McGeorge Law Review

Volume 26 | Issue 2 Article 12

1-1-1995

Crimes

University of the Pacific; McGeorge School of Law

Crimes

Crimes; aggravated sexual assault on children

Penal Code § 269 (new).
SBX 30 (Peace); 1994 STAT. Ch. 48X

Penal Code § 269 (new).
AB 3707 (Boland); 1994 STAT. Ch. 878

Under existing law, rape is defined as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under certain specified circumstances, and is punishable by imprisonment in the state prison for three, six, or eight years.[1] Existing law also provides that any person who commits a forcible[2] sex offense against a child under the age of fourteen is guilty of a felony that is punishable by three, six, or eight years in state prison and a fine of up to $10,000.[3] Chapter 48X creates a new crime of aggravated sexual assault of a child.[4] Chapter 48X defines aggravated sexual assault of a child as sexual conduct with a person under the age of fourteen who is ten or more years younger than the perpetrator and the perpetrator commits forcible acts of rape, sodomy, oral copulation, any sex crime in concert, or penetration by a foreign object.[5]

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1. CAL. PENAL CODE §§ 261, 264 (West Supp. 1994); *see* People v. Jeff, 204 Cal. App. 3d 309, 324, 251 Cal. Rptr. 135, 143 (1988) (interpreting California's rape statute, as set forth in California Penal Code § 261, and holding that for a rape conviction, it must be shown that sexual intercourse was accomplished against the will of the victim by means of fear and that the victim feared immediate and unlawful bodily injury).

2. *See* People v. Senior, 3 Cal. App. 4th 765, 774, 5 Cal. Rptr. 2d 14, 19 (1992) (defining force to mean physical force substantially different from, or substantially in excess of, that required for the lewd act) (quoting People v. Quinones, 202 Cal. App. 3d 1154, 1158, 249 Cal. Rptr. 435, 438 (1988), *review denied*, 1992 Cal. LEXIS 1822 (1992)).

3. CAL. PENAL CODE § 288 (West Supp. 1994); *see* People v. Wallace, 11 Cal. App. 4th 568, 574, 14 Cal. Rptr. 2d 67, 71 (1992) (holding that lewd or lascivious acts are ones that are sexually unchaste or licentious and which suggest moral looseness or incite sensual desire); People v. Gilbert, 5 Cal. App. 4th 1372, 1380, 7 Cal. Rptr. 2d 660, 664 (1992) (holding that the crime of lewd and lascivious act with a child is committed by any touching of a child with the requisite intent, and stating that the crime does not require that the act be inherently sexual in nature), *review denied*, 1992 Cal. LEXIS 4055 (Aug. 12, 1992); *see also* Hampton v. Commonwealth, 666 S.W.2d 737, 741 (Ky. 1984) (upholding a sentence of 105 years of imprisonment for multiple convictions of sodomy and sexual abuse of a child); *cf.* KY. REV. STAT. ANN. § 510.070 (Baldwin 1993) (providing that sodomy in the first degree is a Class A felony when the victim is under 12 years of age and receives a serious physical injury); N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1994) (providing that sexual penetration of a child under 13 years of age constitutes criminal sexual penetration and is a first degree felony); N.D. CENT. CODE § 12.1-20-07 (Supp. 1993) (providing that any adult who knowingly has sexual contact with a minor who is 15 years of age or younger is guilty of a Class A misdemeanor offense of sexual assault); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1993) (defining the crime of criminal sexual conduct with minors).

4. CAL. PENAL CODE § 269 (enacted by Chapter 48X).

5. *Id.* § 269(a)(1)-(5) (enacted by Chapter 48X); *see* State v. Hamilton, 501 A.2d 778, 780 (Del. Super. Ct. 1985) (holding that for purposes of prosecuting first degree rape, a minor child under the age of 16 cannot be a voluntary social companion of a custodial parent), *aff'd without opinion*, 515 A.2d 397 (Del. 1986);

Chapter 48X provides that the crime of aggravated sexual assault of a child is a felony and is punishable by a prison term of fifteen years to life.[6]

INTERPRETIVE COMMENT

The intent of the Legislature in enacting Chapter 48X is to remove child rapists from the community.[7] Sex offenses committed by strangers against children are considered by the Legislature to be among the most vile acts imaginable.[8] As a result, recent times have witnessed a great public outcry demanding harsher

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Commonwealth v. Gallant, 369 N.E.2d 707, 713 (Mass. 1977) (providing that proof of an irregular indulgence in sexual behavior or illicit sexual relations can constitute unnatural sexual intercourse and thus support a conviction of rape of a child under sixteen); *cf.* N.C. GEN. STAT. § 14-202.1 (1993) (providing that a person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, the person willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years).

6. CAL. PENAL CODE § 269(b) (enacted by Chapter 48X); *see* State v. Brand, 363 N.W.2d 516, 520 (Neb. 1985) (holding that a sentence of 35 years in state prison without the possibility of parole for aggravated sexual assault is not cruel and unusual punishment); *see also* State v. Baker, 426 S.E.2d 73, 73 (N.C. 1993) (sentencing a defendant, who was convicted for taking indecent liberties with a minor, to a five-year suspended sentence and special probation for five years), *review denied*, 433 S.E.2d 180 (N.C. 1993); Commonwealth v. Gallant, 369 N.E.2d 707, 709 (Mass. 1977) (affirming a conviction of a defendant for having unnatural sexual intercourse with a child under 16 years of age, for which the defendant was sentenced to imprisonment in the state prison for a term of not less than five nor more than seven years); *cf.* ALASKA STAT. § 11.41.434 (Supp. 1993), ARIZ. REV. STAT. ANN. § 13-604.01 (1989), COLO. REV. STAT. ANN. § 18-3-405 (West 1986 & Supp. 1994), MASS. GEN. LAWS ANN. ch. 265, § 22A (West 1990), NEB. REV. STAT. § 28-319(1)(c) (Supp. 1993), NEV. REV. STAT. § 200.366(2)(c) (1991) (providing various penalties for aggravated sexual assault on a child); UTAH CODE ANN. § 76-5-407 (1990) (providing that in a prosecution for rape of a child, sodomy on a child, and sexual abuse of a child, any touching, however slight, is sufficient to constitute the relevant element of the offense). *But see* Marsha Weissman & Richard Luciana, *Sentencing the Sex Offender: A Defense Perspective*, PLI LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES No. C4-4185 259, 259 (1989) (discussing the incarceration of sexual offenders, particularly those who prey on children, and asserting that such offenders are in need of treatment that is not available or received in prisons). *But cf.* UTAH CODE ANN. § 76-5-406.5 (1990) (providing that sentences for sex offenses committed against a child can be suspended, if certain conditions are fulfilled); *id.* (setting forth conditions to be fulfilled in order for a sentence to be suspended, including, *inter alia*, that the defendant did not use a weapon or force in committing the crime, did not cause bodily injury to the child victim, did not use pornography, and did not act in concert with another offender). *See generally* Arthur S. Frumkin, Note, *The First Amendment and Mandatory Courtroom Closure in* Globe Newspaper Co. v. Superior Court*: The Press' Right, the Child Rape Victim's Plight*, 11 HASTINGS CONST. L.Q. 637 (1984) (discussing prosecutions of child rapists and the plight of the children involved in such prosecutions).

7. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SBX 30, at 2 (May 17, 1994); *see* Laura Lane, Note, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U. L. REV. 793, 802 (1987) (discussing the Child Abuse Reform Act of 1984 passed by the District of Columbia City Council that was intended to eliminate obstacles hindering prosecution of sex offenders and to ensure that more sex offenders were brought to justice); *cf.* Hill v. State, 658 S.W.2d 705, 708 (Tex. Ct. App. 1983) (reversing a conviction for rape of a minor under the age of 17 for which the defendant was sentenced for 99 years because the victim failed to inform someone of the offense within six months of its occurrence). *See generally* Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709 (1992) (discussing a statute which requires certain individuals who have been classified as violent sexual predators and are likely to continue to engage in acts of sexual violence to be civilly committed to institutions when their punishment has been completed).

8. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SBX 30, at 2 (May 17, 1994).

sentences for violent criminals, particularly recidivists and child sex offenders.[9] Because many sex offenders repeat their crimes, ensuring that child rapists are imprisoned for longer periods of time should reduce the number of children made victims of these child predators.[10] Moreover, it is believed that violent sex offenders do not receive adequate prison sentences or do not serve enough of the sentence they have received.[11] However, Chapter 48X may further exacerbate the problem of prison overcrowding.[12]

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9. *See Crime and Criminal Justice Reducing Recidivism: Before the Subcomm. on Crime & Criminal Justice of the House Comm. on Judiciary,* 102d Cong., 2d Sess. (1994) (testimony of Susan W. Sweetser, Vermont State Senator) (advocating strict measures to control violent criminals, including lengthy, mandatory minimum sentences, creation of a nation-wide databank for convicted sex offenders, and sex offender release notification); Jeff Brown, *Book Review,* 45 HASTINGS L.J. 697, 697 (1994) (reviewing CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA (1993)) (noting the wave of anti-crime legislation sweeping California in response to the public's fears and outrage about crime, including legislation such as the "Three-Strikes" bill, and bills to prosecute more juveniles as adults, to limit death penalty defense expenditures, and to ban plea bargaining for serious and violent offenses); Gayle M.B. Hanson, *Experts Vexed at What to Do with Sex Offenders: Authorities Try New Methods for Tracking Them,* WASH. TIMES, June 6, 1994, at A8 (noting that the public has clamored for tougher sentences for career criminals and is condemning the criminal justice system for failing to decrease recidivism); Debra J. Saunders, *Long Sentences Little Punctuation,* S.F. CHRON., June 28, 1993, at A16 (arguing for tougher laws on the state and federal level aimed at keeping sexual offenders in jail for long periods of time and at ensuring that first time offenders do not get light sentences).

10. *See* Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse,* 4 CRIM. L.F. 307, 307 (1993) (discussing prosecutions of child sexual abuse offenders and the possibility of allowing evidence to be admitted that the defendant had committed prior acts of rape or child sex abuse); *see also* Daniel J. Capra, *Innovations in Prosecuting Child Sexual Abuse,* N.Y. L.J., Nov. 9, 1989, at 1 (discussing the difficulties posed in prosecuting child sexual abuse offenses). *But see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SBX 30, at 2 (July 5, 1994) (stating that those opposed to SBX 30 argue that the court has the authority under current law to impose consecutive sentences for each separate count, thereby resulting in very long sentences for each crime). *See generally* Sherrye Henry, *Suffer the Children; How the Legal System Fails Neglected and Abused Children,* WOMAN'S DAY, Oct. 30, 1990, at 52 (stating that sexual offenders rarely attack just one child over a lifetime and that an average deviant will abuse 117 different children); David A. Kaplan, *The Incorrigibles,* NEWSWEEK, Jan. 18, 1993, at 48 (stating that there is a consensus among criminologists that recidivist rates for sex offenders are generally higher than for those who have committed other violent crimes); *id.* (discussing criminals convicted of sex crimes and stating that a solution to punishing repeat offenders is to imprison them for life).

11. *See California Sex Offenders Often Avoid Prison,* UPI, May 29, 1994, *available in* LEXIS, News Library, Curnws File (quoting a California Department of Justice study which stated that 46% of all convicted sex offenders are sentenced immediately to probation or spend less than one year in county jail, and that convicted felony sex offenders who are sentenced to prison serve an average of three years and three months); Saunders, *supra* note 9, at A16 (noting that the average California sex offender spends 38 months in prison).

12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3707, at 3 (June 28, 1994); *see California Sex Offenders Often Avoid Prison, supra* note 11 (stating that prison overcrowding has forced the state to cut in half the sentences of most prisoners, including sex offenders). *But see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SBX 30, at 2 (July 5, 1994) (stating that those opposed to the bill believe its sentence increases are excessive and disproportionate, and will only add to prison overcrowding).

Crimes; arson—registration of offenders

Penal Code § 457.1 (amended).
ABX 8 (Hoge); 1994 STAT. Ch. 11X

Under certain circumstances, prior law authorized a court to require a person convicted of arson,[1] or discharged or paroled from the Department of the Youth Authority for having committed arson, to register with any city or county within thirty days of coming into the county or city where the person expected to reside or be temporarily domiciled for at least thirty days.[2] The court could require registration of a defendant with prior convictions of arson, a present conviction of arson, or a determination that in committing the offense, the defendant exhibited compulsive behavior.[3] Chapter 11X makes registration mandatory instead of discretionary, thus requiring registration for all arson offenders.[4]

At prior law, the duty of a person to register as an arson offender, as adjudicated by a juvenile court, terminated once the person reached the age of twenty-five years.[5] Under Chapter 11X, the duty to register terminates ten years after the

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1. *See* CAL. PENAL CODE § 457.1(a) (amended by Chapter 11X) (defining arson, for purposes of this section, as a violation of California Penal Code §§ 451 or 453); *see also id.* § 451 (West Supp. 1994) (describing arson as where a person sets fire to or otherwise burns any structure, forest land, or property); *id.* § 453 (West 1988) (establishing as a crime the possession of any flammable, explosive or combustible material or substance with intent to set fire to or burn any structure, forest land, or property).

2. 1993 Cal. Legis. Serv. ch. 589, sec. 113, at 2507 (amending CAL. PENAL CODE § 457.1); *see* Bruce A. Berman, Review of Selected 1992 California Legislation, *Criminal Procedure; Registration of Juvenile Arson Offenders*, 24 PAC. L.J. 591, 792 (1993) (reviewing former California Penal Code § 457.1); *see also* Abbott v. Los Angeles, 53 Cal. 2d 674, 681, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960) (declaring unconstitutional a city criminal registration ordinance that regulated a field already preempted by the state). *See generally* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1416 (2d ed. 1989 & Supp. 1994) (stating that statutes that require persons convicted of certain crimes to register with local law enforcement authorities are based upon the assumption that these persons are more likely to be repeat offenders and that accurate information as to their whereabouts is therefore desirable); Annotation, *Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Designated Officials*, 82 A.L.R.2D 398 (1962) (analyzing cases dealing with statutes and ordinances that require persons previously convicted of certain crimes to register with law enforcement officials).

