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Criminal Procedure

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Criminal Procedure: California Tells Criminal Defendants They Can No Longer Make Oral Motions to Suppress Evidence at the Preliminary Hearing

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Code Sections Affected
Penal Code §§ 817, 861, 1538.5 (amended).
SB 123 (Peace); 1997 STAT. Ch. 279

I. INTRODUCTION

California Penal Code section 1538.5 governs how a motion to suppress evidence [hereinafter MTS] is made at a preliminary hearing.[1] A defendant has the right to file a MTS if the search was done without a warrant and was unreasonable.[2] A defendant may also make a MTS if there was a seizure with a warrant under specific instances.[3] For example, if a warrant is insufficient on its face or the property seized was not the same property as that described in the warrant, then the defendant may file a MTS.[4] These instances and others are enumerated in Penal Code section 1538.5.[5] Courts have interpreted this section differently with regard to when and how a MTS may be made before trial.[6] This has led to the enactment of local rules that differ on how to govern a MTS at the preliminary hearing.[7] For instance, in Riverside County, a defendant may make an oral MTS at the preliminary hearing, however while in San Francisco, a defendant may not.[8]

Local courts also differ on what must be pled in a MTS.[9] For example, Riverside County court rules provide that a MTS does not have to be accompanied

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1. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 2 (July 1, 1997) (stating that under Penal Code § 1538.5, a defendant may file a MTS under certain conditions).
2. CAL. PENAL CODE § 1538.5(a) (West 1997).
3. *Id.* § 1538.5(b) (West 1997).
4. *Id.*
5. *See id.* (explaining that a search or seizure with a warrant would be unreasonable if: (1) warrant is insufficient on the face, (2) property was not that described in warrant, (3) lack of probable cause for the issued warrant, (4) execution of the warrant violated federal and state constitutional standards, or (5) any other violation of federal or state standards).
6. *See* 4 B.E. WITKIN & NORMAN L. EPSTIEN, CALIFORNIA CRIMINAL LAW, *Procedure in Lower Courts* § 2253 (2d ed. 1997) (explaining how courts have interpreted Penal Code § 1538.5 differently).
7. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 123, at 3 (Mar. 11, 1997) (explaining that local rules may differ depending on the jurisdiction).
8. *Compare* RIVERSIDE, CAL, R. CT. 7.5100(B)(2) (allowing a MTS to be made orally during the preliminary hearing), *with* SAN FRANCISCO, CAL., R. CT. 10.14(B) (requiring all motions to be made in writing).
9. *Id.*

by a memorandum of points and authorities.[10] However, under San Francisco County court rules, a MTS must be accompanied by a memorandum of points and authorities.[11] Chapter 279 expands existing law by making the requirements of a MTS under Penal Code section 1538.5 uniform and by limiting the discretion of the local courts.[12]

Three procedural issues are addressed in Chapter 279. First, the Legislature believes that an oral motion to suppress evidence by a defendant during the preliminary hearing abridges the people's due process rights under the California Constitution.[13] Second, prosecutors were wasting valuable resources trying to prepare for a surprise MTS by the defendant.[14] Prosecutors also needed to ensure that any peace officer who seized evidence for the prosecution's case was able to testify at the preliminary hearing.[15] This was necessary because a number of California state courts allowed defendants to make an oral MTS during the preliminary hearing.[16] This procedure worked against the prosecution, giving them no notice as to what evidence presented would be objected to by the defense.[17] Chapter 279 attempts to fix both these problems by expanding the procedure required to make a MTS under Penal Code section 1538.5.[18] Finally, Chapter 279 addresses when a misdemeanor arrest warrant may be served on a defendant at his house by amending Penal Code section 817, which deals with misdemeanor arrest warrants, so that they comply with the time limitations set forth in Penal Code section 840.[19]

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10. RIVERSIDE, CAL., R. CT. 7.5100(B)(2).

11. SAN FRANCISCO, CAL., R. CT. 10.14(B).

12. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 123, at 3 (May 13, 1997) (stating that under Chapter 279, a memorandum of points and authorities will be required for all MTSs thereby limiting the discretion of local courts).

13. CAL. CONST. art. I, § 30 (West 1997) (added by Proposition 15, this § of the California Constitution provides that the people of California have the right to a fair and cost efficient trial which is violated by the defendants ability to make an oral MTS at the preliminary hearing because of the added cost the prosecution incurs in preparing for a surprise oral MTS by the defendant); *see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 3 (July 1, 1997) (stating that requiring the defendant to give a noticed memorandum of points and authorities when filing a MTS will protect the people's right to due process).

14. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 3 (July 1, 1997) (explaining that the police officer who had seized the evidence from the defendant would have to be available to testify in case the defendant made a MTS).

15. *See id.* (quoting the author as saying, "[SB 123] would relieve [District Attorneys] from having to needlessly subpoena victims and peace officers into court in the off chance a defendant decides to bring a motion to suppress at the preliminary hearing").

16. *Id.*

17. *Id.*

18. CAL. PENAL CODE § 1538.5 (amended by Chapter 279).

19. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 6 (July 1, 1997) (explaining how lower courts have been confused as to what statute to follow when issuing misdemeanor arrest warrants at night).

II. CURRENT LAW: CONFUSION ABOUT WHETHER SECTION 1538.5 PROVIDES THE DEFENDANT THE RIGHT TO MAKE AN ORAL MTS AT THE PRELIMINARY HEARING

Penal Code section 1538.5 gives the defendant in felony and misdemeanor prosecutions the opportunity to make a MTS at various stages in the criminal procedural process.[20] One of the opportunities for the defendant to make a MTS in felony prosecutions is at the preliminary hearing.[21] The MTS filed at the time of the preliminary hearing is limited to evidence which the prosecution is attempting to introduce at the preliminary hearing.[22] However, courts have had difficulty in determining what procedure must be followed when making a MTS at the preliminary hearing.[23] Specifically, courts have differed on whether Penal Code section 1538.5 gives the defendant the right to make an oral MTS at the preliminary hearing, and whether local court rules may abridge this right.[24]

In *People v. Manning*,[25] the court held that in misdemeanor cases a MTS pursuant to Penal Code section 1538.5(g)[26] did not require written notice and may be made orally.[27] The court stated that in felony prosecutions a MTS made pursuant to Penal Code section 1538.5(f) may be made orally at the preliminary hearing without giving notice to the prosecution.[28] The court reasoned that because misdemeanor prosecutions do not have a preliminary hearing where the defendant has the opportunity to raise a MTS orally, a MTS made at any pretrial conference may be made orally without notice to the prosecution.[29]

Manning clearly states that local rules may govern a MTS.[30] However, the court did not apply the local rule when it discussed the defendant's right to make an oral

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20. *See* CAL. PENAL CODE § 1538.5 (West 1997) (detailing when a MTS may be filed).

21. CAL. PENAL CODE § 1538.5(f) (West 1997).

22. *Id.* § 1538.5 (West 1995).

23. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 3-5 (July 1, 1997) (stating that some courts have ruled that local courts may govern MTS under 1538.5, but noting that other courts have ruled otherwise).

24. *See infra* notes 25-50 and accompanying text (explaining how courts have interpreted Penal Code section 1538.5).

25. 33 Cal. App. 3d 586, 109 Cal. Rptr. 531 (1973).

26. *See* CAL. PENAL CODE § 1538.5(g) (West 1997) (stating that the defendant may make a MTS "at the preliminary hearing").

27. *See Manning*, 33 Cal. App. 3d at 597, 109 Cal. Rptr. at 539 (reasoning that making a MTS at a preliminary hearing would be procedurally difficult if the defense had to give prior written notice to the prosecution).

28. *See id.* (stating that, procedurally, a written motion made pursuant to California Penal Code § 1538.5(f) "[did] not lend itself to prior written notice of motion").

29. *Id.*

30. *See id.* at 598, 109 Cal. Rptr. at 539 (stating that since California Penal Code § 1538.5 references established motion practice and does not provide a unique one, local court procedures and rules will govern suppression motions).

motion.[31] Instead, the court deferred to the legislative intent of Penal Code section 1538.5.[32] Therefore, *Manning* has been interpreted as both prohibiting and allowing local rules to govern how a MTS is made, creating confusion in the courts as to whether a defendant is able to make an oral MTS at the preliminary hearing.[33]

Following the reasoning of the court in *Manning,* several other courts have interpreted Penal Code section 1538.5 as permitting the use of an oral MTS.[34] For example, in *People v. Ciraco,*[35] the court held that the language used in Penal Code section 1538.5 suggested that the Legislature intended to give the defendant the right to make an oral MTS during the preliminary hearing.[36] The court further reasoned that a defendant is not in the position to foresee what evidence may be introduced by the prosecution at the preliminary hearing. Therefore the defendant's right to make an oral MTS at the preliminary hearing protects a defendant caught off guard by the introduction of surprise evidence, to which the defendant would otherwise object.[37] Another case decided by following the *Manning* reasoning is *Cox v. Superior Court*[38] which held that local courts may not abridge the defendant's right under Penal Code section 1538.5 to make an oral MTS at the preliminary hearing.[39]

However, there are a number of cases that interpret *Manning* and Penal Code section 1538.5 differently.[40] In *People v. Lewis,*[41] an appellate court upheld a municipal court's denial of an oral MTS on the grounds that it did not comply with local court rules.[42] The appellate court cited *Manning* for support in deciding that local

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31. *See id.* at 597, 109 Cal. Rptr. at 539 (noting that the legislature implicitly allowed oral MTSs to be made in felony cases during the preliminary hearing therefore, by analogy since misdemeanors have no preliminary hearing the legislature must have meant to allow oral MTSs during the pretrial stage).

32. *Id.*

33. *See infra* notes 35-44 and accompanying text (discussing the holding in cases which have followed the *Manning* courts reasoning).

34. *See infra* notes 35-44 and accompanying text (providing a discussion of such cases).

35. 181 Cal. App. 3d 1142, 226 Cal. Rptr. 541 (1986).

36. *See id.* at 1143, 225 Cal. Rptr. at 542 (determining that the legislature in using the language "at the preliminary hearing" intended that a defendant could raise a MTS orally while the preliminary hearing was going on).

37. *See id.* (stating that requiring advance notice on a MTS during the preliminary hearing would lead to three alternatives: (1) the defense council would have to be "clairvoyant;" (2) the preliminary process would have to be interrupted every time evidence was introduced that the defendant wanted to make a MTS on, so that they could give notice to the prosecution; and/or (3) the defendant's right to make constitutional objections to an invalid search and seizure would be lost during the preliminary hearing).

38. 19 Cal. App. 4th 1048, 23 Cal. Rptr. 2d 751 (1994).

39. *See id.* at 1051, 23 Cal. Rptr. at 753 (holding that Shasta County local court rules 7.03(E) and 10.03 where invalid because they required a defendant to give notice to the prosecution before making a MTS, and thus were inconsistent with the legislative intent of California Penal Code § 1538.5).

40. *See* People v. Hallman, 215 Cal. App. 3d 1330, 1341, 264 Cal. Rptr. 215, 221 (1989) (stating that local court rules, which aid the court in promoting judicial economy, govern the pleading requirements of California Penal Code § 1538.5); *see also* People v. Coleman, 229 Cal. App. 3d 321, 325, 280 Cal. Rptr. 54, 56 (1991) (agreeing with the ruling in *Hallman*).

41. 71 Cal. App. 3d 817, 139 Cal. Rptr. 673 (1977).

42. *Id.* at 820-21, 139 Cal. Rptr. at 674.

rules[43] governed making a MTS under Penal Code section 1538.5 because the statute deferred to established motion practice during the preliminary hearing.[44]

III. CURRENT LAW: CONFLICT AS TO HOW MUCH SPECIFICITY A MTS REQUIRES

The requirements for a defendant's pleading in a MTS vary depending on local court rules which normally determine the requirements for a sufficiently pled MTS motion.[45] Local court rules often require that the MTS pleading be accompanied by points and authorities, contain a detailed description of the evidence to be suppressed, and contain the specific grounds for suppression.[46]

However, courts have refused to uphold pleading requirements under local court rules where the defendant made a motion to suppress evidence obtained without a search warrant.[47] In these cases, the courts have ruled that when a defendant makes a motion to suppress evidence obtained without a search warrant, the pleading would be sufficient if it contained a description of the property and pleads that the evidence was obtained without a search warrant as grounds for suppression.[48]

In *Manning*, the court reasoned that the purpose behind Penal Code section 1538.5 was to shift the procedural burden for pleading a MTS to the defendant, while maintaining the same burden on the prosecution to prove that the evidence it wishes to introduce was obtained properly.[49] Therefore, when pleading a MTS the defendant is required to give clear details of the evidence they wish to suppress, the specific grounds for suppression, as well as whatever the local court rule requires to be pled.[50]

However, the court in *Wilder v. County of Tulare*[51] reasoned that where the evidence was obtained without a search warrant, the defendant's initial pleading of a MTS is sufficient if it contains a specific description of the illegally obtained evidence and provides grounds for suppression of evidence obtained without a search warrant.[52] The court also propounded the procedural steps to be taken after

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43. BEVERLY HILLS, CA, MUNICIPAL CT. R. 55.11(C).

44. *See Lewis*, 71 Cal. App. 3d at 820-21, 139 Cal. Rptr. at 674 (stating that the court in Manning had understood that local rules would apply to a MTS under California Penal Code § 1538.5).

45. *See* ALAMEDA, CA, R. CT. 19 (listing the requirements which the local court requires for filing a MTS under California Penal Code § 1538.5).

46. *Id.*

47. *See* Wilder v. Superior Court, 92 Cal. App. 3d 90, 97, 154 Cal. Rptr. 494, 498 (1979) (overruling a local court rule which required the defendant to file a points and authorities).

48. *Id.* at 97, 154 Cal. Rptr. 494 at 498.

