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Child Pornography and the Internet: A New Era of Regulation

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I. INTRODUCTION

It is established that the "State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch,"¹ but does the State have any business telling a man what files he may download? The battle over pornography is hardly new. The explosion of the Internet and other computer products has created a new market for pornography and, of particular concern, child pornography.

Pornography involving children under the age of eighteen is already prohibited under California law.² Chapter 1080 is designed to bring child pornography laws up to date with the computer age by adding computer-related language to child pornography statutes.³ Chapter 1079 adds evidence of child sexual exploitation to the grounds upon which a search warrant may be issued.⁴

II. EXISTING LAW

Existing California law governs the sale, distribution, possession, and forfeiture of obscene⁵ matter.⁶ Further, existing California law prohibits sexual exploitation of a child.⁷ It is a felony to engage in child pornography for commercial purposes.⁸

1. *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

2. CAL. PENAL CODE §§ 311.1(a), 311.2(b), 311.3(a) (amended by Chapter 1080).

3. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 295, at 2 (Aug. 21, 1996); *see* CAL. PENAL CODE §§ 311.1-311.4, 311.11 (amended by Chapter 1080) (adding specific computer-related terms such as "computer hardware," "software," "data storage media," "CD-ROM," "computer-generated equipment," or "computer-generated image" to the statute).

4. CAL. PENAL CODE § 1524(a)(5) (amended by Chapter 1079).

5. *See id.* § 311(a) (amended by Chapter 1080) (naming "obscene matter" as that which when judged by community standards appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value); *see also Miller v. California*, 413 U.S. 14, 24 (1973) (limiting obscene material subject to regulation as that which appeals to prurient interests and depicts patently offensive sexual conduct lacking serious literary, artistic, political, or scientific value).

6. CAL. PENAL CODE § 311 (amended by Chapter 1080); *see id.* § 311(b) (amended by Chapter 1080) (defining "matter" as any type of pictorial representation, statue, or other figure, recording, reproduction, or telephone message used as part of a commercial transaction).

7. *Id.* § 311.3 (amended by Chapter 1080). Section § 311.3(a) of the California Penal Code indicates that "sexual exploitation of a child" occurs when a person:

knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including, but not limited to, any film, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in

Previous California law lacked the vocabulary to deal with computer terms, leading to the concern that pornographers could use discs, CD-ROMS, and new products and escape prosecution.⁹

III. NEW LAW

Chapter 1080 is designed to expand the definition of "matter" to include information available by computer.¹⁰ Chapter 1080 also requires film and photo processors who observe a picture of a child under fourteen engaged in an act of sexual conduct to report this to a law enforcement agency.¹¹ Chapter 1080 protects persons or entities who provide access to a system or network over which there is no control of substance by providing an affirmative defense.¹² In addition, Chapter 1079 makes it easier to obtain a search warrant in child pornography cases. Evidence tending to show that a person has current or prior possession of child pornography can now be used to obtain a warrant.¹³

any manner, any film or filmstrip that depicts a person under the age of 18 years engaged in an act of sexual conduct.

Id. § 311.3(a) (amended by Chapter 1080); *see id.* § 11166(c) (amended by Chapter 1080) (defining "sexual conduct" as sexual intercourse, vaginal or rectal penetration, masturbation, sadomasochistic abuse, exhibition of genital, pubic, or rectal areas, defecation, or urination for the purpose of sexually stimulating the viewer).

8. *Id.* § 311.2(b) (amended by Chapter 1080); *see id.* (creating a punishment of two, three or six years or a fine of \$100,000, or both for engaging in child pornography for commercial purposes).

9. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 295, at 4 (June 18, 1996) (noting that law enforcement agencies felt deterred from seeking warrants for information stored in computer media due to a lack of computer media language in the statute); *see also* 1988 Cal. Stat. ch. 1378, sec. 1, at 4647 (lacking current computer terms).

10. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 295, at 2 (June 18, 1996); *see id.* (noting that one of the purposes of Chapter 1080 is to add computer terms to the obscenity and child pornography statutes). The definition of "matter" includes:

any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film, or filmstrip.

CAL. PENAL CODE § 311.1(a) (amended by Chapter 1080).

11. CAL. PENAL CODE § 11166(c) (amended by Chapter 1080).

12. *See id.* § 312.6(b) (enacted by Chapter 1080) (proclaiming that employers are not liable for the action of an employee unless such action is sanctioned or within the scope of employment); *id.* 312.6(c) (enacted by Chapter 1080) (providing a defense to prosecution under Chapter 1080 for any person who takes reasonable, effective, and appropriate actions to restrict or prevent the transmission of, or access to, the prohibited communication).

13. *Id.* § 1524(a)(5) (amended by Chapter 1079); *see id.* (declaring that a search warrant may be issued when property to be seized consists of evidence that tends to show either sexual exploitation of a child or possession of child pornography has occurred or is occurring).

IV. ANALYSIS OF NEW LAW

Regulating the Internet presents unique difficulties. Once information is released onto the Net, where it goes (and who sees it) cannot be controlled.¹⁴ Because there is so much information available from so many sources and the Internet is a truly international medium, effective regulation may be nearly impossible.

The Internet provides a forum for individuals to present any information desired. Not surprisingly, the Net has been used by pornographers to distribute pictorial and written pornography.¹⁵ Therefore, limiting regulation of the Internet could potentially protect pornographers who conduct business via computer.

Another concern when attempting to regulate the Internet is the standards to be used in determining obscenity. Because local standards are used to determine whether something is obscene,¹⁶ a critical step is to ascertain whose standards will be used.

This question was addressed in *United States v. Thomas*,¹⁷ in which a couple challenged their convictions for interstate transmission and transportation of obscenity.¹⁸ The couple made child pornography available through the use of a computer bulletin board.¹⁹ They argued that the federal statute did not apply to intangible objects like the computer files that were at issue.²⁰ The court found that the legislative intent was to regulate obscene materials regardless of the medium, including computers.²¹

The couple also argued that venue was incorrect. Tennessee's "community standards" were used instead of California's, where the couple ran their business, because the material was sent to Tennessee.²² This case demonstrated the potential difficulties in using the "community standard" test to determine what is obscene on the Internet. What is considered obscene in Tennessee may be socially acceptable in California. What is considered obscene in the United States might be acceptable in Europe.

Perhaps aware of the difficulties of applying current law to the Internet, the federal government attempted to regulate the Internet through the Communications

14. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996).

15. See generally Fred H. Cate, *Law in Cyberspace*, 39 HOW. L.J. 565, 568-73 (1996) (discussing unique difficulties of applying obscenity standards to the Internet).

16. See *Miller v. California*, 413 U.S. 15, 24 (1973) (stating that local standards are used to determine if material is obscene).

17. 74 F.3d 701 (6th Cir. 1996).

18. *Thomas*, 74 F.3d at 706.

19. *Id.* at 705.

20. See *id.* at 706 (arguing that the federal statute did not expressly prohibit their conduct because computer files are not "tangible"); see also 18 U.S.C.A. § 1465 (West 1984) (prohibiting the interstate transportation of obscene tangible objects).

21. *Thomas*, 74 F.3d at 709.

22. *Id.* at 709; see Cate, *supra* note 15, at 570-73 (reviewing the *Thomas* case and discussing the difficulty of determining whose "community standards" should be used in cyberspace).

Decency Act of 1996.²³ The Act, in part, criminalizes use of an interactive computer device to send or display to a child any "patently offensive" sexual material.²⁴ It also prohibits knowingly permitting the use of any telecommunications facility for prohibited purposes.²⁵ The Act does provide a "safe harbor" much like Chapter 1080 for persons who simply provide access to the computer.²⁶

In *American Civil Liberties Union v. Reno*,²⁷ two sections of the Act regulating obscenity came under constitutional attack.²⁸ The court found that the Internet presents unique First Amendment issues.²⁹ The court argued that the Internet deserves more protection from government regulation than almost any other form of mass communication.³⁰ The court declared unconstitutional parts of the Act attempting to ban indecent and "patently offensive speech."³¹ While the federal court found the Internet deserving of added protection, the court did stress that current laws against obscenity and child pornography do apply to the Internet.³²

V. CONCLUSION

Chapters 1080 and 1079 deal specifically with child pornography, which can be prohibited regardless of whether the matter is considered obscene.³³ Child pornography need not be considered obscene to be prohibited because child pornography laws are intended to protect children from sexual exploitation and its harmful effects.³⁴

23. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (amending 47 U.S.C. § 223).

24. *Id.* § 502, 110 Stat. at 133-34 (amending 47 U.S.C. § 223(d)(1)).

25. *Id.* § 502, 110 Stat. at 133 (amending 47 U.S.C. § 223(a)(2)).

26. *Id.* § 502, 110 Stat. at 134 (amending 47 U.S.C. § 223(e)).

27. 929 F. Supp. 824 (E.D. Pa. 1996).

28. *See American Civil Liberties Union*, 929 F. Supp. at 828 (challenging sections of the Communications Decency Act of 1996 which prohibit transmitting obscene material to children via a "telecommunications device" and which criminalize using an "interactive computer service" to send or display offensive material to children); *see also* Communications Decency Act of 1996 § 502, 110 Stat. at 133-34 (amending 47 U.S.C. §§ 223(a)(1)(B), (d)) (outlining the above prohibited acts).

29. *American Civil Liberties Union*, 929 F. Supp. at 830.

30. *See id.* at 881 (concluding that the Internet deserves the "broadest possible protection from government-imposed, content-based regulation"); *see also* Ramon G. McLeod, *Court Protects Free Speech on Internet*, S.F. CHRON., June 13, 1996, at A15 (noting that the court was reluctant to allow regulation of the Internet).

31. *American Civil Liberties Union*, 929 F. Supp. at 882; *see Miller*, 413 U.S. at 30 (noting that the jury may measure the factual issues of "patent offensiveness" by the standard that prevails in the forum community).

32. *American Civil Liberties Union*, 929 F. Supp. at 833.

33. *New York v. Ferber*, 458 U.S. 747 (1982); *see id.* at 756-62 (finding that the state must have greater leeway in the regulation of child pornography since the state has a compelling interest in protecting the well-being of children, that child pornography leads to the abuse of children, and that there is little value in permitting child pornography).

34. *United States v. Freeman*, 808 F.2d 1290, 1292 (8th Cir. 1987).

Chapters 1080's and 1079's prohibitions are limited to pictures depicting children in a sexual manner.³⁵ Therefore, there is little chance that Chapters 1080 and 1079 will face serious challenge as they are merely adding computer terms to the existing Penal Code.

APPENDIX

Code Sections Affected

Penal Code §§ 312.6, 312.7 (new), §§ 311, 311.1, 311.2 311.3, 311.4, 311.11, 312.3, 11166 (amended).

AB 295 (Baldwin); 1996 STAT. Ch. 1080

Penal Code § 1524 (amended).

AB 1734 (Frusetta); 1996 STAT. Ch. 1079

35. See CAL. PENAL CODE § 311(h) (amended by Chapter 1080) (limiting matter to visual works which depict a child "personally engaging in personally stimulating sexual conduct" by adopting the holding of *People v. Cantrell*); see also *People v. Cantrell*, 7 Cal. App. 4th 523, 542, 9 Cal. Rptr. 2d 188, 199 (1992) (limiting child pornography to visual works).

Compelled Testimony and Self-Incrimination: Is “Use and Derivative Use” Immunity Worth Adopting?

Joshua M. Dickey

I. INTRODUCTION

The privilege against self-incrimination holds a hallowed place in the constitutional framework of the United States. However, this privilege often collides with the government’s ability to collect information needed to enforce its criminal statutes. Immunity statutes maintain the privilege guaranteed by the Constitution, while enabling the government to effectively enforce criminal laws. Chapter 302 amends § 1324 of the California Penal Code, changing the type of immunity granted for compelled testimony that may be self-incriminating.¹

II. CALIFORNIA’S IMMUNITY STATUTE

A. California Law Before Chapter 302

Under existing law, when a witness in a felony proceeding² invokes the Fifth Amendment privilege,³ refusing to answer a question or produce evidence on the grounds that doing so may be self-incriminating, the prosecutor may request the court to compel the witness to answer the question or produce the requested evidence.⁴ The court, after a hearing, *shall* compel compliance with the district attorney’s request unless doing so would subject the witness to prosecution in another jurisdiction or would be contrary to the public interest.⁵

Prior law required a grant of transactional immunity for compelled testimony that was self-incriminating.⁶ Thus, if the person had been privileged not to answer or pro

1. CAL. PENAL CODE § 1324 (amended by Chapter 302).

2. *See id.* (including investigations or proceedings before a grand jury for any felony offense).

3. *See* U.S. CONST. amend. V (declaring that no person shall be compelled to be a witness against one’s self in a criminal case); *see also* CAL. CONST. art. I, § 15, cl. 6 (stating that people may not be compelled to be a witness against themselves); CAL. EVID. CODE § 940 (West 1995) (providing that “[t]o the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him”).

4. CAL. PENAL CODE § 1324 (amended by Chapter 302).

5. *Id.*

6. 1953 Cal. Stat. ch. 1353, sec. 1, at 2912 (enacting CAL. PENAL CODE § 1324); *see* *People v. Campbell*, 137 Cal. App. 3d 867, 874, 187 Cal. Rptr. 340, 344 (1982) (stating that prior law required transactional immunity); *cf.* DEL. CODE ANN. tit. 11, § 3502 (1996) (requiring the grant of transactional immunity for compelled, self-incriminating testimony); MICH. COMP. LAWS ANN. § 767.19b (West 1996) (same); N.M. STAT. ANN. §§ 30-19-14, 30-9-6 (Michie 1996) (same); N.Y. CRIM. PROC. LAW § 50.10 (McKinney 1996) (same); OHIO REV. CODE ANN. § 2945.44 (Anderson 1997) (same); R.I. GEN. LAWS § 12-17-15 (1996) (same); *State v. Miyasaki*, 614 P.2d 915, 923-24 (Haw. 1980) (interpreting Article I, § 10 of Hawaii’s Constitution as requiring transactional immunity);

duce evidence but for the order compelling testimony, that person could not be prosecuted or penalized for any "fact or act" concerning the compelled testimony.⁷ Accordingly, transactional immunity shields a defendant from prosecution for any crime implicated by the compelled testimony.⁸ Although transactional immunity was broader than necessary to remain within the mandate of the Fifth Amendment,⁹ before the enactment of Chapter 302, transactional immunity remained viable in California because the legislature failed to restrict the immunity granted to the constitutional minimum.¹⁰

B. California Law After Chapter 302

Chapter 302 provides that "no testimony or other information *directly or indirectly derived* from the testimony or other information may be *used* against the witness in any criminal case."¹¹ Thus, Chapter 302 changes the type of immunity granted for compelled self-incriminating testimony from "transactional" immunity to "use and derivative use" immunity.¹² Chapter 302 also provides that a district attorney may still request an order granting transactional immunity.¹³

Use and derivative use immunity prohibits all evidentiary uses of compelled testimony in a subsequent prosecution of a witness, including the use of the testimony to gather other evidence.¹⁴ By providing for use and derivative use immunity, Chapter 302 increases prosecutorial flexibility because prosecutors are not forced to choose between prosecuting a defendant and obtaining the defendant's testimony.¹⁵

People v. Lee, 410 N.E.2d 646, 649 (Ill. App. Ct. 1980) (interpreting 725 Illinois Compiled Statutes Annotated 5/206-1 as authorizing only transactional immunity); Attorney Gen. v. Colleton, 444 N.E.2d 915, 920 n.8 (Mass. 1982) (stating that Massachusetts Annotated Laws chapter 233, § 20G grants transactional immunity); State v. Soriano, 693 P.2d 26, 26 (Or. 1984) (declaring that only transactional immunity is permissible under Article I, § 12 of Oregon's Constitution for compelled testimony).

7. 1953 Cal. Stat. ch. 1353, sec. 1, at 2912 (enacting CAL. PENAL CODE § 1324).

8. See People v. Campbell, 137 Cal. App. 3d 867, 874, 187 Cal. Rptr. 340, 343 (1982) (stating that transactional immunity immunizes a defendant from prosecution for any crime implicated by the compelled testimony). But see CAL. PENAL CODE § 1324 (amended by Chapter 302) (stating that a witness may be prosecuted for perjury as a result of his or her compelled testimony).

9. See Kastigar v. United States, 406 U.S. 441, 453 (1972) (acknowledging that transactional immunity is broader than is constitutionally mandated).

10. Campbell, 137 Cal. App. 3d at 876, 187 Cal. Rptr. at 346.

11. CAL. PENAL CODE § 1324 (amended by Chapter 302) (emphasis added).

12. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 3 (June 11, 1996); cf. ALASKA STAT. § 12.50.101 (Michie 1996) (providing, respectively, for use and derivative use immunity for compelled testimony that is self-incriminating); GA. CODE ANN. § 24-9-28 (1996) (same); IND. CODE ANN. §§ 35-34-2-8, 35-37-3-3 (West 1996) (same); MONT. CODE ANN. § 46-15-331 (1996) (same).

13. CAL. PENAL CODE § 1324 (amended by Chapter 302).

14. Campbell, 137 Cal. App. 3d at 873-74, 187 Cal. Rptr. at 343; see *id.* (commenting that use and derivative use immunity "preclude[s] punishment for the compelled disclosures by cutting the causal link between the incriminating testimony and its use through the exclusion of the compelled testimony or any evidence derived" therefrom).

15. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 4 (June 11, 1996).

Prosecutors will no longer have to make this choice because, unlike transactional immunity, use and derivative use immunity still allows the prosecution of the witness with independently obtained evidence.¹⁶

C. Support and Opposition

Proponents of Chapter 302 argue that the testimony of codefendants is often necessary in prosecuting drug offenses or offenses involving multiple individuals because codefendants are often the only witnesses to the crime.¹⁷ Use and derivative use immunity allows prosecutors to obtain evidence necessary for conviction without granting a blanket immunity to the witness for the witness's culpable actions.¹⁸ Hence, Chapter 302 serves the public interest by enabling a prosecutor to compel valuable testimony, while still allowing the prosecution of all culpable parties provided that independent evidence exists to prosecute the witness.

Opponents of Chapter 302 fear that use and derivative use immunity dilutes an individual's Fifth Amendment privilege against self-incrimination by allowing prosecutors to obtain information that they otherwise would not be able to obtain which could subsequently be used to prosecute the witness.¹⁹ The California Attorneys for Criminal Justice and the American Civil Liberties Union worry that prosecutors will misuse a witness's testimony to obtain independent evidence in order to prosecute the witness.²⁰

II. CONSTITUTIONALITY AND CONTROVERSY

A. The Background of Immunity Statutes

The Fifth Amendment mandates that no person "shall be compelled in any criminal case to be a witness against himself."²¹ However, it has long been established that the power of the courts to compel testimony is an essential power of the

16. *Kastigar v. United States*, 406 U.S. 441, 459-60 (1972); *see id.* (stating that a total prohibition exists upon the use of the incriminating testimony but, at the same time, allowing the prosecution of a witness provided that the prosecution proves the evidence used to prosecute the witness is independent of the witness's privileged testimony); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 2 (June 11, 1996) (acknowledging that the purpose of Chapter 302 is to allow a narrower immunity so that a witness may still be prosecuted where independent evidence of a crime exists).

17. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 5 (June 11, 1996); *see* Richard Barbieri, *The Deal of a Lifetime*, RECORDER, Oct. 15, 1992, at 1 (describing a case wherein a hired murderer was granted transactional immunity and set free in exchange for his testimony against his co-conspirators). This article is demonstrative of the breadth of transactional immunity.

18. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 4 (June 11, 1996).

19. *Id.*

20. *Id.* at 5.

21. U.S. CONST. amend. V.

government.²² When a conflict arises between the Fifth Amendment and the government's power to compel testimony, the power to compel testimony must yield to the Fifth Amendment privilege against self-incrimination.²³ Accordingly, immunity statutes provide an essential function in accommodating the government's interest in compelling testimony while preserving a person's Fifth Amendment privilege against self-incrimination.²⁴

The mere grant of some type of immunity is not enough to satisfy the constitutional mandate. Instead, the immunity granted for compelled testimony must be co-extensive with the privilege against self-incrimination.²⁵ Thus, the immunity granted must extend "as broad as the mischief against which it seeks to guard," and must not compel testimony that could, in any way, be used against the witness to show the witness had committed a crime.²⁶

B. The Birth of the Transactional Immunity Requirement in Federal Courts

In *Counselman v. Hitchcock*,²⁷ Counselman appeared as a witness in a grand jury investigation into violations of a transportation statute and refused to answer certain questions on the grounds that they would be self-incriminating.²⁸ The prosecutor sought to compel Counselman's testimony based upon a statute which provided the following:

[N]o answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding . . . shall be given in evidence, or in any manner used against such a party or witness, or his property or estate, in any court of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture, by reason of any act or omission of such party or witness²⁹

Counselman refused to testify, was held in contempt of court, and was taken into custody by the marshal.³⁰

22. *Kastigar v. United States*, 406 U.S. 441, 443-44; *see id.* (tracing the history of the government's power to compel testimony and noting the importance of this power).

23. *Id.* at 444; *see id.* (noting that the power to compel testimony must yield to the fundamental aspect of liberty embodied in the Fifth Amendment's privilege against self-incrimination).

24. *Id.* at 445-46; *see id.* (stating that immunity statutes are not incompatible with the Fifth Amendment).

25. *Id.* at 452-53.

26. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

27. 142 U.S. 547 (1892).

28. *Counselman*, 142 U.S. at 548.

29. *Id.* at 560 (quoting Act of February 25, 1868, 15 Stat. 37 (1868)).

30. *Id.* at 552.

The Supreme Court found this statute unconstitutional because it did not prevent the derivative use of the testimony to seek out other testimony or evidence by which Counselman may have been convicted.³¹ The Supreme Court went on to declare that:

[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating [sic] question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . [A] statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.³²

The Compulsory Testimony Act of 1893³³ was passed shortly after the *Counselman* decision and provided that “no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any *transaction*” implicated by the compelled testimony.³⁴ In 1953, California passed Penal Code § 1324 basing it upon the decision in *Counselman* and the federal statute authorizing transactional immunity.³⁵

C. A Move Away from the Transactional Immunity Requirement

However, the Supreme Court in *Kastigar v. United States*³⁶ later determined that the Fifth Amendment did not require the broad grant of transactional immunity mandated by *Counselman v. Hitchcock*.³⁷ At issue in *Kastigar* was a 1970 statute that Congress passed after careful study. The statute allowed compelled testimony of self-incriminating information so long as the witness was granted use and derivative use immunity.³⁸ The Supreme Court reviewed the *Counselman* decision and found that the problem with the statute at issue in *Counselman* was that it did not prohibit the derivative use of compelled testimony to prosecute the witness.³⁹ Because the 1970 statute provided for both use and derivative use immunity,⁴⁰ the Supreme Court held

31. *Id.* at 564.

32. *Id.* at 585-86.

33. 27 Stat. 443 (1893), *repealed by* Act of October 15, 1970 § 245, Pub. L. No. 91-452, 84 Stat. 923, 931.

34. Compulsory Testimony Act of 1893, 27 Stat. 443, 444.

35. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 3 (June 11, 1996); *see* *People v. Campbell*, 137 Cal. App. 3d 867, 875, 187 Cal. Rptr. 340, 344-45 (1982) (stating that California Penal Code § 1324 adopted the federal immunity language with slightly different grammar).

36. 406 U.S. 441 (1972).

37. *Kastigar*, 406 U.S. at 452-54.

38. *Id.* at 452-53 n.36; *see id.* (discussing the careful study of the National Commission on Reform of Federal Criminal Laws which served as a model for 18 U.S.C. § 6002); *see also* 18 U.S.C.A. § 6002 (West Supp. 1996) (authorizing use and derivative use immunity).

39. *Kastigar*, 406 U.S. at 453-54.

