler*, 488 F.2d 434 (5th Cir. 1974), which stated that the defendant pled guilty to charges relating to pornographic literature, but because he had a Ph.D. in English literature and significant skills in teaching, sales, and business, many letters were written portraying him as civic-minded and socially involved, and unlike typical sex offenders, he had sought treatment prior to the proceedings, the court sentenced him to probation); Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1881, 1888 (1991) (discussing a Rhode Island Superior Court decision that required a convicted sex offender to place a four-by-six-inch ad with his picture and an apology in the local paper as a condition of his probation).

17. See CAL. PENAL CODE § 262 (West Supp. 1993) (stating the punishment for raping one's spouse).

18. See *id.* § 266 (West 1988) (providing the punishment for enticing an unmarried female under 18 into prostitution).

19. *Id.* § 1203.066(a)(5) (amended by Chapter 587); see *id.* § 288.5 (West Supp. 1993) (defining continuous sexual abuse as an offense committed by any person who either resides in the same home with a child under age 14 or has recurring access to the child and within a period of three months, engages in three or more acts of substantial sexual conduct or lewd and lascivious conduct); *People v. Jeffers*, 43 Cal. 3d 984, 992, 741 P.2d 1127, 1131, 239 Cal. Rptr. 886, 890 (1987) (construing a lower court as explaining that "living in the household" denotes physical presence under a common roof, whereas being a "member of the ... household" denotes a quality of relationship). See generally ASSEMBLY COMMITTEE ON WAYS AND MEANS, COMMITTEE ANALYSIS OF AB 2009, at 1 (June 2, 1993) (stating that Chapter 587 is meant to address circumstances related to the shooting death of a convicted child molester by the victim's mother).

20. See CAL. PENAL CODE § 286 (West Supp. 1993) (defining sodomy).

21. See *id.* § 288a (West Supp. 1993) (defining oral copulation and the punishment for committing it with a minor).

on the victim or another person, is ineligible for probation or a suspended sentence.²²

Chapter 587 also specifically provides that if a person commits continuous sexual abuse and meets one of the circumstances listed above, the person is ineligible for probation or a suspended sentence.²³

CCA

Crimes; prohibited classes of firearms

Penal Code § 12021, 12021.1 (amended).
AB 685 (Murray); 1993 STAT. Ch. 612

Existing law prohibits persons¹ convicted of felonies² and various enumerated misdemeanors,³ including assault⁴ or battery,⁵ from owning or possessing⁶ firearms⁷ for a period of ten years.⁸ Chapter 612 adds

22. *Id.* § 1203.066(a)(5) (amended by Chapter 587); *see id.* (stating that these violations disqualify a person from probation or a suspended sentence).

23. *Id.* § 1203.066(a) (amended by Chapter 587).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person).

2. *See id.* § 17(a) (West Supp. 1993) (defining felony); *id.* §§ 12001.6, 12021(a), 12021(c), 12021.1 (West 1992) (enumerating felonies subject to California Penal Code § 12021); *see also* *People v. Ratcliffe*, 223 Cal. App. 3d 1401, 1410, 273 Cal. Rptr. 253, 259 (1990) (declaring that a violation of § 12021(a) is committed simply by an ex-felon who owns, possesses or has in his custody or control a firearm which thereby constitutes a felony).

3. CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining misdemeanor); *see also id.* §§ 136.5, 140, 171b, 171c, 171d, 241, 243, 244.5, 245, 245.5, 246.3, 247, 417, 417.2, 626.9, 12034(b), (d), 12100(a), 12320(a), 12590(a) (West Supp. 1993) (enumerating misdemeanors subject to California Penal Code § 12021).

4. *See id.* § 240 (West 1988) (defining assault); *id.* § 241 (West Supp. 1993) (providing the punishment for assault); *see also* *People v. Mosqueda*, 5 Cal. App. 3d 540, 544, 85 Cal. Rptr. 346, 347 (1970) (stating that under the plain language of § 240, what is determinative is whether the person charged has the present ability to commit the assault and not the subjective belief of the victim of the offender's ability).

5. *See* CAL. PENAL CODE § 242 (West 1988) (defining battery); *id.* § 243 (West Supp. 1993) (providing the punishment for battery); *see also* *People v. Lindsay*, 209 Cal. App. 3d 849, 855, 257 Cal. Rptr. 529, 533 (1989) (holding that for a conviction of a simple battery any force used against the victim is sufficient).

6. *See* *People v. King*, 22 Cal. 3d 12, 24, 582 P.2d 1000, 1007, 148 Cal. Rptr. 409, 416 (1978) (stating that possession under California Penal Code § 12021 does not prohibit those circumstances that are "not planned" or "without preconceived design"); *People v. McClindon*, 114 Cal. App. 3d 336, 340, 170 Cal. Rptr. 492, 494 (1980) (stating that possession must only be for a brief time and without predesign or prior possession); *see also* *People v. Snyder*, 32 Cal. 3d 590, 592, 652 P.2d 42, 44, 186 Cal. Rptr. 485, 487 (1982) (stating that actual knowledge of the provisions of California Penal Code § 12021 is irrelevant to its enforcement).

7. *See* CAL. PENAL CODE § 12001(b) (West Supp. 1993) (defining firearm); *see also* 18 U.S.C. § 921(a)(3) (1993) (defining firearm).

specified domestic violence-related offenses and restraining order violations to the list of offenses for which a person may not possess firearms for the ten-year period.⁹

Under prior law, any person whose livelihood depended on the possession of a firearm could petition the court for relief from the ten-year provision at any time prior to January 1, 1993.¹⁰ Under Chapter 612, only persons seeking employment for specific peace officer positions¹¹ or persons employed as peace officers, who are subject to the prohibition against possession of firearms due to a prior conviction of domestic violence, may petition the court for relief, and may do so only once.¹² Under Chapter 612, the court can grant relief if it finds by the

8. CAL. PENAL CODE § 12021(a)-(c) (amended by Chapter 612); *see id.* § 12021(c) (amended by Chapter 612) (specifying that any violation constitutes a public offense punishable by imprisonment in state prison or county jail for not more than one year, a fine not more than \$1,000 or both); *see also* United States v. Sherbondy, 865 F.2d 996, 1003 (9th Cir. 1988) (stating that prohibiting a convicted felon from possessing a firearm did not violate equal protection rights of felons by treating them differently than non-felons); Marchese v. State 545 F.2d 645, 647 (9th Cir. 1976) (holding that there is a legitimate interest in minimizing the use of firearms by felons and stating that legislatures may decide that convicts have more of a tendency to commit violence than non-convicts); *cf.* 18 U.S.C. § 922 (1993); ILL. REV. STAT. ch. 720, para. 5/24-3.1 (1993); N.M. STAT. ANN. § 30-7-16 (Michie Supp. 1993); W. VA. CODE § 61-7-7 (1992) (enumerating prohibitions against possession of firearms by felons).

9. CAL. PENAL CODE § 12021(a) (amended by Chapter 612); *see also id.* 273.5 (West Supp. 1993) (mandating that domestic violence which results in traumatic injury is either a felony or misdemeanor punishable by two to four years imprisonment in state prison, or up to one year in the county jail, by a fine up to \$6,000, or both); *id.* 273.6 (West Supp. 1993) (mandating that any willful and knowing violation of a court order to prevent domestic violence, obtained pursuant to the Civil Code or the Code of Civil Procedure, is a misdemeanor, punishable by a fine up to \$1,000, up to one year in the county jail, or both); CAL. CIV. PROC. CODE § 527 (West Supp. 1993) (providing the basis for obtaining a temporary restraining order); People v. Gutierrez, 171 Cal. App. 3d 944, 950, 217 Cal. Rptr. 616, 619 (1985) (validating California Penal Code § 273.5 in that it did not deny married persons prosecuted for battery equal protection of the laws); ASSEMBLY COMMITTEE ON WAYS AND MEANS, COMMITTEE ANALYSIS OF AB 242, at 3 (May 25, 1993) (stating that the purpose of the bill is to protect victims of domestic violence from further harm at the hand of the person who already has injured them, and stating that FBI statistics show that 28% of the women murdered in 1991 were slain by their husbands or boyfriends); *see generally* Janice L. Grau, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703, (1982) (evaluating the current laws regarding restraining orders and battered women); Sylvia A. Law, *Every 18 Seconds a Woman is Beaten: What Judges Can Do in the Face of This Carnage*, 30 JUDGES J. 12 (1991) (discussing the developing judicial role in domestic violence).

10. 1992 Cal. Legis. Serv., ch. 163, sec. 114, at 648 (amending CAL. PENAL CODE § 12021).

11. *See* CAL. PENAL CODE § 12021(c)(2) (amended by Chapter 612) (specifying that only persons seeking employment for peace officer positions, or employed as peace officers under California Penal Code §§ 830.1, 830.2, 830.31, 830.32, 830.33, and 830.5 can petition the court for relief from this provision).

12. CAL. PENAL CODE § 12021(a)-(c) (amended by Chapter 612); *see id.* (providing that any felon, narcotic addict, or convicted felon of an offense enumerated under § 12001.6 or a misdemeanor as enumerated under § 12021(c) who owns, possesses a firearm within ten years of the conviction is guilty of a public offense, punishable by imprisonment in the state prison or county jail not exceeding one year, a fine not exceeding \$1,000, or both).

preponderance of the evidence¹³ that the petitioner is likely to use the firearm safely and lawfully, that the person is not subject to prohibition under other provisions,¹⁴ and that the petitioner does not have a previous conviction under subsection (c) of this section.¹⁵ Chapter 612 provides that the court, in making its decision regarding a petition for relief, will consider the petitioner's continued employment, the interest of justice, any relevant evidence, the totality of the circumstances, and whether the petitioner agrees to participate in counseling as deemed appropriate by the court.¹⁶

Under existing law, any person who is alleged to have committed a specified offense¹⁷ subject to juvenile court law,¹⁸ is properly before the juvenile court, and is subsequently adjudged a ward of the court¹⁹ for committing a specified offense, must not own or have in their possession any firearm until the age of thirty years.²⁰ Chapter 612 adds to the specified offenses, felony convictions for controlled substances involving cocaine, cocaine base, methamphetamine, phencyclidine or heroin.²¹

13. See *In re Corey*, 230 Cal. App. 2d 813, 823, 41 Cal. Rptr. 379, 385 (1964) (stating that preponderance of the evidence means evidence which when weighed against opposing evidence is more convincing and is probably closer to the truth).

14. See CAL. WELF. & INST. CODE §§ 8100, 8103 (West Supp. 1993) & CAL. PENAL CODE 12021.1 (West 1992) (amended by Chapter 612) (comprising the enumerated provisions for which the court will not grant relief from California Penal Code § 12021).

15. CAL. PENAL CODE § 12021(c)(2)(A)-(C) (amended by Chapter 612); see *id.* (setting forth the standards for review for the court upon a petition for relief).

16. *Id.* § 12021(c)(2)(C) (amended by Chapter 612).

17. See *id.* § 12021(e) (West Supp. 1993) (amended by Chapter 612) (enumerating the specified offenses as those offenses listed in the California Welfare and Institutions Code § 707); CAL. WELF. & INST. § 707 (West Supp. 1993) (listing the specified offenses which if committed will subject a minor to a determination of fitness prior to being dealt with by the juvenile court).

18. See CAL. WELF. & INST. CODE §§ 245-265 (West 1984 & Supp. 1993) (providing for the jurisdiction and scope of the juvenile court).

19. *Id.* § 602 (West 1984) (providing that any person under the age of eighteen who has committed any crime other than a curfew based solely on age, is within the jurisdiction of the juvenile court which can adjudge such person a ward of the court).

20. CAL. PENAL CODE § 12021(e) (West Supp. 1993) (amended by Chapter 612); see *id.* § 12021(e) (West Supp. 1993) (mandating that a violation of this section is punishable by imprisonment in the state prison or county jail for one year or less, a \$1000 fine, or both).

21. *Id.* § 12021(e) (West Supp. 1993); see *id.* (adding to the specified offenses any offense described in California Penal Code § 1203.073); see *id.* § 1203.073(b) (West Supp. 1993) (providing that if conviction results from one of the enumerated drug related offenses, no probation will be granted); see also *People v. Cattaneo*, 217 Cal. App. 3d 1577, 1587-88, 266 Cal. Rptr. 710, 715-16, *review denied* (1990) (aiding and abetting two sales of cocaine, one involving over 15 pounds of cocaine, did not entitle defendant to probation under the unusual case exception since the interests of justice would not be served).

Under existing law, any person previously convicted of a specified offense who owns or has in their custody or control a firearm²² is guilty of a felony.²³ Chapter 612 adds to the specified offenses: (1) The felony conviction of participation in a criminal street gang;²⁴ (2) carjacking;²⁵

22. See CAL. PENAL CODE § 12001(b) (West Supp. 1993) (defining firearm as any device used as a weapon which expels a projectile by the force of any explosion or other form of combustion through a barrel); cf. 18 U.S.C. § 921(a)(3) (1993) (including within the definition of firearm, the frame or receiver of any explosive weapon, any destructive device, but not including antique firearms); *id.* 18 U.S.C. § 921(a)(4) (1993) (defining destructive device).

23. CAL. PENAL CODE § 12021.1 (amended by Chapter 612); *id.* § 12021.1(b) (amended by Chapter 612) (enumerating the offenses as: (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 14 years old; (7) any felony punishable by death or life imprisonment; (8) any other felony which the defendant inflicted great bodily harm on another person, other than an accomplice, or any felony which the defendant uses a firearm; and (9) attempted murder); *id.* § 17(a) (West Supp. 1993) (defining felony as a crime which is punishable with death or by imprisonment in the state prison); see *People v. Scheidt*, 231 Cal. App. 3d 162, 171, 282 Cal. Rptr. 228, 233 (1991) (holding that the defendant could properly be charged and convicted of both possession of a sawed-off shotgun and being a felon in possession of a firearm, though both charges involved the same shotgun, in that the first charge was not a statutorily lesser included offense of the latter charge); *People v. Roberson*, 81 Cal. App. 3d 890, 894, 146 Cal. Rptr. 777, 779 (1978) (precluding the use of an out-of-state conviction of possession of a firearm after conviction of a felony for enhancement purposes where the prosecution did not allege that the weapon in possession was concealed or used by the defendant in commission of a prior felony and, therefore, the out-of-state conviction would not have been a felony in California).

24. CAL. PENAL CODE § 186.22(a) (West Supp. 1993) (providing sentence enhancement for persons participating in crimes in furtherance of, or while assisting criminal street gang activity, by imprisonment in county jail for not more than one year or up to three years in state prison); *id.* § 186.22(f) (West Supp. 1993) (defining criminal street gang as any ongoing organization, association, or group of three or more persons, identified by a common name or identifying sign or symbol, having as its primary activities crimes such as assault with deadly weapons, robbery, homicide or manslaughter, drug trafficking, drive-by shootings, and intimidation of witnesses); see *People v. Green*, 227 Cal. App. 3d 692, 701-02, 278 Cal. Rptr. 140, 146-47 (1991) (holding that the term criminal street gang as used in California Penal Code § 186.22 was sufficiently defined and did not render the section unconstitutionally vague under the due process clause). Membership in an undefined gang is not prohibited but membership in a criminal street gang with ongoing criminal activities is prohibited. *Id.* at 701; 278 Cal. Rptr. at 146. See also *In re Nathaniel C.*, 228 Cal. App. 3d 990, 1004, 279 Cal. Rptr. 236, 246 (1991) (holding that the focus of California Penal Code § 186.22 is narrower than general criminal conduct and in order to invoke the sentence enhancement of the statute it must be shown that the primary activity of the gang is one of the enumerated offenses).

25. See 18 U.S.C. § 2119 (1993) (comprising the federal carjacking statute which mandates up to 25 years imprisonment if serious bodily injury results, and up to life imprisonment if death results); Julie Tamaki & Jim Herron Zamora, *2 Men Killed in Carjackings 2 Miles Apart*, L.A. TIMES, Apr. 22, 1993, at A1 (describing the killing of two men during carjackings occurring on the same day within two miles of each other); Paul Feldman, *Carjackings Make Fear An Unwelcome Passenger; Crime: Series of Violent Incidents Sours Southland's Love Affair With Cars, and Fuels Calls For Tougher Laws*, L.A. TIMES, Apr. 11, 1993, at A1 (reporting that the increase of carjackings is spawning fear into Southern Californians and prompting legislation with tougher penalties for carjacking convictions); *One More Urban Nightmare: If You Find Yourself Facing A Carjacker, Rule No. 1 Well May Be "Don't Resist,"* L.A. TIMES, Apr. 8, 1993, at B6 (recommending that victims of carjacking surrender without resistance).

and, (3) drawing a loaded or unloaded gun in a rude, angry, or threatening manner or unlawfully using a gun in any fight or quarrel.²⁶

JCB

Crimes; reporting obligations of health practitioners, physicians, and surgeons

Penal Code §§ 11160, 11161 (repealed and new); §§ 11161.9, 11162.5, 11162.7, 11163, 11163.2 (new); § 11162 (amended).
AB 1652 (Speier); 1993 STAT. Ch. 992

Under prior law, any person¹ who oversaw a hospital or a pharmacy was required to report² to the appropriate legal authorities³ if any person was brought into the facility with a wound or injury,⁴ either self-inflicted or inflicted by the act of another person, caused by the use of a deadly weapon,⁵ or inflicted in violation of any state penal law.⁶ Chapter 992

26. CAL. PENAL CODE § 12021.1(b)(28) (amended by Chapter 612) (adding as a specified offense any offense listed in California Penal Code § 12001.6(c) if the person has two or more convictions under California Penal Code § 417(a)(2)); *id.* § 12001.6 (West 1992) (specifying offenses involving the violent use of a firearm, including California Penal Code § 417(2)); *id.* § 417(2) (West Supp. 1993) (providing that any person who, in the presence of others, draws or exhibits a loaded or unloaded firearm, in a rude, angry or threatening manner, or uses in any unlawful manner during a quarrel or fight is guilty of a misdemeanor punishable by imprisonment in county jail for not less than three months but not more than six months, or a fine of \$500, or both); *see In Re Jose A.*, 5 Cal. App. 4th 697, 700, 7 Cal. Rptr. 2d 44, 45 (1992) (exhibiting a pellet gun that operated by use of compressed air rather than by explosion or other form of combustion, in an angry manner was not sufficient for a conviction under California Penal Code § 417).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person).

2. *See id.* § 11160(b)(1)-(2) (enacted by Chapter 992) (requiring that a telephone report be made immediately, and a written report be sent to the local authorities within two working days from the time the information is acquired); *id.* § 11160(b)(4)(A)-(D) (enacted by Chapter 992) (detailing the items to be included in the report such as: (1) Name of victim; (2) victim's location; (3) nature and extent of victim's injuries; and (4) identity of the alleged aggressor).

3. *See id.* § 11160(b) (enacted by Chapter 992) (designating law enforcement officers as the appropriate legal authorities); *id.* § 830.1 (West Supp. 1993) (defining peace officer); *cf.* ALA. CODE § 11-43-181 (1989) (defining a law enforcement officer as an official who is authorized to arrest people, required to carry out law enforcement functions, and employed by a state municipality).

4. *See* CAL. PENAL CODE § 11160(c) (enacted by Chapter 992) (excluding from the definition of injury a psychological or physical condition caused by the voluntary use of drugs).

5. *See* CAL. BUS. & PROF. CODE § 7500.1(k) (West Supp. 1993) (defining deadly weapon as any of the following instruments: blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, dirk, dagger, firearms, knife with a blade over five inches in length, razor without a guarded blade, or metal pipe or bar intended to be used as a club); *People v. Macias*, 77 Cal. App. 2d 71, 82, 174 P.2d 895, 901-02 (1946) (noting that when an instrument is used in a dangerous or deadly fashion, it is inferable from the evidence that its user intended

provides that any health practitioner⁷ employed by a health facility,⁸ clinic,⁹ or physician's office, and acting within the scope of employment,¹⁰ must make a report to the appropriate legal authorities concerning any person that the practitioner knows or reasonably suspects¹¹ has suffered from a wound or injury inflicted by the use of a deadly weapon, or resulting from assaultive or abusive conduct.¹²

to utilize it as a weapon during a certain incident); *cf.* *Sumpster v. State*, 480 So. 2d 608, 614 (Ala. Crim. App. 1985) (indicating that a firearm need not be loaded at the time of the offense to constitute a deadly weapon).

6. 1929 Cal. Stat. ch. 417, sec. 1, at 739 (amending CAL. PENAL CODE § 11160); *see* *People v. Perez*, 2 Cal. 4th 1117, 1123, 831 P.2d 1159, 1161, 9 Cal. Rptr. 2d 577, 579 (1992) (indicating that a police investigation was conducted as a result of the information that the police received from the hospital regarding the defendant's wounds, despite the fact that the defendant had told the nurse that he had cut his hand with a saw); *cf.* MOD. HEALTHCARE, *ERs Ill Prepared for Domestic Violence*, Sept. 6, 1993, at 17 (recognizing that many hospital employees do not have the proper training to spot victims of domestic violence).