49. *See Manning*, 33 Cal. App. 3d. at 596, 109 Cal. Rptr. at 538 (stating that the intention of California Penal Code § 1538.5 was to outline the procedural burdens of the parties, while leaving the burdens of proof alone).

50. *See id.* (explaining what must be plead in the defendants MTS).

51. 92 Cal. App. 3d 90, 154 Cal. Rptr. 494 (1979).

52. *See id.* at 96, 154 Cal. Rptr. at 497-98 (noting where the defendant bears the burden of pleading).

this initial pleading by the defendant.[53] The *Wilder* court came to the conclusion that when the prosecution introduces evidence obtained without a search warrant, a defendant need not plead with specificity the grounds on which they are making a MTS because the prosecution bears the burden of proof in justifying a warrantless search.[54]

In *People v. Hallman,*[55] the court sharply criticizes the decision in *Wilder.*[56] In arguing that the *Wilder* procedure required for pleading a MTS is erroneous, the court brings up two points.[57] First, it contended that the *Wilder* court had failed to recognize the difference between the burden of proving that the evidence presented was obtained legally and the burden required in pleading a motion.[58] Second, it parroted the *Manning* court's deference to local rules regarding the requirements of pleading a MTS under Penal Code section 1538.5.[59]

IV. MOTION TO SUPPRESS UNDER SECTION 1538.5 AFTER CHAPTER 279

A. *Oral Motions*

Chapter 279 eliminates a defendant's ability to make an oral motion during the preliminary hearing when charged with a felony offense.[60] Specifically, it now requires defendants to serve the prosecution with notice of the MTS five days prior to the preliminary hearing.[61] Chapter 279 recognizes that the defendant under this procedure may be caught by surprise during the preliminary hearing with evidence it had no knowledge of prior to the hearing, but about which the defendant would like to file a MTS.[62] Chapter 279 makes allowances for such a contingency.[63]

Prior to the enactment of Chapter 279, a magistrate conducting a preliminary hearing had the discretion to grant the prosecution a continuance when surprised by an oral MTS during the hearing.[64] Under Chapter 279, the magistrate has this same discretion to allow a continuance in order to permit a defendant who has been

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53. *See id.* at 97, 154 Cal. Rptr. at 498 (establishing that after defendants initial pleading, the burden then shifts to the prosecution to justify the warrantless search and seizure in its responsive pleading, followed by an opportunity for the defendant to respond to the prosecution's justifications).

54. *Id.*

55. 215 Cal. App. 3d 1330, 264 Cal. Rptr. 215 (1989).

56. *Id.* at 1333, 264 Cal. Rptr. at 216.

57. *Id.* at 1337-41, 264 Cal. Rptr. at 218-21.

58. *Id.*

59. *Id.*

60. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 123, at 2 (Mar. 11, 1997) (explaining that Chapter 279 now requires the defendant to give notice of a MTS prior to the hearing).

61. CAL. PENAL CODE § 1538.5 (amended by Chapter 279).

62. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 3 (July 1, 1997) (stating that committee members had concerns that circumstances would arise where the defendant would be surprised).

63. *Id.*

64. CAL. PENAL CODE § 1538.5 (West 1997).

surprised by evidence introduced by the prosecution to file a written MTS.[65] Therefore, the defendant will not lose his ability to challenge evidence at the preliminary hearing with a MTS.[66]

Prior to Chapter 279, a number of courts permitted the defendant to make a MTS orally at the preliminary hearing without having to show much support for the motion.[67] After the defendant had made this motion, the prosecution would be required to support fully the validity of its challenged evidence.[68] Therefore, the defendant, without having to plead any specific wrongdoing on the part of the prosecution, was able to make the prosecution fully prove that all the evidence they introduced was properly obtained.[69]

Chapter 279 effectively shifts the burden of making the initial pleading to the defendant by requiring them to plead specifically why they are making a MTS prior to the preliminary hearing and by requiring them to include points and authorities with their written motion.[70] Therefore, the defendant can no longer make the prosecution prove the validity of challenged evidence without making a specific showing of the grounds upon which they have challenged the evidence.[71] Furthermore, Chapter 279 sets forth the procedure that the prosecution must follow in filing a response to a MTS made prior to the preliminary hearing.[72] Chapter 279 requires the prosecution to serve any written response to the defendant within a minimum of two days prior to the hearing.[73]

B. Pleading Requirements of a MTS Under 1538.5 After Chapter 279

Chapter 279 sets forth the conditions for adequately pleading a MTS under Penal Code section 1538.5.[74] Specifically, Chapter 279 outlines four requirements for a sufficient MTS: (1) a MTS must contain a list of the specific items of evidence which the defendant wishes to suppress;[75] (2) a MTS must outline the grounds in support of suppression; (3) a MTS must be accompanied by a memorandum of

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65. *See id.* § 1538.5(f)(2) (amended by Chapter 279) (stating that a continuance may be granted to the defendant to file a written motion).

66. *Id.*

67. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 123, at 4 (May 13, 1997) (explaining that a defendant may make a MTS in jurisdictions that follow *Wilder* without having to point to any specifics in the motion).

68. *See id.* at 5 (explaining how the prosecution was unaware of the evidence the defendant would try to suppress, and therefore the prosecution had to take extreme measures to make sure they were prepared for all contingencies).

69. *Id.*

70. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 123, at 1 (July, 8 1997).

71. *Id.*

72. *See* CAL. PENAL CODE §1538.5(f)(3) (amended by Chapter 279) (stating that the prosecutor must return his response to the defendant two days before preliminary hearing).

73. *Id.* §1538.5(f)(3) (amended by Chapter 279).

74. *See infra* notes 75-76 and accompanying text.

75. CAL. PENAL CODE §1538.5(f)(2) (amended by Chapter 279).

points and authorities; and (4) the defendant must show proof of service by the prosecution.[76] The first two requirements do not change existing law except to require that this information must always be in writing.[77] Therefore local districts that followed *Wilder* must now eliminate all oral MTS's made during the preliminary hearing because Chapter 279 overrules that case.[78] The second two requirements add to the procedural barriers defendants must contend with if they wish to make a MTS.[79] Some have argued that the addition of these barriers will deter overworked public defenders from making a MTS to protect their client.[80]

C. Misdemeanor Arrest Warrants and Chapter 279

In *People v. Ramey*,[81] the California Supreme Court held that the federal and California Constitution prohibits the arrest of a person within his home based on probable cause without a warrant.[82] The Court reasoned that the Fourth Amendment protects people from unreasonable searches of their homes.[83] This protection extends to arrests made within the home.[84] Therefore, an arrest based on probable cause made in a person's home without a warrant is a violation of that person's Fourth Amendment rights and is per se unreasonable.[85] A recent decision, *People v. Bittaker*,[86] affirmed the *Ramey* court's decision regarding felony arrests and has been interpreted as extending to misdemeanor arrests as well.[87]

The rulings in *Ramey* and *Bittaker* were codified in Penal Code section 813 for felony arrests and Penal Code section 817 for misdemeanor arrests.[88] Under existing law, felony arrest warrants made pursuant to Penal Code section 813 may not be served by a police officer after ten at night or before six in the morning.[89] The Legislature meant to apply the same time limitations to misdemeanor arrest

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76. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 1 (July 1, 1997); *see also* CAL. PENAL CODE § 1538.5(f)(2) (amended by Chapter 279) (requiring a MTS to be accompanied by a memorandum of points and authorities).

77. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 3 (July 1, 1997).

78. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 123, at 5 (Mar. 11, 1997) (stating that it was part of the author's intent to overrule the decision in *Wilder*).

79. *See supra* notes 76-77 and accompanying text (describing what is now required to be filed with a MTS).

80. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 123, at 4 (Mar. 11, 1997) (reporting that opposition to the bill believes it will create more of a burden for the courts).

81. 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976).

82. *Id.* at 265-66, 545 P.2d at 1340-41, 127 Cal. Rptr. at 636-37.

83. *Id.*

84. *Id.*

85. *Id.*

86. 48 Cal. 3d 1046, 774 P.2d 659, 259 Cal. Rptr. 630 (1989).

87. *Id.* at 1071, 774 P.2d at 671, 259 Cal. Rptr. at 642.

88. *See* 1995 Cal. Legis. Serv. Ch. 563, sec. 4, at 3449 (West) (enacting CAL. PENAL CODE § 817 and amending CAL. PENAL CODE § 813, § 826) (stating that Chapter 563 codified the ruling in *Bittaker*).

89. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 5 (July 1, 1997) (explaining how Penal Code §§ 836, 817 and 840 worked together).

warrants issued pursuant to Penal Code section 817.[90] However, because of the lack of clarity in Penal Code section 817, the time limitations have not been applied to misdemeanor arrests.[91]

The Legislature enacted Chapter 279 to clarify when misdemeanor arrest warrants issued pursuant to Penal Code section 817 may be served.[92] Chapter 279 makes it clear that misdemeanor arrest warrants issued under Penal Code section 817 must follow the guidelines for service described in Penal Code section 840.[93] Penal Code section 840 prohibits the serving of arrest warrants by police at a person's house between the hours of 10 p.m. and 6 a.m.[94] By enacting Chapter 279, the Legislature has cleared up an anomaly under prior law where misdemeanor arrest warrants based on probable cause could be served anytime day or night, but service of felony arrest warrants were restricted to specific hours.[95]

V. CONSTITUTIONAL ISSUES REGARDING IMPROPERLY SEIZED EVIDENCE

Chapter 279 makes it more difficult for the defendant to make a MTS. The defendant's ability to challenge evidence in this manner is important because evidence obtained by a state agency which was obtained by an improper invasion of privacy without due process may not be used in criminal prosecutions.[96] When the prosecution introduces evidence, the prosecution bears the burden of proving that the method that was used in obtaining evidence was justified.[97] However, unless the evidence is objected to by the defendant through a MTS, the prosecution does not have to meet this burden.[98] An exception to this rule exists when it is clearly evident that the evidence was obtained illegally.[99] Therefore, the ability to file a MTS is an important procedural safeguard for the defendant against the introduction of improperly seized evidence.

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90. *See id.* (stating that it was the Legislature's intent when drafting California Penal Code § 817 that the limitations of California Penal Code § 840 apply).

91. *Id.*

92. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 6 (July 1, 1997) (stating that judges in San Diego had voiced concern over how California Penal Code § 817 applied in misdemeanor situations).

93. *See* CAL. PENAL CODE § 817 (amended by Chapter 279) (stating clearly that misdemeanor arrest warrants were governed by California Penal Code § 840 in regards to the timing of service).

94. *Id.* § 840 (West 1997).

95. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 123, at 3 (July 1, 1997) (explaining that originally both California Penal Code § 817 and § 836 were supposed to have time limitations on when they may be served).

96. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961) (expounding the exclusionary rule which requires that the fruits of an illegal search may not be used as evidence).

97. *See Payton*, 445 U.S. at 582-83 (explaining that the burden of proof is on the prosecution).

98. *Wilder*, 92 Cal. App. 3d at 96-97, 154 Cal. Rptr. at 498.

99. *Id.*

One example of evidence that can be suppressed is evidence which is seized pursuant to a warrantless search of a private home.[100] Evidence seized in this manner is per se unconstitutional, unless there is an applicable exception for entering the house.[101] Furthermore, evidence found outside the scope of the police officer's search to secure the premises may also be a constitutional violation and therefore may be suppressed.[102]

In California, *Badillo v. Superior Court*[103] outlined who has the burden of proving that evidence obtained without a search warrant was the result of a justified search.[104] The court in *Badillo* placed the burden on the prosecution to show that reasonable cause or some other justification existed for the search and seizure.[105] Chapter 279 creates greater procedural barriers for the defendant in trying to suppress illegally obtained evidence.[106] However, it specifically states that it does not change the prosecution's need to prove that evidence which is objected to by the defendant by means of a MTS was not the fruit of an illegal search and seizure.[107] Under Chapter 279, the defendant still has an opportunity to suppress evidence before trial by making a written MTS prior to the Preliminary hearing or by requesting a continuance during the Preliminary hearing in order to file a MTS.[108] Therefore the defendant will be protected from tainted evidence being used against him.[109]

VI. CONCLUSION

Conflicting views in the courts as to the procedural requirements of filing a MTS under Penal Code section 1538.5 have led to inconsistent local court rules in California.[110] Jurisdictions that allow oral MTSs to be made by the defendant at the preliminary hearing or allow a defendant to file a MTS without accompanying points and authorities will have to change their policies. Chapter 279 rejects an oral MTS made during the preliminary hearing. It also eliminates the procedure of filing a MTS without accompanying points and authorities.[111] Chapter 279 states that it

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100. *Id.*

101. *See Payton*, 445 U.S. at 583 (stating that no arrest in one's home without a warrant is valid unless under exigent circumstances, such as if the arrest was made in hot pursuit).

102. *Id.* at 583.

103. 46 Cal. 2d 269, 294 P.2d 23 (1956).

104. *Id.* at 271, 294 P.2d at 26.

105. *See id.* at 271, 294 P.2d at 25 (supporting the notion that the prosecutor bears the burden of proving a search without an arrest warrant is invalid).

106. *See supra* note 75 and accompanying text.

107. *See* CAL. PENAL CODE §1538.5 (amended by Chapter 279) (stating that the statute does nothing to abridge the ruling of *Badillo*).

108. *Id.*

109. *Id.*

110. *See supra* notes 48-50 and accompanying text.