3. 1993 Cal. Legis. Serv. ch. 589, sec. 113, at 2507 (amending CAL. PENAL CODE § 457.1 (b)(1)-(3)); *see* People v. Adams, 224 Cal. App. 3d 705, 710, 274 Cal. Rptr. 94, 98 (1990) (holding that the trial court was not required to conduct an evidentiary hearing or to consult psychiatric experts to determine whether defendant exhibited compulsive behavior under California Penal Code § 457.1, but instead only needed to determine whether the circumstances of the offense and the offender indicated that a repeat offense was likely such that the purpose of the registration statue would be served), *review denied*, 1991 Cal. LEXIS 79 (1991).

4. CAL. PENAL CODE § 457.1(b) (amended by Chapter 11X); *see id.* § 457.1(i) (amended by Chapter 11X) (mandating that a violation of this section is a misdemeanor, and that the offender must be sentenced to between 90 days and one year in county jail); *id.* § 457.1(j) (amended by Chapter 11X) (providing that persons released on parole or probation who are required to register under this section will have their parole or probation revoked for a violation).

5. 1993 Cal. Legis. Serv. ch. 589, sec. 113, at 2507 (amending CAL. PENAL CODE § 457.1(d)); *see id.* at 2508 (amending CAL. PENAL CODE § 457.1(h)) (providing that a person required to register under this section may be relieved of that duty by obtaining a certificate of rehabilitation).

adjudication of the offense.[6]

Prior law also required a first-time arson offender to comply with the registration statute for five years after discharge from prison, release from jail, or termination of probation or parole.[7] Chapter 11X makes registration mandatory for all arson offenders, and therefore this provision is no longer effective.[8]

INTERPRETIVE COMMENT

Chapter 11X was enacted to enhance the effectiveness of the arson registration file as an investigative source.[9] Since most courts were not aware of their authority to require registration,[10] the arson registration file was an incomplete source of information on offenders.[11] However, under Chapter 11X, registration is mandatory, and it is the responsibility of the official in charge of the place of confinement to notify arson offenders of their duty to register upon their discharge or parole from the place of confinement.[12]

The Department of Justice has indicated that it cannot afford the costs of Chapter 11X.[13] However, the Assembly Ways & Means Committee determined that only minor administrative costs would be incurred.[14]

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6. CAL. PENAL CODE § 457.1(d) (amended by Chapter 11X); *see id.* § 457.1(m) (amended by Chapter 11X) (providing that a person required to register under this section may be relieved of that duty by obtaining a certificate of rehabilitation).

7. 1993 Cal. Legis. Serv. ch. 589, sec. 113, at 2508 (amending CAL. PENAL CODE § 457.1 (i)).

8. CAL. PENAL CODE § 457.1 (amended by Chapter 11X).

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF ABX 8, at 2 (June 6, 1994); *see* Andy Furillo, *Arsonists Rarely Face Law's Heat*, SACRAMENTO BEE, Oct. 30, 1993, at A20 (reporting on the difficulty of finding arson offenders); *id.* (providing descriptions of typical arsonists); Pablo Lopez, *Investigators' Hands Tied as Arson Cases, Soar in Fresno*, FRESNO BEE, Sept. 12, 1994, at B1 (reporting that arson in Fresno has increased during the first half of the year by 34.7% compared to the same time period the previous year); Geoffrey Mohan, *The Fight Against Crime: Notes From the Front; Matching Wits with Nature and Arsonists*, L.A. TIMES, Nov. 10, 1993, at Metro B2 (describing the difficulty in solving arson crimes).

10. *See* 1993 Cal. Legis. Serv. ch. 589, sec. 113, at 2507 (amending CAL. PENAL CODE § 457.1(b)(1)-(3)) (authorizing the court to use discretion in requiring registration of arson offenders pursuant to a special finding that the person has a previous or present arson conviction, or that the person exhibited compulsive behavior in committing the offense).

11. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF ABX 8, at 2 (Aug. 26, 1994).

12. CAL. PENAL CODE § 457.1(c) (amended by Chapter 11X).

13. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF ABX 8, at 1 (Aug. 15, 1994).

14. ASSEMBLY COMMITTEE ON WAYS AND MEANS, COMMITTEE ANALYSIS OF ABX 8, at 1 (May 17, 1994); *see id.* (stating that costs would be incurred by the courts for additional registration notification requirements, and by local law enforcement for registration and enforcement requirements).

Crimes; diversions—deferred entry of judgment for suspected child abuse offenders

Penal Code §§ 1000.14, 1000.15, 1000.16, 1000.18 (repealed); § 1000.12 (amended).
SBX 38 (Kopp); 1994 STAT. Ch. 49X

Existing law provides that, in lieu of prosecuting a person suspected of committing any crime in which a minor is a victim of an act of abuse or neglect, the prosecuting attorney may refer that person to the county department in charge of public social services or the probation department for counseling or psychological treatment and any other services as the department deems necessary.[1] Chapter 49X additionally provides that in lieu of trial, the prosecuting attorney may make a motion to the trial court to defer entry of judgment with respect to certain crimes charged involving a minor victim of molestation or sexual abuse, provided that the defendant pleads guilty to all crimes and enhancements charged.[2] Upon that motion and the defendant's plea, the court may defer entry of judgment, contingent upon the defendant's referral to and completion of a treatment program approved by the prosecuting attorney.[3] Upon the defendant's successful completion of the treatment program, and upon the positive recommendation of the treatment program authority and the motion of the prosecuting attorney, the court must dismiss the charge(s) against the defendant.[4] Upon any failure of treatment under the treatment program, the prosecuting attorney may make a motion to the court for entry of judgment and the court must, upon a finding of failure of treatment based on a preponderance of

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1. CAL. PENAL CODE § 1000.12(b) (amended by Chapter 49X); *see id.* (requiring the prosecuting attorney to seek the advice of the county department in charge of public social services or the probation department in determining whether to make the referral). *See generally* Robert Mertens, Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U. L. REV. 437, 437-92 (1985) (explaining how many state legislatures are beginning to adapt their criminal justice systems to the unique problems that child victims face).

2. CAL. PENAL CODE § 1000.12(c)(1) (amended by Chapter 49X); *see id.* § 1000.12(c)(4) (amended by Chapter 49X) (requiring that the deferred entry of judgment be granted upon the following terms: (1) Defendant must seek and participate in a rehabilitation program as prescribed by the district attorney; (2) defendant must not use, handle, or have in his or her possession marijuana, narcotics, dangerous drugs, or controlled substances of any kind, unless lawfully prescribed for the defendant by a licensed physician; (3) defendant must not associate with known or reputed users or sellers of marijuana, dangerous drugs, or narcotics, or be in places where narcotics or dangerous drugs are present; (4) defendant must submit his or her person, property, automobile, and any object under defendant's control to search and seizure in or out of the presence of the defendant, by any law enforcement officer or probation officer; (5) unification with the family or unsupervised contact with the minor victim or any other minor will be prohibited except upon recommendation of the treatment program and motion of the district attorney and order of the court; and (6) any violation of the law constitutes a failure of treatment).

3. *Id.* § 1000.12(c)(1) (amended by Chapter 49X); *see id.* § 1000.12(a) (amended by Chapter 49X) (declaring that the Legislature intends to allow the prosecuting attorney to prosecute any person who is suspected of committing any crime in which a minor is a victim of an act of molestation, abuse, or neglect to the fullest extent of the law, if the prosecuting attorney so chooses).

4. *Id.* § 1000.12(c)(1) (amended by Chapter 49X).

evidence, enter judgment upon the defendant's pleas and admissions, and schedule a sentencing hearing as otherwise provided under the law.[5]

Existing law sets forth administrative guidelines relating to counseling programs for those persons who are suspected of sexually abusing a child and who are referred for counseling in lieu of prosecution.[6] Certain provisions under prior law governed the procedures for monitoring persons participating in a counseling program and the consequences of successful or unsuccessful completion of a program.[7] Chapter 49X repeals those provisions.[8]

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5. *Id.* § 1000.12(c)(2) (amended by Chapter 49X); *see id.* § 1000.12(c)(3) (amended by Chapter 49X) (requiring the office of the prosecuting attorney to promulgate eligibility standards for deferred entry of judgment and treatment of defendants described under Chapter 49X, which must include, but are not limited to, all of the following: (1) Deferred entry of judgment for the defendant is in the best interests of the minor victim; (2) rehabilitation of the defendant is feasible in a recognized treatment program designed to deal with child molestation, abuse, or neglect, as specifically related to the charges made, and if the defendant is to remain in the household or to have unsupervised contact with the minor victim at any time during his or her participation in the treatment program, the program is specifically designed to deal with the conduct supporting the offense charged; (3) there is no threat of harm to the minor victim if entry of judgment is deferred; (4) no person will be deemed eligible for deferred entry of judgment under this section unless he or she pleads guilty to all charges and enhancements; (5) deferred entry of judgment will not apply to any person who is charged with committing a lewd or lascivious act upon a child under the age of fourteen, or any other sexual offense, involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the minor victim or another person; and (6) any person who applies for deferred entry of judgment must also meet all of the requirements for the counseling program delineated under § 1000.13); *id.* § 1000.13(a) (West 1985) (prohibiting any person suspected of violating any section of the California Penal Code in which a minor is a victim of sexual abuse from being referred for counseling in lieu of prosecution except upon written agreement between the prosecuting attorney and the suspected person and unless all of the following apply to the suspected person: (1) The person is a family member of the victim, and "family member" means a parent, stepparent, sibling, aunt, uncle, cousin, grandparent, or a member of the victim's household who has developed a family relationship with the victim; (2) the person's criminal record does not indicate that diversion has been terminated, or probation or parole has been revoked, without thereafter being completed within the previous 10 years; (3) the person has not been referred to counseling or other services prior to the commission of the present alleged offense; (4) the person has no prior conviction for any sexual offense or any offense in which a minor is a victim of sexual abuse and has no conviction for any felony offense involving violence against another person during the previous 10 years in which the suspected person remained free of prison custody); *id.* § 1000.13(b) (West 1985) (adding that the prosecuting attorney may impose additional relevant criteria for determining whether to refer the suspected person under this chapter to counseling); *see also* People v. Everett, 186 Cal. App. 3d 274, 280, 230 Cal. Rptr. 604, 608 (1986) (holding that the 10-year limitation of California Penal Code § 1000.13, which prohibits diversion for anyone convicted within the previous 10 years of any felony involving violence against another person, does not apply to prior felony sex offenses).

6. CAL. PENAL CODE § 1000.17 (West 1985); *see id.* (declaring that if the person is referred, he or she shall be responsible for paying the administrative cost of the referral and the expense of such counseling as determined by the county department responsible for public social services or the probation department, and the administrative cost of the referral must not exceed $100 for any person referred for an offense punishable as a felony and shall not exceed $50 for any person referred for an offense punishable as a misdemeanor); *see also id.* (noting that the department must take into consideration the ability of the referred party to pay, and no such person will be denied counseling services because of his or her inability to pay).

7. 1983 Cal. Stat. ch. 804, sec. 2, at 2006 (enacting CAL. PENAL CODE § 1000.14); *see id.* (declaring that if the person suspected of sexually abusing a child is referred to a counseling program pursuant to California Penal Code § 1000.13, the county department responsible for public social services or the probation department must monitor the progress of the referred person in the counseling program and must report to the prosecuting attorney regarding that progress at agreed upon intervals, and if the person successfully completes the counseling program, the department must report that fact in writing to both the prosecuting attorney and the person); *id.* (enacting CAL. PENAL CODE § 1000.15) (providing that if the person suspected of sexually abusing a child fails to participate in or fails to successfully complete the counseling program as directed, or

INTERPRETIVE COMMENT

According to the author of Chapter 49X, the purpose of the new law is to provide an incentive for diverted suspects to successfully complete treatment programs by offering such suspects a chance to avoid conviction.[9] Some therapists believe that those who physically or sexually abuse others must experience at least some of the penal consequences of their acts in order to begin to understand their wrongfulness; this, therapists argue, is an essential component of the offenders' therapy, and to the extent that this theory is correct, requiring defendants to admit guilt may increase the likelihood that the defendants will successfully complete treatment.[10]

Because reports of child abuse have risen 31% between 1988 and 1990, the need to protect children and preserve families has never been greater.[11] In 1990, 1.7 million reports of child abuse and neglect that involved 2.7 million children were filed, and by 1993 all fifty states had created special phone numbers for reporting abuse and neglect of children.[12]

In recent years, accounts of child sexual abuse have become commonplace, and studies reveal that the incidence of reported sexual abuse among children has increased from less than 1% per 10,000 children in 1976 to approximately 17.9%

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is subsequently charged with any offense involving violence against another person or any offense involving abuse or neglect of a child, the county department responsible for public social services or the probation department must report that failure or subsequently charged offense to the prosecuting attorney who will determine whether to institute prosecution of the suspected person for the violation giving rise to the referral); *id.* (enacting CAL. PENAL CODE § 1000.16) (providing that no statement or information prepared therefrom, with respect to the specific offense for which the person is suspected, which is made to any social or community program worker or the probation department during any counseling program assigned pursuant to this chapter will be admissible in any future criminal action or proceeding); *id.* (enacting CAL. PENAL CODE § 1000.18) (stating that the counseling program may not exceed five years from the time the person suspected of abusing or neglecting the child is referred, but if the suspected person successfully completes the counseling program he or she will not be prosecuted for the alleged offense).

8. 1994 Cal. Legis. Serv. ch. 49X, sec. 2-5, at 4010 (repealing CAL. PENAL CODE §§ 1000.14, 1000.15, 1000.16, and 1000.18).

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SBX 38, at 1 (Aug. 29, 1994); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SBX 38, at 1 (July 5, 1994) (noting that diversion programs are commonly used in cases of drug-related offenses and domestic violence). *But see id.* at 3-4 (suggesting that by requiring a plea of guilty in order to enter the treatment program, defendants will be forced to give up their right to a trial, and they will lose the opportunity to have their guilt determined in a court of law if the treatment fails).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SBX 38, at 3 (June 28, 1994); *see id.* (emphasizing that a plea of *nolo contendere* in lieu of pleading guilty will not be sufficient to grant the suspect the deferred entry of judgment).