7. *See* CAL. PENAL CODE § 11162.5(a) (enacted by Chapter 992) (defining health practitioner the same as under Penal Code § 11165.8); *id.* § 11165.8 (West 1992) (listing the following as health practitioners: physician, surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, optometrist, emergency medical technician, counselor, paramedic, psychological assistant, medical examiner who does autopsies, coroner, religious practitioner who treats children, or public health employee who treats minors for sexually transmitted diseases).

8. *See id.* § 11162.5(c) (enacted by Chapter 992) (defining health facility); CAL. HEALTH & SAFETY CODE § 1250 (West Supp. 1993) (explaining that a health facility is a place organized for the purpose of treating human ailments to persons who visit the facility for 24 hours or longer).

9. *See* CAL. PENAL CODE § 11162.5(b) (enacted by Chapter 992) (defining clinic); CAL. HEALTH & SAFETY CODE § 1200 (West 1990) (describing a clinic as an organized health care facility which provides treatment for outpatients).

10. *See* *Hendy v. Losse*, 54 Cal. 3d 723, 740, 819 P.2d 1, 11, 1 Cal. Rptr. 2d 543, 553 (1991) (stating that a person who negligently treats a patient is acting within the scope of his employment if the actor is functioning with an intent to serve his employer); *cf.* *Williams v. Hughes Moving & Storage Co.*, 578 So. 2d 1281, 1283 (Ala. 1991) (recognizing that persons violating company policy at the time of a pertinent incident, do not necessarily act outside the scope of their employment); *Conchin v. El Paso & Southwestern R.R. Co.*, 108 P. 260, 261 (Ariz. 1910) (stating that the determination of whether a person is acting within the scope of his employment must be assessed on a case-by-case basis).

11. *See* CAL. PENAL CODE § 11162.5(d) (enacted by Chapter 992) (defining reasonably suspects as when a person has a reasonably objective suspicion, based on that person's training and experience).

12. *Id.* § 11160(a)(1)-(2) (enacted by Chapter 992); *see id.* § 11160(b)(1)-(2) (enacted by Chapter 992) (describing the manner in which the report should be made); *id.* § 11160(d)(1)-(24) (enacted by Chapter 992) (listing various types of assaultive and abusive conduct, including abusing a marital partner or cohabitant); *id.* § 11161.8 (West 1992) (requiring that every person overseeing a hospital must inform the legal authorities of any incoming patient from a health facility who is suffering from an injury caused by abuse or neglect); *Landeros v. Flood*, 17 Cal. App. 3d 399, 413, 551 P.2d 389, 396, 131 Cal. Rptr. 69, 76 (1976) (holding that the minor, who accused a doctor and hospital of negligently failing to deal with her battered child syndrome effectively, could, as an alternative, rely on the legal provisions requiring hospitals and physicians to report intentionally inflicted injuries to the appropriate law enforcement agencies); *see also* *People v. Gonzalez*, 182 Cal. App. 2d 276, 277-79, 5 Cal. Rptr. 920, 921-22 (1960) (holding that since hospital workers are required to report the treatment of any wound caused by a deadly weapon to the legal authorities, a search by a hospital attendant for a patient's identification, which results in the discovery of contraband, does not constitute an illegal search and seizure); *cf.* ARK. CODE ANN. § 12-12-602 (Michie 1987) (providing that all doctors, hospitals, druggists, or any other persons, who might be summoned to administer first aid, are required to report any knife or gunshot wounds to a law enforcement agency); DEL. CODE ANN. tit. 24, § 1762 (1987) (stating that a physician, any other person from a hospital, sanitarium, or other institution who treats a stab or gun-related

Under existing law, a physician¹³ or surgeon caring for a patient¹⁴ who is suffering from a specified wound or injury is required to report the wound or injury to the legal authorities.¹⁵ Under Chapter 992, a physician or surgeon is required to adhere to the same reporting procedures as a health practitioner.¹⁶ Chapter 992 also recommends that the physician's or surgeon's report include: (1) Documentation in the patient's medical records regarding any statements made by a domestic violence¹⁷ victim regarding past domestic violence, or made by the culprit of the present domestic violence; (2) a sketch of the victim's body within the patient's medical records, noting the location of the injuries and bruises at the time treatment was provided; and (3) a copy of the report given to the law enforcement agency.¹⁸ Chapter 992 further recommends that the physician

wound, or a victim of an intentional poisoning must report such an incident to the legal authorities); HAW. REV. STAT. § 453-14 (1985) (providing that a physician, surgeon, or manager of a hospital or clinic which treats a knife or gun-related wound, or any injury that could seriously maim, cause death, or render a person unconscious, and is the result of violence, must report the same to the police); TENN. CODE ANN. § 38-1-101(a) (1991) (providing that any hospital, clinic, sanitarium, doctor, physician, surgeon, nurse, pharmacist, undertaker or embalmer, who helps a person with a wound or injury resulting from the use of a deadly weapon or by other means of violence, or who suffers from the effects of poison or suffocation, must make an immediate report of the same to the legal authorities); VT. STAT. ANN. tit. 13, § 4012(a) (1974) (providing that any physician or manager of any hospital, sanitarium, or other institution which treats a gun-related wound must report the same to the police). *See generally* Ian Katz, *The Motives: Rare Disorder Holds Key to Ward Killings; Doctors Say Self-Injury and Child Attacks Were Medical Attention-Seeking Typical of Munchausen's Syndrome by Proxy*, GUARDIAN, May 18, 1993, at 2 (explaining that people who suffer from a rare disorder, called Munchausen's Syndrome by Proxy, get emotional satisfaction from intentionally harming others and causing them to seek medical help).

13. *See* CAL. EVID. CODE § 990 (West 1966) (defining a physician as an individual authorized to engage in the practice of medicine in all states and nations); *cf. Ex parte* Interstate Truck Leasing, 537 So. 2d 53, 54 (Ala. Civ. App. 1988) (referring to a physician as a medical doctor, surgeon, or chiropractor); Clemons v. Fairview Medical Ctr., 449 So. 2d 788, 789 (Ala. 1984) (defining a practitioner as a physician, dentist, or podiatrist who holds a license); Gates v. Kilcrease, 188 P.2d 247, 250 (Ariz. 1947) (defining a physician as a licensed person who is authorized to practice medicine or osteopathy).

14. *See* CAL. CIV. CODE § 56.05(c) (West Supp. 1993) (defining a patient as an individual, dead or alive, who has been administered medical treatment from a health care provider).

15. CAL. PENAL CODE § 11161(a) (enacted by Chapter 992); *cf. Baker v. Arkansas*, 637 S.W.2d 522, 523 (Ark. 1982) (holding that the law requiring a doctor to report his treatment of a knife or gunshot wound to the police is not broad enough to require a doctor to report his treatment of a sexually transmitted disease to the legal authorities, because such information is protected by the doctor-patient privilege).

16. CAL. PENAL CODE § 11161(a) (enacted by Chapter 992).

17. *See* CAL. CIV. PROC. CODE § 542(a), (b)(1)-(12) (West Supp. 1993) (defining domestic violence as purposefully causing bodily harm, sexually assaulting, or putting any of the following persons in imminent apprehension of harm: wife, husband, ex-wife, ex-husband, cohabitant, former cohabitant, blood-related adult, a person with whom the defendant has been engaged or dated, or a person who is the parent of a child). *See generally* CAL. PENAL CODE § 13519(a), (b)(1)-(16) (West 1992) (designating training courses and procedures to be adhered to by police officers for the purpose of effectively handling domestic violence complaints); WASH. REV. CODE ANN. § 70.123.130 (West 1992) (providing that the Social & Health Services Department will be responsible for establishing a technical assistance grant program to help communities to learn how to deal with domestic violence, and setting forth the program's goals).

18. CAL. PENAL CODE § 11161(b)(1)-(3) (enacted by Chapter 992).

or surgeon refer the patient to local agencies providing domestic violence services.¹⁹

Under existing law, any violation of these provisions constitutes a misdemeanor.²⁰ Under Chapter 992, such a misdemeanor will be punishable by a jail sentence of up to six months, a fine of up to \$1,000, or both.²¹

Chapter 992 provides that a health practitioner who makes such a report is immune from civil or criminal prosecution.²² Under Chapter 992, if a person pursues an action against a health practitioner for making a report, the practitioner is permitted to present the claims to the State Board of Control to recover reasonable attorney's fees²³ of up to \$50,000 incurred in connection with such an action.²⁴

19. *Id.* § 11161(c) (enacted by Chapter 992); see Greg Lucas, *Wilson Grants Clemency to Two Battered Women, Petitions Denied for Fourteen Other Female Prisoners*, S.F. CHRON., May 29, 1993, at A1 (reporting that lawyers for the California Coalition for Battered Women in Prison have represented the 21 of the 34 inmates who have petitioned the Governor to commute their sentences based on the battered women's syndrome); cf. *Comic Books and the Rape Culture*, GANNETT NEWS SERVICE, Aug. 31, 1993 (stating that Domestic Violence Project-SAFE House is a private, nonprofit organization which serves as a refuge for battered women in Ann Arbor); Bonnie Miller Rubin, *Shelters, Crisis Centers Confront Increase in Domestic Violence*, CHI. TRIB., Sept. 8, 1993, at 5 (naming two domestic violence crisis centers in the Chicago area: Crisis Center for South Suburbia and Evanston-North Shore YWCA).

20. CAL. PENAL CODE § 11162 (amended by Chapter 992); see *id.* § 17(a) (West Supp. 1993) (defining misdemeanor).

21. *Id.* § 11162 (amended by Chapter 992); cf. DEL. CODE ANN. tit. 24, § 1762(a) (1992) (providing that a person who fails to report to the legal authorities the treatment of a knife or gun-related wound will be subject to a minimum fine of \$25); TENN. CODE ANN. § 38-1-101(a) (1991) (providing that a person who fails to report the treatment of a gun-related wound to the legal authorities will be fined up to \$100).

22. CAL. PENAL CODE § 11161.9(a) (enacted by Chapter 992); see *Landeros v. Flood*, 17 Cal. App. 3d 399, 410, 551 P.2d 389, 394, 131 Cal. Rptr. 69, 74, (1976) (indicating that the statute requiring the defendant doctor to report the treatment of intentionally inflicted injuries to the legal authorities did not make the defendant susceptible to liability for violation of the doctor-patient privilege since the statute exempted the defendant from liability for making such a report); cf. DEL. CODE ANN. tit. 24, § 1762(b) (1992) (providing that any doctor or other person making a report regarding intentionally inflicted injuries will be immune from liability, as long as the report is made in good faith and without malice).

23. See CAL. BUS. & PROF. CODE § 6146(a)(1)-(4) (West 1990) (setting the limited amounts that an attorney can collect in fees when representing a client seeking damages against a health care provider based upon that person's alleged professional negligence); CAL. CIV. PROC. CODE § 1235.140 (West 1982) (including the following as litigation expenses: (1) Reasonable and necessary expenses incurred in connection with trial preparation, trial and subsequent judicial proceedings; and (2) reasonable and necessary attorney's fees, and expert expenses incurred while protecting the defendant's interests in connection with the action); cf. CAL. CIV. CODE § 1717(a) (West Supp. 1993) (providing that where a contract allows for the reimbursement of attorney's fees and costs, the prevailing party will be entitled to reasonable attorney fees and costs).

24. CAL. PENAL CODE § 11163(a)-(b)(2) (enacted by Chapter 992).

Under existing law, communications between a physician or psychotherapist and a patient are confidential under certain conditions.²⁵ Chapter 992 provides that the doctor-patient privilege will not be applicable in court proceedings or administrative hearings concerning the injuries that the health practitioner is required to report.²⁶ Chapter 992 further requires that injury-related reports be kept confidential by the person or facility submitting the report, and the law enforcement agency receiving the report, unless the information is disclosed to investigate the

25. CAL. BUS. & PROF. CODE § 2263 (West 1990); *see id.* (declaring that any intentional, unauthorized violation of professional confidence is unprofessional conduct); *see also* CAL. CIV. CODE § 43.92 (West Supp. 1993) (establishing that a psychotherapist is required to warn or protect others from a patient's threatened volatile behavior where the patient has conveyed to the therapist a serious threat of bodily harm against a person who can be readily identified); CAL. HEALTH & SAFETY CODE § 444.5 (West Supp. 1993) (providing that persons who participate in a cardiac catheterization program must furnish statistical data and patient information for effectively evaluating the program, and procedures will be established to protect the confidentiality of the patient information); *id.* § 1250.9(a), (h) (West Supp. 1993) (noting that privilege procedures will be put in place to assure the confidentiality of patient data gathered during any postsurgical care programs); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976) (holding that the patient-psychotherapist privilege must give way to situations where disclosure is necessary to prevent harm to others); *Inabnit v. Berkson*, 199 Cal. App. 3d 1230, 1239, 245 Cal. Rptr. 525, 531 (1988) (holding that when a plaintiff fails to assert the psychotherapist-patient privilege, such non-action is equivalent to a waiver of the privilege); *cf. ARIZ. REV. STAT. ANN.* § 36-714(B)(1) (1986) (providing that a tuberculosis control officer has the authority to review medical data regarding the condition of tuberculosis patients, and such information will remain confidential and will not reveal the identity of the patient to whom the data relates); *CONN. GEN. STAT. ANN.* § 17a-630(d) (West 1992) (providing that information regarding a minor's treatment for alcohol or drug dependence cannot be divulged to that minor's parents without the minor's consent); *Johnson v. McMurray*, 461 So. 2d 775, 778 (Ala. 1984) (noting that a doctor and the doctor's patient share a confidential relationship); *People v. District Court*, 719 P.2d 722, 724 (Colo. 1986) (stating that the aim of the psychologist-patient privilege is to effectuate a proper diagnosis and treatment of the patient by sheltering the patient from any shame that might result from the psychologist's disclosure of their discussions during treatment); *Tumlinson v. Texas*, 663 S.W.2d 539, 542 (Tex. Ct. App. 1983) (noting four exceptions to the patient-professional privilege: (1) When the patient brings suit against the professional; (2) when the patient waives the privilege; (3) when the intent of the suit is to substantiate and collect on a claim for mental or emotional health services provided to the patient; or (4) when the patient has spoken with a professional pursuant to a court ordered exam and has been informed that such discussions will not be deemed confidential). *But see* Judy E. Zelin, Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R. 4th 668, 680 (1986) (stating that some courts have acknowledged that if a physician reveals confidential information about a patient, that patient may pursue a cause of action against the physician based on an invasion of that patient's privacy); *id.* at 691-92 (explaining that some jurisdictions do not adhere to the common law rule that the patient and the physician have a right to keep their communications private, nor have they enacted statutes protecting such a privilege).

26. CAL. PENAL CODE § 11163.2 (enacted by Chapter 992); *cf. Samaritan Health Servs. v. Glendale*, 714 P.2d 887, 890 (Ariz. Ct. App. 1986) (recognizing that numerous exceptions have been made to the doctor-patient privilege, such as the statutes mandating that a doctor report his treatment of any knife or gunshot wounds to the legal authorities); *Freeman v. Arkansas*, 527 S.W.2d 909, 913 (Ark. 1975) (noting that it would be hypocritical to require a doctor to inform the legal authorities that he has treated a victim with a gunshot wound, but prohibit the doctor from testifying at trial about the nature, location and extent of such a wound). *But cf. In re Onondaga*, 450 N.E.2d 678, 679 (N.Y. 1983) (quashing a government subpoena served upon a hospital, requesting the names and addresses of persons treated for stab wounds on certain days in order to further a murder investigation, since such a request infringed upon the doctor-patient privilege).

report or enforce criminal laws implicated by the report.²⁷ Under Chapter 992, the alleged culprit will not be given any information regarding the injured person's location.²⁸

APW

Crimes; restitution fines—child abuse prevention

Penal Code § 294 (new).

AB 931 (Friedman, B.); 1993 STAT. Ch. 967

Existing law prescribes punishments, fines, and penalties for persons convicted of various specified sex offenses and crimes.¹ Chapter 967 provides that when a person is convicted of violating specified Penal Code sections relating to crimes against children,² or other specified sexual crimes where the victim was under 14 years of age,³ the court may order the defendant to pay a restitution fine of up to \$5,000 upon a felony conviction, or \$1,000 upon a misdemeanor conviction, in addition to any

27. CAL. PENAL CODE § 11163.2(b) (enacted by Chapter 992); *see* CAL. BUS. & PROF. CODE § 2225 (West Supp. 1993) (providing that rules governing the doctor-patient privilege are not applicable when investigations or proceedings are conducted to enforce the law).

28. CAL. PENAL CODE § 11163.2(b) (enacted by Chapter 992).

1. *See infra* notes 2-3 (describing specified sex offenses and crimes). *See generally* Robert T. Mertens, Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U. L. REV. 437 (1985) (discussing changes in California law resulting from the prevalence of child sexual abuse).

2. *See* CAL. PENAL CODE § 273a (West 1988) (describing the punishment for child endangerment); *id.* § 273d (West 1988) (specifying punishment for the willful infliction of corporal punishment upon a child); *id.* § 288.5(a) (West Supp. 1993) (prohibiting continuous sexual abuse of a child by a person with access to the child); *id.* § 311.2(b) (West Supp. 1993) (making it a crime to send or bring any matter depicting sexual conduct by a minor into the state for sale or distribution); *id.* § 311.3(a) (West 1988) (stating that a person is guilty of sexual exploitation of a child when he or she depicts by film, photograph, videotape, etc., sexual conduct by a person under the age of 14); *id.* § 647.6 (West 1988) (specifying the punishment for annoying or molesting a person under the age of 18); *see also id.* § 11165 (West 1992) (defining child as a person under the age of 18 years).

3. *See id.* § 261 (West Supp. 1993) (defining rape); *id.* § 264.1 (West 1988) (setting forth provisions regarding rape or penetration by foreign object and acting in concert by force or violence); *id.* § 285 (West 1988) (defining incest); *id.* § 286 (West Supp. 1993) (defining and specifying the punishment for sodomy); *id.* § 288a (West Supp. 1993) (defining oral copulation and specifying punishment depending upon the age of the victim); *id.* § 289 (West Supp. 1993) (setting forth provisions with respect to penetration by a foreign object).

other penalties or fines⁴ imposed by the court.⁵ The amount of restitution ordered by the court will depend upon the defendant's ability to pay.⁶ In

4. See CAL. CONST. art. I, § 28(b) (stating that it is the unequivocal intention 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 and that restitution shall be ordered from the convicted persons in every case in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary); see also CAL. GOV'T. CODE § 13967(a) (West 1992) (providing that any person convicted of any crime in the State of California shall be ordered to pay restitution in the form of a penalty assessment in accordance with California Penal Code § 1464 and to pay restitution to the victim); CAL. PENAL CODE § 1202.4(a) (West Supp. 1993) (providing that a court will order a defendant convicted of a felony to pay a restitution fine as set forth in California Government Code § 13967(a)); *id.* § 1203.04(a)(2) (West Supp. 1993) (stating that in every case where a convicted person is granted probation, the court will order restitution to the victim or to the Restitution Fund if the crime did not involve a victim); *id.* § 1203.1g (West Supp. 1993) (specifying that where a defendant is convicted of sexual assault on a minor and the defendant is eligible for probation, the court will order the defendant to make restitution for the costs of medical or psychological treatment incurred by the victim as a result of the assault); *People v. Wardlow*, 227 Cal. App. 3d 360, 368-71, 278 Cal. Rptr. 1, 4-6 (1991) (holding that a defendant convicted of child molesting must pay for the psychological treatment of the victim, but does not have to pay Medi-Cal or contribute to the Victim's Assistance Fund, because the Legislature intended to include only the direct and actual victims of an assault under California Penal Code § 1203.1g); *cf.* CAL. CONST. art. I, § 17 (stating that excessive fines may not be imposed); *People v. Allensworth*, 600 N.E.2d 1197, 1200 (Ill. App. 1992) (holding that the defendant must pay restitution for the cost of counseling a sexual abuse victim and his family).

5. CAL. PENAL CODE § 294 (enacted by Chapter 967). See generally SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 931, at 2 (July 6, 1993) (indicating that there is a lack of state and county resources for the prevention of child abuse and that there has been a 123% increase in the number of child abuse cases reported since 1980).