111. *See supra* notes 57-60 and accompanying text.

does not change the constitutional burden of proof requirements as set forth in *Badillo*.[112] However, Chapter 279 has been criticized as either requiring the defendant to guess at what evidence will be offered or having the preliminary hearing be subject to possibly numerous delays.[113]

Furthermore, Chapter 279 creates more work for defense attorneys who are no longer able to make a simple oral MTS at the preliminary hearing.[114] Since most criminal defense attorneys are overworked public defenders, the added procedural burden created by Chapter 279 may discourage some attorneys from making a MTS, even though it would be in his client's best interest.[115] In some cases a defendant may be prosecuted with evidence which otherwise would have been suppressed. The ability of the defendant to suppress evidence through a MTS is an important procedural safeguard.[116] This safeguard may be hindered by the added procedures imposed by Chapter 279. Nevertheless, because the defendant's right to make a MTS has not been changed, due process will not be violated merely because Chapter 279 creates more work for the defendant's attorney.

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112. *See supra* notes 77-79 and accompanying text.

113. *See supra* notes 77-79 and accompanying text.

114. *See supra* note 80 and accompanying text.

115. *See supra* note 80 and accompanying text.

116. *See supra* notes 96-98 and accompanying text (outlining the importance of a MTS to the defendants due process rights).

Getting Tough on Homeless Sex Offenders: Is the New Legislation a Hysterical Response or a Necessary Precaution?

Laura M. Rojas

Code Sections Affected
Penal Code § 290 (amended).
SB 882 (Schiff); 1997 STAT. Ch. 821

I. INTRODUCTION

We see it in the headlines all too frequently; another child sexually molested and often brutally murdered by a repeat sex offender. Names like Polly Klaas[1] and Megan Kanka[2] are reminders of all the ,other victims, too many to name, who have met the same fate.[3] The public is increasingly frustrated with a system that doesn't protect its children from the nightmare of sexual abuse.[4] New legislation dealing

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1. *See* Ellen Hale, *Stolen Children-Repeat Sex Offenders Prey on Children*, GANNETT NEWS SERV., Nov. 10, 1993 (copy on file with the *McGeorge Law Review*) (citing the Polly Klaas story, and noting the sympathy which captured the nation and fueled a campaign for stricter measures with respect to repeat offenders)

2. *See* 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 (discussing the tragedy of Megan Kanka, who was kidnaped, sexually assaulted, and murdered by a repeat offender). Megan's story inspired New Jersey's "Megan's Law," a version of which has been enacted in other states as well. *See, e.g.*, N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-11 (West 1996) (establishing registration and notification requirements for sex offenders in New Jersey).

3. *See* Shari P. Geller, *Zero Tolerance for Child Molesters and Sexual Predators: Why Do We Release Convicted Pedophiles So They Can Do It Again and Again? Make it a One-Strike Offense*, L.A. TIMES, Dec. 16, 1996, at B5 (describing the kidnap and murder of DeAnn Emerald Mu'min and Alicia Sybilla Jones)

4. *See Turning Point: The Revolving Door: When Sex Offenders Go Free*, (ABC television broadcast, Sept. 21, 1994) (copy on file with the *McGeorge Law Review*) (describing public opinion and the "Tennis Shoe Brigade" in Washington—a group dedicated to sex offense issues); *see also* Brian D. Crecente, *Candlelight Vigil to Mark Year Since Amber Abduction*, FORT WORTH STAR-TELEGRAM, Jan. 7, 1997, at 4 (describing the one-year anniversary of the abduction and murder of 9 year-old Amber Hagerman, and noting that the anniversary has spurred action by the Arglington group "People Against Sex Offenders"); Eric Harrison, *Tougher Sex-Crime Laws Spark Right-to-Know Flap Legislation: Backers Say Public Should Be Told About Offenders' Presence. Experts Fear More Harm Than Good*, L.A. TIMES, Feb. 18, 1997, at A1 (noting that a fed-up nation, fueled by fear and frustration with the rising tide of sex crimes committed against children, is lashing out with laws and punitive measures); Shawn Hubler, *"Pillowcase Rapist": Latest Catalyst For Anti-Crime Drives*, L.A. TIMES, Jan. 27, 1996, at 1 (asserting that the public outrage over highly publicized cases of child abuse, along with the fact that victims are more willing to report such attacks, has increased public fear that sex offenders, if freed, will attack again); Louise Slaughter, *Rep. Slaughter Calls on Congress to Protect Citizens from Violent Sex Offenders*, Government Press Release by Federal Document Clearing House, June 23, 1997 (copy on file with the *McGeorge Law Review*) (commenting that "people are fed up with a legal system that allows people, like five-time convicted sex offender Leroy Hendricks, to revolve in and out of prison repeating gruesome crimes in state after state").

with the registration of sex offenders, has been, and continues to be, enacted in many states in response to public furor.[5] However, even with the enactment of new legislation, according to law makers and law enforcement officials, there are flaws in the registration system which need to be corrected.[6] Chapter 821[7] is California's attempt to correct such a perceived flaw.

II. EXISTING LAW

Existing law requires a convicted sex offender to register for the rest of his[8] life with local law enforcement officials upon release from confinement.[9] The sex

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5. *See* Jan Hoffman, *New Law is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1 (noting that neighbors of a murdered girl in New Jersey, Megan Kanka, urged state legislators to pass new legislation, called Megan's Law, requiring community notification of the presence of sex offenders in the neighborhood); *see also* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C.A. § 14071 (West Supp. 1997) (requiring all states to implement laws concerning the registration of sex offenders or risk losing federal funds).

6. *See* Ivan Sciupac, *Megan's Law To Get Revisions: Legislators Hope to Fill in Cracks*, DAILY NEWS L.A., July 13, 1997, at N4 (noting that the current system is far from ideal and that legislators hope to fill in the cracks with legislation such as Chapter 821); *see also infra* notes 12-18 and accompanying text (describing the inaccurate results obtained by the Department of Justice and the Los Angeles Police Department when tracking registered sex offenders).

7. Chapter 821 amends California Code of Civil Procedure § 1279.5 and California Penal Code CODE §§ 243.4, 290, and 290.4 relating to sex offenders. This article will focus on the provision of Chapter 821, which amends California Penal Code § 290, relating to homeless sex offenders.

8. Use of the word "his" rather than a gender neutral term is due to the nature of the typical sex offender. According to a study by the National Institute of Health, a typical sex offender is male, begins molesting at the age of 15, molests an average of 117 children, and often seeks access to a child by legitimate means. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1254, at 2 (July 11, 1997).