40. *See* 18 U.S.C.A. § 6002 (West Supp. 1996) (stating that “no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case”).

that the immunity statute afforded the requisite protection mandated by the Fifth Amendment.⁴¹ Thus, use and derivative use immunity, together, are constitutional.⁴²

Use and derivative use immunity allows the subsequent prosecution of a witness compelled to produce evidence that is self-incriminating, provided that the evidence used in prosecuting the witness derives from an independent source.⁴³ However, the burden of proof lies with the prosecution to prove that the evidence was obtained from an independent source.⁴⁴ Thus, arguably this protection is commensurate with the protection granted by the Fifth Amendment.⁴⁵

D. Controversy Over Use and Derivative Use Immunity

Although use and derivative use immunity is constitutional, it is not without its share of controversy. Many people are not persuaded that use and derivative use immunity provides a witness with protection commensurate with the Fifth Amendment. For example, Justice Marshall, in his dissent in *Kastigar*, argued that use and derivative use immunity was inadequate to meet the requirements of the Fifth Amendment privilege.⁴⁶ He emphasized the slight burden placed on the prosecutor in proving that evidence employed in the prosecution of the witness was obtained independently of the compelled testimony.⁴⁷ According to Marshall, the nature of the investigatory process placed information concerning the origin of the evidence solely within the knowledge of the prosecutor.⁴⁸ Thus, Justice Marshall asserted that the prosecution would easily meet its burden of proof because the prosecution's monopoly of knowledge regarding the investigatory process precluded the defendant from introducing contrary evidence.⁴⁹

41. *Kastigar*, 406 U.S. at 453; *see id.* (stating that the Fifth Amendment privilege does not mean a person cannot be subsequently prosecuted for a crime related to the compelled testimony; rather, it provides protection against being forced to implicate oneself in a criminal act).

42. *See id.* at 462 (finding a statute providing use and derivative use immunity constitutional).

43. *See supra* note 14 and accompanying text (stating that use and derivative use immunity prohibits all evidentiary uses of compelled testimony in the subsequent prosecution of a witness).

44. *Kastigar*, 406 U.S. at 460; *see* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 5 (June 11, 1996) (stating that a prosecutor will be required to show that the evidence used in a subsequent prosecution was not derived from the defendant).

45. *Kastigar*, 406 U.S. at 461; SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 5 (June 11, 1996).

46. *Kastigar*, 406 U.S. at 467-71 (Marshall, J., dissenting).

47. *Id.* at 469 (Marshall, J., dissenting).

48. *Id.*; *see id.* (explaining that only the prosecution is in a position to trace how the information was obtained in the investigatory process); *see also* John F. Martocchio, Note, *Kastigar v. United States: Compulsory Witness Immunity and the Fifth Amendment*, 6 JOHN MARSHALL J. PRAC. & PROC. 120, 132 (1972) (noting that a defendant who has been previously compelled to testify is at a disadvantage because the prosecution has exclusive knowledge about the source of its evidence and the defendant has limited opportunity for discovery); Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171, 181 (1972) (same).

49. *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting). *But see* Richard L. Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 161-62 (1977) (arguing that subsequent lower court

Moreover, Marshall asserted that a prosecutor may not even know about the derivative use of testimony; investigators could use the testimony to gather further evidence against the witness without the prosecutor's knowledge.⁵⁰ Therefore, the allocation of the burden of proof on the prosecution does little to insure the witness's/defendant's Fifth Amendment privilege.⁵¹ Thus, the possibility exists that the prosecution could use privileged testimony to find "independent" evidence and subsequently prosecute a witness.⁵²

Commentators have expressed additional concerns about use and derivative use immunity. For example, the prosecutor may base his or her decision to prosecute a witness upon the witness's testimony.⁵³ Moreover, the possibility exists that privileged testimony may be used by the prosecutor to shape the prosecutor's strategy without using the evidence in an evidentiary manner.⁵⁴ The monopoly that the government holds over its investigatory information amplifies these concerns.⁵⁵ Thus, some commentators argue that a defendant is not left in the same position had the defendant not been compelled to testify.⁵⁶

E. Critique of Use and Derivative Use Immunity

The argument that the government will easily meet its burden in showing the independence of evidence, because the defendant will be unable to introduce contradictory evidence, seems over simplistic. Assuming a defendant has no contrary

decisions have interpreted *Kastigar* as placing a near impossible burden on prosecutors in seeking to prove the independence of evidence used in the subsequent prosecution of a witness compelled to testify).

50. *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting); see Martocchio, *supra* note 48, at 133 (stating that the prosecution's evidence may be tainted in an investigation without the prosecutor's knowledge).

51. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 988, at 4-5 (June 11, 1996); see *id.* (reiterating the fears of the opponents of Chapter 302 that the testimony of an immunized witness may be misused to subsequently prosecute that witness); see also Martocchio, *supra* note 48, at 133 (observing that the independence of the government's evidence may be established by mere assertion because of the disadvantages that the defendant faces); Lawrence Rubenstein, *Immunity and the Self-Incrimination Clause*, 2 AM. J. CRIM. L. 29, 45-46 (1973) (stating that a taint-free prosecution may be impossible because of the informal exchange of information that takes place in offices).

52. See, e.g., WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.11 (1992) (listing concerns that *Kastigar* will not prevent a prosecutor from working backwards with immunized testimony to find a source that the prosecutor can claim is independent).

53. Martocchio, *supra* note 48, at 136-37; see *id.* (declaring that the prosecution could determine the likely outcome or relative strength of the case based upon the privileged testimony).

54. Hal M. Koontz & Jeffrey C. Stodel, Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A. L. REV. 350, 381 (1973).

55. See *supra* notes 48-52 and accompanying text (discussing the difficulty that a defendant faces in rebutting the government's assertion that its evidence was obtained independently).

56. Koontz & Stodel, *supra* note 54, at 382-83; see *Kastigar v. United States*, 406 U.S. 441, 468 (1972) (Marshall, J., dissenting) (stating that the immunity granted must put the defendant in *precisely* the same position with the government that the defendant would have been had the defendant not testified). *But cf. id.* at 462 (declaring that the grant of immunity must leave a defendant in *substantially* the same position with the government, as if the defendant did not testify, to be coextensive with the privilege against self-incrimination).

evidence, the absence of such evidence does not establish the prosecution's case that the evidence was obtained independently. The defendant may prevail by discrediting the prosecution's case without affirmatively proving that evidence was not obtained independently. This may be done through the defendant's own investigation and cross-examination. Although contrary evidence would certainly be helpful to the defendant, contrary evidence is not an absolute necessity. Thus, the defendant is afforded some level of protection by placing the burden of proof on the prosecution. In the eyes of the majority of the Supreme Court in *Kastigar*, this level of protection is enough to satisfy the Fifth Amendment.⁵⁷

Although use and derivative use is constitutional, it affords more opportunity for abuse than transactional immunity, which may compromise the Fifth Amendment privilege against self-incrimination. Transactional immunity prohibits the prosecution of a witness for any crime implicated by the testimony.⁵⁸ Thus, abusing a witness's testimony is impossible because the defendant is immune from prosecution for all crimes related to the compelled testimony.

Conversely, use and derivative use immunity provides for the prosecution of the witness, if the prosecution proves the evidence used in prosecuting the witness is obtained independently of the testimony.⁵⁹ Thus, though arguably unlikely, Chapter 302 makes it possible to prosecute a witness with evidence derived from the witness's testimony provided that the individuals involved in prosecuting the witness can adequately fabricate a story and "prove" that the evidence was obtained independently.

Ironically, Chapter 302 may hinder a prosecutor's ability to extract necessary testimony from a witness. Witnesses faced with the prospect of future prosecution may be more unwilling to testify.⁶⁰ At the very least, witnesses may give superficial testimony to protect themselves.⁶¹ Thus, in practice, Chapter 302 may insulate those individuals, such as the leaders of organized criminal activity, who the prosecution would most like to incarcerate because prosecutors lack the testimony needed to convict them.

57. See *supra* notes 36-41 and accompanying text (discussing the holding of *Kastigar*).

58. *People v. Campbell*, 137 Cal. App. 3d 867, 874, 187 Cal. Rptr. 340, 343 (1982).

59. See *supra* note 16 and accompanying text (stating that use and derivative use immunity allows the subsequent prosecution of the witness with independently obtained evidence).

60. See Rubenstein, *supra* note 51, at 46 (stating that use and derivative use immunity may impede access to information because witnesses may be more unwilling to testify, opting instead for a contempt charge when faced with the possibility of future prosecution); Koontz & Stodel, *supra* note 54, at 383 (stating that witnesses may be more willing to face contempt charges than face possible prosecution in the future); Martoccio, *supra* note 48, at 138 (asserting that use and derivative use immunity quells a witness's motivation to speak).

61. See Martoccio, *supra* note 48, at 138 (arguing that a witness may say what the witness thinks the prosecutor wants to hear rather than what really happened).

III. CONCLUSION

Chapter 302's use and derivative use language mimics a federal law expressly found constitutional by the United States Supreme Court.⁶² Thus, Chapter 302 will almost certainly withstand a federal constitutional attack. Similarly, Chapter 302 will withstand a state constitutional attack unless the California Supreme Court interprets the California Constitution as requiring transactional immunity.⁶³

In the abstract, Chapter 302 has tilted the scales of justice in favor of law enforcement by enabling prosecutors to compel a witness's testimony while allowing the subsequent prosecution of the witness. However, in practice Chapter 302 has afforded a greater opportunity for the abuse of one of the fundamental rights guaranteed by our Constitution. The possibility of such abuse coupled with the possibility of a legitimate future prosecution may render a witness more willing to suffer a contempt charge, rather than produce incriminating evidence. Thus, the true purposes of Chapter 302, prosecutorial flexibility combined with the ability to extract essential testimony, may be hindered. Therefore, Chapter 302 probably will not prove to be the panacea prosecutors hoped for in the fight against criminal conspiracies.

APPENDIX

Code Sections Affected

Criminal Procedure Code § 1324 (amended), § 1324.1 (repealed).
AB 988 (Hawkins); 1996 STAT. Ch. 302

62. See 18 U.S.C.A. § 6002 (West Supp. 1996) (containing the same relevant language regarding use and derivative use immunity as Chapter 302); see also *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding that 18 U.S.C. § 6002 is constitutional).

63. No authority exists in California that supports the proposition that California's Constitution requires transactional immunity for compelled testimony that is self-incriminating. *But see State v. Miyasaki*, 614 P.2d 915, 923-24 (Haw. 1980) (interpreting Article I, section 10 of Hawaii's Constitution as requiring transactional immunity); *State v. Soriano*, 693 P.2d 26, 26 (Or. 1984) (mandating that only transactional immunity is permissible under Article I, section 12 of Oregon's Constitution for compelled testimony).

Domestic Violence: I Don't Need to Have Bruises to Feel Pain—A Worthy Exception to the Warrant Requirement

Crystal Cunningham

I. INTRODUCTION

Enraged that Pamela forgot to buy his beer, Mike begins shouting obscenities at her. His anger escalates with each justification that she tries to offer. As Pamela walks away to try to avoid the blows that she fears will follow, Mike strikes her in the back of the head, knocking her to the ground. He straddles her and continues to punch her in the stomach. She manages to free herself and call the police. Pamela begs the police to arrest him, but they are unable to fulfill her pleas for help because she has no visible injuries.

Even more furious at having to explain himself to the police, Mike continues the attack as the police car vanishes from sight. However, this time he grabs a knife and stabs her until her lifeless body falls to the floor. If the police had arrested Mike, Pamela would still be alive. However, under prior California law, police were not authorized to make warrantless arrests for domestic violence when there was no visible injury.¹ Therefore, perpetrators of domestic violence could slap, punch, or kick a family member, and no matter how much emotional or physical pain their abuse caused, they would escape arrest if the injuries were not visible. Thus, when police officers were called to a house before a domestic fight had climaxed and before serious injury had occurred, they were unable to arrest the perpetrator and break the chain of violence before it swung out of control and caused serious injury or death.

Chapter 131 was introduced to provide greater protection to domestic violence victims²—protection that is unavailable under current law. It allows for the arrest of those previously fortunate perpetrators of domestic violence who struck their victims in an area that did not readily produce a visible injury.³ However, as is the case with most warrantless arrests, there is a delicate balance between providing protection for the victim and respecting the constitutional rights of the offender.

In California, domestic violence is considered a felony or a misdemeanor, depending on the circumstances surrounding the offense.⁴ The offense is considered a felony when the person willfully inflicts corporal injury resulting in a traumatic

1. See CAL. PENAL CODE § 273.5 (West Supp. 1997) (making it a felony to willfully inflict “corporal injury resulting in a traumatic condition”); see *infra* notes 5, 9, 10 (defining “traumatic condition”).

2. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2116, at 4 (June 11, 1996).

3. CAL. PENAL CODE § 836(d) (amended by Chapter 131).

4. See *id.* § 273.5 (West Supp. 1997).

condition⁵ upon his or her spouse, upon any person with whom he or she is cohabitating,⁶ or upon any person who is the mother or father of his or her child.⁷ This offense requires a lesser standard of violence than that required for felony battery.⁸ Thus, a person accused of domestic violence can be charged with a felony for inflicting even a minor injury, unlike other felonies that require serious or great bodily injury.⁹ However, "minor injury" excludes infliction of pain that does not result in injury.¹⁰ Therefore, a defendant who inflicts only pain cannot be charged with a felony and thus is subject to misdemeanor charges only. Chapter 131 is designed to allow for warrantless arrests of persons who fit into this narrow gap of those who merely inflict pain without any evidence of injury.¹¹

Currently, under California law, peace officers are permitted to arrest a person without a warrant for a felony not committed in their presence if there is reasonable cause for making the arrest.¹² Existing law further provides that in order for a peace officer¹³ to arrest a person without a warrant for a misdemeanor, the officer must have reasonable cause¹⁴ to believe that the person has committed a public offense in the officer's presence.¹⁵ However, existing law also authorizes peace officers to make

5. See *id.* § 273.5(c) (West Supp. 1997) (defining "traumatic condition" as a wound or external injury, whether of a minor or serious nature, caused by a physical force).

6. See *People v. Holifield*, 205 Cal. App. 3d 993, 1001, 252 Cal. Rptr. 729, 734 (1988) (stating that in light of its use in other statutes and case law, "cohabitating" means an unrelated man and woman living together in a substantial relationship, one that includes permanence and sexual or amorous intimacy).

7. CAL. PENAL CODE § 273.5 (West Supp. 1997).

8. *Id.*; see *id.* § 243(d) (West Supp. 1997) (requiring "serious bodily injury" for a felony battery).

9. Compare *id.* § 273.5 (West Supp. 1997) with *id.* § 245(a)(1) (West Supp. 1997) (requiring "force likely to produce great bodily injury" for felony assault).

10. *People v. Abrego*, 21 Cal. App. 4th 133, 138, 25 Cal. Rptr. 2d 736, 739 (1993); see *id.* (determining that the statutory requirement of "injury resulting from a traumatic condition" includes minor injury, but that the soreness and tenderness that the victim experienced did not fall within this requirement).

11. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2116, at 7 (June 11, 1996); see CAL. PENAL CODE § 836 (amended by Chapter 131) (setting forth misdemeanor offenses for which officers are permitted to make warrantless arrests even though the misdemeanors do not occur in their presence).

12. CAL. PENAL CODE § 836(a)(2) (amended by Chapter 131).

13. See *id.* § 830 (West Supp. 1997) (defining "peace officer" as any person who meets all standards imposed by law on a peace officer).

14. See *People v. Crovedi*, 253 Cal. App. 2d 739, 743, 61 Cal. Rptr. 349, 352 (1967) (proclaiming that reasonable cause exists when an officer knows from the circumstances at the moment of arrest that an offense has been committed and a person with reasonable caution would have found it so).

15. CAL. PENAL CODE § 836(a)(1) (amended by Chapter 131); *United States v. Watson*, 423 U.S. 411, 418 (1976); see *Music v. Department of Motor Vehicles*, 221 Cal. App. 3d 841, 847-48, 270 Cal. Rptr. 692, 696 (1990) (providing that in determining whether an officer had cause to arrest a person, a court must ascertain when the arrest occurred and what the arresting officer then knew, and whether the officer's knowledge at the time of the arrest constituted adequate cause); see also *People v. Campa*, 36 Cal. 3d 870, 878, 686 P.2d 634, 637, 206 Cal. Rptr. 114, 117 (1984) (recapitulating that the federal and California Constitutions prohibit warrantless arrests within the home, even with probable cause, unless there are exigent circumstances).

warrantless arrests for misdemeanors not occurring in the officer's presence under limited circumstances.¹⁶

Chapter 131 provides that a peace officer may make a warrantless arrest of persons who commit an assault or battery upon their spouses, upon persons with whom they are cohabitating, or upon the parents of their child if the peace officer has reasonable cause to believe that the persons to be arrested have committed the assault or battery and the peace officer makes the arrest as soon as reasonable cause arises,¹⁷ whether or not the assault or battery has in fact been committed.¹⁸ Thus, Chapter 131 creates another exception to the general rule that a peace officer needs a warrant to arrest a person for a misdemeanor that was not committed in the officer's presence.

16. CAL. PENAL CODE § 836(c)(1) (amended by Chapter 131); *see id.* (authorizing an officer to make a warrantless arrest when responding to a call alleging a violation of a protective order, whether or not the violation has occurred in the presence of the officer, and the officer has reasonable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order); *id.* § 836.1 (West Supp. 1997) (providing that grounds for warrantless arrest exist when the person commits an assault or battery against firefighters or other specified personnel); *id.* § 836.3 (West 1985) (allowing a peace officer to make a warrantless arrest of an escapee charged with or convicted of a misdemeanor); *id.* § 12031(a)(4) (West Supp. 1997) (providing for the warrantless arrest of someone carrying a loaded firearm in a public place); *see also id.* § 243.5 (West 1988) (providing for the warrantless arrest of someone who commits an assault on school property during school hours when school activities are taking place).

17. CAL. PENAL CODE § 836(d) (amended by Chapter 131); *see* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 852 (1993) (observing that if arrest is not made as soon as reasonable cause arises, there should be adequate time to obtain a warrant).

18. CAL. PENAL CODE § 836(d) (amended by Chapter 131). Some states permit peace officers to make warrantless arrests for domestic violence without reasonable cause. *See, e.g.*, ALA. CODE § 15-10-3(a)(8) (1995) (providing that an officer may arrest any person without a warrant whenever an offense involves family violence); ARK. CODE ANN. § 1681-113 (Michie Supp. 1993) (same); MINN. STAT. ANN. § 629.34(1) (West Supp. 1996) (same). Other states allow an officer to make a warrantless arrest for domestic violence when he has reasonable cause to believe that the person committed an assault or battery. *See, e.g.*, IDAHO CODE § 19-603(6) (Supp. 1996) (providing that a peace officer may, without warrant, arrest a person at the scene of a domestic disturbance when there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officer upon immediate response to a report of a commission of such a crime, that the person arrested has committed an assault or battery); IOWA CODE ANN. § 804.7(5) (West 1994) (authorizing a peace officer to make an arrest without a warrant if the peace officer has reasonable grounds for believing that domestic abuse has occurred and has reasonable grounds for believing that the person to be arrested has committed it). Some states require "probable cause" rather than "reasonable cause" in order to make a warrantless arrest for domestic violence. *See, e.g.*, MISS. CODE ANN. § 99-3-7(3) (1994) (permitting a peace officer to make a warrantless arrest of an individual who has committed an act of domestic violence within twenty-four hours of the arrest); N.M. STAT. ANN. § 31-1-7 (Michie Supp. 1995) (same); OKLA. STAT. ANN. tit. 22, § 40.3(B) (West Supp. 1996) (same); S.D. CODIFIED LAWS § 23A-3-2.1(2)(a) (Michie Supp. 1996) (same); WYO. STAT. ANN. § 7-20-102(a) (Michie Supp. 1995) (same).

II. ANALYSIS OF CHAPTER 131

Proponents of Chapter 131 assert that existing law does not adequately provide peace officers with practical solutions to misdemeanor domestic violence cases.¹⁹ Proponents further argue that because domestic violence assaults rarely occur in the officer's presence, there is little assistance they can provide with respect to arrests.²⁰ Furthermore, early arrest is an appropriate response to the cyclical nature of domestic violence because it will break the chain of violence before it swings out of control possibly causing serious injury or death.²¹

Opponents, on the other hand, argue that the expansion of the warrantless arrest powers to domestic violence could lead to false arrests.²² Arrest is an extraordinary intrusion upon the personal rights of the individual; thus, a warrant is required unless the activity poses a substantial threat to public safety.²³ Warrants protect due process rights by requiring a showing of cause to an impartial magistrate.²⁴

There are very limited exceptions to the general rule that a peace officer needs a warrant to arrest a person for a misdemeanor that was not committed in the officer's presence.²⁵ All but one exception involve the possibility of physical harm to others: the arrest of a probationer or parolee believed to be in violation of their probation or parole.²⁶ However, this exception takes root in the fact that a person on probation or parole has fewer rights than the ordinary individual.²⁷ Opponents contend that domestic violence does not pose the type of threat to public safety that would justify authorizing warrantless arrests.²⁸ Furthermore, by the time the peace officer arrives, usually the assault or battery has been committed already.²⁹ Therefore, the officer should be required to obtain a warrant from a magistrate.³⁰

19. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2116, at 4 (June 11, 1996).

20. *Id.*

21. *Id.*

22. *Id.* at 5.

23. *Payton v. New York*, 445 U.S. 573, 579 n.13 (1980).

24. *Welsh v. Wisconsin*, 466 U.S. 740, 749 n.10 (1984).

25. *See supra* note 16 (listing exceptions).

26. Compare CAL. PENAL CODE § 836.3 (West 1985) (probationer/parolee exception) with *id.* § 836.1 (West Supp. 1996) (assault or battery against firefighters exception); *id.* § 836.3 (West 1985) (escapee exception) and *id.* § 12031(2) (West 1985 & Supp. 1997) (carrying a loaded firearm in a public place exception).

27. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

28. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2116, at 5 (June 11, 1996).

29. *Id.*

30. *See supra* note 17 and accompanying (discussing the requirement of obtaining a warrant as soon as reasonable cause arises).

A. *Exigent Circumstances Requirement for Warrantless Home Arrests*

Notwithstanding the aforementioned support and opposition, Chapter 131 raises significant constitutional issues. The Fourth Amendment guarantees that people shall be secure from unreasonable searches and seizures.³¹ There is a greater expectation of privacy in one's home³² because home arrests involve a two-step process that invade two separate interests: First, the intrusion into the home; and second, the actual arrest.³³ By contrast, an arrest in a public place involves only the second step, and thus invades only one type of interest.³⁴ For this reason, home arrests deserve a greater degree of protection. Accordingly, in Justice Brennan's majority opinion in *Welsh v. Wisconsin*,³⁵ he noted that warrantless home arrests, even with probable cause, are barred absent exigent circumstances.³⁶ When exigent circumstances exist, the right of the police to enter a home without a warrant is diminished if the arrest is to be made for a minor offense.³⁷ The distinction between the gravity of the offense is drawn because the privacy interest remains the same while the government's interest in making the arrest decreases as the seriousness of the offense decreases.³⁸ Courts have generally rejected the argument that misdemeanors can be justified on the premise that arrestees have a reduced expectation of privacy because they are suspected of committing a crime.³⁹ This means it is likely that the privacy interest

31. U.S. CONST. amend. IV; *see id.* ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); *see also* CAL. CONST. art. I, § 13 (incorporating the Fourth Amendment of the U.S. Constitution into the California Constitution); *id.* art. I, § 19 (providing an express right of privacy).