6. CAL. PENAL CODE § 294(a) (enacted by Chapter 967); see SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 931, at 3 (July 6, 1993) (stating that the fine is discretionary as to its imposition and amount, as long as it does not exceed \$5,000, but noting that Chapter 967 does not specify precisely the manner in which the defendant's ability to pay will be determined); see also *People v. Reyes*, 195 Cal. App. 3d 957, 966, 240 Cal. Rptr. 752, 758 (1987); (stating that a trial court need not state the precise reasons for fixing the amount of a restitution fine, but that the amount of the fine must be supported by the record); *People v. Gray*, 187 Cal. App. 3d 213, 222, 231 Cal. Rptr. 658, 663 (1986) (stating that the amount of restitution ordered under California Government Code § 13967 and California Penal Code § 1202.4 must be supported by the factual record consistent with the defendant's due process rights); *People v. Wyman*, 166 Cal. App. 3d 810, 815, 212 Cal. Rptr. 668, 672 (1985) (stating that, under California Government Code § 13967, factors considered by the court in determining the amount of the restitution fine include: (1) The victim's losses; (2) the seriousness and gravity of the offense; (3) the circumstances of the commission of the offense; and (4) any economic gain to the defendant as a result of the crime); *cf.* 18 U.S.C.S. § 3664(a) (Law. Co-op. 1990 & Supp. 1993) (requiring that the court, in determining whether to order restitution, shall consider the amount of the victim's loss, the defendant's financial resources, the financial needs and earning ability of the defendant and the defendant's dependents and other factors as the court deems appropriate); FLA. STAT. ANN. § 775.089(6) (West 1992) (stating that, in determining the amount of restitution to be paid to the victim, the court shall consider the victim's losses, the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents, and any other factors the court deems appropriate); OR. REV. STAT. § 137.106(2)(a)-(c) (1991) (stating that, in determining the amount of restitution, the court will consider the financial resources of the defendant and the defendant's ability to pay); *McManamon v. State*, 609 So. 2d 91, 92 (Fla. App. 1992) (holding that a defendant who agrees to restitution as part of a plea agreement but fails to argue an inability to pay the amount set by a court waives his rights under FLA. STAT. ANN. § 775.089(6)); *State v. Carr*, 840 P.2d 724, 725 (Or. App. 1992) (holding that the court must consider the defendant's ability to pay restitution, not establish that the defendant actually had that ability). But see *People v. Staley*, 10 Cal. App. 4th 782, 784-85, 12 Cal. Rptr. 2d 816, 818 (1992) (stating that restitution fines imposed under California Penal Code § 1202.4 and California Government Code § 13967 do not require a finding of ability to pay);

cases where the defendant is an immediate family member of the victim, the court will take into account any hardship to the victim that might result from the imposition of the fine.⁷

LTE

Crimes; school crimes

Education Code §§ 1982.5, 48915.2 (new); §§ 1981, 48915.1, 49079 (amended); Penal Code §§ 241.6, 243.6 (amended).
SB 1130 (Roberti); 1993 STAT. Ch. 1257

Existing law provides that the county board of education¹ may enroll in community schools² students who have been expelled³ while attending

People v. McGhee, 197 Cal. App. 3d 710, 715, 243 Cal. Rptr. 46, 48 (1988) (finding that the trial court was not required to consider that the defendant had no assets and had limited employment potential before imposing a \$10,000 restitution fine under California Penal Code § 1202.4); 65 Op. Cal. Att'y Gen. 581, 584 (1982) (stating that a penalty assessment under California Penal Code § 1464 may be levied by the trial court without regard to the criminal defendant's present ability to pay such assessments).

7. CAL. PENAL CODE § 294(c) (enacted by Chapter 967). Fines collected under the provisions of Chapter 967 will be deposited into the state's Restitution Fund to be transferred to the county Children's Trust Fund for child abuse prevention. *Id.* § 294(d) (enacted by Chapter 967) *See* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 931, at 2 (July 6, 1993) (indicating that the fines imposed by the court shall be used for local child abuse prevention programs including, but not limited to, neonatal home visits to at-risk parents, treatment therapy, counseling and training for mandated child abuse reporters); *see also* CAL. WELF. & INST. CODE § 18966 (West 1991) (indicating that California's children's trust funds are currently funded through surcharges on birth certificates, grants, gifts, bequests and money appropriated for the fund from the state legislature or local government agencies); CAL. REV. & TAX. CODE § 18500(a) (West Supp. 1993) (providing that taxpayers may designate a portion of their tax refund to go to the State Children's Trust Fund); *cf.* ALA. CODE §§ 26-16-30(e), 26-16-31(a) (1992), MO. ANN. STAT. § 210.174 (Vernon Supp. 1993) (allowing taxpayers to donate part of their tax refunds to the state children's trust fund); ARK. CODE ANN. § 9-30-109(b) (Michie 1992), MINN. STAT. ANN. § 144.226 (West 1989 & Supp. 1993), N.C. GEN. STAT. § 161-11.1 (1992), WASH. REV. CODE § 70.58.085 (1992) (providing for generation of funds for their state children's trust funds by assessing surcharges on vital records, including birth, marriage and death certificates); MASS. GEN. L. ANN. ch. 10, § 25 (West 1986 & Supp. 1993) (providing that the state will donate part of its lottery revenues to its children's trust fund).

1. *See* CAL. EDUC. CODE § 1000 (West 1978) (providing for the creation of county boards of education); *id.* § 1040 (West Supp. 1993) (explaining the duties of the county board of education).

2. *See id.* § 1980 (West 1978) (providing that the county board may establish or maintain one or more community schools).

3. *See id.* § 48925(b) (West 1993) (defining expulsion as the removal of a student from the immediate or general supervision of school personnel).

continuing classes,⁴ opportunity classes,⁵ or alternative classes.⁶ Chapter 1257 provides that a student may not be enrolled in a community school if that student is expelled because of: (1) Physical injury to another; (2) possession of a firearm, knife, or other dangerous object; (3) unlawful sale of a controlled substance; or (4) robbery or extortion.⁷ Chapter 1257 further provides that a student in juvenile court school⁸ who had been expelled for any of the aforementioned acts is deemed to be enrolled in a county community school for purposes of State School Funds apportionments.⁹

Under existing law, a student must be recommended for expulsion from school for certain acts.¹⁰ Prior law required that the governing board¹¹ of a school district which received a request from an individual who had been expelled from another district for any of these acts, hold a hearing to determine if that student still posed a threat to students or employees.¹²

4. See *id.* § 48430 (West 1993) (providing that the intent of the Legislature in establishing continuation classes is to give students the opportunity to complete academic requirements for highschool graduation, to offer instruction that emphasizes occupational orientation, and to meet the educational needs of each student).

5. See *id.* § 48630 (West 1993) (proclaiming that the legislative intent of an opportunity class is to provide a chance to students in danger of becoming habitually truant from class to resolve their problems and maintain or reestablish themselves in regular classes).

6. *Id.* § 1981(a)(1) (amended by Chapter 1257); see *id.* § 58500 (West 1989) (defining alternative school as a school or separate class designed to maximize the opportunity for students to develop positive values, recognize that the student learns best when the student wants to learn, and maintain a learning situation maximizing student self-motivation).

7. *Id.* § 1981(a) (amended by Chapter 1257); see *id.* § 48915(a) (amended by Chapter 1256) (enumerating the grounds for expulsion that prohibit enrollment in a community school). See generally Jeanne Freeman Brooks, *It's Back to the Books — and the Guns: Weapons a Fact of Life at Today's Schools*, SAN DIEGO UNION-TRIB., Sept. 3, 1993, at A1 (stating that the San Diego Unified School District has adopted a "zero tolerance" policy that expels any student found with a weapon and places the student in an alternative school); *Expulsions Up in Wake of New School Gun Policy*, UPI, July 25, 1993, available in LEXIS, Nexis Library, UPI File (describing a new policy in Los Angeles that does not allow a student expelled for possession of a firearm to attend an alternative school program in the L.A. Unified School District).

8. See CAL. EDUC. CODE § 48645.1 (West 1993) (defining juvenile court school).

9. *Id.* § 1982.5 (enacted by Chapter 1257); see *id.* § 14000 (West Supp. 1993) (stating that the legislative intent behind public school support is to assure that adequate funding exists for schools).

10. *Id.* § 48915(a)(1)-(4) (amended by Chapter 1256); see *id.* (requiring that the principal or superintendent of schools recommend a student's expulsion if the student caused serious physical injury to another person, except in self-defense; possessed certain dangerous objects; unlawfully sold any controlled substance; or committed robbery or extortion); *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (recognizing the substantial interest of school officials in maintaining discipline in response to the increasing levels of school violence and disorder); *Mitchell v. Board of Trustees*, 625 F.2d 660, 664-65 (5th Cir. 1980) (allowing the strict enforcement of school rules when they are rationally related to the legitimate interest of student safety).

11. See CAL. EDUC. CODE § 78 (West 1978) (defining governing board as a board of school trustees, and the city and county boards of education).

12. 1991 Cal. Legis. Serv. ch. 756, sec. 25, at 2976 (amending CAL. EDUC. CODE § 48915.1). The governing board could then deny the enrollment of the student if it determined that the student was still a threat. *Id.* at 2977; cf. IND. CODE ANN. § 20-8.1-5-18(a) (West Supp. 1993) (providing that a student expelled from a school corporation may not enroll in another school corporation during the period of the expulsion, unless certain

Chapter 1257 provides that this hearing will be held for students who were expelled for reasons other than the specified acts.¹³ Chapter 1257 prohibits a student expelled for committing one of the acts from transferring to another district other than a juvenile court school or a county community school during the period of expulsion.¹⁴

Existing law requires a district to inform the teacher of every student who has caused injury¹⁵ or serious bodily injury¹⁶ to another person.¹⁷ Chapter 1257 requires a district to inform the teacher of each student who has engaged in, or is reasonably suspected to have engaged in, certain violations.¹⁸

Existing law provides that no district will be liable for failing to comply with this provision if a good faith effort to inform the teacher is made.¹⁹ Chapter 1257 mandates that no district, or district officer or employee, will be civilly or criminally liable for providing information under this section, unless the information is proven false, and the district, district officer, or employee knew that the information was false, or had given the information with a reckless disregard for its truth or falsity.²⁰ In addition, an officer or employee who knowingly fails to provide the information is guilty of a misdemeanor.²¹

exceptions apply); IOWA CODE ANN. § 282.18(16) (West Supp. 1993) (providing that a pupil who has been suspended or expelled shall not be able to transfer to another school district until the student has been reinstated in the sending district); TENN. CODE ANN. § 49-6-3401(f) (Supp. 1993) (providing that a local education agency need not enroll a student who is under suspension or expelled in another local agency); TEX. EDUC. CODE ANN. § 21.3011(m) (West Supp. 1993) (providing that if a student enrolls in another school district before the expiration of that student's expulsion, the receiving school district may continue the expulsion or allow the student to attend classes); W. VA. CODE § 18-5-15(c) (Supp. 1993) (providing that any student suspended or expelled from public or private school shall only be permitted to enroll in public school upon the approval of the superintendent of the county where the student seeks enrollment).

13. CAL. EDUC. CODE § 48915.1(a) (amended by Chapter 1257).

14. *Id.* § 48915.2(a) (enacted by Chapter 1257).

15. *See* CAL. PENAL CODE § 243(f)(6) (West Supp. 1993) (defining injury as any physical injury which requires professional medical treatment).

16. *See id.* § 243(f)(5) (West Supp. 1993) (defining serious bodily injury as a serious impairment of physical condition).

17. CAL. EDUC. CODE § 49079(a) (amended by Chapter 1257).

18. *Id.*; *see id.* (providing that any act described in any subdivision of California Education Code § 48900, except subdivision (h), constitutes an act for which a teacher must be informed); *see also id.* § 48900 (a)-(g), (i)-(l) (West 1993) (providing that causing physical injury, possessing a dangerous object, unlawfully possessing a controlled substance, selling a controlled substance, committing robbery or extortion, damaging school property, stealing school property, committing obscene acts, unlawfully possessing drug paraphernalia, disrupting school activities, or knowingly receiving stolen school property are grounds for suspension or expulsion).

19. *Id.* § 49079(b) (amended by Chapter 1257).

20. *Id.*

21. *Id.* § 49079(c) (amended by Chapter 1257); *see id.* (providing that the officer or employee may be imprisoned for up to six months in a county jail, or may face a fine of not more than \$1000, or both).

Under existing law, a person who assaults²² or batters²³ a school employee²⁴ in retaliation for an act performed in the course of that employee's duty may be punished.²⁵ Chapter 1257 adds that a person who assaults or batters a school employee who is engaged in the course of his or her duty may also be punished.²⁶

SVB

22. See CAL. PENAL CODE § 240 (West 1988) (defining assault).

23. See *id.* § 242 (West 1988) (defining battery).

24. See *id.* §§ 241.6, 243.6 (amended by Chapter 1257) (stating that for the purposes of these sections, a school employee has the same meaning as defined in California Penal Code § 245.5(d)); *id.* § 245.5(d) (West Supp. 1993) (defining school employee as a certificated or classified employee of a school district on a part-time or full-time basis); see also *State v. Reed*, 832 P.2d 694, 695 (Ariz. 1992) (ruling that a school bus driver was a school employee under a statute similar to the California Code).

25. CAL. PENAL CODE §§ 241.6, 243.6 (amended by Chapter 1257); see *id.* § 241.6 (amended by Chapter 1257) (stating that the penalty for such an offense will be imprisonment in the county jail for up to one year, or a fine not to exceed \$2000, or both); *id.* § 243.6 (amended by Chapter 1257) (providing that the punishment for an injury inflicted during a battery is imprisonment in the state prison for 16 months, or two or three years). These sections shall not apply to conduct arising from a labor dispute. *Id.* §§ 241.6, 243.6 (amended by Chapter 1257); cf. NEV. REV. STAT. § 200.471(c) (1991) (providing that assault upon a school employee in the performance of his or her duty is a gross misdemeanor); N.M. STAT. ANN. § 30-3-9 (Michie Supp. 1993) (defining various types of assaults and batteries against a school employee); OKLA. STAT. ANN. tit. 70, § 6-113(B) (West 1989) (explaining that a person may be punished by imprisonment or by a fine for committing an assault or battery upon a school employee while the latter is in the performance of his or her duty); UTAH CODE ANN. § 76-5-102.3(1) (Supp. 1993) (mandating that any person who assaults a school employee acting within the scope of his or her employment be guilty of a class A misdemeanor); W. VA. CODE § 61-2-15 (1992) (providing that a person who commits an assault or battery against a school employee may be punished by imprisonment or fine).

26. CAL. PENAL CODE §§ 241.6, 243.6 (amended by Chapter 1257); see *People v. Wright*, 272 Cal. App. 2d 53, 58-59, 76 Cal. Rptr. 859, 863 (1969) (holding that a similar statute, California Penal Code § 243, pertaining to assaults and batteries against police officers in the course of their duty, was not unconstitutional as violative of due process for being too vague). See generally *Out-of-State Teachers Seek Nevada Positions*, 29 Gov. Employee Rel. Rep. (BNA) 1014 (Aug. 12, 1991) (reporting that violence in the classroom has caused several applicants for teaching positions to apply to Nevada schools, where tough assault and battery laws against teachers are being enacted); Beth Kaiman, *Bill Targets School Violence; Legislators Seek Tougher Penalties for Weapons, Assault*, WASH. POST, Feb. 27, 1992, at M1 (describing a new bill in Maryland with tougher penalties for assault against school employees).

Crimes; search and arrest warrants—disclosure

Penal Code § 168 (amended).

AB 1314 (Connolly); 1993 STAT. Ch. 311

Existing law provides that if a district attorney, judge, peace officer,¹ or clerk² who, other than by issuing or in executing a search³ or arrest warrant⁴ for a felony,⁵ reveals that a warrant exists prior to its execution for the purpose of preventing the property at issue from being searched or seized, or the person in question from being arrested, that official will be imprisoned in a state prison or in a county jail.⁶ Existing

1. See CAL. PENAL CODE § 830.1 (West Supp. 1993) (defining a peace officer as any type of sheriff, police officer, marshal, constable, port warden, inspector or investigator employed by the city, county or district attorney).

2. See CAL. CONST. art. IV, § 4 (defining a county clerk as an ex officio clerk of the superior court in the county).

3. See CAL. PENAL CODE § 1523 (West 1982) (defining a search warrant as a written order, signed by a magistrate, authorizing a law enforcement officer to seek a particular item of personal property to be submitted to the magistrate); see also *People v. Kesey*, 250 Cal. App. 2d 669, 671, 58 Cal. Rptr. 625, 626 (1967) (confirming that a magistrate has the power to issue a search warrant only if there is enough evidence to cause a reasonably prudent person to conclude that there is sufficient ground for a search to be conducted); cf. *Chenkin v. Bellevue Hosp. Ctr.*, 479 F. Supp. 207, 213 (S.D.N.Y. 1979) (stating that to determine whether a warrantless search of a person is reasonable, there must be a balancing of the societal interest against the Fourth Amendment interest of the person being searched). See generally *Time of Day is Relevant to Reasonableness of Search*, NAT'L L.J., May 24, 1993, at 39 (reporting that the reasonableness of a warrantless, protective search may depend on the time of day that the officer stopped the person and whether or not other people were present during that time).

4. See CAL. PENAL CODE § 813 (West Supp. 1993) (explaining that a magistrate will issue an arrest warrant once a complaint is filed against the defendant, provided that the magistrate is confident from the information in the complaint that an offense has been committed and there is reasonable ground to suspect that the defendant committed the offense); *Cummiskey v. Superior Court*, 3 Cal. 4th 1018, 1029, 839 P.2d 1059, 1066, 13 Cal. Rptr. 2d 551, 557 (1992) (stating that probable cause exists when a reasonably prudent person would have a strong suspicion that the accused has committed the crime in question); see also *People v. Sesslin*, 68 Cal. 2d 418, 421, 439 P.2d 321, 323, 67 Cal. Rptr. 409, 411 (1968), cert. denied, 393 U.S. 1080 (1969) (holding that a magistrate has the authority to issue an arrest warrant only if probable cause exists); *People v. McCarter*, 117 Cal. App. 3d 894, 909, 173 Cal. Rptr. 188, 196 (1981) (stating that arrest warrants cannot be issued upon oral testimony, but rather can only be issued on the basis of sworn written complaints or affidavits establishing probable cause); cf. *Lamb v. Arkansas*, 743 S.W.2d 399, 401 (Ark. Ct. App. 1988) (holding that the prosecution failed to meet the warrant requirements where the warrant was issued without the approval of a disinterested magistrate and without an independent determination of probable cause); *Thompson v. Delaware*, 539 A.2d 1052, 1055-56 (Del. 1988) (holding that when a warrantless arrest is made, the requirements to fulfill the probable cause determination must be, at a minimum, equal to those where an arrest warrant is secured); *Iowa v. Harvey*, 242 N.W.2d 330, 340 (Iowa 1976) (defining probable cause as when a reasonable man believes that an offense has been committed by the arrestee).

5. See CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining felony).

6. *Id.* § 168(a) (amended by Chapter 311); see *id.* (providing that the official's jail or prison term for premature disclosure of a warrant will not exceed one year); cf. *CONN. GEN. STAT. ANN.* § 54-33c (West Supp. 1993) (providing that the court clerk is prohibited from revealing any information relating to a search warrant prior to its execution); *IDAHO CODE* § 18-4402 (1992) (stating that every grand juror, prosecuting attorney, clerk,

law further provides that disclosure⁷ of the warrant's existence made solely with the intention of assuring the defendant's voluntary compliance with the warrant will not be prevented.⁸ Chapter 311 limits this privilege to the Attorney General or a district attorney.⁹

Chapter 311 also provides that the Attorney General or a district attorney, upon an indictment being made and arrest warrant being issued, will not be prevented from disclosing the existence of the indictment and the arrest warrant for the purpose of apprehending the defendant.¹⁰

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judge or other officer who intentionally reveals the existence of an indictment for a felony, prior to the defendant's arrest, has committed a misdemeanor); NEB. REV. STAT. § 29-817 (1989) (indicating that any person who reveals that an application for a warrant has been submitted or a warrant has been issued, prior to its execution, is guilty of a misdemeanor); WIS. STAT. ANN. § 946.76 (West 1982) (stating that a person is subject to a fine of up to \$10,000 or imprisonment for up to two years, or both, for disclosing information regarding a search warrant prior to its execution).

7. See *People v. Tansey*, 593 N.Y.S.2d 426, 435 (N.Y. Sup. Ct. 1992) (defining disclosure as the revelation of secret or not fully comprehended information).

8. CAL. PENAL CODE § 168(b)(1) (amended by Chapter 311); cf. KAN. STAT. ANN. § 21-3827 (1988) (noting that the law against early disclosure of a warrant does not apply to law enforcement officers who disclose the existence of the warrant in order to encourage the defendant to surrender, or in a matter involving a child kidnapping).

9. CAL. PENAL CODE § 168(b)(1) (amended by Chapter 311).

10. *Id.* § 168(b)(2) (amended by Chapter 311); cf. *Pennsylvania v. Johnson*, 409 A.2d 308, 310 (Pa. 1979) (stating that Bucks County officials revealed the existence of an arrest warrant to New Jersey officials where the appellant was imprisoned on unrelated charges); *Wal-Mart Stores v. Medina*, 814 S.W.2d 71, 72 (Tex. Ct. App. 1991) (depicting an incident in which an arrestee surrendered to the police after learning that there was a warrant for her arrest).

Crimes; sentence enhancement—credible threat

Penal Code § 1170.13 (amended).

