McGeorge Law Review

Volume 26 | Issue 2 Article 23

1-1-1995

Criminal Procedure

University of the Pacific; McGeorge School of Law

Criminal Procedure; domestic violence—exception to the prohibition against prosecution for the same offense

Penal Code § 1387 (amended).
SB 1827 (Lockyer); 1994 STAT. Ch. 169

Existing law provides, with narrow exceptions, that an order terminating an action bars another prosecution for the same offense.[1] Under existing law, an exception allows the refiling of specified felony and misdemeanor offenses[2] that were dismissed due to the failure of the victim to appear in court.[3] Furthermore, existing law specifies that refiling under this exception may only occur once in an action and the refiling must occur within six months of the action's original dismissal.[4]

Chapter 169 expands this exception to include the refiling of any misdemeanor based on an act of domestic violence.[5]

INTERPRETIVE COMMENT

Chapter 169 was enacted in order to combat the number of domestic violence cases that are dismissed because the victim fails to appear, possibly out of fear,

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1. CAL. PENAL CODE § 1387 (amended by Chapter 169).
2. *See id.* §§ 243, 262, 273.5, 273.6 (West Supp. 1994) (specifying the felony and misdemeanor offenses as: (1) Battery committed against a noncohabitating former spouse, fiancee, or person with whom the defendant currently has, or previously had, a dating relationship; (2) rape of one's spouse; (3) willful infliction of corporal injury against one's spouse, person of the opposite sex with whom one is cohabitating, or the mother or father of one's child; and (4) willful and knowing violation of a protective order).
3. *Id.* § 1387(a)(3) (amended by Chapter 169).
4. *Id.*
5. *Id.* § 1387(b) (amended by Chapter 169); *see id.* § 13700(b) (West Supp. 1994) (defining domestic violence as abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship); *see also* Cynthia Fuchs Epstein, *Justice and Gender*, 79 CAL. L. REV. 577, 585 (1991) (indicating in a book review that most states have adopted domestic violence legislation protecting women and/or imposing sanctions for violations); Armin Brott, *Battered Statistics*, SACRAMENTO BEE, Aug. 7, 1994, at FO1 (indicating that The National Coalition Against Domestic Violence estimates that more than half of married women will experience violence during their marriage and that over one third are battered repeatedly each year); *Domestic Violence; Too Much of it About*, ECONOMIST, July 26, 1994, at 25 (reporting that in California during 1992, police received 240,826 family-violence calls, up from about 200,000 in 1990, and more than one third of these calls reported that a weapon was involved); Diana Griego Erwin, *Bobbitt Case an Expose of Domestic Violence*, SACRAMENTO BEE, Jan. 25, 1994, at A2 (stating that more than one million American women have reported being forcibly raped by their husbands, while according to the Family Violence Prevention Fund in San Francisco, between two million and four million women are battered by a spouse or intimate partner each year). *But see* Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 733 (1988) (commenting that prosecutors routinely decline to bring charges against a husband for domestic violence, choosing instead not to intervene in such disputes). *See generally* Honorable Billy G. Mills & Mary Lyons McNaimais, *California's Response to Domestic Violence*, 21 SANTA CLARA L. REV. 1, 3-19 (1981) (giving an overview of California's judicial and legislative attempts to deal with domestic violence).

when the case is ready to go to trial.[6] Chapter 169's enactment provides the prosecutor with the opportunity to refile the case and additional time within which to do so.[7]

Lisa R. Brenner

Criminal Procedure; juveniles—appointment of competent counsel in dependency proceedings

Welfare and Institutions Code §§ 317.5, 317.6 (new).
SB 783 (Lockyer); 1994 STAT. Ch. 1073

Existing law provides for the appointment of counsel in juvenile dependency proceedings for both the parents and for the minor.[1] Chapter 1073 provides that all parties in a dependency proceeding are entitled to competent counsel[2] and that each minor who is the subject of a dependency proceeding is a party to that

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6. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1827, at 2 (May 17, 1994); *see* Joan Meier, *Battered Justice; Includes Relate [sic] Article on Wife-Beating and the Rights of Men*, 19 WASH. MONTHLY, 37 (May, 1987) (stating that in some studies, as many as 80% of complaints were dropped by the complainant before prosecution); *see also Ending Domestic Violence*, ST. PETERSBURG TIMES, May 18, 1994, at 12A (declaring that "domestic violence is difficult to prosecute because the victim often refuses to testify, either out of fear or misguided love"). *But see Developments in the Law—Legal Responses to Domestic Violence;* 106 HARV. L. REV. 1501, 1539-40 n.5 (1993) (stating that domestic violence complaints are often dropped because prosecutors often give domestic violence cases low priority and sometimes even try to persuade battered women not to prosecute).

7. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1827, at 2 (May 17, 1994).

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1. CAL. WELF. & INST. CODE § 317 (West Supp. 1994); *see id.* § 317(a)-(b) (providing for the appointment of counsel for parents when the parent or guardian of the minor is presently financially unable to afford counsel and the minor is or may be placed in out-of-home care, and for a minor when it appears to the court that the minor would benefit from appointed counsel); *see also* CAL. CT. R. § 1412(g) (1994) (providing that the court must advise an unrepresented child, parent, or guardian of the right to be represented by counsel and, if applicable, the right to have counsel appointed).

2. Strickland v. Washington, 466 U.S. 668, 687 (1984) (defining the two-part test to determine if counsel's performance was competent). To be judged incompetent, attorney performance must be below that of reasonably effective assistance, considering all the circumstances, and the client must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *see also* Lozada v. Deeds, 498 U.S. 430, 431 (1991) (holding that petitioner had made a substantial showing that he was denied the right to effective assistance of counsel as shown by the attorney's failure to inform him of his right to appeal, of the procedures and time limitations for an appeal, and of his right to appointed counsel). *But see* Bonin v. California, 494 U.S. 1039, 1043 (1989) (Marshall, J., dissenting) (explaining that when counsel is burdened by a conflict of interest, the client is deprived of his Sixth Amendment right as surely as if the counsel had failed to appear at trial; therefore, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial). *See generally In re* Arturo, 8 Cal. App. 4th 229, 238, 10 Cal. Rptr. 2d 131, 140 (1992) (discussing the right to competent assistance of counsel when the right to counsel is of constitutional dimension).

proceeding.[3] Chapter 1073 instructs the Judicial Council[4] to adopt minimum standards for the appointment of competent counsel and to initiate procedures to respond to client complaints regarding the attorney's performance.[5]

INTERPRETIVE COMMENT

Addressed by Chapter 1073 is the concern that an appointed attorney may not have the knowledge and experience required to provide competent service in a dependency proceeding.[6] Prior to the passage of Chapter 1073, only defendants in a criminal case had a statutory right to competent counsel.[7] Chapter 1073 ensures that all parties to a dependency proceeding are entitled to competent counsel, and specifically provides that the minor is a party to the proceeding and is therefore also entitled to such counsel under this law.[8]

Christina L. Wentworth

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3. CAL. WELF. & INST. CODE § 317.5 (enacted by Chapter 1073); *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 783, at 2 (May 12, 1994) (discussing how SB 783 provides that each child who is the subject of a dependency proceeding is a party to that proceeding).

4. CAL. CONST. art. VI, § 6 (explaining the Judicial Council as consisting of the Chief Justice and one other justice of the California Supreme Court, three judges of courts of appeal, five judges of superior courts, three judges of municipal courts, and two judges of justice courts).

5. CAL. WELF. & INST. CODE § 317.6(a) (enacted by Chapter 1073); *see id.* (providing that on or before January 1, 1996, the Judicial Council must adopt rules of court regarding the appointment of competent counsel in dependency proceedings, including minimum standards of experience and education, and the Council must establish procedures for handling client complaints regarding attorney performance); CAL. BUS. & PROF. CODE § 6043.5 (West Supp. 1994) (explaining that anyone who reports to the State Bar that an attorney has engaged in professional misconduct, knowing the report or complaint to be false and malicious, is guilty of a misdemeanor); *see also id.* § 6090.5 (West 1990) (calling for suspension, disbarment, or other disciplinary action to be brought against any member of the State Bar who requires, as a condition of a settlement of a civil action of professional misconduct brought against the member, that the plaintiff agree to not file a complaint with the disciplinary agency concerning that misconduct).

6. *See* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 783, at 3 (Apr. 7, 1994) (discussing the problem of appointed attorneys who do not always have the experience or knowledge to represent their clients competently).

7. *Id.*; *see* U.S. CONST. amend. VI; *Strickland*, 466 U.S. at 686 (holding that the Sixth Amendment right to counsel is the right to the effective assistance of counsel); *see also* Gideon v. Wainwright, 372 U.S. 335, 352 (1963) (deciding that all defendants to a criminal trial are entitled to the assistance of counsel under the Constitution); Johnny S. v. Superior Court, 90 Cal. App. 3d 826, 828, 153 Cal. Rptr. 550, 552 (1979) (giving the court discretion to appoint an investigator to assist court-appointed counsel); *In re* Julius B. v. Cabell, 68 Cal. App. 3d 395, 401, 137 Cal. Rptr. 341, 347 (1977) (applying the constitutional right to counsel in wardship proceedings). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child*, §§ 586, 588 (9th ed. 1989) (discussing the state of California law with regard to counsel appointment in juvenile court cases).

8. CAL. WELF. & INST. CODE § 317.5(a)-(b) (enacted by Chapter 1073); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 783, at 2 (May 12, 1994) (specifying that SB 783 provides that each child who is the subject of a dependency proceeding is a party to that proceeding and that all parties in juvenile dependency cases are entitled to competent counsel); *see also* Bill Kisliuk, *Report: Create Nonprofit for Juvenile Work*, THE RECORDER, Apr. 25, 1994, at 5 (discussing possible methods of reducing the costs of providing counsel in juvenile cases).

Criminal Procedure; juveniles—commencement of actions against minors

Penal Code § 799 (amended).
SB 1548 (Russell); 1994 STAT. Ch. 409

Under prior law, in a prosecution for a criminal offense committed by a juvenile who could be tried as an adult,[1] where the offense had no statute of limitations,[2] jurisdictional problems arose if the offender was no longer under the jurisdiction of the juvenile court.[3] Under Chapter 409, such an action may be commenced at any time.[4]

INTERPRETIVE COMMENT

Chapter 409 was enacted to prevent juveniles from avoiding prosecution for serious crimes on the basis of their having become adults over the age of twenty-five.[5] In one particular case, an individual escaped punishment for a homicide committed while he was under the age of sixteen.[6] When he was apprehended at the age of twenty-five, he could not be prosecuted in either the juvenile or criminal courts.[7] Chapter 409 codifies prior case law[8] as applied to the types of

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1. *See* CAL. WELF. & INST. CODE § 707 (West Supp. 1994) (describing procedures for determining that a juvenile older than 16, but younger than 18, is not suitable to be dealt with by the juvenile justice system); *id.* (detailing the crimes that raise a presumption that the minor is unfit to be dealt with by the juvenile justice system, including, but not limited to, murder, arson, armed robbery, rape, aggravated assault, and drug offenses); *see also* People v. King, 5 Cal. 4th 59, 69, 851 P.2d 27, 32, 19 Cal. Rptr. 2d 233, 238 (holding that a person between the ages of 16 and 18 may be found unfit for juvenile court disposition); Jennifer L. Rutz, Review of Selected 1990 California Legislation, *Juveniles; Presumption of Unfitness for Juvenile Court and Determination of a Minor's Age*, 22 PAC. L.J. 323, 655 (1991) (discussing the presumption of unfitness for juvenile court proceedings).

2. *See* CAL. PENAL CODE § 799 (amended by Chapter 409) (providing that there is no statute of limitations for offenses punishable by death, life imprisonment, life imprisonment without the possibility of parole, and embezzlement of public money).

3. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1548, at 2 (Mar. 22, 1994) (noting that if a juvenile committed a crime while under 16 and then escaped detection until the age of 25, neither the juvenile nor the criminal courts could assert jurisdiction); *see* 1984 Cal. Stat. ch. 1270, sec. 2, at 4335 (enacting CAL. PENAL CODE § 799) (listing the types of offenses for which there is no statute of limitations but not specifying how crimes committed by juveniles should be treated for commencement of action purposes); CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1994) (setting forth procedures for commitment to the Department of the Youth Authority, and providing that a person under the age of 18 committing first degree murder can only be committed to the Youth Authority until the age of 25; thus, the sentence for the crime of first degree murder committed by a juvenile under 16 was not one of those that had no statute of limitations); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1548, at 2 (July 5, 1994) (describing an individual who escaped detection for a homicide for 10 years and then was no longer subject to the jurisdiction of either the criminal or juvenile courts). *But see In re* Gustavo M., 214 Cal. App. 3d 1485, 1494, 263 Cal. Rptr. 328, 332 (stating that it is likely that the policies which govern the statute of limitations applicable to adults pertain to minors).