9. *See* CAL. PENAL CODE § 647(d) (West Supp. 1997) (loitering about a toilet open to the public for the purpose of engaging or soliciting any lewd or lascivious or unlawful act); *id.* § 647.6 (West Supp. 1997) (molesting a child under the age of 18); *id.* § 314 (West 1988) (indecent exposure); *id.* § 311.2 (West Supp. 1997) (printing, exhibiting, distributing, exchanging, or possessing matter depicting sexual conduct by a minor); *id.* § 311.3 (West Supp. 1997) (sexual exploitation of a child); *id.* § 311.4 (West Supp. 1997) (employment of a minor to perform prohibited acts as described in § 311.2); *id.* § 290(a)(1) (West Supp. 1997) (requiring specific sex offenders to register with respective peace officers in the offender's area of domicile); *id.* § 290(a)(2) (West Supp. 1997) (listing the specific criminal violations that trigger the registration requirement); *id.* § 288 (West Supp. 1997) (lewd or lascivious acts with a child under the age of 14); *id.* § 288(a) (West Supp. 1997) (oral copulation); *id.* § 288.5 (West Supp. 1997) (continuous sexual abuse of a child); *id.* § 286 (West Supp. 1997) (sodomy); *id.* § 285 (West 1988) (incest); *id.* § 267 (West 1988) (abduction of a person under the age of 18 for purpose of prostitution); *id.* § 266 (West 1988) (procuring a female for prostitution); *id.* § 266(j) (West 1988) (procuring a child under the age of 16 for lewd and lascivious acts); *id.* § 264.1 (West Supp. 1997) (rape or penetration of genital or anal openings); *id.* § 261 (West Supp. 1997) (rape); *id.* § 243.4 (West Supp. 1997) (sexual battery); *id.* § 220 (West 1988) (assault to commit rape, sodomy, oral copulation, rape in concert with another, lascivious acts upon a child, or penetration of genitals or anus with a foreign object); *id.* § 208(d) (West Supp. 1997) (kidnaping with intent to commit rape, oral copulation, sodomy, or rape by instrument).

offender must update the registration information annually, or within five working days of entering a municipality.[10] Failure to register is a crime.[11]

However, due to the transient nature of sex offenders,[12] law enforcement officials often find that they are not in possession of current information regarding sex offenders.[13] In 1995, the State Department of Justice sent postcards to the addresses it had for all registered sex offenders in order to remind them of the registration requirements.[14] Twenty percent of all of the postcards sent out statewide were returned as undeliverable, leading officials to conclude that they had lost track of one-fifth of the sex-offenders.[15] This was not an isolated incident.[16] In Los Angeles, the police department has approximately 3,200 registered sex offenders on the books,[17] but according to state prison release information and other public records, the actual number of sex offenders in the Los Angeles area is closer to 8,100.[18]

Homeless sex offenders pose a special problem under the current registration system because they have no residence address to change when they move. The current registration system requires sex offenders to register if they plan to be in a municipality for five days or more.[19] Therefore, although homeless sex offenders

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10. *Id.* § 290(a)(1) (West Supp. 1997) (requiring that a person required to register shall register within five working days of coming into any city or county in which he or she resides for that length of time).

11. *See id.* § 290(g)(3) (West Supp. 1997) (providing that failure to register is a felony if the underlying crime was a felony).

12. *See* Nicholas Riccardi & Jeff Leeds, *Many Sex Offenders Not at Registered Addresses*, L.A. TIMES, July 12, 1997, at A1 (noting the vast discrepancy between the number of listed sex offenders and the number of sex offenders law enforcement officials are able to find, and characterizing sex offenders as "notoriously mobile and elusive").

13. *See id.* (identifying an enormous error rate of approximately 70% in the registration system in the Los Angeles County sheriff's department; an estimated two-thirds of the county's high-risk sex offenders were not at their registered addresses).

14. *See* Jeff Leeds & Nicholas Riccardi, *Many Molesters' Addresses are Unknown Officials Say*, L.A. TIMES, Jan. 30, 1997, at A1 [hereinafter *Molesters' Addresses Unknown*] (quoting an official in charge of the Los Angeles Police Department's data base as saying that the system is a complete nightmare, and that sex offenders can pretty much go wherever they want); *see also* Thao Hua, *In Orange County, A Third of Book's Pedophiles Live in Anaheim*, L.A. TIMES, Feb. 22, 1996, at B1 (stating that when sex offenders are released from jail, they're allowed to use the parole or probation address as their address until they get settled, and some sex offenders never change the address).

15. *Molesters' Addresses Unknown, supra* note 14, at A1.

16. *See* Kenneth Reich, *Many Simply Ignore Law: Sex Offender Registration Not Working, Experts Say*, L.A. TIMES, Aug. 8, 1986, at 1 (describing how thousands of people required to register are not doing so and many more thousands who have registered at least once are not notifying the authorities when they move). The Los Angeles Police Department stopped even trying to contact by mail those released sex offenders for whom it had received notices from state institutions of requirements to register and who did not appear voluntarily. *Id.*

17. *Molesters' Addresses Unknown, supra* note 14, at A1.

18. *Id.*

19. *See* Steve Ryfle & Efrain Hernandez Jr., *Sex Offender, Suspected in Burbank Rape, Hangs Himself in Jail*, L.A. TIMES, Jan. 16, 1997, at B4 (describing the suicide of a 28-year old transient who was arrested for raping an 11-year old girl in California while on parole in Oregon for sexually abusing a 5-year old girl, and asserting that sex offender registration may need to be made stricter for transients); *see also supra* notes 9-11 and accompanying text (discussing the requirements of California Penal Code § 290 that sex offenders register annually, or within five

may move more than 100 times in a year, if they don't plan to stay in a municipality for at least five days, they are only required to register once a year.[20] Law enforcement officials acknowledge that sex offenders in the data base are "here today and gone tomorrow," and note that keeping track of the homeless sex offenders is very difficult.[21] Chapter 821 attempts to make the tracking of homeless sex offenders easier by requiring more frequent registration.

III. NEW LAW

Chapter 821 requires registrants with no residence address to update their registration no less than once every ninety days on a Department of Justice form.[22] This requirement is in addition to the requirement to register within five working days of coming into any city or county in which the person temporarily resides.[23] A registrant with no residence address must register within five working days from the date of his birthday.[24] A registrant who fails to register is guilty of a misdemeanor, punishable by up to six months in a county jail.[25]

Does Chapter 821 help law enforcement by keeping track of hard to find people who may have committed another crime, or is it an unnecessary restriction which imposes an additional burden on a class of individuals based solely on their lack of a residence?

IV. CONSTITUTIONAL ISSUES CONCERNING CHAPTER 821

Additional registration requirements pose potential constitutional problems.[26] Opponents of Chapter 821 contend that it tramples the civil liberties of individuals who have already paid their debt to society and imposes an additional burden on a class of individuals based solely on their lack of a residence.[27]

Additionally, studies determining the recidivism rates for sex offenders are inconsistent.[28] Some statistics show that sex offenders have a lower recidivism rate

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days of moving to a new address).

20. *See* Ryfle & Hernandez, *supra* note 19 (quoting the author of Chapter 821 as stating there is "a hole that needs to be plugged" to prevent transients from moving over 100 times in a year and only registering once).

21. *See* Riccardi & Leeds, *supra* note 12, at A1 (quoting a Los Angeles County Sheriff Lieutenant who also described the sex offenders in the database as living in their cars).

22. CAL. PENAL CODE § 290(g)(5) (amended by Chapter 821).

23. *Id.* (a)(1) (West Supp.1997).

24. *Id.* (a)(1)(C) (amended by Chapter 821).

25. *Id.* (a)(1)(B) (amended by Chapter 821).

