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Crimes

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Crimes

Crimes; assault and battery

Penal Code § 836.1 (new).

AB 461 (Rogan); 1995 STAT. Ch. 52

Existing law sets forth the definitions for assault¹ and battery² generally and also provides conditions wherein the penalties for these crimes will be enhanced.³ Existing law further states that if an assault or battery is committed against a firefighter, emergency medical technician,⁴ or a mobile intensive care paramedic⁵ engaged in the performance of his or her duties, and the perpetrator knows or reasonably should know the victim is one of the aforementioned, then the perpetrator may be punished more severely.⁶

Under existing law, a peace officer⁷ is authorized to arrest⁸ without a warrant when the officer has reasonable cause⁹ to believe that the person has committed a public offense¹⁰ in the officer's presence, or committed a felony¹¹ not in the officer's presence, or when the officer has reasonable cause to believe that the

1. See CAL. PENAL CODE § 240 (West 1988) (defining "assault" as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another); *id.* § 241(a) (West Supp. 1995) (setting forth the punishment for an assault as a fine not exceeding \$1000 or by imprisonment in the county jail not exceeding six months, or both); *id.* § 241.6 (West Supp. 1995) (specifying the punishment for an assault on a school employee engaged in the performance of his or her duties); *id.* § 245 (West Supp. 1995) (providing enhanced punishment for an assault with a deadly weapon).

2. See *id.* § 242 (West 1988) (defining "battery" as any willful and unlawful use of force or violence upon another); *id.* § 243(a) (West Supp. 1995) (setting forth the punishment for a battery as a fine of not more than \$2000 or by imprisonment in a county jail for no longer than six months, or both); *id.* § 243.6 (West Supp. 1995) (providing the punishment for battery against a school employee engaged in the performance of his or her duties).

3. *Id.* §§ 240, 242 (West 1988). See generally CAL. R. Cr., 421-23 (West 1995) (defining the circumstances for aggravation, mitigation, and enhancement).

4. See CAL. HEALTH & SAFETY CODE §§ 1797.170-1797.172 (West 1990 & Supp. 1995) (defining emergency medical technicians).

5. See CAL. PENAL CODE § 241(c)(3) (West 1988) (describing a mobile intensive care paramedic).

6. *Id.* § 241(b) (West 1988); see *id.* (providing that the penalty for such an assault is punishable by a fine not exceeding \$2000 or by imprisonment in the county jail not exceeding one year, or by both the fine and the imprisonment).

7. See *id.* § 830 (West Supp. 1995) (defining peace officer).

8. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 115-24 (1991) (explaining the basic rules and exigencies involving arrests and arrest warrants).

9. See *People v. Price*, 1 Cal. 4th 324, 410, 821 P.2d 610, 657, 3 Cal. Rptr. 2d 106, 153 (1991) (defining "reasonable cause to arrest without a warrant" as when such facts and circumstances are known to an arresting officer that would cause an ordinarily prudent person to honestly believe and strongly suspect that an offense has been committed and the accused is guilty of such offense).

10. See CAL. PENAL CODE § 15 (West 1988) (defining "public offense" as an act committed or omitted in violation of a law forbidding or commanding it and to which is punished by any of the following: (1) death, (2) imprisonment, (3) fine, (4) removal from office, or (5) disqualification to hold any state office).

11. See *id.* § 17(a) (West 1988) (defining a "felony" as a crime which is punishable with death or by imprisonment in the state prison); *id.* (noting that every other crime or public offense is a misdemeanor except those offenses that are classified as infractions).

person has committed a felony regardless of whether or not it actually was committed.¹²

Chapter 52 adds a provision that authorizes a peace officer to arrest a person without a warrant when the officer has reasonable cause to believe that the person has committed an assault or battery against an on-duty firefighter, emergency medical technician, or mobile intensive care paramedic, when the perpetrator knew or reasonably should have known that the victim was one of the aforementioned, even though the assault or battery was not committed in the presence of the officer and regardless of whether or not it actually was committed.¹³

COMMENT

Chapter 52 was enacted out of concern regarding the increasing number of attacks upon firefighters, emergency medical technicians and mobile intensive care paramedics when they are in the line of duty.¹⁴ Chapter 52 expands the scope

12. *Id.* § 836 (West Supp. 1995).

13. *Id.* § 836.1 (enacted by Chapter 52); *see id.* § 241(b) (West Supp. 1995) (specifying that the person who committed the assault must have known or reasonably should have known that the victim was a firefighter, emergency medical technician, or mobile intensive care worker, among others, engaged in the performance of his or her duties); *id.* § 243(b) (West Supp. 1995) (specifying that the person who committed the battery must have known, or reasonably should have known, that the victim was, among others, a firefighter, emergency medical technician, or mobile intensive care worker, engaged in the performance of his/her duties). *See generally* Donald Dripps, *More on Search Warrants, Good Faith and Probable Cause*, 95 YALE L.J. 1424, 1424-30 (1986) (discussing the nature of the warrant process and probable cause); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 853 (1993) (explaining that at common law, warrantless arrests were not permitted for misdemeanors unless the offense involved a breach of the peace and was committed in the presence of the person making the arrest); *id.* at 783 (noting that a few jurisdictions have completely eliminated the presence requirement and allow warrantless arrests for both felonies and misdemeanors if there is probable cause to believe that the person committed a crime).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 461, at 3-4 (May 9, 1995); *see Around the Tristate*, CINCINNATI ENQUIRER, Sept. 23, 1994, at B2 (discussing the arrest of a man for felonious assault on a firefighter who was trying to get to the scene of a fire); *see also East Hartford Police News*, HARTFORD COURANT, Aug. 2, 1994, at D3 (reporting an incident in which a man attacked two paramedics while they were aiding his sick father); *House Bill*, CHI. DAILY L. BULL., May 24, 1994, at 3 (discussing legislation in Chicago which would expand the offense of aggravated assault of an on-duty police officer or firefighter from a misdemeanor to a Class-4 Felony); Chip Johnson, *Plan Urges Contracting Out to Aid Paramedics*, L.A. TIMES, Jan. 5, 1994, at B1 (noting that in 1993, there were 68 assaults on firefighters); Lee Leonard, *Bigger Penalties for Assault OK'd*, COLUMBUS DISPATCH, Mar. 3, 1994, at 2C (discussing the passage of legislation in Ohio which sharply increased the penalty for assaulting a police officer or firefighter or police animal); *Man Arrested in Attack on Police*, SEATTLE TIMES, June 16, 1994, at B2 (describing an incident in which a man attacked the victim and then kicked a firefighter and tried to hit two police officers); Kammie Michael, *Emergency Workers Seek New Law to Curb Attacks*, HERALD-SUN (Durham, N.C.), May 24, 1995, at C2 (discussing the recorded 70 assaults on emergency workers over a five-year period and how the increase in assaults on emergency workers is the reason for a call for legislation in North Carolina making an assault on an emergency medical worker a felony); Kammie Michael, *Working Firefighters Dodge Hurled Objects*, HERALD-SUN (Durham, N.C.), July 21, 1994, at A1 (describing the increasing frequency of situations in which firefighters have been subjected to rocks, bottles and chunks of asphalt being hurled at them when they respond to an emergency call); Ray Sanchez, *2 Charged in July Attack on Firefighters*, NEWSDAY, Nov. 11, 1993, at 137 (discussing the arrest of several people in connection with the firebombing of a fire truck which seriously injured three firefighters).

of warrantless arrests in order to assure firefighters, emergency medical technicians and mobile intensive care paramedics that if they are the victim of an assault or battery, the attacker will not go unpunished.¹⁵

Molly J. Mrowka

Crimes; child abuse reporting

Penal Code § 11167.5 (amended).
AB 1440 (Davis); 1995 STAT. Ch. 391

Under existing law, certain professionals and governmental employees must report suspected child abuse to a child protective agency.¹ Health care practitioners² must perform an assessment of a newborn infant and the mother if the infant's toxicology report indicates the presence of controlled substances.³ If the assessment indicates a risk of child abuse, the assessment is forwarded to a child protection agency as a suspected child abuse report.⁴

15. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 461, at 4 (May 9, 1995).

1. CAL. PENAL CODE § 11166 (West Supp. 1995); *see id.* (mandating reports from child care custodians, health practitioners, employees of child protective agencies, firefighters, and animal control officers, among others, to a child protective agency when there is a reasonable suspicion of child abuse based on observations made during the scope of employment); *see also id.* § 270.5(b) (West 1988) (defining "child protective agency" to include the police or sheriff's department, county probation departments, or county welfare departments); *In re Troy D.*, 215 Cal. App. 3d 889, 902, 263 Cal. Rptr. 869, 875-76 (1989) (finding that the reporting requirement applies to children born under the influence of a controlled substance even though the abuse was committed against the fetus prior to birth); *People v. Youghanz*, 156 Cal. App. 3d 811, 817-18, 202 Cal. Rptr. 907, 911 (1984) (holding that a health care worker does not need to provide warnings regarding constitutional rights when the health care practitioner is questioning the suspected child abuser since the provider is not a police agent); 72 Op. Cal. Att'y Gen. 216 (1989) (stating that a ballet teacher at a private school is required to report suspected child abuse). *But see* 70 Op. Cal. Att'y Gen. 38 (1987) (opining that a county probation officer has no duty to report physical injuries inflicted by police officers on a child during an arrest involving excessive force). *See generally* Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R. 4TH 782, 810-14, 844-45 (1989 & Supp. 1995) (discussing the right to privacy, the right against self-incrimination and the need for supplemental child abuse reports).

2. *See* CAL. PENAL CODE § 11165.8 (West 1992) (defining "health care practitioners" to include physicians, psychiatrists, dentists, nurses, and others).

3. *Id.* § 11165.13 (West 1992); *see* CAL. HEALTH & SAFETY CODE § 10900 (West 1991) (requiring the state to develop an assessment procedure for pregnant and post-partum substance-abusing women); *id.* § 10901 (West 1991) (mandating that the counties provide a method for practitioner assessment).

4. CAL. PENAL CODE § 11165.13 (West 1992); *see id.* (noting that a positive toxicology report is insufficient by itself to establish a risk of child abuse and that a report based solely on the parent's inability to provide regular care for the child due to the parent's substance abuse will be reported only to the county welfare departments and not to law enforcement agencies).

These various reports are confidential and disclosure is a misdemeanor.⁵ However, various agencies and persons are exempt from the nondisclosure mandate.⁶

Chapter 391 permits authorized persons within county health departments to receive the assessment required by a positive toxicology screen of a newborn infant.⁷

COMMENT

Chapter 391 is intended to allow county health departments access to prenatal substance abuse information.⁸ Given that perinatal substance abuse is a serious health and economic problem, Chapter 391 allows county health departments access to statistical information in order to help determine the extent of the problem and relevant factors.⁹ This approach recognizes California's interest in

5. *Id.* § 11167.5(a) (amended by Chapter 391); *see id.* (enumerating the punishment for violation as up to six months in jail, a \$500 fine, or both); *see also id.* § 17(a) (West Supp. 1995) (defining a "misdemeanor" as a crime which is not a felony or an infraction). *But see* County of Los Angeles v. City of Los Angeles, 219 Cal. App. 2d 838, 844, 33 Cal. Rptr. 503, 507 (1963) (holding that when the violation does not relate to state affairs, the applicable punishment provisions are under city ordinances rather than under the California Penal Code because cities enjoy freedom from state control with respect to municipal affairs).

6. CAL. PENAL CODE § 11167.5(b) (amended by Chapter 391); *see, e.g., id.* § 11167.5(b)(4) (amended by Chapter 391) (allowing disclosure of child abuse reports to multidisciplinary personnel teams); *id.* § 11167.5(b)(5) (amended by Chapter 391) (allowing disclosure of child abuse reports to child-care facility licensing agencies); *id.* § 11167.5(b)(8) (amended by Chapter 391) (allowing disclosure of child abuse reports to coroners and medical examiners when conducting a child autopsy).

7. *Id.* § 11167.5(c) (amended by Chapter 391); *cf.* FLA. STAT. ANN. § 415.504(1)(a) (West 1993) (requiring that child abuse reports be made by health care practitioners to the Department of Health); *id.* § 415.504(4)(a)(4) (West Supp. 1995) (indicating that child abuse report information is to be used for statistical reports); ILL. ANN. STAT. ch. 325, para. 5/4 (Smith-Hurd 1993) (providing that child abuse reports be made by health care practitioners to the Department of Children and Family Services); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1993) (requiring that child abuse reports be made to the Department of Social Services if a health care provider reasonably believes that child is victim of child abuse); MISS. CODE ANN. § 43-21-257(2) (Supp. 1994) (allowing the Division of Youth Services to compile statistical information regarding child abuse).

8. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1440, at 1 (May 18, 1995); Telephone Interview with Laura Opsahl, Legislative Consultant to Assemblymember Susan Davis on AB 1440 (June 24, 1995) (notes on file with the *Pacific Law Journal*).

9. Telephone Interview with Laura Opsahl, *supra* note 8; *see id.* (indicating that receipt of assessments will provide the county health department access to the aggregate data to track prenatal substance abuse and determine the extent and nature of the problem); Tom Philp, *Alarm Over Meth Babies*, SACRAMENTO BEE, Aug. 6, 1995, at A1 (noting that while the impression is that methamphetamine use has resulted in a costly medical program for newly born infants, no agency tracks the number of babies affected, the extent of the medical treatment given to these newborns, or the amount of public funding used to treat these children); *see also* 1994 Cal. Legis. Serv. ch. 950, sec. 1(b)(3), at 4706 (enacting California Health and Safety Code §§ 1502.3 and 1523.5; amending California Health and Safety Code §§ 1502 and 1520.5; and amending California Welfare and Institutions Code § 16501) (reporting that child protective agencies have noticed an increasing severity of child abuse, including that abuse which results from substance abuse); *In re* Troy D., 215 Cal. App. 3d 889, 898, 263 Cal. Rptr. 869, 873 (1989) (noting that an estimated 11% of all American births show prenatal substance abuse, which indicates a problem of great proportions); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1440, at 3 (July 11, 1995) (stating that the Department of Alcohol and Drug Programs estimated in 1990 that between 59,000 and 72,000 children were born with prenatal drug and alcohol exposure); Nancy L. Day & Gale A. Richardson, *Comparative Teratogenicity of Alcohol and Other Drugs: Prenatal Exposure to Alcohol or Other Drugs Can Impair Physical, Intellectual and Behavioral*

maintaining the delicate balance between a parent's right to raise a child and the government's right to protect and safeguard that child.¹⁰

June D. Coleman

Crimes; custodial officers—tear gas weapons

Penal Code § 12403.9 (new); § 12403 (amended).
AB 176 (Bowler); 1995 STAT. Ch. 15

Existing law grants peace officers¹ the ability to purchase, possess, transport, and use any tear gas weapon² so long as the peace officer satisfactorily completes an instruction program approved by the Commission on Peace Officer Standards

Development, ALCOHOL HEALTH & RES. WORLD, Jan. 1994, at 42 (discussing the adverse effects of maternal substance abuse, and noting that there is insufficient data to explore this area further); Michael M. Engelgaw et al., *Prevalence of Illicit Drugs Detected in the Urine of Women of Childbearing Age in Alabama Public Health Clinics*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PUB. HEALTH REP., July 1994, at 530 (arguing that while prenatal substance abuse remains relatively constant, the incident rate is still a major public concern); Mark G. Fuller, *A New Day: Strategies for Managing Psychiatric and Substance Abuse Benefits*, HEALTH CARE MGMT. REV., Sept. 22, 1994, at 20 (indicating that the 375,000 to 740,000 drug-exposed newborns per year result in additional neonatal care costs due to longer hospital stays, premature births, and low birth weight); Philp, *supra* (stating that surveys at a local hospitals indicate that 25% of mothers who have a premature baby use controlled substances); *id.* (citing a statewide study which indicates that 6.25% of mothers use methamphetamine during pregnancy or the three months preceding pregnancy); Telephone Interview with Laura Opsahl, *supra* note 8 (noting that prenatal substance abuse is on the rise).

10. See 1980 Cal. Stat. ch. 1071, sec. 5, at 3425 (enacting California Penal Code §§ 11165, 11166, 11167, 11168, 11169, 11170, 11171, 11172, 11174; and repealing California Penal Code §§ 11161.5, 11161.6, and 11161.7) (recognizing California's interest in maintaining the balance); Telephone Interview with Laura Opsahl, *supra* note 8 (explaining that the Governor was convinced that information made available by Chapter 391 would only contain statistical information, alleviating any fears regarding the disclosure of confidential information); *cf.* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1440, at 3-4 (July 20, 1995) (stating that the Governor previously vetoed a bill nearly identical to Chapter 391 in 1994 because the bill did not limit the information available to the county health department to statistical data).

1. See CAL. PENAL CODE § 830 (West Supp. 1995) (defining "peace officer" as any person who meets the applicable standards required by law for a peace officer as determined under California Penal Code §§ 830.1-.65) (West Supp. 1995); *see also id.* § 830.55 (West Supp. 1995) (including as peace officers those persons employed as correctional officers who possess the authority and responsibility for supervision over certain state prison inmates and who perform tasks relating to the operation of a detention facility). *But see id.* §§ 830.7-.9, 830.11 (West Supp. 1995) (specifying that although certain persons are not peace officers, they possess the powers of arrest that belong to a peace officer); *id.* § 830.12 (West Supp. 1995) (stating that litter control officers and vehicle abatement officers, sanitation workers, and solid waste specialists are not peace officers and do not possess powers of arrest).

2. See *id.* § 12402 (West 1992) (defining "tear gas weapon" as either of the following: (1) a shell, cartridge, or bomb capable of releasing tear gas; or (2) a revolver, pistol, fountain pen gun, billie or other form of device intended for the release of tear gas); *see also id.* § 12401 (West 1992) (defining "tear gas" as including any liquid, gaseous, or solid substance which, when vaporized or used, results in temporary physical discomfort or permanent injury); *People v. DeLaCruz*, 20 Cal. App. 4th 955, 960, 25 Cal. Rptr. 2d 202, 205 (1993) (affirming that chemical mace constitutes tear gas); *Cook v. Superior Court of San Diego County*, 4 Cal. App. 3d 822, 829, 84 Cal. Rptr. 664, 669 (1970) (finding that chemical mace is tear gas).

and Training.³ In addition, existing law requires that any tear gas weapon utilized must be deemed acceptable by the Department of Justice.⁴ Finally, existing law permits custodial officers to use reasonable force in ensuring custody of prisoners.⁵

Chapter 15 expressly grants custodial officers⁶ the ability to purchase, possess, transport, and use tear gas weapons.⁷ However, this authority is subject to the express limitation that custodial officers may carry tear gas weapons, in accordance with Chapter 15, only while on duty.⁸ While off duty, custodial officers may carry tear gas weapons only in accordance with all other laws governing their use.⁹

3. CAL. PENAL CODE § 12403 (amended by Chapter 15); *see id.* § 13500 (West Supp. 1995) (establishing a Commission on Peace Officer Standards and Training, consisting of 13 diverse members, within the Department of Justice); *cf.* ARK. CODE ANN. § 5-73-124(b) (Michie 1993) (providing that peace officers have the ability to use tear gas while in the course of official duties); MD. ANN. CODE art. 27, § 36(a)(1), (f)(1) (1994) (allowing an officer of any city, county, or the state who is entitled or required to carry a chemical mace, pepper mace or tear gas device as part of the officer's official equipment, to do so).

4. CAL. PENAL CODE § 12403 (amended by Chapter 15); *see id.* § 12451 (West 1992) (defining "acceptable" as being reasonably free of any undue hazard, when used by or upon a human being, as determined by several factors such as: (1) the reasonable safety, availability and effectiveness of other devices; (2) the inherent hazard in using the device versus the inherent hazard in the situation that the weapon is designed to control; and (3) the manner in which the weapon is expected to be used as well as the way the manufacturer or seller recommended that it be used).

5. *Id.* § 831(f) (West Supp. 1995).

6. *See id.* § 831(a) (West Supp. 1995) (defining "custodial officer" as a public officer, employed by a city or county law enforcement agency, with the authority and responsibility for securing custody of prisoners and as one who assists in the operation of the local detention facility); *see also id.* (emphasizing that a custodial officer is not a peace officer); *id.* § 831.5(a) (West Supp. 1995) (defining "custodial officer" additionally as any non-peace officer employed by San Diego County, Fresno County, or any county with a population of 425,000 or less, with the responsibility of maintaining custody of prisoners, and as one who assists with the operation of the detention facility); *id.* (stating that a custodial officer includes a person designated as a correctional officer, jailer, or some other synonymous title by San Diego County, Fresno County or any other county with a population of less than 425,000). *But cf.* County of Santa Clara v. Deputy Sheriff's Ass'n, 3 Cal. 4th 873, 880, 838 P.2d 781, 785, 13 Cal. Rptr. 2d 53, 57 (1992) (noting that legislative attempts to grant peace officer status to custodial officers have proven fruitless); *id.* at 886, 838 P.2d at 789, 13 Cal. Rptr. 2d at 61 (holding that a Director of Corrections cannot confer quasi-peace officer status upon custodial officers, since doing so would constitute a clear violation of legislative intent).

7. CAL. PENAL CODE § 12403 (amended by Chapter 15).

8. *Id.* § 12403.9 (enacted by Chapter 15); *see id.* (omitting the on-duty limitation for peace officers).

9. *Id.* § 12403.9 (enacted by Chapter 15); *see id.* § 12403.7(a) (West Supp. 1995) (allowing a person to purchase, possess, or use tear gas and tear gas weapons, for self defense purposes, so long as the weapon is deemed acceptable by the Department of Justice); *see also id.* § 12403.7(a)(1) (West Supp. 1995) (prohibiting felons, or persons convicted of non-felony assault, or persons convicted of misuse of tear gas from possessing, purchasing or using tear gas); *id.* 12403.7(a)(2) (West Supp. 1995) (declaring that an addiction to narcotic drugs precludes a person from purchasing, possessing, or using tear gas); *id.* § 12403.7(a)(3) (West Supp. 1995) (forbidding a person from providing tear gas to a minor) *id.* § 12403.7(7)(a) (West Supp. 1995) (stating that a person cannot purchase, possess or use tear gas or a tear gas weapon unless a tear gas instruction card has been issued by the Department of Justice); *id.* (delineating prerequisites for the issuance of a tear gas instruction card by the Department of Justice: (1) completion of a course certified by the Department of Justice; (2) completion of an objective test, which includes successful use of a tear gas canister filled with inert ingredients, to ensure knowledge of a tear gas safety; or (3) completion of instruction at the place of sale, which must include the viewing of an instructional videotape approved by the Department of Justice and the successful use of a tear gas canister filled with inert ingredients); *DeLaCruz*, 20 Cal. App. 4th at 962-63, 25 Cal. Rptr. 2d at 207 (holding that a person who used tear gas in response to a reasonable belief that bodily harm

COMMENT

Through Chapter 15, the Legislature addressed an anomaly existing in California jails in which peace officers, but not custodial officers, were authorized by law to possess and use tear gas weapons while on duty.¹⁰ Chapter 15 now affords custodial officers, while on duty and given the requisite training, the same opportunity to purchase, possess, transport, and use approved tear gas weapons as peace officers.¹¹ While off duty, custodial officers must comply with applicable California law governing the use of tear gas weapons.¹²

Allowing custodial officers the opportunity to use tear gas weapons provides an effective defensive tool in the face of increasing violence toward county jail employees.¹³ It is likely, though, that use of tear gas by custodial officers in performing employment responsibilities is subject to the same constraints imposed by the Eighth Amendment upon peace officers.¹⁴

Pamela J. Keeler

was imminent, acted in self defense). See generally J.J. Director, Annotation, *Validity and Construction of Regulations Governing Carrying, Possession, or Use of Tear Gas or Similar Chemical Weapons*, 30 A.L.R. 3d 1416 (1970 & Supp. 1994) (discussing regulations which govern the use, sale, or possession of tear gas).

10. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 176, at 3 (May 16, 1995); see *id.* (reporting that the sponsors of AB 176 intended to resolve the inconsistency that existed because the law prior to AB 176 specifically permitted peace officers to use tear gas and implicitly prohibited, through omission, custodial officers from the use of tear gas weapons); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 176, at 2 (May 18, 1995) (recognizing that while the use of chemical agents is permitted in detention facilities, prior law only authorized peace officers to use tear gas weapons).

11. CAL. PENAL CODE § 12403 (amended by Chapter 15).

12. See *supra* note 9 and accompanying text.

13. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 176, at 2 (May 18, 1995) (quoting a study conducted by the California Board of Corrections which found that assaults on jailers increased 26% since 1994); see also CAL. PENAL CODE § 831(b) (West Supp. 1995) (declaring that a custodial officer cannot carry or possess a firearm while on duty). But see *id.* § 831.5(b) (West Supp. 1995) (allowing custodial officers employed by a law enforcement agency of either San Diego, Fresno or another county with a population of less than 425,000 to carry and possess a firearm in certain enumerated circumstances if under the direction of a sheriff or the chief of police); Bill Wallace, *Attempt to Control Inmates with Stun Guns Prove Fatal*, S.F. CHRON., Oct. 4, 1994, at A7 (reporting that prison officials find the use of Tasers—high voltage electronic stun guns—to be less dangerous and more effective than tear gas).

14. See U.S. CONST. amend. VIII (banning the use, by the government, of cruel and unusual punishment); *Lock v. Jenkins*, 641 F.2d 488, 496 (7th Cir. 1981) (finding that the use of tear gas in order to effectuate the retrieval of a metal food tray from an uncooperative prisoner, and to stop shouting and yelling, was constitutionally impermissible); *Stringer v. Rowe*, 616 F.2d 993, 999 (7th Cir. 1980) (overturning a grant of summary judgment by finding there were genuine issues of material fact as to whether the use of mace by a prison official was violative of the Eighth Amendment); *Spain v. Proconier*, 600 F.2d 189, 195 (9th Cir. 1979) (finding that the use of non-dangerous quantities of tear gas in small amounts is justified where there is a reasonable likelihood of injury to persons); *id.* at 194 (holding that the use of possibly dangerous amounts of tear gas is appropriate only when there is an actual or imminent threat of death, bodily harm, escape, serious damage to a substantial amount of valuable property, or a riot involving a large number of unconfined inmates). See generally Daniel A. Klein, Annotation, *Excessiveness or Adequacy of Awards of Compensatory Damages in Civil Actions for Deprivation of Rights under 42 USCS § 1983—Modern Cases*, 99 A.L.R. FED. 501, 534 (1990) (discussing the awarding of compensatory damages to prisoners for impermissible acts of violence by prison officers); M.L. Schellenger, Annotation, *Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or Prison for Death or Injury of Prisoner*, 14 A.L.R. 2d 353 (1950 & Supp. 1987) (analyzing the personal liability of a jail employee for the death or injury of prisoners under his or her care).

Crimes; documents—deceptive identification

Business and Professions Code § 22430 (amended); Penal Code § 483.5 (new).
AB 156 (Napolitano); 1995 STAT. Ch. 133

Existing law specifies that the production of a counterfeit government seal with the intent to defraud, or possession and willful concealment of a counterfeit government seal knowing that it is counterfeit, is a misdemeanor punishable by imprisonment in the county jail not to exceed one year, or by a fine not exceeding \$1000 or by both the fine and the imprisonment.¹

Existing law also provides that possession of a forged driver's license or identification card with the intent to facilitate the commission of any forgery is an offense punishable by imprisonment in a state prison or up to one year in county jail.²

Existing law provides that selling or manufacturing or offering to sell a driver's license or government-issued identification card is a misdemeanor offense, punishable by up to one year in the county jail or by an escalating fine for subsequent offenses, or both imprisonment and fine.³ If the offense is committed by one who is under twenty-one years of age, but is thirteen years or older, the punishment may also include the suspension of driving privileges for one year.⁴

Existing law prohibits a deceptive identification document⁵ from being manufactured, sold, or offered for sale, unless a statement is printed diagonally across the front of the document stating that the document is not a government

1. CAL. PENAL CODE § 529.5(a) (West 1995).

2. *Id.* § 470b (West 1988).

3. *Id.* § 529.5(a) (West Supp. 1995); *see id.* § 529.5(b) (West Supp. 1995) (specifying that any person who, having been convicted of a violation of California Penal Code § 529.5(a), is convicted of a subsequent violation of California Penal Code § 529.5(a), is punishable for the subsequent conviction by imprisonment in a county jail, not exceeding one year, or by a fine not exceeding \$5000, or by both the fine and the imprisonment); *id.* § 529.5(c) (specifying that any person who possesses a document described in California Penal Code § 529.5(a) and who knows that the document is not a government-issued document is guilty of a misdemeanor punishable by a fine of not less than \$1000 and not more than \$2500); *id.* (specifying that the misdemeanor fine must be imposed except in unusual cases where the interests of justice would be served); *id.* (stating that the court may allow an offender to work off the fine by doing community service; if community service work is not available, the misdemeanor must be punishable by a fine of up to \$1000, based on the person's ability to pay).

4. *Id.* § 529.5(d) (West Supp. 1995); CAL. VEH. CODE § 13202.5 (West Supp. 1995).

5. *See* CAL. BUS. & PROF. CODE § 22430(b) (amended by Chapter 133) (defining a "deceptive identification document" as any document not issued by a governmental agency of this state, another state, or the federal government, and which purports to be, or which might deceive an ordinary person into believing that it is, a document issued by such an agency, including, but not limited to, a driver's license, identification card, birth certificate, passport or social security card); CAL. PENAL CODE § 483.5(b) (amended by Chapter 133) (providing the same definition).

document and the manufacturer's name is printed on the document.⁶ Under existing law, a violation of this provision by a person who knows or reasonably should know that the document will be used for fraudulent purposes is guilty of a crime punishable by imprisonment in the county jail not to exceed one year, or imprisonment in state prison.⁷ Existing law also provides that any person who violates this provision is subject to enjoinder.⁸

Chapter 133 expands the scope of the existing offense by additionally prohibiting a deceptive identification document from being furnished, transported, offered to be transported, imported, or offered to be imported into California.⁹

COMMENT

Chapter 133 was enacted to deter the booming sales of fake identification documents.¹⁰ Chapter 133 allows prosecutors to not only prosecute the people who manufacture the fake cards, but also the sellers and the others who assist in the lucrative trade of fake identification.¹¹ Fake identification cards are used for

6. CAL. BUS. & PROF. CODE § 22430(a) (amended by Chapter 133); *see id.* (specifying that forms of deceptive identification may not be manufactured, sold, or offered for sale unless printed conspicuously on the document, in to less than 14-point type, diagonally, and in permanent ink, containing the following declaration: "NOT A GOVERNMENT DOCUMENT," along with the name of the manufacturer).