4. CAL. PENAL CODE § 799 (amended by Chapter 409).

5. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1548, at 2 (May 26, 1994).

6. *Id.*

7. *Id.*

offenses with no statute of limitations and would authorize the prosecution of an adult for those offenses committed while the perpetrator was a minor.[9]

Johnnie B. Beer

Criminal Procedure; juveniles—evidence presented on behalf of minors in dependency proceedings

Welfare and Institutions Code § 350 (amended).
AB 875 (McDonald); 1994 STAT. Ch. 24

Under prior law, in a hearing to determine the dependency of a minor, in which the probation department bears the burden of proof, if the department did not fulfill its burden by the conclusion of its presented evidence, the court was required to rule in favor of a motion to dismiss before hearing any other evidence.[1] Chapter 24 directs the court to consider evidence offered by any party, including the minor, on the issue of dependency, prior to making a ruling on a motion to dismiss.[2]

INTERPRETIVE COMMENT

Chapter 24 was enacted to codify the holding of *Guadalupe A. v. Superior Court.*[3] In *Guadalupe A.*, the juvenile court did not allow evidence to be presented

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8. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1548, at 2 (July 5, 1994) (stating that Chapter 409 codifies the rule, as applied to crimes with no statutes of limitations, from *In re* Gustavo M., 214 Cal. App. 3d 1485, 1494, 263 Cal. Rptr. 328, 332, which states that juveniles face the same statute of limitations that an adult would face for the same offense).

9. *Id.*

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1. 1992 Cal. Legis. Serv. ch. 360, sec. 2, at 1161 (amending CAL. WELF. & INST. CODE § 350); *see* CAL. WELF. & INST. CODE § 680 (West 1984) (requiring the judge in a juvenile court to control all proceedings in order to promote expeditious and effective ascertainment of all facts and information relevant to the welfare of the minor); CAL. CT. R. § 1412 (d) (1994) (providing a similar rule as in the statute); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 875, at 2 (Mar. 14, 1994) (stating that according to the State Bar Conference of Delegates, the language of the current statute requires a court to rule on a motion to dismiss before receiving any evidence from the minor). *See generally* Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 210-35 (1987) (discussing the state of evidentiary law in California juvenile cases).

2. CAL. WELF. & INST. CODE § 350(c) (amended by Chapter 24); *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 875, at 2 (Mar. 8, 1993) (stating that AB 875 authorizes the presentation of evidence by the minor before the court hears a motion to dismiss).

3. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 875, at 2 (Mar. 8, 1994); *see* Guadalupe A. v. Superior Court, 234 Cal. App. 3d 100, 109, 285 Cal. Rptr. 570, 575 (1991) (holding that before a court made a ruling to dismiss, any evidence put forward by the minor had to be considered); *see also* Allen M. v. Superior Court, 6 Cal. App. 4th 1069, 1075, 8 Cal. Rptr. 2d 259, 265 (1992) (citing *Guadalupe A.* with approval, and stating that a contrary holding would not be consistent with the minor's best interests).

on behalf of the minor before ruling on a motion to dismiss.[4] The Court of Appeal reversed, holding that "section 350 . . . should be interpreted as permitting pertinent evidence offered by another party to be presented before the motion is ruled on.[5] In this way the paramount policy of protecting the best interests of the child is promoted."[6]

Prior to the passage of Chapter 24, the minor was not allowed to present evidence at the hearing if the court found that the probation department had not met its burden of proof.[7] The concern raised is that because the interests of the probation department and those of the minor may be different, the minor may not have an adequate opportunity to present evidence to prove dependency and thereby be removed from an unsafe environment.[8] Chapter 24 requires the judge to weigh all evidence presented by the probation department and the minor before ruling on a motion to dismiss.[9]

Christina L. Wentworth

Criminal Procedure; juveniles—fitness procedure modifications

Welfare and Institutions Code § 707.01 (new); §§ 207.1, 211, 607, 653.1, 653.5, 654.3, 676, 707, 707.1, 727, 781, 827, 828.1, 1731.5, 1753.3, 1767.1, 1769, 1772 (amended).
AB 560 (Peace); 1994 STAT. Ch. 453

Under existing law, a presumption exists that a juvenile sixteen years of age or older is not properly dealt with in juvenile court when that individual has committed any of one or more specified offenses.[1] However, the court may make

4. *Guadalupe A.*, 234 Cal. App. 3d at 104, 285 Cal. Rptr. at 572.
5. *Id.* at 107, 285 Cal. Rptr. at 574.
6. *Id.*; *see id.* (stating that refusing to permit the child to present expert testimony on the psychological effects of reunification with her biological mother would risk her well-being).
7. 1992 Cal. Legis Serv. ch. 360, sec. 2, at 1161 (amending CAL. WELF. & INST. CODE § 350); *see id.* (providing that if a motion to dismiss is not granted, the minor may then offer evidence); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 875, at 1-2 (Mar. 8, 1994) (stating that under the previous version of California Welfare and Institutions Code § 350, the court was to rule on the presented evidence after hearing the evidence offered by the probation department).
8. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 875, at 2 (Mar. 8 1994).
9. CAL. WELF. & INST. CODE § 350(c) (amended by Chapter 24).

1. CAL. WELF. & INST. CODE § 707(b) (amended by Chapter 453); *see* People v. King, 5 Cal. 4th 59, 64, 851 P.2d 27, 29, 19 Cal. Rptr. 2d 233, 235 (1993) (holding that a person between 16 and 18 years of age may be tried in an adult court if found unfit for juvenile court treatment); *see also* People v. Aguirre, 227 Cal. App. 3d 373, 379, 277 Cal. Rptr. 771, 774 (1991) (holding that a minor 16 years of age or older may be tried in an adult court if first found unfit for juvenile court). *See generally* Martha E. Bellinger, *Waving Goodbye to Waiver for Serious Juvenile Offenders: A Proposal to Revamp California's Fitness Statute*, 11 J. JUV. L. 1

a finding that the minor would be best dealt with in the juvenile system based upon certain specific criteria.[2] Chapter 453 adds to the list for which the presumption is created the offenses of willfully and maliciously discharging a firearm from a motor vehicle at another person not the occupant of a motor vehicle,[3] kidnapping in order to commit certain sexual offenses,[4] kidnapping while committing a car jacking,[5] and igniting or exploding, or attempting to ignite or explode, any explosive with the intent to murder.[6]

Chapter 453 also provides that a minor between fourteen and sixteen years of age may be found unfit for juvenile court if the minor committed a specified offense, and the court decides that the minor would not be best treated in the juvenile system based upon certain criteria.[7] A presumption that a minor of fourteen, but not yet sixteen years of age is unfit for juvenile court is created by Chapter 453 if the minor has allegedly committed the offense of murder.[8] The court may eliminate the presumption by determining based upon certain criteria that the minor is best dealt with in the juvenile system.[9]

Under existing law the general public is not allowed entrance to the hearing of a juvenile, except when the hearing is based upon the alleged commission of

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(1990) (discussing the historical context of the California fitness hearing under California Welfare and Institutions Code § 707, failed attempts at overhauling the procedure, and making suggestions for improvements); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child*, §§ 754-73 (1989 & Supp. 1994) (setting forth historical information on fitness hearings and procedures).

2. CAL. WELF. & INST. CODE § 707(c) (amended by Chapter 453); *see id.* (listing criteria to be used in determining whether the subject would be "amenable to the care, treatment, and training program available through the . . . juvenile court"); *see also* CAL. CT. R. § 1483 (regulating conduct of a fitness hearing under California Welfare and Institutions Code § 707(c)); Joey W. v. Superior Court, 7 Cal. App. 4th 1167, 1175, 9 Cal. Rptr. 2d 6, 490-91 (1992) (concluding that the juvenile court retains the discretion to examine circumstances of the case in order to decide fitness); People v. Superior Court, 219 Cal. App. 3d 1475, 1479, 269 Cal. Rptr. 4, 6 (1990) (concluding that the possible sentence in criminal court is irrelevant in deciding whether a minor should be dealt with in juvenile court).

3. *See* CAL. PENAL CODE § 12034(c) (West 1992 & Supp. 1994) (defining the willful and malicious discharge of a firearm from a motor vehicle).

4. *See id.* § 208(d) (West Supp. 1994) (defining kidnapping in order to commit certain sexual offenses).

5. *See id.* § 209.5 (West Supp. 1994) (defining kidnapping while committing a car jacking).

6. CAL. WELF. & INST. CODE § 707(b) (amended by Chapter 453); *see* CAL. PENAL CODE § 12308 (West 1992 & Supp. 1994) (defining igniting or exploding, or attempting to ignite or explode, any explosive with the intent to murder).

7. CAL. WELF. & INST. CODE § 707(d) (amended by Chapter 453); *cf.* FLA. STAT. ANN. § 39.052(2) (West Supp. 1994) (providing procedures for a fitness hearing of a perpetrator fourteen years of age or older); IDAHO CODE § 16-1806A (Supp. 1993) (providing for the removal out of the juvenile system of 14 to 18 year old offenders accused of murder, attempted murder, robbery, forcible rape, mayhem, or assault or battery with intent to commit any of the above offenses).

8. CAL. WELF. & INST. CODE § 707(c) (amended by Chapter 453); *see id.* § 707(c)(1)-(3) (amended by Chapter 453) (enumerating the circumstances which must be alleged in order to create such a presumption).

9. *Id.* § 707(c) (amended by Chapter 453); *see id.* (providing for the evaluation of the degree of criminal sophistication exhibited by the minor, whether rehabilitation may be achieved while juvenile court has jurisdiction, the minor's previous delinquent history, success of previous attempts to rehabilitate, and the circumstances and gravity of the alleged offenses).

certain enumerated offenses.[10] Chapter 453 adds to the list the offenses of kidnapping while committing a car jacking, torture, and aggravated mayhem.[11] Chapter 453 also limits the circumstances under which the public may be admitted to a hearing when the offense charged is penetration of genital or anal openings by a foreign object.[12]

Existing law provides for a proceeding by which juvenile court records may be sealed when the subject of the records has reached eighteen years of age.[13] Chapter 453 mandates that the proceeding not be undertaken when the minor has committed certain offenses until six years after the commission of such offenses.[14]

Under existing law, a court of criminal jurisdiction may commit to the California Youth Authority (CYA) any offender who meets certain requirements.[15] Prior law disallowed any individual convicted of first degree murder perpetrated while eighteen years of age or older from being committed to the CYA, instead sentencing the offender to the Department of Corrections.[16] Chapter 453 eliminates this prohibition.[17]

Prior law forbade the commitment or transfer of a person under sixteen years of age to a state prison.[18] Chapter 453 lowers the age restriction to fourteen years as well as mandating that no person under the age sixteen may be housed in any facility under the jurisdiction of the Department of Corrections.[19]

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10. *Id.* § 676(a) (amended by Chapter 453); *see id.* § 676(a)(1)-(28) (amended by Chapter 453) (enumerating such offenses to include, among others, murder, arson of an inhabited building, and rape or sodomy by force). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child*, §§ 544-46 (1989 & Supp. 1994) (discussing who may be admitted to juvenile court hearings).

11. CAL. WELF. & INST. CODE § 676(a)(26)-(28) (amended by Chapter 453); *see* CAL. PENAL CODE § 209.5 (West Supp. 1994) (defining the crime of kidnapping during a car jacking); *see also id.* § 206 (West Supp. 1994) (defining the crime of torture); *id.* § 205 (West 1988) (defining the crime of aggravated mayhem).

12. CAL. WELF. & INST. CODE § 676(a)(7) (amended by Chapter 453); *see* CAL. PENAL CODE § 289(a) (West Supp. 1994) (requiring the offense to be accompanied with violence or threat of violence).

13. CAL. WELF. & INST. CODE § 781(a) (amended by Chapter 453); *see* CAL. CT. R. § 1499(a) (1994) (discussing application procedures for sealing of records). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child*, § 503 (1989 & Supp. 1994) (discussing the sealing of records).

14. CAL. WELF. & INST. CODE § 781(a) (amended by Chapter 453); *see id.* (defining such offenses to be those contained in California Welfare and Institutions Code §§ 707(b), 707(d)(2), or 707(e) including, among others, murder, arson, and robbery while armed with a dangerous or deadly weapon).