11. *Child Activists Say Federal Drug Policy to Blame for Increases*, ALCOHOLISM AND DRUG ABUSE WEEK, Apr. 22, 1992, at 6; *see id.* (stating that the impact of chemical dependency on the child welfare system's ability to provide services has been profound because drug and alcohol related problems increase the number of children and families who need intervention and services, as well as complicate family preservation and unity).

12. Constance Stapleton, *Could the State Take Your Child?*, WOMAN'S DAY, May 18, 1993, at 54; *see id.* (noting that in most states, professionals who deal with children--teachers, doctors, day-care workers, emergency-room personnel, and others--are required to report suspected abuse and neglect, and failure to report is often punishable by up to a year in prison and a $1000 fine).

in 1985.[13] The more pervasive forms of physical abuse embodied in the excesses of corporal punishment in the home are creating harm as well.[14] Since the parent who understands a child's behavior is less likely to be abusive, there exists a need for programs that teach the values of positive parenting techniques.[15]

Joseph A. Tommasino

Crimes; firearms—criminal possession of a firearm

Penal Code § 12040 (new).
ABX 91 (Burton); 1994 STAT. Ch. 27X

Existing law contains various provisions relating to firearms.[1] Chapter 27X creates the crime of criminal possession of a firearm, which is defined as the carrying of a firearm by a person in public while the person is masked to hide his or her identity.[2] Chapter 27X provides that criminal possession of a firearm is

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13. G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for the Protection of Our Children?*, 39 EMORY L.J. 581, 582 (1990); *see id.* (stating that once child sexual abuse is reported there are often legal barriers to the successful prosecution of these cases for several reasons: (1) It is rarely witnessed by anyone other than the victim, child sexual abuse is often difficult to prove, and consequently many offenders who are arrested plea bargain to lesser charges, are often released, and repeat the offenses; (2) many people within the criminal justice system believe that sexual abusers have mental disorders and therefore should be treated by the mental health system; (3) many parents fear that the pursuit of those cases would further traumatize the child, so they are reluctant to proceed within the judicial system; and (4) prosecutors are often reluctant to undertake sexual abuse cases that rest primarily on the testimony of child victims because prosecutors fear that children will be unable to provide adequate testimony, and therefore resources should be directed to other cases); *cf.* Claudia Morain, *When Children Molest Children: Physicians Are Being Asked to Learn More About This Increasingly Recognized Problem*, AM. MED. NEWS, Jan. 3, 1994, at 13 (noting that in 1992, 220,000 total cases of child sexual abuse were reported in the annual Survey of Child Abuse and Neglect, a compilation of reports made to child-protection agencies in all 50 states).

14. Lisa C. Jones, *Why Are We Beating Our Children?*, EBONY, Mar. 1993, at 80; *see id.* (asserting that a growing number of parents who are finding it difficult to cope with the escalating pressures of poverty, unemployment, drug abuse, and single parenthood are lashing out at their children in fits of anger rather than in acts of love).

15. *Id.*

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1. *See* CAL. PENAL CODE §§ 12000-12101 (West 1992 & Supp. 1994) (setting forth various provisions relating to firearms, including but not limited to, unlawful carrying and possession of concealed weapons, licenses to sell firearms, obliteration of identification marks on firearms, firearm permits, and possession of firearms by juveniles); *id.* § 12001(b) (West Supp. 1994) (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).

2. *Id.* § 12040(a) (enacted by Chapter 27X).

punishable as a misdemeanor or felony.[3] Chapter 27X specifies exceptions to its prohibition.[4]

INTERPRETIVE COMMENT

By enacting Chapter 27X, the Legislature seeks to prevent situations where persons possess or carry firearms under circumstances where there is illicit intent or a unique danger to public safety, without imposing overly broad impacts upon the conduct of otherwise law abiding citizens.[5] Prior to Chapter 27X, California had no specific prohibition on possessing a firearm in public while masked to conceal one's identity.[6]

Until 1984, California had an anti-mask law, enacted as a reaction to the activity of the Klu Klux Klan, but the law was found to be overbroad and unconstitutional.[7] Still, the repealed anti-mask statute had no relation to firearms,

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3. *Id.* § 12040(b) (enacted by Chapter 27X); *see id.* (providing that criminal possession of a firearm is punishable by imprisonment in the state prison or by imprisonment in a county jail not to exceed one year).

4. *Id.* § 12040(c)(1)-(5) (enacted by Chapter 27X); *see id.* § 12040(c)(1) (enacted by Chapter 27X) (exempting peace officers who are acting in the performance of their duties); *id.* § 12040(c)(2) (enacted by Chapter 27X) (exempting full-time paid peace officers of other states and the federal government who are carrying out their official duties while in the state); *id.* § 12040(c)(3) (enacted by Chapter 27X) (exempting any person summoned to assist a peace officer in making an arrest or preserving the peace while he or she is actually engaged in assisting that officer); *id.* § 12040(c)(4) (enacted by Chapter 27X) (exempting the possession of an unloaded firearm or a firearm loaded with blanks by an authorized participant in entertainment or theatrical events); *id.* § 12040(c)(5) (enacted by Chapter 27X) (providing that the prohibition of California Penal Code § 12040(a) does not apply to the possession of a firearm by a licensed hunter while hunting or going to or from hunting); *see also* People v. Jimenez, 8 Cal. App. 4th 391, 395-96, 10 Cal. Rptr. 2d 281, 283 (1992) (holding that a defendant charged with a weapon possession violation has the burden of proving an affirmative defense that he had possessed and registered his assault weapon during a window period prescribed by California Penal Code § 12280); People v. Ross, 60 Cal. App. 163, 167, 212 P. 627, 629 (1922) (holding that, in a firearms violation prosecution, the burden of proving that the defendant fits an exception to the statute rests upon the defendant).

5. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 91, at 3 (Apr. 5, 1994); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ABX 91, at 3 (Aug. 8, 1994) (stating that ABX 91 does not require any proof of intent to commit a crime, as the act of being masked while in possession of a firearm, be it lawful or unlawful, will constitute criminal possession of a firearm).

6. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 91, at 3 (Apr. 5, 1994).

7. *See* 1984 Cal. Stat. ch. 438, sec. 9, at 1821 (repealing CAL. PENAL CODE § 650a) (providing that it was a misdemeanor to wear a mask in order to conceal identity, except as part of an entertainment event); Ghafari v. Municipal Court, 87 Cal. App. 3d 255, 262, 150 Cal. Rptr. 813, 816 (1978) (holding that California's statute prohibiting the wearing of a mask in public was overbroad and unconstitutional, as it was not required by a compelling state interest and was not drafted in the least restrictive manner). *But see* State v. Miller, 398 S.E.2d 547, 550 (Ga. 1990) (holding that Georgia's anti-mask statute does not unconstitutionally restrict free speech as the statute furthers a substantial governmental interest that is unrelated to the suppression of speech and the restriction on First Amendment freedom is no greater than necessary). *See generally* Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991) (examining the origins and applications of anti-mask laws, the constitutional limitations placed upon them, the inconsistent judicial decisions on the issues raised, and concluding that carefully drafted anti-mask laws can fulfill their legitimate purpose while not infringing on First Amendment rights).

whereas Chapter 27X is directly related to the possession of firearms.[8] Illinois already has a similar prohibition in effect.[9]

Darren K. Cottriel

Crimes; mentally disordered sex offenders—credit for time on outpatient status

Penal Code §§ 1026.5, 1600.5 (amended); Welfare and Institutions Code § 6332 (new).
SBX 39 (Russell); 1994 STAT. Ch. 9X

Existing law provides that, in the case of any person who has committed a felony and is subsequently committed, or placed on outpatient status, or confined to a state hospital or other treatment facility, a maximum term of commitment[1] must be determined, and the person may not be kept in actual custody longer than the maximum term of commitment, except as specified.[2] Existing law further

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8. CAL. PENAL CODE § 12040(a) (enacted by Chapter 27X).

9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 91, at 4 (Apr. 5, 1994); *see* ILL. ANN. STAT. ch. 720, para. 5/24-1(a)(9) (Smith-Hurd Supp. 1994) (prohibiting the possession of a pistol, revolver, stun gun or taser gun or firearm or ballistic knife while hooded, robed, or masked in such a manner as to conceal one's identity); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ABX 91, at 3 (Aug. 8, 1994) (stating that although the Illinois anti-mask statute has anti-KKK antecedents, its primary use appears to be against criminals who possess firearms when the conduct in question has not reached an otherwise punishable attempt, and as such, the statute's focus is on firearms possession where there is an indication of criminal intent).

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1. *See* CAL. PENAL CODE § 1026.5(a)(1) (amended by Chapter 9X) (defining "maximum term of commitment" as the longest term of imprisonment that could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed, less any applicable credits as defined by California Penal Code § 2900.5, and disregarding any credits which could have been earned pursuant to Article 2.5 (commencing with § 2930) of the California Penal Code).

2. *Id.*; *see id.* § 1026.5(b)(1) (amended by Chapter 9X) (providing that a person may be committed beyond the maximum term of commitment only under the procedure set forth in California Penal Code § 1026.5(b) only if the person has been committed under California Penal Code § 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others); *see also id.* § 1026 (West Supp. 1994) (enumerating the procedural requirements involved in the commitment or confinement of a person); *id.* § 1604 (West Supp. 1994) (discussing the recommendation of a person for outpatient status); People v. Bodis, 174 Cal. App. 3d 435, 437-38, 220 Cal. Rptr. 57, 58 (1985) (stating that the confinement of a person found to be insane and sentenced under California Penal Code § 1026, governing pleas of insanity, is for care and treatment, not punishment; and thus, persons found guilty by reason of insanity and confined to a hospital are not similarly situated to mentally disordered sex offenders and are not entitled to pretrial conduct credits). *See generally* Mary J. O'Meara, Note: *Constitutional Law: Involuntary Outpatient Civil Commitment Expanded: The 1983 Changes*, 62 N.C. L. REV. 1158, 1164 (1984) (illustrating a potential problem under North Carolina law a decade ago involving the length of a defendant's commitment to outpatient treatment).

provides that where the court or jury finds that the person represents a substantial danger of physical harm to others, the court must order the person recommitted for an additional period of two years.[3]

Chapter 9X provides that a person who is recommitted may not be kept in actual custody longer than two years, unless another extension of commitment is obtained, as specified.[4] Chapter 9X also provides that time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, will not count as actual custody or be credited toward the person's maximum term of commitment or toward the person's term of extended commitment.[5]

Existing law provides that for a person committed as a mentally disordered sex offender, or a person committed after a plea of insanity,[6] who is placed on

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3. CAL. PENAL CODE § 1026.5(b)(8) (amended by Chapter 9X); *see id.* (noting that the patient will be recommitted to the facility in which the patient was confined at the time the petition was filed).

4. *Id.*; *see id.* (stating that the person may be committed for longer than two years if an extension is obtained pursuant to California Penal Code § 1026.5(b)).

5. *Id.*; *id.* § 1600.5 (amended by Chapter 9X); CAL. WELF. & INST. CODE § 6332 (enacted by Chapter 9X); *see* People v. Superior Court, 12 Cal. App. 4th 1308, 1312, 15 Cal. Rptr. 2d 896, 897 (1993) (holding that where a person has been committed as a mentally disordered sex offender, the maximum term of commitment does not run while the person is on outpatient status). *See generally* Russell G. Donaldson, Annotation, *When is Federal Prisoner Entitled, Under 18 USCS § 3568, to Credit for Time Spent in State Custody "In Connection With" Offense or Acts for Which Federal Sentence Was Imposed*, 47 A.L.R. FED. 755 (1980) (collecting and analyzing the federal cases in which the courts have dealt with the question of when a federal prisoner is entitled to credit on his federal sentence for time spent in state custody in connection with the offense or acts for which the federal sentence was imposed); Wade R. Habeeb, Annotation, *Right to Credit for Time Spent in Custody Prior to Trial or Sentence*, 77 A.L.R.3D 182 (1977) (giving a general overview of the topic as well as an application and construction of statutes expressly governing credits); Annotation, *Right of State or Federal Prisoner to Credit for Time Served in Another Jurisdiction Before Delivery to State or Federal Authorities*, 18 A.L.R.2D 511 (1951) (explaining the following types of credits: (1) Credit for federal time on state sentences; (2) credit for state time on federal sentences; and (3) credit for state time on a sentence in another state).