32. *See, e.g.,* *Frisby v. Schultz*, 487 U.S. 474, 477, 484-88 (1988) (opining that the protection of unwilling listeners within their homes from the intrusion of unwanted speech is a significant government interest); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that the First Amendment prohibits making the mere private possession of obscene material in one's own home a crime); *id.* at 564-65 (emphasizing that individuals have the right to privacy in their own homes); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (stating that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

33. *Payton v. New York*, 445 U.S. 573, 588-89 (1980).

34. *See Steagald v. United States*, 451 U.S. 204, 220-21 (1981) (holding that the Fourth Amendment requires that police officers who search the house of one person in order to execute a warrant for the arrest of another person must obtain a warrant to search the third party's home).

35. 466 U.S. 740 (1984).

36. *Welsh*, 466 U.S. at 754; *see id.* (holding a warrantless entry into a suspect's home to arrest him for a minor traffic offense unconstitutional); *see also* *People v. Boragno*, 232 Cal. App. 3d 378, 386, 283 Cal. Rptr. 452, 457 (1991) (defining "exigent circumstances" as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence"); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) (holding that no warrant was needed when, under the "exigencies of the situation," police officers entered the house when they were in hot pursuit of a suspected armed felon who had entered only minutes before they arrived).

37. *Welsh*, 466 U.S. at 754 n.14.

38. *Schroeder*, *supra* note 17, at 841-42.

39. *See Mincey v. Arizona*, 473 U.S. 385, 391 (1978) (commenting that to hold a person's expectations of privacy are reduced because the person is suspected of having engaged in illegal activities would "convict the suspect even before the evidence against him was gathered").

will be overshadowed by the gravity of the offense. Justice Brennan observed that the gravity of the underlying offense is an important factor to consider when determining whether exigent circumstances exist.⁴⁰ In its evaluation, a California court is likely to consider the gravity of a domestic violence offense quite high. This is evidenced by the fact that the legislature determined that the gravity was significant enough to classify it as a felony.⁴¹

Chapter 131 does not draw a distinction between arrests in the individual's home and those in a public place. However, when determining whether a home arrest for domestic violence is constitutional, a court is likely to examine whether the violence is of such a nature as to render it an exigency.⁴² One such factor that this examination will probably include is whether leaving the victim with the batterer to go and obtain a warrant would subject the victim to further violence.⁴³ In *People v. Wilkins*,⁴⁴ the California Court of Appeal concluded that the risk of imminent violence resulting in further physical harm to the victim of domestic violence was an exigent circumstance requiring immediate action, and thus the court validated a police entry into the defendant's home to make a warrantless arrest.⁴⁵

B. Constitutionality of Warrantless Arrests for Misdemeanors

The Supreme Court has never directly addressed the issue of whether a warrantless arrest for a misdemeanor is constitutional if it does not occur in the officer's presence.⁴⁶ However, Chapter 131's constitutionality is further evidenced by lower court decisions addressing the issue in recent years. Most decisions have held that the Fourth Amendment does not prohibit warrantless arrests for misdemeanors not committed in the officer's presence.⁴⁷ However, at least one federal

40. *Welsh*, 466 U.S. at 753.

41. See CAL. PENAL CODE § 273.5 (West 1988).

42. See *supra* notes 32-36 and accompanying text (discussing the requirement of exigent circumstances).

43. See *infra* notes 44-45 and accompanying text.

44. 14 Cal. App. 4th 761, 17 Cal. Rptr. 2d 743 (1993).

45. *Wilkins*, 14 Cal. App. 4th at 772, 17 Cal. Rptr. at 749; see *id.* (concluding that entrance into a home was further justified by the defendant's wife's consent to the entry).

46. See *Welsh*, 466 U.S. at 756 (White, J., dissenting) (noting that the Court has never held that the Fourth Amendment requires a warrant to arrest for misdemeanor offenses not occurring in the officer's presence); see also *Maryland v. Macon*, 472 U.S. 463, 471 (1985) (observing that the question whether the Fourth Amendment prohibits a warrantless arrest for a misdemeanor violation should be left for a future day).

47. See, e.g., *Fields v. City of S. Houston, Tex.*, 922 F.2d 1183, 1189 (5th Cir. 1991) (declaring that there is no warrant requirement mandated by the United States Constitution to arrest individuals for misdemeanors not occurring in the arresting officer's presence); *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990) (reasoning that the Fourth Amendment does not require that a misdemeanor occur in the officer's presence to justify a warrantless arrest); *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974) (determining that the Fourth Amendment does not prohibit warrantless arrests for misdemeanors not committed in the officer's presence); see also *United States v. Mayo*, 792 F. Supp. 768, 770-71 & n.2 (M.D. Ala. 1992) (upholding warrantless home entry to arrest a person for a misdemeanor and authorizing states to continue to expand the power to arrest without a warrant as long as the Constitution's requirement of probable cause is met); *Boucher v. Town of Southbridge*, 679 F. Supp. 131, 133 (D. Mass. 1988) (holding that the warrantless arrest for the misdemeanor of driving while intoxicated did not violate

court has suggested that warrantless misdemeanor arrests may violate the United States Constitution.⁴⁸ Additionally, in one of the few cases that the Supreme Court commented on this question, the Court stated that narcotics agents could have made a warrantless arrest of the defendant only for a felony, or a misdemeanor committed in the presence of the officer.⁴⁹

Current practices also suggest that it is constitutional. There is a strong presumption that is evidenced by the fact that so many states have enacted statutes providing exceptions to the common law rule.⁵⁰ Fifteen states and the District of Columbia *mandate* warrantless arrests when there is probable cause to believe that the offender committed any crime against a family member.⁵¹ Federal legislation provides further evidence of the constitutionality of warrantless misdemeanor arrests by offering funding to states that utilize mandatory arrest policies for domestic violence.⁵² Given the prevalence of warrantless arrest statutes for misdemeanors not committed in an officer's presence and the widespread support in state case law, a court deciding this issue probably will conclude that it is constitutional.

C. Probable Cause vs. Reasonable Cause

Probable cause is always required for arrests, whether it is with or without a warrant.⁵³ Chapter 131 specifically requires reasonable cause rather than probable cause.⁵⁴ The two standards, though different in name, appear to be quite similar.

federal constitutional law and observing that other courts have recognized that such arrests are not prohibited by the Fourth Amendment if they are based on probable cause).

48. See *Gramenos v. Jewel Co.*, 797 F.2d 432, 441 (7th Cir. 1986) (noting that the Supreme Court has never ruled on this question and suggesting that the historical bar on such arrests may be "a useful guide" to their constitutionality).

49. *Johnson v. United States*, 333 U.S. 10, 15 (1948) (holding that the search violated the Fourth Amendment of the federal Constitution and overturning the conviction for the violation of federal narcotic laws); see *Bad Elk v. United States*, 177 U.S. 529, 535 (1900) (noting that at common law an officer was not allowed to make a warrantless arrest for a misdemeanor not committed in the officer's presence).

50. See *infra* note 51 (giving examples of other states' warrantless arrest codes for domestic violence).

51. See ARIZ. REV. STAT. ANN. § 13-3601(B) (West Supp. 1996); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 1995); IOWA CODE ANN. § 236.12(2) (West 1994); LA. REV. STAT. ANN. § 46:2140(1) (West Supp. 1997); ME. REV. STAT. ANN. tit. 19, § 770(5) (West 1981); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West Supp. 1997); MINN. STAT. ANN. § 629.34(1)(c) (West Supp. 1997); MO. ANN. STAT. § 455-085(1) (West Supp. 1997); NEV. REV. STAT. ANN. § 171.137(1) (Michie 1995); N.J. STAT. ANN. § 2C:25-21(a) (West 1995); OR. REV. STAT. § 133.310(1) (1995); R.I. GEN. LAWS § 12-29-3(b) (1994); S.D. CODIFIED LAWS § 23A-3-2.1(2) (Michie Supp. 1996); UTAH CODE ANN. § 77-36-2.2 (1997); WASH. REV. CODE ANN. § 10.31.100(2) (West Supp. 1997).

52. 42 U.S.C.A. § 10410(a)(2)(c) (West 1995); see also *United States v. Watson*, 423 U.S. 411, 416 (1976) (observing that there is a strong presumption for the constitutionality of an act of Congress).

53. *Watson*, 423 U.S. at 418.

54. See CAL. PENAL CODE § 836(a)(1) (amended by Chapter 131).

Recent case law indicates that probable cause is determined by examining the "totality of the circumstances."⁵⁵ This test calls for a practical, common-sense decision as to whether, given all the circumstances, there is a fair probability that the crime was committed.⁵⁶ In *Beck v. Ohio*,⁵⁷ the United States Supreme Court stated that probable cause exists when "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the person to be arrested] had committed or was committing an offense."⁵⁸ In *People v. Crovedi*,⁵⁹ a California appellate court similarly found that reasonable cause exists when an officer knows from the circumstances at the moment of arrest that an offense has been committed and a person with reasonable caution would have found it so.⁶⁰

Reasonableness can often be determined by prevailing rules in individual states and court decisions.⁶¹ Currently, most states allow warrantless misdemeanor arrests for certain exigent circumstances and for certain specific offenses, such as domestic violence.⁶² Although a statute or practice does not necessarily provide immunity from constitutional attack, when the word is as vague as reasonable, custom will play a significant role in the constitutional analysis.⁶³ All of the states have enacted legislation permitting warrantless arrests for domestic violence.⁶⁴ Among these states, the terms reasonable cause and probable cause are used with approximately the same frequency.⁶⁵ For example, South Dakota permits warrantless arrests when the officer has probable cause to believe the person has committed an assault on his or her spouse.⁶⁶ While Idaho's statute is worded differently, an officer may make a warrantless arrest of a person at the scene of a domestic disturbance if there is reasonable cause to believe the person has committed an assault or battery.⁶⁷ This is basically using probable cause. The Idaho code states that reasonable cause is based upon physical evidence observed by the officer or statements made in the presence of the officer.⁶⁸ These grounds for reasonable cause are reminiscent of the totality-of-the-

55. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (reaffirming the totality-of-the-circumstances analysis); see also *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (citing cases that apply the totality-of-the-circumstances analysis); *Winston v. Lee*, 470 U.S. 753, 760 (1985) (examining the facts and circumstances of the case to determine whether the intrusion was justified).

56. See *Gates*, 462 U.S. at 238.

57. 379 U.S. 89 (1964).

58. *Beck*, 462 U.S. at 91 (citations omitted).

59. 253 Cal. App. 2d 739, 61 Cal. Rptr. 349 (1967).

60. *Crovedi*, 253 Cal. App. 2d at 743, 61 Cal. Rptr. at 352.

61. *Garner*, 471 U.S. at 15-16.

62. See *supra* notes 18, 51 (listing statutes).

63. *Payton v. New York*, 445 U.S. 573, 600 (1980).

64. See *supra* note 18 (providing examples of domestic violence statutes of other states).

65. See *supra* note 18 (listing examples of statutes).

66. S.D. CODIFIED LAWS § 23A-3-2.1(2)(a) (Michie Supp. 1996).

67. IDAHO CODE § 19-603 (Supp. 1996).

68. *Id.*

circumstances test used for probable cause.⁶⁹ Both the state courts and the federal courts, including the Supreme Court, use the terms interchangeably.⁷⁰

The "reasonable cause" standard probably will withstand constitutional scrutiny. Its similarity in definitions with probable cause makes it appear to be the same standard as probable cause, which is constitutionally sufficient.

III. CONCLUSION

In California, Chapter 131 is long overdue and greatly appreciated by women like Pamela who sustain beatings by their spouses and, because the husbands were fortunate enough to strike them in areas that do not readily reveal injury, the police could not protect the victims by arresting their assailants. Now, police are empowered to arrest the perpetrator and break the chain of violence before it swings out of control and causes serious injury or death. Given the exigency of protecting against probable, immediate, physical harm, the prevalence of warrantless arrest statutes for domestic violence, and the widespread support in case law, Chapter 131 is likely to survive constitutional scrutiny.

APPENDIX

Code Section Affected

Penal Code § 836 (amended).

AB 2116 (Alby); 1996 STAT. Ch. 131

69. See *supra* notes 53-60 and accompanying text (discussing the totality-of-the-circumstances and probable cause analysis).

70. See, e.g., *United States v. Watson*, 423 U.S. 411, 418 (1976) (discussing that a peace officer is permitted to arrest without a warrant for a misdemeanor committed in the officer's presence if there is a reasonable ground for making the arrest).

Emotion Over Reason: California's New Community Notification and Chemical Castration Laws Feel Good, but Fail "Sensible" Scrutiny

David M. Boyers

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I. INTRODUCTION

I knew nothing about him . . . [N]one of us did. If I had been aware of his record, my daughter would be alive. I would never have allowed her to cross the street.

—Maureen Kanka¹

Megan Kanka's parents were unaware that their suburban New Jersey community was unsafe for their daughter. They were unaware that their neighbor, Jesse Timmendquas, was a twice-convicted felon who had already served six years for sexual assault,² one of his victims being a seven-year-old girl just like Megan.³ They were unaware and could do nothing. And so, in July of 1994, on her way home from a friend's house, little Megan Kanka could do nothing to protect herself. Lured into his house by the promise to see a puppy,⁴ Megan was victimized by Timmendquas—first strangled, then raped, and finally killed by asphyxiation.⁵ If only she had known.

Spurred into action by the incident, Megan's family and neighbors campaigned for legislation that would require law enforcement to notify members of the public who may be unknowingly at risk from sex offenders living nearby.⁶ In response, New Jersey's legislators passed a series of "emergency" registration and notification bills in an effort to provide some assurance.⁷ Governor Whitman promptly signed the new measures into law on October 31, 1994, just three months after Megan's death.⁸ One of the bills—known as "Megan's Law"—requires that law enforcement provide notification to communities, schools, and other institutions when a convicted sex offender poses a potential risk to their safety.⁹ Which segments of the public receive information about the registrant is based upon a three-tiered system of categorizing an offender's potential risk to the community.¹⁰ The theory underlying Megan's Law

1. Richard Jerome et al., *Megan's Legacy; Little Megan Kanka Was Brutally Murdered. Now Her Family Wants Other Parents to Know when a Sex Offender Moves in Next Door*, PEOPLE, Mar. 20, 1995, at 46 (quoting Maureen Kanka as she expressed feelings of helplessness regarding the circumstances surrounding the death of her daughter Megan).

2. Jan Hoffman, *New Law Is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1.

3. Anna Quindlen, *So What if Law Isn't Fair to Sex Offenders?; Children Come First*, CHI. TRIB., Aug. 8, 1994, at 13.

4. *Id.*

5. See Jerome, *supra* note 1, at 46.

6. Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1, 1994, at B1.

7. Under the "emergency" status, the bills bypassed committee discussion and were put to a vote the same day as the second reading. See *W.P. v. Poritz*, 931 F. Supp. 1199, 1203-04 (D. N.J. 1996) (reviewing the circumstances surrounding the passage of Megan's Law).

8. Sullivan, *supra* note 6, at B1.

9. *Id.* See generally N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & Supp. 1996) (establishing provisions for the registration and notification of the release of certain sex offenders).

10. N.J. STAT. ANN. § 2C:7-8(a) (West 1995).

is the greater the risk posed by an offender, the more widespread the warnings become to ensure society's safety. For example, information on Tier I offenders (designated as "low risk"¹¹) is provided solely to law enforcement agencies likely to encounter the registrant,¹² while a Tier II ("moderate risk"¹³) offender's information may be disseminated among law enforcement as well as specified community organizations, including schools, religious groups, and youth groups.¹⁴ Tier III ("high risk"¹⁵) offenders face the release of information to law enforcement, specified community organizations, as well as all members of the public likely to encounter the registrant.¹⁶

Since New Jersey adopted Megan's Law in 1994, more than thirty states have followed suit by enacting their own community notification laws.¹⁷ This year California has joined these states, adopting its own version of Megan's Law—Chapter 908.¹⁸ Like New Jersey's law, Chapter 908 establishes a three-tiered system of risk categorization and corresponding public notification.¹⁹

In addition to joining states that have adopted Megan's Law, or a similar version, California's legislators have also set the state apart from the rest of the country—showcasing their unmatched, "get tough" attitude on sex crimes—by enacting Chapter 596, a groundbreaking law mandating chemical castration for the "worst of the worst" two-time sex offenders.²⁰

A. California Sexual Offender Law: Past and Present

The passage of Chapters 908 and 596 represents the culmination of a wave of reformation to California's sex offender laws that first arose several years ago in

11. See *id.* § 2C:7-8(b) (West 1995) (noting that factors relevant to the determination of re-offense risk include, but are not limited to: (1) Parole conditions that minimize risk of re-offense; (2) physical conditions such as advanced age or debilitating illness that would minimize the risk of re-offense; (3) criminal history indicative of high risk of re-offense, such as repetitive and compulsive criminal conduct, whether the offender served the maximum term, and whether the offender committed the sex offense against a child; (4) other criminal history factors, including the relationship between the offender and the victim, whether the offense involved a weapon or resulted in injury, and the number, date and nature of prior offenses; (5) whether the offender has a psychological or psychiatric profile that indicates a risk of recidivism; (6) the offender's record of responding to treatment; (7) recent behavior, including behavior exhibited while imprisoned and behavior exhibited while on probation or parole, and (8) recent threats against people, or expressions of intent to commit further crimes).

12. *Id.* § 2C:7-8(c)(1) (West 1995).

13. See *supra* note 11 (listing the factors that are relevant to the level of risk determination).

14. N.J. STAT. ANN. § 2C:7-8(c)(2) (West 1995).

15. See *supra* note 11 (listing the relevant factors of the risk-level determination).

16. N.J. STAT. ANN. § 2C:7-8(c)(3) (West 1995).

17. *Wilson Signs Sex-Offender Bill; Photos Will Be Available to Public at Police Stations*, S.F. EXAM., Sept. 26, 1996, at A6.

18. See CAL. PENAL CODE §§ 290, 290.4 (amended by Chapter 908).

19. Compare N.J. STAT. ANN. §§ 2C:7-1 to -11 with CAL. PENAL CODE §§ 290, 290.4 (amended by Chapter 908).

20. CAL. PENAL CODE § 645 (amended by Chapter 596).

response to an ailing system of sex offender registration.²¹ Adopted in 1947, the registration system was novel at the time, making California the first state in the country calling for sex offenders to register with local law enforcement officials upon release from prison.²² The motivation behind the system was the thought that registration would combat the high recidivism rate of sex offenders by arming police with information to aid in the apprehension of suspects.²³

Other states soon followed California's lead by enacting similar legislation: Arizona in 1951, Nevada in 1961, and Alabama in 1967.²⁴ Illinois and Arkansas passed registration laws in 1986 and 1987, respectively,²⁵ and since 1989, a multitude of states rapidly followed suit.²⁶ Presently, all fifty states have enacted sex offender registration statutes.²⁷

California's current registration system requires specified sex offenders²⁸ to register with the chief of police or sheriff in the city, county, or campus²⁹ in which they are domiciled, upon parole.³⁰ As long as the sex offender resides in California, these registration requirements apply for life.³¹

Over the last decade or so of mandatory sex offender registration in California, several inadequacies have become apparent.³² One flaw that has surfaced with the system relates to its reactive, rather than proactive, nature.³³ As primarily a reactionary tool, the system aids only in post-crime apprehension, instead of helping police prevent sex offenses in the beginning. In addition, over the years, the amount

21. See *infra* notes 32-36 and accompanying text (detailing the inadequacies of California's sex offender registration system).

22. 1947 Cal. Stat. ch. 1124, sec. 1, at 2562-63 (enacting CAL. PENAL CODE § 290); see Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 887 n.4 (stating that California's sex offender registration law was the first in the nation).

23. *People v. Mills*, 81 Cal. App. 3d 171, 176, 146 Cal. Rptr. 411, 414 (1978); see *id.* (declaring that the fundamental legislative purpose underlying § 290 of the California Penal Code is to assure that sex offenders are readily available for police surveillance at all times).

24. Bedarf, *supra* note 22, at 887 n.4; see ALA. CODE §§ 13A-11-200 to -203 (1994); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3824 (1989 & Supp. 1996); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1992 & Supp. 1996).

25. Bedarf, *supra* note 22, at 887 n.4; see ARK. CODE ANN. §§ 12-12-901 to -909 (Michie 1995); ILL. ANN. STAT. ch. 730, paras. 150/1-150/10.9 (Smith-Hurd 1992 & Supp. 1996).

26. Bedarf, *supra* note 22, at 887 n.4.; see, e.g., OKLA. STAT. ANN. tit. 57, §§ 581-87 (West 1991 & Supp. 1997); WASH. REV. CODE ANN. §§ 9A.44.130 to -.140 (West Supp. 1997).

27. *Sex Offender Loses Challenge to Classification as High Risk*, N.Y. L.J., July 9, 1996, at 25 n.1.

28. See CAL. PENAL CODE § 290(a)(2) (amended by Chapter 908) (listing the persons who shall be required to register as sex offenders, including, for example, offenders convicted of kidnaping with intent to commit child molestation under California Penal Code § 207(b), offenders convicted of sexual battery (Penal Code § 243.4), and offenders convicted of rape by foreign object (Penal Code § 264.1)).

29. *Id.* § 290(a)(1) (amended by Chapter 908) (requiring the offender to register with the chief of police of a campus of the University of California or the California State University if the offender is domiciled upon the campus).

30. *Id.*

31. *Id.*

32. See Bedarf, *supra* note 22, at 900 (noting that California's registration system has evidently been failing since 1985).

33. *Id.* at 903.

of information collected in the registry databases has grown so large that they have become unmanageable and of little practical utility.³⁴ The result is a seemingly abandoned system where much of the information contained in the registries is outdated, incorrect, or nonexistent.³⁵ Finally, any information that was accurate and accessible in the registries could be obtained by only the police; the public had no such access and thus never knew whether a friend or neighbor was a registered sex offender.³⁶

In an effort to cure some of these inadequacies plaguing the registration system, California's legislators began their wave of reformation legislation. The first surge occurred on September 26, 1994, when Governor Wilson approved a law requiring the Department of Justice to operate a 1-900 telephone number through which concerned members of the public could inquire as to whether a questionable individual had been registered as a sex offender convicted of committing specified crimes against children.³⁷ Parents using the line could obtain an offender's name and physical description, thereby dashing the offender's ability to hide behind a cloak of anonymity.³⁸ Since its inception in July of 1995, the line has received more than 7000 calls and has resulted in more than 600 matches.³⁹

The wave of reformation gained further strength when legislators afforded concerned parents the option of searching for suspicious, potential predators in the Child Molester Identification Line Subdirectory.⁴⁰ The subdirectory listed those persons deemed by the Department of Justice to be habitual sex offenders and a threat to pub-

34. *Id.* at 901; *see id.* (confirming that the police do not have adequate resources to check every name on the registry when attempting to solve a sex offense).

35. *Id.* at 901-02; *see id.* (reporting that in 1984, a sheriff's captain in San Bernardino, after conducting an investigation, found that 90% of the addresses in the sex offender registry were inaccurate). The author states that in 1993, in Sacramento County, an investigation revealed that 80 out of 100 registered sex offender addresses were incorrect. *Id.* Finally, the author reports that the California Department of Justice has estimated that the state has accurate information in its registries regarding sex offenders only 24% of the time. *Id.*

36. *See* 1995 Cal. Legis. Serv. ch. 85, sec. 1, at 208-12 (amending CAL. PENAL CODE § 290) (same); 1995 Cal. Legis. Serv. ch. 91, sec. 120, at 296-300 (amending CAL. PENAL CODE § 290) (having no provisions authorizing public dissemination of registrant information); 1995 Cal. Legis. Serv. ch. 840, sec. 2, at 4976-79 (amending CAL. PENAL CODE § 290) (same).