7. *Id.* § 22430(d) (amended by Chapter 133); CAL. PENAL CODE § 483.5(d) (enacted by Chapter 133).

8. CAL. BUS. & PROF. CODE § 22430(c) (amended by Chapter 133); *id.* (specifying that actions for injunction under California Business & Professions Code §22430 may be prosecuted by the California Attorney General or any district attorney in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any person); CAL. PENAL CODE § 483.5(a) (stating an analogous provision).

9. CAL. BUS. & PROF. CODE § 22430(a) (amended by Chapter 133); CAL. PENAL CODE § 483.5(a) (enacted by Chapter 133) (stating the same provision).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 2 (Apr. 4, 1995); *see id.* (stating that the Los Angeles District Attorney's Office cites the U.S. Department of Justice statistics for Los Angeles County showing a 50% increase over a one-year period in the seizure of counterfeit documents); *id.* (specifying that Immigration and Naturalization Service reported seizing 395,950 counterfeit documents with a street value of over \$15,000,000 during the same one-year period); *see also Computers Start to Crack Foolproof Hologram in California Driver's License*, SAN DIEGO UNION-TRIB., June 5, 1995, at B1 (explaining that while no figures are available on the amount of money annually lost due to false identifications, the amount is estimated to be in the hundreds of thousands of dollars); *id.* (explaining that a driver's license is prized by criminals because it establishes identity, and it is an important gatekeeper document that allows criminals to cash checks, receive public assistance, rent apartments and buy guns); *id.* (indicating that authorities across the country report that a California's driver's license is one of the most sought-after documents in the United States because California is a port of entry for a lot of illegal immigrants); *Feds Arrest Nine Accused of Selling Counterfeit IDs*, REUTERS, LTD., May 19, 1995, at 1 (reporting that nine Mexican nationals were arrested and charged with selling false identification cards and that the Mexican nationals were earning \$1,000,000 a month from the sale of false identification documents); *id.* (indicating that the false identification documents included illegal work visas, Social Security cards, and state driver's licenses); *id.* (quoting the Dallas district chief for the Immigration and Naturalization Service as saying that while the arrests would make a significant dent in the nationwide distribution of these fraudulent documents, the arrests would not stop the use of fraudulent documents).

11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 2 (Apr. 4, 1995); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 2 (Mar. 21, 1995); *see id.* (stating that according to the L.A. District Attorney's Office, a typical sale of a false identification card involves anywhere from three to five people, "[t]he modus operandi is the following: one seller will solicit customers on the street and take orders, i.e., records the information the customer wants on the false card. A

a variety of purposes which include the following: (1) receiving fraudulent welfare payments,¹² (2) cashing stolen or forged checks,¹³ (3) purchasing alcohol when a person is a minor,¹⁴ and (4) obtaining employment when a person is an undocumented worker.¹⁵ Chapter 133 provides prosecutors with the necessary tools to put a stop to this growing crime problem.¹⁶

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second person operates as a runner who takes the information from the seller to the 'mill,' where the false card is being made. Often there is a supervisor who must approve the quality of the card before the runner, a new person, delivers the finished product to the customer"; *id.* (specifying that in a typical case, only the runner who carries the finished card to the buyer can be charged, assuming that possession of the card can be shown "through willful concealment;" therefore, the runner and the salesperson on the street who solicit the sale of the false identification documents, and collect the money are not charged with the crime); *id.* (noting that AB 156 would include the sale, offer to sell, transportation, or importation of fraudulent cards, therefore the runner and the salesperson could also be convicted).

12. See Seth Faison, *Woman with 15 Aliases for Welfare Pleads Guilty*, HOUSTON CHRON., Aug. 5, 1994, at A13 (specifying that a woman deceived one welfare office after another with a collection of fake or stolen documents for herself and fictitious children, claiming parenthood for 11 sets of twins); *Fraud How To Collect \$450,000 in Six Years From Welfare*, CHARLESTON DAILY MAIL, May 26, 1994, at 6A (stating that the same woman collected \$450,000 in welfare payments for 73 fictitious children between 1987 and 1993; she was caught by United States State Department when she applied for multiple passports).

13. See Jim Kirksey, *Crime Network Exposed Cops Say Ring Fueled by Speed*, DENVER POST, May 24, 1995, at B1 (reporting that a group of 30 to 50 criminals committed crimes such as check forgery, and the criminals obtained credit cards and stolen checks through burglaries and searching through people's garbage cans for credit card and bank account numbers); Tim May, *East Valley Focus: San Fernando; Group to Host Class to Deter Check Fraud*, L.A. TIMES, May 20, 1995, at B3 (reporting that because a band of people cashed nearly \$10,000 in fake checks in Mike Majers' liquor store, Majers has given many workshops on how to spot false identification and credit cards; Majers and his staff have helped the police arrest an average of 250 con artists, shoplifters, and criminals each year from his store).

14. See Toni Locy, *2 Plead Guilty to Selling Fake Driver's Licenses*, WASH. POST, June 2, 1995, at A6 (discussing the arrest of two students who pleaded guilty to producing and selling fake driver's licenses; the students used computers to make nearly perfect copies to sell to underage students in several states so that they could buy liquor); *id.* (indicating that the students sold the licenses for \$65 each and made approximately \$8000 in less than six months); Jane Meinhardt, *Spring Break Takes a Rest from the Rowdy*, ST. PETERSBURG TIMES, May 13, 1995, at 2 (reporting that during spring break at Clearwater Beach, the police made about 250 arrests and agents confiscated 68 false identifications).

15. See Robert Enstad, *Fake Licenses Hard to Find for Authorities*, CHI. TRIB., Oct. 4, 1993, at 1L (reporting how the police cracked one of the largest phony license operations ever in Illinois, and recovered 927 illegally issued driver's licenses); *id.* (noting that the majority of the licenses were sold to illegal immigrants, sometimes for as much as \$800 each); Alice Thomas & Bernie Karsko, *INS Says 65 Workers at Plant Illegal*, COLUMBUS DISPATCH, Apr. 20, 1995, at 1C (reporting that an INS raid on a chicken processing plant resulted in about 50% of the company's workforce being taken due to illegal status; one worker admitted that he had bought a green card (a card granting United States residency and the ability to work) and a Social Security card for \$100 in Florida); see also Lora Foo, *Symposium: The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2182 (1994) (noting that many employers hire immigrants with false documentation because they know that the workers will tolerate labor abuses out of fear that they will be turned into the Immigration and Naturalization Service); Kathleen M. Johnson, *Coping with Illegal Immigrant Workers: Federal Employer Sanctions*, U. ILL. L. REV. 959, 973 (1984) (discussing legislation which would create a phone system to verify whether a worker had a valid social security number in order to minimize the false identification problem).

16. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 156, at 2 (May 11, 1995); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 2 (Apr. 4, 1995); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 156, at 2 (Mar. 21, 1995).

Crimes; domestic violence—law enforcement officer training

Penal Code §§ 13519, 13730 (amended).
SB 132 (Watson); 1995 STAT. Ch. 965

Existing law requires the Commission on Peace Officer Standards and Training,¹ in consultation with specified groups and individuals,² to implement courses and guidelines for training law enforcement officers³ to handle domestic violence⁴ complaints.⁵ Existing law also encourages local law enforcement

1. See CAL. PENAL CODE § 13500 (West Supp. 1995) (defining the composition of the Commission); see also *id.* § 13503(e) (West 1992) (describing the duties of the Commission as including development of training and education courses to enhance the effectiveness of law enforcement).

2. See *id.* § 13519(d) (amended by Chapter 965) (listing the groups and individuals that are to assist the Commission in establishing training guidelines, such as one representative from the California Peace Officers' Association, the Peace Officers' Research Association of California, the State Bar of California, the California Women Lawyers' Association, and the State Commission on the Status of Women; two representatives from the Commission and the California Alliance Against Domestic Violence; two peace officers, who are recommended by the Commission; and two domestic violence experts, who are recommended by the commission); see also SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 132, at 3 (Mar. 21, 1995) (noting that in 1986, 1988, and 1994, the Commission published a booklet entitled "Guidelines and Curriculum for Law Enforcement Response to Domestic Violence" that provides guidelines on domestic violence law enforcement, arrests, report writing, protective and restraining orders, and victim assistance).

3. See CAL. PENAL CODE § 13519(a) (amended by Chapter 965) (defining "law enforcement officer" as any officer or employee of local police or sheriff's department, any peace officer of the Department of Parks and Recreation, any peace officer of the University of California or California State University Police Department, or peace officer); see also *id.* § 830.1(a) (West Supp. 1995) (defining "peace officer" as any sheriff, undersheriff, deputy sheriff, employed in that capacity, of a city, any peace officer, employed in that capacity and appointed by the chief of police or the chief executive of the agency, of a city, any chief of police, or police officer of a district authorized by statute to maintain a police department); *id.* § 830.2(c), (d), (g) (West Supp. 1995) (defining "peace officer" as a member of the University of California Police Department, California State University Police Department, or Department of Parks and Recreation); *id.* § 830.31(d) (West Supp. 1995) (defining "peace officer" as a housing patrol officer).

4. See CAL. FAM. CODE § 6211 (West 1994) (defining "domestic violence" as violence perpetrated against a spouse or former spouse, a cohabitant or former cohabitant, a person having had a dating relationship with the perpetrator, a person with whom the perpetrator has had a child, or any child of the perpetrator); see also *id.* § 6209 (West 1994) (defining a "cohabitant" as a person who regularly resides in the household with the perpetrator). See generally ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 132, at 3 (June 6, 1995) (reporting that in 1993 there were 238,895 reported incidents of domestic violence with 206 homicides committed by males and 47 committed by females); Benjamin Pimental, *Domestic Abuse Is Growing, Group Warns; Women's Advocates Say Battering at Crisis Level*, S.F. CHRON., Mar. 8, 1995, at A17 (stating that two to three million women are battered annually in the United States, and 2000 to 4000 of these women are killed).

5. CAL. PENAL CODE § 13519(a), (d) (amended by Chapter 965); see *id.* § 13519(b) (amended by Chapter 965) (listing procedures and techniques that must be included in the basic training of law enforcement officers); see also SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 132, at 3 (Mar. 21, 1995) (indicating that the guidelines of the Commission require eight hours of basic training in domestic violence, and require 24 hours of domestic violence training every two years); cf. CONN. GEN. STAT. ANN. § 7-294g(a) (West Supp. 1995) (requiring that basic or review training of law enforcement officers regarding domestic violence must be a minimum of two hours); D.C. CODE ANN. § 16-1034(c) (Supp. 1994) (requiring at least 20 hours of domestic violence training during basic training of new law enforcement officers); FLA. STAT. ANN. § 943.171(1) (West 1985) (providing for a minimum of six hours of training in handling domestic violence cases); MO. ANN. STAT. § 590.105(8) (Vernon 1995) (requiring that all prospective law enforcement

agencies⁶ to provide periodic updates and training on domestic violence.⁷ Chapter 965 requires each law enforcement officer below the rank of supervisor who is assigned to patrol and would respond to domestic violence calls to complete, every two years, updated training on domestic violence.⁸

Existing law requires each law enforcement agency to create an incident report form that includes a domestic violence identification code and to write a report of all incidents of domestic violence.⁹ Chapter 965 requires, in addition to an identification code, other specified information to be included in a domestic violence incident report.¹⁰

COMMENT

Chapter 965 will improve law enforcement officers' responses to domestic violence complaints, and requires updated training on domestic violence instead of relying on local legislatures or the local law enforcement to provide the updated training.¹¹ These training programs provide a crucial component of the attempt to make law enforcement more responsive by allowing law enforcement officers to perceive how their language and behavior regarding domestic violence

officers must receive a minimum of 30 hours of instruction on domestic and family violence); OHIO REV. CODE ANN. § 109.744(A) (Anderson 1994) (requiring fifteen hours of basic training on domestic violence for all new law enforcement officers); R.I. GEN. LAWS § 12-29-6(a) (1994) (requiring all new law enforcement officers of the Providence police academy, the state police academy, and the municipal academy to receive at least eight hours of training on domestic violence issues); V.I. CODE ANN. tit. 16, § 99b(c) (Supp. 1994) (providing that the basic training of all police cadets must include a minimum of 20 hours in responding to domestic violence cases).

6. See CAL. PENAL CODE § 1545(b) (West 1982) (defining "law enforcement agency" as the Attorney General of the State, every district attorney, and every agency of the State expressly authorized by statute to investigate or prosecute law violators).

7. *Id.* § 13519(c)(4) (amended by Chapter 965); see Elizabeth Fernandez, *How S.F. Police Handle Domestic Violence; City's Model Program Criticized for Falling Short*, S.F. EXAMINER, Mar. 22, 1995, at A1 (explaining how San Francisco law enforcement officers receive eight hours of training on domestic violence every year, and noting how some police departments do not receive any updated training). *But see id.* (noting that the amount of training that San Francisco law enforcement officers receive is much less than the 20 hours per year that Quincy, Massachusetts, officers receive).

8. CAL. PENAL CODE § 13519(e) (amended by Chapter 965); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 132, at 2-3 (June 6, 1995) (noting that the Commission on Peace Officer Standards and Training currently requires 24 hours of continued training every two years, and a two hour telecourse dedicated exclusively to domestic violence); cf. R.I. GEN. LAWS § 12-29-6(b) (1994) (requiring all law enforcement agencies to provide at least four hours of in-service domestic violence training); V.I. CODE ANN. tit. 16, § 99b(d) (Supp. 1994) (providing that the advanced training of all police officers shall include a minimum of 12 hours annually in responding to domestic violence cases).

9. CAL. PENAL CODE § 13730(c) (amended by Chapter 965).

10. *Id.*; see *id.* (requiring information on whether the abuser was under the influence of alcohol or a controlled substance and whether there was a previous incidence of domestic violence involving the same abuser).

11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS ON SB 132, at 2-3 (June 6, 1995); see SENATE FLOOR, COMMITTEE ANALYSIS OF SB 132, at 2 (Apr. 27, 1995) (stating that the author's intent is to ensure appropriate updated training on domestic violence in the context of the continuing professional training the officers obtain every two years).

affect future behavior of the victim and abuser.¹² Thus, law enforcement officers will receive the necessary understanding to appropriately react in order to achieve successful intervention during a domestic violence call.¹³

Chapter 965 also provides the ability to compile data and conduct a statistical analysis on substance abuse and prior abusive acts in domestic violence calls.¹⁴ Thus, if the information is properly utilized, the data can educate the public about the problem of domestic violence and possibly assist in protecting police officers and victims.¹⁵

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12. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1555 (1993); see *id.* (discussing the training implemented by San Francisco, and noting that the training helps turn a reluctant victim into a cooperating victim when the victim does not want to turn against the abuser); see also Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solution*, 60 WASH. L. REV. 267, 299-300 (1985) (discussing how police have traditionally viewed domestic violence as a family matter because there is the assumption that family members will reach mutually beneficial and satisfactory answers based on their love for each other, and because many areas of family life entail controversial value judgments and the superiority of one over the other is unprovable); *Developments in the Law, supra*, at 1535-40 (discussing the disadvantage of mandatory arrest because it only provides a short term solution and may incite the abuser to inflict more violence on the victim); Susan Sward, *O.J. Simpson Case Throws Spotlight on Domestic Violence*, S.F. CHRON., June 24, 1994, at A1 (quoting Assemblywoman Deirdre Alpert, who notes that there is a strong ethic against the government getting involved in family life). But see *Developments in the Law, supra*, at 1535-40 (addressing the advantages of the mandatory arrest policy that some states implement because it takes the abuser away from the victim and allows the victim time to assess his or her situation); *id.* (commenting that mandatory arrest provisions properly establish the role of police as law enforcement officers rather than family counselors).

13. *Developments in the Law, supra* note 12, at 1555; see *id.* (discussing how San Francisco trains law enforcement officers to work through hypothetical fact patterns and how, by integrating domestic violence theory and practical challenges of law enforcement, officers will understand that acting properly in a domestic violence situation is necessary for effective intervention); see also Waits, *supra* note 12, at 320 (asserting that trained police officers can help a victim of domestic violence realize that the abuser's behavior is beyond the victim's control, and that the victim should take steps to assure her own safety); *id.* (noting that some police officers will be unable to get beyond their bias against getting involved in domestic disputes, but others will be much more open to the topic when there is also training regarding police safety). But see Isaac Guzman, *Breaking the Cycle; LAPD Program Helps Officers Step in Before Domestic Violence Escalates*, L.A. TIMES, Nov. 3, 1994, at B1 (illustrating that despite LAPD's policies and training on domestic violence, there are some officers that are still insensitive toward domestic violence and its victims); Susan Sward, *Arrests Soar in Domestic Abuse Cases: Vast Change in Police Attitudes in Past 10 Years*, S.F. CHRON., Mar. 29, 1993, at A1 (discussing how police officers do not like to respond to domestic violence calls because they always end up in the middle of the dispute and embrace the belief that most officer killings are due to domestic violence calls, but the article attempts to dispell the myth by illustrating that less than six percent of officer killings are due to domestic violence calls). See generally *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1056-58 (2d Cir. 1990) (holding that the police department established a special relationship with the victims and owed them a duty of protection from the abuser); *id.* (holding that the city was negligent for failing to protect the victims because the police had knowledge that the abuser was a violent person and could cause harm).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 132, at 2 (June 6, 1995); see SENATE FLOOR, COMMITTEE ANALYSIS OF SB 132, at 2 (Apr. 27, 1995) (stating the intent of the bill to provide a mechanism for collecting data on substance abuse and prior acts in domestic violence cases).

15. *Developments in the Law, supra* note 12, at 1553; see *id.* (contending that information and statistics on domestic violence stimulates public awareness of the problem); see also Waits, *supra* note 12, at 319 n.294 (discussing how most police departments do not have a mechanism for the police to know that there has been a prior incident of domestic violence at that residence); *id.* (noting that violence escalates over time and that inadequate information endangers everyone, including the police and the victim).

Crimes; false representation—public utility and municipal utility district employees

Penal Code § 538f (new).

AB 400 (Gallegos); 1995 STAT. Ch. 460

Existing law makes it a misdemeanor¹ to fraudulently impersonate police officers, fire department personnel, and officers of the State Fire Marshal.² Chapter 460 establishes the crime of false impersonation of a public utility or district employee, providing that anyone who fraudulently represents himself or herself as an employee of a public utility or district³ to a customer of the utility or district is guilty of a misdemeanor punishable by up to six months in county jail, a fine of no more than \$1000, or both.⁴ The misrepresentation must be made willfully⁵ and with fraudulent intent⁶ to impersonate a utility employee or to induce the false belief that one is such an employee.⁷ Chapter 460 expressly excludes from the scope of the offense labor actions arguably protected by state law or the National Labor Relations Act.⁸

1. See CAL. PENAL CODE § 17(a) (West Supp. 1995) (defining "misdemeanor" as a crime punishable by a sentence less than death or imprisonment in state prison).

2. *Id.* §§ 538d, 538e (West 1988).

3. See CAL. PUB. UTIL. CODE § 216(a) (West Supp. 1995) (defining "public utility" to include every common carrier and every corporation which operates a toll bridge or a pipeline, or supplies gas, electricity, telephone service, telegraph service, water, sewer service, or heat where the service is performed for the public or the commodity is delivered to the public); *id.* § 11503 (West 1994) (defining "district" as a municipal utility district).

4. CAL. PENAL CODE § 538f (enacted by Chapter 460); *cf.* NEV. REV. STAT. § 207.345 (1993) (making it a misdemeanor for anyone to impersonate an officer or employee of a public utility company and commit any act purporting to represent the utility company); WIS. STAT. ANN. § 946.69(2)(a), (b) (West Supp. 1994) (creating a Class A misdemeanor for anyone assuming to act in an official capacity or performing an official function as a utility employee knowing that one is not the utility employee that he or she assumes to be).

5. See CAL. PENAL CODE § 7(1) (West 1988) (defining "willfully" when applied to intent as no more than the intent to do the act referred to, without requiring an intent to break the law or cause harm).

6. See 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 676 (9th ed. 1988) (listing the elements of fraud as follows: (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) resulting damage).

7. CAL. PENAL CODE § 538f (enacted by Chapter 460). Compare CAL. PENAL CODE § 538d (West 1988) (requiring fraudulent intent for commission of the crime of impersonating a police officer) with 18 U.S.C.A. § 912 (West Supp. 1995) (creating the crime of falsely assuming or claiming to be an officer or employee of the United States and acting as such, but not specifying the element of intent). *But see* United States v. Rosser, 528 F.2d 652, 655 (D.C. Cir. 1976) (holding that revision of 18 U.S.C. § 912 to delete the phrase "with intent to defraud" did not indicate congressional intent to increase the scope of the statute).

8. CAL. PENAL CODE § 538f (enacted by Chapter 460); see 29 U.S.C.A. § 151 (West 1973) (introducing the National Labor Relations Act and declaring that it is the policy of the United States to encourage collective bargaining by protecting workers' rights to organize themselves and appoint representatives of their own choosing).

COMMENT

The ostensible purpose of Chapter 460 is to provide law enforcement with an additional tool for the prevention of two types of crime: (1) extortion committed by those who, either in person or over the telephone, pose as service workers and threaten to disconnect utility service; and (2) robbery committed by those who gain entry into the homes of victims by impersonating public utility or district employees.⁹ By criminalizing the act of impersonation, Chapter 460 will permit the police to stop such impostors before they commit more serious offenses.¹⁰

An additional purpose of criminalizing impersonation of public utility or district employees may be a desire on the part of the Legislature to preserve the public's trust in such employees.¹¹ If this is the case, an issue could arise as to whether violating Chapter 460 will also provide victims of the crime with a civil cause of action.¹²

The language in Chapter 460 requiring fraudulent intent was added in response to legislative concerns that such innocent activities as the wearing of a costume might be criminalized.¹³ Similarly, the explicit exception provided for activities arguably protected by state or federal labor law was added after the possibility was raised in committee that Chapter 460, without such an exception,

9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 400, at 2 (Mar. 21, 1995).

10. *Id.*; see CAL. PENAL CODE § 530 (West 1988) (providing that impersonation of any other person for the purpose of receiving money or property under false pretenses is punishable as a crime, but requiring that the money or property so converted must first be received by the impostor); see also Sharon Hartnell, *Assembly Bill Targets Bogus Utility Workers*, LONG BEACH PRESS TELEGRAM, Feb. 17, 1995 (facsimile transmission from Assemblymember Gallegos' office, copy on file with the *Pacific Law Journal*) (reporting that Assemblymember Gallegos' sponsorship of the bill was sought by Southern California Edison in response to an increase in impostor crime); *New Bill Introduced to Help Stem Increase in Utility Worker Impersonations and Reduce Crime*, PR NEWswire, Mar. 17, 1995, available in LEXIS, News Library, Cumws file [hereinafter *New Bill*] (quoting Assemblymember Gallegos to the effect that his bill would allow police to act immediately when criminals impersonate service workers rather than having to wait until harm has occurred).

11. See SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 400, at 2 (June 27, 1995) (citing the author of AB 400 as believing that Southern California Edison was concerned that the safety of its own employees might be jeopardized because they could be mistaken for impersonators); see also *id.* (noting that letters of support for AB 400 received from East Bay Municipal Utility District, Pacific Bell, and Southern California Gas indicated that utility employee impersonation was perceived to be a problem by utility companies and municipal utility districts statewide); see also Hartnell, *supra* note 10 (reporting that Southern California Edison took the initiative to seek Assemblymember Gallegos' sponsorship of AB 400, a fact which suggests that the desire to maintain public trust in utility workers played at least some role in the introduction of AB 400); *New Bill*, *supra* note 10 (noting that enactment of Chapter 460 was supported by all major utility companies in California).

12. See *United States v. Barnow*, 239 U.S. 74, 80 (1915) (holding that the predecessor to 18 U.S.C.A. § 912 was intended not merely to protect the victims of those who fraudulently impersonated federal officers, but to protect the dignity and reputation of the federal service itself). *But see Fullerton v. Monongahela Connecting R.R.*, 242 F. Supp. 622, 624-25 (W.D. Pa. 1965) (holding that violation of 18 U.S.C.A. § 912, in light of *Barnow*, could not give rise to a civil cause of action because its purpose was to protect the dignity and reputation of the federal service rather than to protect a particular class of victims).

13. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 400, at 3 (June 27, 1995).

could be used against a striking utility worker or one contesting his or her termination.¹⁴

By responding to the crime statistics provided by Southern California Edison Company which show a marked increase in criminal acts facilitated by service-worker impersonation since 1990, the Legislature apparently seeks both to preserve the confidence usually placed in public utility or district service workers, and to protect the personal security of the most trusting and vulnerable elements of the public itself.¹⁵

Dan Johannes

Crimes; firearms—criminal possession of ammunition

Penal Code §§ 12020.5, 12021.5, 12323 (amended).
AB 99 (Burton); 1995 STAT. Ch. 263

Existing law makes possession, manufacture, importation, or sale of ammunition, designed primarily to penetrate metal or armor, a felony.¹

Chapter 263 clarifies existing law by defining "handgun ammunition designed primarily to penetrate metal or armor" as ammunition primarily designed to penetrate a body vest or shield.²

14. *Id.*

15. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 400, at 1-2 (Mar. 21, 1995) (citing a four-fold increase in reported impersonations in Edison's service territory from 1990 to 1994 over the previous eight years, amounting to 308 cases with losses of more than \$83,000 in the four-year period, and reporting that similar legislation enacted in Wisconsin and Nevada was proposed by Edison). See generally Debra Cano, *Orange County Focus: Buena Park; Police Warn About Utility Worker Ruse*, L. A. TIMES, Aug. 23, 1993, at B3 (warning that thieves posing as utility workers were preying on elderly people); Rita Malley & Seamus McGraw, *Two Men Charged with Burglarizing Homes of Seniors—Phony Utility Workers Stole Money*, THE RECORD, Nov. 24, 1993, at B3 (pointing to a growing trend in crimes committed by thieves who pose as utility workers, victimizing senior citizens in particular).

1. CAL. PENAL CODE §§ 12320, 12321 (West 1992). But see *id.* § 12322 (West 1992) (permitting the sale to and possession of any ammunition by any member of the Army, Navy, Air Force, Marine Corps, or National Guard while on duty, or any police or forensic agency holding a valid permit). See generally 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 1107(5) (2d ed. 1988) (summarizing California statutes prohibiting sale and possession of armor piercing ammunition); 18 CAL. JUR. 3D, *Criminal Law* § 1606 (1984) (restating California statutes prohibiting sale and possession of armor piercing ammunition).

2. CAL. PENAL CODE § 12323(b) (amended by Chapter 263); see *id.* (requiring that for ammunition to fall under the definition of ammunition primarily designed to penetrate metal or armor, its projectile or projectile core must be constructed entirely from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness, or it must be primarily designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, to breach or penetrate a body vest or body shield when fired from a handgun); *id.* § 12323(c) (amended by Chapter 263) (defining "body vest" or "shield" as any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 99, at 2 (May 4, 1995)

Existing law prohibits any person³ from advertising the sale of certain weapons and devices which are illegal to possess.⁴

Chapter 263 adds handgun ammunition primarily designed to penetrate metal or armor to the list of weapons and devices, the sale of which may not be advertised.⁵

COMMENT

Chapter 263 is intended merely to clarify existing law.⁶ Statutes prior to the enactment of Chapter 263 prohibited possession of ammunition designed primarily to penetrate metal or armor, without further definition.⁷ This rather vague language has been broadly interpreted by law enforcement officers.⁸

(stating that the purpose of Chapter 263 is to clarify the existing definition of ammunition designed to penetrate metal or armor); *see also* CAL. PENAL CODE § 12360 (West 1992) (requiring any body armor purchased by the commissioner of the California Highway Patrol to be first certified by the Department of Justice); *id.* § 12361(a) (West 1992) (requiring that before any armor is purchased for use by state peace officers, the Department of Justice must establish minimum performance standards, and determine that such armor satisfies such standards); 11 CAL. CODE REGS. tit. 11, §§ 941-957 (1991) (setting forth requirements and procedures for testing police body armor); *cf.* 18 U.S.C.A. 921(a)(17)(B) (West Supp. 1995) (defining "armor piercing ammunition" as a projectile or projectile core which can be used in a handgun and constructed entirely of one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium, or a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25% of the total weight of the projectile, but excluding certain types of ammunition used for hunting, target, sporting, or industrial purposes); KY. REV. STAT. ANN. § 237.060(7) (Baldwin 1994) (defining "armor-piercing ammunition" as a projectile or projectile core which can be used in a handgun and constructed entirely of one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium, but excluding certain types of ammunition used for hunting, target, sporting, or industrial purposes); MICH. COMP. LAWS. ANN. § 750.224c(3)(a) (West Supp. 1995) (defining "armor piercing ammunition" similarly to Kentucky); 18 PA. CONS. STAT. ANN. § 6121(d) (Supp. 1995) (defining "armor-piercing" ammunition as that which is determined to be capable of penetrating bullet-resistant apparel or body armor); TEX. PENAL CODE ANN. § 46.01(12) (West 1994) (defining "armor-piercing ammunition" as handgun ammunition that is designed primarily for the purpose of penetrating metal or body armor and to be used principally in pistols and revolvers).

3. *See* CAL. PENAL CODE § 12277 (West Supp. 1995) (defining "person" as an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created).

4. *Id.* § 12020.5 (amended by Chapter 263); *see id.* (prohibiting advertising in newspapers, magazines, or any other form of advertisement); *id.* (forbidding persons from advertising the sale of weapons which are illegal to possess under California Penal Code §§ 12020, 12220, or 12280); *see also id.* § 12020(a), (c) (West Supp. 1995) (prohibiting the sale, possession, and manufacture of certain weapons including, but not limited to, short-barreled shotguns, tracer ammunition, zip guns, and other weapons commonly used in crimes); *id.* § 12220(a) (West 1992) (prohibiting the possession, transportation, manufacture or sale of machine guns); *id.* § 12280 (West 1995) (prohibiting the manufacture, sale, possession, transportation, importation, and distribution of assault weapons).