6. *See* CAL. PENAL CODE § 1026(a) (West Supp. 1994) (providing that if a defendant is found to be insane at the time an offense was committed, the court must direct that the defendant be confined in a state hospital for the care and treatment of the mentally disordered or any other appropriate public or private treatment facility approved by the community program director, or the court may order the defendant placed on outpatient status pursuant to Title 15 (commencing with section 1600) of the California Penal Code); *id.* § 1026(b) (West Supp. 1994) (noting that prior to making the order directing that the defendant be placed on outpatient status or confined in a state hospital or other treatment facility, the court must order the community program director or a designee to evaluate the defendant and to submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be placed on outpatient status or confined in a state hospital or other treatment facility, but if it appears to the court that the sanity of the defendant has been recovered fully, the defendant must be remanded to the custody of the sheriff until the issue of sanity is finally determined in the manner prescribed by law); *id.* § 1026.5(a)(1) (amended by Chapter 9X) (providing that in the case of any person committed to a state hospital or other treatment facility pursuant to California Penal Code § 1026 or placed on outpatient status pursuant to California Penal Code § 1604, and who committed a felony on or after July 1, 1977, the court must state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as otherwise provided by law); *id.* § 1604(a) (West Supp. 1994) (providing that upon receipt by the committing court of the recommendation of the director of the state hospital or other treatment facility to which the person has been committed that the person may be eligible for outpatient status, the court must immediately forward such recommendation to the community program director, prosecutor, and defense counsel).

outpatient status, time spent on outpatient status, except when placed in a locked facility, will not count as actual custody and will not be credited toward the person's maximum term of commitment.[7] Chapter 9X clarifies that a person committed as a mentally disordered sex offender is a person committed under certain former provisions of the California Welfare and Institutions Code.[8]

INTERPRETIVE COMMENT

Prior to Chapter 9X, the State did not count outpatient time toward meeting the maximum terms of commitment for either mentally disordered sex offenders or those found not guilty by reason of insanity; however, in *People v. Gunderson*,[9] a California appellate court held that outpatient time should count.[10] As a result, the author of Chapter 9X introduced it in response to the reasoning of this 1991

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7. *Id.* § 1600.5 (amended by Chapter 9X); *see* 1967 Cal. Stat. ch. 1667 sec. 37, at 4107 (enacting CAL. WELF. & INST. CODE § 6300) (defining mentally disordered sex offender as any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others); *cf.* MINN. STAT. ANN. § 241.67(1) (West 1992 & Supp. 1994) (establishing a sex offender treatment system under the administration of the commissioner of corrections to provide and finance a range of sex offender treatment programs for eligible adults and juveniles); *id.* § 242.195(3) (West 1992 & Supp. 1994) (providing that when a juvenile is committed to the commissioner of corrections by a juvenile court, upon a finding of delinquency for a sex offense, the commissioner may, for the purposes of treatment and rehabilitation: (1) Order the child confined to a state juvenile correctional facility that provides the appropriate level of juvenile sex offender treatment; (2) purchase sex offender treatment from a county and place the child in the county's qualifying juvenile correctional facility; (3) purchase sex offender treatment from a qualifying private residential juvenile sex offender treatment program and place the child in the program; (4) purchase outpatient juvenile sex offender treatment for the child from a qualifying county or private program and order the child released on parole under treatment and other supervisions and conditions the commissioner believes to be appropriate; (5) order reconfinement or renewed parole, revoke or modify any order, or discharge the child; or (6) refer the child to a county welfare board or licensed child-placing agency for placement in foster care, or when appropriate, for initiation of the child in need of protection or services proceedings); WASH. REV. CODE ANN. § 71.09.010 (West 1992) (declaring a legislative finding that sexually violent predators have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior and adding that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act). *See generally* Jill J. Spitz, *"It's Not Kiddie Court Anymore;" Preteen Sex Offenders Are Committing Crimes Unheard of a Decade Ago, Clogging the Juvenile Justice System*, ORLANDO SENTINEL, Jan. 9, 1994, at 1 (lamenting the fact that the state of Florida offered so little treatment for sex offenders, for statistics showed that three-quarters of young offenders could benefit from outpatient treatment and that far more community involvement was needed to address the problem).

8. CAL. PENAL CODE § 1600.5 (amended by Chapter 9X); *see* 1981 Cal. Stat. ch. 928, sec. 2, at 3485 (repealing CAL. WELF. & INST. CODE § 6316) (providing for an offender's return to criminal court for further disposition or commitment to a hospital or other facility for care and treatment); *id.* (repealing CAL. WELF. & INST. CODE § 6316.2) (listing the former applicable statutes that dealt with judicial commitment of sex offenders). *See generally* V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2D 350, 350-380 (1952) (discussing the constitutionality, validity, construction, and application of statutes relating to sexual psychopaths).

9. 228 Cal. App. 3d 1292, 279 Cal. Rptr. 494 (1991).

10. *Gunderson*, 228 Cal. App. 3d at 1294, 279 Cal. Rptr. at 495 (1991); *see* SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SBX 39, at 1 (Apr. 18, 1994) (noting that the State has not changed policy to conform to the court decision).

case.[11] The significant resulting effect of that decision was that mentally disordered sex offenders who represent a substantial danger of physical harm to others could be released earlier into the community without any subsequent health treatment or supervision.[12]

To remedy the problem discovered as a result of *Gunderson*, Chapter 9X explicitly provides that time spent in outpatient status by a mentally disordered sex offender may not be counted toward the maximum term of commitment or the extended period of commitment, unless he or she is placed in a locked facility at the direction of the outpatient supervisor.[13] In addition, to ensure that the court's reasoning does not pose similar problems with respect to people who are found not guilty by reason of insanity, Chapter 9X also provides that time spent in outpatient status by such people may not be counted toward the maximum term of commitment or the extended period of commitment unless they are placed in a locked facility at the direction of the outpatient supervisor.[14]

The problem of sexual predators is proving to have no simple solutions, but just as people across the country have clamored for tougher sentences for career felons, they also are condemning a criminal justice system that seems unable to address the high recidivism rates among serial sex offenders.[15] At least twenty-

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11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SBX 39, at 2 (Mar. 22, 1994); *see Gunderson*, 228 Cal. App. 3d at 1294, 1298, 279 Cal. Rptr. at 495, 497 (1991) (holding that because of the way former California Welfare and Institutions Code § 6316.2 was written, time spent in outpatient status by a mentally disordered sex offender must be counted toward the time spent in extended commitment).

12. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SBX 39, at 1 (Apr. 18, 1994); *see* Barbara Kessler, *Sex-Offenders Programs Get Start in State Prisons; Texas' Effort Stymied by Money, Perceptions*, DALLAS MORNING NEWS, Oct. 17, 1993, at 1A (praising group therapy as the most effective way to reach sex offenders, and stating that it has become the centerpiece of most outpatient and prison programs, including the one in Texas; and adding that the group tenor is confrontational as it shreds the secrecy and rationalization that are the twin crutches of pedophiles, people who are sexually attracted to children). The group therapy used in Texas stays away from more controversial methods, such as sex-inhibiting drugs, which are considered viable aids by many therapists but have long-term physical side effects, including weight gain, migraine headaches and gallstones; the plethysmograph, a device that can be attached to the penis to measure arousal responses, also is shunned. *Id.*

13. CAL. PENAL CODE § 1026.5(b)(8) (amended by Chapter 9X).

14. *Id.* §§ 1026.5, 1600.5 (amended by Chapter 9X); CAL. WELF. & INST. CODE § 6332 (amended by Chapter 9X); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SBX 39, at 3 (July 5, 1994) (adding that SBX 39 will save the state unnecessary expenses, for in the absence of SBX 39, the Department of Mental Health would be forced to go through the expensive process of seeking extensions of commitment in court every two years for all persons who have outpatient status). *But see id.* (noting that under California Penal Code § 1606, all persons on outpatient status are entitled to an annual review in court of their outpatient status, at which time the patient can be released, continued on outpatient status, or rehospitalized).

15. Gayle M.B. Hanson, *Experts Vexed at What to Do with Sex Offenders; Authorities Try New Methods for Tracking Them*, WASH. TIMES, June 6, 1994, at A8; *see id.* (describing how Californians were outraged when Melvin Carter was released early from prison based on his good behavior after serving only one-half of a 25-year sentence for 12 convictions of rape, and how the criminal justice system presented no alternative but to release him even though Carter admitted to raping more than 100 women); *see also id.* (noting that the brutal abduction and murder of California teenager Polly Klaas, allegedly committed by a convicted sex offender has fueled public outrage even further); *Legislature Urged to Expand Response to Sexual Assaults*, BUS. WIRE, Apr. 29, 1993, at 1 (estimating that sexual abuse is the most under-reported crime in the nation, with only 16% of rapes reported to the police); *id.* (adding that 16% of the three million cases of reported child abuse involve sexual abuse and that 35% of adult women and 20% of adult men in this country were victims of sexual abuse as children); *id.* (noting that sex offenders have become, overall, the most

seven states already have enacted legislation that forces serial sex offenders to register with local law enforcement agencies upon moving into a community, and many Americans are debating the delicate balance between individual rights and public safety with respect to these offenders.[16]

Joseph A. Tommasino

Crimes; search and seizure warrants—HIV testing of sexual offenders

Penal Code § 1524.1 (amended).
ABX 109 (Martinez); 1994 STAT. Ch. 20X

Existing law provides for the issuance of a search warrant[1] authorizing the testing of a defendant for the human immunodeficiency virus (HIV),[2] provided that certain conditions have been met.[3] First, the defendant must have been

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rapidly increasing category of incarcerated offenders, and the mental health community has attempted to enhance community safety by providing treatment to these offenders, both pre-release from prison and on an outpatient basis, with about 1500 sex offender treatment programs throughout the country).

16. Hanson, *supra* note 15; *see id.* (stating that in Texas, a judge is notorious for promoting the reinstitution of castration as a way to deal with serial sex offenders; in Florida, the Legislature recently passed a bill mandating chemical castration for twice-convicted rapists; and researchers in various states are advocating the use of antidepressants to treat sex offenders); Christy Hoppe & Diane Jennings, *Ex-inmates Pose Quandary for Many States Convicts Seen as Threat Even After Their Release*, DALLAS MORNING NEWS, Aug. 29, 1993, at 1A (commenting on the state of Texas and its problematic combination of a high number of violent offenders, a tight budget, and a vocal public that demands justice: if lawmakers demanded that every inmate serve 100% of his or her sentence, the cost in prison construction, correctional officers, management, and prison maintenance would be astronomical and state government would come to a standstill; on the other hand, if the state created more alternative programs, greater after-care, more counseling, more job placement, and the like, then the result would eventually be better in that many fewer inmates would return to crime; however, that tactic poses major problems since it costs money and the public would see it as coddling the inmate, and if just one convicted murderer or rapist was released and attacked someone else, the whole program would be perceived as a failure).

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1. *See* CAL. PENAL CODE § 1523 (West 1982) (defining search warrant as a written order in the name of the people, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate); *see also* People v. Kesey, 250 Cal. App. 2d 669, 671, 58 Cal. Rptr. 625, 626 (1967) (holding that probable cause must exist for a search warrant to be issued).

2. *See* CAL. HEALTH & SAFETY CODE § 26(b) (West 1990) (defining HIV as the etiologic virus of the acquired immune deficiency syndrome (AIDS) disease).

3. CAL. PENAL CODE § 1524.1 (amended by Chapter 20X); *see id.* (setting forth the conditions to include a hearing to determine if there is probable cause to believe that the accused committed an offense and that blood, semen, or other specified bodily fluids had been transferred from the accused to the victim); *see also* Bill Callahan, *San Carlos Man Will Stand Trial in Series of Rapes*, SAN DIEGO UNION-TRIB., Sept. 16, 1992, at B2 (indicating that a court ordered a defendant to undergo medical tests and if the results were positive, to notify the victim that she was in risk of contracting the HIV); *cf.* DEL. CODE ANN. tit. 11, § 3912 (1994), FLA. STAT. ANN. § 381.004 (West 1993), GA. CODE ANN. § 17-10-15(a) (1994) (mandating HIV testing of a defendant once probable cause has been established).

charged by a complaint,[4] information,[5] or indictment.[6] Second, there must be probable cause[7] to believe that the defendant committed the offense, and that any body fluid capable of transmitting the virus has been transferred from the accused to the victim.[8]

Chapter 20X expands the instances for which a search warrant may be issued.[9] Under Chapter 20X, upon the victim's request, the defendant may be tested even when he or she has not been charged with the offense necessitating an HIV test, but has been charged with a separate crime as long as probable cause exists and the victim has filed a police report alleging the commission of the separate uncharged offense.[10]

Under existing law it is a misdemeanor[11] to disclose test result information that breaches medical confidentiality.[12] Chapter 20X also makes it a misdemeanor to file a false report of sexual assault for purposes of obtaining an HIV test and makes it a separate misdemeanor each time the person filing the false report discloses the HIV test information obtained under this statute.[13]

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4. *See* CAL. PENAL CODE § 691(d) (West Supp. 1994) (defining complaint).

5. *See id.* (defining information); *see also* People v. Gahagan, 14 N.E. 2d 838, 839 (Ill. 1938) (stating that an information is a formal presentation of a criminal charge against a person by the state's attorney instead of by a grand jury as with an indictment).

6. CAL. PENAL CODE § 1524.1(b)(1) (amended by Chapter 20X); *see id.* § 889 (West 1985) (defining indictment).

7. *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) (holding that probable cause is a fluid concept turning on the assessment of probabilities in particular factual contexts, not readily, or even usefully, reduced to a neat set of legal rules); Brineger v. United States, 338 U.S. 160, 175 (1979) (holding that probable cause exists where the facts and circumstances are within the officers' knowledge and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed).

8. CAL. PENAL CODE § 1524.1(b)(1) (amended by Chapter 20X).

9. *Id.* § 1524.1(b)(2) (amended by Chapter 20X).

10. *Id.* § 1524.1 (amended by Chapter 20X). The charged offense and the uncharged offense must be ones that could be charged under California Penal Code § 220 (assault with intent to commit mayhem, rape, sodomy, oral copulation, rape in concert with another, lascivious acts upon a child, or penetration of genitals or anus with foreign object); § 261 (rape); § 261.5 (unlawful sexual intercourse with person under age of 18); § 262 (rape of spouse); § 264.1 (rape or penetration of genital or anal openings by foreign object, etc.; acting in concert by force or violence); § 286 (sodomy); § 288 (lewd or lascivious acts with child under age 14); § 288a (oral copulation); § 288.5 (continuous sexual abuse of a child); § 289 (penetration of genital or anal openings by foreign object); § 289.5 (rape or sodomy). *Id.* § 1524.1(b)(2) (amended by Chapter 20X). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Sexual Offenses and Other Crimes Against Decency & Morals*, §§ 768-792 (2d ed. 1988 & Supp. 1994) (explaining the above offenses).

11. *See* CAL. PENAL CODE § 17(a) (West Supp. 1994) (providing that every other crime besides a felony is a misdemeanor except those classified as infractions); *id.* § 19.2 (West Supp. 1994) (detailing the punishment for a misdemeanor); *see also* United States v. Robinson, 967 F.2d 287, 293 (9th Cir. 1992) (holding that where an offense is considered alternately a felony or misdemeanor, it is considered a felony until judgment); County of Los Angeles v. City of Los Angeles, 219 Cal. App. 2d 838, 844, 33 Cal. Rptr. 503, 507 (1963) (holding that punishment for a misdemeanor under the California Penal Code does not apply to city ordinances that have their own punishment provision).