37. *See* 1995 Cal. Legis. Serv. ch. 85, sec. 2, at 212-15 (amending CAL. PENAL CODE § 290.4) (specifying the offenses to which the 1-900 number applied as: (1) Rape, if the victim is a minor (California Penal Code § 261); (2) procuring a minor for prostitution (Penal Code § 266); (3) abduction of a minor for purposes of prostitution (Penal Code § 267); (4) kidnaping to commit child molestation (Penal Code § 207(b)); (5) sodomy of a minor (Penal Code § 286(b) or (c)); (6) child molestation (Penal Code § 288); (7) oral copulation where the victim is a minor (Penal Code § 288a(b)(2) or (c)); (8) continuous child sexual abuse (Penal Code § 288.5); (9) foreign object rape of a minor (Penal Code § 289(i) or (j)); (10) child molestation punishable by California Penal Code § 647.6; and (11) kidnaping, punishable pursuant to § 208(d) of the California Penal Code if the victim is a minor); 1995 Cal. Legis. Serv. ch. 840, sec. 3, at 4979-85 (amending CAL. PENAL CODE § 290.4) (same).

38. CAL. PENAL CODE § 290.4(a)(2) (amended by Chapter 908).

39. Cassandra Stern, *California Waging War on Sexual Predators; Chemical Castration Law Is State's Latest Weapon*, WASH. POST, Sept. 24, 1996, at A3.

40. 1995 Cal. Legis. Serv. ch. 85, sec. 2, at 212-15 (amending CAL. PENAL CODE § 290.4); 1995 Cal. Legis. Serv. ch. 840, sec. 3.1, at 4982-85 (amending CAL. PENAL CODE § 290.4).

lic safety,⁴¹ and permitted concerned parents to browse through pictures of convicted offenders, obtaining information regarding their name, physical description, age, and distinctive markings.⁴²

One weakness degrading these devices of community empowerment was their requirement that the parent take the first step by actively seeking out information regarding a suspicious person. Some parents inevitably would not take that initiative, while others would be unable to determine who was “suspicious” and who was not, and be unwilling to investigate an entire pool of potential offenders.

This year, with California’s adoption of Chapters 908 and 596, the wave of reformation has reached its crest, with laws providing for active public dissemination by the police of sex offender information and, for a select few, chemical castration.⁴³

1. Chapter 908: Community Notification

Chapter 908 restructures California’s sex offender laws—integrating the old with the new—into a three-tiered system of public notification.⁴⁴ Tier I—entitled “Public Inquiry”⁴⁵—provides the public with access to information regarding sex offenders using two devices: (1) An expanded version of the already existing 1-900 telephone line, and (2) a newly created CD-ROM directory.⁴⁶ Chapter 908 updates the 1-900 line by increasing the number of offenders whose information will be included.⁴⁷ Previously, only offenders guilty of specified sex offenses against children were put on the line.⁴⁸ The new line, however, will include information regarding offenders

41. 1995 Cal. Legis. Serv. ch. 85, sec. 2, at 212-15 (amending CAL. PENAL CODE § 290.4); 1995 Cal. Legis. Serv. ch. 840, sec. 3.1, at 4982-85 (amending CAL. PENAL CODE § 290.4).

42. 1995 Cal. Legis. Serv. ch. 85, sec. 2, at 212-15 (amending CAL. PENAL CODE § 290.4); 1995 Cal. Legis. Serv. ch. 840, sec. 3.1, at 4982-85 (amending CAL. PENAL CODE § 290.4).

43. CAL. PENAL CODE §§ 290, 290.4 (amended by Chapter 908); *id.* § 645 (amended by Chapter 596).

44. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1562, at 1 (Aug. 29, 1996).

45. *Id.*

46. CAL. PENAL CODE § 290.4(a)(1)-(5) (amended by Chapter 908).

47. *See id.*

48. 1995 Cal. Legis. Serv. ch. 85, sec. 2, at 212-15 (amending CAL. PENAL CODE § 290.4); 1995 Cal. Legis. Serv. ch. 840, sec. 3, at 4979-85 (amending CAL. PENAL CODE § 290.4).

guilty of committing crimes without regard to the victim's age, such as rape⁴⁹ and felony sexual battery.⁵⁰

Furthermore, Chapter 908 expands and clarifies the information available on the 1-900 number. Specifically, Chapter 908 requires that the line include not only a physical description, criminal history, and address of an offender—as previously required—but also any known aliases of the offender, the offender's gender, race, date of birth, and zip code in which the offender resides, not including information that would identify the offender's victim.⁵¹

Chapter 908 also repeals provisions calling for a child molester identification line subdirectory, and supplants them with requirements for the creation of an updated CD-ROM directory.⁵² Specifically, Chapter 908 requires the Department of Justice, on or before July 1, 1997, to provide a CD-ROM, or other electronic medium, containing specified information⁵³ to certain law enforcement agencies.⁵⁴ These agencies must then make the CD-ROM available for public viewing.⁵⁵

49. See CAL. PENAL CODE § 261 (West 1988 & Supp. 1997) (defining "rape" as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:" (1) Where the person is mentally or physically incapable of giving legal consent, and this is known by the person committing the act; (2) where it is accomplished by force, violence, duress, menace or fear of bodily injury; (3) where the person is prevented from resisting by any alcohol or drug; (4) where the person is unconscious; (5) where the person submits after the perpetrator has induced, by artifice, pretense, or concealment, a belief that they are the victim's spouse; (6) where the act is committed under threat of future retaliation; and (7) where the act is committed under threat of using the authority of a public official to incarcerate, arrest, or deport the victim, and the victim believes that the perpetrator is a public official).

50. *Id.* § 290.4(a)(1) (amended by Chapter 908); see *id.* § 243.4 (West 1988 & Supp. 1997) (defining "sexual battery" as any of the following: (1) The forceful touching of an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice for the purposes of sexual arousal, gratification, or abuse; (2) the forceful touching of an intimate part of another person while that person is institutionalized for medical treatment and the touching is for the purposes of sexual arousal, gratification, or abuse; or (3) forcefully causing any person who is restrained to masturbate or touch an intimate part of another person's body, for the purposes of sexual arousal, gratification or abuse). The other offenses for which the 1-900 now applies, in addition to the offenses previously available via the line, include: (1) Sexual assault, except assault to commit mayhem (California Penal Code § 220); (2) foreign object rape in concert with another (Penal Code § 264.1); (3) felony unlawful sex when consent procured by false representation (Penal Code § 266c); (4) felony sodomy (Penal Code § 286(b)(2), (d), (f), (g), (i), (j) or (k)); (5) oral copulation (Penal Code § 288a(d), (f), (g), (i), (j) or (k)); and (6) foreign object rape (Penal Code § 289(a), (b), (d), (e), (f), (g) and (h)). *Id.* § 290.4(a)(1) (amended by Chapter 908).

51. *Id.* § 290.4(a)(2) (amended by Chapter 908).

52. Compare 1995 Cal. Legis. Serv. ch. 85, sec. 2, at 212-15 (amending CAL. PENAL CODE § 290.4) and 1995 Cal. Legis. Serv. ch. 840, sec. 3.1, at 4982-85 (amending CAL. PENAL CODE § 290.4) (providing for the creation of a subdirectory listing certain child molesters) with CAL. PENAL CODE § 290.4(a)(4)(A) (amended by Chapter 908) (establishing a CD-ROM directory).

53. See CAL. PENAL CODE § 290.4(a)(2) (amended by Chapter 908) (listing the information that will be available on the CD-ROM). The information is identical to that available on the 1-900 line and includes: the name and any known aliases of the offender, a photograph, a physical description, gender, race, date of birth, criminal history, the address at which the offender resides, and any other information the Department of Justice deems relevant, not to include any information that would identify the victim. *Id.*

54. See *id.* § 290.4(a)(4)(A) (amended by Chapter 908) (listing the various law enforcement agencies receiving the CD-ROM, including the sheriff's department in each county, and municipal police departments of cities with a population of more than 200,000 people).

55. *Id.*

Within Tier II, law enforcement agencies are authorized to provide specified information⁵⁶ to persons⁵⁷ “likely to encounter”⁵⁸ a registered offender⁵⁹ when peace officers “reasonably suspect[,]”⁶⁰ based on information that has come to their attention by any peace officer or member of the public, that a child or other person may be “at risk”⁶¹ from certain offenders.⁶²

Finally, under Tier III of the new system, law enforcement agencies are authorized to notify the general public of “high-risk” sex offenders in their community.⁶³ A “high-risk” sex offender is defined by Chapter 908 as a person who has been convicted of an offense for which registration is required under California Penal Code § 290(a)(2),⁶⁴ and who also meets at least one of the following criteria: (1) Has been convicted of three or more violent sex offenses,⁶⁵ at least two of which were brought and tried separately; (2) has been convicted of two violent sex offenses and one or

56. The information that may be disclosed by peace officers under Tier II includes: the offender’s full name, any known aliases, gender, race, physical description, photograph, date of birth, the crimes and dates of commission that resulted in the offender’s registration, the offender’s address (which must be verified prior to publication), a description and license plate number of the offender’s vehicles or vehicles the offender is known to drive, the type of victim targeted by the offender, relevant parole or probation conditions, and the offender’s date of release from confinement. *Id.* § 290(m)(2)(A)-(N) (amended by Chapter 908).

57. *See id.* § 290(m)(1)(A), (B) (amended by Chapter 908) (providing that this information could be released to persons, agencies, or organizations the offender is likely to encounter including, but not limited to, “[p]ublic and private educational institutions, day care establishments, and establishments and organizations that primarily serve individuals likely to be victimized by the offender,” or “[o]ther community members at risk”).

58. *See id.* § 290(m)(4) (amended by Chapter 908):

The phrase “likely to encounter” means “(A) that the agencies, organizations, or other community members are in a location or in close proximity to a location where the offender lives or is employed, or that the offender visits or is likely to visit on a regular basis, and (B) the types of interaction that ordinarily occur at that location and other circumstances indicate that contact with the offender is reasonably probable”.

Id.

59. *See id.* § 290(m)(7) (amended by Chapter 908) (noting that the law enforcement agency may disclose information on an offender pursuant to this subdivision for as long as the offender is included in the list of offenders set forth in California Penal Code § 290.4).

60. *See id.* § 290(m)(5) (amended by Chapter 908) (providing that the phrase “reasonably suspect” means that “it is objectively reasonable for a peace officer to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect that a child or other person is at risk”).

61. *See id.* § 290(m)(6) (amended by Chapter 908) (defining “at risk” to mean a person who “is or may be exposed to a risk of becoming a victim of a sex offense committed by the offender”).

62. *Id.* § 290(m)(1)-(7) (amended by Chapter 908).

63. *Id.* § 290(n) (amended by Chapter 908).

64. *See id.* § 290(a)(2) (amended by Chapter 908) (listing all the crimes for which conviction requires the offender to register with the state).

65. *See id.* § 290(n)(1)(B) (amended by Chapter 908) (noting that “violent sex offenses” include: (1) Assault with intent to commit enumerated sex offenses, except attempt to commit mayhem (California Penal Code § 220); (2) rape (Penal Code § 261); (3) rape in concert (Penal Code § 264.1); (4) sodomy (Penal Code § 286); (5) child molestation (Penal Code § 288); (6) oral copulation (Penal Code § 288a); (7) continuous sex abuse of a child (Penal Code § 288.5); (8) foreign object rape (Penal Code § 289); (9) child molestation, as specified (Penal Code § 647.6); and (10) infliction of great bodily injury during the commission of a sex offense (Penal Code § 12022.8)).

more violent nonsex offenses,⁶⁶ at least two of which were brought and tried separately; (3) has been convicted of one violent sex offense and two or more violent nonsex offenses, at least two of which were brought and tried separately; or (4) has been convicted of either two violent sex offenses or one violent sex offense and one violent nonsex offense, at least two of which were brought and tried separately, and has been arrested on separate occasions for three or more violent sex offenses, violent nonsex offenses, or associated offenses.⁶⁷

Chapter 908, under Tier III, provides offenders with a “washout” exception, or circumstances under which a person will not be considered a “high-risk” sexual offender.⁶⁸ Two such circumstances suspend application of the label. First, if the offender’s most recent conviction or arrest for an enumerated offense occurred more than five years prior to the Department of Justice’s high-risk assessment, excluding periods of confinement, the offender will not be considered a “high-risk” sexual offender.⁶⁹ Second, if the offender notifies the Department of Justice that the offender has not been convicted in the preceding fifteen years of an offense requiring sex offender registration, and such information is verified by the Department, the “high-risk” label will be deleted.⁷⁰

2. Chapter 596: Chemical Castration

In addition to the passage of the community notification system, California’s legislators this year also passed a first-in-the-nation law—Chapter 596—calling for the “chemical castration” of a small group of sex offenders who commit especially heinous crimes against children.⁷¹ Specifically, Chapter 596 repeals previous California law which provided the courts with the discretion to order a sex offender, found guilty of carnal abuse of a female under the age of ten, to undergo an operation

66. *See id.* § 290(n)(1)(C) (amended by Chapter 908) (noting that “violent nonsex offenses” include: (1) Murder (California Penal Code § 187), (2) voluntary manslaughter (Penal Code § 192(a)), (3) mayhem (Penal Code § 203), (4) torture (Penal Code § 206), (5) kidnaping (Penal Code § 207), (6) felony false imprisonment (Penal Code § 236), (7) child abuse or endangerment (Penal Code § 273a(a)), (8) child abuse (Penal Code § 273d), (9) arson (Penal Code § 451), and (10) attempted murder (Penal Code §§ 187 and 664)).

67. *Id.* § 290(n)(1)(A)(i)-(iv) (amended by Chapter 908); *see id.* § 290(n)(1)(D) (amended by Chapter 908) (noting that “associated offenses” include: (1) Felony sexual battery (California Penal Code § 243.4), (2) specified obscene matter offenses (Penal Code §§ 311.1-.7), (3) indecent exposure (Penal Code § 314), (4) first degree burglary (Penal Code § 459), (5) animal killing (Penal Code § 597), (6) stalking (Penal Code § 646.9), (7) disorderly conduct offenses such as loitering in a public toilet (Penal Code § 647(d), (h) or (i)), (8) telephone harassment (Penal Code § 653(m)), or (9) infliction of great bodily injury during commission of a felony (Penal Code § 12022.7)).

68. *Id.* § 290(n)(1)(G); *see SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1562*, at 6 (Aug. 29, 1996) (using the term “washout”).

69. CAL. PENAL CODE § 290(n)(1)(G)(i) (amended by Chapter 908).

70. *Id.* § 290(n)(1)(G)(ii) (amended by Chapter 908).

71. *Id.* § 645 (amended by Chapter 596). *See generally* Jason Runckel, *Abuse It and Lose It: A Look at California’s Mandatory Chemical Castration Law*, 28 PAC. L.J. 549 (1997) (giving a detailed analysis of the constitutional issues raised by the passage of Chapter 596).

for the prevention of procreation.⁷² In its place, Chapter 596 provides that any offender found guilty of committing either: (1) Lewd and lascivious conduct by force, violence, duress, menace, or fear of immediate unlawful bodily injury;⁷³ (2) oral copulation, whether by force or not;⁷⁴ (3) forceful sodomy;⁷⁵ or (4) penetration of genital or anal openings with a foreign object, whether forceful or not,⁷⁶ on any child under thirteen years of age, may be punished by depo medroxyprogesterone acetate (DMPA) treatment,⁷⁷ upon parole, at the discretion of the judge.⁷⁸ Upon a second conviction, the punishment would become mandatory.⁷⁹ The treatment would consist of weekly injections of DMPA, beginning one week prior to release, and continuing until the Department of Corrections demonstrates to the Board of Prison Terms that it is no longer necessary.⁸⁰ A person subject to this provision may elect surgical castration in lieu of the DMPA treatment.⁸¹ With these new laws cracking down on sex offenders now in place, the question becomes whether the wave of reformation will effectively reduce the incidents of sex crime, or whether it will come crashing down in failure, creating even more problems than before.

II. COMMUNITY NOTIFICATION

A. *A Reversion to the Past—Is California's Version of Megan's Law a Modern Day Scarlet Letter?*

In Colonial America, punishments designed to shame and humiliate were commonplace, with judges frequently handing down sentences ordering offenders to wear lettered clothing, to be branded with irons, or stand in the pillory as a means of publicizing their deviance.⁸² For example, in 1656, in Plymouth, Massachusetts, a

72. 1996 Cal. Legis. Serv. ch. 596, sec 1, at 2711 (repealing CAL. PENAL CODE § 645); see 1923 Cal. Stat. ch. 224, sec. 1, at 448 (enacting CAL. PENAL CODE § 645).

73. CAL. PENAL CODE § 288(b)(1) (West 1988 & Supp. 1997).

74. *Id.* § 288a(b), (d) (West 1988 & Supp. 1997).

75. *Id.* § 286(c), (d) (West 1988 & Supp. 1997).

76. *Id.* § 289(a), (j) (West 1988 & Supp. 1997).

77. See *infra* note 205 and accompanying text (noting that depo medroxyprogesterone acetate, commonly known as Depo-Provera, is a widely used female contraceptive method). Chapter 596 refers specifically to the imposition of medroxyprogesterone acetate (MPA) treatment for sex offenders, rather than the imposition of depo medroxyprogesterone acetate (DMPA). CAL. PENAL CODE § 645 (amended by Chapter 596). The difference between the two is in their form of administration—MPA is a tablet, while DMPA is injectable. Because the committee analyses discussing Chapter 596 refer to the imposition of Depo-Provera, the injectable MPA, I will use the abbreviation DMPA throughout this Legislative Note. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3339 at 3 (Aug. 30, 1996) (referring to the imposition of Depo-Provera under Chapter 596).

78. CAL. PENAL CODE § 645(a) (amended by Chapter 596).

79. *Id.* § 645(b) (amended by Chapter 596).

80. *Id.* § 645(d) (amended by Chapter 596).

81. *Id.* § 645(e) (amended by Chapter 596).

82. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991).

woman was forced to wear on her sleeve a Roman B, cut out of ridd cloth, as punishment for her blasphemous words.⁸³ Similarly, in 1663, a Boston man was ordered to don a sheet of paper on his back bearing the word “Drunkard” as punishment for his drunkenness.⁸⁴ And in 1638, again in Boston, a man was sentenced to wear a red V on his chest in order to signify his viciousness.⁸⁵ The theory behind such “Scarlet Letter” punishments was that offenders humiliated before their community would reshape their behavior to conform with the accepted moral code.⁸⁶ Their effectiveness was due, in part, to the close-knit communities of the colonial era, where the possibility of hiding one’s shame in anonymity was unavailable.⁸⁷

Although such penalties have long been criticized as ineffective and unacceptable in today’s less socially-intimate societies,⁸⁸ many modern courts across the country have revitalized shame punishments in response to the frustrations plaguing prison and parole.⁸⁹ For example, in Florida, a man convicted of drunk driving was ordered to place a bumper sticker on his car reading “CONVICTED DUI - RESTRICTED LICENSE.”⁹⁰ More recently, in Boston, nine men arrested for soliciting sex from an undercover police officer were ordered to shovel the filth piling up in the back alleys of Chinatown, with media cameras and photographers documenting the event for all to see.⁹¹ In Wisconsin, one judge ordered shoplifters to announce their shame from in between a sandwich board—on which were written the words “I’M A THIEF.”⁹²

Just as drunk drivers, “johns” soliciting prostitution, and shoplifters have been recent targets for public humiliation, convicted sex offenders have found themselves the subject of shame punishments as well. For example, in Oregon, a man convicted of child molestation was ordered to place signs on the front door of his residence and on the doors of his vehicle, reading, “DANGEROUS SEX OFFENDER - NO CHILDREN ALLOWED.”⁹³ Moreover, in Rhode Island, a judge ordered a man to place the following four-by-six inch ad in the *Providence Journal Bulletin*: “I am Stephen Germershausen. I am 29 years old . . . I was convicted of child molestation . . . If you are a child molester, get professional help immediately, or you may find

83. Rosalind K. Kelley, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759, 759 (1989).

84. *Id.*

85. *Id.*

86. Bedarf, *supra* note 22, at 913.

87. Massaro, *supra* note 82, at 1912.

88. See Kelley, *supra* note 83, at 760 (stating that penologists have deemed colonial shame punishments as archaic and unacceptable); see also Massaro, *supra* note 82, at 1884 (concluding that public shaming emphasizes retribution, while lacking any other “positive community-expressive or community-reinforcing content”).

89. See Massaro, *supra* note 82, at 1882 (noting that prison overcrowding and doubts about the appropriateness and effectiveness of incarceration have made imprisonment a harsh choice in many cases, while parole is viewed by many judges as too lenient).

90. *Goldschmitt v. State*, 490 So. 2d 123, 124 (Fla. Dist. Ct. App. 1986).

91. *Public Humiliation Used as Means to Deter Criminal Acts* (NPR broadcast, June 10, 1996) (transcript on file with the *Pacific Law Journal*).

92. *Id.*

93. *State v. Bateman*, 771 P.2d 314, 322 (Or. Ct. App.) (en banc), *cert denied*, 777 P.2d 410 (Or. 1989).

your picture and name in the paper, and your life under control of the state.”⁹⁴ The text was accompanied by the man’s picture, just in case people did not know him by name.⁹⁵ Finally, in Louisiana, judges are given the discretion to order punishment that may force sex offenders to affix signs, bumper stickers, handbills, or labeled clothing to themselves or their property as a means of notifying the public of their whereabouts.⁹⁶

California’s newly enacted community notification law, Chapter 908, while not as severe as some of the forms of punishment described above, sanctions a similar form of shame punishment, permitting law enforcement officers to disseminate the identity and location of certain registered sex offenders to the public.⁹⁷ While legislators hope the new laws will decrease the number of sex offenses committed, critics have suggested they are an ineffective, “knee-jerk” reaction to the increase of public demands calling for safer communities in which our children must live, and may even lead to increased problems for the community.⁹⁸

B. Will Community Notification Laws Be Effective?

Community notification laws, such as Chapter 908, have been well received by the public in recent years for two main reasons.⁹⁹ First, the laws promise to empower the public by arming them with information that can be used to fend off victimization and relieve feelings of helplessness.¹⁰⁰ Second, community surveillance, in conjunction with police surveillance, of registered offenders ideally increases the chances of capturing these criminals upon re-offense or, better yet, deters them from re-offending altogether.¹⁰¹

In contrast to the lofty expectations these laws raise stands their realities. Realities that demonstrate their lack of effectiveness under fire. For example, laws such as Chapter 908, in addition to empowering the community with knowledge, can enrage it through fear as well.¹⁰² Armed with knowledge of an offender’s identity and location, those wishing to expel offenders from their neighborhoods may resort to

94. Massaro, *supra* note 82, at 1881.

95. *Id.*

96. LA. CODE CRIM. PROC. ANN. art. 895(H)(2) (West 1984 & Supp. 1997).

97. CAL. PENAL CODE §§ 290, 290.4 (amended by Chapter 908).

98. *See, e.g.*, Kimberly J. McLarin, *Trenton Races to Pass Bill on Sex Abuse*, N.Y. TIMES, Aug. 30, 1994, at B1 (describing how New Jersey legislators passed Megan’s Law by the New Jersey State Assembly without holding its customary committee hearings on the bill); Jenny A. Montana, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey’s Megan’s Law*, 3 J.L. & POL’Y 569, 574 (1995) (arguing that community notification laws such as Megan’s Law neither prevent incidents of child sexual abuse nor make communities safer, but rather create consequences that hinder efforts to deter sex offenders from re-offending).

99. *See* Bedarf, *supra* note 22, at 906.