5. *Id.* § 12020.5 (amended by Chapter 263).

6. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 99, at 2 (June 15, 1995).

7. CAL. PENAL CODE § 12320 (West 1992); *see id.* (prohibiting persons from knowingly possessing any handgun ammunition designed primarily to penetrate metal or armor).

8. *See* Telephone Interview with John Carter, Legislative Assistant to Assemblymember John Burton (July 18, 1995) (notes on file with the *Pacific Law Journal*) (noting that there was a case where someone was charged with possessing ammunition designed primarily to penetrate metal or armor because the arresting officer thought the bullets in the defendant's gun looked "weird").

Supporters argued that even though it was questionable whether bullets marketed as armor piercing can actually penetrate body armor worn by police, Chapter 263 was needed to protect officers who wear protective body armor in the course of their duties by generically banning armor piercing ammunition in case that type of ammunition is ever perfected.⁹

Opponents argued that because there were no minimum standards for the body armor used for the ammunition testing, determinations of which bullets will be prohibited will vary widely.¹⁰ This will in turn diminish effectiveness of ammunition available to law abiding citizens who need to defend themselves.¹¹

The author of Chapter 263 intended to change the definition of the prohibited ammunition to track the federal definition of armor piercing ammunition.¹² However, the federal definition of armor piercing ammunition is more specific than that used in Chapter 263, in that it relies only on specified physical properties of the ammunition, while Chapter 263 prohibits ammunition that by virtue of its shape, density, or coating applied thereto, is designed to penetrate a

9. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 99, at 2 (June 15, 1995); see Paul Richter, *Clinton Calls for Ban on Bullets that Pierce Body Armor*, L.A. TIMES, July 1, 1995, at A22 (reporting that President Clinton demanded a ban on any handgun ammunition able to pierce bulletproof vests or other body armor); Letter from John F. Fleming, Legislative & Retiree Liaison, Los Angeles County Professional Peace Officers Association, to Assemblymember John Burton (June 15, 1995) (copy on file with the *Pacific Law Journal*) (suggesting that Chapter 263 will provide badly needed protection from ammunition designed to penetrate metal or armor equipment use by peace officers); Letter from Sherman Block, Sheriff, County of Los Angeles, to Assemblymember John Burton (June 14, 1995) (copy on file with the *Pacific Law Journal*) (asserting that armor penetrating ammunition poses a threat to officers and the citizens they serve); Letter from Arlo Smith, District Attorney, San Francisco, to Assemblymember John Burton (Mar. 3, 1995) (copy on file with the *Pacific Law Journal*) (commenting that Chapter 263 will put an end to "Rhino" type ammunition which can pierce a bullet-proof vest, break into thousands of razor sharp shards when it hits flesh, and leave a gaping wound which causes almost instantaneous death); Letter from Norm Boyer, Chief Legislative Representative, Los Angeles City Council, to Assemblymember John Burton (Feb. 21, 1995) (copy on file with the *Pacific Law Journal*) (writing that the Los Angeles City Council has recently declared its policy in support of all efforts to ban non-sporting ammunition, and that since armor-piercing ammunition is approximately four dollars per round, it is unaffordable for sporting purposes); *id.* (noting that because deer do not wear bullet-proof vests, hunters do not need armor piercing bullets); see also Judy Pasternak, *Taking Aim at Exotic Bullets*, L.A. TIMES, Jan. 11, 1994, at A1 (stating that in reaction to the sale of a bullet called the "Black Talon" which unfolded into a pattern of sharp, metal petals once inside a victim, Dr. Stephen Haragarten wrote an article for the *Journal of Trauma* about the dangers of armor-piercing bullet fragments which can easily cut a surgeon's glove); Letter from Debby Boucher, Legislative Advocate, California Nurses Association, to Assemblymember John Burton (May 3, 1995) (copy on file with the *Pacific Law Journal*) (stating that the jagged edges of armor-piercing bullets often cut the surgeons and members of the trauma team attempting to identify bullet placement to remove them, which creates the risk of transmitting AIDS and other infectious diseases).

10. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 99, at 2 (June 15, 1995); see Letter from Jack G. Wilson, Legislative Affairs, Gun Owners of California Inc., to Senate Republican Caucus Members (May 15, 1995) (copy on file with the *Pacific Law Journal*) (arguing that because there are no minimum standards for the protective vests to be used for the required ammunition testing, resulting prohibitions on ammunition will vary widely); see also CAL. PENAL CODE § 12323(c) (amended by Chapter 263) (defining "body vest or shield" as any bullet resistant material intended to provide ballistic and trauma protection for the wearer).

11. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 99, at 2 (June 15, 1995).

12. Telephone Interview with John Carter, *supra* note 8.

“body vest or shield.”¹³ Therefore, the definition of ammunition designed primarily to penetrate metal or armor promulgated by Chapter 263 will eventually need clarification as to whether “body vest or shield” as used in that definition, includes any body vest or shield in existence, or only that certified by the State Armor Committee.¹⁴

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Crimes; fleeing a bicycle officer

Vehicle Code § 2800.1 (amended).
SB 170 (Leonard); 1995 STAT. Ch. 68

Under existing law, it is a misdemeanor for any person while operating a motor vehicle¹ to intentionally evade, willfully flee, or otherwise attempt to evade a pursuing peace officer's² motor vehicle if certain conditions exist.³

13. Compare 18 U.S.C.A. § 921(a)(17) (West Supp. 1995) (defining “armor piercing ammunition” as a projectile or projectile core which can be used in a handgun and constructed entirely of one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium, or a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25% of the total weight of the projectile, but excluding certain types of ammunition used for hunting, target, sporting, or industrial purposes) with CAL. PENAL CODE § 12323(b)(2) (amended by Chapter 263) (defining, as one alternative, “handgun ammunition designed primarily to penetrate metal or armor” as ammunition that is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or coating applied to it, to penetrate a body vest or shield).

14. See CAL. CODE REGS. tit. 11, § 941 (1991) (requiring the State Armor Committee to consist of representatives from the California Highway Patrol, State Police, Department of Justice, and Office of Procurement).

1. See CAL. VEH. CODE § 415 (West Supp. 1995) (specifying that a “motor vehicle” is a vehicle which is self-propelled); *id.* § 670 (West 1987) (defining “vehicle” as a device that moves person or property upon a highway, “excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks”).

2. See CAL. PENAL CODE § 830.1(a) (West Supp. 1995) (providing an exhaustive list of persons who could be described as “peace officers”).

3. *Id.* § 2800.1(a) (amended by Chapter 68); see *id.* (enumerating the conditions that make it a misdemeanor to evade a pursuing peace officer as the following: (1) The peace officer's motor vehicle is displaying at least one red light visible from the front and the person either sees or reasonably should have seen the light; (2) the officer's motor vehicle is sounding a siren; (3) the officer's vehicle is marked distinctively; and (4) the officer's motor vehicle is operated by a peace officer wearing a distinctive uniform); *cf.* ALA. CODE § 32-5A-193(a) (1989) (providing that “any driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle, when given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a misdemeanor”); FLA. STAT. ANN. § 316.1935(1) (West Supp. 1995) (maintaining that it is unlawful for the operator of any vehicle who knows he has been directed to stop by a duly authorized law enforcement officer to refuse or fail to stop the vehicle in compliance with such directive or, after having stopped in knowing compliance with the directive to flee in an attempt to elude the officer); GA. CODE ANN. § 40-6-395(a) (Michie 1995) (indicating that it is unlawful for any driver to fail or refuse to stop his or her vehicle or otherwise attempt to elude a pursuing police vehicle or

Chapter 68 makes it a misdemeanor for any person to operate a motor vehicle in order to evade, flee, or elude a pursuing peace officer's bicycle under specified conditions.⁴

COMMENT

Chapter 68 grants bicycle officers the ability to detain suspects in the same manner as other law enforcement officers who use motor vehicles.⁵

The impetus behind the enactment of Chapter 68 was to correct a legal oversight in the law where a suspect could have evaded an arrest by a bicycle officer by merely driving away.⁶ Moreover, Chapter 68 was intended to mimic law enforcement vehicle laws with respect to stopping motorists and to place bicycle law enforcement officers on par with vehicle law enforcement officers.⁷

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officer when given a visual or an audible signal to halt the vehicle); IDAHO CODE § 49-1404(1) (1994) (specifying that any driver who willfully flees or attempts to elude a pursuing police vehicle when given a signal to stop the vehicle, shall be guilty of a misdemeanor); OHIO. REV. CODE ANN. § 2921.331(B) (Anderson 1994) (stating that no person may operate a vehicle so as to elude or flee a police officer after receiving a signal from a police officer to stop his motor vehicle); OR. REV. STAT. § 811.540(1), (2) (1993) (setting forth the crime of fleeing or attempting to elude a police officer and setting forth the applicable penalty).

4. CAL. PENAL CODE § 2800.1(b) (amended by Chapter 68); *see id.* (enumerating the specific conditions that make it a misdemeanor to evade, willfully flee, or otherwise attempt to elude a pursuing peace officer's bicycle as the following: (1) The officer's bicycle is distinctively marked; (2) the officer's bicycle is operated by a peace officer wearing a distinctive uniform; (3) the officer gives a verbal command to stop; (4) the officer sounds a horn producing a sound of at least 115 decibels; (5) the officer displays a hand signal commanding the person to halt; and (6) the person is aware or reasonably should have been aware of the verbal command, horn, and hand signal, but still refuses to comply).

5. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 170, at 2 (March 21, 1995).

6. *Id.*; *see id.* (providing that on a number of occasions drivers have driven away from bicycles officers after the officers have made contact with the driver of the motor vehicle); *id.* (noting that flight from a bicycle officer occurs frequently when a bicycle officer is working in congested traffic situations, and the officer attempts to pull over a motor vehicle).

7. Telephone Interview with Charles Bacchi, Legislative Assistant for Senator Bill Leonard (Nov. 1, 1995) (notes on file with the *Pacific Law Journal*); *see id.* (discussing the legal problem that bicycle officers were facing when they attempted to pull over motorists, whereby the motorists drove away and there were no legal penalties for evading the bicycle officer).

Crimes; Gun-Free School Zone Act

Penal Code § 626.9 (amended).

AB 624 (Allen); 1995 STAT Ch. 659

Under existing law it is a felony, punishable by two, three, or five years in state prison, for any person, with the exception of certain authorized individuals,¹ to possess a firearm² in a school zone,³ without special permission,⁴ where the person knew or should have known that the area was a school zone.⁵ Prior law,

1. See CAL. PENAL CODE § 626.9(l) (amended by Chapter 659) (allowing the following individuals to possess firearms on school grounds: (1) A California peace officer; (2) a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California; (3) any person summoned by these officers to assist in making arrests or preserving the peace; (4) members of the California state military forces or the United States military forces who are engaged in the performance of their duties; (5) any person holding a valid license to carry a firearm pursuant to the California Penal Code; and (6) an armored vehicle guard in the performance of his or her duties); *id.* § 626.9(m) (amended by Chapter 659) (permitting a security guard authorized to carry a loaded gun pursuant to California Penal Code § 12031 to possess a firearm on school grounds); see also *id.* § 12031(d)(4), (5) (West Supp. 1995) (stating that uniformed security guards employed by a public agency or persons engaged in a lawful business, while acting within the scope of and course of their employment, are allowed to carry loaded firearms).

2. See *id.* § 12001(b) (West Supp. 1995) (defining "firearm" as a device designed to be used as a weapon from which a projectile is expelled through a barrel by force or explosion or other form of combustion).

3. See *id.* § 626.9(e)(1) (amended by Chapter 659) (defining "school zone" as an area on the grounds of, or within 1000 feet of, a public or private school providing instruction in kindergarten through the twelfth grade).

4. See *id.* § 626.9(b) (amended by Chapter 659) (allowing possession of a firearm on school grounds with the written permission of the school district superintendent or an equivalent school authority).

5. *Id.* § 626.9(b) (amended by Chapter 659); see Johnnie B. Beer, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 396 (1995) (discussing the 1994 amendments to California Penal Code § 626.9); see also *In re Joseph G.*, 32 Cal. App. 4th 1735, 1743, 38 Cal. Rptr. 2d 902, 907 (1995) (holding that California Penal Code § 626.9 requires only that a person be in possession of a loaded firearm on school grounds, while the offense of possession of a loaded firearm, under California Penal Code § 12031(a)(1), requires that the defendant carry the firearm on his or her person or in a vehicle in a public place); cf. FLA. STAT. ANN. § 810.095(1) (West 1994) (stating it is a felony for a person trespassing on school grounds to possess a firearm on school property); KAN. STAT. ANN. § 21-4204(a)(5), (6) (Supp. 1994) (stating it is a misdemeanor to possess, or refuse to remove, a firearm on school grounds or school sponsored event without permission); LA. REV. STAT. ANN. § 14:95.2(A), (D) (West Supp. 1995) (providing that any person who possesses a firearm on school grounds or in a firearm-free zone shall be imprisoned at hard labor for not more than five years); MASS. GEN. LAWS ANN. Ch. 269, § 10(j) (West Supp. 1995) (providing that whoever, despite any license, carries on his person a firearm, loaded or unloaded, on school grounds, shall be punished by a fine and/or imprisonment for not more than one year); N.J. STAT. ANN. § 2C:39-5(e) (West Supp. 1994) (stating that any person who knowingly possesses a firearm or various other weapons on school grounds is guilty of a crime regardless of any permit or license); N.Y. PENAL LAW § 265.01(3) (McKinney 1989 & Supp. 1995) (stating that a person is guilty of criminal possession of a weapon if he knowingly has in his possession a firearm upon the grounds of any school); R.I. GEN. LAWS § 11-47-60(a), (b) (1994) (stating that no person, unless exempt, shall have a firearm in his possession on school grounds); TENN. CODE ANN. § 39-17-1309(b)(1), (2) (1991) (stating that it is a felony to carry any weapon on school grounds with the intent to go while armed, but it is only a misdemeanor to merely possess a firearm); VA. CODE ANN. § 18.2-280(B) (Michie Supp. 1994) (stating that it is a felony to willfully discharge a firearm on, or within 1000 feet of, school grounds); WIS. STAT. ANN. § 948.605(2)(a) (West Supp. 1994) (providing that it is a misdemeanor to knowingly possess a firearm on, or within 1000 feet of, school grounds). Compare *People v. Singer*, 56 Cal. App. 3d Supp. 1, 4, 128 Cal. Rptr. 920, 921-22 (1976) (holding that California Penal Code § 626.9 is

for penalty purposes, did not distinguish between possession of a firearm on school grounds⁶ and possession of a firearm within 1000 feet of school grounds.⁷ Existing law requires that a sentence of two, three, or five years be imposed on any person who possesses a firearm on the actual grounds of a school.⁸ Chapter 659 establishes a provision, whereby, depending upon the circumstances, an individual may be charged with either a misdemeanor or a felony for the possession of a firearm within 1000 feet of school grounds.⁹

Chapter 659, except in unusual circumstances,¹⁰ establishes a three month minimum sentence for persons convicted of possession of a firearm, on or within 1000 feet of school grounds, who have been previously convicted of specified

constitutional) with *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995) (holding that the federal Gun-Free School Zone Act of 1990 is an unconstitutional extension of Congress' power under the Commerce Clause).

6. See CAL. PENAL CODE § 626.9(e)(1) (amended by Chapter 659) (specifying that the schools covered by the statute are public or private schools providing instruction in kindergarten or grades one through twelve); see also *id.* § 626.9(h) (amended by Chapter 659) (applying the provisions of Chapter 659 to the University of California, California State University, California Community Colleges or any private university or college).

7. 1994 Cal. Legis. Serv. ch. 1015, sec. 1, at 5158-59 (amending CAL. PENAL CODE § 626.9); see *id.* (providing that any person who violates the provision will be punished in the state prison for two, three or five years); see also ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 624, at 1 (Apr. 18, 1995) (mentioning that the law prior to enactment of Chapter 659 did not distinguish between possession of a firearm on school grounds and possession of a firearm within 1000 feet of school grounds); cf. CAL. PENAL CODE § 626.9(f)(1)-(3) (amended by Chapter 659) (providing that possession of a firearm on school grounds shall be punishable in state prison for two, three, or five years, while possession merely within 1000 feet of school grounds is punishable by either one year or less in county jail or imprisonment in state prison for two, three, or five years).

8. CAL. PENAL CODE § 626.9(f)(1) (amended by Chapter 659).

9. *Id.* § 626.9(f)(2)(A) (amended by Chapter 659); see *id.* (establishing a penalty of imprisonment for two, three, or five years in state prison if: (1) The individual has been previously convicted of a violation of California Penal Code § 12000, the Dangerous Weapon Control Law; (2) the individual is within the class of persons prohibited from possessing or acquiring a firearm pursuant to California Penal Code §§ 12021 or 12021.1 or California Welfare and Institutions Code §§ 8100 or 8103; or (3) the firearm is capable of concealment and the offense is punished as a felony pursuant to California Penal Code § 12025); see also *id.* § 626.9(f)(2)(B) (amended by Chapter 659) (establishing a penalty that consists of imprisonment for one year or less in the county jail or by imprisonment in the state prison for two, three, or five years for all violations other than those specified in California Penal Code § 626.9(f)(2)(A)); *id.* § 626.9(f)(3) (amended by Chapter 659) (providing that an individual, who with reckless disregard for the safety of others discharges or attempts to discharge a firearm in a school zone, is to be punished by imprisonment in the state prison for two, three, or five years); *id.* § 626.9(o) (amended by Chapter 659) (allowing an honorably retired peace officer to possess a firearm on school grounds if he or she is authorized to carry a concealed or loaded firearm pursuant to California Penal Code §§ 12027 or 12031).

10. See *id.* § 626.9(g)(4) (amended by Chapter 659) (stating that the court must apply a three month minimum sentence except where the interests of justice would best be served by granting probation or suspending the sentence and that the court is required to specify on the record the reasons why justice would best be served by such a disposition).

misdemeanors,¹¹ felonies,¹² or firearm related offenses.¹³

COMMENT

The purpose of Chapter 659 is to correct the inconsistency that exists where a person, who would otherwise be guilty of a misdemeanor firearm violation, is charged with a felony merely because the person passed within 1000 feet of school grounds.¹⁴ Additionally, prosecutors are concerned that overcharging a defendant makes it extremely difficult to persuade sympathetic juries to return felony convictions.¹⁵ Chapter 659 allows prosecutors to choose between filing misdemeanor or felony charges where the defendant possessed a firearm in a school zone and the facts indicate that the person posed no risk of danger to anyone.¹⁶

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11. See *id.* § 626.9(g)(1) (amended by Chapter 659) (stating that the specified misdemeanors are those enumerated in California Penal Code § 12001.6); see also *id.* § 12001.6(a)-(d) (West Supp. 1995) (providing that the specified misdemeanors are violations of California Penal Code §§ 245(a)(2) (assault with a firearm), 245(a)(3) (assault with a machine gun or assault weapon), 246 (discharge of a firearm at an inhabited dwelling house or occupied building), 417(a)(2) (drawing or exhibiting a firearm in a threatening manner or during a fight), and 417(c) (drawing or exhibiting a firearm in the immediate presence of a peace officer)).

12. See *id.* § 626.9(g)(2), (3) (amended by Chapter 659) (stating that the minimum three month sentence is mandatory if the defendant has been convicted of a felony violation of California Penal Code § 626.9(b) or (d), and (1) has previously been convicted of a misdemeanor enumerated in California Penal Code § 12601.6, or (2) has previously been convicted of any felony or of any crime punishable by to California Penal Code § 12000).

13. *Id.* § 626.9(g)(1)-(4) (amended by Chapter 659); see *id.* § 12000 (West 1992) (establishing the Dangerous Weapon Control Law).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 624, at 2 (Apr. 18, 1995); see CAL. PENAL CODE § 12031(a)(1) (West Supp. 1995) (making possession of a loaded firearm in a public place a misdemeanor); *id.* § 12025 (West Supp. 1995) (providing that possession of a concealed firearm in public is punishable as a misdemeanor); see also *Guns, Schools and Common Sense*, TAMPA TRIB., May 12, 1995, at 14 (discussing the federal firearm-free school zone law and stating that it is impractical to make it a federal crime merely because someone possessed a weapon too near a school); Mike McCloy, *Tempers Flare Over Bills Aimed at Youths, Guns*, PHOENIX GAZETTE, Jan. 25, 1994, at B1 (reporting that citizens legally carrying handguns will get caught up in the criminal justice system because of the unfortunate mistake of traveling too near a school).

15. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 624, at 2 (Apr. 18, 1995); see Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 107 (1993) (outlining conflicts between sentencing laws and prosecutors' caseload management, conviction rates, and desire for consistent punishments); see also Newton N. Minow & Fred H. Cate, *What the Jury Doesn't Know . . . Could Hurt You; Using Criminal's Past As Evidence*, WASH. MONTHLY, Sept. 1994, at 18 (stating that in three-strike cases, the defendant may want to have his past criminal convictions entered into evidence to sway sympathetic jurors).

16. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 624, at 2 (Apr. 18, 1995). See generally P.S. Kane, Note, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion For Selective Prosecution*, 67 TUL. L. REV. 2293, 2294 (1993) (outlining the role and effect of prosecutorial discretion); *DWI Statistics Need Deeper Investigation*, NEWS & REC. (Greensboro, NC), Jan. 2, 1995, at A6 (stating that American courts wisely give discretion to prosecutors to abandon bad cases to avoid wasting manpower, court time, and money).

Crimes; hate crimes—probation, rewards

Government Code § 50050 (amended); Penal Code §§ 422.75, 422.95, 1547, 2085.5, 11413 (amended).
SB 911 (Marks); 1995 STAT. Ch. 876

Existing law makes it unlawful to use force, threats, or destruction of property to interfere with another person's enjoyment of any constitutional right because of that person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.¹ Existing law further provides that an offense directed against a person because of the factors listed above, which causes bodily injury or destruction of property in excess of \$500, is punishable by up to one year imprisonment in either a state prison or a county jail and a fine of up to \$10,000.²

Existing law provides that as a condition of probation for specified offenses,³ the court may order the offender to complete a class or program on racial or

1. CAL. PENAL CODE § 422.6(a), (b) (West 1988); *see id.* § 422.6(c) (West 1988) (providing that a violation is punishable by incarceration in the county jail for up to one year and/or a fine not exceeding \$5000); *see also id.* § 13519.6(a) (West Supp. 1995) (calling for the creation of courses to train law enforcement officials in how to handle hate-crimes); *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993) (upholding Wisconsin's hate crime statute by reasoning that First Amendment protections did not extend to the conduct prohibited by the statute); *In re M.S.*, 10 Cal. 4th 698, 718, 896 P.2d 1365, 1376, 42 Cal. Rptr. 2d 355, 366 (1995) (ruling that California Penal Code § 422.6 was not unconstitutionally vague since it expressly requires willful behavior); *cf. ILL. ANN. STAT. ch. 720, para. 5/12-7.1(a)* (Smith-Hurd Supp. 1995) (declaring that a hate-crime is committed when a person assaults, batters, or commits theft of, or trespass to, another person's property, by reason of the victim's race, religion, gender, ancestry, sexual orientation, or physical or mental disability); MASS. GEN. LAWS ANN. ch. 22C, § 32 (West 1994) (defining a hate-crime as any overt criminal act which is motivated by the perpetrator's bigotry and bias). *See generally* Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63 (1994) (exploring how hate-crime statutes may be employed to combat violence against women); Claire Cooper, *State Laws Against Hate Crime Survive Court Challenge*, SACRAMENTO BEE, July 4, 1995, at B4 (discussing how the California Supreme Court upheld the constitutionality of the state's hate-crime statute); Lori A. Spillane, *Hate Crimes: Violent Intolerance*, THE PROSECUTOR, July/Aug. 1995, at 24 (indicating that in determining whether to prosecute a crime as one that is bias-motivated, the prosecutor must examine (1) the language used by the perpetrator, (2) the severity of the attack, (3) lack of provocation, (4) prior contact between the victim and the suspect, (5) history of similar incidents in the locale, and (6) the absence of any other motive for the crime).

2. CAL. PENAL CODE § 422.7 (West Supp. 1995); *see id.* § 422.7(c) (West Supp. 1995) (stating that a previous violation under California Penal Code § 422.6 will constitute an aggravating factor in the sentencing of the offender); *see also In re M.S.*, 10 Cal. 4th at 725, 896 P.2d at 1381, 42 Cal. Rptr. 2d at 372 (ruling that California Penal Code § 422.7 is constitutionally valid since it does not infringe on a person's freedom of speech, but instead, merely enhances punishment for a misdemeanor which is unlawfully bias-motivated); *In re Joshua H.*, 13 Cal. App. 4th 1734, 1750, 17 Cal. Rptr. 2d 291, 301 (1993) (holding that since California Penal Code § 422.7 proscribed conduct and not speech, it is constitutionally valid).

3. Compare 1991 Cal. Stat. ch. 607, sec. 8, at 21-22 (enacting CAL. PENAL CODE § 422.95(a)) (listing California Penal Code §§ 422.6, 422.7, and 422.75 as the specified offenses) with CAL. PENAL CODE § 422.95(a) (amended by Chapter 876) (specifying California Penal Code §§ 422.6, 422.7, 422.75, 594.3, and 11411 as the relevant hate-crimes).

ethnic sensitivity.⁴

In addition, existing law makes it unlawful to knowingly⁵ commit an act of vandalism against any religious institution.⁶ Existing law also proscribes displaying a sign, mark, symbol, emblem, or other physical impression on the property of another with the purpose of terrorizing⁷ the owner or occupant of that property.⁸

Chapter 876 provides that any person, who is convicted of a specified hate-crime,⁹ may as a condition of probation, be sentenced by the court to complete a one year counseling program intended to reduce the offender's anti-social behavior.¹⁰ Chapter 876 also allows the court to order the offender to pay compensation to the victim¹¹ and/or to a community based program organized to

4. CAL. PENAL CODE § 422.95(a)(1) (amended by Chapter 876); *see id.* (providing that the court may only impose a counselling program as a probation condition if such a program is available); *id.* § 422.95(c) (amended by Chapter 876) (declaring that the Legislature intends to reduce the incidence of hate-crimes by including counseling programs as probation conditions).

5. *See id.* § 7(5) (West 1988) (defining "knowingly" to mean knowledge that the facts exist which brings the act or omission within the provisions of the penal code); *see also* *People v. Calban*, 65 Cal. App. 3d 578, 584, 135 Cal. Rptr. 441, 444 (1976) (explaining that the word "knowing" in a criminal statute only requires an awareness of the facts which bring the proscribed act within the terms of the statute).

6. CAL. PENAL CODE § 594.3(a) (West 1988); *see id.* (providing that an offense is punishable by up to one year incarceration in the county jail); *id.* § 594.3(b) (West 1988) (stating that any act of vandalism against a religious institution which is committed because of the race, color, religion, or national origin of another person or group to deter people from exercising their religious beliefs, is punishable by imprisonment in the state prison); *cf.* GA. CODE ANN. § 16-7-26(a) (1992) (declaring that a person who maliciously defaces or desecrates a place of worship is guilty of vandalism); MO. ANN. STAT. § 574.085(1) (Vernon 1995) (defining the crime of institutional vandalism as any vandalizing, defacing, or damaging of any place of worship).

7. *See* CAL. PENAL CODE § 11411(d) (West 1992) (defining "terrorizing" as causing an ordinary person to fear for his or her personal safety).

8. *Id.* § 11411(a) (West 1992); *see id.* (providing that an offense is punishable by incarceration in the county jail for up to one year, and/or a fine not exceeding \$15,000); *id.* § 11411(b) (West 1992) (making repeated offenses punishable by incarceration in the state prison for a term ranging from 16 months to 3 years, and/or a fine of up to \$10,000; or by imprisonment in the county jail not exceeding one year and/or a fine not exceeding \$5000); *id.* § 11411(c) (West 1992) (providing that it is unlawful to desecrate or burn a religious symbol on another person's property for the purpose of terrorizing that person); *see also In re Steven S.*, 25 Cal. App. 4th 598, 615-16, 31 Cal. Rptr. 2d 644, 653 (1994) (ruling that California Penal Code § 11411(c) was not unconstitutional since it was directed against acts of terrorism against private property, rather than the expression of ideas). *But see* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547 (1992) (finding that a municipal ordinance making it unlawful to place any symbol or object on the property of another knowing that it would tend to arouse anger or alarm in others on the basis of race, creed, religion or gender, facially violated the First Amendment since it prohibited speech based solely on the subjects addressed). *See generally* Lisa S.L. Ho, Comment, *Substantive Penal Hate Crime Legislation: Toward Defining Constitutional Guidelines Following the R.A.V. v. City of St. Paul and Wisconsin v. Mitchell Decisions*, 34 SANTA CLARA L. REV. 711 (1994) (attempting to reconcile the seemingly contradictory decisions in *R.A.V.* and *Mitchell*).

9. *See* CAL. PENAL CODE § 422.95(a) (amended by Chapter 876) (listing California Penal Code §§ 422.6, 422.7, 422.75, 594.3, and 11411 as the specified hate-crimes).

10. *Id.* § 422.95(a)(1) (amended by Chapter 876); *see id.* (providing that the one year counselling program may be imposed as an alternative to a class or program on ethnic sensitivity); *id.* (requiring the counselling program to be developed or authorized in cooperation with organizations within the affected community).