15. *Id.* § 1731.5(a) (amended by Chapter 453); *see id.* (requiring the offender be less than 21 years of age at the time of apprehension; is not sentenced to death, imprisonment for life, with or without the possibility of parole, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment; and is not granted probation or was granted probation which was revoked or terminated).

16. 1987 Cal. Stat. ch. 354, sec. 1, at 1466 (amending CAL. WELF. & INST. CODE § 1731.5).

17. CAL. WELF. & INST. CODE § 1731.5(a)(2) (amended by Chapter 453); *see* People v. Ladanio, 211 Cal. App. 3d 1114, 1121, 260 Cal. Rptr. 12, 16 (1989) (calling for the Legislature to correct the anomalous treatment between those convicted for murder and those convicted of attempted murder).

18. 1976 Cal. Stat. ch. 1068, sec. 1.5, at 4741 (amending CAL. WELF. & INST. CODE § 211).

19. CAL. WELF. & INST. CODE § 211 (amended by Chapter 453); *see id.* § 211(b) (enacted by Chapter 453) (stating that this provision is notwithstanding any other provision of law).

Under existing law a person who is honorably discharged by the Youthful Offender Parole Board[20] and who has never been placed in a state prison is released from all penalties resulting from the committed offense and may make a petition to have the conviction dismissed.[21] Chapter 453 provides that the conviction of such a person may be used in a subsequent proceeding if the person was at least sixteen years of age at the time of commission, the court found the person unfit to be dealt with in the juvenile system, the person was tried and convicted of certain offenses, and the person was committed to the Youth Authority.[22] Chapter 453 also provides that the prior conviction may be used to enhance the punishment for subsequent offenses.[23] Chapter 453 further states that a person so discharged is subject to sections of the California Penal Code which place restrictions upon firearm possession by individuals convicted of enumerated felonies.[24]

INTERPRETIVE COMMENT

In California, sixty-three percent of juveniles dealt with under the Youth Authority return to prison as repeat offenders.[25] Critics of the juvenile justice system contend that leniency toward the youthful offender contributes significantly to this statistic by reinforcing the ideal that only the most grievous crimes are intolerable to the system.[26] The intent of the Legislature in enacting

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20. *See id.* § 1716 (West 1984) (creating the Youthful Offender Parole Board within the Youth and Adult Correctional Agency).

21. *Id.* § 1772(a) (amended by Chapter 453).

22. *Id.* § 1772(b)(3) (amended by Chapter 453).

23. *Id.* § 1772(b)(4) (amended by Chapter 453); *see* People v. Pride, 3 Cal. 4th 195, 256-57, 833 P.2d 643, 680-81, 10 Cal. Rptr. 2d 636, 673-74 (1992) (stating that convictions forgiven under the California Welfare and Institutions Code § 1772 may be used to enhance a subsequently imposed sentence).

24. CAL. WELF. & INST. CODE § 1772(b)(2) (amended by Chapter 453); *see* CAL. PENAL CODE § 12021 (West Supp. 1994) (forbidding possession of firearms by persons convicted of certain felonies); *see also id.* § 12021.1 (West Supp. 1994) (listing prior convictions which impose restrictions upon firearm possession and ownership); People v. Bell, 49 Cal. 3d 502, 545, 778 P.2d 129, 154, 262 Cal. Rptr. 1, 26 (1989) (concluding that the California Penal Code § 12021 prohibiting the possession of firearms by certain individuals is not a penalty released under honorable discharge).

25. Ron Harris, *One State Gives Juveniles a Hand Instead of a Cell*, L.A. TIMES, Aug. 25, 1993, at A1; *see id.* (describing the statistical differences between the juvenile justice systems of California and Massachusetts); *see also* Ron Harris, *A Nation's Children in Lockup*, L.A. TIMES, Aug. 22, 1993, at A1 (stating that ". . . studies in California show a correlation between longer sentences and how often minors return to crime.").

26. David Freed, *Justice in Distress: The Devaluation of Crime in Los Angeles*, L.A. TIMES, Dec. 22, 1990, at A1; *see id.* (discussing the various problems in the criminal justice system).

Chapter 453 was to provide a rational response to the growing concerns of the public regarding the increase in seriously violent crime perpetrated by juveniles.[27]

Mark E. Bellamy

Criminal Procedure; parole—county of release

Penal Code § 3003 (amended).
SB 1736 (Greene); 1994 STAT. Ch. 904

Existing law provides, with some exceptions, that a parolee released on parole must be returned to the county from which he or she was committed.[1] Existing law gives the Board of Prison Terms (BPT)[2] or the California Department of Corrections (CDC)[3] the authority to release a parolee to a county other than the

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27. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 560, at 3-4 (Apr. 26, 1994) (quoting the author of AB 560 as to the need for the bill). *But cf.* James H. Andrews, *Trust Us to Deal With Criminal Youth, Contend Juvenile-Court Judges*, CHRISTIAN SCI. MONITOR, Mar. 3, 1994, at 3 (reporting on the meeting of the National Council of Juvenile and Family Court Judges where they asserted that the juvenile justice system is most suited to dealing with violent youth offenders); Simon I. Singer, *Criminal Court Not Place to Get Results on Juveniles*, BUFFALO NEWS, June 12, 1994, at 9 (providing information in opposition to dealing with juveniles in the criminal justice system). *See generally* Charles P. Halgren Jr., *'Kid Glove' Justice System Won't Halt Juvenile Crime*, WASH. TIMES, Nov. 3, 1993, at C2 (expressing one individual's concern that the juvenile justice system is not tough enough on the juvenile offender); Joe Hallihan, *More States Consider Trying Violent Youths as Adults*, S.F. EXAMINER, Oct. 31, 1993, at A5 (discussing various states' legislative treatments of violent youth offenders); Bill Walsh, *Tougher Justice Advocated*, TIMES-PICAYUNE, July 28, 1993, at A8 (reporting Louisiana's legislative response to increasing juvenile crime); *Whip Those Punks Into Shape?*, HARTFORD COURANT, May 29, 1994, at C2 (discussing the public desire in Connecticut to punish the juvenile offender more harshly).

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1. CAL. PENAL CODE § 3003(a) (amended by Chapter 904); *see id.* § 3003(a) (amended by Chapter 904) (explaining that the county from which the parolee was committed refers to the county where the crime for which the parolee was convicted occurred); Telephone Interview with Elva Raish, Legislative Consultant for Senator Greene on SB 1736, in Sacramento, CA (July 19, 1994) (copy on file with the *Pacific Law Journal*) [hereinafter *Interview with Consultant for SB 1736*] (stating that county from which the parolee was committed means, for purposes of California Penal Code § 3003, the county in which the crime was committed); *see also* CAL. PENAL CODE § 3003(g) (amended by Chapter 904) (allowing a parolee to be paroled to another state, pursuant to any other law); Prison Law Office v. Koenig, 186 Cal. App. 3d 560, 566, 233 Cal. Rptr. 590, 594 (1986) (holding that equal distribution of parolees is a reasonable state goal and is constitutional under either a substantive due process or an equal protection analysis). *But see* McCarthy v. Superior Court, 191 Cal. App. 3d 1023, 1029, 236 Cal. Rptr. 833, 836 (1987) (holding that county from which the parolee was committed means, for purposes of California Penal Code § 3003, the county in which a prisoner was committed to prison by the court, and not where he or she committed the crime). *See generally* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Parole* § 1734 (2d ed. 1989 & Supp. 1994) (discussing parole of inmates).

2. *See* CAL. PENAL CODE §§ 5075-5082 (West 1982 & Supp. 1994) (setting forth the powers, duties, and authority of the Board of Prison Terms).

3. *See id.* §§ 5000-5050 (West 1982 & Supp. 1994) (setting forth the powers, duties, and authority of the California Department of Corrections (CDC)).

county where he or she was committed, if it is determined that it would be in the best interests of the public and the parolee to do so.[4] However, existing law provides that a parolee may not be paroled within thirty-five miles of the actual residence of a victim or witness of a violent felony[5] if the victim or witness has requested additional distance in the placement of the parolee, and the BPT or CDC finds that there is a need to protect the life, safety, or well-being of the victim or witness.[6]

Chapter 904 provides that in considering whether a parolee should be released to another county, the BPT or CDC must give the greatest weight to the protection of the victim and the safety of the community.[7] Additionally, the BPT or CDC must consider the proportion of out-of-county commitments to a county compared to the number of commitments from the same county and make an equitable distribution when making parole decisions.[8]

Chapter 904 also establishes a pilot program in San Bernardino County, whereby certain information will be released to local law enforcement agencies regarding inmates paroled in San Bernardino County.[9] The San Bernardino County Sheriff's Department must provide a monthly program evaluation to the CDC, and the CDC must submit a report to the Legislature by June 30, 1996,

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4. *Id.* § 3003(b) (amended by Chapter 904); *see id.* (requiring that a statement be placed in the parolee's permanent record of the reason the parolee is released to another county); *see also id.* § 3003(b)(1)-(6) (amended by Chapter 904) (setting forth factors to be considered in determining if a parolee should be released to a county other than the county from which he or she was committed).

5. *See id.* § 667.5(c) (West Supp. 1994) (defining violent felonies); *id* § 3003(e) (amended by Chapter 904) (declaring that any felony in which a defendant inflicts great bodily injury on any person other than an accomplice constitutes a violent felony); *see also* People v. Hetherington, 154 Cal. App. 3d 1132, 1140, 201 Cal. Rptr 756, 760 (1984) (holding that child molestation and abuse qualifies as a violent felony due to the extreme psychological and emotional harm); *accord* People v. Stephenson, 160 Cal. App. 3d 7, 10, 206 Cal. Rptr. 444, 446 (1984).

6. CAL. PENAL CODE § 3003(e) (amended by Chapter 904); *see* J. Harry Jones, *State Frees Molester, But Not in County*, SAN DIEGO UNION-TRIB., Apr. 9, 1994, at B-1 (discussing briefly the application of the 35-mile law as it applies to Thomas Hetherington, a convicted child molester).

7. CAL. PENAL CODE § 3003(b) (amended by Chapter 904); *see id.* § 3003(c) (amended by Chapter 904) (requiring the CDC to give priority to the safety of the community, witnesses and victims in determining out-of-county commitments); *see also* Michael Connelly & Richard Simon, *Bernardi Asks Review on Placement of Parolees*, L.A. TIMES, Jan. 26, 1989, at Metro 8 (discussing the conflict between a convict's right to parole and the protection of the community).

8. CAL. PENAL CODE § 3003(f) (amended by Chapter 904); *see Prison Law Office*, 186 Cal. App. 3d at 566, 233 Cal. Rptr. at 594 (upholding equal distribution of parolees amongst different counties).

9. CAL. PENAL CODE § 3003(d)(1) (amended by Chapter 904); *see id.* §§ 3003 (d)(1)(A)-(K) (amended by Chapter 904) (requiring that the information to be released, if available, must include the parolee's name, birth date, physical description, date of parole and discharge, registration status as a result of controlled substance abuse, sex or arson offenses, criminal information number, FBI number, social security number, driver's license number, county of commitment, scars, marks and tattoos, offense(s) of which the inmate was convicted that resulted in the parole, address, and contact officer and unit); *see also id.* § 3003(d)(4) (amended by Chapter 904) (prohibiting the unauthorized release or receipt of the parolee's information). This provision of Chapter 904 is actually an incorporation of Assembly Bill 3 of the 1993-94 First Extraordinary Session and is added to Chapter 904 to prevent the chaptering out of these provisions. *See* 1994 Cal. Stat. ch. 904, sec. 2(b), at 3862 (setting forth the double joining scheme of SB 1736 and ABX 3); *see also* 1994 Cal. Stat. ch. 56X, sec. 5(b), at 4034(setting forth the double joining scheme of ABX 3 and SB 1736).

recommending whether the program should be expanded statewide and evaluating the necessary resources for expansion.[10]

INTERPRETIVE COMMENT

Chapter 904 was enacted to prevent counties from receiving a disproportionate amount of parolees.[11] With an increase in the number of parolees in certain counties, some people fear that there is an increase in criminal activity and a reduction of public safety in those counties.[12]

Jonathan P. Hobbs

Criminal Procedure; release from institution upon restoration of sanity

Penal Code §§ 1026.2, 1603 (repealed and amended).
SB 1487 (Mello); 1994 STAT. Ch. 1086

Under existing law, a person found not guilty by reason of insanity,[1] may apply for release from a state hospital or other treatment facility on the basis of his or her sanity being restored.[2] Existing law, requires the court to hold a hearing[3] to

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10. CAL. PENAL CODE § 3003(d)(5), (6) (amended by Chapter 904).

11. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1736, at 2 (May 3, 1994) (stating that the purpose of SB 1736 is to prevent some counties from becoming "dumping grounds" for parolees); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1736, at 2 (Aug. 26, 1994) (stating that Sacramento County and other counties have traditionally received more parolees than were committed from their counties); *Interview with Consultant for SB 1736, supra* note 1 (stating that the purpose of SB 1736 is to keep counties from receiving too many parolees); *see also* Ralph Frammolino, *Paroled Felons Returning in Large Numbers*, L.A. TIMES, Feb. 20, 1990, at B1 (reporting that the number of parolees released in Los Angeles County had drastically increased between 1984 and 1990 and providing statistics of the increase).

12. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1736, at 2 (Aug. 26, 1994); *see* George Skelton, *Capitol Journal: The Per-Capita Factors in Rapist's Parole*, L.A. TIMES, Mar. 24, 1994, at A3 (discussing Modoc county's disapproval of a notorious rapist being paroled to its county); Elizabeth Venant, *Felons, Freedom and Fear*, L.A. TIMES, Jan. 24, 1990, at E1 (discussing society's fear of a parolee committing a repeat offense and stating factors that contribute to recidivism).

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1. *See* CAL. PENAL CODE § 1201 (West Supp. 1994) (setting forth insanity as a cause which may be shown against a judgment, and requiring a trial on the question of insanity); *cf.* D.C. CODE ANN. § 24-301(a) (1989) (providing for acquittal to an offense by reason of insanity).

2. CAL. PENAL CODE § 1026.2(a) (repealed and amended by Chapter 1086); *see id.* § 1026.2(e) (repealed and amended by Chapter 1086) (describing restoration to sanity as no longer being a danger to the health and safety of others); *see also* People v. Tilbury, 54 Cal. 3d 56, 59, 813 P.2d 1318, 1319, 284 Cal. Rptr. 288, 289 (1991) (holding that an applicant for outpatient status is not entitled to a jury trial for a hearing on the applicant's eligibility patient status); People v. Superior Court, 219 Cal. App. 3d 614, 617, 268 Cal. Rptr. 379, 380 (1990) (stating that California Penal Code § 1026.2 sets up a two-step process for determining an applicant's release after having been found not guilty by reason of insanity: (1) The court must first determine if release to outpatient status is appropriate, and (2) after one year of outpatient status, the court must determine

determine if the applicant is a danger to the health and safety of others because of a mental defect,[4] disease,[5] or disorder.[6] Under existing law, the court may grant outpatient status[7] to applicants who have shown proof of having regained sanity, but the court is required to provide notice of the applicant's release to the victims of the applicant's offense for which he or she was committed.[8]

Under prior law, the provisions for outpatient care and for release based on restoration of sanity would have expired January 1, 1995.[9] Chapter 1086 repeals

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whether the applicant's sanity has been restored), *review denied,* 1990 Cal. LEXIS 2396 (1990); *see also* People v. Mallory, 254 Cal. App. 2d 151, 157, 61 Cal. Rptr. 825, 829 (1967) (upholding a finding that an applicant's sanity had not been restored based on the testimony of two physicians appointed by the court, and specifying that the applicant was quite mentally ill, would have more difficulties if released, and had changed very little since his commitment).

3. *See* CAL. PENAL CODE § 1026.2(a) (amended by Chapter 1086) (stating that the applicant must apply to the superior court of the county where the commitment of the applicant was made).

4. *See In re* Ramon M., 22 Cal. 3d 419, 427-28, 584 P.2d 524, 530, 149 Cal. Rptr. 387, 393 (1978) (defining mental defect as a condition not considered capable of either improving or deteriorating and which may be either congenital, the result of injury, or the residual effect of physical or mental defect (quoting Durham v. United States, 214 F.2d 862 (1954))).

5. *See id.* at 427, 584 P.2d at 530, 49 Cal. Rptr. at 393 (stating that a mental disease is a condition which is considered capable of either improving or deteriorating (quoting Durham v. United States, 214 F. 2d 862 (1954)).

6. CAL. PENAL CODE § 1026.2(e) (repealed and amended by Chapter 1086); *see* Conservatorship of Roulet, 23 Cal. 3d 219, 234 n. 14, 590 P.2d 1, 10 n.14, 152 Cal. Rptr. 425, 434 n.14 (1979) (defining mental disorder as any of the mental problems as set forth in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association); *see also* Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992) (holding that in order for a state to continue to confine a person acquitted by reason of insanity, the person must be both dangerous and mentally ill); *In re* Franklin, 7 Cal. 3d 126, 130-31, 496 P.2d 465, 466-67, 101 Cal. Rptr. 553, 554-55 (1972) (finding the release provisions of California Penal Code § 1026.2 constitutional), *superseded by statute as stated in* People v. Tilbury, 54 Cal. 3d 56, 813 P.2d 1318, 284 Cal. Rptr. 288; *id.* (stating that the appropriate standard to apply in a proceeding to determine the release of a person found not guilty by reason of insanity, is whether he or she has improved to the extent that he or she is no longer a danger to the health and safety of others or to himself or herself); People v. Alesch, 152 Cal. App. 3d 365, 372, 199 Cal. Rptr. 314, 317-18 (1984) (including within the definition of "a danger to the health and safety of others" the danger of damaging the property of others because an individual's health includes the freedom from damage to one's property); People v. Blackwell, 117 Cal. App. 3d 372, 378, 172 Cal Rptr. 636, 639 (1981) (upholding the definition of a dangerous person as one who is likely to cause pain, or is reasonably likely to expose himself or herself or others to injury); *cf.* COLO. REV. STAT. § 16-8-115 (Supp. 1994) (codifying the process by which a person adjudged insane may seek release from confinement, upon proof of having regained sanity); GA. CODE ANN. § 17-7-131 (Supp. 1994) (setting forth the procedures following a plea of insanity at the time of a crime); IDAHO CODE § 66-337(b)-(d) (1989) (setting forth the conditions for discharge of a person acquitted of a crime based on insanity); MICH. COMP LAWS ANN. § 330.2050 (West 1992) (describing the process by which a person acquitted of a criminal charge by reason of insanity may be released from confinement); N.Y. CRIM. PROC. LAW § 330.20 (McKinney 1994) (delineating the procedure for release of a person found not responsible by reason of mental disease or defect).

7. *See* People v. Harner, 213 Cal. App. 3d 1400, 1414, 262 Cal. Rptr. 422, 431 (1989) (defining outpatient status as a one-year community-based supervised transition to complete discharge which is to be completed before consideration for final release).

8. CAL. PENAL CODE § 1603(a) (repealed and amended by Chapter 1086); *see id.* § 1603(a)(3) (repealed and amended by Chapter 1086) (requiring the victim or next of kin of the victim to be notified prior to the release of the applicant). *See generally* Janet L. Polstein, Note, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in Jones v. United States,* 34 AM. U. L. REV. 479, 498 (1985) (stating that the public objective of commitment following an acquittal by reason of insanity is to treat, and not punish, the acquitted).

9. 1993 Cal. Legis. Serv. ch. 1141, sec 2, at 5190 (amending CAL. PENAL CODE § 1026.2).

the sunset date, making permanent the provisions regarding release upon restoration of sanity and outpatient programs.[10]

INTERPRETIVE COMMENT

Chapter 1086 makes the outpatient programs for those found not guilty by reason of insanity a permanent part of the law by repealing the sunset dates on these provisions.[11] At the present time, more than 790 people in California have been found not guilty by reason of insanity.[12] The annual cost of housing these people is estimated to be $96,000 per patient, while the outpatient program costs $20,000 per patient per year.[13] Without Chapter 1086, the provisions for outpatient programs would have expired on January 1, 1995, and released individuals may have been released from court supervision, which could have been detrimental to public safety.[14]

Chris J. Ore

Criminal Procedure; restitution funds

Civil Code § 2225 (amended).
SB 1330 (Calderon); 1994 STAT. Ch. 556
(Effective September 12, 1994)

Under existing law, proceeds[1] collected from the sale of materials based on a story, for which a felon was convicted,[2] is subject to a five-year involuntary trust.[3]

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10. 1994 Cal. Legis. Serv. ch. 1086, sec 1, at 5382 (amending CAL. PENAL CODE § 1026.2); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1487, at 1 (Aug. 24, 1994) (stating that SB 1487 would delete the sunset dates and make the programs indefinite in duration).

11. 1994 Cal. Legis. Serv. ch. 1086, sec 1, at 5382 (amending CAL. PENAL CODE § 1026.2).

12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1487, at 2 (Apr. 4, 1994).

13. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1487, at 1 (Apr. 18, 1994).

14. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1487, at 2 (Apr. 21, 1994); *see id.* (stating that the program would have expired on January 1, 1995); *id.* (noting that the sponsor of Chapter 1086 believed that without the mandatory treatment program, the public safety would be endangered).

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1. *See* CAL. CIV. CODE § 2225(a)(9) (amended by Chapter 556) (defining proceeds as all fees, royalties, real property, or other consideration of any and every kind or nature received by or owing to a felon or his or her representatives for the preparation for the purpose of sale of materials, for the sale of the rights to materials, or the sale or distribution by the convicted felon of materials whether earned, accrued, or paid before or after the conviction). The term proceeds includes any interest, earnings, or accretions upon proceeds, and any property received in exchange for proceeds. *Id.*

2. *See id.* § 2225(a)(1) (amended by Chapter 556) (defining a convicted felon as any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court or jury trial or by entry of a plea in court); CAL. PENAL CODE § 689 (West 1985) (specifying the manner of conviction).

Chapter 556 expands the circumstances in which the trust applies, to cover income[4] from anything sold[5] or transferred whose value is enhanced by the notoriety gained from the commission of the crime.[6] Previously, the trust only applied to proceeds in connection with the sale of materials based on the story of the felony for which a felon was convicted.[7]

Under prior law, ten percent of the funds in the trust were reserved for the victim-beneficiary.[8] Under Chapter 556, sixty percent of the funds are now reserved.[9] Additionally, Chapter 556 mandates that any unclaimed funds remaining in the trust at the end of the five-year period be transferred to the State Controller[10] to be allocated to the Restitution Fund.[11]

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3. CAL. CIV. CODE § 2225(10)(b)(2) (amended by Chapter 556); *cf.* ALA. CODE § 41-9-80 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ REV. STAT. ANN. § 13-4202 (1993); ARK CODE ANN. § 16-90-308 (Michie 1987); COLO. REV. STAT. ANN. § 24-4.1-102 (West 1988 & Supp. 1994); FLA. STAT. ANN. § 944.512 (West 1993); TEX. REV. CIV. STAT. ANN. art. 8309-1 (West 1994); WASH. REV. CODE ANN. § 7.68.165 (1992) (setting forth similar provisions for the establishment of an escrow fund for crime victims resulting from proceeds).

4. *See* CAL. CIVIL CODE § 2225(a)(10) (amended by Chapter 556) (defining profits as all income from anything sold or transferred, including any right, the value of which is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted).

5. *See id.* § 2225(a)(8) (amended by Chapter 556) (defining sale to include a lease, license, or any other transfer or alienation taking place in California or elsewhere).

6. *Id.* § 2225(b) (amended by Chapter 556); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1330, at 4-5 (Mar. 1, 1994) (hypothesizing non-speech related activities as: (1) A convicted murderer profiting from his or her notoriety by licensing the rights to toy guns and knives that are similar to the real weapons used in his crimes; (2) a car thief stealing the cars of Hollywood movie stars and using his new found notoriety to market an anti-vehicle-theft device; and (3) a convicted bank robber starting a security consulting firm while in prison).

7. *Compare* 1992 Cal. Legis. Serv. ch. 178, sec. 2, at 719 (amending CAL. CIV. CODE § 2225(b)) (providing that the section is applicable to all proceeds from the story of a felon) *with* CAL. CIV. CODE § 2225(b) (amended by Chapter 556) (providing that the section applies to all profits and proceeds derived from a felony).

8. 1992 Cal. Legis. Serv. ch. 178, sec. 2, at 719 (amending CAL. CIV. CODE § 2225(d)); *see* CAL. CIV. CODE 2225(a)(4)(A) (amended by Chapter 556) (defining beneficiary as any person who has or had the right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted); *see also id.* § 2225(a)(4)(C) (amended by Chapter 556) (providing that "beneficiary" can include devisees of the decedent's will).

9. CAL. CIV. CODE § 2225(d) (amended by Chapter 556).

10. *See* CAL. GOV'T CODE §§ 12400-12470.1 (West 1992 & Supp. 1994) (setting forth duties and regulations of the State Controller).