100. *Id.*

101. *Id.*

102. *See id.* at 907 (explaining that community notification laws transform what was once an “abstract anxiety” into an “identifiable threat” where people “become worried that this particular offender will attack again”).

vigilantism—creating crime to deter crime.¹⁰³ Similarly, because these laws only inform the public as to those offenders who have already been convicted and pose a certain base-level threat to society, first time offenders, offenders failing to register, and less threatening offenders who may become violent will remain unknown.¹⁰⁴ Thus, a false sense of security is fostered among those who believe they are aware of the danger and can prevent any harm. Finally, community notification places a label—a badge of shame if you will—on offenders who have already served their time, depriving them of the ability to reintegrate into society.¹⁰⁵ Ultimately, this ostracism creates sexual offender outcasts who have a greater chance of reverting to their prior tendencies.¹⁰⁶

1. *The Possibility of Vigilante Justice*

Sex offenders commit heinous crimes—many times against the most innocent of victims, our children. Their acts justifiably provoke public outrage, disgust, and hate.¹⁰⁷ Chapter 908 will inevitably feed these emotions and create a volatile situation where members of the community, armed with information and looking either to get revenge or to expel the offender, may resort to acts of vigilantism.¹⁰⁸ Such was the case in Washington in 1993. Just prior to the release of convicted child rapist Joseph Gallardo, Washington law enforcement officials posted fliers in Gallardo's intended neighborhood describing him as "an extremely dangerous untreated sex offender with a very high probability for re-offense."¹⁰⁹ The flyer also listed several of Gallardo's "deviant sexual fantasies," including "torture, sexual assault, human sacrifice, bondage and the murder of young children."¹¹⁰ Members of the community, after receiving this information, held a protest rally on the day before Gallardo was scheduled to be released.¹¹¹ Hours later, Gallardo's house was burned to the ground by an arsonist.¹¹² A similar outburst occurred several years later in Phillipsburg, New Jersey, where two men—a father and his son—after being notified by police of a certain sex offender residing in the neighborhood, broke into the man's house and

103. See *infra* notes 107-17 and accompanying text (discussing some of the incidents of vigilantism that have occurred in response to community notification).

104. See *infra* notes 118-22 and accompanying text (addressing the problems that will likely result from the failure to identify these groups of offenders).

105. See *infra* notes 123-26 and accompanying text (warning that such ostracism of a released sex offender may actually incite further crime).

106. *Id.*

107. See Montana, *supra* note 98, at 577 n.39 (quoting one person as saying "there are few things viewed as more obscene and that provoke as much public outrage as sex crimes against children").

108. See *id.* at 575-76 (noting that community notification laws "heighten community fears concerning the threat of convicted sex offenders and create an environment that is ripe for acts of vigilantism").

109. Doug Conner, *Did Flyer on Sex Offender's Release Invite Vigilantism?*, L.A. TIMES, July 22, 1993, at A1.

110. *Vigilante Justice Is No Answer to Sex Crimes*, SEATTLE TIMES, July 13, 1993, at B4.

111. *Id.*

112. *Id.*

attacked the person inside.¹¹³ Their only mistake was they had attacked the wrong man.¹¹⁴ Another incident took place on March 5, 1996, when a New York school district superintendent, via mass mailing, identified a sex offender who had moved into the community upon his release from prison.¹¹⁵ Following the mailing, the individual was fired from his job, his family was harassed, and an attempt was made to break into his home.¹¹⁶

Perhaps the most frightening aspect of all these cases is that they are not uncommon. A 1993 study conducted by the Institute for Public Policy in Washington concluded that up to twenty-six percent of sex offenders subject to Washington's community notification law had been harassed.¹¹⁷ California can expect a similar response to the implementation of Chapter 908.

2. *Offenders Who Maintain Anonymity*

Community notification laws promote a false sense of security for those who believe that because police will notify them of any dangerous offenders in their area, they will be able to protect their families by keeping an eye on potential predators.¹¹⁸ The problem with creating this state of mind is that many offenders will remain anonymous and may take advantage of those who let down their guard. Several groups of offenders will escape the grasp of Chapter 908, and California's communities must beware.

Chapter 908 cannot afford protection from first time offenders or offenders who have not yet been caught and registered¹¹⁹ because what is unknown cannot be warned against. In addition, offenders failing to register and offenders registering under a phony address can beat the system and avoid community notification.¹²⁰ Registration depends on the cooperation of the offenders themselves, any many would rather dodge the police than face the consequences posed by public notification.¹²¹ Finally, because not all states have adopted community notification laws, many offenders can seek refuge in other states, remaining hidden from watchful

113. Malcolm Gladwell, *N.J. Law on Released Sex Offenders Proves Problematic*, WASH. POST, Jan. 16, 1995, at A6.

114. *Id.*

115. *Doe v. Pataki*, 940 F. Supp. 603, 609 (S.D.N.Y. 1996).

116. *Id.*

117. Katherine Seligman, *Molesters' "Scarlet Letter" Bill; Is Public Disclosure Invasion of Privacy?*, S.F. EXAM., Mar. 6, 1994, at A1.

118. See McLarin, *supra* note 98, at B1 (reporting that New Jersey Attorney General Deborah T. Poritz, before the passage of Megan's Law, cautioned that the community notification system included in the bill "cannot guarantee protection" and that it would be foolish to "send a message that gives a false sense of security").

119. See Bedarf, *supra* note 22, at 907.

120. See Montana, *supra* note 98, at 590-91 (noting the difficulty many law enforcement agencies have in locating a sex offender once the state has lost track of him due to the lack of resources).

121. *Id.* at 591.

eyes.¹²² Thus, the problem only migrates from one community to the next; it never really goes away.

3. *Wearing a Badge of Infamy*

When law enforcement officials notify a community of the presence of a sex offender, they are, in essence, branding that offender with a lifelong badge of shame: most likely, a badge of shame from which ostracism will follow. This ostracism prevents offenders who have already served their sentence from reintegrating into society, a result that harms not only the offender, but the community as well.

First, for those sex offenders who have been properly rehabilitated so that they no longer pose a threat to society, community ostracism can lead to a reversion back to engaging in the behavior that evoked society's rage in the first place.¹²³ This ostracism spawns a certain mentality which ultimately leads to a rise in the number of offenses committed, as offenders rationalize that because they are already being punished as an outcast, there is no reason to fight temptation in an effort to conform.¹²⁴ Second, because pedophiles generally manifest their difficulties relating to adults by seeking out children, both socially and sexually, ostracizing an offender may actually reinforce that attraction.¹²⁵ Again, the rate of offense would increase rather than decrease. Finally, in an effort to avoid being labeled altogether, many offenders are likely to secure pleas to lesser crimes rather than plead guilty to a sex crime.¹²⁶ The offenders are back on the street without treatment, anonymous and ready to victimize another innocent child.

122. *Id.* at 579; see Robert Davis & Deeann Glasmer, *Sex Offender Notification: Help or Harassment?*, USA TODAY, July 16, 1993, at 2A (reporting that after neighbors burned down his house, convicted sex offender Joseph Gallardo moved to New Mexico, a state with no community notification requirements); see also *Dealing with Sex Offenders*, N.Y. TIMES, Aug. 15, 1994, at A14 (noting that the problem may even be heightened in the areas of refuge as offenders are driven from family and friends who may be the only ones who can help control their behavior).

123. See Andy Newman, *Megan, Her Law and What It Spawned*, N.Y. TIMES, Feb. 25, 1996, at 1. A convicted sex offender was quoted as saying,

[i]f you're going to treat a sex offender so that at some point you feel safe for him to go out into society and live again . . . you have to set up a system so that he can live. If a man can't find a place to live, or if he finds a place to live and gets verbally harassed. [sic] It's like, if you back somebody far enough into a corner, they're going to react. And the sex offender's reaction is going to be to commit another sex offense.

124. See Bedarf, *supra* note 22, at 910-11 (professing that a community's rejection of an offender's attempts at rehabilitation may become a self-fulfilling prophecy for that offender).

125. Montana, *supra* note 98, at 583.

126. Kenneth Crimaldi, "Megan's Law": *Election-Year Politics and Constitutional Rights*, 27 RUTGERS L.J. 169, 173 (1995).

C. Constitutional Challenges: Ex Post Facto Punishment?

In an article appearing in the *ABA Journal*, *Washington Post* columnist Bruce Fein concedes that “Megan’s Law is no panacea [and that] its impact on the incidence of crime may prove marginal.”¹²⁷ Fein professes that such “marginal improvement is welcome when little else is working” and cautions critics to “pause before unleashing their constitutional attacks.”¹²⁸ Yet his inference that constitutional scrutiny be considered an “attack” is misleading. Addressing the constitutionality of any law in no way directly attacks the policy or emotions behind its enactment. Because crimes committed by sex offenders evoke a powerful emotional response,¹²⁹ it is important to remember the necessity for the separation of legal analysis from emotional influence. A New Jersey court articulated the point well, noting that its assessment of the constitutionality of Megan’s Law was “not a balancing of the rights of sex offenders against the rights of their victims [but rather] an analysis of the breadth of the rights which every American holds and the constitutional limitations on a government’s power to infringe them.”¹³⁰

Community notification laws, such as Megan’s Law, have been scrutinized under various constitutional provisions, including the Eighth Amendment protection against cruel and unusual punishment, the Due Process Clause, the right to privacy, and the Equal Protection Clause.¹³¹ However, the most common challenge—and thus the focus of this Legislative Note—has been that they constitute ex post facto punishment.¹³²

Article I, sections 9 and 10 of the U.S. Constitution prevent both federal and state governments from enacting ex post facto laws, or laws that have a retroactive punitive effect.¹³³ The Ex Post Facto Clause covers specifically: (1) Every law that changes the definition of a crime, so that an act, innocent when committed, now subjects a person to criminal liability; (2) every law that aggravates a crime, so as to make it a greater crime than when committed; (3) every law that changes the punishment for a crime and inflicts a greater punishment on an offender after the

127. Bruce Fein, *Megan’s Law: When a Sex Offender Moves In, Is There a Duty to Warn the Community?*, 81 A.B.A.J. 38 (1995).

128. *Id.*

129. See Quindlen, *supra* note 3, at 13 (stating that the feeling created by sex offenses on children is “part revulsion, part rage, as equal as a high fever”).

130. See *W.P. v. Poritz*, 931 F. Supp. 1199, 1203 (D.N.J. 1996).

131. See generally Ryan A. Boland, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183 (1995) (discussing these and other constitutional issues raised by Megan’s Law); Simeon Schopf, “Megan’s Law”: *Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117 (1995) (same); G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633 (1995) (same).

132. See, e.g., *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996); *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996); *State v. Ward* 869 P.2d 1062 (Wash. 1994).

133. U.S. CONST. art. I, §§ 9, 10.

crime is committed; and (4) every law that alters the rules of evidence, allowing for a conviction on lesser evidence than previously required.¹³⁴

The purpose behind the Ex Post Facto Clause is to minimize the risk that legislators—driven by political pressures to please their constituents—will be tempted to use retroactive legislation to punish unpopular groups or individuals.¹³⁵ In *Cummings v. Missouri*,¹³⁶ the Supreme Court noted that the Ex Post Facto Clause was adopted because “the people of the United States . . . have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.”¹³⁷

Chapter 908 requires specified registered sex offenders who have been deemed as presenting an adequate risk to society to be publicly exposed—even humiliated—upon their release from prison.¹³⁸ Therefore, it may be considered in violation of the third category of laws prohibited by the Ex Post Facto Clause of the Constitution, increasing the punishment for a crime after the offender has already committed the crime and been punished.

There is no dispute that Chapter 908 applies retroactively, so the crucial issue becomes whether it constitutes a punishment or a regulation. The distinction is important because while states generally may freely regulate individuals in order to further the good of society, the U.S. Constitution limits their ability to punish their citizens.¹³⁹

The California Legislature has clearly evidenced its intent that Chapter 908 be classified as regulatory rather than punitive in nature. In the purposes and findings clause of Chapter 908, the legislature notes “[t]his policy of authorizing the release of necessary and relevant information about serious and high-risk sex offenders to members of the public is a means of assuring public protection and shall not be construed as punitive.”¹⁴⁰

This statement of intent may be highly determinative of whether Chapter 908 is classified by the courts as regulatory or as punitive. Such was the case in *Rise v. Oregon*¹⁴¹ where the Ninth Circuit focused solely on the Oregon Legislature’s regulatory intent in concluding that the “obvious purpose” of the Oregon statute requiring convicted murderers and sex offenders to provide blood samples for the state’s DNA data bank was to assist law enforcement officials, and that the statute was therefore not punitive in nature, and not in violation of the Constitution.¹⁴² Similarly, the

134. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

135. *W.P.*, 931 F. Supp. at 1206.

136. 71 U.S. 277 (1866).

137. *Cummings*, 71 U.S. at 322.

138. CAL. PENAL CODE § 290 (amended by Chapter 908).

139. Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1716 (1996) [hereinafter *Prevention Versus Punishment*].

140. 1996 Cal. Legis. Serv. ch. 908, sec. 1, at 4128 (stating the legislature’s findings and declarations).

141. 59 F.3d 1556 (9th Cir. 1995).

142. *Rise*, 59 F.3d at 1562.

Illinois Supreme Court, in *People v. Adams*,¹⁴³ determined that legislative intent was dispositive when deciding the nature, either regulatory or punitive, of a legislature's act.¹⁴⁴

Under *Rise* and *Adams*, it appears as though Chapter 908, because of the legislature's clearly stated intent, would be classified for constitutional purposes as regulatory and thus, not violative of the Ex Post Facto Clause. However, this relatively simple standard of "legislative intent wins" is not the prevailing method for making the prevention/punishment determination.¹⁴⁵

The prevailing method for analyzing whether a statute constitutes a punishment or a regulation is more complex and originates from the United States Supreme Court case *Kennedy v. Mendoza-Martinez*.¹⁴⁶ The *Kennedy* court tailored several factors into a balancing test by which an act of Congress could be deemed penal or regulatory in nature. The factors are: (1) Whether the sanction involves an "affirmative disability or restraint"; (2) whether it "has historically been regarded as punishment"; (3) whether it operates only upon a finding of scienter; (4) whether it "promotes the traditional aims of punishment," such as retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether it can be assigned an alternative purpose other than punishment; and (7) whether it "appears excessive in relation to the alternative purpose assigned."¹⁴⁷ Several courts have used the *Kennedy* analysis to determine the nature of community notification laws similar to Chapter 908, emerging with opposing results.

The Supreme Court of Washington, in *State v. Ward*,¹⁴⁸ concluded, after engaging in a *Kennedy* analysis, that its registration statute which allowed for law enforcement agencies to disseminate information to the public¹⁴⁹—a community notification provision—was regulatory in nature.¹⁵⁰ The *Ward* court, under the first *Kennedy* factor, held that Washington's registration statute did not involve an affirmative disability or restraint.¹⁵¹ The appellant argued that the dissemination of registrant information created hostility among members of the public, amounting to an additional punitive effect on the registrants.¹⁵² Despite this argument, the court ruled that because the statute, on its face, requires the disclosing agency to first have some evidence that the offender poses a threat to the community before releasing the information, the effect of the statute is to prevent future harm rather than punish past

143. 581 N.E.2d 637 (Ill. 1991).

144. *Adams*, 581 N.E.2d at 641.

145. See *Prevention Versus Punishment*, *supra* note 139, at 1717.

146. 372 U.S. 144 (1963); *Prevention Versus Punishment*, *supra* note 139, at 1717.

147. *Kennedy*, 372 U.S. at 168-69.

148. 869 P.2d 1062 (Wash. 1994).

149. *Ward*, 869 P.2d at 1069.

150. *Id.* at 1066.

151. *Id.* at 1069.

152. *Id.*

offenses.¹⁵³ Further, under the second factor, the court determined that, historically, registration has not been regarded as punishment, but rather as a traditional governmental method of disclosing relevant information to law enforcement officials, with public safety being the goal.¹⁵⁴ Finally, under the seventh *Kennedy* factor, *Ward* ruled that the statute was not excessive in relation to its nonpunitive purpose.¹⁵⁵

While the *Ward* court utilized the *Kennedy* factors to ultimately conclude that Washington's sex offender registration and notification statutes were regulatory in nature, a federal district court in New Jersey used the same *Kennedy* factors to reach the opposite conclusion. In *Artway v. Attorney General*,¹⁵⁶ a New Jersey federal district court used the seven *Kennedy* factors to determine that New Jersey's Sex Offender Registration Act was punitive in nature.

Under the first *Kennedy* factor, the *Artway* court concluded that public notification involves an affirmative disability or restraint: the offender's employability and ability to reintegrate into the community were said to be hampered when the state disseminates information ensuring that his "former mischief . . . shall remain with him for life."¹⁵⁷ Continuing its analysis, under the second *Kennedy* factor, the *Artway* court concluded that the public dissemination element of Megan's Law has been regarded, historically, as punitive.¹⁵⁸ The court equated the punishing social stigma that followed offenders branded in earlier times with the stigma that attaches to an offender subject to Megan's Law.¹⁵⁹ In analyzing whether the New Jersey statute promotes the traditional aims of punishment—the fourth *Kennedy* factor—the *Artway* court reasoned that, because the statute empowers the public by increasing their awareness, the traditional deterrent element of punishment exists as offenders weary of being caught are less likely to re-offend.¹⁶⁰ The *Artway* court went on to conclude that the behavior to which Megan's Law applies is indeed already a crime, and that it goes beyond the traditional law enforcement objectives by providing the public with otherwise unobtainable information.¹⁶¹ Thus, the court categorized the fifth and sixth *Kennedy* factors as evidencing a more punitive nature.¹⁶² Finally, under the seventh *Kennedy* factor, the *Artway* court concluded that the stated legislative intent for Megan's Law as a regulatory measure concerned with public protection is outweighed by the foregoing punitive factors, and that the effect of the

153. *Id.* at 1070.

154. *Id.* at 1072.

155. *Id.* at 1073.

156. 876 F. Supp. 666 (D.N.J. 1995).

157. *Artway*, 876 F. Supp. at 689.

158. *Id.*

159. *Id.*

160. *Id.* at 690; *see id.* (noting that Megan's Law would "deputize" every member of the registrant's community and thus would be the ultimate deterrent).

161. *Id.* at 691-92.

162. *Id.*

community notification provision, if not its purpose, is ultimately punitive in nature.¹⁶³

From the cases outlined above, it is unclear whether Chapter 908—if analyzed using *Kennedy*—would be labeled as punitive or regulatory.

A different test, one more recent than *Kennedy*, indicates that community notification statutes—such as Chapter 908—may stand less chance of receiving a “regulatory,” rather than a “punitive,” categorization by a reviewing court. This new test for determining whether a statute constitutes nonpunishment was set forth by the Third Circuit, upon review of the *Artway* ruling.¹⁶⁴ The court criticizes the *Kennedy* factors as “too indeterminate and unwieldy to provide much assistance.”¹⁶⁵ However, the court falls short of dispensing with them entirely. According to the Third Circuit, a measure must pass a three-prong analysis—(1) Actual purpose, (2) objective purpose, and (3) effect—to constitute nonpunishment.¹⁶⁶ The first prong asks whether it was the legislature’s aim to punish.¹⁶⁷ If the legislature’s intent was to regulate, and the restriction on the offender is merely a “relative incident” to that regulation, the law will pass the first prong.¹⁶⁸ The second prong—the legislature’s objective purpose—is divided into three subparts. The first asks whether the law can be explained solely by a remedial purpose.¹⁶⁹ If not, then it constitutes a punishment.¹⁷⁰ The second prong questions whether a historical analysis suggests that the measure has been traditionally regarded as punishment.¹⁷¹ If so, and the text or legislative history does not show a nonpunitive nature, the measure must be considered punitive.¹⁷² Third, a court must determine whether the law serves both punitive and regulatory goals.¹⁷³ If so, then the court must ask whether the punitive purpose historically has complimented the regulatory purpose, and whether the measure operates in its “usual” manner, consistent with its historically mixed purposes.¹⁷⁴ Finally, if the two purpose tests are satisfied, the court must then look to the effects of the measure, and determine whether the negative repercussions—regardless of how they are justified—are great enough to be considered punishment.¹⁷⁵ If a measure fails any one of these prongs, it will be considered punitive in nature.

The Third Circuit, in their review of *Artway*, set out the test but failed to apply it to the public notification provisions of New Jersey’s Megan’s Law, ruling that the

163. *Id.* at 692.

164. *See Artway v. Attorney General*, 81 F.3d 1235 (3rd. Cir. 1996).

165. *Id.* at 1263.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

issue was not ripe for review.¹⁷⁶ However, the U.S. District Court for the District of New York, in *Doe v. Pataki*,¹⁷⁷ recently applied a similar test to determine whether New York's community notification statute was regulatory or punitive in nature.

The *Pataki* court concluded that New York's community notification provisions were punitive in nature and thus violated the Ex Post Facto Clause.¹⁷⁸ In reaching this conclusion, the court examined the legislature's intent behind the act, the design of the act, the history of similar punishments, and the effects of notification.¹⁷⁹

Pataki determined that even though the New York legislature's stated intent was to protect, other indications, including remarks made by members during debates, pointed to a more punitive intent.¹⁸⁰ This punitive intent was evidenced by some of the remarks offered by members of the New York State Legislature to describe sex offenders, labeling them as "'depraved,' 'the lowest of the low,' 'animals,' and 'the human equivalent of toxic waste,'" who, because of their crimes, deserved whatever punishments were imposed.¹⁸¹

Looking at the design of New York's community notification laws, the *Pataki* court concluded that it "contain[ed] classic indicia of a punitive scheme."¹⁸² For example, the act allows for a judge to determine the level of notification,¹⁸³ with many of the risk factors used in this calculation relating to the crime, to its circumstances, or to the offender's criminal history.¹⁸⁴

The *Pataki* court went on to compare community notification in New York to two sentencing measures that have been historically regarded as punitive in nature: stigmatization and banishment.¹⁸⁵ The court found several disturbing similarities. It said, "today's lawmakers—like their colonial counterparts—are counting on 'the invisible whip of public opinion' to deter the sex offender from future wrongdoing."¹⁸⁶

Finally, in looking at the effects of community notification, the *Pataki* court was further convinced of the act's punitive nature. The court held that community notification involved an affirmative disability or restraint, hindered an offender's ability to reintegrate safely and effectively into society, and served traditional goals of punishment—deterrence, retribution, and incapacitation.¹⁸⁷

176. *Id.* at 1251-52.

177. 940 F. Supp. 603 (S.D.N.Y. 1996).

178. *Pataki*, 940 F. Supp. at 604-05.

179. *Id.*

180. *Id.*

181. *Id.* at 605.

182. *Id.* at 623.

183. *Id.*

184. *Id.*

185. *Id.* at 624-26.

186. *Id.* at 625.

187. *Id.* at 626-29.

Ultimately, whether Chapter 908 is deemed regulatory or punitive in nature depends on the test adopted by California's courts and the Ninth Circuit to analyze its constitutionality. The foregoing analysis shows that even though California's Legislature may have expressly provided that its intent in enacting Chapter 908 was to serve a regulatory purpose, its punitive "effect" or "design" might take precedence. The trend in New York, as evidenced by the *Pataki* case, suggests that Megan's Law, and similar community notification provisions, may constitute ex post facto punishment. That same trend may eventually eliminate Chapter 908.

III. CHEMICAL CASTRATION

While Chapter 908 may resemble a modern day scarlet letter, shaming an offender into compliance with the law, Chapter 596 mirrors something much darker. Chapter 596, and its provisions mandating the chemical castration of certain two-time sex offenders, resembles ancient codes, such as the Germanic "barbarian codes," and the Twelve Tables of Roman Law, that profess punishment through mutilation.¹⁸⁸ One Middle Assyrian regulation, for example, punished any man guilty of kissing a woman by slicing off his lip.¹⁸⁹ Another Mesopotamian code contained a provision that threatened, "if a child should strike his father, they shall cut off his hand."¹⁹⁰ While these specific methods of punishment by mutilation have been abandoned in today's modern, "civilized" world, Chapter 596 shamefully has revitalized a punishment not too far removed.