11. *See id.* § 679.01(b) (West 1988) (describing "victim" as a person against whom a crime is committed).

provide services to victims of hate crimes.¹²

Existing law also provides for sentence enhancements for felonies committed because of the victim's race, color, religion, nationality, country of origin, ancestry, disability, or sexual orientation.¹³

Chapter 876 provides that the court may enhance the sentence of any person convicted of committing a felony against the property of any public or private institution¹⁴ because of that institution's association with a person or group of an identifiable race, color, religion, nationality, country of origin, ancestry, disability, or sexual orientation.¹⁵

Existing law also makes it a felony for a person to explode, ignite, or

12. *Id.* § 422.95(a)(2) (amended by Chapter 876); *see id.* § 422.95(a)(3) (amended by Chapter 876) (specifying that the defendant may be liable to the victim for the reasonable costs of counselling and other expenses the victim has incurred as a result of the attack); *id.* § 422.95(b) (amended by Chapter 876) (mandating that a defendant must pay any restitution payments in whole before making any payments ordered under this section); *see also* CAL. CIV. CODE § 52(a) (West Supp. 1995) (providing that whoever violates another's civil rights is liable for up to three times the actual damages—in no case less than \$1000—and any additional attorney fees); *cf.* ILL. ANN. STAT. ch. 720, para. 5/12-7.1(b) (Smith-Hurd Supp. 1995) (authorizing the court to order a defendant convicted of a hate-crime to perform 200 hours of public service as a probation condition); *id.* ch. 720, para. 5/12-7.1(c) (Smith-Hurd Supp. 1995) (allowing courts to order a defendant convicted of a hate-crime to compensate the victim for emotional distress, punitive damages, and attorney fees); *id.* ch. 730, para. 5/5-5.3(c)(2)(L) (Smith-Hurd Supp. 1995) (authorizing the court to order a defendant convicted for a subsequent hate-crime to pay restitution to the victim); IOWA CODE ANN. § 729A.5 (West 1993) (providing that the victim of a hate-crime may bring a civil action against the offender for injunctive relief, general and special damages, and attorneys fees); OKLA. STAT. ANN. tit. 21, § 850(D) (West Supp. 1995) (providing that a person convicted of malicious intimidation because of race, color, religion, ancestry, national origin, or disability, may be held civilly liable for any damages caused by the offense); VA. CODE ANN. § 8.01-42.1(A) (Michie 1992) (allowing the victim of a hate crime to seek injunctive relief and/or civil damages).

13. CAL. PENAL CODE § 422.75 (amended by Chapter 876); *see id.* § 422.75(a) (amended by Chapter 876) (providing that a person convicted of a hate-crime will receive an additional term of one to three years in the state prison); *id.* § 422.75(c) (amended by Chapter 876) (providing that a person who voluntarily commits a hate crime in concert with another will receive an additional term of two to four years in the state prison); *id.* § 422.75(d) (amended by Chapter 876) (listing the use of a firearm by the defendant in the commission of a hate-crime as an aggravating factor); *id.* § 422.75(e) (amended by Chapter 876) (providing that a person convicted of a hate-crime will receive an additional year in the state prison for each prior hate-crime conviction); *see also* *People v. Superior Court*, 10 Cal. 4th 735, 741, 896 P.2d 1387, 1390, 42 Cal. Rptr. 2d 377, 381 (1995) (declaring that a conviction under California Penal Code § 422.75 requires that the bias-motivation must have been a substantial factor in bringing about the crime).

14. *See* CAL. PENAL CODE § 422.75(b) (amended by Chapter 876) (specifying that institutions include schools, educational facilities, libraries, community centers, meeting halls, or the offices of advocacy groups).

15. *Id.*; *see id.* (providing that the offender will receive an additional term from one to three years in the state prison); *cf.* IOWA CODE ANN. § 716.8(3) (West 1993) (declaring that a person who trespasses on the property of another with the intent to commit a hate-crime is guilty of a serious misdemeanor); *id.* § 716.8(4) (West 1993) (indicating that a person is guilty of an aggravated misdemeanor if he or she trespasses onto the property of another with the intent to commit a hate-crime which results in bodily harm); WIS. STAT. ANN. § 939.645(2)(c) (West Supp. 1994) (stating that a court may increase a defendant's sentence by up to five years where the defendant has committed a felony against property on the basis of the owner or occupant's race, religion, disability, sexual orientation, or ancestry).

attempt¹⁶ to explode or ignite any destructive device,¹⁷ or to commit arson,¹⁸ on or about any place specified by law,¹⁹ with the purpose of terrorizing another person.²⁰

Chapter 876 adds private property that is targeted because of the race, color, religion, ancestry, national origin, disability, gender, or sexual orientation of the owner or occupant, to the list of specified places.²¹

Existing law also authorizes the Governor to offer a reward²² for information leading to the arrest and conviction of any person who has committed a specified offense.²³

Chapter 876 adds certain hate-crimes²⁴ which result in serious bodily injury or destruction of property in excess of \$10,000 to the list of crimes for which the Governor may offer a reward for the arrest and conviction of the perpetrator.²⁵

16. See CAL. PENAL CODE § 21a (West 1988) (defining "attempt" as consisting of two elements: a specific intent to commit a crime, and a direct but ineffectual act done towards its completion).

17. See *id.* § 12301(a) (West 1992) (indicating that the term, "destructive device," includes: (1) any projectile containing explosive or incendiary material; (2) any bomb, grenade, rocket or explosive missile; (3) any weapon of a caliber greater than .60; or (4) any breakable container which contains a flammable liquid).

18. See *id.* § 451 (West Supp. 1995) (dictating that a person who willfully and maliciously sets fire to, or aids in setting fire to, any structure or property is guilty of the crime of arson); *id.* § 451(a) (West Supp. 1995) (mandating that a person who commits arson which causes bodily harm may be sentenced to the state prison for five to nine years); *id.* § 451(b) (West Supp. 1995) (declaring that a person who sets fire to an inhabited structure may receive a sentence of three to eight years in the state prison); *id.* § 451.5(a) (West Supp. 1995) (indicating that one who sets fire to a building or a structure with the intent to cause bodily harm may be guilty of aggravated arson).

19. See *id.* § 11413(b)(1)-(7) (amended by Chapter 876) (listing specified places as licensed health facilities, places of worship, meeting places and offices of pro-and anti-abortion groups, bookstores or libraries, courthouses, and homes and offices of judicial officers); *id.* § 11413(b)(8) (amended by Chapter 876) (adding probation department facilities to the list).

20. *Id.* § 11413 (amended by Chapter 876); see *id.* § 11413(a) (amended by Chapter 876) (providing that an offense is punishable by incarceration in the state prison for a term ranging from three to seven years and/or a fine of up to \$10,000).

21. *Id.* § 11413(b)(9) (amended by Chapter 876).

22. See CAL. GOV'T CODE § 12031(b) (West 1992) (requiring the Governor to keep an account of all rewards offered).

23. CAL. PENAL CODE § 1547 (amended by Chapter 876); see *id.* § 1547(a) (amended by Chapter 876) (setting the limit of the reward which may be offered at \$50,000); *id.* § 1547 (a)(1)-(10) (amended by Chapter 876) (listing offenses for which the Governor may offer a reward); *id.* § 1547(a)(11) (amended by Chapter 876) (providing that the Governor may offer a reward for the arrest of any person who sets fire to a property designated as a hazardous fire zone); *id.* § 1547(b) (amended by Chapter 876) (providing that the Governor may offer a reward of \$100,000 for the capture of a person who kills a peace officer or fire fighter who is acting in the line of duty); see also *Lees v. Colgan*, 120 Cal. 262, 267, 52 P. 502, 503-04 (1898) (ruling that it was against public policy to allow police officers to receive rewards offered by the Governor).

24. See CAL. PENAL CODE § 1547(a)(12), (13) (amended by Chapter 876) (declaring that rewards may be offered for violations of California Penal Code § 422.75 and § 11411).

25. *Id.*; see *id.* § 1547(a)(13) (amended by Chapter 876) (providing that the Governor may only offer a reward for a violation of California Penal Code § 11411 if it is determined that the act is one in a series of similar or related acts).

Chapter 876 also retains existing law authorizing the Director of Corrections²⁶ to collect monies owing on a restitution order²⁷ from a parolee, and to transfer these amounts to the State Board of Control²⁸ for payment to the victim²⁹ or for deposit in the restitution fund.³⁰

Finally, existing law mandates that any collected restitution money which is unclaimed after a three year period is to be deposited into the restitution fund.³¹

Chapter 876 provides that any unclaimed money in a local agency's³² treasury may also be used to fund victim services.³³

COMMENT

Chapter 876 was enacted in an effort to discourage the increase in hate crimes³⁴ by imposing additional probationary requirements, such as restitution

26. *See id.* § 5051 (West Supp. 1995) (indicating that the Director must be appointed by the Governor with the Senate's consent); *id.* § 5053 (West 1982) (proclaiming that the Director is the chief administrative officer of the Department of Corrections); *id.* § 5054 (West 1982) (entrusting the Director with the supervision of the state prisons, and the responsibility for the care, custody, and treatment of the inmates).

27. *See id.* § 1202.4(b) (West Supp. 1995) (permitting the court to impose a restitution fine on any person convicted of a crime proportional to the gravity of the offense); *see also id.* (establishing that a restitution fine for a felony may range from \$200 to \$10,000, and a restitution fine for a misdemeanor may range from \$100 to \$1000); *id.* § 1202.4(d) (West Supp. 1995) (setting forth the factors a court may consider in determining the amount of a defendant's restitution fine); *id.* § 1202.4(g) (West Supp. 1995) (listing the various losses for which a victim may receive restitution). *See generally id.* § 1202.4(a)(1) (West Supp. 1995) (expressing the Legislature's intent that a victim of a crime should receive restitution directly from the defendant convicted of the crime).

28. *See* CAL. GOV'T CODE § 13901 (West 1992) (recognizing the existence of the Board of Control, which is composed of the Director of General Services, the Controller, and a third member appointed by the Governor); *see also id.* §§ 13920-13928 (West 1992 & Supp. 1995) (setting forth the powers and duties of the Board of Control).

29. *See* CAL. PENAL CODE § 1202.4(k) (West Supp. 1995) (declaring that for purposes of restitution, the term "victim" includes the victim's surviving immediate family).

30. *Id.* § 2085.5(a), (b) (amended by Chapter 876); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 911, at 4 (Sept. 8, 1995) (declaring that SB 911 is intended to prevent SB 1095, which amended California Penal Code § 2085.5, from becoming operative). *Compare* 1995 Cal. Legis. Serv. ch. 876, sec. 4, at 5191-92 (amending CAL. PENAL CODE § 2085.5(d)) (stating that where a parolee owes money on a restitution fine, the Director may collect the money from the parolee and transfer that amount to the State Board of Control) *with* 1995 Cal. Legis. Serv. ch. 377, sec. 6, at 1693-94 (amending CAL. PENAL CODE § 2085.5(d), intended to become operative on January 1, 1996) (requiring the Director to collect money for a restitution order from a parolee before collecting money for a restitution fine).

31. CAL. GOV'T CODE § 50050 (amended by Chapter 876); *see id.* (permitting the local treasurer to publish notice of the unclaimed funds in a local newspaper at the expiration of the three-year period).

32. *See id.* (including all districts within the term, "local agency").

33. *Id.*; *cf.* LA. REV. STAT. ANN. § 1568.2(A) (West Supp. 1995) (permitting the Juvenile Court to distribute unclaimed restitution funds to elderly victims of crimes who have not received restitution); MONT. CODE ANN. § 46-18-250(1) (1993) (authorizing unclaimed restitution funds to be deposited in a county's restitution fund); *id.* § 46-18-250(2) (1993) (providing that funds in the county restitution fund may be used to pay victims who are not receiving restitution because the offender is unable to pay).

34. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 911, at 4 (Sept. 8, 1995) (reporting that 332 hate crimes were committed against homosexuals in Los Angeles last year, a 53% increase); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 911, at 2 (May 15, 1995) (observing that approximately 5000 hate crimes had been committed statewide according to preliminary numbers released by the Attorney General's Office); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 911, at 3 (Apr.

and counselling programs,³⁵ and creating sentence enhancements for certain hate-related offenses.³⁶

In addition, Chapter 876 was created to deal with the rise in the use of explosives and firebombs as weapons of terror against victims chosen on the basis of their race.³⁷

Chapter 876 is also intended to assist in reducing the number of hate crimes that go unsolved and unpunished.³⁸ Proponents hope that the offering of rewards will lead to more apprehensions and convictions of hate crime perpetrators.³⁹

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4, 1995) (indicating that the number of hate crimes being committed has increased despite legislation creating new crimes and imposing sentence enhancements); *see also* Tony Bizjak, *Crimes Against Asians Tallied*, SACRAMENTO BEE, Apr. 25, 1994, at B1 (reporting that of 8918 hate crimes committed in 1992, 3.4% were against Asian-Americans); Denise Hamilton, *Violence Against Minorities on the Rise*, L.A. TIMES, May 17, 1994, at B1 (observing that hate crimes were becoming more violent with assaults constituting almost one-third of all hate crimes committed in Los Angeles County, California, in 1993). *See generally* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387 (1994) (detailing the rise of hate crimes being committed against homosexuals).

35. *See Impact of Counseling on Skinheads Seen as 'Positive'*, L.A. TIMES, Jan. 5, 1994, at B2 (noting that a three-day counseling program had a positive impact on gang members accused of hate crimes). *But see* Bettina Boxall & Frederick Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. TIMES, July 11, 1994, at A1 (reporting that some prosecutors believe imprisonment is a better method of deterring offenses such as spousal abuse than counselling).

36. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 911, at 3 (May 23, 1995); *see* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 911, at 2 (Aug. 23, 1995) (observing that on average, only four people each year are incarcerated in the State prison for hate crimes); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 911, at 6 (Apr. 4, 1995) (stating that the sentence enhancements for hate crimes committed against the property of a public institution were enacted to deal with situations where a crime is committed against property that is identified with a particular group, but not owned by it). *But see* SENATE COMMITTEE ON CRIMINAL PROCEDURE, *supra*, at 6 (quoting a letter sent by the California District Attorneys Association requesting lawmakers to refrain from enacting piecemeal sentencing increases which tend to complicate criminal sentencing).

37. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 911, at 5 (Apr. 4, 1995); *see id.* (observing that there had been many instances where explosives or fire had been used in the commission of hate crimes); *id.* (stating that the use of explosives or fire should be added to the hate crime section because of the dangerous nature of explosives and their potential harm to bystanders); *see also* Ramon Coronado & Robert Davila, *Campos Guilty of 5 Bomb Charges*, SACRAMENTO BEE, Aug. 30, 1994, at A1 (reporting the conviction of Richard Campos for a string of firebombings in Sacramento, California, in 1993); *id.* (explaining that Campos was convicted for, among other things, firebombing a Chinese-American councilmember's home and the Sacramento offices of the Department of Fair Employment).

38. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 911, at 4 (May 23, 1995); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 911, at 4 (Aug. 31, 1995) (estimating that more than 90% of all hate crimes go unsolved); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 911, at 4 (Apr. 4, 1995) (describing an attack on a gay couple in San Francisco, California, that went unsolved where one victim was struck by the attacker's car and shot).

39. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 911, at 6 (June 27, 1995).

Crimes; hunting—shotguns

Fish and Game Code § 2010 (amended).
AB 1305 (Bowler); 1995 STAT. Ch. 321

Existing law prohibits an individual from using or possessing a shotgun¹ that is larger than 10-gauge or capable of holding more than six cartridges at one time.² California case law has construed this provision to apply only to those possessing such shotguns for the purpose of hunting.³ Chapter 321 clarifies existing law by adding language to the statute, which specifically limits its application to those whose purpose is to take any mammal or bird.⁴ Chapter 321 also defines the cartridge capacity of guns that have been modified by means of a plug⁵ as the capacity after modification.⁶ Chapter 321 authorizes the Fish and Game Commission to place further limitations on shotguns used for hunting once a public hearing has taken place.⁷

COMMENT

Prior to Chapter 321, California Fish and Game Code section 2010 had not been amended since its enactment in 1957.⁸ The purpose of Chapter 321 is to clarify the statutory provision so as to harmonize the section with the case law interpreting it.⁹ By resolving any ambiguities in the statute, the Legislature

1. See CAL. PEN. CODE § 12020(c)(21) (West Supp. 1995) (defining “shotgun” as a weapon manufactured and intended to be fired from the shoulder and using the explosive energy in a fixed shotgun shell, which fires either a single projectile or multiple projectiles through a smooth bore each time the trigger is pulled).

2. CAL. FISH & GAME CODE § 2010 (amended by Chapter 321).

3. *Ex Parte Peterson*, 119 Cal. 578, 578 (1898); see *id.* (interpreting former CAL. PENAL CODE § 627 (1897 Cal. Stat. ch. 89, sec. 11, at 92) (current version at CAL. FISH & GAME CODE § 2010)); *id.* (stating that it was not the Legislature’s intent that the statute apply to all situations where one possesses a shotgun, rather only to those in which a shotgun is used to kill game or other animals); see also 65 Op. Cal. Att’y Gen. 76, 81 (1982) (concluding that California’s fish and game laws do not prohibit the possession and use of a shotgun that holds more than six cartridges for purposes other than hunting).

4. CAL. FISH & GAME CODE § 2010 (amended by Chapter 321); cf. GA. CODE ANN. § 27-3-4(3) (1993) (limiting shotguns to 20 gauge when hunting deer, bear, or feral hogs, unless using slugs or buckshot); NEV. REV. STAT. ANN. § 503.150(1)(a) (Michie Supp. 1993) (restricting shotguns used for hunting game birds or game mammals to a maximum of 10-gauge); VA. CODE ANN. § 29.1-519(A)(1) (Michie 1992) (prohibiting the use of a shotgun which is larger than 10-gauge for hunting wild animals or wild birds).

5. See WEBSTER’S NEW INT’L DICTIONARY 1743 (3d ed. 1931) (defining “plug” as a piece of wood or metal that is placed in the magazine of a repeating shotgun to reduce the magazine’s ammunition capacity).

6. CAL. FISH & GAME CODE § 2010 (amended by Chapter 321); cf. GA. CODE ANN. § 27-3-4(5)(A), (B) (Michie 1993) (permitting the use of plugs to modify shotguns so as to be in compliance with the law so long as the plug is one piece and incapable of being removed through the loading end of the gun).

7. CAL. FISH & GAME CODE § 2010 (amended by Chapter 321); see CAL. CONST. art. IV, § 20(b) (creating a five member Fish and Game Commission to be appointed by the Governor and approved by the Senate for six-year terms).

8. 1957 Cal. Stat. ch. 456, sec. 2010, at 1342 (enacting CAL. FISH & GAME CODE § 2010).

9. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1305, at 2 (June 27, 1995).

intends to assist law enforcement officials with the correct application of the law.¹⁰

Stricter regulations regarding the taking of specific types of animals may be adopted without conflicting with California Fish and Game Code section 2010; however, they may not exceed those limits established by section 2010.¹¹ Shotguns are subject to other statutory and regulatory restrictions as well. Loaded shotguns may not be stored in a vehicle which is either standing or moving on a public roadway.¹² Setting, causing to be set, or placing a trap gun is also prohibited.¹³ California regulations require that only steel or other nontoxic shot, which has been approved by the United States Fish and Wildlife Service, may be used when hunting waterfowl, American coot, and common moorhen.¹⁴ While these provisions affect the use of shotguns, California Fish and Game Code section 2010 pertains to the specifications of the shotgun itself.¹⁵

Christopher P. Blake

10. *Id.*; see SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1305, at 3 (July 11, 1995) (reporting anecdotal evidence that State Fish and Game Wardens have cited individuals who were involved in trap shooting or target practice and confiscated their guns under authority of California Fish and Game § 2010 when such activities are not prohibited by that section).

11. 65 Op. Cal. Att'y Gen. 76, 81 (1982); see *id.* (considering any other stricter provisions to be exceptions to California Fish and Game Code § 2010); cf. CAL. CODE REGS. tit. 14, § 353(b) (1994) (limiting shotguns to a maximum capacity of three shells when hunting deer, bear, or wild pigs); *id.* § 551(b)(2) (1994) (prohibiting a person from possessing or firing a shotgun larger than a 12-gauge in designated wildlife areas).

12. CAL. FISH & GAME CODE § 2006 (West 1984); see *id.* (defining "loaded" as an unexpended cartridge or shell in the firing chamber).

13. *Id.* § 2007 (West 1984); see *id.* (defining a "trap gun" as a loaded firearm which is attached to a string or other instrument which enables it to be discharged).

14. CAL. CODE REGS. tit. 14, § 507.1 (1995). See generally Bruce B. Weyrauch, *Waterfowl and Lead Shot*, 16 ENVTL. L. 883, 893-99 (discussing the vulnerability of waterfowl and other wildlife to the damaging effects of lead poisoning through the digestion of lead shot).

15. CAL. FISH & GAME CODE § 2010 (amended by Chapter 321).

Crimes; income tax—fraudulent returns

Revenue and Taxation Code §§ 18626, 19720, 19721 (new).
SB 633 (Kopp); 1995 STAT. Ch. 845

Under existing law, a person failing to comply with California's tax laws is subject to various penalties.¹ Existing law also allows for the seizure of any computer equipment that is used to commit a crime.²

Chapter 845 declares that electronic filing is included in the term "return" for purposes relating to the filing of fraudulent returns.³ Chapter 845 also makes it

1. CAL. REV. & TAX. CODE §§ 19701-19717 (West 1994 & Supp. 1995); *see id.* § 19701(a) (West 1994) (providing that any person who fails to file a return, or fraudulently files a return, may be punished by a fine of not more than \$5000); *id.* 19701(b) (West 1994) (permitting a \$5000 penalty to be levied against any person who assists another person in evading taxes); *id.* § 19701.5(a), (b) (West Supp. 1995) (providing that any person who signs his or her spouse's name to a tax return or files a tax return electronically, without that spouse's consent, is guilty of a misdemeanor and may be sentenced to one year imprisonment and/or a \$5000 fine); *id.* § 19705(a) (West 1994) (listing various tax-evading activities that are punishable by a fine of up to \$20,000 and/or imprisonment for up to three years); *id.* § 19706 (West 1994) (declaring that any corporation employee who fails to file the corporation's tax return, or fraudulently files a return, may be fined up to \$20,000 and/or imprisoned for not more than one year); *id.* § 19708 (West 1994) (indicating that any person who willfully fails to collect or account for any tax due, may be additionally punished by a fine not exceeding \$2000 and/or imprisoned in the state prison); *id.* § 19709 (West 1994) (making it a misdemeanor punishable by a fine of up to \$1000 and/or incarceration for up to one year, for any person to fail to withhold or to pay over any withheld tax); *id.* § 19711 (West 1994) (providing that any person who fails to supply information to his or her employer which might result in an increase in his or her taxes, may be punished by a fine not exceeding \$1000 and/or imprisonment for up to one year); *id.* § 19712 (West 1994) (stating that any tax preparer who endorses or negotiates any warrant issued to a tax payer, may be fined up to \$1000 and/or imprisoned for up to one year); *id.* § 19713(a) (West 1994) (declaring that any person who fails to comply with California Revenue and Taxation Code § 19009(b), is guilty of a misdemeanor and may be fined not more than \$5000 and/or imprisoned for up to one year); *id.* § 19714 (West 1994) (making it punishable by a fine of up to \$5000 for any taxpayer to institute any frivolous proceeding with the intent to cause delay); *see also id.* § 19009(b) (West 1994) (mandating that an employer who has collected any tax, must deposit that money in a separate bank account within California until it is paid over to the Franchise Tax Board). *See generally* People v. Allen, 20 Cal. App. 4th 846, 855, 25 Cal. Rptr. 2d 26, 31 (1993) (ruling that a failure to file a tax return is a public welfare offense, and therefore it is not necessary to show criminal intent); People v. Roper, 144 Cal. App. 3d 1033, 1042, 193 Cal. Rptr. 15, 20-21 (1983) (finding that a statute which made it unlawful to file fraudulent tax returns did not violate a defendant's right to privacy); People v. Rosseau, 129 Cal. App. 3d 526, 533, 179 Cal. Rptr. 892, 895 (1982) (upholding defendant's conviction for a failure to pay employee taxes where the defendant had substantial control over the corporation); People v. Singer, 115 Cal. App. 3d Supp. 7, 10-11, 171 Cal. Rptr. 587, 588 (1980) (finding evidence that a defendant had money to pay taxes she owed sufficient to support a conviction for willfully failing to account for employee withholdings and taxes).

2. CAL. PENAL CODE § 502.01 (West Supp. 1995); *cf.* N.M. STAT. ANN. § 30-45-7(A)(1) (Michie 1989) (declaring that any computer equipment which is used to violate the state's Computer Crimes Act, is subject to forfeiture). *See generally* Robert M. Couch, Note, *A Suggested Legislative Approach to the Problem of Computer Crime*, 38 WASH. & LEE L. REV. 1173 (1981) (discussing a nationwide increase in computer crime and some new methods of policing required to deal with it).

3. CAL. REV. & TAX. CODE § 18626 (enacted by Chapter 845). *See generally* Elizabeth Douglass, *Electronic Tax Filing Has Its Bugs But Despite This Year's Problems, It's the Coming Thing*, SAN DIEGO UNION-TRIB., Apr. 1, 1995, at A1 (reporting that 14 million federal tax returns were filed electronically in 1994); *id.* (estimating that 80 million federal tax returns will be filed electronically by the year 2000); Elizabeth Douglass, *Electronically: Not Free, Not Too Hard*, SAN DIEGO UNION-TRIB., Apr. 1, 1995, at A19 (describing the process by which one may file an electronic tax return).

unlawful for a person, either knowingly⁴ or with intent to defraud,⁵ to fraudulently file, or to assist⁶ someone else in fraudulently filing an income tax return for an income tax refund which he or she is not entitled to receive.⁷ In addition, Chapter 845 provides that an individual's signature on an income tax refund check is prima facie evidence to support a conviction.⁸

4. See CAL. PENAL CODE § 7(5) (West 1988) (defining "knowingly" as having knowledge that facts exist which bring about an act, but not requiring the knowledge that the act is itself unlawful); see also *People v. Calban*, 65 Cal. App. 3d 578, 584, 135 Cal. Rptr. 441, 444 (1976) (rejecting the argument that a jury must be instructed as to specific intent where the statute employs the word, "knowing," since its use imports only an awareness of the facts which bring the act within the terms of the statute).

5. See CAL. PENAL CODE § 8 (West 1988) (stating that there is sufficient evidence where it appears that any person intended to defraud another person, association, body politic, or corporation); cf. CAL. CIV. CODE § 1572 (West 1982) (defining "actual fraud" as consisting of any of the following acts by a contract party with the intent to deceive another party to enter into the contract: (1) The suggestion that a fact may be true by one who does not believe it to be true; (2) the positive assertion of that which is not true, although the declarant believes it to be true, in a manner not warranted by the information possessed by the declarant; (3) the suppression of the truth; (4) a promise made without any intention of performance; and (5) any other act intended to deceive).

6. See CAL. PENAL CODE § 31 (West 1988) (providing that any person who aids or abets in the commission of a crime shall be considered to be a principal in the commission of the crime); see also *People v. Demes*, 220 Cal. App. 2d 423, 432, 33 Cal. Rptr. 896, 901 (1963) (stating that the test for determining whether someone is an aider and abettor is whether that person, directly or indirectly, aided the perpetrator by acts or gave encouragement by words or gestures), *cert. denied*, 377 U.S. 946 (1964); *People v. Etie*, 119 Cal. App. 2d 23, 28, 258 P.2d 1069, 1072 (1953) (holding that it is not necessary to prove felonious intent to support a conviction for aiding and abetting).

7. CAL. REV. & TAX. CODE §§ 19720(a), 19721(a) (enacted by Chapter 845); see *id.* § 19720(a) (enacted by Chapter 845) (declaring that any person who knowingly commits a crime under Chapter 845 can be punished by a fine not exceeding \$5000); *id.* § 19720(d) (enacted by Chapter 845) (providing that a person who knowingly files for a tax refund which he or she is not entitled to receive is guilty of a misdemeanor and may be punished by incarceration not to exceed one year and/or a fine of up to \$10,000, at the court's discretion); *id.* § 19721(a) (enacted by Chapter 845) (permitting a fine of up to \$10,000 to be levied against any person who, with the intent to defraud, violated the provisions of Chapter 845); *id.* § 19721(b) (enacted by Chapter 845) (mandating that any person who, with the intent to defraud, violates the provisions of Chapter 845 may, at the court's discretion, be sentenced for up to one year in the county jail or state prison, and/or receive a fine not to exceed \$20,000 plus the costs of the investigation and prosecution); cf. N.Y. TAX LAW §§ 1804(a), 1807(a) (McKinney 1987) (making it a misdemeanor to file, or to assist another in filing, a fraudulent tax return with the intent to evade a tax); *id.* §§ 1804(b), 1807(b) (McKinney 1987) (providing that any person who substantially understates his or her tax liability, or assists another person in understating his or her tax liability, with the intent to evade a tax is guilty of a felony); UTAH CODE ANN. § 59-1-401(9)(b) (Supp. 1994) (providing that any person who, with intent to defraud, files a false or fraudulent tax return can be fined from \$1000 to \$5000).

8. CAL. REV. & TAX. CODE §§ 19720(b), 19721(c) (enacted by Chapter 845); see *id.* § 19705(c) (West Supp. 1995) (stating that an individual's signature on a return, statement, or other filed document, will constitute prima facie evidence that the return, statement, or document has been signed by him or her); *id.* § 19703 (West 1994) (providing that a certificate issued by the Franchise Tax Board that states that a tax return has not been filed is prima facie evidence that the return has not been filed); see also 26 U.S.C.A. § 6064 (West 1989) (declaring that a person's name signed to a return shall constitute prima facie evidence that the person has signed the return); *United States v. Crooks*, 804 F.2d 1441, 1448 (9th Cir. 1986) (holding that there was sufficient evidence to sustain a conviction against the defendant for knowingly filing a false return where the defendant had signed the return); *United States v. Carrodegua*, 747 F.2d 1390, 1396 (11th Cir. 1984) (finding that the defendant's signature on his return was prima facie evidence that he had actually signed them, which could have been rebutted by the defendant); cf. ILL. ANN. STAT. ch. 35, para. 5/503(a) (Smith-Hurd 1993) (stating that the fact a person's name is signed to a return shall be considered prima facie evidence for all purposes that such person has actually signed the return).