11. CAL. CIV. CODE § 2225(b)(2) (amended by Chapter 556); *see* CAL. CONST. of 1879, art. I, § 28(b) (providing that all persons who suffer losses as a result of a criminal act have the right of restitution from the person convicted of the crimes which caused their losses); CAL. CIV. CODE § 13967 (West Supp. 1994) (setting forth provisions of the Restitution Fund); *see also* People v. Richards, 17 Cal. 3d 614, 620, 552 P.2d 97, 100-01, 131 Cal. Rptr. 537, 540-41 (1976) (recognizing that restitution has a rehabilitative value for the defendant); People v. Fritchey, 2 Cal. App. 4th 829, 839, 3 Cal. Rptr. 2d 585, 591 (1992) (holding that the Restitution Fund is only for victims who suffer or claim to suffer a compensable loss); Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 715-16 (1984) (explaining that a 1982 act passed by Congress, the Victim and Witness Protection Act (VWPA), was held unconstitutional in States v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983), because it violated substantial and procedural rights); Comment, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 946 (1984) (indicating that restitution has the ability to achieve the goals of criminal law, specifically: rehabilitation, deterrence, and retributivism).

INTERPRETIVE COMMENT

By expanding the provisions pertaining to the trust fund, Chapter 556 provides for additional funding to be allocated to victims of crime.[12]

In addition, Chapter 556 strengthens these restitution provisions by removing their content-based requirements.[13] In doing so, this statute is better able to withstand judicial scrutiny on constitutional grounds.[14] In New York, a similar statute was found unconstitutional by the United States Supreme Court.[15]

In 1991, the United States Supreme Court heard arguments in *Simon & Schuster v. New York State Crime Victims Board.*[16] The constitutionality of the

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12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1330, at 2 (Mar. 1, 1994); *see "Blood Money"—The Legal Profits of Crime Are Hot Stuff* (Day One television broadcast, May 2, 1994), *available in* LEXIS, News Library, Curnws File (stating that people are irresistibly drawn to criminal stories, thus turning criminals into a commodity and listing as examples of items people will buy: Comic books, pictures, paintings, toe tags worn by the deceased criminal, trading cards, and receipts touched by the criminal); *Families of Criminals Shouldn't Profit Either*, COLUMBUS DISPATCH, Feb. 27, 1994, at 2B (stating that the wife of serial killer Thomas Dillon will receive $25,000 for a movie depicting his life and crimes); *Lawmakers Call for Expanding Crime Debate*, UPI, Feb. 1, 1994, *available in* LEXIS, News Library, UPI File (explaining Chapter 556's origin as one that was spurred by the public's anger that Charles Manson would profit from a t-shirt stating 'Charlie Don't Sur' and a Guns 'N Roses album featuring a song written by Manson).

13. *See* 1992 Cal. Legis. Serv. ch. 178, sec. 2, at 719 (amending CAL. CIV. CODE § 2225(b)) (providing that any proceeds from the story of a felon was within the fund's provisions); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1330, at 2 (June 21, 1994) (stating that once the restitution provisions are no longer content-based restrictive on expressive behavior, they stand a better chance of not violating the right to freedom of speech contained within the First Amendment); *see also id.* (stating that a requirement that proceeds or profits be from material based on the story of the felon's crime is still a content-based restriction on expressive behavior and subject to strict constitutional scrutiny); Simon & Schuster, Inc. v. New York State Crime Victims Board, 112 S. Ct. 501, 512 (1991) (holding that a similar New York "Son of Sam" statute violated the First Amendment because its content-based provisions were not drawn narrowly enough to serve a "compelling state interest"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 268 (1994) (indicating that regulations restricting constitutionally privileged conduct must be narrowly tailored to serve a compelling state interest); Lori F. Zavack, Note, *Can States Enact Constitutional "Son of Sam" Laws After* Simon & Schuster, Inc. v. New York State Crime Victims Board?, 37 ST. LOUIS U. L.J. 701, 728 (1993) (stating that in *Simon & Schuster*, it is unclear whether the United States Supreme Court felt that preventing criminals from profiting from their crimes was a compelling state interest). *Contra* Benedict J. Caiola & Esther Oz, Note, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board—*"Crime Goes Hollywood"—The Striking Down of the "Son of Sam" Statute*, 14 WHITTIER L. REV. 859, 891 (1993) (maintaining that had the Supreme Court used more "appropriate" standards of review, such as the rational basis test, the *O'Brien* test, or a strict scrutiny test, then the "Son of Sam" law would have been upheld, and asserting that the New York statute struck a "just balance" between First Amendment interests and the interests of the victim).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1330, at 2 (June 21, 1994); *see* Zavack, *supra* note 13, at 723 (stating that many states are likely to amend or repeal their "Son of Sam" laws in light of *Simon & Schuster, Inc.*); *Beware Ill-Considered Laws Aimed at Criminals Profits*, U.S.A. TODAY, Feb. 18, 1994, at 10A (arguing that "Son of Sam" laws create confusion and stifle free speech and that if these laws are used against criminals, they can be used just as easily against anyone); *see also* Josh Meyer, *Lungren Declines to Seize Profits on Koon's Book*, L.A. TIMES, Apr. 9, 1994, at B1 (maintaining that the Attorney General was "wary of testing" the California law, because the New York statute was found unconstitutional by the United States Supreme Court and that efforts were underway to make the California law "constitutionally bulletproof").

15. Simon & Schuster v. New York State Crime Victim's Bd., 112 S. Ct. 501 (1991); N.Y. EXEC. LAW § 632-a (McKinney 1982 and Supp. 1991).

16. 112 S. Ct. 501 (1991).

New York "Son of Sam" Restitution statute turned on the Supreme Court's holding in this case.[17]

The "Son of Sam" statute was introduced in response to the crimes of David Berkowitz.[18] David Berkowitz, otherwise known as the Son of Sam, terrorized New York in 1977 with his serial killings.[19] Because the rights to his story were worth a considerable amount, the state legislature passed the "Son of Sam" statute to prevent him from profiting from his crimes.[20]

The statute provided that an entity contracting with a person accused of or convicted of a crime, for the production of a book or other work that detailed the crime, must pay the monies owed to the accused to the Crime Victims Board instead.[21] In the controlling U.S. Supreme Court case, Simon & Schuster contracted with organized crime figure Henry Hill in 1981 to write a book detailing Hill's life.[22] Upon learning of the contract, the Crime Victims Board conducted an investigation of the matter.[23]

The Board concluded that the book was covered under the New York statute and that Simon & Schuster had violated the statute by not turning over the money received from the contract with Hill and by subsequently paying Hill.[24] The Board ordered Hill to turn over the payments he had already received and ordered the publishing company to turn over any future payments owed to Hill to the restitution fund.[25]

Simon & Schuster filed suit against the Board alleging that the restitution statute violated the First Amendment.[26] Both parties filed cross motions for summary judgment and the district court held for the defendants.[27] On appeal, the lower court's decision was affirmed.[28]

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17. *Id.*
18. *Id.* at 504.
19. *Id.*
20. *See id.* at 504 (stating that the restitution statute was enacted to prevent Berkowitz from profiting from his crimes); N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1991) (providing a section of the "Son of Sam" statute). The section in full reads:

> Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused of or convicted of a crime in this state, with respect to the reenactment of such crime, by way or a movie, book, magazine article, tape recording, phonograph record, radio, or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by such contract, be owing to the person so accused or convicted or his representatives.

21. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991).
22. *Simon & Schuster*, 112 S.Ct at 506; *see* NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1985) (detailing Pileggi's account of life within a New York mafia).
23. *Simon & Schuster*, 112 S. Ct. at 506.
24. *Id.* at 507.
25. *Id.*
26. *Id.* at 508.
27. *Id.* at 507-08.
28. *Id.* at 508.

Ultimately, the Supreme Court held that the statute was unconstitutional because it violated the First Amendment.[29]

Writing for the majority, Justice O'Connor articulated that, as in *Leathers v. Medlock*,[30] a statute violates the First Amendment if it imposes a financial burden on speakers because of the content of their speech.[31] The "Son of Sam" statute was held to be content-based because it singled out income earned from an expressive activity.[32]

Chapter 556 was drafted to avoid a similar fate. By amending the current California statute, Chapter 556 refocuses California's restitution statute to apply to all activities that result in a felon profiting from his or her crime.[33] Under Chapter 556, the restitution statute has been broadened to include other activities that are non-speech related.[34]

The Legislature, by revising the California statute, has bestowed two benefits upon California citizens: (1) Expanding the percentage of the trust from ten percent to sixty percent results in a greater amount of restitution for crime victims;[35] and (2) amending the statute will enable it to better withstand a First Amendment challenge, thus assuring future victims of crime a method whereby they may be compensated for the damage they have suffered.[36]

Marnie I. Smith

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29. *Id.* at 512.

30. 499 U.S. 439 (1991); *see id.* at 447 (holding that differential taxation of speakers violates the First Amendment if the tax is directed at, or presents the danger of suppressing, particular ideas).

31. *Simon & Schuster*, 112 S. Ct. at 508.

32. *Id.*

33. *Compare* 1992 Cal. Legis. Serv. ch. 178, sec. 2, at 719 (amending CAL. CIV. CODE § 2225(b)) (providing that the section is applicable to all proceeds from the story of a felon) *with* CAL. CIV. CODE § 2225(b) (amended by Chapter 556) (providing that the section applies to all profits and proceeds derived from a felony).

34. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1330, at 4-5 (Mar. 1, 1994) (hypothesizing non-speech related activities that would come under the statutory provisions).

35. CAL. CIV. CODE § 2225(d) (amended by Chapter 556).

36. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1330, at 4-5 (Mar. 1, 1994) (stating that because Chapter 556 does not single out income from expressive activity, it stands a better chance of being held not to violate the First Amendment).

Criminal Procedure; sentencing—pregnant women and women with children

Penal Code §§ 1174, 1174.1, 1174.2, 1174.3, 1174.4, 1174.5. 1174.6, 1174.7, 1174.8 (new).
SB 519 (Presley); 1994 STAT. Ch. 63
(Effective May 9, 1994)

Existing law requires the Department of Corrections to establish and administer a community treatment program for women inmates with children under six years of age.[1] Chapter 63 requires the Department of Corrections to establish the Pregnant and Parenting Women's Alternative Sentencing Program (Program)[2] as a pilot program, for women who have an established history of substance abuse and who meet specified criteria.[3] Under Chapter 63, women who qualify for the Program will be sent to authorized alcohol and drug treatment centers.[4] To be eligible for the Program, the woman must meet specified criteria.[5] The woman must be pregnant or have one or more children under six years of age.[6] The crime she is convicted of must not be one of certain enumerated crimes, nor can she have been convicted of one of those crimes in the past.[7] Additionally, the sentence for the crime she is presently convicted of may not exceed thirty-six months.[8]

Under Chapter 63, before a court sentences an eligible woman to the Program, it must consider a written evaluation by the probation department.[9] The evaluation must include a determination of whether the defendant is eligible, whether participation is in the best interest of the children, and whether she is amenable to treatment.[10] If the child is a dependent of the court,[11] the evaluation must

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1. CAL. PENAL CODE §§ 3410-3424 (West 1982 & Supp. 1994); *see id.* (providing that eligible women inmates with eligible children be placed in public or private community facilities which will provide the best possible care for the mothers and children). A history of substance abuse is not a prerequisite for participation in the program. *Id.*
2. *See id.* § 1174 (enacted by Chapter 63) (establishing the Pregnant and Parenting Women's Alternative Sentencing Program Act).
3. *Id.* §§ 1174-1174.8 (enacted by Chapter 63); *see id.* §§ 1174.1-1174.3 (enacted by Chapter 63) (providing guidelines for the establishment and administration of the Program); *id.* § 1174.4 (enacted by Chapter 63) (providing criteria for participation in the Program); *id.* §§ 1174.5-1174.8 (enacted by Chapter 63) (describing procedures for assessing the status and effectiveness of the Program, including annual reports by the Department of Corrections to the Legislature, commencing no later than January 1, 1996).
4. *Id.* § 1174.2(b) (enacted by Chapter 63); *see id.* § 1174.2(b)(1)(A)-(G) (enacted by Chapter 63) (describing plans for the establishment of centers and qualifications for agency providers, including a history of success, expertise and experience, cost-effectiveness, and the ability to implement programs expeditiously).
5. *Id.* § 1174.4(a)(1)-(3) (enacted by Chapter 63).
6. *Id.* § 1174.4(a)(1) (enacted by Chapter 63).
7. *Id.* § 1174.4(a)(2)(A)-(V) (enacted by Chapter 63); *see id.* (listing the proscribed offenses including, but not limited to, murder, kidnapping, sexual offenses, robbery, arson, and sale of narcotics).
8. *Id.* § 1174.4(a)(3) (enacted by Chapter 63).
9. *Id.* § 1174.4(a)(4) (enacted by Chapter 63).
10. *Id.* § 1174.4(a)(4)(B), (C) (enacted by Chapter 63).
11. *See* CAL. WELF. & INST. CODE § 300 (West Supp. 1994) (describing persons who may be adjudged dependent children of the court).