AB 106 (Martinez); 1993 STAT. Ch. 553

Under existing law, a person¹ convicted of a felony,² who willfully³ and maliciously⁴ communicates a credible threat⁵ to use force or violence against a victim⁶ or witness⁷ of the felony, is subject to imprisonment.⁸ Upon the consecutive convictions for the communication of a credible threat, the subordinate term⁹ imposed shall not exceed fifteen years and shall consist of the full length of the middle term¹⁰ for that offense.¹¹ However, the sentence imposed may exceed fifteen years if the person making the credible threat is either confined or subject to reimprisonment in state prison.¹²

1. See CAL. PENAL CODE § 7 (West 1988) (defining person).

2. See *id.* § 17 (West Supp. 1993) (defining a felony as a crime that is punishable by death or imprisonment in a state prison).

3. See *id.* § 7(1) (West 1988) (defining willfully as an intentional act done with a purpose or willingness to commit the act); *People v. Williams*, 102 Cal. App. 3d 1018, 1029, 162 Cal. Rptr. 748, 755 (1980) (concluding that words such as willfully, knowingly, and maliciously are words relating to general intent); 2 CALJIC 351 (4th ed. 1979) (stating that willfully, knowingly, and maliciously are normally expressions of mental states in general criminal intent).

4. See CAL. PENAL CODE § 136(1) (West 1988) (defining malice as an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice).

5. See *id.* § 139(c) (West Supp. 1993) (defining credible threat as a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family); *People v. Dollar*, 228 Cal. App. 3d 1335, 1341, 279 Cal. Rptr. 502, 505 (1991) (requiring that for the threat to be credible it must be made by an actor who has the apparent ability to carry out the threat and the additional criminal intent to cause the victim to fear).

6. See CAL. PENAL CODE § 136(3) (West 1988) (defining victim).

7. See *id.* § 136(2) (West 1988) (defining witness).

8. *Id.* § 139(a) (West Supp. 1993); see *id.* (requiring the sentence to be either imprisonment in the county jail not to exceed one year or in the state prison for two, three, or four years); *Dollar*, 228 Cal. App. 3d at 1340 n.2, 279 Cal. Rptr. at 504 n.2 (concluding that the requisite intent required by California Penal Code § 139 is the intent to cause reasonable fear); see also *People v. Hood*, 1 Cal. 3d 444, 455-57, 462 P.2d 370, 377-78, 82 Cal. Rptr. 618, 625-26 (1969) (reviewing the distinction between general and specific intent crimes).

9. See 3 B.E. WITKIN & N.L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1474 (2d ed. 1989) (defining subordinate terms as consecutive sentences). See generally *People v. Lawson*, 107 Cal. App. 3d 748, 165 Cal. Rptr. 764 (1980) (discussing principal, subordinate, and consecutive terms).

10. See CAL. PENAL CODE § 1170(b) (West Supp. 1993) (defining middle term as the term to be given if the statute provides three possible terms, or as a sentence when no mitigating or aggravating factors exist to warrant the sentence being longer or shorter); *People v. Lobaugh*, 188 Cal. App. 3d 780, 785, 233 Cal. Rptr. 683, 686 (1987) (holding that the imposition of the middle term is mandated by California Penal Code § 1170, absent aggravating or mitigating factors).

11. CAL. PENAL CODE § 1170.13(a) (amended by Chapter 553); see *id.* (providing that the term not exceed 15 years).

12. *Id.* § 1170.13(b) (amended by Chapter 553).

Existing law requires the term of the imprisonment not to exceed twice that of the base term imposed by the trial court.¹³ Chapter 553 expressly exempts the subordinate terms imposed by the existing law from the double-base term-limit.¹⁴

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13. *Id.* § 1170.1(g) (West Supp. 1993); see CAL. R. CT. 405(b) (defining base term as the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed); see also 3 B.E. WITKIN & N.L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1487 (2d ed. 1989 & Supp. 1993) (discussing the double-base-term rule); *Review of Selected 1991 California Legislation*, 22 PAC. L.J. 323, 523 (1991) (reviewing California Penal Code § 1170.1).

14. CAL. PENAL CODE § 1170.13(c) (amended by Chapter 553); see *id.* (expressly overriding the double-base-term limit set forth in § 1170.1(g)); CAL. CONST. art. I, § 28(f) (stating that any prior felony convictions shall subsequently be used without limitation for purposes of sentence enhancements in any criminal proceeding); *People v. Pieters*, 52 Cal. 3d 894, 904, 802 P.2d 420, 426, 276 Cal. Rptr. 918, 924 (1991) (holding that quantity sentence enhancements under California Penal Code § 1170 were impliedly exempted from the double-base-term limit of California Penal Code § 1170.1(g) before § 1170 was amended to expressly provide such); see also CAL. PENAL CODE § 667.5(b) (West Supp. 1993) (requiring the court, for any new felony which requires a sentence to be imposed, to add a one-year term for each prior separate prison term served for any felony); *People v. Prather*, 50 Cal. 3d 428, 440, 787 P.2d 1012, 1020, 267 Cal. Rptr. 605, 613 (1990) (concluding that the California Constitution supersedes the application of the double-base-term limitation of California Penal Code § 1170.1(g) to sentence enhancements based on California Penal Code § 667.5); *People v. Fritz*, 40 Cal. 3d 227, 233, 707 P.2d 833, 837, 219 Cal. Rptr. 460, 464 (1985) (Lucas, J. dissenting) (arguing that the intent of the framers and voters was thwarted by allowing the trial courts to dismiss or strike prior convictions to avoid the mandatory sentence enhancements of California Penal Code § 667); Sue Ellen Dieb, *California Supreme Court Survey*, 18 PEPP. L. REV. 682, 685 (1991) (stating that *People v. Prather* should be broadly interpreted due to the constitutional language used); cf. ARIZ. REV. STAT. ANN. §§ 13-604, 13-702 (West Supp. 1993) (providing similar sentence enhancement statutes); *State v. Phillips*, 678 P.2d 512, 515 (Ariz. 1983) (stating that the elements of the prior offenses are relevant in determining whether the enhanced punishment provisions apply). But see CAL. PENAL CODE § 1385(b) (West Supp. 1993) (overruling *People v. Martinez*, 175 Cal. App. 3d 881, 221 Cal. Rptr. 258 (1985) by providing that a judge may not strike any prior convictions of a serious felony for purposes of sentence enhancement under California Penal Code § 667(a)); *People v. Salazar*, 194 Cal. App. 3d 634, 637 n.2, 239 Cal. Rptr. 746, 747 n.2 (1987) (stating that *People v. Fritz* was abrogated by emergency legislation on May 6, 1986, which amended California Penal Code §§ 667 and 1385). See generally *Victim's Rights Symposium*, 23 PAC. L.J. 815 (1992) (discussing Proposition 8 and the Victim's Rights Bill regarding sentence enhancements and the double-base-term rule).

Crimes; sentence enhancement—great bodily injury to the elderly

Penal Code § 12022.7 (amended).

AB 1549 (Epple); 1993 STAT. Ch. 608

Existing law provides that any person who, with the intent to inflict great bodily injury,¹ personally inflicts such injury on any person, other than an accomplice, during the commission of a felony, will receive an additional three year sentence.²

Chapter 608 provides that any person who intentionally inflicts great bodily injury on another person which causes that person to become paralyzed³ or comatose, will receive an additional and consecutive five year term.⁴ Chapter 608 further provides that a person who inflicts great bodily injury on a victim who is seventy years of age or older, other than an accomplice, during the commission or attempted commission of a

1. See CAL. PENAL CODE § 12022.7(d) (amended by Chapter 608) (defining great bodily injury as a significant or substantial physical injury).

2. *Id.* § 12022.7(a) (amended by Chapter 608); see *id.* § 1170.1 (West Supp. 1993) (listing the sentence enhancements which are imposed for aggravating circumstances); *id.* (discussing the statutory provisions relating to aggravating circumstances); cf. 18 U.S.C. § 3553(b) (1988) (permitting a court to impose a sentence which extends beyond a specified range if aggravating circumstances exist).

3. See CAL. PENAL CODE § 12022.9(a)(3)(A) (West Supp. 1993) (defining paralysis as a major or complete loss of motor functioning resulting from injury to the nervous system or muscular mechanisms).

4. *Id.* § 12022.7(b) (amended by Chapter 608).

felony, will receive an additional five year term, unless the injury is an element of the felony offense of which that person is convicted.⁵

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Crimes; sentence enhancement—sex offenses against minors

Penal Code § 667.15 (new).

AB 25 (Burton); 1993 STAT. Ch. 591

Under existing law, it is a felony punishable by a three, six, or eight year prison term for any person¹ to willfully² commit any lewd or

5. *Id.* § 12022.7(c) (amended by Chapter 608); *see id.* § 12022.7(e) (amended by Chapter 608) (noting that this provision does not apply to murder, manslaughter or arson); *Finney v. State*, 320 S.E.2d 147, 153 (Ga. 1984) (finding that the defendant's acts of intentionally inflicting serious physical and psychological abuse on two elderly women, prior to their deaths, were aggravating circumstances for increased sentences), *cert. denied*, 470 U.S. 1088 (1985); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1549, at 2 (Apr. 13, 1993) (stating that the purpose of the bill is to protect seniors who are vulnerable victims and who are afraid to leave their homes at night or even to walk during the daytime); *id.* (reporting that seniors who hear of others being attacked become fearful of walking outdoors and subsequently may become psychological prisoners in their own homes); *id.* (noting that some of the seniors that have been attacked have ended up in hospitals, or nursing homes with broken hips or may have had to move out of their neighborhood and in with their children); *see also* *People v. Bean*, 46 Cal. 3d 919, 960, 760 P.2d 996, 1022, 251 Cal. Rptr. 467, 493-94 (1988) (Broussard, J., dissenting) (stating that the nature of the crimes, involving senseless violence against older, defenseless victims, was inherently prejudicial), *cert. denied*, 494 U.S. 1038 (1990); *People v. Jackson*, 28 Cal. 3d 264, 315, 61 P.2d 149, 175, 168 Cal. Rptr. 603, 629 (1980) (noting that in the case of the murders of two elderly people in their mobilehome, one of the aggravating circumstances was the use of lethal and unusually brutal force against the elderly ladies), *cert. denied*, 450 U.S. 1035 (1981); *cf.* 42 U.S.C.A. § 3002(24) (West Supp. 1993) (defining elder abuse as the abuse of an older individual); GA. CODE ANN. § 16-5-21(d) (1992) (stating that any person who commits the offense of aggravated assault against a person who is 65 years of age or older will be punished by imprisonment for three to 20 years); ILL. ANN. STAT. ch. 720, para. 5/12-2(a)(12) (Smith-Hurd 1993) (stating that a person who knowingly or without legal justification, commits an assault on a person 60 years of age or older is guilty of misdemeanor aggravated assault); *id.* ch. 320, para. 15/2(D) (1993) (defining "abuse" as intentionally or knowingly causing any physical injury or exploiting the resources of an elderly individual); VT. STAT. ANN. tit. 33, § 6913(a) (1992) (providing that any person who willfully or intentionally engages in abuse or exploitation of an elderly person will be fined not more than \$10,000 or imprisoned for not more than 18 months, or both). *See generally* Susan M. Witt, Note, *The Illinois Aggravated Battery of a Senior Citizen Statute: Out of Sync with the Sentencing System*, 1989 U. ILL. L. REV. 1161, 1161 (discussing an Illinois law that defines the offense of aggravated battery of a senior citizen as a class 2 felony, distinguished from the general class 3 felony of aggravated battery, and concluding that the law hinders rather than promotes convictions); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1549, at 3 (Apr. 13, 1993) (reporting that the California Attorneys for Criminal Justice oppose this bill because the group has experienced that the Penal Code is a poor medium by which to send a message to those who commit violent crimes).

1. *See In re Paul C.*, 221 Cal. App. 3d 43, 49, 270 Cal. Rptr. 369, 372 (1990) (concluding that the definition of person may include a minor under 14 committing sexual acts with other children upon clear proof of the minor's knowledge of the wrongfulness of the acts and criminal intent); *In re John L.*, 209 Cal. App. 3d

lascivious act³ with a child under the age of fourteen.⁴ It is also a felony punishable by a six, twelve, or sixteen year prison term, for a person who lives with or has recurring access to a minor to engage in continuous sexual abuse⁵ with that child.⁶

Existing law further provides that it is a felony to knowingly possess or control any matter depicting a minor under age fourteen personally engaging in or simulating sexual conduct.⁷

1137, 1141, 257 Cal. Rptr. 682, 684 (1989) (holding that a minor 14 or older is a person under California Penal Code § 288(a), when the minor engages in sexual contact with a willing partner who is under 14 years of age).

2. See CAL. PENAL CODE § 7(1) (West 1988) (defining willfully, when applied to the intent with which an act is done, as simply a purpose or willingness to commit the act).

3. See *People v. O'Connor*, 8 Cal. App. 4th 941, 947-48, 10 Cal. Rptr. 2d 530, 533-34 (1992) (acknowledging that the defendant's act of directing a child to remove all his clothes except underwear was sufficient for lewd and lascivious conduct under California Penal Code § 288(a)); *People v. Catelli*, 227 Cal. App. 3d 1434, 1447-48, 278 Cal. Rptr. 452, 461 (1991) (affirming that defendant's act of forcing the victim to lick the defendant's scrotum was lewd and lascivious); cf. *People v. Gilbert*, 5 Cal. App. 4th 1372, 1380, 7 Cal. Rptr. 2d 660, 664 (1992) (noting that the lewd and lascivious act need not be inherently sexual in nature). A crime is committed by any touching of a child with requisite intent. *Id.*

4. CAL. PENAL CODE § 288(a) (West Supp. 1993); see *People v. Dunnahoo*, 152 Cal. App. 3d 561, 574, 199 Cal. Rptr. 796, 802-03 (1984) (stipulating that other uncharged sexual acts are admissible to prove that the defendant committed the charged acts with the intent required under the statute).

5. See CAL. PENAL CODE § 288.5(a) (West Supp. 1993) (defining continuous sexual abuse).

6. *Id.*

7. *Id.* § 311.11(a) (West Supp. 1993); see *id.* § 311.4(d) (West 1988) (defining sexual conduct); see also *New York v. Ferber*, 458 U.S. 747, 774 (1982) (holding that a state statute prohibiting the distribution of child pornography did not violate the First Amendment due to the state's interest in protecting children); *id.* at 760 (stating that the most expeditious and practical method of law enforcement is to impose severe criminal penalties on persons selling, advertising, or otherwise promoting child pornography); *id.* at 761 (stating that it was not necessary to find the pornography patently offensive in order to have required the sexual exploitation of a child for its production); *Miller v. California*, 413 U.S. 15, 24 (1973) (stipulating that criminalization of pornography distribution is constitutional only if the material is obscene and providing a three-part test to determine obscenity); *People v. Cantrell*, 7 Cal. App. 4th 523, 542-43, 9 Cal. Rptr. 2d 188, 199-200 (1992) (noting that the trial court's interpretation of the term "sexual conduct" was not overbroad when it stated that simple nude photographs of children without more would not fall within California Penal Code § 311.4(d); the photographs must have been taken for the purpose of sexual stimulation of the viewer). See generally *United States v. Schultz*, 970 F.2d 960, 961 n.1 (1st Cir. 1992) (interpreting § 2G2.2(b)(1) of the United States Sentencing Guidelines (1992) which provides a two level enhancement to the Level 13 sentencing guideline when pornographic materials involve minors under age 12), *cert. denied*, 113 S. Ct. 1020 (1993); *United States v. Meyer*, 802 F.2d 348, 350 (9th Cir. 1986) (citing 18 U.S.C. § 2252(a)(1) (Supp. 1984) which prohibits transporting in foreign commerce the visual depictions of minors engaging in sexually explicit conduct), *cert. denied*, 484 U.S. 817 (1987); *id.* at 351 (citing 18 U.S.C. § 2253(2)(E) (1982), which uses the term lascivious to describe photographs of the genitals of fifteen and seventeen year old boys which were found in the defendant's possession). The purpose of these statutes is to combat the sexual exploitation of minors. *Id.* at 351-52; *Review of Selected 1989 California Legislation*, 21 PAC. L.J. 429, 429-30 (1989) (comparing *New York v. Ferber* with *Miller v. California* and earlier court decisions concerning child pornography). Most states prohibit child pornography because it is exploitative of minors. See generally COLO. REV. STAT. §§ 18-6-403(1),(1.5) (Supp. 1992); HAW. REV. STAT. § 707-751 (Supp. 1992); KY. REV. STAT. ANN. § 531.320(1) (Baldwin 1992); LA. REV. STAT. ANN. § 14:81.1(A)(1) (West 1992); MONT. CODE ANN. § 45-5-625(1) (1993).

Chapter 591 enhances the punishment for an adult⁸ convicted of the crimes of lewd and lascivious acts with a child or continuous sexual abuse upon a minor.⁹ The punishment shall be increased by an additional one year or two year term, if the adult uses child pornography prior to or during the lewd or lascivious act, in order to seduce the child, or for the adult's or the child's gratification.¹⁰

The punishment shall be increased by an additional two year term if the adult engages in continuous sexual abuse with the child and uses child pornography prior to or during the molestation.¹¹

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8. See CAL. FAM. CODE § 6501 (West Supp. 1993) (defining adult as an individual who is 18 years of age or older).

9. CAL. PENAL CODE § 667.15 (enacted by Chapter 591).

10. *Id.* § 667.15(a) (enacted by Chapter 591); see *In re Duncan*, 189 Cal. App. 3d 1348, 1358, 1360, 234 Cal. Rptr. 877, 883-84 (1987) (stating that the purpose of California Penal Code § 311.3 is to protect children from sexual abuse and invasion of their privacy rights through the development and duplication of photographs, movies, and video tapes depicting them engaged in sexual conduct), *cert. denied*, 484 U.S. 985 (1987); *id.* (stating that California Penal Code § 311.3(a) is part of a statutory scheme to combat the exploitative use of children in the production of pornography); cf. *Schultz*, 970 F.2d at 961 (citing § 2G2.2(b)(1) of the United States Sentencing Guidelines (1992) which provides a two level enhancement for transporting, trafficking, or receiving pornographic materials involving minors under age 12); *State v. Reed*, 853 P.2d 605, 606-07 (Idaho Ct. App. 1993) (holding that a twenty-five year to life sentence was not an abuse of the court's discretion when the defendant had used pornographic movies among other manipulative techniques to engage in sexual activity with minors). See generally *State v. Mankiller*, 722 P.2d 1183, 1191 (N.M. 1986) (discussing the relevance of presenting pornographic materials as evidence at trial); Darrel W. Cole, *A Success Story With a Different Type of Spin: Prosecutor Has No Plans to Give Up Battle*, OAKLAND BUS. MONTHLY, Jan. 1992, § 1, at 36 (discussing how molesters use pornography to desensitize a child to sexual acts, and then abuse the child).

11. CAL. PENAL CODE § 667.15(b) (enacted by Chapter 591).

Crimes; sex offenses—spousal rape, sex offender registration

Penal Code §§ 261, 262, 264, 286, 288a, 289, 290 (amended).
AB 187 (Solis); 1993 STAT. Ch. 595

Penal Code § 293 (amended).
AB 191 (Umberg); 1993 STAT. Ch. 555

Existing law defines rape as an act of sexual intercourse with a person not the spouse of the perpetrator under specified circumstances.¹ Spousal rape is described as an act of intercourse achieved against the will of one's spouse through the use of force or fear of immediate and unlawful bodily injury on the spouse or another, or through threatening to retaliate² in the future.³

Chapter 595 redefines spousal rape to be substantially similar to general rape including sexual intercourse accomplished against the victim's will through: (1) The use of force, violence, duress,⁴ menace,⁵ or fear of immediate and unlawful bodily injury on the person of the victim or another; (2) the prevention of the victim's resistance by any intoxicating, anesthetic or controlled substance administered by, or with the knowledge of, the accused; (3) threats to retaliate in the future against the victim or another person with the reasonable possibility that the perpetrator will carry out the threat; (4) threats to incarcerate, arrest, or deport the victim or another where the victim holds a reasonable belief that the accused is

1. CAL. PENAL CODE § 261(a)(1-7) (West Supp. 1993); *see id.* (delineating the circumstances constituting rape as where, due to a mental disorder, the victim is incapable of consent, where intercourse is accomplished through the use of force, violence, duress, menace or fear of immediate harm to the victim or another; where resistance is prevented by any intoxicating, anesthetic or controlled substance; where victim mistakenly believes that the accused is the victim's spouse and the accused has cultivated this belief; where the accused threatens future retaliation; and where the accused threatens incarceration, arrest or deportation to accomplish intercourse).

2. *See id.* § 262(a)(4) (amended by Chapter 595) (defining threatening to retaliate as a threat to kidnap, or falsely imprison, or to inflict extreme pain, serious bodily injury, or death).

3. *Id.* § 262(a) (amended by Chapter 595).

4. *See id.* § 262(c) (amended by Chapter 595) (defining duress as a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which would otherwise not have been performed, or acquiesce in an act to which one otherwise would not have submitted).

5. *See id.* § 262(d) (amended by Chapter 595) (defining menace as any threat, declaration, or act which shows an intention to inflict an injury upon another).

a public official;⁶ and (5) intercourse with a person who the accused knows is unconscious during the act.⁷

For the offenses of rape, spousal rape, sodomy, oral copulation, and rape by foreign object, Chapter 595 describes a victim “unconscious of the nature of the act” as incapable of resisting because the victim: (1) Was unconscious or asleep; (2) was not aware, knowing, perceiving, or

6. See *id.* § 261(a)(7) (amended by Chapter 595) (defining public official as a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another).