A. Blinded by Emotion: Did California's Legislators Enact Chapter 596 at the Expense of Logic and Reason?

The idea of chemical castration through the use of DMPA treatment has found rigorous support among the public and the California Legislature, in large part due to the justifiable loathing of sex offenders.¹⁹¹ Susan Carpenter McMillan, president of the Women's Coalition in Pasadena was recently quoted as saying that "[t]here is no cure for this disease, and we have got [sic] to begin someplace . . . I don't care about the rights of serial child molesters. To me, they've lost their rights once they rape, molest and violate small children."¹⁹² Similar comments were made by Dee Jepsen, president of Enough is Enough—a group dedicated to educating the public about the detrimental effects of child pornography—who stated that "our first respon-

188. See James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?* 71 *CHI.-KENT L. REV.* 41, 45-47 (1995) (describing how the law and the state derived, in part, from ancient codes that often called for punishment through mutilation).

189. *Id.* at 47.

190. *Id.* at 46-47.

191. See *infra* notes 192-95 and accompanying text (recounting several comments made that evidence the hate and disregard society has for sex offenders).

192. Ed Bond, *Should Repeat Sex Offenders Be Castrated?*, *L.A. TIMES*, Sept. 24, 1996, at B3.

sibility as a decent society is to protect our children.”¹⁹³ She went on to explain that even though it may be difficult to exact harsh penalties on sex offenders, for the sake of society it must be done or else we risk being run by those who disobey the law.¹⁹⁴ Even Governor Wilson gave a stern warning to offenders in his support of the law. He cautioned, “I have a message for those skulking in the shadows . . . You better stay in the shadows or leave this state. We will not tolerate your conduct.”¹⁹⁵

Much of the enthusiasm for chemical castration stems from the fact that in several European countries which have utilized the treatment, recidivism rates for sex offenders are as low as 2%, whereas in the U.S., nearly half of all sex offenders are re-arrested.¹⁹⁶ One Danish study following over 900 castrated sex offenders for periods as long as thirty years reported a recidivism rate of only 2.2%.¹⁹⁷ In contrast, a group of noncastrated offenders had a recidivism rate of over 40%.¹⁹⁸ Similarly, in Switzerland, a five-year study of 121 castrated sex offenders found a recidivism rate of only 7.4%, while men not undergoing the treatment re-offended 52% of the time.¹⁹⁹

Even in the absence of these European studies, it is no surprise that Chapter 596 has received unmitigating support, because anything less might be construed as advocating the protection of sex offenders. In the legislative game, when society’s emotions run high, constituent pressures often force legislators into hasty decisions.²⁰⁰ In the case of chemical castration, California’s legislative response to these pressures, without adequate consideration of the consequences, may create unanticipated problems in the future. Medically, without the proper studies monitoring DMPA’s long-term effects on men, unanticipated side effects may spark lawsuits where the criminal ends up suing his punisher.²⁰¹ Socially, DMPA treatment—in the absence of conjunctive psychotherapy—may create a false sense of security,

193. Cheryl Wetzstein, *Texas Child Molester’s Case Reignites Decades-Old Debate; ‘First Responsibility . . . Is to Protect Our Children,’* WASH. TIMES, Apr. 17, 1996, at A2.

194. *Id.*

195. *It’s Now the Law: ‘Chemical Castration’ of Molesters; Weekly Injections of Depo-Provera Would Be Mandatory for Offenders After a Second Conviction,* ORANGE COUNTY REG., Sept. 18, 1996, at B5.

196. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 3 (Aug. 30, 1996) (noting that the actual rate of re-offense in the U.S. is probably higher than 50% since sex crimes often go unreported).

197. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 4 (Aug. 15, 1996).

198. *Id.*

199. *Id.*

200. See generally Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on “Three Strikes” in California*, 28 PAC. L.J. 243 (1996) (observing that California’s “Three Strikes” law originated from marginal pressure groups and passed through the legislature with little expert scrutiny from governmental specialists or scholars).

201. See *infra* notes 204-19 and accompanying text (identifying the process through which Depo-Provera proceeded before FDA approval, and noting that while many studies have measured the effects of Depo-Provera as a contraceptive in women, little is known about the long-term side effects of the drug when administered to men as a treatment for sex crimes).

as the procedure may prove ineffective for most, if not all, offenders.²⁰² Legally, constitutional challenges may block the implementation of these treatments altogether, with valuable time and resources going to waste.²⁰³

B. Medical Questions: Effects of DMPA Treatment—the Known and the Unknown

Medroxyprogesterone acetate (brand name Provera) in the injectable form (depo medroxyprogesterone acetate, or DMPA) is commonly known as Depo-Provera.²⁰⁴ While today the drug is approved for use as a female contraceptive in more than ninety countries and is taken by more than 15 million women worldwide,²⁰⁵ its potential effects on humans once created fear.²⁰⁶ In 1974, the FDA granted the Upjohn Company—the manufacturer of Depo-Provera—approval to market the drug as a female contraceptive.²⁰⁷ However, less than two months later, the FDA stayed that approval in light of concerns raised by Congress that Depo-Provera may increase the risk of cervical cancer.²⁰⁸ Several years later, in 1978, the FDA withdrew its approval entirely based on evidence indicating that the drug had caused mammary tumors in beagles.²⁰⁹ The fear was that this effect may manifest itself in humans.²¹⁰ That fear, however, has since subsided, as this cancerous connection has proven unique to the beagle.²¹¹ In 1992, long after its introduction, DMPA was re-approved for use in this country as a female contraceptive.²¹²

While many studies on Depo-Provera as a contraceptive have been completed—assessing and measuring its side effects when used as such²¹³—the drug has

202. See *infra* notes 220-40 and accompanying text (developing the idea that Depo-Provera is not an effective treatment for all types of offenders).

203. See *infra* notes 241-74 and accompanying text (analyzing DMPA treatment as a possible violation of the right to privacy).

204. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 3 (Aug. 30, 1996).

205. ROBERT A. HATCHER ET AL., *CONTRACEPTIVE TECHNOLOGY* 285 (16th ed. 1994).

206. See Sidney A. Shapiro, *Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry*, 1986 DUKE L.J. 288, 314 (detailing the drawn-out processes that the FDA went through before approving Depo-Provera as a female contraceptive).

207. *Id.*

208. *Id.*

209. *Id.*

210. See HATCHER ET AL., *supra* note 205, at 310.

211. *Research and Regulatory Approval of Injectable Contraceptives*, POPULATION REP., Aug. 1995, at 3 (explaining that the WHO Collaborative Study of Neoplasia and Steroid Contraceptives provided epidemiologic evidence that humans and animals differ in their responses to hormones).

212. *Id.*

213. See Shari Roan, *Weekly Injections of Depo-Provera for Repeat Child Molesters Becomes Law Jan. 1, But Critics Question Whether It's Effective and Free of Side Effects for Men*, L.A. TIMES, Sept. 26, 1996, at E1 (recognizing common side effects experienced by women taking depo-provera as including irregular bleeding, weight gain, leg cramps, depression, hot flashes, insomnia, and blood clots).

not yet been cleared by the FDA as an effective treatment for violent sex offenders, and has not been studied adequately for such a purpose.²¹⁴

What is known is that, in the short-term, when administered to men, Depo-Provera suppresses testosterone production, with varying degrees of negative effect on genital functioning, including a decrease in spermatogenesis, erection, and ejaculation.²¹⁵ However, in the long-term, little is known about the effects of Depo-Provera when administered to men.²¹⁶ Some believe its long-term noncontraceptive use may produce atypical sperm and ultimately lead to deformed children.²¹⁷

By imposing this unknown, possibly with grave long-term effects, on a group of people in society, whether they are criminals or not, California's legislators have abandoned their sense of morality in favor of satisfying society's demand for action.²¹⁸ One critic equated forcing Depo-Provera on offenders without first knowing its full effects as "akin to the experimentation of Third Reich doctors in Nazi Germany."²¹⁹ While this may be somewhat of an exaggeration, the premise is not far off.

C. Social Questions: Will DMPA Treatment Be Effective on All Offenders?

In an article appearing in the *American Journal of Criminal Law*, Edward A. Fitzgerald examined the effects of DMPA treatment when administered to sex offenders.²²⁰ He began by categorizing sex offenders into four types.²²¹ Type I offenders are those that deny either the commission or criminal nature of their crimes.²²² Type II offenders confess to their crimes, but place the blame on some nonsexual or nonpersonal force, such as drugs or alcohol.²²³ Type III offenders are violent criminals whose motivation to offend stems from nonsexual gain, such as anger or

214. Daniel C. Tsang, *A Sex-Crime Law for the Dark Ages; Justice: Chemical Castration Won't Stop Rape and Child Abuse*, L.A. TIMES, Sept. 18, 1996, at B9; see Max Vanzi, *Assembly OKs Castration Drug for Molesters*, L.A. TIMES, Aug. 31, 1996, at A1 (noting that a spokesman for the FDA in Washington said that Depo-Provera is not on the approval list as a castration agent and that although physicians may prescribe certain drugs for purposes other than the approved purposes listed for approval, it is unclear whether criminal justice officials have similar authority).

215. William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 6 (1986).

216. Roan, *supra* note 213, at E1; see Edward Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 9 (1990) (noting that even though DMPA is effective in reducing deviant sexual behavior, the long-term effects of the treatment are unknown).

217. Green, *supra* note 215, at 6 n.31.

218. See Roan, *supra* note 213, at E1 (noting that there is an ethical imperative that the full effects of MPA treatment be understood before it is imposed on anyone).

219. Tsang, *supra* note 214, at B9.

220. See generally Fitzgerald, *supra* note 216.

221. See *id.* at 4.

222. *Id.*

223. *Id.*

power.²²⁴ Finally, Type IV offenders are the paraphiliacs who exhibit a pattern of sexual arousal, erection, and ejaculation.²²⁵

The paraphiliac's pattern of sexual arousal originates in puberty, with the sexual fantasy having been reinforced by orgasm many times.²²⁶ Sex offenses recognized as paraphilias include pedophilia, exhibitionism, transvestitism, voyeurism, sexual sadism, sexual masochism, and other psychosexual disorders including some forms of rape.²²⁷

Fitzgerald concludes that DMPA treatment is only effective when administered to Type IV offenders—the paraphiliacs.²²⁸ In men, DMPA causes a decrease in the level of testosterone produced in the testicles, which consequently reduces his sexual imagery, providing relief from an incessant sexual fantasy.²²⁹ Because DMPA treatment acts as a suppressant on an offender's sexual drive, paraphiliacs—whose crimes are sexually driven—will be the only group of offenders whose deviant behavior will decrease due to the treatment.²³⁰ Fitzgerald notes that the paraphiliac undergoing DMPA treatment is freed from his compulsive sex drive, his spontaneous erections, and his fear of relapse.²³¹ With those vices lifted, he becomes more amenable to psychotherapy, and poses a minimal threat to society.²³²

As for the other three types of offenders categorized by Fitzgerald, the connection between DMPA treatment and a lower rate of recidivism is tenuous. Because DMPA only suppresses the drive for sex, crimes not driven by sex but by some other motivating factor, such as aggression, exhibition, or psychosis, would be unaffected by DMPA treatment.²³³ Collier Cole, a psychologist who has treated nonviolent sex offenders with Depo-Provera for more than fifteen years agrees, noting that “each and every person won't respond to Depo-Provera. If the motivation isn't sex, if it's a bad-ass criminal like Mr. (Richard Allen) Davis (the convicted killer of Polly

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 4-5.

228. *Id.* at 5.

229. *Id.* at 6-7.

230. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 4 (Aug. 15, 1996); Fitzgerald, *supra* note 216, at 16.

231. See Fitzgerald, *supra* note 216, at 16.

232. *Id.*

233. Jeff Stryker, *Sentenced to Drugs: 'Chemical Castration' Will Not Solve the Problem of Repeat Sex Offenders*, RECORDER, Sept. 4, 1996, at 4. Fred Berlin, director of the National Institute of the Study, Prevention and Treatment of Sexual Trauma in Baltimore said:

[Chapter 596] does not include an evaluation to see if an individual is among the subset group of offenders for whom this might work. I think there is a role for [DMPA treatment] for people whose sexual appetites are of the sorts that can cause suffering. But if one lacks social conscience or is antisocial, no medicine in the world will help that.

Roan, *supra* note 213, at E1.

Klaas), giving him Depo-Provera won't solve the problem. This drug won't give people a conscience."²³⁴

Even those offenders potentially amenable to DMPA treatment—the paraphiliacs—may be unaffected in the absence of conjunctive psychotherapy—something Chapter 596 fails to provide.²³⁵ In fact, while the drug may be lauded by some therapists as a vital treatment tool, its use alone is condemned.²³⁶ One critic believes the best place to begin treatment of sex offenders is while they are still in prison. Sue North, a lobbyist for the California Psychiatric Association said, “[l]earned behavior is very difficult to change” and that “[t]he best shot we have for changing someone’s behavior is working intensively with that person while they are away from circumstances that . . . got them into trouble.”²³⁷ That way, the offender is cured before he ever has a chance at freedom.

Therapy that works, whether done in or out of prison, involves group or individual sessions where the offender learns to recognize what triggers the behavior—whether it be loneliness, boredom, depression, drugs, alcohol, or proximity to children.²³⁸ Some offenders learn to recognize their triggers and can be taught strategies to avoid them.²³⁹ DMPA alone cannot teach an offender what drives his behavior and how to avoid those urges for a lifetime. The stories of successful chemical castration as an effective recidivism reducer for sex offenders in Europe, which have lent such overwhelming support to proponents of Chapter 596, involve only willing participants and are combined with various forms of psychotherapy²⁴⁰—a fact California’s legislators chose to ignore.

Chapter 596 and its failure to include provisions that would (1) screen offenders in order to differentiate between those whose crimes were driven by sex and those whose crimes were driven by hate, and (2) mandate conjunctive psychotherapy for those offenders who are deemed amenable to such treatment increases the likelihood the DMPA treatment will be wholly ineffective. These deficiencies ultimately will create a false sense of security among the public who may assume unknowingly that DMPA will work on all offenders, regardless of their criminal motive. When the public lets their guard down and feels secure, the offenders that the state has cleared for release remain potent predators and may capitalize on this comfort.

234. Katherine Seligman, *Chemical Castration Costly, Won't Work, Experts Insist; Drug Not Effective on All Who Take It, Therapists Say*, S.F. EXAM., Sept. 15, 1996, at C1.

235. See Jen M. Olsen, *Chemical Castration Used in Europe with Some Success: Some States in U.S. Are Considering Similar Programs*, PRESS-ENTERPRISE (Riverside, CA), Aug. 31, 1996, at A15 (noting that Heidi Hansen, Chief Physician at Denmark's jail for sex offenders, urged a patient's need for extensive psychotherapy).

236. Seligman, *supra* note 234, at C1.

237. Dan Bernstein, *Chemical Castration Law OK'd*, SACRAMENTO BEE, Sept. 18, 1996, at A1.

238. Seligman, *supra* note 234, at C1.

239. *Id.*

240. *Id.*

D. Legal Questions—Invasion of an Individual's Right to Privacy?

The U.S. Constitution contains no express provision granting an individual's right to privacy. However, the Supreme Court has recognized such a right as implicit within the Due Process Clause of the Fourteenth Amendment and, therefore, applicable to state action.²⁴¹ This privacy right has been interpreted by the Court as protecting an individual's right to refuse medical treatment²⁴² as well as his right to procreate.²⁴³ Chapter 596, which imposes chemical castration as a condition of parole for certain two-time sex offenders, may ultimately be found as violating one or both of these privacy rights.²⁴⁴

1. The Right to Refuse Medical Treatment

Critics may contend that Chapter 596 interferes with an individual's right to refuse medical treatment—a right recently articulated in the California Supreme Court decision *Thor v. Superior Court (Andrews)*.²⁴⁵ In *Thor*, the court was faced with the issue of whether an individual's right to exercise bodily control was sufficiently broad so that the individual may decline life-sustaining treatment.²⁴⁶ Howard Andrews, a prisoner and real party in interest in the case, had rendered himself a quadriplegic in a fall while incarcerated, leading to his dependence on medical personnel for the maintenance of all of his routine bodily functions.²⁴⁷ Several months following the injury, Andrews began refusing to eat.²⁴⁸ Thor, a licensed physician and staff member of the Vacaville Medical Center where Andrews was confined, sought a court order that would allow him to tube-feed Andrews against his will, to keep him alive.²⁴⁹ The court denied Thor's request.²⁵⁰ On appeal, California's highest court agreed with the lower court's denial, stating that "under California law a competent, informed adult has a fundamental right of self-determination to refuse . . . medical treatment of any form irrespective of the personal consequences."²⁵¹ Chapter 596 and its mandatory parole condition imposing DMPA treatment on two-time sex offenders convicted of certain crimes against children likely violates this fundamental right of refusal.

241. Fitzgerald, *supra* note 216, at 40. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

242. See *infra* notes 245-57 and accompanying text.

243. See *infra* notes 258-74 and accompanying text.

244. See Mike Lewis, 'Castration' Law Set for Challenges, DAILY RECORDER (Sacramento, Cal.), Sept. 20, 1996, at 1 (noting that opponents of Chapter 596 say the law is an "open target" for legal challenge, foremost under an individual's right to privacy).

245. 5 Cal. 4th 725, 855 P.2d 375, 21 Cal. Rptr. 2d 357 (1993).

246. *Thor*, 5 Cal. 4th at 732, 855 P.2d at 378, 21 Cal. Rptr. 2d at 360.

247. *Id.* at 732, 855 P.2d at 379, 21 Cal. Rptr. 2d at 361.

248. *Id.*

249. *Id.* at 733, 855 P.2d at 379, 21 Cal. Rptr. 2d at 361.

250. *Id.*

251. *Id.* at 732, 855 P.2d at 378, 21 Cal. Rptr. 2d at 360.

Proponents of Chapter 596 probably will argue that the decision to undergo DMPA treatment upon parole is voluntary and based on informed consent, however critics suggest that such a decision is more coercive than consensual.²⁵² Offenders faced with the decision between further imprisonment or treatment with DMPA really have no decision at all.²⁵³ Further, because the long-term effects of DMPA are still unknown, the state cannot adequately inform the offender of all the potential risks involved with accepting the treatment.²⁵⁴ Considering the coercive aspect behind any decision made to achieve freedom through parole, and the fact that the long-term effects of DMPA are still unknown, the decision by a sex offender to accept such treatment is truly uninformed and nonconsensual. Such a decision can be considered in violation of the right to refuse medical treatment as set forth in *Thor*.

In addition, proponents of Chapter 596 may contend that the law falls within one of the four exceptions to the right to refuse medical treatment provided in the *Thor* decision. In *Thor*, the court noted four state interests that might act as countervailing considerations to the right to bodily autonomy: (1) Preserving life, (2) preventing suicide, (3) maintaining the integrity of the medical profession, and (4) protecting innocent third parties.²⁵⁵ The fourth category—the protection of innocent third parties—arms proponents of Chapter 596 with the most powerful weaponry to combat the holding of *Thor*.²⁵⁶

While DMPA treatment may be an effective cure for offenders whose crimes stemmed from an aberrant sexual fantasy—so called paraphiliacs—and while there may be a compelling state interest to administer the drug to such offenders falling within this category, there can be no such interest for those offenders whose crimes were committed out of violence, rage, or the need for power and control, as DMPA treatment cannot curb such tendencies.²⁵⁷ Chapter 596 fails to screen offenders to determine which of them would be receptive to DMPA treatment, and so, fails to protect society from the offenders on parole, undergoing DMPA, who still pose a threat to society. Thus, Chapter 596 does not fall within this exception to the rule stated in *Thor*. Although the intent may be to protect, the actual effect will fall short.

252. Green, *supra* note 215, at 16.

253. *Id.*

254. *Id.* at 15.

255. *Thor*, 5 Cal. 4th at 738, 855 P.2d at 383, 21 Cal. Rptr. 2d at 365.

256. See Fitzgerald, *supra* note 216, at 49 (noting that if the convicted paraphiliac is granted probation, the state's interest in protecting the public from future offenses warrants chemical castration by DMPA).

257. See *supra* notes 222-25 and accompanying text (discussing the four categories of sexual offenders).

2. *The Right to Procreate*

The United States Supreme Court first espoused a right to procreation under the Fourteenth Amendment in their 1942 decision *Skinner v. Oklahoma*.²⁵⁸ Specifically, in *Skinner*, Justice Douglas held that an Oklahoma statute mandating sterilization for “habitual criminals” was a deprivation “of a right which is basic to the perpetuation of a race—the right to have offspring.”²⁵⁹ Some years later, in *Griswold v. Connecticut*,²⁶⁰ the Court formally articulated the right to procreation as inherent within an individual’s fundamental right to privacy.²⁶¹ With Justice Douglas again delivering the opinion, the Court struck down a Connecticut statute which prohibited any person from using any “drug, medicinal article or instrument for the purpose of preventing conception,” holding that married individuals have a constitutionally protected right to marital privacy regarding decisions involving the use or nonuse of contraception.²⁶² In *Eisenstadt v. Baird*,²⁶³ the Court extended the application of the right to procreation and privacy to unmarried persons as well, thereby protecting any individual.²⁶⁴

Because Chapter 596 mandates a drug treatment known to cause impotence in some men, with no provision allowing for a decrease in dosage if such impotence arises, it is most likely violative of an offender’s right to procreate. State-imposed DMPA treatment—which is known to have a negative effect on sex drive²⁶⁵—unconstitutionally involves the state in the regulation of the enjoyment of marriage and family.²⁶⁶ Such a fundamental right²⁶⁷ may only be restricted when the government can articulate a compelling interest and show that their means of achieving that interest is narrowly tailored, with no alternate means.²⁶⁸ While the interest in protecting society in general, especially our children, from sexual offenders is undoubtedly compelling, the imposition of DMPA treatment on offenders is not the least restrictive means of achieving this goal.²⁶⁹ In fact, DMPA has been criticized as not even being rationally related to this end,²⁷⁰ as the drug—when administered

258. 316 U.S. 535 (1942).

259. *Skinner*, 316 U.S. at 536.

260. 381 U.S. 479 (1965).

261. *Griswold*, 381 U.S. at 479; Scott J. Jebson, *Conditioning a Woman’s Probation on Her Using Norplant: New Weapon Against Child Abuse Backfires*, 17 CAMPBELL L. REV. 301, 311 (1995).

262. *Griswold*, 381 U.S. at 485-86.

263. 405 U.S. 438 (1972).

264. *Eisenstadt*, 405 U.S. at 443.

265. Green, *supra* note 215, at 24.

266. *Id.*

267. *See Skinner*, 316 U.S. at 541 (stating that “marriage and procreation are fundamental to the very existence and survival of the race”).

268. *See generally Skinner*, 316 U.S. 535 (1942) (using strict scrutiny to analyze the constitutionality of an Oklahoma statute that discriminated between offenders and impaired the fundamental right to procreate).

269. Green, *supra* note 215, at 25.

270. *Id.*

to sex offenders without conjunctive psychotherapy or a prescreening process for receptibility—may be wholly ineffective.²⁷¹

Proponents of Chapter 596 may make several arguments to counter this claim. First, they may contend that DMPA does not in fact interfere with a person's right to procreate because a person subjected to the injections does not become impotent, but rather only "erotically apathetic."²⁷² Such erotic apathy, they argue, does not interfere with one's ability to procreate.²⁷³ Second, proponents may argue that the use of DMPA is only a temporary barrier to the right to procreation, as any impotence disappears when treatment is stopped, and thus no more hinders the right to procreate than does imprisonment.²⁷⁴

However, because the long-term effects of DMPA are still unknown and because there is no provision in Chapter 596 calling for the cessation of DMPA after a certain time, imposing Depo-Provera on an offender may lead to a future inability to procreate. With such an effect still unknown and at least within the realm of possibility, the right to procreate is violated by Chapter 596.