include a report from the appropriate representative of the county child welfare services agency as to whether placement is in the best interests of the child.[12]

Under Chapter 63, the court must also consider whether the defendant has been recommended for participation by the district attorney.[13] If the court places the defendant in the Program without the district attorney's recommendation, the reasons must be specified in writing for the record.[14]

Under Chapter 63, an eligible defendant who the court concludes may benefit from the Program can be sentenced to state prison with a recommendation that she be allowed to participate in the Program.[15] The Director of Corrections must make a determination whether to accept the defendant, considering the court's recommendation.[16] When the defendant is accepted into the Program she must voluntarily sign an agreement detailing the terms and conditions of her participation.[17] If the defendant successfully completes the Program, including one year of intensive parole supervision, she will be released from parole.[18] Defendants who do not successfully complete the Program must complete their sentences in the state prison.[19]

INTERPRETIVE COMMENT

Chapter 63 was introduced in order to combat a rapidly increasing number of pregnant women and single mothers entering the penal system, many with substance abuse problems.[20] Separation of the mothers and their young children can have damaging consequences for both.[21] It is believed that implementation of

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12. CAL. PENAL CODE § 1174.4(a)(4)(D) (enacted by Chapter 63).
13. *Id.* § 1174.4(a)(5) (enacted by Chapter 63).
14. *Id.*
15. *Id.* § 1174.4(a)(6) (enacted by Chapter 63).
16. *Id.* § 1174.4(a)(7) (enacted by Chapter 63).
17. *Id.* § 1174.4(a)(7)(c) (enacted by Chapter 63).
18. *Id.* § 1174.4(a)(7)(e) (enacted by Chapter 63).
19. *Id.*; *see id.* (specifying that defendants returned to the state prison will receive full credit for their time served in the program).
20. *See* 1994 Cal. Legis. Serv. ch. 63, sec. 1, at 370 (enacting CAL. PENAL CODE §§ 1174-1174.8) (providing statistics to demonstrate the problem, including the fact that over one-half of the women in California prisons have minor children, up to six percent of female inmates are pregnant at a given time, and 39% of inmates report daily drug use in the month before their offense); *see also Drug Crimes Blamed for Rising Number of Women Jailed*, CHI. TRIB., Mar. 23, 1992, at 3 (noting that drug crimes accounted for nearly half of the increase in the nationwide female prison population over the last decade); *Remembering Mother's Day—Behind Bars*, L.A. TIMES, May 7, 1994, at B5 (stating that the population of mothers in prison in 1994 is 65,000); Elizabeth Levitan Spaid, *Advocates Urge Better Conditions for Women Inmates*, CHRISTIAN SCI. MONITOR, May 29, 1991, at 9 (noting that the nationwide female prison population grew from 13,000 to over 40,000 during the 1980's, and that more than 75% of female inmates nationwide are mothers).
21. Eugenie A. Gifford, Comment, *Recent Development: California's Mother-Infant Care Program: An Alternative Model For Prison Mothers*, 2 UCLA WOMEN'S L.J. 279, 279 (1992); *Drug Crimes Blamed For Rising Number of Women Jailed*, *supra* note 20; *see also* 1994 Cal. Legis. Serv. ch. 63, sec. 1, at 370 (enacting CAL. PENAL CODE § 1174-1174.8) (noting the increased likelihood that children of incarcerated women will become school dropouts, substance abusers, pregnant as adolescents, or enter the criminal justice or child welfare systems).

alternative sentencing programs for substance abusing mothers will lead to decreased recidivism, decreased welfare dependency and will be in the best interests of the inmate's children.[22]

Johnnie B. Beer

Criminal Procedure; sex offender registration—expansion of included offenses

Penal Code § 290 (amended).
AB 1211 (Rainey); 1994 STAT. Ch. 864

Existing law orders those convicted of specified sex offenses to register with the appropriate law enforcement agency.[1] Failure to register constitutes a

22. ASSEMBLY COMMITTEE ON WAYS AND MEANS, COMMITTEE ANALYSIS OF SB 519, at 1 (Aug. 25, 1993); *see also Report of the Missouri Task Force on Gender and Justice,* 58 MO. L. REV. 485, 624 (1993) (urging adoption of community-based alternative sentencing programs); *Remembering Mother's Day—Behind Bars, supra* note 20 (stating that programs that help keep mothers and their children together would eventually lower the number of mothers in prison).

1. CAL. PENAL CODE § 290(a) (amended by Chapter 864); *see id.* (requiring registration for persons convicted of the following crimes: Assault with intent to commit rape or sodomy; penetration with a foreign object; sexual intercourse with unmarried females under 18; abduction; lewd and lascivious conduct; incest; sodomy; sex acts with children under 14; oral copulation; and rape or sodomy); *id.* (mandating offenders to register with either the chief of police of the city or applicable university, or the sheriff of the county within two weeks of entering any area for temporary residence or domicile); Carin C. Azarcon & Jennifer L. Miller, Review of Selected 1993 California Legislation, *Crimes; Sex Offenses—Spousal Rape, Sex Offender Registration,* 25 PAC. L.J. 368, 590 (1994) (discussing California Penal Code § 290); *see also* People v. King, 16 Cal. App. 4th 567, 575-76, 20 Cal. Rptr. 2d 220, 224-25 (1993) (finding that mandatory sex offender registration for a person convicted of misdemeanor indecent exposure was not constitutionally violative as cruel and unusual punishment when justified by the defendant's individual culpability); *In re* DeBeque, 212 Cal. App. 3d 241, 245, 260 Cal. Rptr. 441, 444 (1989) (holding that it was not cruel and unusual punishment to require sex offender registration of an individual found guilty of masturbating in front of children), *review denied,* 1989 Cal. LEXIS 4333; People v. Monroe, 168 Cal. App. 3d 1205, 1209, 215 Cal. Rptr. 51, 53 (1985) (determining that due to the use of the term "shall," registration requirements of California Penal Code § 290 are not discretionary); *cf.* ALA. CODE § 13A-11-200 (1982) (providing registration requirements for certain convicted sex offenders); ARIZ. REV. STAT. ANN. § 13-3821 (Supp. 1993) (defining which convicted persons are required to register with the county sheriff); COLO. REV. STAT. § 18-3-412.5 (Supp. 1993) (prescribing registration requirements for convicted child sex offenders); ILL. ANN. STAT. ch. 730, para. 150/3 (Smith-Hurd Supp. 1994) (providing that a child sex offender has a duty to register within 30 days of entering any county in which he or she will reside); MINN. STAT. ANN. § 243.166 (West Supp. 1994) (requiring the registration of predatory offenders); NEV. REV. STAT. § 207.152 (1991) (ordering sex offenders entering any county to register with the county's sheriff within 48 hours); OHIO REV. CODE ANN § 2950.02 (Anderson 1993) (providing registration requirements for habitual sex offenders); OR. REV. STAT. § 181.519(3)(a) (Supp. 1994) (permitting sex offenders 30 days to provide the state police with a change of address after moving); UTAH CODE ANN. § 77-27-21.5 (Supp. 1994) (defining the sex offender registration program); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1994) (listing procedures and applicable definitions for the registration of sex offenders). *Compare* CAL. PENAL CODE § 290(a) (amended by Chapter 864) (prescribing California's sex

misdemeanor.[2]

Chapter 864 expands the list of sex offenses requiring registration to include other specified offenses such as abduction, sexual battery, and employment of a minor to perform sexual acts.[3]

Existing law requires individuals convicted of specified sex offenses who willfully neglect to register to serve a minimum of ninety days in a county jail, but no longer than one year.[4]

Chapter 864 specifies that those convicted of lewd and lascivious acts committed upon a child, who willfully fail to register as required are guilty of a felony and subject to a term of incarceration for sixteen months, or two or three years in the state prison.[5] Individuals found guilty of other enumerated sex offenses who purposefully fail to register will be faced with either county-jail imprisonment for not less than ninety days and no more than one year, or a term of sixteen months or two or three years in the state prison system.[6]

Under prior law, persons who willfully chose not to register as required, after being twice convicted for failing to register, were guilty of a public offense and subject to imprisonment in either county jail or a state penitentiary.[7]

For those previously convicted of committing lewd and lascivious acts upon a minor, Chapter 864 makes their willful failure to register a felony, and if this felony is committed after being discharged from parole, the felon will be required to complete a parole period of at least one year.[8] Chapter 864 also limits probation for those convicted under this provision to only those situations where the interests of justice would be best served.[9]

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offender registration requirements) *with* CAL. HEALTH & SAFETY CODE § 11590 (West 1991) (ordering controlled substance abusers to register). *See generally*, W.J. Dunn, Annotation, *Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Designated Officials*, 82 A.L.R. 2D 398, 398 (1962) (discussing various state law approaches to sex offender registration).

2. CAL. PENAL CODE § 290(g) (amended by Chapter 864).

3. *Id.* § 290(a) (amended by Chapter 864); *see id.* (expanding the statute to include convictions for enumerated offenses under federal or military courts).

4. *Id.* § 290(g) (amended by Chapter 864); *see id.* (specifying that the court has no power to reduce a 90-day jail term for those found to have willfully violated the provisions of this section).

5. *Id.* § 290(g)(2) (amended by Chapter 864); *see id.* § 288(a) (West Supp. 1994) (describing the offense of lewd and lascivious acts committed upon a minor under 14 years of age); *see also* People v. Wallace, 11 Cal. App. 4th 568, 574, 14 Cal. Rptr. 2d 67, 71 (1992) (holding that the terms lewd or lascivious describe an act which suggests moral looseness, or sexual unchasteness, which was intended to arouse sexual passions, desires, or imagination); People v. Gilbert, 5 Cal. App. 4th 1372, 1380, 7 Cal. Rptr. 2d 660, 664 (1992) (finding that lewd and lascivious acts could be committed by any touching of a child with the requisite intent of arousing, appealing to, or gratifying the sexual feelings of either the perpetrator or the victim), *review denied*, 1992 Cal. LEXIS 4055 (1992); *In re* Paul C., 221 Cal. App. 3d 43, 54, 270 Cal. Rptr. 369, 375 (1990) (determining that the required criminal intent could be shown through the circumstances under which the offense occurred), *review denied*, 1990 Cal. LEXIS 4365 (1990).

6. CAL. PENAL CODE § 290(g)(1) (amended by Chapter 864); *see id.* (listing such enumerated offenses as assault with intent to commit rape, sodomy, or oral copulation, anal or vaginal penetration by a foreign object, lewd and lascivious acts in general, continuous sexual abuse of a child, and rape or sodomy).

7. 1993 Cal. Legis. Serv. ch. 595, sec. 8, at 2588 (amending CAL. PENAL CODE § 290(g)(2)).

8. CAL. PENAL CODE § 290(g)(2) (amended by Chapter 864).

9. *Id.*; *see id.* (specifying that if probation is granted to an offender under this provision, the record must specify what interests of justice are being served by such probation).

INTERPRETIVE COMMENT

Chapter 864 was enacted to address the ineffectiveness of existing sex offender registration requirements.[10] By elevating the failure to register from misdemeanor status to felony, Chapter 864 seeks to ensure the future registration of the many offenders who currently neglect to register as required.[11] Due to limited resources, district attorneys are frequently unable to pursue misdemeanor violations, providing an incentive for sex offenders to ignore the law.[12] Given the reported rates of recidivism for sex offenders,[13] proponents believe Chapter 864 to be vital in assisting law enforcement in monitoring the whereabouts of sexual predators within the state.[14]

Sean P. Lafferty

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10. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1211, at 3 (Aug. 12, 1994); *see id.* (stating that since registration violations are only a misdemeanor, most of those required to register neglect to do so); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 3 (June 28, 1994) (noting that a Sacramento County study revealed that 70% of offenders neglected to register after completing probation); *id.* at 4 (citing the Sacramento Sheriff Department's Sexual Assault/Child Abuse Program finding that 70-80% of unsupervised parolees were incorrectly registered); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1211, at 2 (Jan. 27, 1994) (commenting that the registration program for sex offenders as directed by the Department of Justice is not working). *See generally* Kenneth Reich, *Many Simply Ignore the Law; Sex Offender Registration Not Working*, L.A. TIMES, Aug. 8, 1986, at A1 (discussing the failures of existing sex offender registration laws).