26. *See infra* notes 31-101 and accompanying text (noting potential problems concerning cruel and unusual punishment, equal protection, and ex post facto issues).

27. *See* Hubler, *supra* note 4, at 1 (quoting Mary Broderick of the California Attorneys for Criminal Justice as saying that when somebody has served their time, that should be it).

28. *See* Diane Brady, *Radical Treatment: A Special Program in Manitoba Seeks to Put Sex Offenders Back in Society*, MACLEAN'S, Apr. 26, 1993, at 38 (showing recidivism rates as low as 20%); *see also* Robert E. Freeman-Longo & Ronald V. Wall, *Changing a Lifetime of Sexual Crime: Can Sex Offenders Ever Alter Their Ways? Special*

than do persons convicted of crimes against property.[29] There are also many types of sex offenders, some more likely than others to repeat sex crimes, which complicates any study of recidivism rates among sex offenders.[30] Imposing additional registration requirements when there is little danger to society may amount to cruel and unusual punishment.

A. Cruel and Unusual Punishment

The California Supreme Court has held that the sex offender registration compelled by California Penal Code section 290 is a form of punishment.[31] The court also has held that a punishment may be excessive and therefore unconstitutional, not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed.[32] In determining whether the punishment is disproportionate to the offense, an analysis using the *Lynch* test is necessary.[33] The *Lynch* test involves three factors: (1) a consideration of the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society;[34] (2) a comparison of the challenged penalty with penalties imposed in the same jurisdiction for more serious crimes;[35] and (3) a comparison of the challenged penalty with penalties imposed for the same offense in other jurisdictions.[36]

Treatment Programs Provide Some Hope, PSYCHOL. TODAY, Mar. 1986, at 58 (estimating a recidivism rate of up to 80%); Andrew Vaches, *Sex Predators They Can't Be Saved, So What Should We Do?*, DALLAS MORNING NEWS, Jan. 10, 1993, at J5 (citing a Minnesota study which found that rapists and child molesters who completed psychiatric treatment were arrested more often for new sex crimes than those who had not been treated at all).

29. *See* Franklin E. Zimring, *The Truth About Repeat Sex Offenders*, L.A. TIMES, May 5, 1997, at B5 (comparing recidivism rates for those convicted of lewd conduct with those convicted of burglary and robbery).

30. *See Treatment For Sex Offenders*, SACRAMENTO BEE, Dec. 9, 1991, at B14 (noting the various histories of sex offenders such as pedophilia, exhibitionism, voyeurism or dirty phone calls, and sexual assault); *see also* Hoffman, *supra* note 5, at B1 (explaining the difficulty of casting all sex offenders in the same category).

31. *See In Re Reed*, 33 Cal. 3d 914, 922, 663 P.2d 216, 220, 191 Cal. Rptr. 658, 662 (1983) (holding that mandatory registration of sex offenders convicted under misdemeanor disorderly conduct statute is punishment, that in this instance violated cruel and unusual punishment provision of the California Constitution).

32. *See In Re Lynch*, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972) (concluding that "in California a punishment may violate article I, section 6, of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity").

33. *See id.* at 425-27, 503 P.2d at 930-32, 105 Cal. Rptr. at 226-28 (1972) (finding that the life sentence prescribed for a second offense of indecent exposure was so disproportionate to the crime as to violate the cruel or unusual punishment clause of the California Constitution).

34. *Id.* at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226.

35. *Id.* at 426, 503 P.2d at 931, 105 Cal Rptr. at 227.

36. *Id.* at 427, 503 P.2d at 932, 105 Cal. Rptr. at 228.

1. Nature Of Offense and Degree of Danger To Society

In looking at the nature of the offense, a determination must be made concerning the severity of the offense for which a person can be convicted.[37] The California Supreme Court has considered the lifetime registration penalty as it applies to various offenses. The court has held that requiring registration under California Penal Code section 290 for persons convicted of California Penal Code section 647(a)[38] misdemeanors (lewd or dissolute conduct) constitutes cruel and unusual punishment.[39] The court has held likewise for persons convicted under Penal Code section 314, subdivision 1 misdemeanors (indecent exposure).[40] In both instances, the court found the offenses to be relatively minor in nature.[41]

Because victims of sexual abuse are often children, because sex offenders tend to be former victims of molestation themselves, and because the average sex offender molests multiple times, a sex offense poses a high degree of danger to society.[42] Therefore, under the first factor of the *Lynch* test, the degree of danger to society, the ninety day registration update requirement is likely not cruel and unusual punishment.

2. Comparison of the Challenged Penalty with Penalties Imposed in the Same Jurisdiction for More Serious Crimes

The basis for the second factor in the *Lynch* test is the assumption that the Legislature, while occasionally responding to public emotion, will, for the most part, act with proper consideration of constitutional limits in establishing penalties for various offenses.[43] The penalties established by the Legislature will illustrate the constitutionally permissible degrees of severity.[44] If, in reviewing the penalties, more serious crimes are punished less severely than the offense in question, the challenged penalty is suspect.[45]

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37. *See In Re King*, 157 Cal. App. 3d 556, 557, 204 Cal. Rptr. 39, 40 (1984) (holding that California Penal Code § 290, a sex offender registration statute for indecent exposure, is unconstitutional as cruel and unusual punishment).

38. CAL. PENAL CODE § 647(a) (West 1996) (prohibiting lewd or dissolute conduct).

39. *In re Reed*, 33 Cal. 3d at 926, 663 P.2d at 222, 191 Cal. Rptr. at 667.

40. *In re King*, 157 Cal. App. 3d at 558, 204 Cal. Rptr. at 41; *see* CAL. PENAL CODE § 314.1 (West 1996) (prohibiting indecent exposure).

41. *See King*, 157 Cal. App. 3d at 558, 204 Cal. Rptr. at 40 (noting that the commission of the offense invariably entails no physical aggression or even contact); *see also In re Reed*, 33 Cal. 3d at 923, 663 P.2d at 220, 191 Cal. Rptr. at 663 (noting that the sexual overture in the case was by no means violent or dangerous and no one need be victimized in the traditional criminal sense).

42. *See supra* note 8 and accompanying text (describing a study by the National Institute of Health which found that the typical sex offender molests an average of 117 children).

43. *See In re Lynch*, 8 Cal. 3d at 426, 503 P.2d at 931, 105 Cal. Rptr. at 227 (detailing the second factor used in determining whether a challenged penalty is considered cruel and unusual).

44. *Id.*

45. *Id.*

Violation of the registration update required by Chapter 821 results in a misdemeanor punishable by six months in jail.[46] Currently, failure to register as a sex offender is considered a felony if the underlying crime is a felony.[47] Because the resulting penalty is less severe under Chapter 821 (misdemeanor as opposed to felony), it is unlikely that the ninety day registration update requirement will be suspect under the second factor in the *Lynch* test.