COMMENT

The Internal Revenue Service has noticed an increase in tax fraud over the past few years, especially with the increase in the use of electronic filing of tax returns.⁹ Chapter 845 was enacted to deter the filing, electronically or by mail, of fraudulent claims for income tax refunds.¹⁰ Proponents of Chapter 845 believe that allowing the signature on a refund check as evidence will significantly help with electronic fraud prosecutions.¹¹

A. James Kachmar

Crimes; mandatory work release programs

Penal Code § 4024.3 (new).
SB 485 (Solis); 1995 STAT. Ch. 106

Under existing law, the board of supervisors¹ of any county may authorize the sheriff or other equivalent county correctional facility official² to offer a voluntary

9. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 633, at 2 (May 23, 1995); see SENATE COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF SB 633, at 2 (Apr. 5, 1995) (reporting that the I.R.S. had observed that incidents of electronic filing fraud had increased from 5700 returns in 1990 to 34,500 returns in 1993, with the amount of illegal claims increasing from \$17 million to \$79 million); Aaron Nathans, *IRS Moves to Block 'Rapid Refund' Scam Artists Fraud*, L.A. TIMES, Oct. 27, 1995, at A24 (quoting U.S. Treasury officials as estimating that fraudulent tax filings cost the federal government about \$5 billion each year); Robert A. Rosenblatt, *IRS Loses Millions in Fraud with Electronic Tax Filing Crime*, L.A. TIMES, Feb. 11, 1994, at A1 (reporting that incidents of electronically filing false returns had increased over 105% in 1993); David G. Savage, *Nine Indicted for Alleged Electronic Tax Fraud*, L.A. TIMES, May 23, 1991, at D2 (discussing how a group of nine people in Los Angeles had been indicted for electronically filing false tax returns by using fictitious names).

10. SENATE COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF SB 633, at 2 (Apr. 5, 1995); see *id.* (observing that deterring tax fraud will reduce tax losses to the state's General Fund); Fact Sheet on SB 633, from the Office of Senator Quentin Kopp (Aug. 2, 1995) (copy on file with the *Pacific Law Journal*) (suggesting that the problem of fraud posed by electronic tax filing was created by the Franchise Tax Board's efforts to move toward a paperless filing system). See generally Jim H. Zamora, *Tax Cheaters Entering the Computer Age*, L.A. TIMES, Aug. 25, 1991, at B1 (reporting that a group in Southern California was charged with filing more than 200 fraudulent tax returns for refunds exceeding \$500,000).

11. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 633, at 2 (May 15, 1995); see *id.* (observing that with the use of electronic filing, the endorsed refund check is usually the only evidence that fraud has been committed); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 633, at 2-3 (Apr. 18, 1995) (stating that the use of the signature as evidence is helpful since criminal acts committed by computer do not leave "paper trails").

1. See CAL. GOV'T CODE § 25000 (West 1988) (requiring that each county have a five member board of supervisors); see also *id.* § 53000 (West 1983) (providing that the board of supervisors is the legislative body for the county); *Johnston v. Board of Supervisors of Marin County*, 31 Cal. 2d 66, 74, 187 P.2d 686, 691 (1947) (holding that county boards of supervisors perform administrative and legislative functions).

2. See CAL. GOV'T CODE § 23013 (West 1988) (stating that the county board of supervisors can establish a department of corrections, which shall have control over all county facilities relating to institutional punishment—including county jails, industrial farms, and road camps). But see *id.* § 26605 (West Supp. 1995)

work release program to any person committed to a county correctional facility.³ Additionally, under voluntary work release programs, existing law provides that: (1) The board of supervisors can establish various rules and regulations governing work release programs; (2) any person who fails to appear for the work release program is guilty of a misdemeanor; (3) a peace officer may retake an individual into custody to serve the remainder of their sentence if the peace officer reasonably believes that the individual has failed to appear for his or her program, or will fail to appear; (4) the proper authority is not required to assign an individual to a work release program if the individual has not performed satisfactorily or has failed to comply with any rules or regulations; (5) eligibility for work release is determined by the proper authority; and (6) the board of supervisors may establish a program of administrative fee.⁴

Chapter 106 creates a separate, involuntary, work release program allowing the board of supervisors of any county to authorize the sheriff or equivalent correctional facility authority to institute and operate such a program.⁵ To institute such a program, however, the county must have an average daily jail population of ninety percent of the county's correctional system's mandated capacity.⁶ The provisions governing involuntary work release programs, under Chapter 106, are the same as those governing voluntary work release programs.⁷ Additionally,

(providing that, except where the sheriff was not the sole and exclusive authority to keep the county jail prior to July 1, 1993, sheriffs are the sole and exclusive authority to keep county jails); CAL. PENAL CODE § 4000 (West 1982) (stating that sheriffs are keepers of the common jails in their jurisdictions).

3. CAL. PENAL CODE § 4024.2(a) (West Supp. 1995); *see id.* § 4024.2(b) (West Supp. 1995) (setting forth that the criteria for authorizing work release programs includes such projects as: manual labor to improve and maintain public facilities; manual labor in support of nonprofit organizations; graffiti cleanup; and manual labor for senior citizens). Credit may also be given for participation in education, vocational training, or substance abuse programs. *Id.*

4. *Id.* § 4024.2(c)-(e) (West Supp. 1995); *cf. id.* § 4024.3(c)-(e) (enacted by Chapter 106) (incorporating the voluntary work release program requirements in the newly established involuntary work release program).

5. *Id.* § 4024.3(a) (enacted by Chapter 106); *see id.* (stating that the criteria for involuntary work release programs is the same as found in California Penal Code § 4024.2(b) and that priority for participation in the work release programs is given to inmates who volunteer); *cf. GA. CODE ANN.* § 42-1-4(a), (b) (1994) (providing that participation in a work release program is voluntary and that the inmate must return to the institution when not working); TEX. CODE CRIM. PROC. ANN. art. 42.034(a) (West Supp. 1995) (stating that work release programs are voluntary and at the court's discretion).

6. CAL. PENAL CODE § 4024.3(a) (enacted by Chapter 106); *see id.* § 4024.3(b)(1) (enacted by Chapter 106) (defining the "county correctional system's mandated capacity" as the county's total capacity of all correctional facilities for permanent housing of adult inmates); *see also id.* § 4024.3(b)(2) (enacted by Chapter 106) (defining "mandated capacity" as the lesser capacity of either that established by court order or by the Board of Corrections); *id.* § 4024.3(b)(3) (enacted by Chapter 106) (defining "average daily jail population" as the county jail system's average number of inmates incarcerated on a yearly basis).

7. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 485, at 2 (May 9, 1995); *see id.* (stating that all aspects of the involuntary work release programs parallel those of the voluntary work release programs). Compare CAL. PENAL CODE § 4024.2 (West Supp. 1995) (outlining the provisions governing voluntary work release programs) with *id.* § 4024.3(c)-(f) (enacted by Chapter 106) (providing that the provisions governing involuntary work release programs are to be the same as those outlined in California Penal Code § 4024.2).

under Chapter 106, inmates earn the same sentence reduction credits that they would have received had they been incarcerated.⁸

COMMENT

Complying with court orders to relieve jail overcrowding and circumventing the inability to construct new correctional facilities, authorities have been forced to release inmates early and to close correctional facilities.⁹ Prior to the enactment of Chapter 106, because work release programs were only voluntary, there was no way to force inmates who were released early to complete the portion of their sentences that were excused.¹⁰ Work release programs yield two benefits to the community: they lessen jail overcrowding, and they provide a work force to perform much needed public work that would otherwise go undone.¹¹ Until Chapter 106 was enacted, though, there was no incentive for inmates to participate in work release programs because such programs were voluntary and

8. CAL. PENAL CODE § 4024.3(a) (enacted by Chapter 106); *see id.* § 4019(b), (c) (West Supp. 1995) (providing the standard credits and deductions from a period of confinement); *see also id.* § 4024.2(a) (West Supp. 1995) (stating that one day of work is in lieu of one day of confinement); *id.* § 8052(e)(8) (West Supp. 1995) (defining "work, in lieu of confinement" as an intermediate sanction, as something other than simple incarceration); *People v. Bravo*, 219 Cal. App. 3d 729, 735, 268 Cal. Rptr. 486, 489 (1990) (noting that the Legislature intended any partial day to count as a whole day and that the sentencing court must award credit for all days in custody, up to and including the day of sentencing); *In re Walrath*, 106 Cal. App. 3d 426, 431, 164 Cal. Rptr. 923, 926 (1980) (concluding that if sentenced for one year, a prisoner is entitled to 60 days credit and that if there is misconduct—depending on the severity of the misconduct and regardless of whether it occurs at the beginning or end of the sentence—the sheriff may deduct any part of the credit); *In re Allen*, 105 Cal. App. 3d 310, 313, 164 Cal. Rptr. 319, 322 (1980) (explaining that conduct credits are computed on the full period of confinement, beginning with the day of arrest).

9. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 485, at 3 (May 9, 1995); *see* CAL. PENAL CODE § 4024.1(a), (b) (West 1982) (providing that the person responsible for the county's correctional facilities may apply to the court for authorization to accelerate inmate releases); *see also* Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 315 (1983) (discussing how prison administrators, correction authorities, and legislatures are in an increasingly untenable positions as more mandatory sentences and longer minimum sentences are established, while budgetary constraints will not allow the expansion of correction facilities); Andy Furillo, *Presto! Prison Overcrowding Would Disappear*, SACRAMENTO BEE, June 9, 1995, at A1 (suggesting, as an alternative to work release, doubling up inmates in one cell); Rene Lynch, *'3 Strikes' Leads to More Early O.C. Jail Releases; Corrections: Inmates Asking for Trials to Avoid Another Conviction Crowd Prisons, Pushing Other Criminals Out*, L.A. TIMES, Dec. 19, 1994, at A1 (arguing that the three strikes law is benefitting criminals where overcrowded jails are leading to new legislation aimed at early release).

10. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 485, at 2 (May 9, 1995); *see* *Senate OKs Bill on Mandatory Manual Labor for Inmates Freed Early*, L.A. TIMES, May 20, 1995, at B2 (stating that inmates can avoid mandatory work because programs only apply to those who volunteer).

11. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 485, at 2-3 (May 9, 1995); *see* J. Harry Jones, *County Unveils 6 Steps to Cut Jail Crowding*, SAN DIEGO UNION-TRIB., Apr. 8, 1995, at B1 (explaining that the San Diego Sheriff Department wants to ease restrictions on work release programs because it is impossible to put inmates to work in the community); Kathleen Kellerher, *Firefighting Felons; Female Prisoners Battle Blazes, Clear Away Tinder and Gain Self-Esteem While Serving Out Their Sentences at Malibu's Fire Camp 13*, L.A. TIMES, Sept. 4, 1994, at J10 (finding that fire camps help ease overcrowding in jails, provide the community valuable services, and rehabilitate prisoners).

many inmates were already eligible for court mandated early release.¹² According to a statement of legislative intent, the purpose of Chapter 106 is to ensure that all early released inmates serve their sentences in one form or another by mandating that they successfully complete a work release program.¹³

Nonetheless, there is an issue as to whether Chapter 106 violates the Constitution's prohibition against involuntary servitude.¹⁴ In light of this, the Legislative Counsel has opined that mandatory work release programs in lieu of imprisonment, like those established by Chapter 106, are constitutional.¹⁵ The case of *Draper v. Rhay*¹⁶ supports the position that the Thirteenth Amendment has no application where a person has been convicted under a penal statute.¹⁷ Therefore, it appears that Chapter 106 will withstand constitutional challenge under the Thirteenth Amendment.

Timothy J. Moroney

12. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 485, at 2-3 (May 9, 1995); *see id.* (describing how, prior to Chapter 106 being enacted, work release was merely voluntary and there was no way to force inmates to participate in a work release program, even though several California counties are under a court order to keep their jail populations at 90%); *see also* Matt Lait, *Rift Deepens Between O.C. Sheriff, Judges*, L.A. TIMES, Apr. 27, 1995, at A1 (stating that the Orange County Sheriff is under a federal court order to cure the jail overcrowding problem); *Molina Wants Work-Release for Inmates Freed Early*, L.A. TIMES, Mar. 11, 1995, at B2 (suggesting that inmates opt to stay in jail rather than to participate in work release because they know they will be released only after serving one-third of their sentences).

13. 1995 Cal. Legis. Serv. ch. 106, sec. 1, at 391 (enacting CAL. PENAL CODE § 4024.3); *see id.* (finding that because of chronic budget problems, jail overcrowding, and court orders, Los Angeles County was forced to close Pitchess Honor Rancho and Biscailuz Center allowing 3200 inmates to avoid serving their entire sentence; the Legislature, by enacting Chapter 106 intends to stop circumstances like these from happening again); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 485, at 2 (May 9, 1995) (stating that Chapter 106 will see that criminals actually receive the punishment to which they are sentenced).

14. *See* U.S. CONST. amend. XIII (providing that slavery and involuntary servitude are only allowed to exist in the United States as a punishment for a crime, after an individual has been duly convicted). *See generally* *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (holding that the Thirteenth Amendment was not only meant to end slavery, but to maintain a system of completely free and voluntary labor across the United States). *But see* *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) (establishing that forcing inmates to work without pay does not constitute involuntary servitude since compensating prisoners for work is not a constitutional requirement); *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (holding that requiring an inmate to perform manual labor does not constitute involuntary servitude).

15. *Inmates: Mandatory Work Release Programs*, California Office of Legislative Counsel, Op. No. 19519, at 4 (May 3, 1995) (copy on file with the *Pacific Law Journal*); *see also* CAL. GOV'T CODE § 25359 (West 1988) (providing that the county board of supervisors can authorize prisoners convicted of misdemeanors to work for the benefit of the public); CAL. PENAL CODE § 2700 (West Supp. 1995) (stating that the Department of Corrections is to require able-bodied prisoners to work); *id.* § 4017 (West 1982) (permitting the county board of supervisors to require inmates to perform labor on public works and to engage in fire prevention); *Patterson v. Oberhauser*, 331 F. Supp. 220, 221 (C.D. Cal. 1971) (holding that there is no federal right which exempts state prisoners from working while imprisoned). *But see* *United States v. Reynolds*, 235 U.S. 133, 149-50 (1914) (providing that the state cannot accept the obligation of another, to whom the prisoner owes a debt, and force an individual to work); *Ex parte Arras*, 78 Cal. 304, 306, 20 P. 683, 684 (1889) (providing that hard labor cannot be imposed to collect a fine).

16. 315 F.2d 193 (9th Cir. 1963).

17. *Id.* at 197; *see id.* (holding that an individual held in a state penitentiary or county jail may be required to work in accordance with the institution's rules).

Crimes; privacy—eavesdropping

Penal Code § 636 (amended).

AB 1892 (Burton); 1995 STAT. Ch. 129

Prior law provided that every person who eavesdropped or recorded, by means of an electronic or other device, a conversation between a person who was in the physical custody of a law enforcement officer and his or her attorney, religious advisor, or licensed physician was guilty of a felony, unless consent was given by all parties to the conversation.¹

Chapter 129 narrows the felony provision of existing law to apply only to eavesdropping by electronic device.² Additionally, Chapter 129 adds a wobbler provision³ to existing law that prohibits the intentional non-electronic

1. 1967 Cal. Stat. ch. 1509, sec. 1, at 3588 (enacting CAL. PENAL CODE § 636); *see* CAL. PENAL CODE § 636(c) (amended by Chapter 129) (stating that the provisions of California Penal Code § 636 do not apply to the employee of a public utility acting within the scope of his or her employment who listens to conversations for the limited purpose of testing or servicing telephone or telegraph communications equipment); *see also In re Escobedo Arias*, 42 Cal. 3d 667, 681, 725 P.2d 664, 671, 230 Cal. Rptr. 505, 512 (1986) (construing California Penal Code § 636 as prohibiting the monitoring of conversations in a Youth Authority school between a ward and his religious advisor in locations traditionally used for that purpose); *cf.* KAN. STAT. ANN. § 21-4001 (1988) (defining "eavesdropping" as any of the following: (1) entering into a private place with intent to secretly listen to private conversations or to spy on persons therein; (2) installing or using outside a private place any device for hearing or recording sounds, without the consent of the person entitled to privacy; or (3) installing or using any device or equipment for the interception of telephone or wire communication without the consent of the person in control of the wire communication facilities); *id.* (classifying the crime of eavesdropping as a class A misdemeanor); KY. REV. STAT. ANN. §§ 526.010, 526.020 (Baldwin 1995) (stating that a person is guilty of eavesdropping, a class D felony, when he or she intentionally uses any device to overhear, record, amplify, or transmit any part of a wire or oral communication of others without the consent of at least one party to the conversation); MICH. COMP. LAWS ANN. § 750.539c (West 1991) (instructing that any person who intentionally uses any device to eavesdrop upon a private conversation or employs another to do the same, without the consent of all parties thereto, is guilty of a felony regardless of whether that person is present during the conversation); N.Y. PENAL LAW § 250.05 (McKinney 1989) (declaring that a person is guilty of eavesdropping, a class E felony, when he or she unlawfully engages in wiretapping, utilizes a mechanical device to surreptitiously listen to a conversation, or intercepts or accesses an electronic communication). *But see* John T. Soma & Lorna C. Yongs, *Confidential Communications and Information in a Computer Era*, 12 HOFSTRA L. REV. 849, 854 (1984) (noting that under the traditional rule, an eavesdropper who surreptitiously listens to the conversation between an attorney and his client is not precluded from testifying as to what he or she overheard because the client assumes the risk that some third person will be listening). *See generally* Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. CAL. L. REV. 903 (1991) (discussing the limited protection that privileged conversations receive from initial interception by electronic surveillance); 25 AM. JUR. 2d *Eavesdropping* § 1 (1966 & Supp. 1995) (providing an overview of the common law crime of eavesdropping); Kenneth J. Rampino, Annotation, *Admissibility, in Criminal Prosecution, of Evidence Obtained by Electronic Surveillance of Prisoner*, 57 A.L.R. 3d 172 (1994) (discussing cases considering the admissibility of evidence procured through surreptitious electronic surveillance of a prisoner during conversations with persons other than interrogating police officers).

2. CAL. PENAL CODE § 636(a) (amended by Chapter 129).

3. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1892, at 3 (June 13, 1995) (explaining that a wobbler provision accords the prosecutor a degree of discretion to charge the crime as a misdemeanor or a felony depending on the circumstances); *see also* Letter from Attorney General, Daniel L. Lungren, and Assistant Attorney General, Jack R. Stevens, to Assemblymember James Rogan, (May 12, 1995) (copy on file with the *Pacific Law Journal*) (noting that AB 1892 treats violations of California Penal

eavesdropping on a conversation between an in-custody defendant and his or her attorney, religious advisor or licensed physician, under circumstances where there exists a reasonable expectation of privacy.⁴

COMMENT

Chapter 129 was precipitated by *Morrow v. Superior Court*,⁵ a case in which a Deputy District Attorney was alleged to have engaged in unethical activity by conspiring with an investigator to eavesdrop on a conversation between a burglary suspect and his defense counsel.⁶ While charges were initially filed against the Deputy District Attorney, they were dismissed on the grounds that the statute was vague and applied only to electronic eavesdropping.⁷ Consequently, Chapter 129 was enacted to ensure that privileged conversations are protected from both electronic and non-electronic eavesdropping.⁸

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Code § 636 as a "wobbler," thereby giving prosecutors flexibility in dealing with the offense).

4. CAL. PENAL CODE § 636(b) (amended by Chapter 129); *see id.* (exempting conversations that are inadvertently overheard or that take place in a courtroom or other room used for adjudicatory proceedings from the provisions of California Penal Code § 636(b)); *id.* (establishing that the violation of this subdivision is a public offense punishable by incarceration in the state prison or county jail for a term not to exceed one year, or by a fine not to exceed \$2,500, or by both the fine and imprisonment); *see also* *Katz v. United States*, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment protects people and not places; therefore, what a person seeks to preserve as private may be constitutionally protected, even in an area accessible to the public); *Lanza v. New York*, 370 U.S. 139, 144-45 (1962) (noting that those relationships that the law has endowed with particularized confidentiality must continue to receive unceasing protection even when such conversations occur in a jail cell); *cf.* *North v. Superior Court*, 8 Cal. 3d 301, 311-12, 502 P.2d 1305, 1311, 104 Cal. Rptr. 833, 839 (1972) (holding that a reasonable expectation of privacy was accorded to a conversation between a prisoner and his wife where the conversation occurred in a private office and under circumstances indicating that the couple was lulled into believing that their conversation would be confidential). *But see In re Joseph A.*, 30 Cal. App. 3d 880, 885-86, 106 Cal. Rptr. 729, 733 (1973) (finding no reasonable expectation of privacy as to a conversation between a prisoner and his uncle where such conversation was conducted in an interrogation room under circumstances that would not be likely to induce the parties to believe that their conversation was confidential).

5. 30 Cal. App. 4th 1252, 36 Cal. Rptr. 2d 210 (1994).

6. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1892, at 2 (June 22, 1995) (declaring that the conversation between the burglary suspect and the defendant took place in a room specifically reserved for such privileged conversations); *see also Morrow*, 30 Cal. App. 4th at 1255, 36 Cal. Rptr. 2d at 213 (finding that the prosecutor instructed an investigator to sit next to the holding cell and listen to the conversation between defendant and his attorney); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1892, at 1 (May 2, 1995) (describing the *Morrow* case in which the Deputy District Attorney is alleged to have directed her investigator to position herself in a place where she could surreptitiously listen to the confidential conversation between a criminal defendant and the defendant's attorney).

7. *Morrow*, 30 Cal. App. 4th at 1256, 36 Cal. Rptr. 2d at 213; *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1892, at 2 (June 22, 1995) (declaring that the language of California Penal Code § 636 is ambiguous in that it could not be determined whether "or other device" included the naked ear).

8. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1892, at 2 (June 22, 1995) (declaring that the purpose of AB 1892 is to prohibit all intentional eavesdropping on certain privileged conversations).

Crimes; sexually violent predators

Welfare and Institutions Code §§ 6600, 6601, 6602, 6603, 6604, 6605, 6606, 6607, 6608 (new); § 6250 (amended).
AB 888 (Rogan); 1995 STAT. Ch. 763

Chapter 763 creates a new type of criminal in California—the sexually violent predator.¹ A sexually violent offense is defined by Chapter 763 to include a felony act committed on, before, or after the effective date of the Sexual Predator Act and resulting in a conviction, plus a determinate sentence involving any of the following crimes, when the crime is committed against a person's will by way of force,² violence,³ duress,⁴ menace,⁵ or fear⁶ of immediate and illegal

1. CAL. WELF. & INST. CODE § 6600(a) (enacted by Chapter 763); *see id.* (defining a "sexually violent predator" as a person who has been found guilty of a sexually violent offense against two or more individuals for which the convicted received a determinate sentence and who has been diagnosed with a mental disorder which makes him or her a danger to the health and safety of others in that it is likely that the person will partake in sexually violent criminal behavior); *id.* § 6600(c) (enacted by Chapter 763) (determining that the phrase "diagnosed mental disorder" includes a hereditary or acquired symptom that affects the emotional or voluntary control of a person that predisposes that person to commit criminal sexual acts that constitute a danger to the health and safety of others); *id.* § 6600(d) (enacted by Chapter 763) (stating that the phrase "danger to the health and safety of others" does not necessitate the proof of a recent overt act while the individual is in custody); *id.* § 6600(e) (enacted by Chapter 763) (mandating that the term "predatory" is an act that is aimed toward a stranger or an individual in which a relationship has been made or encouraged for the main purpose of victimization); *id.* § 6600(f) (enacted by Chapter 763) (stating that a "recent overt act" is any criminal behavior that shows a likelihood that the actor may partake in sexually violent predatory criminal behavior); *cf.* IOWA CODE ANN. § 709C.2(1) (West Supp. 1995) (defining the term "mental abnormality" almost exactly the same way as California Welfare and Institutions Code § 6600(c) defines the phrase "diagnosed mental disorder"); *id.* § 709C.2(2) (West Supp. 1995) (providing that the term "predatory" means an act that is directed toward a stranger or an individual with whom that person has established a relationship for the primary purpose of victimization); *id.* § 709C.2(4) (West Supp. 1995) (defining the term "sexually violent predator" as a person who has been found guilty of or charged with a sexually violent offense and who is afflicted with a mental abnormality or personality disorder which makes that person a likely candidate to commit predatory acts of sexual violence); KAN. STAT. ANN. § 59-29a02(a)-(c) (1994) (defining the terms "sexually violent predator," "mental abnormality," and "predatory" exactly the same as found in Iowa Code § 709C.2); WASH. REV. CODE ANN. § 71.09.020(1)-(3) (West Supp. 1994) (defining the terms "sexually violent predator," "mental abnormality," and "predatory" exactly the same as found in Iowa Code § 709C.2). *See generally* CAL. PENAL CODE § 667.71(a) (West Supp. 1995) (describing a "habitual sexual offender" as a person who has been previously convicted of at least one of the enumerated felonies in California Penal Code § 667.71(d) and who is presently being convicted of one of those felonies); *id.* § 667.71(d) (West Supp. 1995) (enumerating similar crimes and providing similar wording as found in California Welfare and Institutions Code § 6600(b)); Decio C. Rangel, Jr., *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 399-401 (1995) (providing an in-depth discussion of California Penal Code § 667.71).

2. *See* CAL. PENAL CODE § 242 (West 1988) (defining "battery" to include the use of unlawful force upon another person); *People v. Mansfield*, 200 Cal. App. 3d 82, 88, 245 Cal. Rptr. 800, 803 (1988) (concluding that force, as used in the context of battery, need not be violent or harsh and does not even need to cause pain or bodily injury, nor leave any type of mark); *People v. Martinez*, 3 Cal. App. 3d 886, 889, 83 Cal. Rptr. 914, 915 (1970) (finding that the use of force in the context of battery is any type of harmful or offensive contact); *see also* *People v. Shulz*, 2 Cal. App. 4th 999, 1004, 3 Cal. Rptr. 2d 799, 802 (1992) (providing that the term force as used in California Penal Code § 288(b) is physical force that differs substantially or is substantially excessive to that required to commit a lewd or lascivious act itself); *Powe v. State*, 597 So. 2d 721, 725 (Ala. 1991) (explaining that in cases involving sex crimes committed against children, the force required to complete the crime differs from the force necessary to complete the crime against

bodily injury to that person or another: rape,⁷ spousal rape,⁸ the aiding or abetting of a rape,⁹ lewd or lascivious acts committed upon a child,¹⁰ acts of penetration with a foreign object,¹¹ sodomy,¹² or oral copulation.¹³

a mature female).

3. Compare CAL. PENAL CODE § 13700(b) (West Supp. 1995) (defining the term domestic violence to include any abuse committed against a cohabitant or closely related relative) with *Mansfield*, 200 Cal. App. 3d at 87-88, 245 Cal. Rptr. at 802 (concluding that the word violence as used in California Penal Code § 242 has no real meaning).

4. See CAL. PENAL CODE § 261(b) (West Supp. 1995) (defining the term "duress" as used in this section as being a direct or inferred threat of force, violence, danger, or retribution that is enough to coerce a reasonable person of ordinary faculties to partake in an act to which that person otherwise would not have partaken); *id.* (explaining that the totality of the circumstances, including the victim's age and his or her relationship to the accused, are factors to be weighed in determining if duress exists); *Schulz*, 2 Cal. App. 4th at 1005, 3 Cal. Rptr. 2d at 803 (holding that "duress" as used in § 288 of the California Penal Code can arise from different circumstances, including the existence of a family relationship, the difference in ages, and contrast in size); *People v. Pitmon*, 170 Cal. App. 3d 38, 50, 216 Cal. Rptr. 221, 227 (1985) (defining the term "duress" as used in California Penal Code § 288 as a direct or implied threat of danger, force, hardship, violence, or retribution that is sufficient to induce a reasonable person of average susceptibilities to do an act that ordinarily would not have been done or, acquiesce in an act to which the person would not have otherwise submitted).

5. See CAL. PENAL CODE § 261(c) (West Supp. 1995) (defining "menace," as used in this section to mean any threat, act, or declaration which shows a purpose to inflict harm upon another person).

6. See *People v. Cardenas*, 21 Cal. App. 4th 927, 939-40, 26 Cal. Rptr. 2d 567, 574-75 (1994) (declaring that the term "fear" as used in California Penal Code §§ 288 and 289 is defined as a feeling of distress that is caused by an expectation of danger, pain, disaster, or something similar; terror and dread; apprehension; and submissive or awe towards a higher power).

7. See CAL. PENAL CODE § 261(a) (West Supp. 1995) (explaining that "rape" is the act of sexual intercourse done with a person who is not the spouse of the aggressor).

8. See *id.* § 262 (West Supp. 1995) (setting forth a similar definition as found in California Penal Code § 261 except that the act is done with the perpetrator's spouse).

9. See *id.* § 264.1 (West Supp. 1995) (stating that notwithstanding California Penal Code § 264, in any instance where the defendant who voluntarily acts in concert with another person, by force or violence and against the will of the victim, commits an act that is described in California Penal Code §§ 261, 262, or 289, either himself or herself or by assisting the other person, is guilty of aiding or abetting a rape); see also *id.* § 264 (West Supp. 1995) (setting forth the punishments for the crime of rape).

10. See *id.* § 288(a) (West Supp. 1995) (asserting that any person who willfully and lewdly commits any lewd or lascivious act, including any other act found in the California Penal Code, upon a child who is younger than 14 years old, with the intent of arousing, appealing to, or satisfying the lust, passions, or sexual wants of that person or child is guilty of a felony); *People v. Gilbert*, 5 Cal. App. 4th 1372, 1380, 7 Cal. Rptr. 2d 660, 664 (1992) (expounding that the crime of lewd and lascivious conduct committed upon a child need not be inherently sexual in nature nor must it be shown that the defendant touched the child's genitalia); *People v. Cordray*, 221 Cal. App. 2d 589, 593, 34 Cal. Rptr. 588, 590 (1963) (holding that the intent to arouse the passions in a child may be based upon conduct, or the manner or performance of the act in a criminal case concerning lewd and lascivious conduct).