7. *Id.* § 262 (amended by Chapter 595); see U.S. CONST. amend. XIV, § 1 (mandating that no state shall make or enforce any law which denies any person within its jurisdiction the equal protection of the laws); OR. REV. STAT. §§ 163.305-.475 (1987) (repealing the portion of its sex crimes statutes defining woman as “a female person not married to the actor,” thus giving sex crimes against spouses the same elements and penalties as crimes against nonspouses); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 187, at 3 (Apr. 13, 1993) (noting that since Oregon deleted the distinction between spousal and nonspousal rape, very few cases have been reported, those that are reported tend to be very violent in nature, and there is no evidence that the law has been abused); see also *Merton v. State*, 500 So. 2d 1301, 1305 (Ala. 1986) (holding that an Alabama statute providing for a marital exemption to rape was violative of the Fourteenth Amendment); *State v. Rider*, 449 So. 2d 903, 906 (Fla. 1984) (refusing to recognize an interspousal exception to rape); *State v. Smith*, 401 So. 2d 1126, 1129 (Fla. 1981) (holding that there is no such thing as a wife’s implied consent to sexual battery by her husband); *Commonwealth v. Chretien*, 417 N.E.2d 1203, 1209 (Mass. 1981) (holding that forcible, nonconsensual sexual intercourse between spouses following the entry of a divorce judgment nisi is unlawful); *People v. Liberta*, 474 N.E.2d 567, 572 (N.Y. 1984) (declaring that there is no rational basis for distinguishing between marital and non-marital rape and therefore a New York statute which did so was unconstitutional); *Weishaupt v. Commonwealth*, 315 S.E.2d 847, 855 (Va. 1984) (holding that while consent to marital relations may be implied between spouses, a wife may unilaterally revoke this implied consent); c.f. N.C. GEN. STAT. § 14-27.8 (Michie 1992) (prohibiting the prosecution of a spouse for rape unless the parties are living separate and apart); OHIO REV. CODE ANN. § 2907.02 (Baldwin 1993) (allowing for a spousal exemption unless the spouses are living apart); TENN. CODE ANN. § 39-13-507(b)(1)(A) (1992) (allowing for a spousal exemption unless the defendant causes serious bodily injury to the victim, is armed with a weapon, or the spouses are living apart and one has filed for a separation or divorce); Linda Chong, *When Rape Shatters the Vows to Love, Honor and Cherish*, ORLANDO SENTINEL TRIB., July 5, 1992, at 1 (discussing spousal rape and reporting that one in seven wives is sexually abused by her husband); Jerry Gillam, *Bill Targets Spousal Rapists for Longer Prison Sentences*, L.A. TIMES, Jan. 24, 1993, at A25 (reporting the introduction of AB 187); Linda Goldston, *California Moves to Strengthen Law for Prosecuting Spouse Rape*, HOUST. CHRON., Aug. 2, 1992, at A13 (reporting on a bill with the same content as AB 187 in the 1992 session and noting that studies have shown that 80% of the approximate 1.8 million women who are battered are also victims of spousal rape); Dana Wilkie, *Taking the Measure of Violence*, S.D. UNION-TRIB., May 29, 1993, at A1 (noting the high wave of crime against women and recently proposed legislation aimed at combatting such crime); *Sonya Live: Spousal Rape Laws* (CNN television broadcast, July 31, 1992), available in LEXIS, Nexis Library, Transcripts File (reporting that according to some studies marital rape is more prevalent than non-marital rape since it occurs over and over — up to 20-40 times in one relationship). See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975) (denouncing the concept that compulsory sexual intercourse is a husband’s right); SUSAN ESTRICH, *REAL RAPE* (1987) (noting that wives are the most suspect class of victims in rape prosecutions); FINKELHOR AND YILO, *LICENSE TO RAPE* (1985) (discussing marital rape and indicating that it may be more traumatic than stranger rape); DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* (1982) (reporting that over one million women are raped by their husbands each year); Thomas R. Bearrows, *Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL. L. REV. 201 (1983) (discussing the roots of the marital rape exemption and suggesting potential changes in the law); Kenneth McLaughlin, Case Note, *Criminal Law — Sexual Battery — No Interspousal Exception from Prosecution Under Florida Sexual Battery Statutes*, 10 FLA. ST. U. L. REV. 326 (1982) (examining *State v. Smith*, 401 So. 2d 1126 (Fla. 1981), and the rejection of the interspousal exception from prosecution under Florida Sexual Battery statutes).

cognizant that the act occurred; or (3) was not aware, knowing, perceiving or cognizant of the essential characteristics of the act due to the perpetrator's fraud.⁸

Existing law provides that rape is a felony, punishable by three, six, or eight years in the state prison.⁹ Under prior law, spousal rape was punishable as a felony by three, six, or eight years in state prison or it could be treated as a misdemeanor and punished by imprisonment in the county jail, a fine up to \$1,000, or both.¹⁰ Chapter 595 abolishes the misdemeanor alternative for spousal rape and makes it a felony punishable by imprisonment in the state prison for three, six, or eight years.¹¹

Under existing law, a prosecution of a felony punishable by eight or more years' imprisonment must be commenced within six years after the commission of the offense.¹² Prior law provided that no prosecution may be commenced for spousal rape unless the victim reported the incident to a peace officer with the power to arrest, or to the district attorney for the county in which the violation occurred within ninety days after the day of the violation.¹³

Chapter 595 makes spousal rape a felony with a statute of limitations of six years.¹⁴ Additionally, the time for reporting the violation is extended to one year, the same as that allowed to rape victims.¹⁵ If the victim's allegations are corroborated by independent evidence which is admissible at trial the victim is not required to have reported the incident in accord with specified guidelines.¹⁶

Existing law mandates that any person who, since July 1, 1944, is convicted of an assault with the intent to commit rape, sodomy,¹⁷ or other sexual offenses,¹⁸ contributing to the delinquency of a minor,¹⁹

8. CAL. PENAL CODE §§ 261, 262, 286, 288a, 289 (amended by Chapter 595).

9. *Id.* § 264(a) (amended by Chapter 595).

10. 1988 CAL. STAT. ch. 1243, sec. 264, at 4133 (amending California Penal Code § 264).

11. *Id.*

12. CAL. CRIM. PROC. CODE § 800 (West Supp. 1993).

13. 1992 Cal. Stat. ch. 184, sec. 262, at 941 (amending California Penal Code § 262).

14. CAL. PENAL CODE § 262(b) (amended by Chapter 595).

15. *Id.*

16. *Id.*

17. *See id.* § 286(a) (West Supp. 1993) (defining sodomy); *id.* § 220 (West 1988) (stating the criminal provision for assaulting another with intent to commit mayhem, rape, sodomy, or oral copulation).

18. *See id.* § 285 (West 1988) (stating the criminal provision for committing incestuous acts); *id.* § 288 (West Supp. 1993) (stating the criminal provision for committing a lewd or lascivious act with a child under the age of 14); *id.* § 288.5 (West Supp. 1993) (stating the criminal provision for committing continuous sexual abuse with a child); *id.* § 289 (amended by Chapter 595) (stating the criminal provision for penetrating the genital or anal openings of another person with any foreign object, for the purpose of sexual arousal); *id.* § 314(1)-(2) (West 1988) (stating the criminal provision for exposing one's genitals in public or procuring another to expose

disorderly conduct,²⁰ or is convicted in any other state of any similar attempt or committed offense, or has been determined to be a mentally disordered sex offender,²¹ must register with the appropriate authority.²²

himself); *id.* § 647.6 (West 1988) (stating the criminal provision for annoying or molesting a child under the age of 18, on school property); *see also In re DeBeque*, 212 Cal. App. 3d 241, 245, 260 Cal. Rptr. 441, 443 (1989) (holding that requiring a person convicted under California Penal Code § 647.6 to register does not constitute cruel and unusual punishment); *People v. Tate*, 164 Cal. App. 3d 133, 140, 210 Cal. Rptr. 117, 121 (1985) (holding that in order to grant probation, a person convicted of violating California Penal Code § 647.6 must comply with the registration requirement). *But see In re King* 157 Cal. App. 3d 554, 558, 204 Cal. Rptr. 39, 41 (1984) (holding that the continuing penalty of sex offender registration is out of proportion to the misdemeanor crime of indecent exposure provided for in California Penal Code § 314(1)).

19. *See* CAL. PENAL CODE § 266 (West 1988) (stating the criminal provision for luring, through false pretenses, an unmarried female, under the age of 18, into prostitution); *id.* § 267 (West 1988) (stating the criminal provision for kidnapping a person under the age of 18 for the purpose of prostitution); *id.* § 272 (West Supp. 1993) (stating the criminal provision for inducing any person under the age of 18 to fail or refuse to conform to a lawful order of the juvenile court); *id.* § 288.2 (West Supp. 1993) (stating the criminal provision for sending harmful matter to a minor with the intent of seducing the minor); *see also id.* § 313 (West Supp. 1993) (defining harmful matter).

20. *See id.* § 647(d) (West Supp. 1993) (stating the criminal provision for loitering in or about any public toilet for the purpose of soliciting a lewd or lascivious act).

21. *See* 1981 Cal. Stat. ch. 928, sec. 2, at 3485 (repealing CAL. WELF. & INST. CODE § 6300) (defining a mentally disordered sex offender as any person who was diagnosed, between July 1, 1969 and Jan. 1, 1981, with a disease or disorder that predisposed this person to the commission of sexual offenses to such degree that he was dangerous to the health and safety of others); 1981 Cal. Stat. ch. 928, sec. 3, at 3485 (repealing CAL. WELF. & INST. CODE § 6300) (stating that those offenders who committed their crimes between July 1, 1969 and Jan. 1, 1981, are still retained as mentally disordered sex offenders, in order for society to have proper control over them and to protect society against repeated commissions of sex crimes).

22. CAL. PENAL CODE § 290(a) (amended by Chapter 595); *see id.* (providing that the person must register within 14 days of release with the chief of police of the city in which that person temporarily resides or is domiciled, with the sheriff of the county if domiciled in an unincorporated area, and, additionally, with the chief of police of the University of California or the California State University if he or she is domiciled upon the campus or in any of its facilities). Many other states have statutes requiring registration for sex offenders. *See, e.g.,* ALA. CODE § 13A-11-200 (Michie 1982); ARIZ. REV. STAT. ANN. § 13-3821 (West Supp. 1993); COL. REV. STAT. § 18-3-412.5 (Bradford Supp. 1993); ILL. REV. STAT. ch. 38, para. 223 (West 1992); MINN. STAT. § 243.166 (West 1992); NEV. REV. STAT. ANN. § 207.152 (Michie 1991); OHIO REV. CODE ANN. § 2950.06 (Baldwin 1993); OKLA. STAT. tit. 57, § 582 (1991); OR. REV. STAT. § 181.519 (1991); UTAH CODE ANN. § 77-27-21.5 (Michie Supp. 1993); WASH. REV. CODE § 9A.44.130 (1991); *see also Kirk v. Hesselroth*, 707 F. Supp. 1149, 1153 (N.D. Cal. 1988) (holding that unless a person who acts under color of state law acts with gross negligence, the improper arrest of a person for failing to register is not a violation of the arrestee's rights); *People v. Monroe*, 168 Cal. App. 3d 1205, 1209, 215 Cal. Rptr. 51, 53 (1985) (holding that the mandatory language "shall" of California Penal Code § 290 leaves no discretion to the trial judge to not require registration if one or more of the listed violations occurs); *cf.* CAL. HEALTH & SAFETY § 11590 (West 1991) (requiring registration for controlled substance offenders). *See generally People v. Tye*, 160 Cal. App. 3d 796, 802, 206 Cal. Rptr. 813, 816 (1984) (stating that the fundamental legislative purpose underlying California Penal Code § 290 is to assure that persons convicted of the crimes enumerated therein will be readily available for police surveillance at all times because the Legislature has deemed them likely to commit similar offenses in the future); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 191, at 4 (June 22, 1993) (stating that the ACLU opposes the registration provision of this bill because registration laws impose additional penalties for crimes for which the individuals have already been penalized by the criminal justice system).

Existing law also mandates that any person, who after August 1, 1950, is discharged or paroled from an institution,²³ or is released on probation,²⁴ and has been confined because of a conviction of a previously mentioned offense, must be informed of the duty to register, prior to discharge or parole, by the official in charge of the place of confinement.²⁵

Chapter 595 expressly states that any person who has been or is convicted of assault with intent to commit lewd or lascivious acts with a child under fourteen years of age,²⁶ rape,²⁷ oral copulation,²⁸ spousal rape involving the use of force or violence, or rape or penetration of genital or anal openings by a foreign object,²⁹ must also register.³⁰

Existing law further provides that an employee of a law enforcement agency who personally receives a report from a person alleging to have

23. See CAL. PENAL CODE § 290(b) (amended by Chapter 595) (specifying that an institution includes a jail, prison, school, road camp, state hospital, or other facility where a person was confined because of the attempt or commission of an offense listed earlier).

24. See *id.* § 290(c) (amended by Chapter 595) (providing that a person may be released on probation or discharged upon payment of a fine).

25. *Id.* § 290(b) (amended by Chapter 595); see *id.* (providing that the official must require the person to read and sign a form from the Department of Justice, which states that the duty to register has been explained to this person); *id.* (providing that if the person has been convicted of a felony, the official must, no later than 45 days prior to the scheduled release date, send one copy of the notice to the appropriate law enforcement agency having local jurisdiction where the person expects to reside, one copy to the prosecuting agency which prosecuted the person, and one copy to the Department of Justice).

26. See *id.* § 288 (West Supp. 1993) (stating the provision for this type of conduct).

27. See *id.* § 261(a)(1) (amended by Chapter 595) (stating that this provision applies when the rape occurs when the victim is incapable, because of a mental disorder or disability, of giving legal consent, and the accused should have been aware of the disorder or disability); *id.* § 261(a)(2) (amended by Chapter 595) (stating that this provision applies when the rape is accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another); *id.* § 261(a)(3) (amended by Chapter 595) (stating that this provision applies when the rape occurs while the victim is prevented from resisting by any intoxicating or anesthetic substance that is administered by the accused); *id.* § 261(a)(4) (amended by Chapter 595) (stating that this provision applies when the rape occurs when the victim is unconscious and the accused is aware of the victim's condition); *id.* § 261(a)(6) (amended by Chapter 595) (stating that this provision applies when the rape occurs because the accused threatens to kidnap, falsely imprison the victim, or to inflict extreme pain, serious bodily injury, or death upon the victim and there is a reasonable possibility that the accused will execute the threat); *id.* § 262 (amended by Chapter 595) (stating that this provision applies when the victim is the spouse of the accused and the accused uses force or violence during the assault).

28. See *id.* § 288a(a) (West Supp. 1993) (defining oral copulation).

29. See *id.* § 264.1 (West 1988) (stating the punishment for this conduct if it is committed by force or violence); *id.* § 289 (amended by Chapter 595) (stating the punishment for this conduct if it is committed for the purpose of sexual arousal, gratification, or abuse).

30. *Id.* § 290(a) (amended by Chapter 595). But see *People v. Saunders*, 232 Cal. App. 3d 1592, 1598, 284 Cal. Rptr. 212, 216 (1991) (holding that a defendant who was convicted of assault with the intent to commit oral copulation was not required to register as a sex offender because the registration requirement under the statute did not expressly enumerate the convicted crime). Penal Code section 290 was amended with the intent of abrogating the *Saunders* decision. SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 191, at 2-3 (June 22, 1993).

been the victim of a sex offense, must inform the person that his or her name will be part of the public record, unless the person requests otherwise.³¹ Existing law states that the employee may disclose the name³² or address of a person who alleges to be the victim of a sex offense only to the prosecutor.³³

Chapter 555 provides that a law enforcement agency may disclose the name or address of a person who alleges to be the victim of a sex offense to any person or public agency that is authorized or required by law to have such information.³⁴

CCA/JLM

Crimes; stalking

Civil Procedure Code § 527 (amended); Family Code § 6222 (amended); Penal Code §§ 166, 273.6 (amended).
AB 284 (Speier); 1993 STAT. Ch. 583

Penal Code §§ 646.9, 2684 (amended).
AB 1178 (Epple); 1993 STAT. Ch. 581

Penal Code § 602 (amended).
AB 504 (Quackenbush); 1993 STAT. Ch. 793

Existing law defines stalking as willfully, maliciously, and repeatedly following or harassing¹ another person and making a credible threat² with

31. CAL. PENAL CODE § 293(a) (amended by Chapter 555); *see id.* (stating that the alleged victim's name is automatically part of the public record when the report is filed, unless the alleged victim specifically requests otherwise).

32. *See* CAL. GOV'T CODE § 6254(f)(2) (West Supp. 1993) (providing circumstances under which a person may exercise the right to maintain anonymity).

33. CAL. PENAL CODE § 293(c) (amended by Chapter 555).

34. *Id.* § 293(c)-(d) (amended by Chapter 555).

1. *See* CAL. PENAL CODE § 646.9(d) (amended by Chapter 581) (defining harassment as a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments or terrorizes the person and which serves no legitimate purpose).

2. *See id.* § 646.9(f) (amended by Chapter 581) (defining a credible threat as a threat made with the intent and the apparent ability to carry it out so as to cause the targeted person to reasonably fear for the person's safety or the safety of the person's immediate family); *People v. Dollar*, 228 Cal. App. 3d 1335, 1338, 279 Cal. Rptr. 502, 503 (1991) (using the statutory definition of credible threat in the jury instruction).

the intent to place that person or that person's immediate family in reasonable fear of death or great bodily injury.³

Existing law defines credible threat as a threat coupled with the apparent ability to carry it out.⁴ Chapter 581 specifies that a credible threat may be verbal, written, implied by conduct, or a combination thereof.⁵

Under existing law, anyone who stalks another is guilty of a misdemeanor which is punishable by up to one year in the county jail, a fine of up to \$1000, or both.⁶ Under prior law, a subsequent conviction for stalking the same victim, which occurred within seven years of the prior conviction, could be categorized as a felony or misdemeanor, and punished by either imprisonment in the state prison or a fine.⁷ Chapter 581 provides that a first offense for stalking may be treated as a felony or a misdemeanor.⁸ Furthermore, under Chapter 581, if the offender has been

3. CAL. PENAL CODE § 646.9(a) (amended by Chapter 581); *see id.* § 646.9(i) (amended by Chapter 581) (defining immediate family). *See generally* SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 284, at 3 (July 6, 1993) (noting that five percent of all women in the United States will be stalked at some point in their lives and there are approximately 200,000 stalkers nationwide).

4. CAL. PENAL CODE § 646.9(e) (amended by Chapter 581).

5. *Id.*; *see* Telephone Interview with Deputy District Attorney Rhonda Saunders, Office of the District Attorney, Los Angeles (May 28, 1993) (detailing a recent case which prompted the enactment of Chapter 581, because the previous definition of credible threat was not broad enough to encompass behavior that was clearly life threatening) (notes on file with the *Pacific Law Journal*).

6. CAL. PENAL CODE § 646.9(a) (amended by Chapter 581); *cf.* ARK. CODE ANN. 5-71-208(a)(3) (Michie Supp. 1993) (encompassing stalking under the heading of harassment and defining it as following a person in or about a public place); COLO. REV. STAT. ANN. § 18-9-111(1), (4) (Bradford 1986 & Supp. 1993) (setting forth extensive examples that constitute stalking); ILL. ANN. STAT. ch. 720, para. 5/12-7.3(a) (Smith-Hurd 1993) (defining stalking as a threat coupled with either following the victim or placing the victim under surveillance); KY. REV. STAT. ANN. §§ 508.140, 508.150 (Baldwin 1992) (defining stalking and providing that stalking accompanied by an explicit or implicit threat is punishable); N.Y. PENAL LAW § 240.26 (2)-(3) (McKinney Supp. 1993) (categorizing conduct which is indicative of stalking as harassment). *See generally* Kelli L. Attinello, Comment, *Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9*, 24 PAC. L.J. 1945 (1993); Matthew J. Gilligan, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285 (1992) (addressing recent legislation designed to offer relief to victims who are harassed, followed, or threatened by other persons); Scott Armstrong, *States Crack Down on Stalking*, CHRISTIAN SCIENCE MONITOR, May 19, 1993, at 7 (detailing recent stalking cases and legislation designed to curb stalking); Miles Corvin, *When the Law Can't Protect*, L.A. TIMES, May 8, 1993, at A1 (mentioning recently proposed federal legislation to make stalking a federal crime); Pamela Newkirk, *New Laws Put Bite on Stalkers*, NEWSDAY, May 3, 1993, at 21 (discussing the stalking of David Letterman and the shooting of Mary Jo Buttafuoco and that new legislation is in response to such high profile cases); Rene Riley-Adams, *Can Laws Stop the Obsessed?*, THE TIMES, Feb. 22, 1993, at 3 (discussing the stalking phenomenon and the penalties imposed in the 31 states which have adopted such legislation).