12. CAL. PENAL CODE § 1524.1(h) (amended by Chapter 20X).

13. *Id.*

COMMENT

At this time, the victim of a particular sex offense is deemed to have the right to know if he or she is infected by HIV, and if so, whether it was because of an offense committed against him or her.[14] Although, this appears to be a worthy cause, Chapter 20X may encounter complications regarding the defendant's right to privacy in regards to confidentiality.[15]

Since 1988, California law has mandated that any person charged with a complaint, information, or indictment for a violent sexual assault, is to be tested for AIDS,[16] as long as there is cause to believe that the assault involved the transfer of body fluids.[17] Courts authorizing blood testing face the provisions of the Fourth Amendment as a barrier to obtaining such tests.[18] Under this amendment, the rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures is guaranteed.[19] Because the Fourth Amendment only prohibits unreasonable searches, various courts have

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14. CAL. PENAL CODE §1524.1(a) (amended by Chapter 20X) (indicating that the primary purpose of the testing and disclosure is to benefit the victim of a crime by informing the victim whether the defendant is infected with HIV); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 109X, at 4 (Apr. 5, 1994) (stating that, previously, if the judge or prosecutor could not or would not elect to prosecute a defendant, then the victim was not entitled to information regarding the defendant's medical status); *see also* Anne Burke, *Is HIV Privacy Law Protecting Rapists?; Confidentiality Rule Leaves Victims in the Dark, Traumatized*, S.F. EXAM., Dec. 12, 1993, at B3 (stating that five months after being raped, a woman was notified that she might have HIV; however, she was not able to learn if she was infected by the defendant); Diane Martinez, *HIV Testing in Rape Cases*, L.A. TIMES, Feb. 15, 1994, at B6 (indicating that by providing victims of rape with information concerning HIV and the defendant's status in regards to HIV, the victims are given control over lives); Josh Meyer, *Women Fear Rape Suspect May Have Given Them HIV*, L.A. TIMES, Jan. 10, 1994, at A1 (indicating that some rape victims have been notified that they may have been infected with the HIV, but they are unable to ascertain whether they were infected by the defendant or another person); *cf.* Martinez, *supra* (stating that serial rapists have forfeited their right to privacy when they commit a crime that may infect their victim with the HIV).

15. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 109X, at 4 (Apr. 5, 1994).

16. *See* Emily Campbell, *Mandatory AIDS Testing and Privacy: A Psycholegal Perspective*, 66 N.D. L. REV. 449 (1990) (outlining the cause of AIDS as an infection by the human T-cell lymphotropic retrovirus/lymphadenopathy-associated virus (HTLV-III)). Because of the virus, the body's T-cells, specifically the T-4 cell that is responsible for warding off infection, become weakened. *Id.* Eventually, the T-cells no longer fight infection, but rather become a type of factory that reproduces the virus. *Id.*; *see also id.* at 458 (detailing the procedures available that test for the etiologic virus of AIDS, HIV, as the enzyme-linked immunosorbent assay test (ELISA) and the Western Block test). Both of these tests are used to detect the presence of HTLV-III and although the ELISA test is not 100% accurate, the Western Block test is. *Id.*

17. CAL. PENAL CODE § 1524.1 (amended by Chapter 20X); *see* Campbell, *supra* note 16, at 453 (explaining that the HIV has been found in several bodily fluids including blood, semen, saliva, tears, urine, and breast milk). *See generally* David Kennon Moody, Note, *Aids and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238 (1990).

18. *See* Schmerber v. California, 384 U.S. 757, 766 (1966) (stating that a compulsory blood test constitutes a search under the Fourth Amendment); *see also* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (holding that the exclusionary rule adopted for federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914), must also be applied to criminal prosecutions); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that evidence obtained in violation of the Fourth Amendment is illegal and cannot be used at the trial of the defendant).

19. U.S. CONST. amend. IV.

molded a test that entails balancing the government's need to conduct the search against the invasion of the person's privacy resulting from the search.[20]

The governmental interest in mandating AIDS testing is to provide for the physical and psychological welfare of the victim.[21] However, the utility of such a test has been questioned.[22]

Primarily, it is viewed that although the alleged offender has been tested, the results reveal nothing regarding the victim's status.[23] Several concerns are present: First, the offender's status, if negative, could be false because of the seroconversion rate of the virus.[24] Second, the victim might accept the offender's negative status without question, developing a false sense of security, and thus will refuse to be tested regularly and to take the necessary precautions to avoid spreading HIV.[25] On the other hand, if the offender's status is positive, this report could alarm the victim unnecessarily because the offender may have been infected with the virus after the sexual contact with the victim, or flaws in the testing procedure may have indicated a false positive.[26] The best method for determining the status of victims is to test the victims themselves, not the offender.[27]

Still, others argue that victims who are at a risk of contracting the HIV may use zidivudine, otherwise known as AZT, to delay the onset of AIDS.[28] However,

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20. *See* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 619 (1989) (reiterating that the Fourth Amendment does not prescribe all search and seizures, only those which are unreasonable).

21. Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 34, 100 (1990); *see id.* (providing that information regarding the offender's status has the potential to offer comfort to the victim or eliminate uncertainty).

22. Bernadette Pratt Sadler, *Rape and Mandatory HIV Testing*, 67 WASH. L. REV. 195, 210-12 (1992).

23. *Id.* at 210.

24. *Id.*; *see id.* at 196 (indicating that seroconversion is the process by which the body produces antibodies to the viral infection); Emily Campbell, *supra* note 16, at 458 (stating that the length of time before a person's body starts producing antibodies that are detected through the testing procedure varies from six days to eight weeks). *But see* Moody, *supra* note 17, at 241 (stating that there is generally a three to twelve week delay before the body will produce antibodies in response to the HIV). However, some cases show that individuals still test negative after 12 weeks, although they were infected prior to that time. *Id.* Virtually all cases will test accurately after six months from the time of infection. *Id.*

25. Sadler, *supra* note 22, at 211; *see Cost Analysis Questions Value of Routine HIV Testing*, AIDS ALERT, Aug. 1993, at 120 (warning that routine testing is not a substitute for precautions because HIV tests will not detect recently infected patients who have not seroconverted).

26. Sadler, *supra* note 22, at 211; *see False-Positive Serologic Tests for Human T-Cell Lymphotropic Virus Type I Among Blood Donors Following Influenza Vaccination*, JAMA, Apr. 28, 1993, at 2076 (giving as examples, blood donors who had recently been vaccinated for influenza and who had tested positively for HIV). However, the duration for testing falsely positive is under four months and the influenza vaccination is not likely to cause a reaction after this time period has passed. *Id.*; *see also Pennsylvania—Woman Sues Over False-Positive Test*, AIDS WEEKLY, May 17, 1993 (explaining that a woman who tested falsely positive for an HIV test is suing her employer, a Pennsylvania hospital, for illegally barring her from work, making her test results public, and failing to provide counseling after the results were known); *Cost Analysis*, *supra* note 25 (reporting that the actual rate of false positive test result is unknown).

27. Sadler, *supra* note 22, at 212.

28. *Id.*; *see* Dave Brown, *Speedy Release of AIDS Drug Challenged on Lack of Follow-Through*, WASH. POST, Sept. 11, 1994, at A3 (indicating that AZT's benefits do not last beyond three years and they rarely prolong a person's life when taken early in the infection period); Christine Gorman, *Lets Not Be Too Hasty; Activists Who Once Clamored for Speedier Approval of AIDS Drugs Now Favor a More Deliberate Approach*, TIME, Sept. 19, 1994, at 71 (explaining that AZT works by attacking a reverse transcriptase enzyme that helps the HIV to copy itself); Joanne Kenen, *FDA Assesses AIDS Drug Approval Policy*, Reuters North American

because AZT has severe side effects and is considered highly toxic, there is not a guarantee that a doctor will prescribe AZT treatment for the victim solely due to his or her exposure to the HIV.[29]

Not all authorities question the utility of mandatory HIV testing. According to David Kennon Moody, author of *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, the possibility of a false sense of security resulting from a negative testing result is outweighed by the probability that the offender will be out of his latency period and will test positive if he has the HIV.[30] If indeed the results are positive, the victim can begin AZT treatment and take other precautions.[31] Further, because there is only a 28.2% risk of testing falsely positive, it is likely that the test will be accurate.[32]

Still other questions remain regarding the extent of the alleged offender's invasion of privacy. This invasion must be weighed against the government's interest.[33] There appears to be two factors to examine in an invasiveness inquiry of Chapter 20X: (1) The intrusion upon the defendant's body itself, and (2) the intrusion upon the defendant's privacy by releasing the test results.[34]

The United States Supreme Court has come to recognize that blood tests are a minimal intrusion upon a person's body because they "are widely used and involve virtually no risk, trauma, or pain."[35] Furthermore, as argued by Bernadette Pratt Sadler, author of *When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance*, by engaging in criminal behavior that is known to transmit AIDS, the offender should reasonably expect his blood to be tested; the defendant's own actions weaken his expectation.[36] However, according to Martha A. Field, a professor at Harvard Law School, "it is antithetical to our system of justice to presume that an individual has committed a crime of which he is accused."[37] She goes further to

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Wire, Sept. 12, 1994, *available in* LEXIS, News Library, Curnws File (reporting that AZT, developed in 1987, is the best-known anti-AIDS medication).

29. Sadler, *supra* note 22, at 212; *see id.* (listing the side effects to include bone marrow suppression resulting in anemia that requires transfusions and neutropenia, a condition associated with acute leukemia, infection, and arthritis, and chronic spleen enlargement); *see also* Moody, *supra* note 17, at 242 (explaining that users of AZT also have problems with nausea, muscle pain, insomnia, and severe headaches); *id.* at 243 (explaining that the annual cost of AZT treatment exceeds $3000); *cf. id.* (stating that the National Institute of Health has recommended reducing the dosage of AZT by half, thus reducing the cost of treatment and some side effects).

30. Moody, *supra* note 17, at 255.

31. *Id.*

32. *Id.*; *see id.* (explaining that if the offender is in a high risk group, the HIV test is almost 100% accurate); *see also id.* (defining high risk groups as homosexual men, bisexual men, and intravenous drug users (citing Centers for Disease Control, *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WEEKLY REP., S-4, 7)).

33. *See supra* note 20 and accompanying text (explaining that a Fourth Amendment search and seizure issue must be analyzed under a balancing test).

34. *Id.*

35. Schmerber v. California, 384 U.S. 757, 771 (1966).

36. Sadler, *supra* note 22, at 207.

37. Field, *supra* note 21, at 101.

declare that the culpability of an attacker is an important part of the justification for requiring him to be tested, and that courts cannot assume culpability until after conviction.[38] Accordingly, many states require HIV testing only after the defendant has been convicted of a sexual offense.[39]

California differs in this respect because the prosecution must only prove that there is probable cause that the alleged offender committed the offense[40] and that there was an exchange of blood, semen, or other bodily fluid capable of transmitting HIV resulting from the attack.[41] Thus, Chapter 20X may face a challenge that mandatory HIV testing violates the defendant's right to privacy because it intrudes upon his or her body without first requiring the defendant to be convicted for the sexual offense necessitating the test.

The second step in the two part invasion of privacy analysis is to look at the confidentiality aspect of the statute. In *Doe v. Connell*,[42] a New York county court judge was prohibited from ordering a defendant to undergo HIV testing because the governing statute's disclosure provisions were not met.[43] Specifically, the confidentiality statute authorized testing and disclosure only upon the consent of the defendant.[44] In California, however, once the test results have been ascertained, Chapter 20X authorizes their release to the victim as long as probable cause exists that the defendant committed the crime and bodily fluid was exchanged.[45]

Authorities argue that such a release of information is too much of an invasion primarily because: (1) An analysis of the blood reveals medical information that compromises an individual's right to confidentiality in his medical information;[46]

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38. *Id.* at 102.

39. *Id.*; *see id.* (stating that Illinois, Oregon and Washington all require conviction prior to mandating HIV testing of a defendant); *cf.* ILL. ANN. STAT. ch. 38, para. 1005-3(g) (Smith-Hurd Supp. 1994), 1987 Or. Laws 600, WASH. REV. CODE ANN. § 24.340 (West Supp. 1994) (requiring that the defendant be convicted of the sexual offense before an HIV test will be mandated).

40. *See supra* note 10 (listing the applicable offenses).

41. CAL. PENAL CODE § 1524.1(b)(2) (amended by Chapter 20X).

42. 583 N.Y.S.2d 707 (1992).

43. Doe v. Connell, 583 N.Y.S.2d 707, 710 (1992); *see* Annotation, *State Statutes or Regulations Expressly Governing Disclosure of Fact that Person Has Tested Positive for Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS)*, 12 A.L.R.5TH 149, 170 (1993) (stating that the New York AIDS confidentiality statute did not authorize a court order mandating the defendant to undergo testing and it did not authorize the disclosure of the test results to the complainant and her husband without the consent of the defendant).

44. N.Y. PUB. HEALTH LAW § 2781(1) (Consol. 1994).

45. CAL. PENAL CODE § 1524.1(g) (amended by Chapter 20X); *see id.* § 1524.1(i) (authorizing victims receiving information that the defendant has tested positive for the HIV virus to disclose the test results as "the victim deems necessary to protect his or her health and safety or the health and safety of his or her family or sexual partner"); *see also id.* § 1524.1(g) (amended by Chapter 20X) (mandating that no positive test results be communicated to the victim or the accused without providing or offering counseling).

46. Sadler, *supra* note 22, at 208; *see* Whalen v. Roe, 429 U.S. 589, 603-04 (1977) (holding that a statute requiring physicians to report recipients of certain prescription drugs was valid because it could not be proven that there was a risk of improper dissemination). Thus, the court recognized a constitutional right to privacy regarding the disclosure of medical information, even though there was no violation in this instance. *Id.*

and (2) tests for HIV are not analogous to blood alcohol tests or drug tests because the impact of the results is more devastating.[47] Sadler argues that the stigma of being HIV positive has lead to increased discrimination against victims of AIDS where social death is as certain as the physical death that is sure to follow.[48] Additionally, Sadler argues that forcing the defendant to undergo a test deprives the individual of the choice to know or to remain unaware of his or her HIV status.[49]

Moody declares that the California statute is unconstitutional because of its confidentiality provisions.[50] He makes arguments similar to Sadler's in that the disclosure of one's HIV status is highly stigmatizing, and will probably lead to discrimination in areas such as housing, employment, and health care.[51] Moody also notes that in *Whalen v. Roe*,[52] which upheld the constitutionality of a medical disclosure statute, disclosure was limited to the state, whereas the California statute authorizes disclosure to victims.[53]

Thus, Chapter 20X may also face challenges with respect to the confidentiality of test results and the defendant's right to privacy because of the holding in *Whalen*. However, as *Doe v. Connell* held, as long as the requirements of the confidentiality statute are met, the defendant can be tested and the results disclosed.[54] Chapter 20X authorizes testing and disclosure if the victim requests the test and if probable cause exists to believe the defendant committed the crime and that bodily fluid capable of transmitting HIV was exchanged.[55] Thus, under the holding of *Connell*, Chapter 20X's provisions would be valid.