11. See CAL. PENAL CODE § 289(a) (West Supp. 1995) (defining "penetration by a foreign object" as any penetration, even slight, caused by a person or directed by that person to another person, of the genital or anal cavities of any person for the reason of sexual arousal, gratification, or abuse by any foreign object, substance, device, or instrument, or by an object that is unknown when the act is done); *id.* § 289(k)(1) (West Supp. 1995) (providing that the terms "foreign object," "substance," "instrument," or "device" include any part of the body except a sexual organ); *id.* § 289(k)(2) (West Supp. 1995) (explaining that the term "unknown object" includes any foreign object, substance, instrument, or device, or any portion of the body, which includes the penis, when it is not known if penetration was made by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body); CAL. WELF. & INST. CODE § 6600(b) (enacted by Chapter 763) (listing California Penal Code § 289(a) as a specified penetration with foreign object violation and repealed California Penal Code § 289.5); 1991 Cal. Legis. Serv. ch. 293, sec. 1, at 1598 (enacting CAL. PENAL CODE § 289.5) (describing a crime similar to § 289 of the California Penal Code that concerned

Chapter 763 mandates that whenever the Director of the Department of Corrections¹⁴ finds that a person, who is in custody under the jurisdiction of the department and who is either in the midst of a prison term or whose parole has been revoked, may be a sexually violent predator, the director must, at a minimum of six months before that person's scheduled date for release from incarceration or termination of parole, refer that individual for evaluation pursuant to California Penal Code section 6601.¹⁵

If a person has been referred for evaluation, Chapter 763 sets forth the procedure for the evaluation.¹⁶ If the county's selected counsel agrees with the

penetration by a penis or foreign object).

12. See CAL. PENAL CODE § 286(a) (West Supp. 1995) (defining "sodomy" as sexual conduct that consists of contact between the penis of one male and the rectum of another person and stating that even slight sexual penetration is enough to commit the crime of sodomy); CAL. WELF. & INST. CODE § 6600(b) (enacted by Chapter 763) (listing sodomy acts in violation of California Penal Code § 286 when committed by force, violence, duress, menace, or fear of immediate and illegal bodily injury on the victim or another).

13. CAL. WELF. & INST. CODE § 6600(b) (enacted by Chapter 763); see CAL. PENAL CODE § 288a(a) (West Supp. 1995) (defining "oral copulation" as the act of copulating the mouth of one person with the sexual organ or rectum of any other person); CAL. WELF. & INST. CODE § 6600(b) (enacted by Chapter 763) (listing violations of California Penal Code § 286, oral copulation violations, when committed by force, duress, violence, menace, or fear of immediate and illegal bodily harm on the victim or another individual); see also *id.* § 6600(a) (enacted by Chapter 763) (mandating that conviction of one or more of the crimes found in California Welfare and Institutions Code § 6600 will constitute evidence that can support a jury or court finding that an individual is a sexually violent predator, but cannot be the only basis for such a finding); *id.* (requiring that jurors be told that they may not find that an individual is a sexually violent predator based upon prior offenses without relevant evidence of a presently diagnosed mental disorder that would make that person likely to be a sexually violent predator and dangerous to the community). For examples of other states' definitions of sexually violent offenses, see IOWA CODE ANN. § 709C.2(3) (West Supp. 1995); KAN. STAT. ANN. § 59-29a02(e) (1994); MINN. STAT. ANN. § 609.1352(b) (West Supp. 1995); WASH. REV. CODE ANN. § 71.09.020(4) (West Supp. 1995).

14. See CAL. PENAL CODE § 5001 (West 1982) (stating that the California Department of Corrections is to be composed of the Director of Corrections and the Prison Industry Authority); *id.* § 5002 (West Supp. 1995) (describing the powers and duties of the California Department of Corrections). See generally 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1254 (2nd ed. 1989 & Supp. 1995) (providing an overview of the California Department of Corrections).

15. CAL. WELF. & INST. CODE § 6601(a) (enacted by Chapter 763); see *id.* § 6601(b) (enacted by Chapter 763) (mandating that the individual must be screened by the Department of Corrections and the Board of Prison Terms based on whether the individual has partaken in a sexually violent predatory offense and upon an examination of the person's social, criminal, and institutional background); *id.* (stating that the screening must be done in accordance with a structured screening instrument created and updated by the State Department of Mental Health with advice from the Department of Corrections); *id.* (announcing that if through the screening it is found that the person is likely to be a sexually violent predator, the Department of Corrections must refer that individual to the State Department of Mental Health for a complete evaluation as to whether the individual meets the criteria as set forth in California Penal Code § 6600).

16. *Id.* § 6601(c)-(g) (enacted by Chapter 763); see § 6601(c) (enacted by Chapter 763) (indicating that the State Department of Mental Health must examine the person in accordance with accepted assessment protocol, created and updated by the State Department of Mental Health, to find whether the individual is a sexually violent predator); *id.* (propounding that the standardized assessment protocol must include assessment of mental disorders, in conjunction with various known factors to be associated with the risk of re-offense among sex offenders); *id.* (instructing that risk factors to be weighed must include criminal and psychosexual history, kind, degree, and duration of sexual deviance, and severity of personality disorder); *id.* § 6601(d) (enacted by Chapter 763) (providing that any individual who has been referred must be examined by two practicing psychiatrists or psychologists, or one of each, designated by the Director of Mental Health); *id.* (explaining that if both evaluators agree that the individual is a possible sexually violent predator, the Director

recommendation, a petition for commitment¹⁷ must be filed in the superior court of the county in which the person was convicted of the offense.¹⁸ Chapter 763 provides the guidelines for judicial review of the petition, which is used to determine whether a trial is to be had.¹⁹ If so, Chapter 763 provides the means and

of Mental Health may pass on a request for a petition for commitment pursuant to California Penal Code § 6602(i) and copies of the evaluation reports and any other supporting information, must be made available to the lawyer designated by the county pursuant to California Penal Code § 6601(i), who then may file a petition for commitment); *id.* § 6601(e) (enacted by Chapter 763) (stating that if one of the examiners does not believe that the person meets the criteria of a sexually violent predator, the Director of Mental Health must arrange for further examination of the individual by two independent professionals selected pursuant to California Penal Code § 6601(g)); *id.* § 6601(f) (enacted by Chapter 763) (announcing that if an evaluation by individual professionals pursuant to California Penal Code § 6601(e) is done, a petition to ask for commitment under this article can only be submitted if both independent professionals who examine the individual agree that the person meets the criteria for commitment as set forth in California Penal Code § 6601(d)); *id.* (declaring that professionals chosen to examine the person pursuant to California Penal Code § 6601(g) must inform the individual that the aim of their examination is not treatment but rather to determine if the individual meets specific criteria to be involuntarily committed, but noting however, that it is not necessary that the individual appreciate or understand that information); *id.* 6601(g) (enacted by Chapter 763) (mandating that any independent professional who is selected by the Director of Corrections or the Director of Mental Health, must have at a minimum five years of experience in the treatment and diagnosis of mental problems, and includes psychiatrists and licensed psychologists who have received a doctorate degree in psychology, but cannot be a state government employee); *id.* (providing that the law set forth in California Penal Code § 6601(g) also applies to any professionals who are appointed by the court to examine the individual for purposes of any other proceeding under the Sexual Predator Article).

17. See Diane B. Bartley, Note, *State v. Field: Wisconsin Focuses on Public Protection by Reviving Automatic Commitment Following a Successful Insanity Defense*, 1986 WIS. L. REV. 781, 781-82 (stating that in the context of insanity defendants, the purpose of commitment is to treat the defendant's mental illness and protect the public); see also Louis A. Chiafullo, Comment, *Innocents Imprisoned: The Deficiencies of the New Jersey Standard Governing the Involuntary Commitment of Children*, 24 SETON HALL L. REV. 1507, 1508 n.3 (1994) (defining the term "involuntary civil commitment" as any compulsory hospitalization or other restriction on personal liberty that is imposed by a state due to a person's mental illness).

18. CAL. WELF. & INST. CODE § 6601(i) (enacted by Chapter 763); see *id.* (requiring that the petition must be filed and the proceedings handled by either the district attorney or the county counsel of that county); *id.* (stating that the county board of supervisors must designate either the county counsel or district attorney to handle the responsibility for commitment proceedings); see also *id.* § 6601(h) (enacted by Chapter 763) (announcing that copies of the examination records and any other pertinent documents must be made available to the lawyer designated by the county pursuant to California Penal Code § 6601(i) who may submit a petition for commitment). For examples of other states' petition procedures, see IOWA CODE ANN. § 709C.3 (West Supp. 1995); KAN. STAT. ANN. § 59-29a03 (1994); WASH. REV. CODE ANN. §§ 71.09.025, 71.09.030 (West Supp. 1995). See generally Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 KAN. L. REV. 887, 891-92 (1994) (describing the petition process in the state of Kansas).

19. CAL. WELF. & INST. CODE § 6602 (enacted by Chapter 763); see *id.* (declaring that a judge of the superior court must review the petition and then determine whether there is probable cause to believe that the person named in the petition is likely to partake in sexually violent criminal conduct upon his or her release); *id.* (stating that if probable cause is not found, the petition must be dismissed, but if probable cause is found, a trial must be conducted); *id.* (relating that the individual named in the petition has the right to an attorney at the probable cause hearing). But cf. WASH. REV. CODE ANN. § 71.09.040 (West 1992) (reciting that upon the filing of a petition, the judge must determine whether probable cause exists to believe that the individual named in the petition is a sexually violent predator, and if so, then the judge must direct that the individual be taken into custody and transferred to an appropriate place for an examination as to whether the person is a sexually violent predator); *id.* (stating that the examiner must be professionally qualified to evaluate mental disorders); IOWA CODE ANN. § 709C.4 (West Supp. 1995) (providing a similar provision as found in Washington Code § 71.09.040); KAN. STAT. ANN. § 59-29a05 (1994) (setting forth similar language as found in § 71.09.040 of the Washington Code).

procedures for a trial for this offense.²⁰ Finally, Chapter 763 establishes the burden of proof, which is beyond a reasonable doubt, that must be met in these cases.²¹

Chapter 763 provides that if a person is found to be a sexually violent predator, the person must be committed for two years to the custody of the State Department of Mental Health²² for proper treatment and confinement in a secure place as specified by the Director of Mental Health.²³ A person who is found to be a sexually violent predator and committed to the custody of the State Department of Mental Health is allowed to have a current examination of his or her mental condition at least once a year.²⁴ Further, a person is guaranteed treatment of his or her condition by Chapter 763.²⁵

20. CAL. WELF. & INST. CODE § 6603 (enacted by Chapter 763); *see id.* § 6603(a) (enacted by Chapter 763) (propounding that a person facing possible commitment as a sexually violent predator is entitled to a trial by jury, the help of counsel, the right to have experts or professional persons to perform an examination on his or her behalf, and have available to him or her all relevant medical and psychological reports and records); *id.* (providing that when a person is indigent, the court must appoint counsel to help him or her, and, upon the request of that individual, help the person obtain an expert or professional person to perform an evaluation or participate in the trial on the defendant's behalf); *id.* § 6603(b), (c) (enacted by Chapter 763) (declaring that the attorney who petitions for commitment may demand the trial be before a jury, but if no demand is made by the defendant or the petitioning attorney, the trial will be before the court without a jury); *id.* § 6603(d) (enacted by Chapter 763) (mandating that a unanimous verdict is required by any jury trial in a case involving the possible commitment of an alleged sexually violent predator); *see also id.* § 6600(a) (enacted by Chapter 763) (stating that conviction of any crime listed in California Penal Code § 6600 will constitute evidence that can support a court or jury finding that a person is a sexually violent predator, but can not be the only basis for such determination). For examples of other states' trial procedures in these type of cases, see IOWA CODE ANN. § 709C.6 (West Supp. 1995); KAN. STAT. ANN. § 59-29-a07 (1994); WASH. REV. CODE ANN. § 71.09.060 (West 1992). *See generally* McCaffrey, *supra* note 18, at 892 (discussing the trial procedure in the state of Kansas regarding sexually violent predators).

21. CAL. WELF. & INST. CODE § 6604 (enacted by Chapter 763); *see id.* (requiring that the fact finder determine whether, beyond a reasonable doubt, the defendant is a sexually violent predator). For other state statutes using the beyond a reasonable doubt standard for "sexually violent predator" determinations, see IOWA CODE ANN. § 709C.6 (West Supp. 1995); KAN. STAT. ANN. § 59-29a07 (1994); WASH. REV. CODE ANN. § 71.09.040 (West 1992).

22. *See* CAL. WELF. & INST. CODE §§ 4000-4096.5 (West 1984 & Supp. 1995) (discussing the duties and powers given to the State Department of Mental Health).

23. *Id.* § 6604 (enacted by Chapter 763); *see id.* (warning that the person cannot be kept in actual custody for a period longer than two years absent a subsequent finding for extended commitment pursuant to the filing of a new petition under the Sexual Predator Article or unless the term of commitment changes in accordance with California Penal Code § 6605(e)); *id.* (mandating that time spent on conditional release does not count toward the two year commitment period, unless the individual is placed in a locked facility by the conditional release program, in which instance the time spent in a locked location shall count toward the two year term of commitment); *id.* (stating that the facility must be found on the grounds of an institution under the control of the Department of Corrections). For examples of other states' commitment requirements, see IOWA CODE ANN. § 709C.6(1) (West Supp. 1995); KAN. STAT. ANN. § 59-29a07(a) (1994); WASH. REV. CODE ANN. § 71.09.060(1) (West 1992).

24. CAL. WELF. & INST. CODE § 6605(a) (enacted by Chapter 763). For examples of other states that allow yearly examinations to an individual committed as a sexual predator, see IOWA CODE ANN. § 709C.7 (West Supp. 1995); KAN. STAT. ANN. § 59-29a08 (1994); WASH. REV. CODE ANN. § 71.09.070 (West 1992).

25. CAL. WELF. & INST. CODE § 6606(a) (enacted by Chapter 763); *see id.* (insisting that a person who is committed as a sexual violent predator is to be provided with programming by the State Department of Mental Health in treating the person for his or her diagnosed mental disorder); *id.* § 6606(b) (enacted by Chapter 763) (providing that a person need not agree to treatment for a finding that a person is a sexual predator, nor does treatment mean that the treatment must be a success or possibly successful, nor does it mean

Chapter 763 also provides a procedure for the person's release based upon the opinion of the Director of Mental Health.²⁶ In addition, Chapter 763 creates an extensive procedure for the committed person to petition for his or her release from treatment.²⁷

that the individual must acknowledge his or her condition and willingly engage in the treatment for that condition); *id.* § 6606(c) (enacted by Chapter 763) (mandating that programming given by the State Department of Mental Health in facilities must be consistent with current institutional standards for the treatment of sex offenders, and must be based on a structured treatment procedure created by the State Department of Mental Health); *id.* (stating that the procedure must describe the amount and kinds of treatment components that are administered in the program, and must dictate how assessment data will be used to locate the course of treatment for each individual person); *id.* (requiring that the protocol must also specify the measures that will be used to determine treatment progress and changes with respect to the person's risk of re-offense).

26. *Id.* § 6607(a) (enacted by Chapter 763); *see id.* (stating that if the Director of Mental Health finds that the person's condition has changed such that the person is not likely to commit acts of sexual violence while under watch and treatment in the community, the director must provide to the county attorney a request for the attorney to petition the court for a conditional release of the person); *id.* § 6607(b) (enacted by Chapter 763) (providing that when a petition is filed for a conditional release, the court must hear the petition pursuant to the procedure that is set forth in California Penal Code § 6608).

27. *Id.* §§ 6605, 6608 (enacted by Chapter 763); *see id.* § 6605(b) (enacted by Chapter 763) (announcing that the director of the State Department of Mental Health must provide the committed person with a yearly written notice of that person's right to petition the court for a conditional release pursuant to California Penal Code § 6608); *id.* (providing that the petition must contain a waiver of rights and if the individual does not affirmatively waive his or her right to petition the court for his or her conditional release, the court must set a show-cause hearing to find out whether facts exist that would warrant a hearing on whether the individual's condition has changed so that he or she would not be a danger to society if discharged and the committed person has the right to have an attorney present at the show-cause hearing); *id.* § 6605(c) (enacted by Chapter 763) (stating that if at the show-cause hearing, probable cause exists to believe the person can be discharged, then a hearing must be set to determine if the person can be released); *id.* § 6605(d) (enacted by Chapter 763) (providing that at the hearing, the committed individual has a right to be present and is entitled to all constitutional protections that were given to him or her at the commitment proceeding); *id.* (relating that the county attorney has the right to demand a jury trial and to have the committed person examined by experts chosen by the state); *id.* (instructing that the committed person also has the right to a jury trial, the help of counsel, and to have experts examine him or her on his or her behalf, and that the court must appoint an expert if the person is indigent and asks for such appointment); *id.* (propounding that the burden of proof at the hearing is placed upon the state and thus, the state must prove beyond a reasonable doubt that the person should remain committed); *id.* § 6605(e) (enacted by Chapter 763) (declaring that if the jury or court finds against the committed person at the hearing, conducted pursuant to California Welfare and Institutions Code § 6605(d), then the period of commitment of the individual will run for a period of two years from the date of the finding; but if the fact finder rules in favor of the committed person, he or she must be unconditionally released and discharged); *id.* § 6605(f) (enacted by Chapter 763) (allowing for a procedure in which the California State Department of Mental Health may seek an unconditional release and discharge of a person who it believes is no longer a sexually violent predator); *id.* § 6608(a) (enacted by Chapter 763) (stating that a person may petition for release without the approval of the Director of Mental Health, but if an individual has already filed a petition for conditional release without the approval of the Director and the court found, either upon examination of the petition or following a hearing, that the petition was frivolous or that the person's condition had not changed so as to make him a safe member of the community, then the court must deny the subsequent petition unless it shows facts upon which a court could determine that the condition of the committed person has changed such that a hearing is necessary); *id.* (announcing that upon the receipt of the first or later petition from a person without approval of the Director, the court must endeavor whenever possible to examine the petition and determine whether it is based upon frivolous grounds and if so, the court must deny the petition without a hearing); *id.* (reciting that an individual who petitions for conditional or unconditional release has the right to assistance from an attorney); *id.* § 6608(b) (enacted by Chapter 763) (mandating that at least 15 days before the hearing, the court must provide notice to the county's attorney, the committed person's attorney, and the Director of Mental Health); *id.* § 6608(c) (enacted by Chapter 763) (providing that no hearing

COMMENT

Chapter 763 was signed on the same day as Chapter 762.²⁸ The significance of this is that both pieces of legislation are identical in content, word for word; the only difference is that Chapter 763 originated in the Assembly while Chapter 762 originated in the Senate.²⁹ Assemblymember Rogan, the author of Chapter 763, and Senator Mountjoy, the author of Chapter 762, worked together to get these laws passed.³⁰ Thus, the two Chapters can probably be considered the same legislation. Therefore, considering that the two Chapters were treated as one single piece of legislation, this legislative review will present information found in conjunction with each bill.

Governor Pete Wilson ardently supports Chapter 763.³¹ According to Assemblymember Rogan, approximately 3000 sex offenders, including predatory child molesters, forcible rapists, and repeat violent sex offenders, are automatically released each year into society.³² Among these individuals this year will

upon the petition can be had until the committed person has been under confinement and care for at least one year from the order date of the commitment); *id.* § 6608(d) (enacted by Chapter 763) (setting forth a conditional release program of one year for people released pursuant to a petition under California Penal Code § 6608); *id.* § 6608(e) (enacted by Chapter 763) (stating the method for recommending a conditional release program); *id.* § 6608(g) (enacted by Chapter 763) (explaining that if the court rules against the committed at the trial for an unconditional release from commitment, the court may put the person in outpatient status as set forth in California Penal Code §§ 1600-1620); *id.* § 6608(h) (enacted by Chapter 763) (reporting that if the court refuses to place the person in an appropriate forensic conditional release program, or if the petition for unconditional release is denied, the person must wait at least one year before filing another petition); *id.* § 6608(i) (enacted by Chapter 763) (mandating that the petitioner has the burden of proving by a preponderance of evidence when a hearing is requested under California Penal Code § 6608); *id.* § 6608(k) (enacted by Chapter 763) (noting that time that is spent in a conditional release program pursuant to California Penal Code § 6608 does not count toward the time of commitment unless the individual is confined in a locked location during part of the conditional release program, in which case, the time spent locked up will count toward the term of the commitment). For examples of other states' petition for release procedures, see IOWA CODE ANN. §§ 709C.8, 709C.9 (West Supp. 1995); KAN. STAT. ANN. §§ 59-29-a10, 59-29-a11 (1994); WASH. REV. CODE ANN. §§ 71.09.090, 71.09.100 (West 1992 & Supp. 1994). See generally McCaffrey, *supra* note 18, at 893-95 (discussing the release procedure of committed sexual violent predators in the State of Kansas).

28. Mary L. Vellinga, *Mentally Ill Sex Criminals Face Longer Lockup*, SACRAMENTO BEE, Oct. 11, 1995, at A3.

29. Telephone Interview with Nancy Leneis, Legislative Consultant to Senator Richard Mountjoy on SB 1143 (Oct. 11, 1995) (notes on file with the *Pacific Law Journal*). Compare 1995 Cal. Legis. Serv. ch. 762, sec. 1-3, at 4604-10, with 1995 Cal. Legis. Serv. ch. 763, sec. 1-3, at 4610-16.

30. Telephone Interview with Nancy Leneis, *supra* note 29; see Vellinga, *supra* note 28, at A3 (labeling both SB 1143 and AB 888 as a "two bill package" and noting that they were passed together by an overwhelming bipartisan vote in the Assembly and Senate).

31. Vellinga, *supra* note 28, at A3; see *id.* (quoting Governor Wilson as stating that Chapter 763 is a way to keep society's most dangerous and mentally disturbed predators off the streets); *id.* (citing Governor Wilson as believing that Chapter 763 will rid California of liberal laws that allow sick and dangerous criminals to be released from prison).

32. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 888, at 4 (June 2, 1995).

be Reginald Muldrew, the "Pillowcase" serial rapist, who, as of this writing, is scheduled to be released from prison in early December, 1995.³³

The California Legislature declares that there are a small number of sexually violent predators in society.³⁴ Although the number is small, these individuals are perceived by the California Legislature as being dangerous to the health and safety of others.³⁵

The author of Chapter 763 states that past law created no authority to detain these individuals.³⁶ Thus, Chapter 763 was enacted in realization of this and therefore establishes a civil commitment procedure for the placement and treatment of these individuals in a safe mental health facility after their release from incarceration.³⁷

As of January 1, 1994, the California Department of Corrections had 8295 prisoners who fell under the provisions of Chapter 763.³⁸ However, it is not known how many inmates would have actually been deemed sexually violent predators.³⁹

33. *Serial Rapist Free Next Month*, SACRAMENTO BEE, Oct. 11, 1995, at B4; *see id.* (reporting that Muldrew will complete his sentence on November 29 and should be free five days later); *id.* (discussing the sexual crimes committed by Muldrew); *see also* Vellinga, *supra* note 28, at A3 (quoting Senator Mountjoy as stating that he decided to create this legislation last year after thousands of people in his district protested out of fear that Muldrew would be paroled to their area).

34. 1995 Cal. Legis. Serv. ch. 763, sec. 3, at 4611-16 (enacting CAL. WELF. & INST. CODE §§ 6600-6608).

35. *Id.*; *see* Telephone Interview with Nancy Leneis, *supra* note 29 (stating that it is unconscionable for sexual predators to prey upon innocent people and that these predators are not well and need to receive appropriate treatment); *id.* (relating an example of a woman who had ammonia poured in her eyes, was raped by a group of individuals, and was raped with a knife as well; presently the woman is in the hospital again, fighting for her life, while the people who did this to her will be released from prison in one year); *Metropolitan Digest/Los Angeles County News in Brief: Glendale; Wilson Backs Bill to Commit Violent Sex Offenders*, L.A. TIMES, Apr. 20, 1995, at B2 (stating that Governor Pete Wilson supported a bill similar to SB 1143 in fighting sexual predators); Tom Precious, *How Many . . . Children Will It Have to Take?*, TIMES UNION (Albany, N.Y.), June 15, 1995, at A1 (discussing horrendous sexual acts committed on children and the anger expressed by people over these types of acts); Tony Rizzo, *Sex Predator Law Gets Johnson County Test; Trial to Decide If Man Will be Ordered to a Mental Institution*, KAN. CITY STAR, Apr. 4, 1995, at A1 (describing numerous sex crimes one individual has committed in his lifetime; including masturbation in front of young girls, spying on the girls' shower while employed as a school janitor, attempted rape of his then wife, and the making of obscene phone calls); *cf.* KAN. STAT. ANN. § 59-29a01 (1994) (proclaiming the legislative intent behind the State of Kansas' sexually violent predator statutes); WASH. REV. CODE ANN. § 71.09.010 (West 1992) (describing the legislative intent behind the State of Washington's sexually violent predator statutes).

36. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 888, at 4 (June 2, 1995); *see* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1143, at 2-3 (Apr. 25, 1995) (discussing the California Mentally Disordered Act, which was enacted in 1967 and repealed in 1981, which allowed for the commitment of the offender based upon a showing beyond a reasonable doubt that there was a danger and that the person could benefit from the treatment); *id.* at 3 (discussing current California law concerning mentally disordered offenders, which includes both an inpatient or outpatient treatment program for applicable persons).

37. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 888, at 4 (Sept. 15, 1995).

38. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 888, at 1 (Sept. 6, 1995).

39. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1143, at 1 (May 15, 1995); *see id.* (suggesting that staff of the California Department of Corrections believes that a high number of individuals would be convicted).

Chapter 763 will most likely face constitutional challenges in many areas.⁴⁰ What follows is a discussion in each area of potential constitutional challenge.

DOUBLE JEOPARDY AND EX POST FACTO LAWS

Civil commitment procedures have faced challenges under the Double Jeopardy Clause⁴¹ and the Ex Post Facto Clause.⁴² However, a very early Supreme Court Case held that the Ex Post Facto Clause only applies to retrospective criminal statutes.⁴³ The California Legislature, in its declaration regarding Chapter 763, labels Chapter 763 a civil commitment program.⁴⁴

In contrast, the Supreme Court held in *United States v. Halper*⁴⁵ that the Double Jeopardy Clause can apply in a civil setting when the additional civil penalty is punitive in nature.⁴⁶ Critics believe that Chapter 763 is punitive in nature, based on their belief that the intent of Chapter 763 is to keep sexual predators incarcerated.⁴⁷

Nonetheless, in a recent Washington State case, the Washington Supreme Court held that statutory commitment of sexually violent predators in Washington is civil in nature and therefore does not violate the prohibition against ex post facto laws.⁴⁸ Further, by application of the test set forth in *Halper*, the Washington Supreme Court found that the statutory commitment of sexually violent predators in Washington does not violate the Double Jeopardy Clause.⁴⁹ Thus, based on the Washington State Supreme Court's analysis, Chapter 763

40. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 4 (Sept. 13, 1995); see SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1143, at 4 (May 31, 1995) (noting that the ACLU opposes SB 1143 (AB 888) on both policy and constitutional grounds and believes that it violates substantive due process).

41. See U.S. CONST. amend V (proclaiming that no person can be tried twice for the same offence); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that through the Fourteenth Amendment, the Double Jeopardy Clause applies to the states).

42. McCaffrey, *supra* note 18, at 895; see U.S. CONST. art. I, § 9, cl. 3 (stating that no ex post facto law can be passed); *id.* § 10, cl. 1 (mandating that no state can pass an ex post facto law); CAL. CONST. art. I, § 9 (mandating that ex post facto laws may not be passed). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 419 (9th ed. 1988) (explaining that an ex post facto law is a retrospective statute that applies to crimes committed before the passage of the statute and substantially harms the accused).

43. *Calder v. Bull*, 3 U.S. 386, 391 (1798).

44. 1995 Cal. Legis. Serv. ch. 763, sec. 3, at 4611-16 (enacting CAL. WELF. & INST. CODE §§ 6600-6608).

45. 490 U.S. 435 (1989).

46. *Id.* at 448-49; see *id.* at 447-48 (holding that the labeling of a statute as either criminal or civil is not of great importance, but that a civil as well as a criminal sanction can constitute punishment when the penalty as applied serves the goals of punishment); *id.* at 448 (noting that the goals of punishment are retribution and deterrence); *id.* at 448-49 (holding that under the Double Jeopardy Clause a person who has previously been punished in a criminal action may not be subjected to an additional civil penalty to the extent that the second penalty can not be fairly characterized as remedial, but only as a deterrent or retribution).

47. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1143, at 12 (Apr. 25, 1995).

48. *In re Young*, 857 P.2d 989, 999 (Wash. 1993).

49. *Id.* at 999-1000.

would appear to survive both of these constitutional challenges since its wording is based in part upon Washington's sexual predator statutes.⁵⁰

However, in *Young v. Weston*,⁵¹ a United States District judge found that Washington's Sexual Violent Predator Statute does violate both the Ex Post Facto Clause and the Double Jeopardy Clause of the Constitution.⁵² Applying the test set forth in *United States v. Ward*,⁵³ the court determined that the Washington statute is criminal in nature and violates the Ex Post Facto Clause.⁵⁴ The court found that the Double Jeopardy Clause was violated through application of the *Halper* test, which is the exact opposite result of that reached by the Washington State Supreme Court in *In re Young*.⁵⁵

In *Allen v. Illinois*,⁵⁶ the Supreme Court found an Illinois civil commitment procedure based upon dangerous sexual acts to be civil in nature.⁵⁷ The Supreme Court based its holding on the fact that the Illinois Supreme Court found the statute to be civil in nature, the state was statutorily obligated to provide care and treatment to those committed, committed persons were released when they were no longer considered dangerous, and release on a conditional basis was made

50. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1143, at 4 (Apr. 25, 1995); see *id.* (stating that SB 1143 is loosely patterned in part after Washington's sexual predator statutes); *id.* (reporting that SB 1143 is also loosely patterned in part after Minnesota's civil commitment statutes); see also *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991) (affirming the holdings of the district court and state courts before it, that Minnesota's civil commitment of a sexually violent predator does not violate the Constitution), *cert. denied*, 112 S. Ct. 1516 (1992); McCaffrey, *supra* note 18, at 896 (noting that the statutory language of the Sexual Predator Act in Kansas is very similar to that of the Illinois statute upheld in *Allen v. Illinois*, 478 U.S. 364 (1985)); *id.* (stating that civil commitment is found to be constitutional because of different goals associated with civil commitment as compared to criminal confinement); *id.* (explaining that civil commitment is aimed towards help, care, and treatment, while criminal incarceration is geared toward deterrence and retribution).

51. No. C94-480C, 1995 U.S. Dist. LEXIS 12928 (W.D. Wash. 1995).

52. *Id.* at *30.

53. 448 U.S. 242 (1980).