IV. CONCLUSION

The passage of Chapters 908 and 596 represents the culmination of a wave of reformation to California's sexual offender laws that began several years ago in response to an ailing system of registration. The question whether the wave will eradicate sex crimes in California or create further difficulties can only be answered with time. However, all indications suggest that these new community notification and chemical castration laws are an ineffective and unconstitutional means of protecting the public from sex offenders. Chapter 908—California's community notification law—not only unjustly increases an offender's punishment after the fact, by branding him with a humiliating badge of shame, but fails to adequately protect society as well. Members of the public who rely on Chapter 596 to warn them of any and all danger will be left with a false sense of security. Chapter 908—California's chemical castration law—imposes an unknown medical treatment on offenders, without first screening them to determine who will be receptive and who will not. Even those amenable to DMPA may still not be affected, as the law fails to provide for any form of conjunctive psychotherapy. The result, again, will leave the public feeling protected when, in reality, they are not.

Chapters 908 and 596, in addition to their separate inadequacies, fail to work in harmony with one another. Specifically troubling is the legislature's failure to include provisions within Chapter 908 that would create an exception for offenders falling

271. *Id.*; see *supra* notes 220-40 and accompanying text (explaining the deficiencies of Chapter 596 when imposed on offenders without a prescreening search for receptibility and without conjunctive psychotherapy).

272. Fitzgerald, *supra* note 216, at 44.

273. *Id.*

274. *Id.*

within Chapter 596. If the legislature were so confident in the effectiveness of DMPA treatment, society would need no warning of those offenders receiving injections. Similarly, offenders opting for surgical castration are subject to the community notification provisions in Chapter 908. Is such a warning truly necessary? Currently, the law as written seems to believe so.

In a recent article appearing in the *Sacramento Bee*, Assemblywoman Barbara Alby said of Chapter 596 and its potential applicants, "I could give a rip about castrating a child molester. I could do it with a [sic] dull hedge clippers. My concern is that there's only a small group of people that this is effective against. There are other reasons for assaults against women and children besides sexual desire."²⁷⁵ This statement by Assemblywoman Alby reflects all that is wrong with the new sexual offender laws. Alby's rage and disgust with sex offenders in general and the brutal acts they commit, evidenced by her vengeful desire to castrate them with dull hedge clippers, clouds her logic that such a solution will only work on a select few offenders, if any. Such haste in the face of reason seems to have choked the entire California legislature that voted to implement Chapters 908 and 596. Our only hope is that the negative implications rippling throughout society as a whole are not too severe for future legislation to cure.

APPENDIX

Code Sections Affected

Penal Code §§ 290, 290.4 (amended).

AB 1562 (Alby); 1996 STAT. Ch. 908

Penal Code § 645 (amended).

AB 3339 (Hoge); 1996 STAT. Ch. 596

275. Mary Lynne Vellinga, 'Castration' Law Under Fire: Drug Injections for Molesters Called 'Cartoon Solution,' SACRAMENTO BEE, Feb. 4, 1997, at A1.

Ending a Prisoner's Right to Have Personal Visits

Jason O. Runckel

I. INTRODUCTION

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."¹ However, as a result of lawful incarceration, many rights and privileges afforded to citizens under the Constitution are withheld from prison inmates.² Over the past three decades, rights retained by California's state prisoners have changed dramatically.³ In 1968, the California Legislature codified the "Civil Death" doctrine which stripped inmates of all their civil rights during their imprisonment.⁴ In 1975, the California Legislature repealed the Civil Death doctrine and enacted a Penal Code section on "Civil Rights of Prisoners" into its Penal Code.⁵ Under prior law, a California state prison inmate had some enumerated rights, including the right to personal visits, written into the statute.⁶

II. VISITATION AS A RIGHT

Under existing law, a person sentenced to imprisonment in a California state prison may only be denied such rights reasonably related to legitimate penological⁷ interests.⁸ As enumerated by California statute, a prisoner's civil rights include the right to own property,⁹ correspond confidentially with any member of the state bar

1. *Turner v. Safely*, 482 U.S. 78, 84 (1987).

2. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977); *see id.* (stating that confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration); *see also infra* note 33 and accompanying text (noting various rights and privileges withheld from prisoners).

3. *See* Mona Halprin, Comment, *Constitutional Rights in Prison: The Standard of Review in California*, 16 PAC. L.J. 1077 (1985) (discussing the evolution of prisoners' constitutional rights in the California state prison system).

4. 1968 Cal. Stat. ch. 1402, sec. 2, at 2763 (amending CAL. PENAL CODE § 2600).

5. 1975 Cal. Stat. ch. 1175, sec. 3, at 2897 (enacting CAL. PENAL CODE §§ 2600-2601).

6. *Id.* at 2897-98.

7. *See* BLACK'S LAW DICTIONARY 1135 (6th ed. 1990) (defining "penology" as the science of prison management and rehabilitation of criminals).

8. CAL. PENAL CODE § 2600 (West Supp. 1997).

9. *See id.* § 2601(a) (amended by Chapter 132) (stating that property ownership includes all written and artistic material produced or created by that person during confinement). *But see id.* (authorizing the Department of Corrections to restrict or prohibit personal or real property sales or conveyances which are made for business purposes).

or holder of public office,¹⁰ receive and read all legal materials,¹¹ and initiate civil actions.¹² Further, state prisoners' civil rights also include the right to marry, create a power of appointment, and make a will.¹³

III. PERSONAL VISITS AS A PRIVILEGE

Prior to the enactment of Chapter 132, state prisoners had an enumerated civil right authorizing them the right to have personal visits.¹⁴ Chapter 132 changes prior law by deleting from the enumerated civil rights of a state prisoner the right to have personal visits.¹⁵ Case law on the rights of inmates under the California Constitution clearly permit the right to confidential access to an attorney, the right to own or transfer property, and the right to marry.¹⁶ However, under Chapter 132, the Director of the Department of Corrections¹⁷ would have "greater control of inmate activities such as visitation."¹⁸

10. *See id.* § 2601(b) (amended by Chapter 132) (enabling prison authorities to inspect incoming mail during these sessions to search for contraband).

11. *See id.* § 2601(c)(1) (amended by Chapter 132) (allowing prisoners to read newspapers, periodicals, and books accepted for distribution by the United States Postal Office); *see also id.* (allowing authorities to exclude obscene publications, writings, or any matter of a character tending to incite forms of violence or concerning gambling or a lottery). *But see id.* § 2601(c)(2) (amended by Chapter 132) (stating that nothing in this section restricts the right of prison authorities to open and inspect all packages received by an inmate, as well as limiting the number of publications an inmate may have in the prison).

12. *See id.* § 2601(d) (amended by Chapter 132) (allowing civil action, but subjecting prisoners to a three dollar fee for the filing of civil actions to be collected by the Department of Collections).

13. *Id.* § 2601(f)-(h) (amended by Chapter 132).

14. *See* 1975 Cal. Stat. ch. 1175, sec. 3, at 2897-98 (enacting CAL. PENAL CODE § 2601) (authorizing the Department of Corrections to make any restrictions that are necessary for the reasonable security of the institution); *see also* CAL. CODE REGS. tit. XV, § 3173 (1996) (setting forth the general visiting regulations including proof of identification, fingerprints, and vehicle inspection).

15. *Compare* 1994 Cal. Legis. ch. 555, sec. 2, at 2379-80 (amending CAL. PENAL CODE § 2601) (authorizing the Department of Corrections to provide any restrictions on personal visitation rights for the reasonable security of the institution) *with* CAL. PENAL CODE § 2601 (amended by Chapter 132) (deleting a right to have personal visits from the list of prisoners' rights).

16. *See, e.g.,* *Payne v. City of L.A.*, 17 Cal. 3d 908, 924, 552 P.2d 565, 576, 132 Cal. Rptr. 405, 416 (1976) (holding that the "denial of appointed counsel to an indigent prisoner, when no other relief will preserve his right to access to the courts, is constitutionally impermissible"); *In re Carrafa*, 77 Cal. App. 3d 788, 789, 143 Cal. Rptr. 848, 849 (1978) (concluding that denying general visitation rights to an inmate's wife does not justify the denial of the inmate's marriage request); *In re Dickinson Estate*, 51 Cal. App. 2d 638, 639, 125 P.2d 542, 543 (1942) (stating that a person who has been sentenced to serve a term less than life imprisonment is capable of inheriting real estate).

17. *See* CAL. PENAL CODE § 5054 (West 1982) (providing the Director of the Department of Corrections with the supervision, management, and control of the state prisons including the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein).

18. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1221, at 2 (June 24, 1996); *see* Rich Harris, *Prisoners Lose Right to Conjugal Visits as Wilson Wins Victory*, SAN DIEGO UNION-TRIB., July 9, 1996, at A3 (stating that Chapter 132 gives the Corrections Department the power to drastically limit prisoners' personal visits).

IV. CONSTITUTIONAL ISSUES

Persons incarcerated in correctional institutions do not lose all of their constitutional protections.¹⁹ However, the constitutional rights retained by prisoners are limited by their inmate status.²⁰ The extent of protection offered by the California Constitution differs from that offered by the United States Constitution.²¹ Unlike the United States Constitution, the California Constitution specifically provides a right to privacy.²² However, although the right to reasonable visitation opportunities is an essential part of the rehabilitative process,²³ “locating a constitutional anchor for it is a formidable task.”²⁴ In *Kentucky Department of Corrections v. Thompson*,²⁵ the United States Supreme Court held that an inmate’s interest in “unfettered visitation” is not directly guaranteed by the Due Process Clause.²⁶ Although the Supreme Court clearly stated that inmates do not have a constitutional right to unfettered visits, it did not answer the question of whether there is a constitutional right for prison inmates to have a program of reasonable visitation.²⁷

Without specific guidance from the United States Supreme Court, lower federal courts are not in agreement about whether there is a right of visitation and, if one does exist, what are its limitations.²⁸ Many federal courts have concluded, with little analysis, that there is no absolute constitutional right to prison visitation.²⁹ Although many courts conclude that visitation is not an absolute constitutional right, most fail to address whether prisoners have a right to reasonable visitation programs.³⁰

19. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). *See generally* Halprin, *supra* note 3 (discussing constitutional rights retained by prisoners).

20. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

21. Halprin, *supra* note 3, at 1081.

22. *Compare* U.S. CONST. amend. XIV, § 1 with CAL. CONST. art. I, § 1.

23. *See* CAL. CODE REGS. tit. XV, § 3170(a) (1996) (describing inmate visiting as a means to establish and maintain meaningful family and community relationships); *see also* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE STANDARD 23.6.2 cmt. 23.82 (1986) (asserting that “because almost all inmates ultimately will be returned to the community at the expiration of their terms, it is important to preserve, wherever possible, family and community ties”); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS CORRECTION, PROCEEDINGS OF THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE 66 (1973) (recording testimony from Ellis C. MacDougall, Commissioner, Georgia Department of Offender Rehabilitation, Atlanta, Ga. “Corrections Task Force” stating that 98 out of every 100 people put into incarceration eventually come back into the community).

24. 2 MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 12.01, at 88 (2d ed. 1993).

25. 490 U.S. 454 (1989).

26. *Thompson*, 490 U.S. at 460; *see* *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (rejecting the notion that any change in confinement conditions resulting in substantial impact on a prisoner is sufficient to invoke the protections of the Due Process Clause).

27. MUSHLIN, *supra* note 24, at 88-89.

28. *Id.* at 89; *see supra* notes 29-33 (listing cases).

29. *See, e.g., White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977) (concluding that prisoners do not have a right to visitation, without analysis).

30. *Id.*; *see, e.g., Evans v. Johnson*, 808 F.2d 1427, 1428 (11th Cir. 1987) (holding that a “convicted prisoner has no absolute constitutional right to visitation” because visitation is a privilege “subject to the discretion of prison authorities, provided that the visitation policies of the prison meet legitimate penological objectives”);

On the other side of the coin, many courts have found a constitutionally protected visitation entitlement under several theories.³¹ Although substantive due process does not guarantee inmates an absolute right to have visits, there does appear to be an independent constitutional entitlement found in the fundamental constitutional right to privacy in family relationships when prisoners seek to visit with their families.³² Even though a right to privacy in family relationships exists, it, like all rights of prisoners, is not absolute and can be taken away as long as the deprivation is not for unreasonable or arbitrary reasons.³³ Even if there is no independent constitutional right to have visits, a constitutionally protected liberty interest may be created under state law.³⁴ Moreover, even if there is no right for prisoner visitation contained in the federal Constitution, prisoners may find a right to visitation as an independent entitlement under a state constitution.³⁵ In addition, one federal court held that the Eighth Amendment protection against cruel and unusual punishment is implicated when visiting restrictions are excessively restricted.³⁶

Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984) (concluding that "prison inmates have no absolute constitutional right to visitation").

31. See MUSHLIN, *supra* note 24, at 89 (discussing some possible arguments where visiting rights fall under constitutional protection).

32. *Id.* at 90; see Laaman v. Helgemoe, 437 F. Supp. 269, 322 (D.N.H. 1977) (stating that "visitation privileges may be curtailed as a punishment for disciplinary infractions" but "may not be so great as to infringe upon inmates' First Amendment rights to family association").

33. MUSHLIN, *supra* note 24, at 92; see Pell v. Procunier, 417 U.S. 817, 826 (1974) (illustrating that prison visitation can be restricted for institutional security reasons, but that those restrictions must be imposed because of the obvious institutional needs and not arbitrarily drawn); see also Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (promulgating that the Constitution protects the sanctity of the family because the institution of family is deeply rooted in the nation's history and tradition); N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958) (declaring that "it is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment"); Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989) (suggesting that the right to come together for the purpose of expressing ideas may be broad enough to encompass meetings and communication between family and friends); Hardway v. Kerr, 573 F. Supp. 419, 427 (W.D. Wis. 1983) (asserting that the value of face-to-face visits cannot be replaced by phone calls or letters).

34. See *Kentucky Dep't of Corrections*, 490 U.S. at 461 (declaring that "state law may create enforceable liberty interests in the prison setting"); *id.* (concluding that in order for visitation to become an enforceable state-created liberty interest, it is necessary to closely examine the language of the relevant statute or regulation); see also *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983) (stating that if the language places substantive limitations on official discretion then a liberty interest is created which cannot be taken away without due process protections).

35. See MUSHLIN, *supra* note 24, at 92 (stating that even if there is no right to visit under the federal Constitution, either as an independent right or as a state-created liberty interest, there may be a right under state constitutional law); see also *Donahue v. Fair Employment & Hous. Comm'n*, 13 Cal. App. 4th 350, 363 n.7, 2 Cal. Rptr. 32, 39 n.7 (1991) (announcing that California must independently determine the scope of a claim asserted under its constitution); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (proclaiming that state courts are increasingly "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased").

36. See *Laaman*, 437 F. Supp. at 322 (concluding that a total denial of visits would violate the Eighth Amendment right to be free from cruel and unusual punishment). *But see* *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1413 (N.D. Cal 1984) (ruling that visitation restrictions placed on segregated inmates which do not deprive an inmate of all visits and accords most inmates contact visits does not violate the Eighth Amendment).

Although there has been some constitutional concern regarding the extent to which visitation privileges can be restricted, the Supreme Court has identified four relevant factors which must be proved to establish the unreasonableness of a prison regulation.³⁷ Courts should consider the following: (1) Whether a "valid, rational connection" exists between the regulation and the legitimate interest advanced to justify it; (2) whether alternative means for exercising the asserted right remain available; (3) whether accommodation of the asserted right will adversely affect guards, other inmates, and allocation of the prison generally; and (4) whether an obvious alternative to the regulation exists that fully accommodates the "prisoner's right at de minimis cost to valid penological interests."³⁸

"The Supreme Court's decision in *Thompson* represents a continued restriction of the due process rights of prisoners."³⁹ "It further demonstrates that protected liberty interests in prisoners will only arise from state statutes and regulations."⁴⁰ "Generally, federal and state prison administrators promulgate the regulations which govern the extent of prisoners' rights."⁴¹ In the past, these officials have exercised almost unfettered discretion in this area of prison administration.⁴²

In the Ninth Circuit, the burden of proof is placed on the prisoner to demonstrate the unreasonableness of a prison regulation which infringes upon their constitutional rights.⁴³ Furthermore, until Chapter 132, California was the only state which granted its inmates personal visits as a right.⁴⁴

37. *Turner v. Safely*, 482 U.S. 78, 89-91 (1987). See generally Colette G. Matzzie & Charles Jones, *Twenty-Second Annual Review of Criminal Procedure: United State Supreme Court and Courts of Appeals 1991-92*, 81 GEO. L. J. 1621 (1993) (discussing prisoners' rights and the reasonableness of prison regulations).

38. *Turner*, 482 U.S. at 89-91.

39. Joseph P. Messina, Case Comment, *Kentucky Dep't of Corrections v. Thompson: The Demise of Protected Liberty Interest Under the Due Process Clause*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 258 (1991).

40. Messina, *supra* note 39, at 258-59; see *id.* (stating that the Court will not inquire into any actual prison practices, nor will it consider whether any actual expectations of liberty on the part of prisoners arise); see also *Kentucky Dep't of Corrections*, 454 U.S. at 46 (holding that protected interests in prisoners will be determined, almost entirely, by the statute's mandatory language).

41. Jacqueline B. DeOliveira, Comment, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 TOURO L. REV. 189 (1988).

42. J. GOBERT & N. COHEN, THE RIGHTS OF PRISONERS 7-9, 12-14 (1981); see Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275, 275 (1985) (illustrating that administrators have the power to control every aspect of a prisoner's life, including the food eaten, the work done, and the time and manner of recreation); see also 17 Op. Att'y Gen. 565, 565 (1983) (stating that prisoners confined in state prisons under federal or state sentences are subject to rules and regulations promulgated by the several states).

43. *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir. 1993); see Song Hill, *Casey v. Lewis: The Legal Burden Is Raised; The Physical Barrier Is Spared*, 25 GOLDEN GATE U. L. REV. 1, 21 (commenting that "the Ninth Circuit places a practically unattainable burden on prisoners to establish that a prison regulation violate; their constitutionally protected rights").

44. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1221, at 3 (June 24, 1996); see *id.* (reporting that California has the most liberal policies regarding inmate rights).

V. CONCLUSION

Advocates of Chapter 132 claim that by making visitation a privilege the Department of Corrections can teach inmates that they are accountable for their actions by showing inmates that there is a penalty for breaking the rules and a privilege for following them.⁴⁵ In addition, the incentives of visiting privileges enhance prison security and make it easier for guards to manage prisoners.⁴⁶ Opponents of Chapter 132 argue that all prisoners have the right to contact visits with family and friends,⁴⁷ and that the Corrections Department will now use its authority to drastically limit prisoners' visits.⁴⁸ Moreover, many prisoners' rights groups oppose Chapter 132 because it has the potential to take away all types of visitation, from contact visits with family members to conjugal visits.⁴⁹ Although Chapter 132 broadly grants the Department of Corrections almost absolute power over all prisoners' visitation rights, it is this author's opinion that Chapter 132 will survive constitutional scrutiny and remain the law.

APPENDIX

Code Section Affected

Penal Code § 2601 (amended).

SB 1221 (Calderon); 1996 STAT. Ch. 132

45. *Id.*

46. *Family Visits for Inmates Upheld*, L.A. TIMES, May 26, 1995, at A33.

47. *Society's Interests and Prisoner Rights*, S.F. CHRON., June 4, 1996, at A18.

48. Harris, *supra* note 18, at A3.

49. *See id.* (stating that Chapter 132 will take away conjugal visits from many prisoners, especially sex offenders and violent criminals).

Limiting Parole: Required Consideration of Statements and Recommendations Received by the Parole Board

Mike A. Cable

On October 1, 1993, a knife-wielding intruder invaded a young girl's slumber party in the middle of the night.¹ After ordering the three twelve-year-old girls to the floor, the invader abducted one of the girls, Polly Klass, and drove away.² Subsequently, the man strangled Polly to death because he was afraid he would go back to prison if he let her go home.³ Perhaps even more reprehensible than this gruesome crime, however, is that the abduction and murder could have been avoided; prison authorities had released Richard Allen Davis on parole just three months before he murdered Polly Klass.⁴ Moreover, parole officials downgraded Davis to a lower risk parolee two weeks after the murder occurred.⁵ Stories such as this spawn public outrage, causing legislatures to react by limiting the availability of parole.⁶

I. INTRODUCTION

Fear of increasing crime and moral decay has led to public resentment toward criminals.⁷ Moreover, the public views early release programs as revolving doors that

1. See Ken Hoover, *Polly's Killer Guilty on All Counts*, S.F. CHRON., June 19, 1996, at A1 [hereinafter Hoover, *Polly's Killer*] (describing how Richard Allen Davis broke into Polly Klass's house with a knife during a slumber party); *Key Dates in Klass Case*, FRESNO BEE, July 30, 1996, at A3 (reporting that on October 1, 1993, Davis broke into Polly's house with a knife during a slumber party).

2. Hoover, *Polly's Killer*, *supra* note 1, at A1; *see id.* (explaining that Davis ordered the girls to the floor, gagged Polly's two friends, then left taking Polly with him).

3. Michael Dougan, *Klass Suspect Said Drugs Led to Killing*, S.F. EXAM., Apr. 24, 1996, at A1; *see id.* (reporting that Davis confessed in vivid detail how he had strangled Polly); *see also* Hoover, *Polly's Killer*, *supra* note 1, at A1 (stating that Davis was convicted for the murder of Polly).

4. See Hoover, *Polly's Killer*, *supra* note 1, at A1 (reporting that Davis was paroled three months before he murdered Polly); *Richard Allen Davis' Life of Crime*, S.F. CHRON., Aug. 6, 1996, at A11 (stating that Davis was released on parole on June 27, 1993).

5. Ken Hoover, *Defense Opens in Klass Case*, S.F. CHRON., May 29, 1996, at A13; *see id.* (reporting that Davis's parole agent downgraded Davis on October 15, 1993 to a status for a less dangerous offender).

6. See *infra* notes 7-11 and accompanying text (describing public frustration with crime and early release programs, and the responses of various legislatures to this frustration).

7. See *Juvenile Justice Initiative Supported by Vast Majority*, PHOENIX GAZETTE, July 18, 1996, at B4 (reporting that public frustration with violent crime in Phoenix has led to political consistency favoring legislation that is tough on juvenile crime); *see also* Kirk Loggins, *State Turns Out Justice White*, TENNESSEAN, Aug. 2, 1996, at 1A (explaining that Justice White was removed from the Tennessee Supreme Court because she was "soft-on-crime"); Eric Miller, *Sure as Shootin', It's Arpaio's Show*, ARIZ. REPUBLIC, Jan. 24, 1996, at A1 (stating that the nationally known, "tough-on-crime" sheriff, has an extremely high approval rating in Arizona polls); *Slice of Life*, TIMES LONDON, Mar. 4, 1995, at *2, available in part 1995 WL 7653109 (copy on file with the *Pacific Law Journal*) (declaring that California's "Three Strikes" measure was passed because of public frustration with increasing crime).

dump criminals into the streets only to commit more crimes.⁸ Legislatures have responded to the public disfavor of criminals by establishing longer prison terms⁹ and restricting early release programs.¹⁰ One program that legislatures and the public have severely criticized is parole.¹¹ Although parole was first developed as a humanitarian means of safely integrating prisoners back into society,¹² the current goal of legislators is to limit the parole system.¹³

The California Legislature has recently followed this trend by enacting specific guidelines that require the Board of Prison Terms (Board) to consider comments and recommendations concerning a prisoner's parole.¹⁴ Proponents of Chapter 212 believe that requiring consideration of outside information will give the Board insight

8. See Joseph T. Hallinan, *Although Outlawed, Parole is a Persistent Problem*, TIMES-PICAYUNE, June 23, 1996, at A12 (describing parole boards as toll booth attendants because inmates are released from prison almost as fast as they are put in prison); *Scrap the Parole System*, DETROIT NEWS, June 26, 1995, Editorial (explaining new legislation that will stop violent offenders from going back to the streets through a revolving door made of early release programs); see also Tim Landis, *Real Time: Truth-in-Sentencing Law Changes Plea Negotiations*, ST. LOUIS POST-DISPATCH, July 11, 1996, at 1 (reporting that Illinois's "Truth-in-Sentencing" law was enacted in response to the public cry for longer prison terms); *Nix "Good Time,"* COLUMBUS DISPATCH, Sept. 21, 1993, at 6A (stating that the public is sick of prisoners only serving a fraction of their sentences).