As has been illustrated, questions remain regarding the constitutionality of the California Statute. Due to the balancing of the government's interest in protecting the victim versus the invasion of the defendant's privacy, it appears that Chapter 20X will likely meet several challenges. However, the courts could very well find that the interest of the victim's health outweighs the defendant's privacy invasion, thereby upholding Chapter 20X; this is particularly true if the court focuses upon

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47. Sadler *supra* note 22, at 209; *see id.* (explaining that the results of the test implicate every aspect of the offender's life); *see also* People v. Thomas, 529 N.Y.S.2d 429, 431 (1988) (declaring the results of an HIV test as a death sentence); Sadler *supra* note 22 at 208 (stating that the expected results after having received a positive test are severe anxiety and depression as well as an increased risk of suicide, homicide, and drug or alcohol abuse).

48. Sadler *supra* note 22, at 209.

49. *Id.*

50. Moody *supra* note 17, at 262-63.

51. *Id.* at 262.

52. 429 U.S. 589 (1977).

53. Moody, *supra* note 17, at 263.

54. *Connell*, 583 N.Y.S.2d at 710.

55. CAL. PENAL CODE § 1524.1(b)(1) (amended by Chapter 20X); *see supra* notes 1-13 and accompanying text (explaining the various provisions of Chapter 20X).

Schmerber's holding that blood tests are minimally intrusive, and *Connell's* analysis of authorization if the statute's provisions have been met.[56]

Marnie I. Smith

Crimes; sentence enhancement—sex offenses: "one strike you're out"

Penal Code § 667.61 (new); §§ 667.71, 1203.066 (amended).
ABX 26 (Bergeson); 1994 STAT. Ch. 14X

Existing law provides for sentence enhancements under certain circumstances.[1] Chapter 14X provides that, in addition to the sentence for specified sex offenses,[2] a defendant will receive an indeterminate sentence enhancement of twenty-five years to life imprisonment if any one of the following circumstances is fulfilled: (1) The defendant has been previously convicted of the specified sex offenses, including an offense committed in another jurisdiction that includes all of the elements of a specified sex offense;[3] (2) the defendant kidnapped the victim of the

56. *See* Schmerber, 384 U.S. at 771 (holding that blood tests are minimally intrusive); *John Doe*, 583 N.Y.S.2d at 710 (holding that because the specific statutory authority requirement were not met, the defendant could not be tested for HIV).

1. CAL. PENAL CODE § 667 (West Supp. 1994); *see id.* (providing for enhancement of sentences for habitual criminals); *id.* § 667.8 (West 1988) (providing enhanced sentences for persons convicted of kidnapping victims under 14 years of age to commit felony sexual offenses).

2. *See id.* § 667.61(c) (enacted by Chapter 14X) (mandating that this section shall apply to any of the following offenses: (1) A violation of California Penal Code § 261(a)(2); (2) a violation of California Penal Code § 262(a)(1); (3) a violation of California Penal Code § 264.1; (4) a violation of California Penal Code § 288(b); (5) a violation of California Penal Code § 289(a); (6) sodomy or oral copulation in violation of California Penal Code §§ 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (7) a violation of California Penal Code § 288a, unless the defendant qualifies for probation under California Penal Code § 1203.066); *see also id.* § 261 (West Supp. 1994) (defining the offense of rape); *id.* § 262 (West Supp. 1994) (defining the offense of rape of spouse); *id.* § 264.1 (West 1988) (identifying the punishment for rape or penetration of genital or anal openings by foreign objects); *id.* § 288 (West Supp. 1994) (imposing punishment for lewd or lascivious acts with a child under age 14); *id.* § 289 (West Supp. 1994) (imposing punishment for penetration of genital or anal openings by a foreign object, etc.); *id.* § 667.61(f) (enacted by Chapter 14X) (mandating that if the specifications of this rule are met, those specifications will be used to impose the punishment identified by this bill, rather than to impose the punishment authorized under another law, unless another law provides for a greater penalty); *id.* § 667.61(g) (enacted by Chapter 14X) (stating that if there are multiple victims during a single occasion, the term shall be imposed on the defendant once for each separate victim); *id.* § 667.61(h) (enacted by Chapter 14X) (stating that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under subdivision (c) of this section).

3. *See id.* § 667.61(d)(1) (enacted by Chapter 14X) (listing the circumstances that apply to the offenses specified in subdivision (c)).

present offense;[4] (3) the defendant inflicted aggravated mayhem or torture on the victim or on another person in the commission of the present offense;[5] or (4) the defendant committed the present offense during the commission of a burglary with intent to commit a specified sex offense.[6]

Chapter 14X also provides that the defendant will receive a punishment of twenty-five years to life if any two of the following circumstances are true: (1) The defendant kidnapped the victim;[7] (2) the defendant committed the present offense during a burglary;[8] (3) the defendant personally inflicted great bodily injury[9] on the victim or another person in the commission of the present offense; (4) the defendant used a dangerous or deadly weapon or firearm in the commission of the present offense;[10] (5) the defendant has been convicted in the present case or cases of committing a specified sex offense against more than one victim; (6) the defendant engaged in the tying or binding of the victim or another person in the commission of the present offense; or (7) the defendant administered a controlled substance to the victim by force, violence, or fear in the

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4. *See id.* § 667.61(d)(2) (enacted by Chapter 14X) (stating that the movement of the victim must have substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense).

5. *See id.* § 667.61(c) (enacted by Chapter 14X) (stating that the offense must be in violation of California Penal Code §§ 205 or 206); *see also id.* § 205 (West 1988) (mandating that a person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body). For purposes of this section, it is not necessary to prove an intent to kill. *Id.* Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole. *Id*; *see also id.* § 206 (West Supp. 1994) (stating that every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in California Penal Code § 12022.7, upon the person of another, is guilty of torture).

6. *Id.* § 667.61(c)-(d) (enacted by Chapter 14X); *see id.* § 460(a) (West Supp. 1994) (defining burglary of the first degree); *id.* § 667.61(b) (enacted by Chapter 14X) (stating that except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j)); *id.* § 667.61(j) (enacted by Chapter 14X) (defining when a minimum term under this law may be reduced and by how much).

7. *See id.* § 667.61(e)(1) (enacted by Chapter 14X) (providing that, except as provided in California Penal Code § 667.61(d)(4), the defendant must have kidnapped the victim of the present offense in violation of California Penal Code §§ 207, 208, 209 or 209.5); *see also id.* § 207 (West Supp. 1994) (defining kidnapping); *id.* § 208 (West Supp. 1994) (specifying the punishment and conditions of probation for kidnapping with intent to commit rape or other sex related offenses where the victim is under 14 years of age); *id.* § 209 (West Supp. 1994) (specifying the punishment for the crime of kidnapping for ransom, reward, extortion, or robbery); *id.* § 209.5 (West Supp. 1994) (specifying the punishment and conditions for probation for the crime of kidnapping during the commission of carjacking).

8. *See id.* § 667.61(e)(2) (enacted by Chapter 14X) (providing that, except as provided in California Penal Code § 677.61(d)(4), the defendant must have committed the present offense during the commission of a burglary, as defined in California Penal Code § 460(a), or during the commission of a burglary of a building, including any commercial establishment, which was then closed to the public in violation of California Penal Code § 459).

9. *See id.* §§ 12022.7, 12022.8 (West 1992 & Supp. 1994) (discussing great bodily injury).

10. *See id.* §§ 12022, 12022.3, 12022.5 (West Supp. 1994) (establishing the punishment for the crime of using weapons in the commission of a crime).

commission of the present offense.[11] Chapter 14X also provides that a person convicted of certain specified sex offenses in conjunction with any one of the seven conditions listed above will be punished by imprisonment in state prison for life, and will not be eligible for release on parole for fifteen years.[12]

Existing law provides eligibility requirements for probation for persons convicted of child sexual abuse.[13] Chapter 14X revises these eligibility requirements.[14] Chapter 14X adds to the list of offenders who may not be eligible for probation or sentence suspension persons convicted of lewd or lascivious acts[15] with a child under fourteen years of age while kidnapping the child victim or having substantial sexual conduct[16] with the victim.[17] Further, Chapter 14X adds to this ineligibility list persons convicted of continuous sexual abuse[18] of a child while kidnapping the child victim or having substantial sexual conduct with the victim.[19]

Existing law provides, under certain circumstances, that persons convicted of committing child sexual abuse are ineligible for probation.[20] However, existing law also provides that if the defendant is closely related to the child, and if it is in the child's best interest, the defendant may be eligible for probation, as long as rehabilitation of the defendant is feasible and there is no threat of physical harm to the child.[21] Chapter 14X specifies that these conditions for probation will no longer apply to certain specified sex offenses.[22]

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11. *Id.* § 667.61(e)(1)-(7) (enacted by Chapter 14X); *see id.* § 12022.75 (West 1992) (mandating additional punishment for administering a controlled substance against a victim's will).

12. *Id.* § 667.61(b) (enacted by Chapter 14X).

13. *Id.* § 1203.066 (amended by Chapter 14X).

14. *Id.*

15. *See* City of Shreveport v. Wilson, 83 So. 186, 188 (La. 1919) (defining lewd as lustful, indecent, lascivious, or lecherous); BLACK'S LAW DICTIONARY 882 (6th ed. 1990) (defining lascivious as tending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; or licentious).

16. *See* CAL. PENAL CODE § 1203.066(b) (amended by Chapter 14X) (defining substantial sexual conduct as meaning: 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); People v. Grim, 9 Cal. App. 4th 1240, 1242, 11 Cal. Rptr. 2d 884, 885 (1992) (providing that any contact between the mouth of one person and the sexual organs of another constitutes oral copulation and should be considered "substantial sexual conduct").

17. CAL. PENAL CODE §§ 1203.066(a)(6),(8) (amended by Chapter 14X); *see id.* § 1203.066(c)(4) (amended by Chapter 14X) (stating that the defendant must be removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim).

18. *See* People v. Jones, 51 Cal. 3d 294, 310, 270 Cal. Rptr. 611, 620 (1990) (stating that "continuous sexual abuse" of a child consists of three or more lewd or "substantial sexual acts with a child under fourteen over a period of at least three months and that the jury must unanimously agree that at least three such acts occurred").

19. CAL. PENAL CODE § 1203.066(a)(8) (amended by Chapter 14X).

20. *Id.* § 1203.066 (amended by Chapter 14X); *see id.* (providing that notwithstanding California Penal Code § 1203, probation shall not be granted to, nor shall the execution or imposition of a sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to California Penal Code § 1385 for specified persons).

21. *Id.* § 1203.066(c)(1)-(5) (amended by Chapter 14X); *see id.* (listing the circumstances that must be present before allowing probation).

22. *Id.* § 667.61(h) (enacted by Chapter 14X).

COMMENT

Chapter 14X was enacted to increase the punishment for forcible sex offenses.[23] Many sex offenders serve only half of their sentences before being released and many eventually recidivate.[24] Chapter 14X was enacted to ensure that violent sex offenders will not receive early release from incarceration.[25] Since California is the first state to enact a "one-strike" rape law, it has yet to be tested against the Eighth Amendment's proscription of cruel and unusual punishment.[26]

The Supreme Court has identified three objective factors to be used in determining whether a punishment is "cruel and unusual."[27] First, the gravity of the offense must be compared to the harshness of the penalty.[28] Second, the sentence should be compared to sentences imposed in the same jurisdiction.[29] Finally, the sentence should be compared to sentences in other jurisdictions.[30]

In using this test to evaluate the provisions of Chapter 14X, it appears that Chapter 14X will withstand a constitutional challenge.[31] First, since Chapter 14X

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23. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 26X, at 1 (Aug. 31, 1994); *see* Lynn Smith, *Dialing Up A Weapon Against Molestation; Agencies: By Next Summer, Californians Will Have A Hot Line To Identify Convicted Sex Offenders. But Is It Fair?*, L.A. TIMES, Oct. 5, 1994, at 1 (stating that this crackdown on sex crimes "reflects public anguish and frustration over several brutal and tragic killings of children by parolees in recent months").

24. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 26X, at 2 (Aug. 16, 1994); *see id.* (stating that most sex offenders only serve 50% of their sentences and 50% recidivate after release).

25. *Id.* at 2; *see* Eric Bailey & Paul Jacobs, *One-strike Measure For Sex Offenders Praised; Bill To Give California One Of Nations Toughest Rape Laws*, HOUSTON CHRON., Sept. 2, 1994, at 1 (revealing that this law will at least double the time spent behind bars by most hard core rapists and act as an effective deterrent to others); Amy Wallace & Eric Baily, *California Elections/Governor; 'One Strike' Rape Bill Is Signed By Wilson*, L.A. TIMES, Sept. 9, 1994, at A3 (quoting Governor Wilson as stating that he had just signed "the toughest rape law in the nation . . . which requires up to life in prison for first time violent sex offenders").

26. U.S. CONST. amend. VIII; *see* Solem v. Helm, 463 U.S. 277, 290 (1983) (holding that a criminal sentence must be proportionate to the defendant's crime); *see also* Gregg v. Georgia, 428 U.S. 153, 176 (1976) (holding that although the Court has applied the proportionality test in capital cases, it has not drawn a distinction with cases of imprisonment).

27. U.S. CONST. amend. VIII; *see Solem*, 463 U.S. at 292 (identifying the three objective tests); *id.* at 294 (finding that "it is clear that a 25-year sentence is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not").

28. *Solem*, 463 U.S. at 292; *see* Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (comparing the seriousness of the crime of rape to murder and other crimes).

29. *Solem*, 463 U.S. at 291; *see id.* (stating that comparing sentences imposed in the same jurisdiction may be "helpful").

30. *Id.*; *see id.* at 291-92 (stating that comparing the sentence to sentences in other jurisdictions may be "useful").