54. *Young v. Weston*, No. C94-480C, 1995 U.S. Dist. LEXIS 12928, *28 (W.D. Wash. 1995); see *id.* at *22-23 (citing *United States v. Ward*, 448 U.S. 242 (1980) and stating that where the legislature has expressed an intention to establish a civil law, the Court must determine whether that law is so punitive either in purpose or effect as to negate that expressed intention; only the clearest proof will work to establish the unconstitutionality of a statute on this ground); *id.* at *23-24 (providing a list of factors to assist a court in determining whether a statute is civil or criminal for purposes of the Ex Post Facto Clause: (1) whether the sanction includes an affirmative disability or restraint, (2) whether it has in the past been regarded as a punishment, (3) whether it materializes only on a finding of scienter, (4) whether the statute's operation will promote retribution and deterrence, which are the traditional aims of punishment, (5) whether the behavior to which it attaches is already a crime, (6) whether another purpose to which it could be rationally connected is assignable for it, and (7) whether it appears to be excessive in relation to the alternative purpose assigned); *id.* at *25-28 (using and applying some of the factors listed above in reaching its conclusion).

55. *Id.* at *28-30.

56. 478 U.S. 364 (1986).

57. *Id.* at 375.

available.⁵⁸ Since Chapter 763 arguably provides all of these measures,⁵⁹ the argument that Chapter 763 is civil in nature may pass the test set forth in *Allen*.

Considering conflicting precedent at various levels on the issue of whether the similar Washington State Sexual Predator Statutes violate the Ex Post Facto and Double Jeopardy Clauses, it is unclear whether Chapter 763 will pass these constitutional obstacles. Nonetheless, it may be safe to assume that the Washington Supreme Court's decision may carry more weight than the district court decision. Strengthening this argument is the fact that the decision is being appealed.⁶⁰ This would mean, of course, that the district court's decision could be overturned.

The argument for reversal may be strong for both the Ex Post Facto Clause and Double Jeopardy Clause analyses. Since it is central to both an ex post facto and double jeopardy challenge that the law in question be determined to be a criminal-type punishment, a court must find such punishment before finding either clause violated. The District Court in *Young v. Weston* recognized this and explicitly so stated.⁶¹ Given the alleged equality of the analysis under both clauses, the court may, by using the *Ward* test, have nonetheless applied the wrong test with respect to the Ex Post Facto Clause analysis⁶² and, in turn, prejudiced the Double Jeopardy Clause analysis by espousing the sameness of both analyses. Though the Court set forth the *Halper* standard in its Double Jeopardy Clause analysis, it arguably did not apply it.⁶³

58. *Id.* at 369, 369 n.4; see 1995 Cal. Legis. Serv. ch. 763, sec. 3, at 4611-16 (enacting CAL. WELF. & INST. CODE §§ 6600-6608) (stating that Chapter 763 is civil in nature); see also CAL. WELF. & INST. CODE § 6606(a) (enacted by Chapter 763) (guaranteeing treatment to individuals committed as sexually violent predators); *id.* § 6608(a) (enacted by Chapter 763) (allowing an individual to petition for both conditional and unconditional release).

59. See CAL. WELF. & INST. CODE § 6606(a) (enacted by Chapter 763) (obligating the state to provide treatment for the committed sexually violent predator); see also *id.* § 6605(f) (enacted by Chapter 763) (providing a procedure to release committed sexually violent predators when they are deemed no longer dangerous); *id.* § 6608(a) (enacted by Chapter 763) (allowing for release of a committed sexually violent predator upon a conditional basis). But see *Young v. Weston*, No. C94-480C, 1995 U.S. Dist. LEXIS 12928, *26 (W.D. Wash. 1995) (distinguishing the Illinois statutory scheme, that was upheld in *Allen*, from the Washington statutory scheme in that the Washington statutory scheme does not have the requirement that the State elect either punishment or treatment at the time the individual is charged); *id.* (contrasting the two statutes further in that the Washington statutory scheme mandates that the convicted sex offender serve his sentence prior to commitment, and thus, the state does not have the power to initiate proceedings until the sentence of the individual in question is about to expire, or has expired).

60. Vellinga, *supra* note 28.

61. *Young v. Weston*, No. C94-480C, 1995 U.S. Dist. LEXIS 12928, *30 (W.D. Wash. 1995); see *id.* (determining that in the court's analysis of the Ex Post Facto Clause, the Washington statute in question serves the traditional aims of punishment, which are retribution and deterrence; the analysis applies equally for the question posed regarding the double jeopardy challenge).

62. See *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1218 (9th Cir. 1994) (interpreting the *Ward* test as having been abandoned by the United States Supreme Court in *Halper*).

63. *Young v. Weston*, No. C94-480C, 1995 U.S. Dist. LEXIS 12928, *28-30 (W.D. Wash. 1995).

SUBSTANTIVE DUE PROCESS

The United States Supreme Court has held that the right to be free from bodily restraint is a fundamental right.⁶⁴ Substantive due process⁶⁵ requires that any governmental restrictions on a fundamental right must be examined under strict scrutiny; that is, the restriction must be the least restrictive means of accomplishing a compelling governmental interest.⁶⁶ In *Addington v. Texas*,⁶⁷ the Supreme Court held that the state must prove by clear and convincing evidence that the individual who is to be committed is mentally ill and that he or she requires hospitalization for his or her own benefit and for the safety of others.⁶⁸ Further, in *Foucha v. Louisiana*,⁶⁹ the Supreme Court held that an individual can be committed through civil commitment proceedings, and satisfy substantive due process, only if the state proves by clear and convincing evidence that the individual is mentally ill and dangerous.⁷⁰ Since Chapter 763 requires a burden of proof beyond a reasonable doubt,⁷¹ Chapter 763 should face no attack for committing a person due to a low standard of proof.

The Washington State case of *In re Young*⁷² held that a Washington State dangerous sexual predator commitment statute did in fact further a compelling state interest both in treating sexual predators and in protecting society from their actions.⁷³ Also, the Supreme Court of Washington found that both mental abnormality and personality disorders are legitimate mental disorders and thus satisfy the mental illness requirement as set forth in *Foucha*.⁷⁴ Further, the

64. United States v. Salerno, 481 U.S. 739, 750 (1987).

65. See U.S. CONST. amend. XIV, § 1 (mandating that no state can take away from any person his life, liberty, or property, absent due process of law). See generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, Constitutional Law § 481 (9th ed. 1988 & Supp. 1995) (discussing procedural and substantive due process).

66. Roe v. Wade, 410 U.S. 113, 155 (1973), *reh'g denied*, 410 U.S. 959 (1973).

67. 441 U.S. 418 (1979).

68. *Id.* at 433.

69. 112 S. Ct. 1780 (1992).

70. *Id.* at 1784.

71. See CAL. WELF. & INST. CODE § 6604 (enacted by Chapter 763) (requiring a burden of proof of beyond a reasonable doubt in determining whether a person is a sexually violent predator).

72. 857 P.2d 989 (Wash. 1993).

73. *Id.* at 1000.

74. *Id.* at 1001-03, nn.4-6; see SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1143, at 11 (Apr. 25, 1995) (arguing that SB 1143 fails to meet the minimum requirements as set forth in *Foucha* since "sexually violent predator" as defined in the statute does not apply to individuals who are mentally ill); see also Erin Gunn, Comment, *Recent Developments: Washington's Sexually Violent Predator Law: The "Predatory" Requirement*, 5 UCLA WOMEN'S L. J. 277, 278 (1994) (asserting that Washington's sexually violent predator law is unconstitutional because it allows a person to be committed based solely upon assumptions of future dangerousness and that the law allows for the civil commitment of persons who do not have a mental illness); *id.* at 282 (propounding that even if Washington's sexually violent predator law is not criminal in nature, it is an unconstitutional civil statute due to the belief that it does not require proof of mental illness for commitment); Roy E. Pardee III, Note, *Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee*, 36 ARIZ. L. REV. 223, 230-32 (1994) (arguing that Washington State's sexual predator civil confinement laws are unconstitutional and the terms personality disorder and mental abnormality as defined are not mental illnesses).

Washington Supreme Court held that to commit presently imprisoned individuals does not require a recent overt act to prove dangerousness.⁷⁵ However, in the case of persons who are not presently imprisoned, the petition for commitment must include an allegation of a recent overt act that is sufficient to establish probable cause.⁷⁶

Making the issue more confusing is the fact that the court in *Young v. Weston* held that the Washington State statute violates an individual's right to substantive due process, which is the exact opposite holding of that in *In re Young*.⁷⁷ The court in *Young v. Weston* based its decision in part upon the finding that Washington's Sexually Violent Predator Statute can confine a person for an indefinite period of time.⁷⁸ Further, the opinion attacked the Washington statute as abandoning the requirement of a mental illness for civil commitment.⁷⁹

In contrast to the Washington statute, Chapter 763 requires that for a person to be committed as a sexually violent predator, he or she must have a diagnosed mental disorder.⁸⁰ Though the mental condition requirement is not known as mental abnormality under Chapter 763, the definition is exactly the same as Washington State's definition of mental abnormality but for one word: Chapter 763 replaces the word "means" with "includes" in the definition.⁸¹ Further, experts in the trials in question in the Washington State Supreme Court case believed the term mental abnormality to be nearly identical by definition to the term "mental disorder."⁸² Thus, both terms probably can be used interchangeably.

Therefore, given the scholarly criticism of the legitimacy of mental abnormality as a mental illness, the broader definition found in Chapter 763 of mental disorder, and the fact that the Washington Supreme Court based its ruling

75. *In re Young*, 857 P.2d at 1008-09.

76. *Id.* at 1009.

77. *Young v. Weston*, No. C94-480C, 1995 U.S. Dist. LEXIS 12928, *20 (W.D. Wash. 1995).

78. *Id.* at *14; see Vellinga, *supra* note 28 (quoting Senator Mountjoy as proclaiming that California's Sexually Violent Predator Laws has the potential of keeping these individuals in jail indefinitely); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 4 (Sept. 13, 1995) (noting that AB 888 is opposed by the American Civil Liberties Union due to its belief that the law violates principles of substantive due process because AB 888 would permit the state to indefinitely confine in mental facilities individuals convicted of sexually motivated crimes based on perceived fears that these individuals will commit future crimes).

79. *Young*, No. C94-480C, U.S. Dist. LEXIS 12928 at *14-20.

80. CAL. WELF. & INST. CODE § 6600(a) (enacted by Chapter 763).

81. Compare *id.* § 6600(c) (enacted by Chapter 763) (defining "diagnosed mental disorder" as including a congenital or acquired condition that affects the emotional or volitional capacity that makes the person susceptible to commit criminal sexual acts in such a degree that makes the person a danger to the health and safety of others) with WASH. REV. CODE ANN. § 71.09.020(2) (West Supp. 1995) (defining "mental abnormality" as meaning a congenital or acquired condition that affects the emotional or volitional capacity that makes the person susceptible to commit criminal sexual acts in such a degree that makes the person a danger to the health and safety of others). See IOWA CODE ANN. § 709C.2(1) (West Supp. 1995) (providing a definition of "mental abnormality" exactly the same as the one found in Washington Code § 71.09.020(2)); KAN. STAT. ANN. 59-29a02(b) (1994) (defining "mental abnormality" exactly the same as found in Washington Code § 71.09.020(2)); see also *Young v. Weston*, No. C94-480C, U.S. Dist. LEXIS 12928 at *16 (finding that Washington Code § 71.09.020(2) provides a definition of no value to treatment professionals and in turn, is a sign that the State did not intend to commit only the seriously mentally ill).

82. *In re Young*, 857 P.2d 989, 1001 (Wash. 1993).

upon a narrower definition of mental abnormality, no case is on point concerning the language found in Chapter 763. Even Governor Wilson seems confused in an attempt to distinguish Chapter 763 from Washington law. Governor Wilson believes that Chapter 763 should withstand constitutional attack due in part to his statement that an individual must be found to have a diagnosable mental illness.⁸³ The term "mental illness" is not found anywhere in the text of Chapter 763. The Governor seems to be confusing the term "mental illness" with the term "mental disorder," which is arguably "mental abnormality" in disguise.

Thus, given the arguably open ended definition of mental disorder found in Chapter 763 (which is a mental abnormality in disguise), a person possibly could be committed who is not mentally ill, which would violate the requirements of *Foucha* and in turn, deny the person his or her right to due process on a substantive level.

PROCEDURAL DUE PROCESS

The United States Constitution guarantees procedural due process.⁸⁴ The procedural portion of the Due Process Clause guarantees that a person cannot be deprived of life, liberty, or property without constitutionally adequate process.⁸⁵ However, note the distinction that procedural due process requirements are provided to protect individuals not from the deprivation of the right, but from the erroneous or unjustified deprivation of life, liberty, or property.⁸⁶

The United States Supreme Court has held that the right to be free from bodily restraint is a strong liberty interest.⁸⁷ Thus, it would appear that procedural due process must be afforded to committed sexually violent predators.⁸⁸

Due process has been interpreted by the United States Supreme Court to be flexible in nature when procedural protections are provided for whatever is called for in a particular situation.⁸⁹ However, the United States Supreme Court has held that three distinct factors must be considered in the application of procedural due process.⁹⁰ However, based upon the Washington Supreme Court's finding in *In*

83. Vellinga, *supra* note 28.

84. U.S. CONST. amend. XIV, § 1; *see id.* (mandating that no State, without due process of law, take from any person his or her life, liberty, or property). *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 481 (9th ed. 1988 & Supp 1995) (discussing procedural and substantive due process).

85. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990).

86. *Id.*

87. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

88. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1143, at 8 (July 11, 1995); *see id.* (believing that a liberty interest is involved with SB 1143, and thus, procedural due process must be satisfied).

89. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

90. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see id.* (providing the following factors to be considered: (1) the private interest that will be influenced by the official action; (2) the risk of any deprivation of such interest based upon error through the procedures used and the likely value, if any exists, of any other or substitute procedural safeguards; and (3) the Government's interest, which includes the function involved

re Young, it would appear that Chapter 763 should survive a procedural due process attack.⁹¹ The author of Chapter 763 also believes that procedural due process is met in the present instance.⁹²

CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment protects against cruel and unusual punishment.⁹³ The basic test to determine whether a punishment is cruel or unusual is to look toward the evolving standards of decency that show the progress of a society that is maturing.⁹⁴ Further, it has been said that a punishment is considered cruel and unusual if it does not afford human dignity.⁹⁵

Chapter 763 may face attack based upon cruel and unusual punishment as last year a United States magistrate found that the lack of adequate care for mentally ill prisoners by the Department of Corrections is cruel and unusual punishment based upon indifference expressed by the Department.⁹⁶ In fact, it is suggested that the Department of Corrections acknowledges that mental health care within the Department has been lacking in quality for many years.⁹⁷

and the administrative and fiscal burdens that the additional or different procedural requirement would need).

91. *In re Young*, 857 P.2d 989, 1011-12 (Wash. 1993); see *id.* (discussing and applying due process principles to the Washington State Sexual Predator Statutes and holding that they do not violate due process). But see Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 893 (1988) (asserting that in institutions such as facilities for the mentally ill and mentally retarded, states confine individuals for their own benefit without providing to these individuals procedural safeguards that are found in criminal proceedings); *id.* at 893 n.350 (suggesting that imprisoning a person without treatment is punishment and punishing a person requires full criminal procedural safeguards); *id.* at 893-94 (arguing that the promise of a benefit in these settings in turn justifies less stringent procedural safeguards, and that failing to perform the expected treatment results in custodial confinement, punitive incarceration, and a loss of liberty, which is for all intents and purposes, a due process violation).

92. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1143, at 8 (July 11, 1995); see *id.* (noting among other things that SB 1143 requires a trial to be had if necessary, counsel to be provided to the person, and the right of yearly review).

93. U.S. CONST. amend VIII.

94. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

95. *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

96. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1143, at 8 (Apr. 25, 1995); see *id.* (noting that the delivery of mental health care within the California Department of Corrections has been for many years, and still is, highly inadequate); *id.* (finding also that mentally ill persons who do receive some types of treatment suffer unnecessary delays in access to needed psychiatric care).

97. *Id.*; see *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (stating that intentional indifference to serious medical needs of prisoners is cruel and unusual punishment, and thus violates the Eighth Amendment); *Bailey v. Gardebring*, 940 F.2d 1150, 1155 (8th Cir. 1991) (interpreting *Estelle* to mean that absent a reliable medical diagnosis of some serious mental illness that can be treated, at least partially by some type of treatment, prisoners have no right founded upon the Constitution to state-provided psychiatric treatment), *cert. denied*, 112 S. Ct. 1516 (1992); cf. Feld, *supra* note 91, at 893 (describing the environment of Texas juvenile treatment facilities as violent and understaffed); *id.* at 894-95 (offering examples of abuses found in juvenile centers).

CONCLUSION

Even though there is past case law that looks favorably upon Chapter 763, Chapter 763 may still face constitutional challenge. *In re Young*, the Washington Supreme Court case, which holds Chapter 763's strongest support, is only a state decided case. Chapter 763 is modeled in part after the Washington statutes, but considering the possible difference in mental illness definitions, Chapter 763 could face substantive due process challenges.

Further, given the fact that the United States Supreme Court has not heard a case involving the Washington statutes and that ample criticism exists that attacks the validity of Washington's sexual predator laws, Chapter 763 may very well face constitutional challenge in the future in multiple areas. The possibility of Chapter 763 facing constitutional attack may be increased by the unfavorable district court decision. Conceivably, from this district court case, the United States Supreme Court may soon be provided with a case to possibly resolve these constitutional issues.

Matthew E. Farmer

Crimes; stalking

Government Code § 6254 (amended); Penal Code § 646.92 (new); § 646.9 (amended).
AB 985 (Firestone); 1995 STAT. Ch. 438

Under existing law, a person is guilty of the crime of stalking when he or she willfully,¹ maliciously,² and repeatedly follows or harasses³ another person and makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.⁴ Existing law

1. See CAL. PENAL CODE § 7 (West 1988) (defining "willfully" as a purpose or willingness to commit the act, but intent to violate the law is not required); see also *People v. McCaughey*, 261 Cal. App. 2d 131, 135, 67 Cal. Rptr. 683, 685 (1968) (ruling that the term "willfully" does not require an evil intent, but rather, a purpose or willingness to commit the act).

2. See CAL. PENAL CODE § 7 (West 1988) (defining "maliciously" as wishing to vex, annoy, or injure another person).

3. See *id.* § 646.9(d) (amended by Chapter 438) (defining "harasses" as a knowing and willful course of conduct, without a legitimate purpose meant to seriously alarm, annoy, torment, or terrorize a specific person).

4. *Id.* § 646.9(a) (amended by Chapter 438); see *id.* (providing that a violation is punishable by up to one year in jail and/or a fine not exceeding \$1000); *id.* § 646.9(k) (amended by Chapter 438) (defining "immediate family" as any spouse, parent, child, or person who regularly resides in the household); *id.* § 646.9(b) (amended by Chapter 438) (stating that a violation where there has been a restraining order in place is punishable by a term in prison of up to four years); *id.* § 646.9(c) (amended by Chapter 438) (punishing subsequent violations by imprisonment for up to four years); see also *People v. Heilman*, 25 Cal. App. 4th 391, 400, 30 Cal. Rptr. 2d 422, 427 (1994) (concluding that the use of the word "repeatedly" did not render California Penal Code § 646.9 unconstitutionally vague since its meaning was one of common understanding).

defines "credible threat" to mean any threat, or a threat combined with conduct, made with the intent and apparent ability to carry out the threat, so as to put the targeted person in reasonable fear for his or her safety or the safety of his or her immediate family.⁵

Chapter 438 provides that it is not necessary to prove that the defendant intended to carry out the threat.⁶

Prior law permitted the court to issue restraining orders valid for up to ten years against a defendant convicted of stalking, but orders over five years could only be granted in extreme cases.⁷ Chapter 438 removes the *extreme case* requirement for restraining orders exceeding five years.⁸

Chapter 438 also permits the court to require a person convicted of felonious stalking to register as a sex offender if the court determines that the offense is sexual in nature.⁹ Additionally, Chapter 438 adds stalking to the list of crimes in which disclosure of information regarding the identity of the victim¹⁰ is prohibited.¹¹

and did not create a danger of arbitrary enforcement); cf. *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854, 857 (Mass. 1994) (deciding that the use of the terms "repeatedly follows or harasses," was unconstitutionally vague since it was uncertain whether the harassment had to take place on more than one occasion). See generally Nannette Diacovo, Comment, *California's Anti-Stalking Statute: Deterrent or False Sense of Security?*, 24 SW. U. L. REV. 389 (1995) (providing an overview of California Penal Code § 646.9 as well as its effectiveness in deterring the crime of stalking).

5. CAL. PENAL CODE § 646.9(g) (amended by Chapter 438); see *id.* (providing that a stalking conviction will not be barred even though the defendant was incarcerated at the time of making the threat); cf. DEL. CODE ANN. tit. 11, § 1312A(b)(3) (1994) (requiring the threat to be made against the victim's life or to cause serious bodily harm).

6. CAL. PENAL CODE § 646.9(g) (amended by Chapter 438).

7. 1992 Cal. Legis. Serv. ch. 627, sec. 1, at 2421 (amending CAL. PENAL CODE § 646.9(i)).

8. CAL. PENAL CODE § 646.9(j) (amended by Chapter 438). Compare 1992 Cal. Legis. Serv. ch. 627, sec. 1, at 2421 (amending CAL. PENAL CODE § 646.9(i)) (stating that the length of the order was to be based upon the seriousness of the facts of the case, the probability of future violations, and ensuring the safety of the victim) with CAL. PENAL CODE § 646.9(j) (amended by Chapter 438) (retaining the same factors in considering the length of the order).

9. CAL. PENAL CODE § 646.9(d) (amended by Chapter 438); see *id.* § 290(e) (West Supp. 1995) (requiring the court to state the reasons on record for requiring the registration of the offender); see also *People v. King*, 16 Cal. App. 4th 567, 576, 20 Cal. Rptr. 2d 220, 225 (1993) (holding that a defendant's culpability for a misdemeanor sex offense was not so disproportionate to the punishment of requiring him to register as a sex offender pursuant to California Penal Code § 290, as to constitute cruel and unusual punishment); cf. KAN. STAT. ANN. § 22-3717(d)(1)(C)(i),(ii) (1994) (permitting a court to extend the post-release supervision period of a defendant convicted of a sex offense provided the court states on the record the reasons for the extension); *id.* § 22-3717(d)(1)(C)(vii) (1994) (requiring the registration as habitual sex offenders of persons convicted of sex offenses or crimes which are sexual in nature). But see *In re Reed*, 33 Cal. 3d 914, 926, 663 P.2d 216, 222, 191 Cal. Rptr. 658, 665 (1983) (holding that requiring a defendant to register as a sex offender for a conviction of soliciting lewd or dissolute conduct was disproportional to the offense and constituted cruel and unusual punishment).

10. See CAL. PENAL CODE § 679.01 (West 1988) (defining "victim" as someone against whom a crime is committed).

11. CAL. GOV'T CODE § 6254(f)(2) (amended by Chapter 438); see *id.* (listing crimes for which disclosure of information concerning the victim is proscribed); see also *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 655, 117 Cal. Rptr. 106, 112 (1974) (holding that exemptions from disclosure of public records do not violate the public's First Amendment right of access to information). See generally Sarah H. Hutt, Note, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41

COMMENT

The crime of stalking is a recent phenomenon and many states have rushed to implement statutes¹² to counter its violent consequences since California enacted the nation's first anti-stalking law in 1990.¹³

There has been some concern that anti-stalking legislation violates constitutional rights, and several states' anti-stalking laws have been ruled unconstitutional due to vagueness.¹⁴

The United States Supreme Court has held that a statute must define the criminal offense with sufficient clarity so that an ordinary person can understand what conduct is prohibited, otherwise that statute will be unconstitutionally

DUKE L.J. 368 (1991) (examining whether restrictions on the release of information concerning victims infringes on the public's right to access information).

12. See ALASKA STAT. §§ 11.41.260, 11.41.270 (1994) (prohibiting activities that constitute nonconsensual contact); ARK. CODE ANN. § 5-71-229(a)(1) (Michie 1993) (imposing the requirement that the defendant harass the victim and make a terroristic threat in order to be convicted of stalking); D.C. CODE ANN. § 22-504(b) (1994) (providing that a person who repeatedly follows or harasses another without a legal purpose with the intent to cause emotional distress is guilty of the crime of stalking); GA. CODE ANN. § 16-5-90(a) (Michie 1994) (defining "stalking" as following, placing under surveillance, or contacting another person without his or her consent for the purpose of harassing or intimidating that person); ILL. ANN. STAT. ch. 720, para. 5/12-7.3(a) (Smith-Hurd Supp. 1995) (requiring that the defendant knowingly and without justification follow another person on at least two occasions and communicate a threat or place that person in reasonable apprehension of bodily harm before the statute's protections can take effect); ME. REV. STAT. ANN. tit. 17-A, § 506-A(1) (West Supp. 1994) (providing that any person who engages in a course of conduct with the intent to harass, torment, or threaten another person after having been forbidden to do so by a law officer or judge is guilty of the crime of harassment); MONT. CODE ANN. § 45-5-220(1)(a),(b) (1993) (criminalizing conduct which causes another person substantial emotional distress by defendant's repeatedly following, harassing, threatening, or intimidating that person); N.Y. PENAL LAW §§ 120.13, 120.14 (McKinney Supp. 1995) (classifying stalking as the crime of menacing); N.C. GEN. STAT. § 14-277.3(a)(1)-(3) (1993) (prohibiting a defendant from following or being in the presence of another person on more than one occasion without legal purpose and with the intent to cause that person emotional distress, or after reasonable warning to desist on behalf of that person); OR. REV. STAT. § 163.732(1) (Supp. 1994) (defining "stalking" as a repeated and unwanted contact with a person, serving no legitimate purpose, which causes that person to be alarmed or coerced); TEX. PENAL CODE ANN. § 42.07(a)(1)-(7) (West 1994) (categorizing stalking as the crime of harassment).

13. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 985, at 4 (Apr. 18, 1995); see *id.* (observing that the rush by the states to enact anti-stalking statutes resulted in several flawed statutes). See generally Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525 (1994) (discussing the need for anti-stalking legislation); Laurie Salame, Note, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67 (1993) (providing an overview of all the states' anti-stalking legislation as well as challenges that have arisen); Marsha Ginsburg, *Tougher Law Takes New Aim at Stalkers*, S.F. EXAMINER, Jan. 2, 1994, at A1 (stating that although the stalkings of celebrities gets more notice, 90% of all stalking victims are ordinary people); Mike Tharp, *In the Mind of a Stalker*, U.S. NEWS & WORLD REP., Feb. 17, 1992, at 28 (observing that 1 in 20 adults will be stalked in their lifetime).

14. Dean Copelan, Comment, *Is Georgia's Stalking Law Unconstitutionally Vague?*, 45 MERCER L. REV. 853, 853 (1994); see *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854, 857 (Mass. 1994) (holding that the use of the terms, "repeatedly follows or harasses", was unconstitutionally vague since it was uncertain whether the harassment had to take place on more than one occasion); *Oregon v. Norris-Romine*, 894 P.2d 1221, 1225 (Or. App. 1995) (finding that the use of the words "without a legitimate purpose" made the stalking statute unconstitutionally vague). See generally M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769 (1994) (discussing potential challenges to the constitutionality of stalking laws).

vague.¹⁵ California's anti-stalking law survived a constitutional challenge in 1994 when an appellate court held that the statute was not unconstitutionally vague.¹⁶

Chapter 438 was enacted to help clarify the ambiguity in the wording of the previous statute, which seemed to require that the defendant actually intend to carry out the threat, and not just intend to terrorize the victim.¹⁷ Proponents of Chapter 438 argued that requiring the defendant to intend to carry out the threat would make prosecutions for stalking more difficult, and lessen the intended protection offered by the statute.¹⁸

Chapter 438, in listing the elements of a credible threat, employs language similar to that used in California's "Terrorist Threats" statute, which has been upheld as constitutional.¹⁹

Chapter 438 also requires registration of certain stalking violators to deter future stalking violations.²⁰ If a person fails to comply with the registration requirement, the police will have grounds upon which to arrest the offender

15. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see id.* at 359 (stating that an anti-loitering statute was unconstitutionally vague since it encouraged arbitrary enforcement by providing police officers with the discretion to determine what was credible and reliable identification); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding the city's anti-vagrancy statute to be unconstitutionally vague since it did not adequately specify what conduct was prohibited).

16. *People v. Heilman*, 25 Cal. App. 4th 391, 401, 30 Cal. Rptr. 2d 422, 428 (1994); *see id.* at 400, 30 Cal. Rptr. 2d at 427 (holding that the meaning of the word "repeatedly" was not uncertain as it was of common usage and its use would not encourage arbitrary or discriminatory enforcement); *see also* Marjorie A. Caner, Annotation, *Validity, Construction, and Application of Stalking Statutes*, 29 A.L.R. 5TH 487, 497 (1995) (explaining that the court in *People v. Heilman* found that it is the defendant's intent which triggers the applicability of California Penal Code § 646.9, which ensures against law enforcement officials obtaining boundless discretion in defining the offense).

17. SENATE COMMITTEE ON CRIMINAL PROCEDURES, COMMITTEE ANALYSIS OF AB 985, at 3 (July 5, 1995); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 985, at 3 (July 17, 1995) (stating that this clarification is needed to prevent stalkers from going free). *Compare* 1990 Cal. Stat. ch. 1527, sec. 1, at 2 (enacting CAL. PENAL CODE § 646.9(e)) (making it unlawful for the defendant to make a threat with the intent and apparent ability to carry it out) *with* CAL. PENAL CODE § 646.9(g) (amended by Chapter 438) (providing that it is not required to prove that the defendant intended to carry out the threat).

18. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 985, at 4 (Apr. 18, 1995); *see* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 985, at 4 (July 5, 1995) (referring to a Los Angeles District Attorney's office memorandum which states that California Penal Code § 646.9 was intended to punish defendants who intend to put a victim in fear as a result of a threat made by the defendant, even though the defendant did not intend to carry out the threat); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, *supra* (discussing prosecutors' concerns that the law was almost unenforceable because of the requirement that both specific intent and credible threat had to be proven).