7. Cal. Legis. Serv. ch. 627, sec. 1, at 2419 (amending CAL. PENAL CODE § 646.9); *cf.* FLA. STAT. ch. 784.048 (2)-(3) (West Supp. 1993) (providing for up to five years in prison); MASS. GEN. ANN. ch. 265, § 43(b), (c) (West Supp. 1993) (providing that a first offense for stalking may warrant a five year prison sentence with any subsequent offenses warranting up to ten years imprisonment with a two year mandatory minimum).

8. CAL. PENAL CODE § 646.9(a) (amended by Chapter 581).

convicted of felony stalking, any subsequent conviction for stalking is punishable by imprisonment in the state prison for two, three or four years.⁹

Existing law provides that every person who unlawfully commits a trespass is guilty of a misdemeanor.¹⁰ Chapter 793 includes as an act constituting trespass the refusal or failure to leave a battered women's shelter after being asked to leave by the managing authority of the shelter.¹¹ Additionally, Chapter 793 gives the court discretion to order the defendant to pay restitution to the battered woman in the amount of relocation expenses of herself and her child.¹²

Existing law provides that any person guilty of contempt of court through the willful disobedience of any lawfully issued court process or order is guilty of a misdemeanor and may be punished by imprisonment in county jail for up to six months.¹³ Under prior law, any person who violated the stalking provision when there was a court order prohibiting such behavior, was punishable by imprisonment in a county jail for not more than one year, or a fine of up to \$1000, or by imprisonment in the state prison.¹⁴

9. *Id.* § 646.9(c) (amended by Chapter 581).

10. *Id.* § 602 (amended by Chapter 793); *see id.* (specifying acts which constitute trespass).

11. *Id.* § 602(u) (enacted by Chapter 793); *see id.* § 602(u)(1) (enacted by Chapter 793) (providing that punishment is imprisonment in the county jail for not more than one year); SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 284, at 4 (July 6, 1993) (setting forth findings that more than 600 families must be evicted from battered women's shelters each year because they have been located by the batterer and are both endangered and endangering the other families at the shelter); *see also id.* at 3 (noting that the San Mateo Battered Women's Shelter has had situations where battered women seeking refuge at the shelter were followed and harassed by the person from whom they are trying to escape). *See generally* Eric Bailey, *State's Landmark Stalking Law Could Have Put Hilburn Behind Bars*, L.A. TIMES, May 7, 1993, at A18 (detailing the recent stalking of a co-worker by a mail carrier which culminated in the Dana Point Post Office shooting spree); Mareva Brown, *State Anti-Stalking Law Shadows Lovers Who Won't Let Go*, SACRAMENTO BEE, Nov. 29, 1992, at A1 (reporting that most stalking victims are women and in the vast majority of cases, the stalkers are rejected husbands or boyfriends); Kevin Fagan, *New Focus on Deadly Stalkers*, S.F. CHRON., Jan. 11, 1993, at A1 (describing the shooting of Yon Soon Choe at the hands of her ex-husband after she had sought help from the law and sought the refuge of a women's shelter, and reporting on the inadequacy of such measures as restraining orders in keeping obsessed stalkers at bay); David Holmstrom, *Efforts to Protect Women From Stalkers Gain Momentum at State, Federal Levels*, CHRISTIAN SCIENCE MONITOR, Dec. 22, 1992, at 1 (quoting the Massachusetts Chief of the Victim Witness Service as stating that when a woman makes the effort to end an abusive relationship, such as going to a women's shelter, she is at a potentially greater risk of danger at the hands of her ex-husband).

12. CAL. PENAL CODE § 602(u)(2) (amended by Chapter 793).

13. *Id.* § 166(a)(4) (amended by Chapter 583); *see* *People v. Lindemann*, 8 Cal. App. 4th Supp. 7, 10, 11 Cal. Rptr. 2d 886, 889 (1992) (holding that when a person disregards an order issued by the court, such disregard constitutes a contempt of court which may be prosecuted as a misdemeanor); *McCann v. Municipal Court for Los Angeles County*, 221 Cal. App. 3d 527, 535, 270 Cal. Rptr. 640, 643 (1990) (defining contempt as disobedience by action in opposition to the authority, justice or dignity of a court).

14. Cal. Legis. Serv. ch. 627, sec. 1, at 2419 (amending CAL. PENAL CODE § 646.9)

Under Chapter 583, any person guilty of such contempt, by willfully contacting a victim in person, by phone or mail, when that person has previously been convicted of stalking, will be punished by imprisonment in the county jail for not more than one year, or by a fine of \$5000, or both.¹⁵

Existing law gives courts discretion to issue an order restraining the defendant from contacting the victim for up to ten years.¹⁶ Chapter 581 provides that any stalking violation committed while there is a temporary restraining order, injunction, or other court order in effect is punishable by imprisonment in the state prison for two, three, or four years.¹⁷

Chapter 583 provides that any willful or knowing violation of a protective order or stay away order¹⁸ issued as a condition of probation in a criminal action for domestic violence, or in the pending criminal proceeding itself, shall constitute a misdemeanor contempt of court, punishable by imprisonment in the county jail, a fine not exceeding \$1000, or both.¹⁹ If the violation of such orders results in physical injury, the defendant will be imprisoned in the county jail for at least forty-eight hours.²⁰ A second or subsequent conviction for a violation of such orders, which occurs within seven years of the prior conviction and involves an act of violence or a credible threat of violence, may be punished as a misdemeanor or a felony.²¹ As a condition of probation, the defendant is required to participate in a batterer's treatment program unless, after considering the facts and circumstances, the court determines that participation would be inappropriate for the defendant.²² As an additional condition of probation, in lieu of a fine, the court may require that the defendant make payments to a battered women's shelter, provide restitution to the victim for reasonable costs of counseling and other expenses the

15. *Id.* § 166(b)(1) (amended by Chapter 583); see Mareva Brown, *State Anti-Stalking Law Shadows Lovers*, SACRAMENTO BEE, Nov. 29, 1992, at A1 (describing that in a great many cases, the stalker never makes an actual threat but bombards the victim with telephone calls, letters, gifts, flowers, and other forms of harassment).

16. *Id.* § 646.9(h) (amended by Chapter 581).

17. CAL. PENAL CODE § 646.9(b) (amended by Chapter 581).

18. See *id.* § 136.2 (West Supp. 1993) (stating the requirements for issuing these orders).

19. *Id.* § 166(c)(1) (amended by Chapter 583). This includes orders: (1) Enjoining a party from molesting, attacking, striking, threatening, sexually assaulting, battering, harassing, contacting repeatedly by mail with the intent to harass, or disturbing the peace of the other party, or other named family and household members; (2) excluding one party from the family dwelling or the dwelling of the other; or (3) enjoining a party from specified behavior that the court determined was necessary to effectuate such orders. See *id.* § 166(c)(3)(A)-(C) (amended by Chapter 583).

20. *Id.* § 166(c)(2) (amended by Chapter 583).

21. *Id.* § 166(c)(4) (amended by Chapter 583).

22. *Id.* § 166(d)(1) (amended by Chapter 583).

court finds to be directly resulting from the defendant's conduct, or both.²³

Existing law provides that no fees may be charged for the issuance of an injunction, preliminary injunction, or a temporary restraining order, unless the order has previously been dissolved three times.²⁴ Chapter 583 eliminates the filing fee for a petition or response regarding a protective order, restraining order or a permanent injunction restraining violence or threats of violence.²⁵

Under existing law, there is no filing fee for a petition or response regarding a protective order or a permanent injunction restraining violence or threats of violence.²⁶ Chapter 583 eliminates the filing fee for a modification of a protective order against violence or threats of violence.²⁷

Under existing law, a willful²⁸ and knowing violation of a protective order²⁹ is a misdemeanor punishable by a fine of no more than \$1000, by imprisonment in the county jail for no more than one year, or both.³⁰

23. *Id.* § 166(d)(2) (amended by Chapter 583); *see id.* § 166(d)(2)(A) (amended by Chapter 583) (providing that such payments may not exceed \$1000); *id.* § 166(d)(3) (amended by Chapter 583) (stating that the court shall make a determination of the defendant's ability to pay the fine, make payments to a battered women's shelter, or pay restitution). The court shall not order the defendant to make payments to a shelter if it would impair the defendant's ability to pay restitution. *Id.* In cases where the victim is the spouse of the defendant, the defendant may not use community property to pay restitution. *Id.* § 166(d)(4) (amended by Chapter 583).

24. CAL. CIV. PROC. CODE § 527(a) (amended by Chapter 583).

25. *Id.* § 527(c) (amended by Chapter 583).

26. CAL. FAM. CODE § 6222(a) (amended by Chapter 583).

27. *Id.* (amended by Chapter 583); *see* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 284, at 4 (July 6, 1993) (suggesting that this bill is in response to the recent postal murders in Dana Point due to a stalker's obsession and his victim's inability to afford the filing fee for a restraining order); *see also* Eric Bailey, *State's Landmark Stalking Law Could Have Put Hilburn Behind Bars*, L.A. TIMES, May 7, 1993, at A18 (reporting that Kim Springer, the victim of a stalker who went on a rampage in a Dana Point Post Office, had attempted to obtain a restraining order but was unable to afford the \$182 filing fee); Miles Corwin, *When the Law Can't Protect*, L.A. TIMES, May 8, 1993, at A1 (describing the stalking of Kim Springer by Hilburn and reporting that Hilburn followed her, sent her obsessive notes, called her at home, and sent her a letter threatening to kill them both).

28. *See* CAL. PENAL CODE § 7(1) (West 1988) (defining willful as a purpose or willingness to commit the act or make the omission referred to, and not requiring any intent to violate the law or to injure another or to acquire any advantage).

29. *See* CAL. FAM. CODE § 6218 (amended by Chapter 219) (defining protective order as an order enjoining a party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, or disturbing the peace of the other party, and, in the discretion of the court, upon a showing of good cause, other named family and household members).

30. CAL. PENAL CODE § 273.6(a) (amended by Chapter 583).

Chapter 583 adds temporary restraining orders, preliminary injunctions, and injunctions to these requirements.³¹

Existing law provides that if, in the opinion of the Department of Corrections,³² a defendant convicted of stalking would benefit from treatment in a state hospital and the court deems it appropriate, the defendant will be transferred to the appropriate hospital for treatment.³³ Under Chapter 581, the court must also consider whether the defendant would benefit from treatment in a state hospital, and if the court decides that the defendant would so benefit, it shall make this recommendation to the Director of Corrections.³⁴ The Director must consider any recommendation made by the court, and if the Director determines that it is appropriate, the defendant will be placed in a state hospital for treatment.³⁵

JLM

Crimes; storage of firearms

Penal Code §§ 12020, 12071, 12285 (amended).
SB 180 (Hughes); 1993 STAT. Ch. 1139

Under existing law, a person selling firearms¹ must satisfy certain

31. *Id.*; see *id.* (providing that a willful and knowing violation of a protective order obtained under California Family Code § 6218 [the Domestic Violence Prevention Law], California Civil Procedure Code § 527 [providing timing requirements for granting injunctions and temporary restraining orders] or § 527.6 [providing injunctions and temporary restraining orders for those suffering harassment] is a misdemeanor punishable by a fine of no more than \$1,000, by imprisonment in the county jail for no more than one year, or both).

32. See CAL. PENAL CODE § 5050 (West 1982) (creating the Department of Corrections).

33. *Id.* § 2684(a) (amended by Chapter 581); see *id.* § 2690 (West 1982) (authorizing the removal of inmates); *id.* § 5080 (West 1982) (governing the transfer of prisoners); CAL. WELF. & INST. CODE § 7227 (West 1984) (allowing for the admission of mentally disordered prisoners to state hospitals for treatment).

34. CAL. PENAL CODE § 2684(b) (amended by Chapter 581).

35. *Id.*; see Telephone Interview with Deputy District Attorney Rhonda Saunders, Office of the District Attorney, Los Angeles (May 28, 1993) (notes on file with the *Pacific Law Journal*) (relating this change to her most recent stalking case and commenting that giving the court discretion to suggest a defendant be treated in a state hospital almost assures compliance by the Department of Corrections).

1. See CAL. PENAL CODE § 12001(b) (West Supp. 1993) (defining firearm as any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion); see also 18 U.S.C. § 921(a)(3) (1988) (defining firearm as: (1) Any weapon, including starter gun, which will or is designed to or may be readily converted to expel a projectile by the action of an explosive; (2) the frame or receiver of any such weapon; (3) any firearm muffler or firearm silencer; or (4) any destructive device); *id.* § 921(a)(4) (1988) (defining destructive device); *United States v. York*, 830 F.2d 885,

requirements to qualify as a licensee or dealer,² which includes the requirement that the person only conduct business in buildings designated in the license.³

Chapter 1139 requires a lost or stolen firearm that is stored at the licensee's place of business or a firearm that is part of the licensee's merchandise, to be reported by the dealer to the proper law enforcement agency within forty-eight hours of discovery.⁴ Chapter 1139 also requires a dealer in certain areas⁵ to hold all firearms in the business establishment in a secure manner using specified storage methods⁶ when the establishment is not open for business.⁷ Chapter 1139 also requires the licensing agency to require licensees to follow the same specified methods

891 (8th Cir. 1987) (upholding a conviction for possession of a firearm on the grounds that the firearm need not be operable, that it need only be designed to expel a projectile by action of an explosive); *Emmons v. State*, 546 So. 2d 69, 71 (Fla. Dist. Ct. App. 1989) (holding that a flare gun is considered a firearm).

2. See CAL. PENAL CODE § 12071(a)(1) (amended by Chapter 1139) (defining licensee or dealer as a person who has a valid federal firearms license, any regulatory or business license or licenses required by local government, a valid seller's permit issued by the State Board of Equalization and a certificate of eligibility issued by the Department of Justice); cf. MASS. ANN. LAWS ch. 140, § 129C (Law Co-op. 1993) (discussing restrictions on ownership of firearms).

3. CAL. PENAL CODE § 12071(b)(1)(A) (amended by Chapter 1139); cf. 18 U.S.C. § 923 (Supp. 1990) (specifying licensing requirements).

4. CAL. PENAL CODE § 12071(b)(13) (amended by Chapter 1139); cf. 18 U.S.C. § 842(K) (1993) (requiring a report of stolen or lost explosive materials within 24 hours of discovery); CONN. GEN. STAT. ANN. § 29-37b(a) (West Supp. 1993) (requiring that dealers provide trigger locks); *id.* § 29-37d (West Supp. 1993) (requiring that those involved in the retail sale of firearms must install burglar alarm systems); *id.* § 53a-217 (West Supp. 1993) (establishing that the negligent storage of a firearm is a felony); FLA. STAT. ch. 790.174(2) (West 1992) (stating that it is a misdemeanor of the second degree to fail to store a firearm in the required manner thereby allowing a minor access to the firearm). See generally ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 180, at 2 (June 29, 1993) (stating that SB 180 was written in response to a suggestion by the Los Angeles Police Department, which believes that the theft of firearms from retail outlets is a method by which gangs and criminals obtain firearms). In 1992, 25,023 guns were reported as stolen in California, with 10,395 guns reported as stolen in Los Angeles County alone. *Id.*; John L. Mitchell, *Easy Access to Guns Fuels Epidemic of Youth Violence*, L.A. TIMES, March 29, 1993, at A1 (discussing the underground market by which youths acquire stolen guns); Sue Anne Pressly, *When Tragedy Lurks an Error Away*, WASH. POST, Sept. 22, 1991, at A1 (mentioning a county proposal to require dealers to sell trigger locks).

5. See CAL. PENAL CODE § 12071(b)(14) (amended by Chapter 1139) (specifying that in a city with a population of 50,000 persons or more; a county or in an unincorporated area of county with a population of 200,000, storage requirements must be met).

6. See *id.* § 12071(b)(14)(A)-(C) (amended by Chapter 1139) (defining specified methods of storage of firearms to include: (1) In a secure facility in the licensee's business premises; (2) securing each firearm with a shielded or protected steel rod or cable of at least one-eighth inch in diameter through the trigger-guard; or (3) in a locked fireproof safe or vault in the licensee's business premises).

7. *Id.* § 12071(b)(14) (amended by Chapter 1139).

in areas with smaller populations.⁸ Chapter 1139 authorizes the licensing authority to allow exemptions from these standards.⁹

TLS

Crimes; threats to public officials

Penal Code § 76 (amended).

SB 1042 (Beverly); 1993 STAT. Ch. 134

Existing law provides that an individual who knowingly¹ and willingly² threatens the life of an elected state official, exempt appointee of the Governor,³ a judge,⁴ or the immediate family⁵ of such official, appointee, or judge with the specific intent that the assertion be taken as

8. *Id.* § 12071(b)(15) (amended by Chapter 1139).

9. *Id.* § 12071(d) (amended by Chapter 1139); *see id.* (granting requests for exemption if the licensee is unable to comply because of local ordinances, covenants, lease conditions, or similar circumstances not under control of the licensee).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining knowingly); *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (holding that a threat is knowingly made if the person that made it comprehends the meaning of the words uttered).

2. *See Howell*, 719 F.2d at 1260 (stating that a threat is willfully made if the maker voluntarily and intelligently utters threatening words in an apparent determination to carry out the threat).

3. *See* CAL. GOV'T CODE § 1300 (West 1980) (stating that every officer, the mode of whose appointment is not prescribed by law, shall be appointed by the Governor).

4. *See id.* § 75002 (West 1993) (defining judge as a justice of the Supreme Court, court of appeal, or a judge of a superior court, municipal court or justice court); *id.* (distinguishing a retired justice of the court as not acquiring the same status); *cf.* 18 U.S.C. § 115(c)(3) (1988) (defining United States judge as any judicial officer of the United States).

5. *See* CAL. PENAL CODE § 76 (amended by Chapter 134) (defining immediate family to include a spouse, parent, child, or anyone who has regularly resided in the household for the past six months); *cf.* 18 U.S.C. § 115(c)(2) (1988) (defining immediate family member as a spouse, parent, brother, sister, child, person to whom the official stands in loco parentis, or any other living person in the official's household that is related by blood or marriage).

a threat, and who possesses the apparent ability⁶ to carry out that threat, is guilty of a public offense.⁷

Chapter 134 expands this crime by adding to it the alternative act of knowingly and willingly threatening serious bodily harm⁸ to these same elected state officials, exempt appointees of the Governor, judges, or immediate families of the same, with the specific intent that the statement is a threat, and the person has the apparent ability to carry out that threat by any means.⁹ TLS

6. See CAL. PENAL CODE § 76(c)(1) (amended by Chapter 134) (defining "apparent ability to carry out a threat" as including the ability to fulfill the threat at some future date when the person making the threat is an incarcerated prisoner with a stated release date); *People v. Ross*, 205 Cal. App. 3d 1548, 1554, 253 Cal. Rptr. 178, 182 (1988) (interpreting the statute's "present ability" limitation in its definition of assault to indicate that the defendant could not be convicted of attempted assault if a factual impossibility prevented the commission of the crime); *Lamb v. State*, 613 A.2d 402, 412 (Md. Ct. Spec. App. 1992) (discussing the differing perspectives of the victim and the assailant in perceiving apparent present ability). See generally ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1042, at 2-3, (April 28, 1993) (discussing an example of the inadequacy of existing law when the provisions could not be used by the Los Angeles District Attorney against an inmate who was incarcerated and, therefore under the statute, had no apparent ability to carry out threats).

7. CAL. PENAL CODE § 76(a) (amended by Chapter 134); see *id.* § 217.1(a) (West 1988) (stating that attempting to kill public officials is a criminal offense); cf. LA. REV. STAT. ANN. 14:122.2 (West 1986) (stating that threatening a public official is a public offense); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) (holding that alleged threats against a federal law enforcement officer must be considered using an objective standard); *People v. Williams*, 614 N.E.2d 367, 371 (Ill. App. 1993) (reversing defendant's conviction for threatening the mayor on the telephone, because the State did not sufficiently prove beyond a reasonable doubt that the defendant made the threatening call).

8. See CAL. PENAL CODE § 76 (amended by Chapter 134) (defining serious bodily harm to include serious physical injury or serious traumatic condition); cf. *United States v. Fitzgerald*, 882 F.2d 397, 398 (9th Cir. 1989) (holding that "serious bodily injury," as used in 18 U.S.C. § 113(f), was not unconstitutionally vague as used against a defendant who was charged with shooting an individual in the neck); *Fleming v. State*, 604 So. 2d 280, 293 (Miss. 1992) (holding that Mississippi Code Annotated § 97-3-7(2) which includes the term "serious bodily injury" was not unconstitutionally vague even though the phrase was not defined by the aggravated assault statute because this case involved brutal bone fractures). See generally ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1042, at 2 (April 28, 1993) (citing specific examples of credible threats of serious bodily injury to public officials by state prisoners which resulted in emotional trauma to the victims).