31. *Id.*; *see* Simmons v. State of Iowa, 28 F.3d 1478, 1482 n.5 (8th Cir. 1994) (recognizing that the proportionality analysis used by the Court in *Solem* was weakened by the Court's later decision in *Harmelin v. Michigan*, 501 U.S. 957 (1990), where a plurality of the Court expressed a desire to narrow or overrule *Solem*); *id.* (stating that if a statute is upheld by the *Solem* test, it will certainly survive the less stringent test set forth in *Harmelin*); *see also Harmelin*, 501 U.S. at 957 (Scalia, J., plurality opinion) (stating that *Solem* was incorrect and should be overruled since the Eighth Amendment contains no proportionality guarantee). *But see* U.S. v. Morse, 983 F.2d 851, 855 (8th Cir. 1993) (recognizing that while one plurality of the *Harmelin* Court wanted to overrule *Solem*, a majority of the Court "either declined to expressly overrule *Solem* or explicitly approved of *Solem*").

only provides for sentence enhancements for certain extreme circumstances during a rape, the harshness of the penalty appears to match the crime.[32] Additionally, although the sentence enhancement mandated by Chapter 14X is greater than sentences imposed in this and other jurisdictions, these factors are not determinative.[33]

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32. *See* CAL. PENAL CODE § 667.61 (enacted by Chapter 14X) (identifying the combination of circumstances that require a sentence requirement of either life in prison with no possibility of parole until 25 years have been served or life in prison with no possibility of parole until 15 years have been served); *see, e.g., id.* § 667(a) (West Supp. 1994) (imposing a five-year enhancement for anyone convicted of a serious felony who has previously been convicted of a serious felony in this state or any crime including all the elements of any serious felony in any other jurisdiction); *id.* § 667.8 (West 1988) (providing an additional term of three years for any person convicted of a sexual offense who kidnapped the victim and an additional term of nine years if the victim was under 14 years of age); *id.* § 667.15 (West Supp. 1994) (providing a one or two-year enhancement for an adult convicted of lewd and lascivious acts with a child or continuous sexual abuse upon a minor if the adult uses child pornography during or before the act); *id.* § 12022(b) (West Supp. 1994) (providing a one-year sentence enhancement for the use of a deadly or dangerous weapon in the commission or attempted commission of a felony or an enhancement of one, two, or three years if the weapon was used in a carjacking or attempted carjacking); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 26X, at 2 (Aug. 16, 1994) (providing that most rapists and child molesters cannot be cured of their aberrant compulsions and should be separated from society); *cf.* N.Y. PENAL CODE § 130.35 (McKinney 1987) (providing that it is rape in the first degree to engage in sexual intercourse with a female: (1) If committed by forcible compulsion; or (2) who is incapable of consent by reason of being physically helpless; or (3) who is less than 11 years old). *See generally* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) (recognizing the validity of the proportionality principle only in extreme cases, such as life imprisonment for trivial offenses); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentence Reform*, 81 CAL. L. REV. 61, 79 (1981) (discussing an Arizona sentence enhancement law that provides that anyone using a firearm in the commission of a rape is no longer eligible for a suspended sentence); Carin C. Azarcon, Review of Selected 1993 California Legislation, *Crimes; Sentence Enhancement—Great Bodily Injury to the Elderly*, 25 PAC. L.J. 368, 586-87 (1994) (discussing the sentence enhancement imposed when any person who intentionally inflicts great bodily injury on a person causes paralysis or a coma); Carin C. Azarcon, Review of Selected 1993 California Legislation, *Crimes; Sentence Enhancement—Sex Offenses Against Minors*, 25 PAC. L.J. 368, 589 (1994) (describing the sentence enhancement for an adult convicted of lewd or lascivious acts with a child or continuous sexual abuse upon a minor); Greg A. Ruppert, Review of Selected 1993 California Legislation, *Crimes; Sentence Enhancement—Credible Threat*, 25 PAC. L.J. 368, 584-85 (1994) (discussing the exemption of subordinate terms from the double-base term-limit).

33. *See Solem*, 463 U.S. at 291-92 (commenting that comparing sentences with those in other jurisdictions is merely helpful when determining the proportionality of a sentence); *see, e.g.*, CAL. PENAL CODE § 667.6 (West Supp. 1994) (providing that persons previously convicted of sex offenses, who are convicted of new sex offenses, may receive a sentence enhancement of five or ten years imprisonment); *see also* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 64 (1993) (stating that legislatures have increasingly enacted mandatory sentencing laws with penalty provisions that are severe and that by 1990, 46 states had enacted mandatory sentence enhancement laws); Marvin E. Frankel & Leonard Orland, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-84*, 73 GEO. L.J. 671, 702 (1984) (discussing the factors to be considered in determining whether a sentence should be considered "cruel and unusual" and discussing the decision in *Rummel v. Estelle*, 445 U.S. 263 (1980), where the Supreme Court determined that the length of felony sentences is purely a matter of legislative prerogative). This absolute type of view was softened by *Solem*, where the Supreme Court adopted a standard of "substantial deference" to the legislature. *Id*; *cf.* MISS. CODE ANN. § 99-19-81 (1993) (specifying that every person convicted of a felony who had been convicted twice previously of any felony of federal crime upon charges separately brought will be sentenced to the maximum term of imprisonment prescribed for such felony, and the sentence will not be reduced or suspended nor will the person be eligible for parole or probation); NEV. REV. STAT. ANN. § 200.366(2)(a)(1)-(2) (Michie Supp. 1994) (providing that any person who commits a sexual assault and the crime results in substantial bodily harm to the victim, the punishment will be imprisonment in state prison for life with no

The Legislature has determined that these enhancements are necessary to curb violent sex crimes.[34] The Supreme Court gives "substantial deference" to the broad authority that legislatures possess in determining the types and limits of punishments for crimes.[35] As a result, since the harshness of the sentence mandated by Chapter 14X matches the gravity of the crimes, and since the courts are hesitant to breach the legislature's authority to determine limits of punishment, Chapter 14X should not be found to violate the Eight Amendment.[36]

Opponents of Chapter 14X nonetheless claim that these sentence enhancements are arbitrary and disproportionate and that they add to the overcrowding problem in California's prison system.[37] Some opponents also claim that the harsh punishment mandated by Chapter 14X will deter prosecutors from prosecuting rape cases.[38]

Although Chapter 14X will increase California's prison population, it will still help relieve prison overpopulation in the long run by qualifying California to receive federal funding for prison construction.[39] In light of public outcry against

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possibility of parole or imprisonment in state prison for life with the possibility of parole, eligibility for which begins when a minimum of 10 years has been served); NEV. REV. STAT. ANN. § 201.230(1) (Michie Supp. 1994) (providing for a discretionary sentence of not less than one year and not more than 10 years for lewd acts with a child under fourteen years of age); OR. REV. STAT. § 161.725 (1994) (providing that the maximum term for an indeterminate sentence of imprisonment for a dangerous offender is 30 years and identifying the factors to be examined in determining sentencing); TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974) (imposing life imprisonment on defendants convicted of a felony after two previous felony convictions on separate occasions).

34. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 26A, at 2 (Aug. 16, 1994).

35. *Solem*, 463 U.S. at 290; see *id.* at 289-90 (determining that successful challenges to proportionality of particular sentences, outside capital sentences, will be exceedingly rare).

36. *See id.* (discussing proportionality of punishment); *see also* Marvin E. Frankel & Leonard Orland, *supra* note 33, at 703 (revealing that recent court decisions indicate that successful challenges to the proportionality of sentences will be exceedingly unlikely).

37. Wallace & Bailey, *supra* note 25; *see id.* (stating that by 1998, Chapter 14X will only add about 11 inmates over those imprisoned under the "three strikes" law but that by 2025 there will be about 2000 additional inmates who will cost about $1.5 million for prison construction and about $40 million each year in operating costs); Letter from Cathy R. Dreyfuss, Legislative Advocate, *California Attorneys for Criminal Justice*, to Senator Marian Bergeson (July 27, 1994) (copy on file with the *Pacific Law Journal*) (stating that the penal code is a poor medium for reaching potential criminals and that California's inmate population has increased from 22,500 in 1979 to over 110,000 today); Letter from Francisco Lobaco, Legislative Director, *American Civil Liberties Union*, to members of the Assembly Public Safety Committee, (Aug. 1, 1994) (copy on file with the *Pacific Law Journal*) (stating that the increases in penalties by Chapter 14X are arbitrary and disproportionate, and unnecessary since the court has the authority to impose consecutive sentences for each separate count).

38. *See* Greg Lucas, *Political Ad Watch*, S.F. CHRON., Oct. 7, 1994, at A2 (stating that Governor Wilson faces opposition by several women's groups who feel that the draconian sentences might deter prosecutors from taking rape cases to trial); *see also One-strike Snags in Senate*, CAL. J. WEEKLY, Apr. 25, 1994, at Feature 1 (stating that the Legislature heard from women's groups who fear that, in cases of acquaintance rape, where the only evidence is often a woman's word against a man's, prosecutors will be reluctant to file charges). Experts also say that most rapes fall into this acquaintance rape category. *Id.* Others say it is possible, if sentences for rape and murder are the same, that more rapists will kill their victims. *Id.*

39. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (providing that funding for state prisons will be predicated on the state implementing truth-in-sentencing laws that ensure that violent offenders serve a substantial portion of the sentences imposed); *see also* James A. Baker III, *'New Democrats' Seem Like 'Old Republicans' On Crime*, L.A. TIMES, Mar. 6, 1994, at M3 (discussing a new senate crime bill which would allocates $3 billion to the states for 10 regional prisons, so long as the state ensures that all prisoners serve at

repeat violent offenders, prosecutors face increased pressure to ensure that these offenders stay off the streets.[40]

Kenneth J. Pogue

Crimes; sex offenses—victims who are prevented from resisting

Penal Code §§ 261, 286, 288a, 289 (amended).
ABX 85 (Martinez); 1994 STAT. Ch. 40X

Existing law provides definitions of rape,[1] sodomy,[2] oral copulation,[3] and penetration by a foreign object.[4] Under prior law, each of the definitions

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least 85% of their allotted sentences); *Crime-Law Wave*, NAT'L. L.J., Sept. 12, 1994, at A20 (stating that the provision requiring states to ensure that prisoners will serve at least 85% of their sentences, to receive federal prison funding, will help keep vicious criminals off the streets).

40. Baker, *supra* note 39, at M3; *see id.* (stating that public anger about crime is becoming extreme). "The murder of Polly Klaas, the killing of Michael Jordan's father, or the slaughter of commuters on the Long Island Railroad are symptoms of a broader pathology that has beset our society." *Id.*

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1. *See* CAL. PENAL CODE § 261 (amended by Chapter 40X) (defining rape); People v. Jeff, 204 Cal. App. 3d 309, 324-28, 251 Cal. Rptr. 135, 143-46 (1988) (stating that rape may be committed by acts causing only fear of immediate bodily harm to the victim or to another, and does not require threats of imminent harm); People v. Sheffield, 9 Cal. App. 130, 132-33, 98 P. 67, 68-69 (1908) (providing that it is not unconstitutional to make rape a felony, regardless of whether the accused intended to commit a crime or knew any facts which would constitute his acts as a crime); *see also* State v. Simmons, 621 So. 2d 1135, 1138 (La. 1993) (stating that simple rape is an act of anal or vaginal sexual intercourse with a female who is deemed to be legally incapable of resisting or intelligently consenting). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals*, § 778 (2d. ed. 1988) (discussing the crime of rape and its elements).

2. *See* CAL. PENAL CODE § 286(a) (amended by Chapter 40X) (defining sodomy); People v. Thompson, 50 Cal. 3d 134, 170-71, 785 P.2d 857, 877, 266 Cal. Rptr. 309, 329 (1990) (stating that physical evidence concerning the victim's body was sufficient to corroborate forcible sodomy), *cert. denied sub nom.* Thompson v. California, 498 U.S. 881 (1990); People v. Martinez, 188 Cal. App. 3d 19, 24-25, 232 Cal. Rptr. 736, 739-40 (1986) (stating that penetration, however slight, remains an element of sodomy under the amended statute defining sodomy); People v. Howard, 117 Cal. App. 3d 53, 55, 172 Cal. Rptr. 539, 541 (1981) (stating that it is not necessary for a violation of the statutes proscribing the acts of sodomy and oral copulation which require the victim to be unconscious of the nature of the act that the victim be completely unconscious); People v. Hurd, 5 Cal. App. 3d 865, 876-77, 85 Cal. Rptr. 718, 725-26, (1970) (stating that the section proscribing the offense of sodomy does not constitute an unconstitutional infringement on the defendant's right to privacy). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* §§ 782, 783 (2d. ed. 1988) (discussing the crime of sodomy and its elements).

3. *See* CAL. PENAL CODE § 288a(a) (amended by Chapter 40X) (defining oral copulation); People v. Hunter, 158 Cal. App. 2d 500, 505-06, 322 P.2d 942, 945 (1958) (stating that proof of copulation is not required to sustain a conviction). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* §§ 784, 785 (2d. ed. 1988) (discussing the offense of oral copulation and its elements).

4. CAL. PENAL CODE §§ 261, 286(a), 288a(a), 289 (amended by Chapter 40X); *see id.* § 289 (amended by Chapter 40X) (defining penetration by a foreign object); *id.* § 289(k)(1) (amended by Chapter 40X) (stating that "foreign object, substance, instrument, or device" includes any part of the body, except a sexual organ);

discussed the circumstance whereby a victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance,[5] which has been "administered by or with the privity of the accused."[6] Chapter 40X deletes the language "administered by or with the privity of the accused," and replaces it with language applicable to situations in which the accused knew or reasonably should have known of the victim's condition.[7]

INTERPRETIVE COMMENT

The Legislative intent behind Chapter 40X is to bring more sexual offenders to justice, and not allow them to escape accountability on a technicality.[8] By deleting the language "administered by or with the privity of the accused," Chapter 40X expands the definitions of these crimes to include situations where the accused merely knew or should have known of the victim's intoxicated condition.[9] The author of this bill felt that whether or not the accused administered the intoxicating substance should have no bearing on the accused's culpability.[10] In either case, the victim is prevented from resisting due to being

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id. § 289(k)(2) (amended by Chapter 40X) (stating that "unknown object" includes any foreign object, substance, instrument, or device, or any part of the body, including the male sexual organ, when it is not known whether penetration was by the aforementioned male sex organ, or by a foreign object, substance, instrument, or device, or by any other part of the body); People v. Harrison, 48 Cal. 3d 321, 334, 768 P.2d 1078, 1085, 256 Cal. Rptr. 401, 408 (1989) (stating that each act of penetration which occurred during a continuous sexual assaultive encounter may constitute separate violations). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* § 792 (2d. ed. 1988) (discussing the crime of penetration with a foreign object).