19. *People v. Fisher*, 12 Cal. App. 4th 1556, 1560, 15 Cal. Rptr. 2d 889, 891 (1993) (rejecting the argument that California Penal Code § 422 was unconstitutionally overbroad because a threat which the speaker does not intend to implement is not speech protected by the First Amendment); *see In re David L.*, 234 Cal. App. 3d 1655, 1661, 286 Cal. Rptr. 398, 402 (1991) (holding that California Penal Code § 422 was not unconstitutionally overbroad since it did not reach a substantial amount of protected conduct). *Compare* CAL. PENAL CODE § 422 (West Supp. 1995) (prohibiting the making of a threat with the intent that the statement be taken as a threat, even if there is no intent to carry out the threat) *with id.* § 646.9(g) (amended by Chapter 438) (specifying that it is not necessary to prove that the defendant intended to carry out the threat).

20. CAL. PENAL CODE § 646.9(d) (amended by Chapter 438).

should he or she resume his or her pattern of harassment.²¹

Finally, Chapter 438 preserves the privacy of stalking victims by requiring law enforcement agencies²² to refrain from disclosing information concerning the victim.²³

A. James Kachmar

Crimes; vandalism

Penal Code § 594.5 (amended); Welfare and Institutions Code § 656 (amended).

AB 1837 (Figueora); 1995 STAT. Ch. 42

Under existing law, no provision from the California Penal Code will invalidate any local ordinance regulating the sale of aerosol paint containers or other liquid substances capable of defacing property.¹ Chapter 42 supplements existing law by providing that nothing in the Penal Code will invalidate local ordinances dealing with civil administrative regulations, procedures, or penalties which govern the placement of graffiti² or other inscribed material on all public or privately owned properties—both real or personal.³

Existing law sets forth specific conditions that must be satisfied in order to declare a minor a ward⁴ of the court as follows: (1) the petition must be verified,

21. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 985, at 3 (Apr. 18, 1995); see also CAL. CODE REGS. tit. 15, § 3000 (1994) (defining "harassment" as engaging in a course of conduct which serves no legitimate purpose and annoys, alarms, or terrorizes the targeted person).

22. See CAL. PENAL CODE § 1545(b) (West 1982) (defining "law enforcement agencies" as including the State's Attorney General, district attorneys, and agencies empowered to investigate and prosecute crime).

23. CAL. PENAL CODE § 646.92(b) (amended by Chapter 438); see SENATE FLOOR, COMMITTEE ANALYSIS OF AB 985, at 4 (July 17, 1995) (predicting that AB 985 will increase the protection of the victim since it will prevent the stalker from learning additional information concerning the targeted victim); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 985, at 3 (Apr. 18, 1995) (stating the author's intent to preserve victim confidentiality).

1. CAL. PENAL CODE § 594.5 (amended by Chapter 42); cf. FLA. STAT. ANN. § 806.13(1)(a) (West 1992) (specifying that a person is guilty of criminal mischief if he willfully and maliciously injures or damages any real or personal property belonging to another, including the placement of graffiti on the property); ILL. ANN. STAT. ch. 55, para. 5/5-1078.5 (Smith-Hurd 1995) (indicating that a county board may ban graffiti and establish penalties within the county, except within a municipality's corporate limits).

2. See CAL. PENAL CODE § 640.5(f) (West Supp. 1995) (specifying that "graffiti" includes any unauthorized markings, wordings, or designs that are placed by any means on real or personal property).

3. *Id.* § 594.5 (amended by Chapter 42). See generally Steve Terrell, *Should Parents Answer for Children's Actions?*, SANTA FE NEW MEXICAN, Mar. 19, 1995, at B1 (discussing a state law in New Mexico which permits victims to seek compensation from parents of juvenile offenders); *id.* (asserting that inadequate parental supervision is a predominant cause of juvenile crime).

4. See BLACK'S LAW DICTIONARY 1583 (6th ed. 1990) (defining "ward" as "a person, especially a child or incompetent, placed by the court under the care and supervision of a guardian or conservator").

and (2) the minor's parents or legal guardian must be notified if there is a current proceeding pending against the minor for any specified graffiti offense.⁵ Additionally, under existing law, liabilities are imposed on the children and their parents as a result of the children's juvenile offenses.⁶ Chapter 42 adds other specified offenses involving vandalism within the provisions already specified under existing law.⁷

5. CAL. WELF. & INST. CODE § 656(a)-(k) (amended by Chapter 42); *see id.* (enumerating the required contents of the petition as the following: (1) The court's name; (2) the title of the proceeding; (3) the applicable code section and subdivision for instituting the proceedings; (4) the minor's name, age, and address, if any; (5) the parent's and/or guardian's name and residence addresses, if known to the petitioner—if there is no parent or guardian living within California, or if the residence location is unknown, the petition must also contain the name and residence address of any adult relative residing within the county, or if none, the adult relative living nearest to the court's location; (6) a separate and concise factual statement supporting the conclusion that the minor identified by the petition fits within the definition of each of the sections and subdivisions under which the proceedings are instituted; (7) whether or not the minor upon whose behalf the petition is brought is in custody—including the precise date and time the minor was taken into custody; (8) notification to the father, mother, spouse, or other person liable for the minor's support that specified sections may make that person, the person's estate, and the minor's estate liable for the cost associated with the minor child's care, support, maintenance, legal services provided, and probationary supervision provided by the county; (9) a notice to the minor's parent or legal guardian that a proceeding is pending against the minor for a violation of §§ 640.5 or 640.6 of the California Penal Code, and that if the minor is found guilty, that any community service which may be required may be performed under the parents' or legal guardian's direct supervision if the minor cannot pay any fine assessed, and that the parent or legal guardian of the minor will be liable for payment of the fine); *id.* § 656(k) (amended by Chapter 42) (setting forth that the minor's parents or legal guardian must be notified if the minor is ordered to make restitution to the victim pursuant to §§ 729.6 or 731.1, and that the parent or guardian may be liable for restitution); *see also id.* § 729.6(a)(2) (West Supp. 1995) (specifying the restitutionary measures that the minor must make); *id.* § 731.1(a)(2) (West Supp. 1995) (suggesting a restitution order in lieu of a fine or placement of the minor with the youth authority); CAL. PENAL CODE § 640.5(a) (West Supp. 1995) (providing that those who deface with graffiti or other inscribed material any governmental facility or vehicle, or any part of a public transportation system, or any entity subsidized by the Department of Transportation, or any leased or rented facility or vehicle for which any of the aforementioned entities incurs repair or cleanup costs not exceeding \$250, is guilty of an infraction); *id.* (indicating that the punishment for the infraction is a fine of no more than \$500 and a minimum of twenty-four hours of community service); *id.* § 640.6(a) (West Supp. 1995) (providing that any person who defaces with graffiti another's property, and the cost of the damage or destruction is less than \$250, is guilty of an infraction, punishable by a fine not in excess of \$500); CAL. GOV'T CODE § 811.2 (West 1995) (setting forth that "public entity" includes any of the following: the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation within California); CAL. PUB. UTIL. CODE § 99211 (West 1991) (defining "public transportation system" as any system which serves the public by providing transportation services on land or water).

6. CAL. WELF. & INST. CODE § 656(j), (k) (amended by Chapter 42); *see id.* § 656(h) (amended by Chapter 42) (stating that the liabilities established by California Welfare and Institutions Code §§ 903-903.2 are joint and several). *See generally* Chris J. Ore, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 393 (1995) (discussing the increase in the maximum damages amount that may be imputed to parents for their children's vandalism and graffiti).

7. *Id.* § 656(j) (amended by Chapter 42); *see id.* (providing that §§ 594.2 and 640.7 of the California Penal Code are included in the offenses involving vandalism that require notice to the parent or legal guardian of the minor); *see also* CAL. PENAL CODE § 594.2(a) (West Supp. 1995) (asserting that it is a misdemeanor to be in possession of the following: a masonry or glass drill bit, a carbide drill bit, a glass cutter, a grinding stone, an awl, a chisel, a carbide scribe, an aerosol paint container, a felt tip marker, or any other marking substance intended to be used for vandalism or graffiti); *id.* § 594.2(c)(1) (West Supp. 1995) (specifying that a "felt tip marker" means any broad-tipped marker pen with a tip exceeding three-eighths of one inch in width, or any similar instrument with non-water soluble ink); *id.* § 594.2(c)(2) (West Supp. 1995) (defining "marking substance," as any instrument—other than aerosol paint containers and felt tip markers—that could be used as a graffiti instrument to draw, spray, paint, etch, or mark); *id.* § 640.7(a) (West Supp. 1995) (maintaining that

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Chapter 42 was enacted to specify that a municipality's authority to set forth specific guidelines intended to clean away graffiti and to repair or replace graffiti-damaged property, is not superseded by state law.⁸ Furthermore, Chapter 42 corrects previous chaptering problems by putting California Penal Code sections 544.2 and 640.7 back into California Welfare and Institutions Code § 656, whereby the parents of minors charged pursuant to these Penal Code sections are rebuttably presumed to be jointly and severally liable for restitution orders.⁹

According to the author of Chapter 42, by re-establishing municipality authority in these areas the bill will encourage local governing bodies to promulgate regulations (ordinances) intended to curtail the problems caused by graffiti and to implement solutions to meet individual community needs.¹⁰

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any person who violates §§ 640.5, 640.6, or 594 of the California Penal Code on or within 100 feet of a highway, or its appurtenances—not including signs naming streets—is guilty of a misdemeanor, punishable by imprisonment in a county jail not in excess of six months, or by a fine of no more than \$1000, or by both). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* § 678(1)(a) (2d ed. Supp. 1995) (discussing the new law, California Penal Code § 640.7, regarding graffiti offenses committed near highway); Sean P. Lafferty, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 465 (1995) (describing additions to the 1993 California Graffiti Omnibus Bill, 1993 Cal. Legis. Serv. ch. 605, sec. 1-22, at 2621-45—specifically California Penal Code § 594.2—that broaden the list of prohibited marking instruments).

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1837, at 2 (May 2, 1995). *See generally* Richard Simon, *Riordan OK's \$1000 Penalty for Tagging; Legislation: Mayor Signs Law Providing Civil Sanctions, City Attorney Would Have to Ask Court to Impose the Fine*, L.A. TIMES, July 9, 1993, at B1 (reporting the signing of a new measure that establishes civil penalties of up to \$1000 for graffiti offenders; further, explaining that fines collected from graffiti offenders will be used to pay \$500 rewards to those individuals who provide information leading to the arrest and conviction of offenders).

9. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 1837, at 3 (June 6, 1995).

10. *Id.*; *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1837, at 2 (May 11, 1995) (noting that in San Jose, statistics since July 1, 1994, have shown that 365 juveniles have been reprimanded for vandalism, and further stating that since the initiation of the Anti-Graffiti program, over 490,000 square feet of graffiti has been cleaned); *see also In re Rudy L.*, 29 Cal. App. 4th 1007, 1012, 34 Cal. Rptr. 2d 864, 867 (1994) (citing a report that indicated graffiti and vandalism fuel public outrage, that graffiti removal costs are tremendous, and graffiti instigates territorial wars and gang violence). *See generally* David R. Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U.L.Q. 683, 685 n.12 (1995) (discussing street gangs and their wide use of graffiti, and noting the neighborhoods' fear of gang violence); Patricia Callahan, *Decking the Halls; Schurz Students Spend Break Cleaning Up School*, CHI. TRIB., Dec. 28, 1994, at 1 (reporting that a school program was instituted where twenty students cleaned bathrooms, locker rooms, and hallways of their school to eliminate graffiti and the possibility of gang violence outbreaks on their campus); Emily DeNitto, *Merchants, City Face Writing on the Wall*, CRAIN'S N.Y. BUS., Apr. 10, 1995, at 19 (noting that a local merchants group in Brooklyn has taken steps to eliminate graffiti by setting up a graffiti offender hotline to report acts of vandalism, and by investigating special paint and wall sealants that could prevent graffiti or make cleanup easier); Simon, *supra* note 8 (citing a quote from Los Angeles mayor Richard Riordan who called graffiti, "a constant assault on the psyche of Angelenos"); *Coping With Graffiti Vandals*, S.F. CHRON., Jan. 1, 1993, at A26 (reporting that the city of Oakland was contemplating formal action to impose fines upon property owners unless they promptly removed graffiti).

Crimes; vandalism

Penal Code § 594 (amended).

AB 392 (Gallegos); 1995 STAT. Ch. 38

Under existing law, every person who maliciously damages, destroys, or defaces, with graffiti,¹ real property belonging to any public entity² or the federal government, is subject to a permissive inference that he or she neither owned the property nor had the permission of the owner to deface, damage or destroy the property.³

Chapter 38 makes this permissive inference applicable to every person who maliciously defaces with graffiti or damages, or destroys real property, vehicles, signs, fixtures, or furnishings belonging to any public entity or the federal government.⁴

1. See CAL. PENAL CODE § 594(e) (amended by Chapter 38) (defining "graffiti" or other inscribed material as, among other things, any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property); cf. N.Y. PENAL LAW § 145.60(1) (McKinney 1994) (defining "graffiti" as the etching, painting, covering, drawing upon or otherwise placing of a mark upon public or private property with intent to damage such property). See generally Maria V. Daquipa, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 386, 389 (1995) (explaining that the California Graffiti Omnibus Bill increased penalties for specified graffiti and vandalism offenses, and included graffiti clean-up as a condition of probation for specified crimes).

2. See CAL. PENAL CODE § 811.2 (West 1980) (defining a "public entity" as including the State, Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State).

3. *Id.* § 594(a) (amended by Chapter 38); see *id.* (specifying that any person who damages, destroys, or defaces with graffiti or other inscribed material, any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism); *id.* § 594.3 (West 1988) (enumerating a separate crime and punishment for any person who knowingly commits any act of vandalism to a church, synagogue, building owned and occupied by a religious educational institution, or other place primarily used as a place of worship where religious services are regularly conducted); see also *id.* § 594(b) (amended by Chapter 38) (enumerating the penalties for defacement, damage, or destruction of property as the following: (1) if the amount of defacement, damage, or destruction is \$50,000 or more, the vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than \$50,000, or by both; (2) if the amount damage is between \$5000 or more, but less than \$50,000, the vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than \$10,000, or by both; (3) if the amount of defacement, damage, or destruction is \$400 or more, but less than \$5000, the vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of \$5000, or by both; (4) if the amount of defacement, damage, or destruction is less than \$400, the vandalism is punishable by imprisonment in a county jail for not more than six months, or by a fine of not more than \$1000, or by both); *id.* § 594(c) (amended by Chapter 38) (stating that upon conviction, the court may, in addition to any other punishment and at the victim's option, order the defendant to clean up, repair, or replace the damaged property himself or herself, or to pay someone else to do so); *id.* § 594(d) (providing that if a minor is personally unable to pay the fine for a violation of this section, the parent of that minor is liable for payment of the fine); *id.* (specifying that a court may waive a payment of the fine or any part thereof by the parent upon a finding of good cause).

4. *Id.* § 594(a) (amended by Chapter 38); cf. ARK. CODE ANN. § 27-52-101(a) (Michie 1994) (specifying that in Arkansas, no person may, without authorization, attempt to, or in fact, alter, deface, damage, knock down, or remove any official highway traffic-control device, road marker, lighting equipment, or any railroad crossing sign or signal, or any inscription, or shield); FLA. STAT. ANN. § 806.13(1)(a) (West 1992) (providing that in Florida a person commits the offense of criminal mischief if he or she willfully and maliciously places graffiti on any real or personal property belonging to another); MONT. CODE ANN. § 45-6-

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Chapter 38 closes a loophole in previous law.⁵ The law prior to Chapter 38 established a permissive inference only for governmental real property.⁶ However, the majority of vandalism occurs on overpasses, highway signs, and vehicles.⁷ Chapter 38 expands the inference to property that is most commonly vandalized, thus providing prosecutors with an easier mechanism for punishing vandals.⁸

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Crimes; vehicles—automated enforcement system

Vehicle Code § 21455.5 (new and repealed); §§ 210, 22451, 40518 (amended, repealed, and new); §§ 14602.6, 14604, 40000.11 (amended).
SB 833 (Kopp); 1995 STAT. Ch. 922

Existing law authorizes government agencies to equip rail transit crossings, in cooperation with law enforcement agencies, with automated rail crossing enforcement systems.¹ Existing law also provides a special written, mailed

101(1) (1994) (defining the criminal offense of "criminal mischief" as the knowing or purposeful injury, damage, or destruction of any property of another or public property without consent); N.Y. PENAL LAW § 145.65 (McKinney 1994) (providing that a person is guilty of possession of graffiti instruments when he or she possesses any tool, instrument, article, substance, solution, or other compound designed or commonly used to etch, paint, cover, draw upon, or otherwise place a mark upon a piece of property which that person has no permission or authority to etch, paint, cover, draw upon or otherwise mark, under circumstances evincing an intent to damage the property); *id.* § 145.60(2) (McKinney 1994) (specifying that no person may make graffiti of any type on any building, public or private, or any other property, real or personal, owned by any person, firm or corporation or any public agency or instrumentality, without the express permission of the owner or operator of said property).

5. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 392, at 2 (Mar. 21, 1995).

6. 1994 Cal. Legis. Serv. ch. 909, sec. 3, at 3892-93 (amending CAL. PENAL CODE § 594).

7. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 392, at 2 (Mar. 21, 1995); *see also* Robert J. Byers, *Signs Always in Season for Highway Hunters*, CHARLESTON GAZETTE, Sept. 28, 1994, at P1C (discussing that in West Virginia, the state has a significant problem with people shooting at road signs); *id.* (specifying that the state also has problems with spray painting and theft of road signs; for example, six students died in a car accident at an intersection after a stop sign was stolen); Richard Louv, *Below the Surface, Taggers Seek to Impress*, SAN DIEGO UNION-TRIB., August 18, 1993, at A2 (explaining that having one's name marked on a freeway sign is "the ultimate achievement for taggers"); *War Against Graffiti Los Angeles Has Lost, but San Diego Fights On*, SAN DIEGO UNION-TRIB., March 12, 1995, at G2 (reporting that in San Diego, Cal-Trans is spending at least \$20,000 a month to clean up graffiti on signs, overpasses and walls along the freeways, and Cal-Trans has a full-time crew working forty-hours per week solely painting out graffiti); *id.* (specifying that repairing one overhead sign can cost thousands of dollars).

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 392, at 2 (Mar. 21, 1995).

1. CAL. VEH. CODE § 21362.5(a) (West Supp. 1995); *see id.* (permitting rail transit grade crossings to be equipped with an automated rail crossing enforcement system if the system is identified by signs clearly indicating the presence of the system); *see also* 1995 Cal. Legis. Serv. ch. 922, sec. 2, at 5459-60 (enacting

notification procedure regarding violations recorded by the automated rail crossing enforcement system, and limits the availability of photographic records to the purposes of law enforcement.²

Chapter 922 expressly applies the procedures of the automated rail crossing enforcement system to an official traffic control signal displaying different colored lights.³ Chapter 922 renames the automated rail crossing enforcement system as the automated enforcement system.⁴ These changes by Chapter 922 will be effective until January, 1, 1999, and then will be repealed.⁵

Existing law authorizes a peace officer⁶ to arrest a person and seize the person's vehicle when the officer determines that the person was driving the vehicle with a suspended or revoked license, or even if the person had never

CAL. VEH. CODE § 210) (defining "automated rail crossing enforcement system" as any system operated by a governmental agency that photographs a driver's responses to a rail or rail transit signal or crossing gate, and one that is designed to obtain a clear photograph of a vehicle's license plate and the driver of the vehicle); *id.* (indicating that this section, which concerns automated rail crossing enforcement systems, will become operative on January 1, 1999); *id.* at 5459 (explaining that the section concerning automated enforcement systems is to remain in effect until January 1, 1999, unless a later enacted statute deletes or extends this date).

2. CAL. VEH. CODE §§ 21362.5(b), 40518(a), (b) (West Supp. 1995); *see id.* § 21362.5(b) (West Supp. 1995) (mandating that the photographic records made by automated rail crossing enforcement systems are confidential and made available only to governmental and law enforcement agencies); *id.* § 40518(a), (b) (West Supp. 1995) (requiring a written notice to be mailed within 30 days of the alleged violation, and that the appearance date is to be 10 days after the notice is delivered). *See generally* Kenneth J. Pogue, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 733-34 (1995) (explaining that the automated rail crossing enforcement system is designed to deter violations of rail crossings and prevent related accidents).

3. CAL. VEH. CODE § 21455.5(a) (enacted and repealed by Chapter 922); *see id.* (permitting an automated enforcement system to be installed at a limit line, intersection, or other location of a traffic signal if the system is clearly identified by signs clearly indicating the presence of the system or if signs are placed at all major entrances to the city); *see also id.* § 21450 (West Supp. 1995) (mandating that when traffic is controlled by an official traffic control signal showing different colored lights one at a time or in combination, only red, yellow, or green may be utilized); *cf.* N.Y. VEH. & TRAF. LAW § 1111-a(a), (g) (McKinney Supp. 1995) (authorizing cities with a population of one million or more to install traffic-control signal photo-monitoring devices at no more than 25 intersections, and permitting summons by first class mail identifying the violation, where it took place, and the date and time); VA. CODE ANN. § 46.2-833.01(A), (G) (Michie Supp. 1995) (permitting, until July 1, 1998, certain local governments to install traffic light signal photo-monitoring systems at no more than 25 locations, and providing that a summons may be executed by first-class mail sent to the address of the owner, but no contempt or arrest will occur if the owner does not appear under this summons procedure). *See generally* Peter Baker, *Smile! You're on Big Brother's Camera Virginia Area to Test Traffic-Monitoring System*, BEACON J. (Akron, Ak.), Mar. 13, 1995, at A4 (explaining that a traffic light photo system contains sensors in the ground that indicates when a car enters the intersection after the light turns red, and a high resolution camera takes two pictures, one for showing the movement through the intersection and the other to be enlarged for identifying the license plate number).

4. CAL. VEH. CODE § 210 (amended and repealed by Chapter 922); *see id.* (including within the definition of "automated enforcement system" the provision for photographic records taken at an official traffic control signal).

5. *Id.*

6. *See* CAL. PENAL CODE § 830.1(a) (West Supp. 1995) (defining "peace officer" as any sheriff, undersheriff, deputy sheriff, employed in that capacity by a city, any peace officer, employed in that capacity and appointed by a city's chief of police or the chief executive of the agency, any chief of police, or police officer of a district authorized by statute to maintain a police department); *id.* § 830.2(c), (d), (g) (West Supp. 1995) (defining "peace officer" as a member of the University of California Police Department, California State University Police Department, and Department of Parks and Recreation); *id.* § 830.31(d) (West Supp. 1995) (defining "peace officer" as a housing patrol officer).

obtained a driver's license.⁷ Existing law requires impoundment of the vehicle for thirty days.⁸

Chapter 922 empowers the officer to remove and seize the vehicle without the necessity of arresting the person when the vehicle driven by the person without a valid driver's license is involved in a traffic accident.⁹ Furthermore, Chapter 922 establishes procedures to be followed for the release of the vehicle prior to the end of thirty-day impoundment period, including a requirement that once the legal owner has obtained possession of the vehicle, the legal owner is not to return the vehicle to the registered owner until after the end of the thirty-day period, and not until the registered owner tenders to the legal owner proof of a valid driver's license or valid temporary license.¹⁰

Existing law determines that violations of certain provisions relating to vehicles are misdemeanors rather than infractions.¹¹ Chapter 922 makes a violation of specified provisions relating to driving with a suspended or revoked driver's license a misdemeanor.¹²

7. CAL. VEH. CODE § 14602.6(a) (amended by Chapter 922); *cf.* MICH. COMP. LAWS ANN. § 257.904b(1) (West Supp. 1995) (permitting a court to impound a vehicle for not more than 120 days if a person is convicted of an offense relating to operating a vehicle under a suspended, revoked, or denied driver's license).

8. CAL. VEH. CODE § 14602.6(a) (amended by Chapter 922).

9. *Id.*; *cf.* WASH. REV. CODE ANN. § 46.20.435(1) (West 1987) (authorizing a law enforcement officer to immediately impound a vehicle upon determination that a person is operating the vehicle without a valid driver's license or a driver's license that has been expired for 90 days or more).

10. CAL. VEH. CODE § 14602.6(f)(1)-(3), (g)(1)-(3) (amended by Chapter 922); *see id.* § 14602.6(f)(1)-(3) (amended by Chapter 922) (allowing the release of a vehicle to the legal owner if the legal owner is a licensed financial institution legally operating in the state, the legal owner or the legal owner's agent pays all towing and storage fees related to the vehicle's seizure, or the legal owner or the legal owner's agent presents foreclosure documents or an affidavit of repossession for the vehicle); *id.* § 14602.6(g)(1) (amended by Chapter 922) (providing that a legal owner or the legal owner's agent that obtains release cannot release the vehicle to the registered owner of the vehicle or any agents of the registered owner, unless the registered owner is a rental car agency, until termination of 30 day period); *id.* § 14602.6(g)(2) (amended by Chapter 922) (mandating that the legal owner or the legal owner's agent not relinquish the vehicle to the registered owner until the registered owner or that owner's agent presents a valid driver's license or temporary driver's license).

11. *Id.* § 40000.11(a)-(p) (amended by Chapter 922); *see id.* (determining that a violation is a misdemeanor and not an infraction, which includes, but is not limited to, provisions relating to unlicensed drivers, special drivers' certificates to operate a schoolbus, and to special drivers' certificates to operate a farm labor vehicle).

12. *Id.* § 40000.11(k) (amended by Chapter 922); *see id.* § 14601 (West Supp. 1995) (mandating that no person can drive a motor vehicle when the person's license is suspended or revoked for reckless driving if the person has knowledge of the suspension or revocation); *id.* § 14601.1 (West Supp. 1995) (prohibiting a person from driving a motor vehicle at any time when the person's driving privilege is suspended or revoked for any offense, except for those specified in the California Penal Code §§ 14601.2, 14601.5, if the person has knowledge of the suspension or revocation); *id.* § 14601.2 (West Supp. 1995) (providing that it is unlawful for a person to drive without a license when the person's license has been suspended for driving under the influence of alcohol or drugs if the person has knowledge of the suspension or revocation); *id.* § 14601.5 (West Supp. 1995) (prohibiting a person from operating a vehicle without a driver's license when the person's license has been suspended for refusing to take a chemical, breath, urine, or preliminary alcohol screening test if the person has knowledge of the suspension or revocation).

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The purpose of Chapter 922 is to install the automated enforcement system in order to reduce the number of violations as well as the number of traffic accidents and fatalities at intersections relating to drivers running through red lights.¹³ Thus, Chapter 922 could improve road safety without diverting police officers from enforcing law that prohibits other criminal activities.¹⁴

According to police agencies, impounding vehicles provides a way to take these dangerous drivers off the road, and proves effective in suppressing other criminal activities involving the use of vehicles.¹⁵ As existing law regarding impoundment indicates, Chapter 922 will encourage unlicensed drivers to clear up their driving record with the Department of Motor Vehicles.¹⁶

13. ASSEMBLY COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 833, at 3 (July 10, 1995); see SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 833, at 3 (May 2, 1995) (providing various studies and tests of the equipment concluding that a substantial number of urban vehicle crashes at intersections are due to drivers running through red lights); *id.* (stating that reports from Victoria, Canada, showed a 72% decrease in red light violations and Melbourne, Australia, reported a 32% reduction in traffic fatalities, both reports attribute the declines to the automated enforcement units). See generally Doris Sue Wong & Thomas C. Palmer Jr., *Camera Would Catch State's Driving Cheats*, BOSTON GLOBE, Dec. 2, 1993, at 1 (noting that 30% of Massachusetts' accidents occurred at intersections, with two-thirds of those accidents being caused by red light violators, and that in New York the photo-monitoring system caused traffic lights to be obeyed by an increase of 80%).

14. See *Picture Perfect: Digital Camera to Nab Speeders, Red-Runners*, ST. LOUIS POST DISPATCH, Mar. 19, 1995, at 3D (discussing the assertion by police and politicians that the photo system will improve road safety dramatically when police officers are too busy chasing drug dealers and carjackers to watch stoplights).

15. *Id.*; see SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 833, at 3 (May 2, 1995) (indicating that law enforcement agencies throughout California have made frequent and effective use of the recently-enacted vehicle impoundment provisions, have impounded thousands of vehicles related to unlicensed drivers, and have concluded that impoundment takes these drivers off the road as well as suppresses other criminal activity involving the use of vehicles); see also David Dietz, *Unlicensed Drivers Face Car Seizure Harsher Punishments Go into Effect Sunday*, S.F. CHRON., Dec. 28, 1994, at A1 (noting that Santa Rosa, California, has been fighting unlicensed drivers with a special impoundment, and asserting that the impoundment has reduced the number of accidents by as much as 50%). But see Joe Swickard, *Illegal Drivers Pose a Deadly Threat*, DETROIT FREE PRESS, Apr. 18, 1995, at 1B (suggesting that if the police impound cars, the unlicensed driver might find other cars to drive). See generally Cynthia H. Craft, *Katz's 'Safe Streets Act' Passes One Roadblock*, L.A. TIMES, Aug. 10, 1995, at B6 (indicating that one million motorists have never had a driver's license, another 720,000 are driving with a suspended or revoked license, and that a driver with a suspended license is four times as likely to be involved in a fatal accident); Lisa Respers, *Law Will Let Officials Seize Cars of Unlicensed Drivers*, L.A. TIMES, Dec. 29, 1994, at B1 (stating that 20% of the drivers involved in a fatal accident were driving without a valid driver's license).

16. ASSEMBLY COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 833, at 3 (July 10, 1995).

Furthermore, Chapter 922 was enacted to address uncertainties and other unclear situations regarding the impoundment and release provisions.¹⁷

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17. *Id.*; see SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 833, at 3 (May 2, 1995) (indicating the inability of numerous financial institutions' and rental agencies' to reclaim vehicles they legally owned but leased, financed, or rented to others that have been impounded by the police); *id.* (noting that some law enforcement agencies have refused to release vehicles before the end of the 30 day period, causing significant impound fees to the legal owner when the registered owners subsequently did not reclaim the vehicles). See generally Maria Alicia Gaura, *No License, No Car For Would-Be Drivers*, S.F. CHRON., July 11, 1995, at A13 (quoting Senator Quentin Kopp as saying that just because a rental car is driven by an unlicensed driver, the company should not have to wait 30 days to recover, nor should a bank have to wait to repossess a car as long as the unlicensed driver is not allowed to drive).