9. CAL. PENAL CODE § 76 (amended by Chapter 134); see also 18 U.S.C. § 115(a)(1) (Supp. 1988) (stating that it is a criminal offense to threaten to assault, kidnap, or murder a United States official, United States judge, federal law enforcement officer, or the immediate family of such a person); 18 U.S.C. § 871(a) (1988) (defining the crime of threatening the President); ALA. CODE § 36-33-4(a) (Michie 1991) (stating that whoever knowingly and willfully threatens to take the life or to inflict bodily harm upon the governor, governor-elect, lieutenant governor, lieutenant governor-elect, attorney general, attorney general-elect or protectee of the department of public safety shall be fined not more than \$1,000 or imprisoned not more than five years, or both); CAL. PENAL CODE § 69 (West 1988) (providing that it is a crime to attempt, by means of threat or violence, to deter an executive officer from performing the officer's duty); *id.* § 71 (West 1988) (providing that it is a public offense to attempt, or to cause, a public officer, employee, or school official to engage in, or refrain from, an act in the performance of that person's duties, by threatening that person); NEV. REV. STAT. ANN. § 199.300 (Michie 1992) (stating that every person who directly or indirectly, addresses any threat or intimidation to a public officer, juror, referee, arbitrator, appraiser or assessor or to any other person authorized by law to determine any controversy with the intent to induce that person to act contrary to his duty will be punished);

Crimes; unlawful sexual intercourse

Penal Code § 261.5 (amended).

SB 22 (Russell); 1993 STAT. Ch. 596

Prior law defined unlawful sexual intercourse as an act of sexual intercourse with a female under the age of eighteen years who is not the wife of the perpetrator.¹ Chapter 596 redefines unlawful sexual intercourse as an act of sexual intercourse accomplished with any person, male or female, under the age of eighteen who is not the spouse of the perpetrator.²

United States v. Hoffman, 806 F.2d 703, 711 (7th Cir. 1986) (holding the conditional nature of a threat against the President is not dispositive, and may be considered an actual threat); Pierce v. United States, 365 F.2d 292, 294 (10th Cir. 1966) (holding that it is the making of the threat, not the intent to carry out the threat that is the actual offense).

1. 1970 CAL. STAT. Ch. 1301, sec. 2, at 2406 (enacting CAL. PENAL CODE § 261.5); see Michael M. v. Superior Court, 450 U.S. 464, 468-76 (1980) (upholding the constitutionality of California's gender-specific statutory rape laws); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (holding that the law properly may subject minors to more stringent limitations than are permissible with respect to adults); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968) (holding that the well-being of children is a subject within the State's constitutional power to regulate); Ferris v. Santa Clara County, 891 F.2d 715, 717-18 (9th Cir. 1989) (holding that California statutes prohibiting certain sexual activities with minors does not violate any right of privacy which individuals might have under the Fourteenth Amendment to engage in consensual sexual activities with females between fourteen and eighteen years of age), *cert. denied*, 498 U.S. 850 (1990); Liberta v. Kelly, 839 F.2d 77, 82 (2d Cir. 1988) (holding that a statute containing a gender-based classification must be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances), *cert. denied*, 488 U.S. 832 (1988); People v. Hernandez, 61 Cal. 2d 529, 531, 393 P.2d 673, 674, 39 Cal. Rptr. 361, 362 (1964) (stating that a minor female is presumed too innocent and naive to understand the implications and nature of her act, and therefore is incapable of giving consent to the act of sexual intercourse); see also Susan Andre Clark, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933, 1952-59 (1992) (discussing the equal protection issues raised by Michael M.); Rita Eidson, *Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762-815 (1980) (examining the history of statutory rape laws and how they may be vulnerable to attack on both equal protection and due process grounds); Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 105 (1965) (stating that the nearly uniform holding, in cases involving statutory rape, has been that mistake as to the age of the female is no defense); Linda Sharpe Waits, *Unlawful Sexual Intercourse: Old Notions and A Suggested Reform*, 12 PAC. L.J. 217, 217-19 (1980) (discussing the historical significance of gender specific statutory rape laws and how they are outdated and flawed); David Wharton, *California's Statutory Rape Law Applies Only to Female Victims. For Underage Males, There is Less Legal Protection*, L. A. TIMES, Apr. 30, 1992, at 9A (discussing the issue of whether underage males need protection under statutory rape laws).

2. CAL. PENAL CODE § 261.5 (amended by Chapter 596). At least 30 other state legislatures have revised their sexual assault statutes to make them gender neutral. See, e.g., ALASKA STAT. §§ 11.41.410 to .440 (1989 & Supp. 1993); ARIZ. REV. STAT. ANN. §§ 13-1404, 13-1405 (Supp. 1992); ARK. CODE ANN. §§ 5-14-106 to -108 (Michie 1987); COLO. REV. STAT. §§ 18-3-403 to -404 (Supp. 1993); CONN. GEN. STAT. §53a-71 (1985); FLA. STAT. ANN. §§ 794.011, 794.05 (West 1992 & Supp. 1993); ILL. ANN. STAT. ch. 720, para. 5/12-13

Chapter 596 revises the penalties for unlawful sexual intercourse to reflect the ages and age differences of the parties.³

DMB

to -14 (Smith-Hurd 1993); IND. CODE § 35-42-4-3 (1986); IOWA CODE ANN. §§ 709.1-709.4 (West 1993); KAN. STAT. ANN. § 21-3503 (1988); KY. REV. STAT. ANN. § 510.040 (Baldwin 1984); LA. REV. STAT. ANN. § 14:42 (West 1986); ME. REV. STAT. ANN. tit. 17A, §§ 253-54 (West. Supp. 1992); MD. CODE ANN., CRIM. LAW §§ 463, 464A, 464B (Supp. 1992); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1990); MICH. COMP. LAWS ANN. §§ 750.520b-.520d (West 1991); MINN. STAT. ANN. §§ 609.342-.345 (West Supp. 1992); MONT. CODE ANN. §§ 45-5-501 to -502 (1993); NEB. REV. STAT. §§ 28-319, 28-320.01 (1989); N.H. REV. STAT. ANN. §§ 632-A:2, -A:3 (Supp. 1992); N.M. STAT. ANN. §§ 30-9-11 (Michie Supp. 1993); N.D. CENT. CODE §§ 12.1-20-03, -05, -07 (1985 & Supp. 1993); OHIO REV. CODE ANN. §§ 2907.02, .04 (Anderson 1993); PA. STAT. ANN. tit. 18, § 3122 (1993); S.C. CODE ANN. § 16-3-655 (Law Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1993); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1992); W.VA. CODE §§ 61-8B-2, -3, -5 (1992); WIS. STAT. ANN. § 940.225 (West 1993); WYO. STAT. §§ 6-2-302 to -304 (Supp. 1993); *see also* *People v. Andersen*, 604 N.E.2d 424, 430 (Ill. 1992) (stating that sexual statutes now provide for conviction of either males or females in Illinois and that under earlier statutes, a female could be found guilty of rape only as an accessory, an aider, or an abetter), *appeal denied*, 612 N.E.2d 516 (1993); *Commonwealth v. Knap*, 592 N.E.2d 747, 748-49 (Mass. 1992) (holding that statutory rape is a strict liability crime and that reasonable mistake as to the age of the victim is not a defense); *State v. Bartlett*, 792 P.2d 692, 695 (Ariz. 1990) (holding that under Arizona's gender neutral statute, the fact that a minor under the age eighteen consents to sexual intercourse is not a defense), *vacated by*, 111 S.Ct. 2880 (1991). *See generally*, Frances J. Sulman, *Constitutionality of Gender Based Statutes Ostensibly Aimed at Males: Implications of Michael M. v. Superior Court*, 16 LOY. L.A. L. REV. 17, 58-60 (1983) (discussing the problems with gender-based statutory rape laws and the need for legislative action); Veronica T. Jennings, *Legal Labyrinth: Woman is Charged With Rape*, WASH. POST, July 11, 1992, at B1 (discussing a case of a woman being prosecuted for statutory rape under Maryland's sexual assault laws).

3. CAL. PENAL CODE § 261.5(b) (amended by Chapter 596) (stating that any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor); *id.* § 261.5(c) (amended by Chapter 596) (stating that any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony); *id.* § 261.5(d) (amended by Chapter 596) (stating that any person over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony).

Crimes; vandalism

Penal Code § 594.4 (new).

AB 68 (Alpert); 1993 STAT. Ch. 427

Under existing law, a person who maliciously¹ damages property is guilty of vandalism.² Existing law also provides punishment depending upon the amount of damage.³ Existing law sets forth a separate crime and a penalty enhancement for vandalism motivated by bias.⁴

1. See CAL. PENAL CODE § 7(4) (West 1988) (defining maliciously as a wish to vex, annoy, or injure another person, or an intent to do a wrongful act); 2 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* § 678(b) (2d ed. 1988) (stating that malice generally calls for more than mere intentional harm without justification or excuse, but rather it must be a wanton and willful or reckless disregard of the plain dangers of harm).

2. CAL. PENAL CODE § 594(a) (West Supp. 1993); see *id.* (providing that malicious defacement with paint or any other liquid, or damaging or defacing any property not your own, constitutes vandalism); see also *People v. Kahanic*, 196 Cal. App. 3d 461, 466, 241 Cal. Rptr. 722, 725 (1987) (stating that "not his or her own" in California Penal Code § 594, includes community property because the property is not wholly his or her own); CALJIC 16.320 (West 1988) (stating that it is a misdemeanor for any person to maliciously deface, damage, or destroy any real or personal property not the person's own).

3. CAL. PENAL CODE § 594(b)(1)-(4) (West Supp. 1993); see *id.* (providing that if the amount of damage caused by the vandalism is \$50,000 or more, the punishment is imprisonment for up to one year, a fine of not more than \$50,000, or both; if the damage is at least \$5,000, but less than \$50,000, the punishment is imprisonment for up to one year, a fine not to exceed \$10,000, or both; if the damage is at least \$1,000, but less than \$5,000, the punishment is a fine not to exceed \$5,000, up to one year imprisonment, or both; if the damage is less than \$1,000, the punishment is a fine up to \$1,000, imprisonment not to exceed six months, or both).

4. *Id.* § 422.7 (West Supp. 1993); see *id.* (permitting a misdemeanor to be punished as a felony if the crime is committed against the person or property of another for the purpose of intimidating or interfering with the other person's free exercise or enjoyment of any right secured by the Constitution or laws of California, or by the Constitution or laws of the United States, because of the person's race, color, religion, ancestry, national origin, or sexual orientation); *id.* § 594.3 (West 1988) (providing that the crime of vandalism to a church, synagogue, building owned and occupied by a religious educational institution, or other place primarily used for worship and religious services is punishable by imprisonment for up to one year). If the act is committed by reason of race, color, religion, or national origin, for the purpose of intimidating or deterring persons from freely exercising their beliefs, the person is guilty of a felony. *Id.*; cf. MASS. GEN. LAWS ANN. ch. 266, § 127A (West 1990) (prohibiting vandalism to a place of worship, or place used for the burial of the dead); see also *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2202 (1993) (upholding a Wisconsin statute containing a penalty enhancement aimed at bias-motivated offenses, which the Court held to be conduct unprotected by the First Amendment); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2540 (1992) (invalidating an overly broad Minnesota statute prohibiting expressions constituting "fighting words" because it attempted to impose special prohibitions on those speakers who express views on disfavored subjects); *In re Joshua H.*, 13 Cal. App. 4th 1734, 1746, 17 Cal. Rptr. 2d 291, 298 (1993) (upholding the constitutionality of California's hate crime statute, stating that such statutes do not regulate speech, but rather regulate acts of violence intended to interfere with the victim's protected rights), *review denied*, 1993 Cal. LEXIS 3412 (1993); *Commonwealth v. DiPietro*, 604 N.E.2d 1344, 1346 (Mass. 1992) (stating that the purpose of Massachusetts General Laws Annotated Chapter 266, § 127A is to deter any physical attack of vandalism specifically against religious institutions, schools, and other facilities by increasing penalties for such attacks), *review denied*, 609 N.E.2d 88 (1993); *State v. Vogenthaler*, 548 P.2d 112, 115 (N.M. 1976) (declaring that the role of religion in society as a whole is the reason that vandalism upon a church is treated differently than criminal damage to other property). See generally Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of*

Chapter 427 adds that it is vandalism to maliciously deface, damage, or contaminate any structure⁵ with butyric acid, or any other caustic or chemical substance.⁶ Chapter 427 further provides punishment in the form of a fine, imprisonment, or both.⁷

SAK

Ethnic Intimidation Laws, 39 U.C.L.A. L. REV. 333, 334 (1991) (stating that those who oppose bigotry-related crime statutes believe that these laws tread dangerously close to criminalization of speech and thought, and they impermissibly distinguish among people based on their beliefs); Note, *Protecting Religious Exercise: The First Amendment and Legislative Responses to Religious Vandalism*, 97 HARV. L. REV. 547, 547 (1983) (stating that in the last three years at least 14 legislatures have reacted to the increase in religiously motivated violence by enacting statutes that provide stiffer penalties for violence directed at religious facilities); Susan Espinosa & Benjamin Pimentel, *Investigators: Arrests Foiled Mass Terrorism; White Supremacist Link Reported*, THE TIMES-PICAYUNE, August 14, 1993, at A14 (stating that July's rash of fire bombings at prominent black, gay, and Jewish sites in California and Washington are believed to be part of a grand conspiracy by white supremacists to stage terrorist style attacks from Los Angeles to Seattle); David Ferrell, *Racist, Satanic Symbols Deface Church 2nd Time; Vandalism: Community Groups Express Alarm Over Rising Incidence of Hate Crime*, L.A. TIMES, April 1, 1992, at 1 (stating that hate crimes in Los Angeles have reached record levels for seven consecutive years, numbering 672 last year).

5. See CAL. PENAL CODE § 594.4(c) (enacted by Chapter 427) (defining structure as any house or other building used at the time of the offense as a dwelling or for commercial purposes).

6. *Id.* § 594.4(a) (enacted by Chapter 427); see SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 68, at 2 (June 22, 1993) (stating that the author's intent in introducing Assembly Bill 68 is to deter acts of chemical vandalism committed on health clinics, and was introduced in response to five attacks on San Diego Women's medical clinics on March 9, 1993); see also Susan D. Rice, *Feds Won't Probe Attacks on Clinics*, DAILY J., May 28, 1993, at 2 (discussing the March 10 chemical attack on five San Diego medical clinics, and stating that last year 48 medical facilities were sprayed with noxious chemicals). *Id.* The clinics were sprayed with butyric acid, a toxic chemical that invades porous surfaces such as tiles and carpeting. *Id.* The chemical is irritating to the eyes and respiratory system, can cause skin burns, with unknown long term effects. *Id.*

7. CAL. PENAL CODE § 594.4 (enacted by Chapter 427); see *id.* (providing for punishment by imprisonment in the state prison or county jail, and imposing a fine of up to \$50,000, or as low as \$1,000, depending upon the amount of damage caused).

Crimes; victim assistance

Government Code § 13963.1 (amended).
SB 644 (Hart); 1993 STAT. Ch. 780

Penal Code § 1463.007 (amended).
AB 2211 (Committee on Judiciary); 1993 STAT. Ch. 589

Government Code § 13966 (repealed and new); §§ 13966.01,
13966.02, 13969.3 (new); Unemployment Insurance Code § 1095
(amended).
SB 774 (Leslie); 1993 STAT. Ch. 295

Existing law provides that crime¹ victims² may apply for assistance.³

1. See CAL. GOV'T CODE § 13960(c) (West Supp. 1993) (defining crime).

2. See CAL. GOV'T CODE § 13960(a) (West Supp. 1993) (defining victim); *id.* § 13960.2(a) (West 1992) (excluding any person who is convicted of a felony from consideration as a victim as defined in California Government Code § 13960(a) until that person has been discharged from probation, released from a correctional facility, or has been discharged from parole); *id.* § 13960.5 (West 1992) (including nonresidents as victims in certain circumstances); *Cano v. State Bd. of Control*, 7 Cal. App. 4th 1162, 1165, 9 Cal. Rptr. 2d 355, 357 (1992) (providing that the sister of a murder victim qualified under the definition of victim in California Government Code § 13960(a)(4), but that the sister's husband and children were not victims under the statute); *People v. Williams*, 207 Cal. App. 3d 1520, 1523, 255 Cal. Rptr. 778, 779 (1989) (stating that an insurer which had a contractual obligation to pay the victim did not also become a victim of the crime); *cf. People v. Gaytan*, 542 N.E.2d 1163, 1170-71 (Ill. App. Ct. 1989) (providing that when determining whether a person is a victim, a court will evaluate whether the person is a victim of a violent crime, whether property was taken or damaged, and whether the person was injured). See generally Larry B. Kehl, *Victim Compensation and Restitution: Legislative Alternatives*, 20 LAND & WATER L. REV. 681, 683 (1985) (discussing the types of legislative initiatives that may respond to the needs of victims).

3. CAL. GOV'T CODE § 13961(a) (West 1992); see *id.* § 13959 (West 1992) (stating that it is in the public's interest to provide victims with assistance and that they may obtain compensation from the Restitution Fund); *id.* § 13965(a)(1)-(5) (West Supp. 1993) (providing that there are various types of assistance available, including cash payments); see also *Anne B. v. State Bd. of Control*, 165 Cal. App. 3d 279, 285, 209 Cal. Rptr. 83, 87 (1984) (stating that a victim may be compensated even if the victim has not filed a criminal complaint and a conviction has not been obtained); *cf. 18 U.S.C. § 3663* (1989) (providing that the court may order defendants to pay restitution to victims). Many other state statutes provide for victim compensation. ALASKA STAT. §§ 18.67.010 to .180 (1991 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 54-204 to -210 (West Supp. 1993); FLA. STAT. ANN. §§ 960.001(1)(a), 960.04, 960.07 to .28 (West 1985 & Supp. 1993); GA. CODE ANN. §§ 17-15-5 to -6, 17-15-8 to -13 (Michie 1990 & Supp. 1993); HAWAII REV. STAT. §§ 351-13 to -17, 351-31 to -35, 351-51 to -52, 351-61 to -62, 351-62.5 to -67 (1985); KAN. STAT. ANN. §§ 74-7301 to -7321 (1992); KY. REV. STAT. ANN. §§ 346.010-.185 (Baldwin 1992); MD. CODE ANN. STATE GOV'T § 9-1701 to -1708 (Michie 1993); MASS. GEN. LAWS ANN. ch. 258A, §§ 1-9 (West 1988 & Supp. 1993); MICH. COMP. LAWS ANN. §§ 18.351 to .361 (West 1981 & Supp. 1993); MONT. CODE ANN. §§ 53-9-103 to -112, 53-9-121 to -133 (1993); NEV. REV. STAT. ANN. §§ 217.010 to .070, 217.090 to .350 (Michie 1992); N.J. STAT. ANN. §§ 52:4B-1 to -23 (West 1986 & Supp. 1993); N.M. STAT. ANN. § 31-17-1 (Michie Supp. 1993); N.Y. EXEC. LAW §§ 620-635 (McKinney 1982 & Supp. 1993); N.D. CENT. CODE §§ 65-13-01 to -20 (1985); OHIO REV. CODE ANN. §§ 2743.51 to .67 (Baldwin 1992); OKLA. STAT. ANN. tit. 21, §§ 142.1 to .18 (West 1983 & Supp. 1993); TENN. CODE ANN. §§ 29-13-101 to -117, 29-13-201 to -208 (Michie 1980 & Supp. 1993); VA. CODE ANN. §§ 19.2-

Existing law also provides that hearings are conducted to review victims' applications for assistance.⁴ Under current law, a victim of a sexual assault is entitled to a closed hearing.⁵ Under prior law, this closed hearing provision was only effective until January 1, 1994.⁶ Chapter 780 removes this January 1, 1994 date, and provides that closed hearings are available to victims of sexual assault permanently.⁷ Chapter 780 also provides that victims of domestic violence may have closed hearings.⁸

Existing law provides that there are various types of assistance available to victims.⁹ Chapter 295 provides that a victim who is

368.1 to -368.18 (Michie 1990 & Supp. 1993); WASH. REV. CODE ANN. §§ 7.68.015 to .915, 7.68.035, 7.68.060 to .090 (West 1992 & Supp. 1993); W. VA. CODE §§ 14-2A-1 to -27 (Michie 1991 & Supp. 1993); WIS. STAT. ANN. §§ 949.01 to .18 (West 1982 & Supp. 1993). *See generally* 1 B.E. WITKIN & RICHARD EPSTEIN, CALIFORNIA CRIMINAL LAW 2D § 4 (1988) (summarizing the law in California regarding compensation available for private citizens who are victims of crime); Randall A. Schmidt, *Crime Victim Compensation Legislation: A Comparative Study*, 5 VICTIMOLOGY 401 (Spring-Fall 1980) (providing an overview of victim compensation legislation and suggesting that there should be a uniform act); Lori Ann Merrill, *The 1981 Oklahoma Crime Victim Compensation Act*, 17 TULSA L.J. 260, 262 (1981) (comparing Oklahoma's victim restitution legislation against similar legislation in other states); *Review of Selected 1983 California Legislation, Criminal Procedure; Victim of Crime Restitution* 15 PAC. L.J. 411, 559-68 (1983) (discussing the implementation of the Crime Restitution Program of 1983); Andrea G. Nadel, Annotation, *Statutes Providing for Governmental Compensation for Victims of Crime*, 20 A.L.R. 4th 63 (1992) (analyzing state and federal cases involving government compensation for the victims of crimes).