9. See Carl Ingram, *Senate Votes to Toughen Law on Spousal Rape*, L.A. TIMES, Aug. 15, 1992, at A1 (reporting that the California Senate voted overwhelmingly to lengthen prison sentences for spousal rapists); Laura Meade Kirk, *Bill Would Put Child Abusers in Prison Longer*, PROVIDENCE J.-BULL., Nov. 9, 1995, at 3B (describing Rhode Island legislation that will increase the minimum sentence for those convicted of first-degree child abuse); Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1, 1994, at B1 (describing New Jersey legislation that increases minimum prison terms for violent sex offenders); see also Philip Hager, *State Justices Affirm Penalty for Use of Gun*, L.A. TIMES, Dec. 15, 1992, at A3 (stating that the California Supreme Court upheld a 1989 state law that requires judges to add on an extra three to five years to sentences if a firearm was used to commit a crime); Mark Ragan, *Prison Chief Links Tough Crime Laws, Overcrowded Cells*, SAN DIEGO UNION-TRIB., Jan. 14, 1986, at B3 (quoting the director of the California Department of Corrections as stating that recent legislation requiring longer prison terms has filled the state's prisons to 163% of capacity).

10. Landis, *supra* note 8, at 1; see *id.* (reporting that the Illinois Legislature enacted the truth-in-sentencing law because the public criticized the policy of giving prisoners time off for good behavior); *Nix "Good Time," supra* note 8, at 6A (explaining legislation that would limit various early release programs in Ohio); see also John M. Broder, *Curbs Upheld on Multiple Killers' Rights*, L.A. TIMES, Apr. 26, 1995, at A3 (stating that the United States Supreme Court upheld California legislation that limits the ability of multiple murderers to appeal for early parole).

11. See Governor George Allen, *The Courage of Our Convictions: The Abolition of Parole Will Save Lives and Money*, POL'Y REV., Spring 1995, at 4 (explaining that parole should be abolished in Virginia because incarceration is the only foolproof crime-prevention technique); Sharon Shahid, *Letting Offenders Out on Parole*, USA TODAY, Sept. 19, 1991, at 13A (reporting that the Nebraska state attorney general suggested that parole be abolished); see also *Nix "Good Time," supra* note 8, at 6A (stating that the American people should not tolerate parolees being dumped out into society simply because prisons are overcrowded).

12. See CAL. PENAL CODE § 3000(a)(1) (West 1982 & Supp. 1997) (declaring that the period following incarceration is a critical time, and that parole will be used as a means of promoting successful reintegration into the community); see also George G. Killinger & Paul F. Cromwell, Jr., *Parole, in ALTERNATIVES TO IMPRISONMENT: CORRECTIONS IN THE COMMUNITY* 400, 421 (1974) (stating that proponents of parole argue that it is a humanitarian way to protect the public).

13. See *supra* note 11 and accompanying text (stating that legislators want to abolish parole).

14. See CAL. PENAL CODE § 3042 (amended by Chapter 212) (requiring the Parole Board to consider all information received concerning an inmate's parole).

that will aid in the determination of an inmate's parole.¹⁵ Specifically, Chapter 212 requires the Board to consider the sentencing judge's concerns regarding an inmate's early release.¹⁶

Consequently, Chapter 212 poses both constitutional and practical problems. Opponents of Chapter 212 fear that allowing the judiciary to influence the Board's decision in granting parole violates California's separation of powers doctrine.¹⁷ Moreover, legislation that limits parole creates practical concerns about prison overcrowding.¹⁸ Currently, California prisons suffer from severe overpopulation,¹⁹ and legislation that limits the availability of parole adds to this serious problem without providing any solution.

II. LEGAL BACKGROUND

Notifying interested parties that an inmate is eligible for parole and considering statements made by those parties is common practice in many states.²⁰ Typically, the sentencing judge, the attorneys, the victims, and the law enforcement agencies involved are notified in advance that an inmate will be having a parole hearing to decide whether the parole authority should grant the person parole.²¹ The parole authority usually welcomes comments and recommendations, and the information received may be used to set the terms and conditions of parole.²²

15. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 2 (June 28, 1996) (stating that Chapter 212 will ensure that the Parole Board gives full consideration to the harm caused by the prisoner).

16. CAL. PENAL CODE § 3042(f)(3) (amended by Chapter 212); see *id.* (requiring that the Parole Board consider the information received from the judge).

17. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 3 (June 28, 1996); see *id.* (acknowledging that opponents have concerns that Chapter 212 may allow judges to infringe upon the Board's power over prisoners).

18. Jason S. Ornduff, *Releasing the Elderly Inmates*, 4 ELDER L.J. 173 (1996); see *id.* (discussing prison overcrowding in the United States, and how using the sentence of life-without-parole especially adds to this prevalent problem).

19. See *infra* notes 54-57 and accompanying text (describing the prison overpopulation problem that exists in California).

20. See, e.g., ALA. CODE § 15-22-36(d) (1995) (requiring that notice be sent to certain parties 30 days before an inmate's parole hearing, and that those notified have the opportunity to express their views in person or in writing); ARIZ. REV. STAT. ANN. § 31-411(H) (West 1996) (stating that notice is to be given to certain parties 15 days before an inmate's parole hearing, and that the victim shall be informed of the right to submit a written report to the Parole Board); FLA. STAT. ANN. § 947.1745(6) (West 1996) (explaining that the sentencing judge is to receive 90 days notice of an inmate's parole release date interview and that the judge may object to the release of the prisoner); OHIO REV. CODE ANN. § 2967.12(A) (Anderson 1996) (providing that various parties shall be notified at least three weeks before the parole authority grants an inmate parole, and allowing those notified to send a written statement to the parole authority); TENN. CODE ANN. § 40-28-505(b) (1996) (setting forth the parties to be notified at least 14 days before an inmate's parole hearing).

21. See *supra* note 20 (describing the notification procedure of several states).

22. See ALA. CODE § 15-22-36(e)(2)(I) (1995) (allowing the parties that are notified to express their views in person or in writing to the parole board); ARIZ. REV. STAT. ANN. § 31-411(H) (West 1996) (stating that the victim has the right to submit a written report to the parole board); OHIO REV. CODE ANN. § 2967.12(B) (Anderson 1996) (providing that those notified may send any written statement to the parole authority).

A. Notification of Parole Hearings and Consideration of Materials Given the Board Before Chapter 212

Before the enactment of Chapter 212, California law set forth general requirements concerning notification of an inmate's eligibility for parole.²³ California law required the Board to send written notice of the possibility of an inmate's parole thirty days before the Board met to determine the inmate's eligibility.²⁴ Among those notified by the Board were the sentencing judge, the defendant's attorney, the District Attorney, and the law enforcement agencies involved in the case.²⁵ Although the law required that written notice be sent to the above referenced parties, no guidelines had been established with respect to how the Board should send notification, or what consideration should be given to incoming statements and recommendations.²⁶

Prior to Chapter 212, California law required that any materials considered by the Board to determine parole must be incorporated into the transcript unless doing so would create a dangerous situation.²⁷ Before the enactment of Chapter 212, California law did not require the Board to consider any information received from outside parties, and accordingly, the Board could base its decision solely upon the inmate's files.²⁸

B. Chapter 212

Chapter 212 expands existing law by explicitly requiring that information received by the Board be considered in determining an inmate's parole.²⁹ Chapter 212 sets forth procedures to ensure that the Board fully comprehends the impact that the release of the inmate will have upon the community.³⁰ Specifically, Chapter 212 mandates that the Board consider incoming comments and recommendations to

23. See 1991 Cal. Legis. Serv. ch. 1017, sec. 1, at 4490 (amending CAL. PENAL CODE § 3042) (requiring written notice sent to various parties, and that any information shall be read into the transcript).

24. *Id.*

25. *Id.*

26. Compare 1991 Cal. Legis. Serv. ch. 1017, sec. 1, at 4490 (amending CAL. PENAL CODE § 3042) (stating only that information received is to be incorporated into the transcript of the hearing) with CAL. PENAL CODE § 3042 (amended by Chapter 212) (requiring that information received by the Board be considered in determining an inmate's parole).

27. CAL. PENAL CODE § 3042(d) (amended by Chapter 212).

28. See 1991 Cal. Legis. Serv. ch. 1017, sec. 1, at 4490 (amending CAL. PENAL CODE § 3042) (stating only that information received is to be incorporated into the transcript of the hearing).

29. See CAL. PENAL CODE § 3042(f)(3) (amended by Chapter 212).

30. See *id.* § 3042(a) (maintaining that the Board is still required to notify the sentencing judge, the defendant's attorney, the District Attorney, and the law enforcement agencies involved, at least 30 days before the Board meets to determine an inmate's parole); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 2 (June 28, 1996) (explaining that Chapter 212 ensures the Board fully considers the inmate's crime).

obtain more depth and understanding about the prisoner and the crime committed.³¹ Moreover, the legislation singles out the sentencing judge as a source of vital information because the judge can enlighten the Board about the harm caused by the inmate.³²

Chapter 212 provides specific procedures describing how the Board is to notify the judge about the upcoming hearing. For instance, Chapter 212 requires that the judge which presided over the inmate's trial be notified by certified mail with return receipt requested.³³ Moreover, the judge, or any other person, may send any unprivileged information to the Board that is pertinent to the inmate's parole.³⁴ The rationale in requiring the judge and others to influence the Board's decision is to ensure that the determination of parole will be based on a solid understanding of the past and present situation, and not upon sterile files that only state the actions of the inmate.³⁵

Chapter 212 further declares that nothing in § 3042 of the California Penal Code limits what is sent to the Board and that all comments and recommendations should be reviewed and considered in determining an inmate's parole.³⁶ This provides assurance that the Board is considering the inmate's impact upon the community, but still leaves the determination of parole in the hands of the Board.³⁷ The fact that the judge's recommendations are not conclusive of the parole proceeding, in that the Board continues to have the final decision regarding parole, however, fails to alleviate the concern of those who believe that required judicial influence over a prisoner's parole violates the separation of powers.

31. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 2 (June 28, 1996); see CAL. PENAL CODE § 3042(f)(3) (amended by Chapter 212) (explaining that the information received by the Board shall be considered in determining an inmate's parole).

32. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 2 (June 28, 1996) (acknowledging that sentencing judges usually know a lot about the inmates, and that judges will generally know if the inmate poses a threat to the public); see also CAL. PENAL CODE § 3042(f) (amended by Chapter 212) (requiring that the judge's notification be sent by certified mail with return receipt requested, and specifying that the judge's recommendations shall be considered by the Parole Board).

33. CAL. PENAL CODE § 3042(f)(1) (amended by Chapter 212).

34. *Id.* § 3042(f)(2) (amended by Chapter 212).

35. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 2 (June 28, 1996) (stating that parole officers typically have only nondescript case files about the inmates and that Chapter 212 will ensure that the Parole Board considers the actual grievousness of the crime).

36. CAL. PENAL CODE § 3042(f)(3) (amended by Chapter 212).

37. See *infra* Part III.B. (explaining that the judge is not empowered to decide a prisoner's parole because Chapter 212 merely provides that a judge *may* forward information to be *considered* by the Parole Board).

III. JUDICIAL INFLUENCE OVER PAROLE AND THE SEPARATION OF POWERS DOCTRINE

A. Federal Separation of Powers

Although separation of powers is not expressly guaranteed in the United States Constitution,³⁸ the Supreme Court has inferred the separation of powers doctrine from principles found within the Constitution.³⁹ For many years, this nation has been protected against the tyranny of an unbalanced government by enforcing the lines between the governmental branches.⁴⁰ However, the federal doctrine of separation of powers has not been forced upon state governments.⁴¹

Since the Supreme Court has held that states are not required to embrace the separation of powers doctrine, the individual states are left to determine their own distribution of governmental power.⁴² Consequently, Chapter 212 will violate the separation of powers only if California endorses the separation of powers doctrine and interprets required judicial influence over parole decisions as violative of that doctrine.⁴³

38. See *Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928) (explaining that the United States Constitution does not contain an express provision that mandates the separation of governmental powers); *Bean v. Nevada*, 410 F. Supp. 963, 966 (D. Nev. 1974) (stating that the separation of powers doctrine is not expressly enunciated in the United States Constitution); Matthew J. Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 961-62 (1995) (commenting that the United States Constitution does not thoroughly set forth the separation of powers doctrine).

39. See *Springer*, 277 U.S. at 201 (noting that the separation of powers doctrine logically follows from the Constitution's separation of the several governmental departments); *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880) (explaining that the lines between the three branches of government shall be clearly defined); see also *Bean*, 410 F. Supp. at 966 (maintaining that the separation of powers can be inferred from the Constitution's underlying principles).

40. David A. Martland, Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, YALE L.J. 1675, 1675 (1985); see *id.* (explaining that the separation of powers is necessary to ensure the impartial administration of laws); see also Robert M. O'Neil, *Separation of Powers*, 37 EMORY L.J. 539, 539 (1988) (stating that the framers of the Constitution wanted distinct lines between the branches of government).

41. Martland, *supra* note 40, at 1675; see, e.g., *Hughes v. Superior Court (Contra Costa County)*, 399 U.S. 460, 467 (1950) (noting that the Fourteenth Amendment does not make the states abide by the separation of powers doctrine); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (holding that a state is to determine on its own whether to recognize the separation of powers doctrine); *Bean*, 410 F. Supp. at 966 (acknowledging that the separation of powers doctrine has not been extended to the states).

42. *Dreyer*, 187 U.S. at 84; see *supra* note 41 and accompanying text (explaining that states determine on their own whether to follow the separation of powers doctrine).

43. See *infra* notes 45-48 and accompanying text (describing California's separation of powers doctrine, and the court's determination that parole hearings are not a judicial function).

B. Chapter 212 and the Separation of Powers

California, like all states,⁴⁴ recognizes the separation of powers within its Constitution.⁴⁵ Accordingly, legislation requiring a branch of government to infringe upon the duties of another branch of government violates the California Constitution.⁴⁶ Various court decisions hold that the paroling of inmates constitutes a purely administrative function that is properly performed by the Board.⁴⁷ Thus, in keeping with the separation of powers, the California Constitution prohibits the judiciary from infringing upon the parole system.⁴⁸ Chapter 212, however, escapes a constitutional violation, by ensuring that judges do not interfere with the Board's administrative function.⁴⁹

Chapter 212 requires that a judge *may* forward information to be *considered* by the Board in assessing an inmate's parole.⁵⁰ This requirement does not empower judges to decide a prisoner's parole, but only requires the Board to consider a judge's concerns regarding the inmate.⁵¹ Moreover, Chapter 212 does not command that the Board follow the comments and recommendations sent to it by the judge and others.⁵² The power in determining an inmate's parole continues to be in the hands of the Board, and not in the hands of a judge or anyone else.⁵³ Accordingly, Chapter 212 will likely survive constitutional scrutiny because it does not allow the judiciary

44. See O'Neil, *supra* note 40, at 539 (declaring that all the states recognize the separation of powers doctrine in their constitutions).

45. CAL. CONST. art. III, § 3; see *id.* (stating that the powers of one state government may not exercise either of the others except as permitted by this Constitution); see also 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 107 (9th ed. 1988) (explaining that the California Constitution expressly embraces the separation of powers doctrine).

46. CAL. CONST. art. III, § 3.

47. See, e.g., *In re Tucker*, 5 Cal. 3d 171, 177, 486 P.2d 657, 659, 95 Cal. Rptr. 761, 763 (1971) (explaining that the length of sentences and the conditions of parole are for the determination of the Adult Authority, and are not judicial acts (quoting *In re Schoengarth*, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967))); *In re Sandel*, 64 Cal. 2d 412, 415, 412 P.2d 806, 809, 50 Cal. Rptr. 462, 465 (1966) (stating that the imposition of a sentence is a judicial function, while the carrying out of that sentence is an administrative function); *In re Lee*, 177 Cal. 690, 693, 171 P. 958, 959 (1918) (explaining that the judicial branch determines guilt and imposes the sentence, whereas an administrative body carries out that sentence); *In re Fain*, 65 Cal. App. 3d 376, 389, 135 Cal. Rptr. 543, 550 (1976) (declaring that parole is purely an administrative matter); see also Douglas J. Hitchcock, *The California Adult Authority-Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U.C. DAVIS L. REV. 360, 370 (1972) (citing the California Supreme Court as holding that the function of parole is wholly administrative).

48. See *supra* notes 44-47 and accompanying text (explaining that parole is not a judicial function, and that California embraces the separation of powers doctrine).

49. See *infra* notes 50-53 and accompanying text (discussing how Chapter 212 does not create judicial interference with the Board's function).

50. CAL. PENAL CODE § 3042(f)(2) (amended by Chapter 212).

51. See *id.* § 3042(f)(3) (amended by Chapter 212) (requiring only that the parole board *consider* the information being received).

52. *Id.*

53. See *supra* note 50 and accompanying text (stating that a judge *may* forward information, and that the Board is only required to merely *consider* the information being received).

to infringe upon the Board's decision, but merely requires that the Board have all available information concerning the parole of a particular inmate.

IV. LIMITING THE OPPORTUNITY OF PAROLE

The concerns presented by the judge and others will influence the Board's decision, and these concerns will limit the opportunity for an inmate to receive parole.⁵⁴ Although many individuals desire to incarcerate criminals for the entirety of their sentence, no state has a prison system with the facilities to satisfy that fixation.⁵⁵ In fact, even though California has the largest prison system in the country,⁵⁶ the current prison population rate exceeds well beyond the intended capacity.⁵⁷ Consequently, prisons are becoming more dangerous and unsanitary.⁵⁸ Thus, legislation focused on limiting parole only assists in increasing the problem to epidemic levels.

Without the money to adequately expand the current system,⁵⁹ California will be forced to find alternative means of controlling the prison population. One way to combat prison overpopulation is to be more selective about who is being imprisoned. Instead of creating overpopulation problems by trying to incarcerate every criminal, one solution could be to incarcerate only the criminals that pose a threat to society. The employment of early release programs, like parole, helps lower the nonviolent criminal population in prisons so that space remains available for those criminals that

54. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 3 (June 28, 1996) (stating that Chapter 212 will help keep inmates incarcerated for the entirety of their sentence).

55. See Michael Gottesman & Lewis J. Hecker, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 706-07 (1963) (stating that with the increase in crime, a state no longer enjoys the option of incarcerating every prisoner for the maximum term).

56. *California Tops the Nation in Rate of Parolees Rejailed*, SAN DIEGO UNION-TRIB., Sept. 19, 1991, at A1.

57. John Hurst, *Full Cells and Empty Pockets*, L.A. TIMES, May 8, 1991, at A1; see DATA ANALYSIS UNIT, CAL. DEP'T OF CORRECTIONS, CALIFORNIA PRISONERS & PAROLEES 1992, at 1-1 (1995) [hereinafter DATA ANALYSIS] (stating that the 1992 prison population was 186.6% of the design capacity); Hurst, *supra*, at A1 (reporting that in the year 2000, the inmate population will be so high that every 125 prisoners will have to be placed in space designed for 100); see also Ragan, *supra* note 9, at B3 (noting that there are three state prisons that operate at 200% over capacity).

58. Ornduff, *supra* note 18, at 176-80; see Hurst, *supra* note 57, at A1 (stating that state prisons are dangerously overcrowded because the population is growing); see also Ragan, *supra* note 9, at B3 (reporting that several state prisons have lawsuits condemning overcrowding).

59. *Lockyer Proposes Shift in Prison*, BC CYCLE, Apr. 6, 1995, at Regional News; see Hurst, *supra* note 57, at A1 (noting that the cost of incarceration in California, not including prison construction, is \$2.1 billion a year and climbing); Eric Lichtblau & Paul Fledman, *Boxer, Feinstein Urge U.S. to Redirect Money to County's Jails*, L.A. TIMES, May 22, 1996, at B1 (stating that Senators Barbara Boxer and Diane Feinstein are demanding money from the federal government to help pay for the cost of running the Los Angeles County jail system); *Lockyer Proposes Shift in Prison*, *supra*, at Regional News (describing Senate Pro Tem Bill Lockyer's plan to divert prisoners to county control because the increasing State prison population would require the building of 15 new prisons and stating that the construction of 15 new prisons is unaffordable and would be the largest public works project since the pyramids).

are a danger to the community.⁶⁰ Unfortunately, a substantial margin of error occurs in determining which criminals are a threat to society, and recidivism of parolees remains one of the reasons why legislatures want to limit parole.⁶¹

Although concern that parolees are committing new crimes once they return to the community may be justified,⁶² parole should not be discarded as an alternative to unsafe prisons and jails. Instead, legislation should focus on increasing supervision of parolees and improving the accuracy of predicting recidivism. California can no longer demand incarceration to stifle crime without increased facilities to house prisoners.⁶³ Absent funding required to expand the current prison system, alternatives like parole will need to be utilized.

V. CONCLUSION

Current frustration with crime has led to tougher policies regarding criminals,⁶⁴ and less concern about providing a humanitarian means of integrating prisoners back into society.⁶⁵ Accordingly, legislatures have reacted by limiting the amount of prisoners released on parole.⁶⁶ Chapter 212 attempts to limit parole by requiring the Board of Prison Terms to consider the information received from the sentencing judge and others.⁶⁷ Although Chapter 212 may meet constitutional challenges on the basis that it conflicts with the separation of powers doctrine, Chapter 212 will survive such scrutiny because the judge only plays a limited role in the Board's determination. However, Chapter 212 poses practical problems in that limiting parole will have an adverse effect upon the prison population. The advantages of requiring the Board to consider the impact of the parolee upon the community may be at the expense of compounding current problems regarding prison overpopulation.

60. See Shahid, *supra* note 11, at 13A (explaining that parole may be used to relieve an overcrowded correctional system).

61. CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND THE LAW: RESEARCH AND APPLICATION* 328-30 (2d ed. 1994); see *id.* (describing various ways to attempt to predict criminal behavior, and stating that even after careful study, prediction will result only in a rough estimation); Allen, *supra* note 11, at 6 (arguing that less crime would result if parole was abolished); see also Shahid, *supra* note 11, at 13A (reporting that the Nebraska attorney general suggested abolishing the parole system after a parolee killed a person).

62. See DATA ANALYSIS, *supra* note 57, at 1-1 (reporting that 34,932 parolees were returned to custody after early release); *id.* at 5-1 (reporting that parole violators returned to prison with a new term increased from 16,010 during 1991 to 17,939 during 1992); *California Tops Nation in Rate of Parolees Rejailed*, *supra* note 56, at A1 (explaining that only 19% of parolees in California successfully complete the program). *But see* Shahid, *supra* note 11, at 13A (stating that the parole system does not create new crime).

63. See *supra* note 55 and accompanying text (stating that no state has the option of incarcerating every prisoner for the maximum term); *supra* note 59 and accompanying text (discussing the cost of housing prisoners).

64. See *supra* notes 7-9 and accompanying text (describing the public's frustration toward crime and several "tough on crime" policies).

65. See *supra* note 11 and accompanying text (noting legislation that is focused on abolishing parole).

66. *Id.*

67. See CAL. PENAL CODE § 3042 (amended by Chapter 212); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1600, at 3 (June 28, 1996) (stating that Chapter 212 will aid in keeping inmates incarcerated for the entirety of their sentence).

APPENDIX

Code Section Affected

Penal Code § 3042 (amended).

SB 1600 (Leonard); 1996 STAT. Ch. 212