5. *See* CAL. HEALTH & SAFETY CODE §§ 11054-11058 (West 1991 & Supp. 1994) (listing the known controlled substances which are provided for under the California Uniform Controlled Substances Act).

6. 1993 Cal. Legis. Serv. ch. 595, sec. 1, at 2576-77 (amending CAL. PENAL CODE § 261); *id.* § 4, at 2578-79 (amending CAL. PENAL CODE §286); *id.* § 5, at 2580-81 (amending CAL. PENAL CODE § 288a); *id.* § 6 at 2581-83 (amending CAL. PENAL CODE § 289).

7. CAL. PENAL CODE §§ 261(a)(3), 286(i), 288a(i), 289(e) (amended by Chapter 40X); *see* People v. Mack, 11 Cal. App. 4th 1466, 1480-81, 15 Cal. Rptr. 2d 193, 202-03 (1992) (stating that the relevance of the resistance-suppressing substance is only to negate the inference of consent from what is in fact mere submission; the fact that the victim willingly partook of what she knew was Percodan, is not relevant since the accused knew, or should have known of her condition); Boro v. Superior Court, 163 Cal. App. 3d 1224, 1228-29, 210 Cal. Rptr. 122, 124-25 (1985) (stating that a victim need not be totally unconscious for the purposes of a statute which includes in the definition of rape an act of sexual intercourse in which the victim is at the time unconscious to the nature of the act and this is known to the accused).

8. ASSEMBLY WAYS & MEANS COMMITTEE, COMMITTEE ANALYSIS OF ABX 85, at 1 (May 25, 1994).

9. *See id.* (suggesting a standard such as simple negligence as opposed to a standard of intent). This change is directed toward not allowing the accused to escape accountability based upon a lack of intent. *Id.*

10. *Id.*

intoxicated.[11] Chapter 40X brings California law into conformity with the laws of other states.[12]

Christian A. Ameri

Crimes; stalking—notification upon release of offender

Penal Code § 646.9 (amended).
ABX 95 (Burton); 1994 STAT. Ch. 12X

Existing law requires the notification of the pending release of violent offenders[1] to certain parties who have requested such knowledge.[2] Existing law also defines the crime of stalking.[3]

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11. *Id.*; ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 85, at 1 (May 3, 1994).

12. *See, e.g.*, IDAHO CODE § 18-6108(5) (Supp. 1994) (defining a form of rape, and making provisions for the accused to have known that the victim, at the time of the offense, was unconscious); KAN. STAT. ANN. § 21-3502(a)(1)(C) (Supp. 1993) (defining rape, and making provisions for the accused to have known that the victim, at the time of the offense, was incapable of understanding the nature of the act); *id.* § 21-3506(a)(1)(C) (Supp. 1993) (defining aggravated criminal sodomy, and making provisions that the accused either knew or should have known that the victim, at the time of the offense, was incapable of understanding the nature of the act); OKLA. STAT. ANN. tit. 21, § 1111(A)(5) (West Supp. 1994) (defining rape, and providing that the accused knew or should have known that the victim, at the time of the offense, was incapable of understanding the nature of the act); UTAH CODE ANN. § 76-5-406(5) (1990) (defining sodomy, and making provisions for the accused to have known that the victim, at the time of the offense, was incapable of understanding the nature of the act).

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1. *See* CAL. PENAL CODE § 3058.8 (West Supp. 1994) (defining a violent offender as one convicted of a violent felony); *see also id.* § 667.5(c) (West Supp. 1994) (listing those offenses deemed to be violent felonies).

2. *Id.* § 3058.8 (West Supp. 1994).

3. *Id.* § 646.9(a) (amended by Chapter 12X); *see id.* (defining stalking as willfully, maliciously, and repeatedly following or harassing another person and making credible threats with the intent to place the person in reasonable fear for their safety or that of their immediate family); *see also id.* § 646.9(d) (amended by Chapter 12X) (defining harassing behavior as a series of acts intending to torment or annoy which serve no legitimate purpose); *id.* § 646.9(e) (amended by Chapter 12X) (defining a credible threat as any threat made with the intent and apparent ability to carry it out so as to cause reasonable fear within the target); *id.* § 646.9(i) (amended by Chapter 12X) (defining immediate family to include any spouse, parent, child, person related by blood or marriage within the second degree, or any person regularly residing in the household or who within the last six months resided regularly in the household); People v. Heilman, 25 Cal. App. 4th 391, 401, 30 Cal. Rptr. 2d 422, 428 (1994) (holding that the term "repeatedly" is not unconstitutionally vague). *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) (discussing the remedies available to victims of harassment before and after the enactment of California Penal Code § 646.9); Christian P. Hurley, Review of Selected 1992 California Legislation, *Crimes; Stalking*, 24 PAC. L.J. 591, 762 (1993) (discussing the ramifications of the 1992 amendments to California Penal Code § 646.9); Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819 (1992) (discussing similarities and differences among various treatments of stalking legislation); Jennifer L. Miller, Review of Selected 1993 California Legislation, *Crimes; Stalking*, 25 PAC. L.J. 368, 595 (1994) (discussing

Chapter 12X requires the Department of Corrections[4] or County Sheriff to give notice, upon request, of the release from the state prison or county jail of any offender convicted of stalking or a felony offense involving domestic violence[5] to any person the court defines as a victim of the offense, a family member of such victim, or a witness to the offense.[6] Chapter 12X further provides that all information relating to the parties notified must remain confidential and must not be provided to the offender.[7]

INTERPRETIVE COMMENT

The Legislature enacted Chapter 12X believing that most stalkers return to the target of their harassment.[8] The Legislature has attempted to alleviate much of the fear felt by victims in not knowing when an offender would be released.[9] The Legislature has eliminated the necessity and time consumption of numerous phone calls from prior victims desiring to know of any escape or pending release

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the 1993 amendments to California Penal Code § 646.9); Arthur Higbee, *American Topics*, INT'L HERALD TRIB., June 6, 1992 (stating that advocates of victims' rights support anti-stalking laws as additional deterrents to the kind of behavior that often precedes more violent acts); Constance Sommer, *Senator, Wife Know Awful Lot About Stalkers*, L.A. TIMES, Mar. 18, 1993, at A5 (discussing the terror felt by Senator Robert Krueger and his wife as they are forced to deal with a harasser who returns each time he is released from prison).

4. *See* CAL. PENAL CODE § 5000 (West Supp. 1994) (creating the Department of Corrections within the Youth and Adult Correctional Agency).

5. *See* CAL. FAM. CODE § 6211 (West 1994) (defining domestic violence as that perpetrated against a spouse or former spouse, a cohabitant or former cohabitant, a person with whom the offender is having or has had a dating or engagement relationship, a person with whom the perpetrator has had a child, any child of the perpetrator, or any person related to the perpetrator by consanguinity or affinity within the second degree); *see also* CAL. FAM. CODE § 6209 (West 1994) (defining a cohabitant as a person who regularly resides in the household); CAL. PENAL CODE § 273.5 (West Supp. 1994) (defining as a felony offense the willful infliction of a corporal injury upon one's spouse, any person of the opposite sex with whom one cohabitates, or the mother or father of one's child); People v. Holifield, 205 Cal. App. 3d 993, 1000, 252 Cal. Rptr. 729, 733-34 (1988) (explaining that "cohabitating" refers to an unrelated man and woman living together in a substantial relationship which is manifested minimally by permanence and sexual or amorous intimacy).

6. CAL. PENAL CODE § 646.9(k)(1) (amended by Chapter 12X); *see id.* (providing that such notification be made by telephone and certified mail to the last known address at least 15 days prior to the release); *see also id.* (imposing the responsibility upon the victim, family members, and witnesses to keep addresses current); *id.* § 646.9(k)(3)-(4) (amended by Chapter 12X) (extending the notification requirement to escapes by offenders from an institution or reentry facility); *id.* § 646.9(k)(5) (amended by Chapter 12X) (allowing substantial compliance to fulfill notification requirements); *cf.* TEX. CRIM. PROC. CODE ANN. art. 56.11(a) (West Supp. 1994) (requiring a victim be notified upon the release or escape of a convicted stalker); WASH. REV. CODE ANN. § 9.94A.155(2) (West Supp.1994) (requiring the department of corrections to send the victim, any witness, or any party specified in writing by the prosecuting attorney, notice of the parole, release, community placement, work release placement, furlough, or escape of a convicted stalker, provided such notice is requested in writing).

7. CAL. PENAL CODE § 646.9(k)(2) (amended by Chapter 12X).

8. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ABX 95, at 2 (July 5, 1994) (stating that the Domestic Violence Unit of the Los Angeles District Attorney's Office has informed the author of the bill that it is a routine occurrence for stalkers to return to harass victims).

9. *See id.* (providing the purpose of the bill as expressed by the author is to lower the possible risk to victims who do not know an offender has been released).

to district attorneys, who must then use their time calling the appropriate jail for the information.[10]

Mark E. Bellamy

Crimes; trespass—credible verbal threats

Penal Code § 601 (amended).
ABX 87 (Alpert); STAT. Ch. 25X

Prior law provided that a person was guilty of trespass if he or she made a credible threat[1] to cause serious bodily injury[2] to another person and, within fourteen days of the threat, unlawfully entered into the person's residence, surrounding property, or workplace.[3] Chapter 25X instead declares that a person is guilty of trespass if a credible threat to cause serious bodily injury is made to another person with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family,[4] and within thirty days of making the threat, the person making the threat enters the person's residence, surrounding property, or workplace, under specified circumstances.[5]

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10. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF ABX 95, at 2 (Aug. 16, 1994) (expressing the desire of victims to take steps to protect themselves by actively seeking information regarding release of the offender).

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1. *See* CAL. PENAL CODE § 646.9(e) (West Supp. 1994) (defining credible threat within the California stalking statute as a verbal or written threat, a threat implied by a pattern of conduct, or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family). *See generally* Greg A. Ruppert, Review of Selected 1993 California Legislation, *Crimes; Sentence Enhancement—Credible Threat*, 25 PAC. L.J. 368, 584-85 (1994) (discussing credible threats in relation to sentence enhancements).

2. *See id.* § 417.6(a) (West 1988) (defining serious bodily injury as a serious impairment of physical condition, including but not limited to loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, or serious disfigurement).

3. 1990 Cal. Legis Serv. ch. 1448, sec. 1, at 5670 (amending CAL. PENAL CODE § 601); *see* CAL. PENAL CODE § 601(b) (amended by Chapter 25X) (stating that an exception applies if the residence, real property, or workplace is also that of the person making the threat); *id.* § 601(d) (amended by Chapter 25X) (stating that a violation of this section is punishable by imprisonment of up to one year, a fine of up to $2000, or both).

4. *See* CAL. PENAL CODE § 422 (West Supp. 1994) (defining immediate family for purposes of a threat of committing a crime against another or their immediate family: Any spouse, whether by marriage or not; parent; child; any person related by consanguinity or affinity within the second degree; or any person who regularly resides in the household, or within the prior six months, regularly resided in the household).

5. *Id.* § 601(a)(1)-(2) (amended by Chapter 25X); *see id.* § 601(a)(1) (amended by Chapter 25X) (requiring that the person unlawfully enter the residence or surrounding property of the person threatened with the intent to execute the threat against the target of the threat); *id.* § 601(a)(2) (amended by Chapter 25X) (requiring that the person enter the threatened person's workplace with the knowledge that the place is the threatened person's workplace, and therein carry out an act or acts to locate the threatened person without

INTERPRETIVE COMMENT

The author of Chapter 25X asserts that prior to the enactment of Chapter 25X, a loophole existed in the crime of trespass, whereby a person could threaten to hurt another person's immediate family, and then unlawfully enter the person's residence, surrounding property, or workplace, without being guilty of the offense.[6] By enacting Chapter 25X, the Legislature has alleviated this problem, as a threat that puts a person in fear of his or her safety or the safety to his or her immediate family will suffice to support a trespass prosecution.[7] By enacting Chapter 25X, the Legislature also provides a longer time period during which the trespass may take place.[8]

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lawful purpose with the intent to carry out the threat against the target of the threat).

6. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 87, at 3 (May 3, 1994). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* §§ 679-687 (6th ed. 1988 & Supp. 1994) (setting forth and discussing various California trespass statutes, including California Penal Code § 601).

7. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 87, at 3 (May 3, 1994); *see* CAL. PENAL CODE § 601(a)(1)-(2) (amended by Chapter 25X) (providing that a person is guilty of trespass who makes a credible threat to cause serious bodily injury to another person with the intent to place the person in reasonable fear for his or her safety, or the safety of his or her immediate family and within 30 days enters the persons residence, surrounding property, or workplace). *See generally* CAL. PENAL CODE § 646.9(a)-(j) (West Supp. 1994) (setting forth the provisions of the California stalking statute, which makes it a crime for any person to willfully, maliciously, and repeatedly follow or harass another person and who makes a credible threat with the intent to place that person in reasonable fear); People v. Heilman, 25 Cal. App. 4th 391, 401, 30 Cal. Rptr. 2d 422, 426 (1994) (holding that the California Penal Code § 646.9, which makes stalking a crime, is not unconstitutionally vague by its use of the term "repeatedly"); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ABX 87, at 2 (Aug. 8, 1994) (stating that ABX 87 conforms criminal trespass law to the law on stalking in that it requires the threat to be made with the intent to place another person in fear for his or her safety or the safety of his or her immediate family).

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF ABX 87, at 3 (May 3, 1994); *see* CAL. PENAL CODE § 601(a)(1)-(2) (amended by Chapter 25X) (requiring that the unlawful entrance to the threatened person's residence, surrounding property, or workplace occur within 30 days of a credible threat).