4. CAL. GOV'T CODE § 13963 (West 1992); *see id.* (providing the function of hearings).

5. *Id.* § 13963.1 (amended by Chapter 780); *see id.* (providing that the State Board of Control may exclude all persons other than board members, members of the staff, the victim, the victim's parents, the victim's representative, witnesses, and other persons of the victim's choice if the victim is either a victim of a sexual assault or a minor).

6. 1990 Cal. Stat. ch. 245, sec. 1, at 1207 (enacting CALIFORNIA GOV'T CODE § 13963.1) (amended by Chapter 780).

7. CAL. GOV'T CODE § 13963.1 (amended by Chapter 780); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 774, at 2 (June 22, 1993) (expressing the need for closed hearings for victims of sexual assault, because it reduces the trauma that victims have to endure); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 774, at 2 (May 17, 1993) (noting that the State Board of Control had not received any criticism regarding the closed hearings available to sexual assault victims); *cf.* HAW. REV. STAT. § 351-14 (1985) (providing for private hearings if the offender has not been convicted or if the person was a victim of a sexual offense); IND. CODE ANN. § 5-2-6.1-27 (West Supp. 1993) (providing for private hearings when it is in the interest of the victim or society or as required by justice); OR. REV. STAT. § 147.115(1)(a)-(d) (1990) (providing for closed hearings for any of the following reasons: (1) The assailant has not been brought to trial; (2) the victim was raped or sexually abused; (3) the victim is a minor, or (4) the interests of justice would be frustrated); WIS. STAT. ANN. §§ 949.11(3) (West 1982) (providing that the examiner may hold the hearing in private if the offender has not been convicted or if the victim suffered a sexual assault).

8. CAL. GOV'T CODE § 13963.1 (amended by Chapter 780); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 774, at 3 (June 22, 1993) (explaining that the trauma faced by victims of domestic violence is intensified because they were victimized by someone with whom they had a close personal relationship).

9. CAL. GOV'T CODE § 13965(a)(1)-(5) (West Supp. 1993); *see id.* (providing that the State Board of Control may take various actions including, but not limited to, cash payments); *see also* Webster v. State Bd. of Control, 197 Cal. App. 3d 29, 34, 242 Cal. Rptr. 685, 687 (1987) (providing that victims are not to be compensated for pain and suffering, emotional distress, or loss of consortium); Blazeovich v. State Bd. of Control, 191 Cal. App. 3d 1121, 1127, 237 Cal. Rptr. 35, 38 (1987) (providing that the State Board of Control was

overcompensated¹⁰ is liable for the amount that was overpaid.¹¹ Current law also provides that the State of California shall be subrogated to the rights of the victim.¹²

Existing law provides that if the victim or the victim's representative¹³ begins legal proceedings against the person liable for the victim's injury or death and the State Board of Control (Board)¹⁴ awarded the victim cash, then the victim must notify¹⁵ the Attorney General and the Board.¹⁶ Chapter 295 requires that the victim also notify the Board if the victim has reason to believe that the person against whom the victim is seeking damages, is receiving a defense provided by an insurer or carrier.¹⁷ Chapter 295 provides that in an action prosecuted by the victim alone, litigation expenses must be paid first from any award or judgment that is won, and then the Board may place a lien on the judgment or award for the assistance which was paid to the victim.¹⁸

justified in denying an award to the victim's son, because the Board was not required to speculate what the unemployed mother might have earned if she had not been murdered); *Fierro v. State Bd. of Control*, 191 Cal. App. 3d 735, 740, 236 Cal. Rptr. 516, 518 (1987) (providing that not all victims of crime are to be compensated, but only those victims with specific financial losses).

10. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 774, at 3 (June 22, 1993) (suggesting that overpayment may occur, through no fault of the victim, when emergency assistance is given to a victim, because it is difficult to determine the financial impact on the victim).

11. CAL. GOVT. CODE § 13969.3 (enacted by Chapter 295); *see id.* (providing that victims who have been overpaid are liable for the amount of overpayment, unless (1) the overpayment was not due to fraud and (2) the recovery of the overpayment would be against equity and good conscience). The State Board of Control may authorize limits for the administration of this section in situations where victims were overcompensated in an amount less than \$2,000. *Id.* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 774, at 3 (June 22, 1993) (indicating that the State Board of Control may be placed in the difficult position of trying to collect money from victims that the Board was created to aid); *cf.* FLA. STAT. ANN. § 960.17 (West 1985 & Supp. 1993); GA. CODE ANN. § 17-15-13 (Michie 1990); N.D. CENT. CODE § 65-13-14 (1985); WASH. REV. CODE ANN. § 7.68.120 (West 1992) (providing for repayment by victims who receive assistance).

12. CAL. GOV'T CODE § 13966.01(a) (enacted by Chapter 295); *see id.* (providing that the subrogation rights shall be against the perpetrator of the crime or the person liable for the pecuniary loss).

13. *See id.* § 13966.01(e) (enacted by Chapter 295) (providing that if a victim, the victim's guardian, personal representative, estate, or survivors bring an action, the State Board of Control must be notified).

14. *See id.* § 13963 (West 1992) (discussing the role of the State Board of Control during the hearing); *id.* § 13964 (West 1992) (discussing the role of the State Board of Control during the application process).

15. *See id.* § 13966.01(e) (enacted by Chapter 295) (providing that notice shall include names and addresses of parties or names and addresses of attorneys, and the nature of the claim, among other things).

16. *Id.* (enacted by Chapter 295).

17. *Id.* (enacted by Chapter 295); *see id.* (requiring that the notice shall include a statement of facts and the name and address of the carrier); *id.* § 13966(a) (enacted by Chapter 295) (defining carrier).

18. *Id.* § 13966.02 (enacted by Chapter 295).

Existing law provides for a comprehensive collection program.¹⁹ Chapter 589 provides that a county that utilizes the comprehensive program must share debt collection information with state agencies.²⁰

TLS

Crimes; video recordings

Penal Code § 313.1 (amended).
AB 538 (Richter); 1993 STAT. Ch. 559

Existing law requires businesses that rent or sell video recordings of harmful matter¹ to create an area designated “adults only” for the placement of such recordings.² Under existing law, a violation of this provision is an infraction.³ Existing law also provides that a person⁴ who

19. CAL. PENAL CODE § 1463.007 (amended by Chapter 589); *see id.* (establishing the components of comprehensive collection programs).

20. *Id.* § 1463.007 (amended by Chapter 589).

1. *See* CAL. PENAL CODE § 313(a) (West Supp. 1993) (defining harmful matter to mean matter which appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value for minors); *id.* § 313(b) (West Supp. 1993) (defining matter); *cf. id.* § 311(a) (West Supp. 1993) (defining obscene matter to mean matter which appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value); *Miller v. California*, 413 U.S. 15, 24 (1973) (defining an obscene work as one which: (1) Taken as a whole, the average person would find the work to appeal to the prurient interest by applying contemporary community standards; (2) describes or depicts sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political or scientific value); *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (referring to WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed. 1949) and defining prurient material to mean a material having a tendency to excite lustful thoughts).

2. CAL. PENAL CODE § 313.1(e) (amended by Chapter 559); *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (stating that a state may apply stricter standards in regulating what minors may view, but only in narrow, well-defined circumstances); *Ginsberg v. New York*, 390 U.S. 629, 638-40 (1968) (stating that since the state has an interest in children's well-being, it may regulate material affecting children more strictly than material affecting adults to aid parents in protecting their children). *See generally* J. Rex Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 S. CAL. L. REV. 345, 346 (1966) (expressing the need for proper regulatory laws to protect children from obscenity to discourage community groups from going too far in imposing their personal values upon others); Ann H. Coulter, Note, *Restricting Adult Access to Material Obscene as to Juveniles*, 85 MICH. L. REV. 1681, 1683 (1987) (discussing whether state regulations which restrict the access of minors to obscene material encroaches upon the First Amendment rights of adults); Christopher W. Weller, Comment, *See No Evil: The Divisive Issue of Minors' Access Laws*, 18 CUMB. L. REV. 141, 142 (1987) (discussing the constitutionality of minors' access laws).

3. CAL. PENAL CODE § 313.1(e) (amended by Chapter 559); *see id.* (providing that this infraction is punishable by a \$100 fine).

maliciously damages any personal property which is not owned by that person is guilty of vandalism⁵ and will be punished according to the amount of damage caused by that person.⁶ Chapter 559 provides that any person who rents a video recording and adds harmful matter to the recording before returning it is guilty of a misdemeanor.⁷ Chapter 559, however, provides as a defense to prosecution the video rental store's failure to post a reasonably visible sign informing its customers of this provision.⁸

MDL

4. See *id.* § 7 (West 1988) (defining person).

5. See *id.* § 594(a) (West Supp. 1993) (providing that any person who damages or defaces the real or personal property of another is guilty of vandalism).

6. *Id.* § 594(b)(1)-(4); see *id.* § 594(b)(1) (West Supp. 1993) (providing that if the amount of damage is greater than \$50,000, the person may be punished by imprisonment for a maximum term of one year in the state prison or county jail, or by a maximum fine of \$50,000, or both); *id.* § 594(b)(2) (West Supp. 1993) (providing that if the amount of damage is between \$5,000 and \$50,000, the person may be punished by imprisonment for a maximum term of one year in the state prison or county jail, or by a maximum fine of \$10,000, or both); *id.* § 594(b)(3) (West Supp. 1993) (providing that if the amount of damage is between \$1,000 and \$5,000, the person may be punished by imprisonment for a maximum term of one year in the county jail, or by a maximum fine of \$5,000, or both); *id.* § 594(b)(4) (West Supp. 1993) (providing that if the amount of damage is less than \$1,000, the person may be punished by imprisonment for a maximum term of six months in the county jail, or by a maximum fine of \$1,000, or both). See generally SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 538, at 2 (July 6, 1993) (stating that when a renter of a videotape alters the tape by recording harmful matter onto the tape before returning it, the renter is committing an act of vandalism).

7. CAL. PENAL CODE § 313.1(f) (amended by Chapter 559); see *id.* § 17(b) (West Supp. 1993) (defining misdemeanor); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 538, at 2 (July 6, 1993) (stating there is no current law to charge persons who rent videotapes and return them with pornography recorded at the end of the tapes); ASSEMBLY FLOOR ANALYSIS OF AB 538, at 1 (May 20, 1993) (stating that this bill is aimed at preventing persons from recording pornographic material at the end of a rented videotape before returning the tape); see also 17 U.S.C. § 106 (Supp. II 1990) (providing that the owner of a copyright has the exclusive right to reproduce the copyrighted work, to prepare derivative works, to transfer ownership of copies of the work, to publically perform the work, and to publically display the work); *id.* § 501 (Supp. II 1990) (stating that a violation of an exclusive right as provided in 17 U.S.C. § 106 is an infringement of the copyright); *id.* § 504 (1988) (providing that copyright infringers are liable for the copyright owner's actual damages and for specified statutory damages); *id.* § 505 (1988) (allowing a court to award costs and attorney's fees for civil actions for copyright infringement); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 105 (2d Cir. 1951) (stating that a copyright owner has the exclusive right not to have others copy the copyrighted work); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947) (stating that an entire motion picture does not have to be copied in order to constitute an infringement, but that the copying of a major sequence is enough); cf. *United States v. Taxe*, 540 F.2d 961, 965 (9th Cir. 1976) (stating that an alteration of a sound recording on an unauthorized re-recording might constitute copyright infringement), *cert. denied*, 429 U.S. 1040 (1977). But see *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 n.8 (2d Cir. 1946) (stating that an unauthorized copy must be substantial or material in order to constitute an infringement, and the defendant has a defense if it can be shown that the copying was too insubstantial to be wrongful); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 538, at 2 (July 6, 1993) (reporting the opposing argument that it would be virtually impossible to enforce this provision because it would be too hard to establish who was responsible for the illicit recording).

8. CAL. PENAL CODE § 313.1(f) (amended by Chapter 559).

Crimes; weapons

Penal Code § 417.4 (new); §§ 171b, 417.2 (amended).
SB 292 (Roberti); 1993 STAT. Ch. 598

Penal Code § 626.10 (amended).
SB 647 (Leslie); 1993 STAT. Ch. 599

Prior law provided that a person who used a “replica” of a firearm¹ in a threatening manner, except in self defense,² was guilty of a misdemeanor.³ Chapter 598 changes this so that any person using an “imitation” firearm,⁴ except in self defense, is guilty of a misdemeanor.⁵

Prior law provided that any person who sold, manufactured, or distributed an imitation firearm would be liable for a civil fine.⁶ Prior law provided that the fine would not be assessed if the imitation was sold, manufactured, or distributed for export in interstate or foreign commerce, theatrical productions, athletic events, military defense activities, or public displays authorized by public or private schools.⁷ Chapter 598 amends this so that any person who purchases, sells, manufactures, ships, transports, distributes, or receives, by mail order or in any other manner, any imitation firearm⁸ will be liable for a civil fine.⁹

1. See 1991 Cal. Legis. Serv. ch. 950, sec. 1.5, at 3778 (amending CAL. PENAL CODE § 417.2) (defining replica firearm as any device with the apparent capability of expelling a projectile which is reasonably perceived by the person threatened to be an actual firearm). Imitation firearms do not include antique replicas for presentation, commemorative replicas issued by a nonprofit organization used for presentation, or an instrument that expels a metallic projectile through force of air pressure. *Id.*

2. See CAL. PENAL CODE §§ 692, 693 (West 1985) (explaining who is entitled to use self-defense and the circumstances in which it may be used).

3. 1991 Cal. Legis. Serv. ch. 950, sec. 1.5, at 3777-78 (amending CAL. PENAL CODE § 417.2); see *People v. Moore*, 224 Cal. App. 3d 234, 236, 273 Cal. Rptr. 680, 681 (1990) (rejecting the argument that § 417.2 is not a lesser related offense for a violation of § 12021 of the Penal Code, which makes it illegal for a felon to possess a firearm).

4. See CAL. PENAL CODE § 417.4 (enacted by Chapter 598) (defining imitation firearm as a replica of a firearm that is substantially similar in physical characteristics to an actual firearm so as to cause a reasonable person to conclude that the replica is a real firearm).

5. *Id.* § 417.4 (enacted by Chapter 598); see *id.* (providing that violation of this Code is punishable by a term of not less than 30 days in a county jail); cf. CONN. GEN. STAT. ANN. § 53-206c(c), (d) (West Supp. 1993) (prohibiting the brandishing of facsimile firearms); MINN. STAT. ANN. § 609.713 (West 1987 & Supp. 1993) (providing that anyone brandishing a replica firearm in a threatening manner may be imprisoned or fined).

6. 1991 Cal. Legis. Serv. ch. 950, sec. 1.5, at 3778 (amending CAL. PENAL CODE § 417.2). Prior law provided that such distribution is illegal and subject to a maximum penalty of \$10,000. *Id.*

7. 1991 Cal. Legis. Serv. ch. 950, sec. 1.5, at 3778 (amending CAL. PENAL CODE § 417.2).

8. See CAL. PENAL CODE § 417.2(c) (amended by Chapter 598) (defining imitation firearm); see also *id.* § 417.2(d)(1)-(5) (amended by Chapter 598) (providing that imitation firearms do not include antique replicas for presentation, commemorative replicas issued by a nonprofit organization used for presentation, firearms

Existing law prohibits any person,¹⁰ except for a peace officer,¹¹ from possessing any type of blade on the campus of a public school or university.¹² Chapter 599 amends this to include any private university.¹³ In addition, Chapter 599 makes it a public offense to possess without permission of the school district superintendent, any instrument that expels a metallic projectile by force of air pressure on or within a public or private school or university.¹⁴

Existing law provides that any person in possession of any firearm, deadly weapon, knife, tear gas weapon, or stun gun within a courthouse or at any meeting required to be open to the public is guilty of a public offense.¹⁵ Chapter 598 provides that an offense is committed within any

approved by the Secretary of Commerce, or instruments that expel metallic projectiles by air pressure); *cf.* 15 U.S.C. § 5001(c) (1988) (defining look-alike firearms).

9. CAL. PENAL CODE § 417.2(a) (amended by Chapter 598). Chapter 598 provides that the maximum penalty shall not exceed \$10,000. *Id.* See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 292, at 4 (July 6, 1993) (stating that the purpose of adding purchases, ships, transports, and receives was to close a perceived loophole in the prior law which only regulated the sale, manufacture, or distribution of an imitation firearm); *cf.* 15 U.S.C. 5001(a)-(b) (1988) (providing that it is unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any type of imitation firearm unless it contains a marking approved by the Secretary of Commerce); KAN. STAT. ANN. § 12-16, 115 (1991) (assessing a civil penalty upon anyone who sells, manufactures, or distributes an imitation firearm); MINN. STAT. ANN. § 325F.81 (West Supp. 1993) (requiring that a warning label be placed on replica firearms intended for sale).

10. See CAL. PENAL CODE § 7 (West 1988) (defining person).

11. See *id.* § 626.10(a)-(b) (amended by Chapter 599) (excepting peace officers as defined in chapter 4.5 of Title 3 of Part 2 of the Penal Code, peace officers of another state or the federal government, or those summoned by an officer to assist them).

12. *Id.* Existing law excepts those possessing the knife within the scope of their employment and those who are using the knife for lawful food preparation upon a residential facility at a university. *Id.* § 626.10(d)-(e) (amended by Chapter 599).

13. *Id.* § 626.10 (amended by Chapter 599); see *id.* § 626.10(a)-(b) (amended by Chapter 599) (stating that a knife as defined in this statute may not have a blade longer than two and one-half inches); *id.* § 626.10(h) (amended by Chapter 599) (defining dirk or dagger as a knife or other instrument that is primarily designed to be a stabbing instrument capable of inflicting great bodily injury or death).

14. *Id.* § 626.10(a) (amended by Chapter 599). No offense is committed if the person has the written permission of the school principal or designee. *Id.* § 626.10(f); see *id.* § 626.9 (West Supp. 1993) (providing that no person, except a peace officer, may possess a loaded firearm on the campus of any public or private school or university); see also Carlos Alcala, *Fake Guns Mean Real Trouble When Toted by Kids at School*, SACRAMENTO BEE, Apr. 19, 1993, at B1 (stating that imitation weapons look real to police officers and may provoke a shoot out); Tom McQueeney, *Triggering Alarm; Fake Guns Posing Real Dangers at High Schools*, L.A. TIMES, Feb. 8, 1993, at A3 (providing that the occurrence of imitation handguns at school is rising).

15. CAL. PENAL CODE § 171b(a)(1)-(5) (amended by Chapter 598); *cf.* IDAHO CODE § 18-3302C(1) (Supp. 1993) (stating that a licensed individual may not carry a concealed weapon in a courthouse); N.C. GEN. STAT. § 14-269.4 (1992) (providing that it is unlawful for any person to possess or carry any deadly weapon in any courthouse); S.D. CODIFIED LAWS ANN. § 22-14-23 (Supp. 1993) (stating that any person who knowingly possesses a firearm or other dangerous weapon in any county courthouse is guilty of a misdemeanor); VA. CODE ANN. § 18.2-283.1 (Michie 1988) (providing that it is unlawful for any person to possess any gun or other dangerous device in a courthouse).

state or local public building.¹⁶ Chapter 598 adds that any person in possession of an instrument that expels a metallic projectile by force of air pressure is guilty of the offense.¹⁷

Existing law also provides that a person who is a peace officer, has a valid license to carry a firearm, has a valid tear gas weapon card, or possesses an item to be used as evidence in a court of law is exempt from this provision.¹⁸ Chapter 598 provides that a peace officer authorized to possess such weapons may not do so if the officer is a party to an action pending in the court.¹⁹

SVB

16. CAL. PENAL CODE § 171b(a) (amended by Chapter 598); *cf.* MONT. CODE ANN. § 45-8-351(2)(a) (1993) (providing that a county or other local government may restrict the carrying of concealed or unconcealed weapons at any public assembly or publicly owned building); OR. REV. STAT. § 166.370(1) (1990) (providing that any person possessing a loaded or unloaded firearm within a public building may be fined up to \$500, imprisoned for up to one year, or both); S.C. CODE ANN. § 16-23-420 (Law. Co-op. 1985 & Supp. 1992) (mandating that any person who carries a firearm of any kind into a public building is guilty of a misdemeanor); WIS. STAT. ANN. § 941.235(1) (West 1982) (providing that any person armed with a firearm within any building owned or leased by the state or a political subdivision of the state is guilty of a Class B misdemeanor).

17. CAL. PENAL CODE § 171b(a)(6) (amended by Chapter 598).

18. *Id.* § 171b(b)(1)-(4) (amended by Chapter 598).

19. *Id.* § 171b(b)(2)(B) (amended by Chapter 598). Chapter 598 also exempts persons possessing restricted weapons with written authorization, persons that lawfully own or lawfully reside in the building, or hired security guards. *Id.* § 171b(b)(5)-(7) (amended by Chapter 598).