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 3 (June 28, 1994); *see id.* (citing Department of Justice support for AB 1211).

12. *Id.* at 4; *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1211, at 2 (Jan. 27, 1994) (noting that prosecutors and the court system are too over-burdened to pursue the additional offense of failure to register); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1211, at 4 (Aug. 12, 1994) (mentioning that since failure to register only constituted a misdemeanor, district attorneys normally failed to file a complaint).

13. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (June 28, 1994) (reporting Department of Justice findings that over a 15 year period, almost 50% of sex offenders were later arrested for some offense and 19.7% of them were rearrested for a sexual crime); *id.* (noting that over 63% of persons arrested initially for forcible rape were subsequently arrested for some type of offense, 25.5% of which were detained for a sexual offense); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1211, at 3 (Aug. 12, 1994) (describing a Sacramento Sheriff Department's program that pursued 290 persons who had failed to register as required by law; the task force operation succeeded in obtaining voluntary registration updates by 60 individuals, and 125 were arrested, 25 of which were arrested for sex offender registration violations).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 1-2 (June 28, 1994); *see id.* at 1 (listing the support of the California Correctional Peace Officers Association, the California Union of Safety Employees, and the Doris Tate Crime Victims Bureau); *cf.* Fred Bayles, *Supporters of Law Want Sex Crime Records Disclosed*, COM. APPEAL (Memphis), Aug. 8, 1994, at 5A (noting that 29 states currently have sex-offender notification statutes, most of which only permit police and school officials to know the residence of convicted offenders); Mimi Hall, *A Furor Brews over Release of Sex Offenders*, USA TODAY, Aug. 17, 1994, at 3A (describing public outrage over a Minnesota state mental hospital's release of a convicted murderer and sex offender, and the Governor's ordering of 24-hour surveillance of the felon); *All Things Considered: Notification Laws Grow in Popularity, but Do They Work?* (National Public Radio, Aug. 17, 1994) (transcript on file with the *Pacific Law Journal*), *available* in LEXIS, News Library, Curnws File (discussing national legislative efforts to require communities to be informed when sex offenders move to their neighborhood).

Criminal Procedure; undocumented felons—state cooperation with the INS

Government Code § 68109 (new).
AB 2979 (Napolitano); 1994 STAT. Ch. 563

Under existing federal law, an alien[1] may be deported from the United States[2] when he or she has committed one of a various assortment of crimes ranging from smuggling controlled substances to aggravated felonies.[3]

Under existing state law, the California Department of Corrections (CDC), must implement and maintain procedures to identify inmates serving terms in state prison who are undocumented aliens and subject to deportation.[4] Furthermore, the CDC is required to report annually to the Legislature the number of persons it has referred to the United States Immigration and Naturalization Service (INS).[5]

Under existing law, the CDC is authorized to cooperate with the INS by providing the use of prison facilities, transportation, and general support, for the purposes of conducting and expediting deportation hearings and subsequent placement of deportation holds on undocumented aliens incarcerated in state prisons.[6]

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1. *See* 8 U.S.C.A. § 1101(a)(3) (West 1970 & Supp. 1994) (defining alien as any person not a citizen or national of the United States).

2. *See id.* § 1101(a)(38) (West 1970 & Supp. 1994) (defining the United States in a geographic sense as including the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands).

3. *Id.* § 1251(a)(1)-(5) (West 1970); *see id.* (listing the various types of deportable aliens under the 1990 Immigration Act including excludable aliens, aliens who have violated nonimmigrant status or conditions of entry, aliens who have committed marriage fraud, drug abusers, and falsifiers of documents); *id.* § 1252 (West 1970 & Supp. 1994) (describing the procedure for apprehension and deportation of deportable aliens from the United States); *see also id.* § 1101 (a)(43) (West 1970 & Supp. 1994) (defining aggravated felony as including murder, illicit trafficking of any controlled substance, firearms, or destructive devices, or any crime of violence). *See generally* William R. Robie & Ira Sandron, *Criminal Aliens in the Immigration System*, 38 FED. B. NEWS & J., Oct. 1991, at 449-53 (describing in detail the general function of criminal alien deportation hearings in the United States district court system).

4. *Id.* § 5025(a) (West Supp. 1994); *cf.* CONN. GEN. STAT. ANN. § 54-1j(a) (West 1985) (instructing a Connecticut court not to accept a plea of guilty or *nolo contendere* from an alien defendant in a criminal proceeding without first warning of possible deportation or exclusion from the United States); D.C. CODE ANN. § 16-713(a) (1989) (providing that a D.C. court, when seeking a plea from a defendant, must first inform the defendant of the possibility of deportation or exclusion from the United State); HAW. REV. STAT. § 802E-2 (Supp. 1992) (requiring a Hawaii court to inform the defendant of possible deportation and exclusion measures if the defendant is an undocumented alien); MICH. COMP. LAWS ANN. § 404.31 (West 1988) (instructing the manager, superintendent, warden, or other person in charge of an institution to report any undocumented aliens in state, county, or private institutions to the Michigan Department of Corrections for possible deportation); OHIO REV. CODE ANN. § 2943.031 (Anderson 1993) (ordering the courts to advise a defendant of possible deportation or exclusion from the United States if the defendant is an undocumented alien); VA. CODE ANN. § 19.2-294.2 (Michie Supp. 1994) (authorizing probation officers in Virginia to notify the INS when a convicted felon is determined to be an alien); *id.* § 53.1-220.1 (Michie 1991) (permitting Virginia state officials to transfer prisoners convicted of violent felony offenses who are undocumented aliens to the INS); WASH. REV. CODE ANN. § 9.94A.280 (West Supp. 1994) (instructing Washington state officials to release undocumented aliens convicted of serious offenses to federal immigration authorities).

5. CAL. PENAL CODE § 5025(d) (West Supp. 1994).

6. *Id.* § 5026 (West Supp. 1994).

Chapter 563 requires every state court to cooperate[7] with the INS to identify and place a deportation hold on any undocumented alien who has been convicted of a felony and is subject to deportation.[8]

INTERPRETIVE COMMENT

According to Legislative findings, the federal government cannot aggressively pursue undocumented aliens who enter the country illegally when they have not been formally deported.[9] Furthermore, Legislative findings suggest that early cooperation with the INS will allow the federal government to perform its share of protecting the state's borders and reduce state costs in imprisoning criminal aliens.[10]

Chapter 563 was enacted in order to place deportation holds on illegal aliens earlier in the process, thus reducing the number of illegal aliens in the courts and prisons and saving local government money.[11] By having the INS present in the courtrooms, the delay encountered by finding and identifying illegal aliens in the prison system is greatly reduced, and the number of INS agents needed is decreased.[12]

Currently, Governor Wilson is suing the federal government to seek reimbursement for the costs of illegal immigration, focusing on the costs of illegal aliens convicted of felonies under state law.[13] The federal government has

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7. *See* CAL. GOV'T CODE § 68109(b) (enacted by Chapter 563) (defining cooperate as providing the INS and its agents with access to all court records available to the public and any necessary paperwork within a reasonable time).

8. *Id.* § 68109(a) (enacted by Chapter 563); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2979, at 2 (Aug. 16, 1994) (stating the purpose of AB 2979 is to require courts to cooperate with the INS in identifying illegal alien felons subject to deportation).

9. 1994 Cal. Legis. Serv. ch. 563, sec. 1, at 2395 (enacting CAL. GOV'T CODE § 68109); *cf.* 8 U.S.C.A. § 1252 (West 1970 & Supp. 1994) (providing the procedure for arresting and deporting an alien from the United States).

10. 1994 Cal. Legis. Serv. ch. 563, sec. 1, at 2395 (enacting CAL. GOV'T CODE § 68109); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2979, at 3 (June 22, 1994) (reporting that a study by the States Joint Committee on Prison Construction and Operations estimated that criminal aliens make up 12% to 16% of California's prison population, at a cost of $350 million per year); Deane Dana, *A New Climate for Control of Our Border*, L.A. TIMES, June 1, 1993, at B5 (reporting that the state will suffer a terrible backlash unless the government works to control the flood of illegal immigrants into California).

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2979, at 3 (June 22, 1994).

12. *Id.*; *see* William Claiborne, *Administration Unveils Plans to Beef up Border Control*, WASH. POST, Feb. 4, 1994, at A2 (stating that the new $368 billion federal border control program could stem the tide of illegal immigration from Mexico, by adding more than 1000 agents and sophisticated electronic equipment to the Southwest border); Robert Suro, *California Border Crackdown Vowed with the Administration Under Fire, Reno Promises a New Effort*, WASH. POST, Sept. 18, 1994, at A3 (detailing Operation Gatekeeper, a new federal program adding and redeploying several hundred Border Patrol agents to crackdown on illegal smugglers and immigrants).

13. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1744, at 4 (June 28, 1994); *see* Greg Lucas, *Speaker Derides Wilson Lawsuit, Governor Seeks $377 Million from U.S. to Pay for Costs of Illegals*, S.F. CHRON., Apr. 27, 1994, at A18 (indicating that Governor Wilson's suit also asks for an unspecified amount to pay for new prison construction, and comes 18 days after Florida Governor Lawton Chiles filed a suit against the federal government asking $1.5 billion to pay for the costs of educating,

responded by fully funding a program to reimburse several states, including California, for some of the costs associated with illegal immigration.[14]

In addition, California voters have recently voted Proposition 187, the controversial "Save Our State" initiative, into law.[15] Proposition 187 denies public services, health care, and education to illegal aliens.[16] Despite constitutional problems the initiative may face, the passage of Proposition 187 reflects the public concern for a solution to California's immigration problems.[17]

Although the immigration problem continues to grow in California, and the costs associated with illegal aliens continues to soar, Chapter 563 provides a chance for governmental entities to work together to find a common solution to the problem.[18] Providing quicker deportation may remedy the immediate problem of illegal alien felons in the state court system, but much work remains to be done to curb the long-range problem of illegal aliens entering the state.[19]

Anthony J. Enciso

Criminal Procedure; undocumented felons—transfer to the INS

Penal Code § 5026 (repealed); §§ 2911, 5025 (amended).
SB 1314 (Johannessen); 1994 STAT. Ch. 567
(Effective September 15, 1994)

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incarcerating, and providing health care to undocumented immigrants).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1744, at 4 (June 28, 1994); *see also* John Jacobs, *Immigration Politics, Round 2,* SACRAMENTO BEE, Apr. 28, 1994, at B8 (revealing that the Clinton administration has recognized the federal government's obligation to help states defray the costs associated with problem borders). *But see* Ken Chavez, *Wilson Sues U.S. Again Over Illegal Immigrant Costs, New Case Seeks Nearly $370 Million for Repayment of Emergency Medical Expenses,* S.F. EXAMINER, June 1, 1994, at A7 (indicating Governor Wilson's second suit asks for nearly $370 million from the federal government for money that California will spend this year to provide emergency medical care to 309,000 undocumented residents).

15. Sam R. Sperry, *Prop. 187 Wins Big; Immigrant Measure Legal Test Promised,* S.F. EXAMINER, Nov. 9, 1994, at A1 (stating that California voters approved Proposition 187 by 60% to 40%).

16. 1994 Cal. Legis. Serv. prop. 187, sec. 5, at A-79 (enacting CAL. WELF. & INST. CODE § 10001.5); *see id.* (excluding illegal aliens from obtaining social services); *id.*, sec. 6, at A-79 (enacting CAL. HEALTH & SAFETY CODE § 130) (prohibiting illegal aliens from publicly funded health care services); *id.*, sec. 7, at A-80 (enacting CAL. EDUC. CODE § 48215) (excluding illegal aliens from attending public elementary and secondary schools); *id.*, sec. 8, at A-80 (enacting CAL. EDUC. CODE § 6610.8) (denying admittance to illegal aliens from post-secondary educational institutions).

17. Joel Kotkin, *187's Opposition May Be Shooting Itself in the Foot,* SACRAMENTO BEE, Nov. 5, 1994, at B7; *see id.* (stating that much of the public's concern over Proposition 187 is the illegal immigrants' drain on hard-pressed public services).

18. Stephen Green, *Imprisonment of Immigrants Costs State Half-Billion a Year,* SACRAMENTO BEE, Mar. 23, 1993, at A3; *see id.* (suggesting that some numbers may be much higher due to filings of misdemeanors against illegal aliens and the costs associated with that practice).

19. *Id.*

Under existing law, the Director of Corrections[1] may, with the approval of the Director of General Services,[2] contract with officials and agencies of the United States for the care, confinement, treatment, education, and employment of persons incarcerated in California state prisons.[3] Under Chapter 567, that provision is no longer applicable to prisoners or wards transferred to the custody of agencies of the United States Attorney General pursuant to California Penal Code section 5025.[4]

Under prior law, the Director of Corrections was required, on or before July 1, 1993, to implement a procedure for referring to the Immigration and Naturalization Service (INS) individuals who may be undocumented and subject to deportation.[5] Under Chapter 567, the Department of Corrections and California Youth Authority[6] must, within ninety days of gaining custody of an inmate or ward, determine whether the inmate or ward is an undocumented felon subject to deportation.[7] Additionally, Chapter 567 requires, within forty-eight hours of determining that an inmate or ward is an undocumented felon, that the inmate or ward be transferred to the custody of the United States Attorney General.[8]

Under prior law, a court was authorized, after all direct appeal opportunities had been exhausted or waived, to refer those incarcerated for certain felonies to the INS for a determination of whether that person was an undocumented felon.[9] Chapter 567 deletes the requirement that a conviction be final, allowing transfer prior to depletion of appeal opportunities.[10] However, the provisions of Chapter 567 will only become operative upon the enactment of federal legislation requiring the United States agencies given custody of the wards or inmates to imprison in federal prisons any undocumented felon sentenced and incarcerated under the laws of California for the entire length of the sentence.[11]

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1. *See* CAL. PENAL CODE § 5050 (West 1982) (creating the position of the Director of Corrections); *see also id.* § 5054 (West 1982) (vesting in the Director of Corrections the management, supervision, and control of state prisons, as well as the care, custody, and treatment of those confined therein).
2. *See* CAL. GOV'T CODE § 14602 (West 1992) (establishing the position of Director of General Services); *id.* § 14605 (West 1992) (defining the duties of the Director of General Services).
3. CAL. PENAL CODE § 2911(a) (amended by Chapter 567).
4. *Id.* § 2911(g) (amended by Chapter 567); *see id.* §5025(a)-(c) (amended by Chapter 567) (providing for the identification and transfer of undocumented felons to the INS).
5. 1992 Cal. Stat. ch. 1322, sec. 2, at 5532 (enacting CAL. PENAL CODE § 5025).
6. *See* CAL. WELF. & INST. CODE § 1710 (West 1984) (establishing the California Youth Authority).
7. CAL. PENAL CODE § 5025(a) (amended by Chapter 567).
8. *Id.* § 5025(c) (amended by Chapter 567).
9. 1992 Cal. Stat. ch. 1322, sec. 2, at 5532 (enacting CAL. PENAL CODE § 5025).
10. 1994 Cal. Legis. Serv. ch. 567, sec 2, at 2406 (amending CAL. PENAL CODE § 5025); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1314, at 3 (Apr. 26, 1994) (noting SB 1314's deletion of the requirement that all appeal opportunities be exhausted prior to referring an incarcerated person to the INS).
11. 1994 Cal. Legis. Serv. ch. 567, sec. 6, at 2407 (amending CAL. PENAL CODE § 5025).

COMMENT

The apparent intent of Chapter 567 is to decrease the financial burden on the State of California placed upon it by the incarceration of undocumented aliens convicted of felonies.[12] In a marked change from prior law, under Chapter 567, an undocumented felon is subject to transfer to the INS prior to the exhaustion of all appeal opportunities.[13] This provision has resulted in concerns that Chapter 567 may violate the Due Process and Equal Protection clauses of the United States Constitution.[14]

The Fourteenth Amendment of the United States Constitution prohibits states from depriving any person of life, liberty, or property without due process of law.[15] The Constitution also proscribes state action which denies to any person within its jurisdiction the equal protection of the State's laws.[16]

It is settled law in California and throughout the United States that aliens, including illegal aliens, are persons protected by the Due Process and Equal Protection clauses of the Constitution.[17] Indeed, the United States Supreme Court, in *United States v. Wong Kim Ark*,[18] stated that all citizens or subjects of other countries, while domiciled in the United States, are within the protection of all of the laws of the United States.[19] It is also unquestioned that resident legal aliens are afforded constitutional protections, and that no plausible distinction exists constitutionally between those who enter the country legally and those who enter illegally.[20] Thus, illegal aliens are persons afforded protection by the Constitution.[21]

Although the effect of this provision would be to deprive an undocumented felon of the opportunities afforded other convicted persons to appeal his or her conviction or to seek other remedies, it does not appear that constitutional due process principles would be violated because the right to appeal is a creature of

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12. *See* 1994 Cal. Legis. Serv., ch. 567, sec. 5, at 2407 (finding that, as of March 31, 1994, there were 13,558 persons incarcerated in state prisons who were subject to INS holds); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1314, at 2 (Aug. 19, 1994) (discussing the burden placed on state resources by incarcerating illegal aliens).

13. CAL. PENAL CODE § 5025 (amended by Chapter 567).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1314, at 3-4 (Apr. 26, 1994); *see* U.S. CONST. amend. XIV (prohibiting states from depriving persons of life, liberty, or property without due process of law); *id.* (mandating that no state shall deprive any person within its borders the equal protection of its laws).

15. U.S. CONST. amend. XIV.

16. *Id.*

17. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding that a person's immigration status does not factor into determining whether an alien is a person for constitutional purposes), *reh'g denied*, 458 U.S. 1131 (1982); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (stating that all persons domiciled in the United States are persons protected by the Constitution); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (concluding that all persons within the territory of the United States are entitled to the protections provided by the Fifth Amendment).

18. 169 U.S. 649 (1898).

19. *Wong Kim Ark*, 169 U.S. at 693.

20. *Plyler*, 457 U.S. at 210.

21. *Id.*

statutory law, and not a constitutional guarantee.[22] In order to possess a statutory right to appeal, one must first come within the provisions of the applicable statute.[23] Although the California statute that provides for appeals does not expressly except from its provisions undocumented felons, it is possible the provisions of Chapter 567 could serve to carve out such an exception.[24] Because the right to appeal is statutory in nature, the right can be taken away in certain circumstances by another statute without violating constitutional Due Process principles.[25]

In *Plyler v. Doe,*[26] the United States Supreme Court held that illegal aliens are entitled to the equal protection of the laws of the states in which they are found.[27] Although the Equal Protection Clause does not require that all people be treated equally, those similarly situated must be treated alike.[28] Likewise, classifications of people are not forbidden.[29] In fact, legislatures are given wide latitude to legitimately classify groups of people to accommodate the public and private needs of their respective states.[30] Once a legislature makes that decision, these classifications are entitled to a presumption that they are valid.[31]

Two levels of scrutiny have been developed under which these classifications have been examined.[32] If the classification does not involve a suspect class, or infringe upon a fundamental right, the classification must only be rationally

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22. *See* CAL. PENAL CODE §§ 1237, 1237.5 (West Supp. 1994) (authorizing defendants to appeal certain actions taken in superior courts); *see also* Abney v. United States, 431 U.S. 651, 656 (1977) (stating that a person's situation must come within the applicable statute in order to possess the right to appeal); *id.* (stating there is no constitutional right to appeal); People v. Rawlings, 42 Cal. App. 3d 952, 959, 117 Cal. Rptr. 651, 656 (1974) (deciding that, if no appeal is authorized by statute, no right of appeal exists).

23. *Abney,* 431 U.S. at 656.

24. *See* CAL. PENAL CODE § 1237 (West Supp. 1994) (creating the statutory right to appeal).

25. *See Rawlings,* 42 Cal. App. 3d at 959, 117 Cal. Rptr. at 656 (expressing the view that the right to appeal exists at the will of the legislature); *cf.* Goetz v. Aetna Casualty & Sur. Co., 710 F.2d 561, 564 (1983) (stating that the legislature may abolish common law rights without impacting constitutional guarantees as long as it furthers legitimate states ends).

26. 457 U.S. 202 (1982), *reh'g denied,* 458 U.S. 1131 (1982).

27. *Plyler,* 457 U.S. at 215.

28. *Id.*; *see* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (stating that the command of the Equal Protection Clause is to treat those similarly circumstanced alike); *see also* Tigner v. Texas, 310 U.S. 141, 147 (1940) (providing that the Constitution does not require things that are factually different to be treated as if they were the same), *reh'g denied,* 310 U.S. 659 (1940).

29. *See* Nordlinger v. Hahn, 112 S. Ct. 2326, 2331 (1992) (stating that the Equal Protection Clause was promulgated for the purpose of keeping governmental decisionmakers from treating as different people who were in all relevant aspects alike).

30. *Plyler,* 457 U.S. at 216.

31. *Nordlinger,* 112 S. Ct. at 2331-32; *see* Serrano v. Priest, 18 Cal. 3d 728, 760-61, 557 P.2d 929, 947-48, 135 Cal. Rptr. 345, 363-64 (1976) (holding that state legislation is entitled to a presumption of constitutionality), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977).

32. *Serrano,* 18 Cal. 3d at 761, 557 P.2d at 947-48, 135 Cal. Rptr. at 363-64; *see* Marshall v. Parker, 470 F.2d 34, 38 (9th Cir. 1972) (stating that the standards used for evaluating classifications and the justifications for them vary according to the interest affected), *aff'd,* 414 U.S. 417 (1974); Keker v. Procunier 398 F. Supp. 756, 761 (E.D. Cal. 1975) (determining that the level of scrutiny applied will be based upon the nature of the interest protected).

related to a conceivable state purpose.[33] If, on the other hand, the classification involves a suspect class, or impinges upon a fundamental right, the classification must be tailored to serve a compelling governmental interest to be considered valid.[34]

In determining whether legislative classifications involve a suspect class, it is appropriate to look at whether the classification is relevant to a proper legislative goal.[35] Chapter 567's goal of reducing expenditures incurred by incarcerating undocumented felons appears to be a proper legislative goal since state spending falls within the purview of the Legislature.[36] By classifying undocumented felons as a group of people who may not afford themselves of the appellate process, this goal could conceivably be furthered as these prisoners pose a significant drain on the state's resources and immediate transfer of them would result in substantial savings.[37] Finally, it has been specifically held that illegal aliens are not a suspect class of people requiring a higher level of scrutiny of the laws impacting them.[38]

The other factor which would cause the courts to give Chapter 567 a higher level of scrutiny is whether it involved a fundamental interest.[39] Since the right to appeal is statutory, not constitutional in nature, it is likely not fundamental.[40]

Thus, since illegal aliens are not a suspect class, and a fundamental interest is not involved, Chapter 567's transfer provisions are likely to be given the lower, rationally-related test.[41]

It appears that the concerns over the constitutionality of Chapter 567's provision which allows transfer of undocumented aliens prior to the exhaustion of all appeal opportunities are unfounded.[42] Thus, upon enactment of federal legislation requiring the Attorney General to hold transferred undocumented

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33. *Nordlinger*, 112 S. Ct. at 2331-32; *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (requiring that a legislative classification bear some fair relationship to a legitimate public purpose); Bell v. Hongisto, 501 F.2d 346, 353 (9th Cir. 1974) (holding that a state law is valid so long as it rationally furthers a legitimate state interest), *cert. denied*, 420 U.S. 962 (1975).

34. *Plyler*, 457 U.S. at 217.

35. *Id.*

36. *See* CAL. CONST. art. IV, § 12 (defining the Legislature's role in the state budget).

37. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1314, at 3 (Apr. 26, 1994) (stating that there are over 18,000 undocumented prisoners in California state prisons); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1314, at 2 (Aug. 19, 1994) (explaining that illegal felons cost California over $350 million annually).

38. *Plyler*, 457 U.S. at 223.

39. *Id.* at 216-17.

40. *See* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (holding that the key to determining whether an interest is fundamental is if it is explicitly or implicitly found in the state or federal constitution), *reh'g denied*, 411 U.S. 959 (1973); *see also Keker*, 398 F. Supp. at 762 (stating that even some rights found in the federal constitution are not considered fundamental); *cf.* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (determining that states are not required to provide appellate review of judgments or orders), *reh'g denied*, 351 U.S. 958 (1956).

41. *See Bell*, 501 F.2d at 355 (using the rational relationship test to evaluate an individual's right to appeal).

42. *See id.* (finding a statute limiting a person's right to appeal constitutional because it furthered a legitimate state objective).

felons for their entire terms, use of Chapter 567's provisions should result in significant savings for California.[43]

T. Scott Belden

43. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1314, at 2 (June 2, 1994) (noting that over one billion dollars was spent by the State of California over the past five years incarcerating undocumented felons).