3. *Comparison of the Challenged Penalty with Penalties Imposed for the Same Offense in Other Jurisdictions*

The basis for the third factor in the *Lynch* test is similar to the reasoning for the second factor. The assumption is that the vast majority of jurisdictions will have enacted statutes that are within the constitutional limit of severity.[48] If the challenged penalty exceeds the penalty imposed by a significant number of other jurisdictions, the disparity is an indicator of excessiveness, and the challenged penalty is suspect.[49]

Currently, although all states have enacted lifetime registration for sex offenders, no other state requires a ninety day registration update for transient sex offenders.[50] However, there are five states that require a ninety day registration

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46. CAL. PENAL CODE § 290(a)(1) (amended by Chapter 821).

47. *See id.* § 290(g)(3) (West Supp. 1997) (providing that any person required to register based on a felony conviction who willfully violates the registration provision, upon each subsequent conviction, shall be guilty of a felony punishable in the state prison for 16 months or two or three years).

48. *See Lynch*, 8 Cal. 3d. at 427, 503 P.2d. at 932, 105 Cal. Rptr. at 228 (explaining the third technique used to determine whether a challenged penalty constitutes cruel and unusual punishment).

49. *Id.*

50. *See* ALA. CODE §§ 13A-11-200 to 13A-11-203 (1994) (requiring an initial registration requirement, but lacking an additional registration update requirement for homeless sex offenders); ALASKA STAT. §§ 12.63.010 to 12.63.020 (Michie 1995) (requiring an annual registration update, but lacking additional registration update requirement for homeless sex offenders); ARIZ. REV. STAT. ANN. §§ 13-3821 to 13-3825 (West Supp. 1996) (requiring an initial registration and requiring that an identification card be obtained from the motor vehicles division after every 3 years, but lacking additional registration update requirement for homeless sex offenders); ARK. CODE ANN. §§ 12-12-901 to 12-12-909 (Michie 1995) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); COLO. REV. STAT. § 18-3-412.5 (1997) (lacking an additional registration update requirement for homeless sex offenders, but requiring registration each time a sex offender changes a temporary or permanent address, regardless of whether the address is within the same jurisdiction); CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1997) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); DEL. CODE ANN. tit. 11, § 4120 (1995 & Supp. 1996) (same); FLA. STAT. ANN. § 775.21 (West Supp. 1997) (same); GA. CODE ANN. § 42-1-12 (1997) (same); HAW. REV. STAT. §§ 707 to 743 (Supp. 1995) (same); IDAHO CODE § 18-8301 to 18-8311 (1997) (same); 730 ILL. COMP. STAT. ANN. 150/3 to 150/10 (West 1992) (same); IND. CODE ANN. § 5-2-12-1 to 5-2-12-13 (West Supp. 1996) (same); IOWA CODE ANN. §§ 692A.1 to 629.A.15 (West Supp. 1997) (requiring an initial registration requirement, requiring a verification of address every three months for sexually violent predators, but lacking additional registration update requirement for homeless sex offenders); KAN. STAT. ANN. §§ 22-4901 to 22-4910 (1995) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); KY. REV. STAT. ANN. §§ 17.500 to 17.540 (Baldwin 1996) (same); LA. REV. STAT. ANN. §§ 15:542 to 15:549 (West Supp. 1997) (same); ME. REV. STAT. ANN. tit. 34, §§ 11101 to 11144 (West Supp.1996) (same); MD. CODE ANN., CRIMES & PUNISHMENT § 792 (1996) (same); MASS. GEN. LAWS ANN. ch. 6,

update for sexually violent predators.[51] The key question is whether the danger involved in not being able to track sexually violent predators is similar to the danger involved in not being able to track homeless sex offenders. To date, there have not been any studies indicating what percentage of sex offenders are homeless, although

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§§ 178C to 178O (West Supp. 1997) (same); MICH. COMP. LAWS. ANN. §§ 28-721 to 28-730 (West Supp.1997) (same); MINN. STAT. § 243.166 (West Supp.1997) (same); MISS. CODE ANN. §§ 45-33-1 to 45-33-19 (Supp. 1996) (same); MO. ANN. STAT. §§ 566.600 to 566.625 (West Supp. 1997) (same); MONT. CODE ANN. §§ 46-23-502 to 46-23-508 (1995) (same); NEB. REV. STAT. §§ 29-4001 to 29-4013 (Supp. 1996) (requiring an initial registration requirement, annual verification, verification every three months for a sexually violent offender, but lacking additional registration update requirement for homeless sex offenders); NEV. REV. STAT. ANN. §§ 207.151 to 207.157 (Michie 1997) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); N.H. REV. STAT. ANN. §§ 632-A:11 to 632-A:21 (1996) (same); N.J. STAT. ANN. § 2C:7-2 (West Supp. 1997) (requiring an initial registration requirement, annual verification, but lacking additional registration update requirement for homeless sex offenders); N.M. STAT. ANN. §§ 29-11A-1 to 29-11A-8 (Michie Supp. 1997) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); N.Y. CORRECT. LAW §§ 168a to 168s (McKinney Supp. 1997) (requiring an initial registration requirement, annual update, but lacking additional registration update requirement for homeless sex offenders); N.C. GEN. STAT. §§ 14-208.5 to 14-208.11 (Supp. 1996) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995) (same); OHIO REV. CODE ANN. §§ 2950.01 to 2950.08 (Anderson 1996) (same); OKLA. STAT. ANN. tit. 57, §§ 581 to 587 (West Supp. 1997) (same); OR. REV. STAT. §§ 181.515 to 181.519 (1989) (same); 42 PA. CONS. STAT. ANN. §§ 9791 to 9798 (West Supp. 1997) (requiring an initial registration requirement, annual verification, verification of sexually violent predators every ninety days, but lacking additional registration update requirement for homeless sex offenders); R.I. GEN. LAWS. §§ 11-37.1-1 to 11-37.1-19 (Supp. 1996) (requiring an initial registration requirement, annual registration, quarterly verification for sexually violent predators, quarterly verification for first 2 years, but lacking additional registration update requirement for homeless sex offenders); S.C. CODE ANN. §§ 23-3-400 to 23-3-490 (Law. Co-op. Supp. 1996) (requiring an initial registration requirement, annual registration, but lacking additional registration update requirement for homeless sex offenders); S.D. CODIFIED LAWS §§ 22-22-31 to 22-22-42 (Michie Supp. 1997) (requiring an initial registration requirement, annual registration, but lacking additional registration update requirement for homeless sex offenders); TENN. CODE ANN. §§ 40-39-101 to 40-39-108 (Supp. 1996) (requiring an initial registration requirement, ninety day verification by the Tennessee Bureau of Investigation, but lacking additional registration update for homeless sex offenders); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1997) (requiring an initial registration requirement, and requiring a person who does not have a residence address within 7 days to provide the address of the temporary residence and to report to a supervising officer not less than twice a week for as long as the person is not at their intended address); UTAH CODE ANN. § 77-27-21.5 (Supp. 1997) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); VT. STAT. ANN. tit. 13, §§ 5401 to 5413 (Supp. 1996) (requiring an initial registration requirement, annual registration, update every ninety days for sexually violent predators, but lacking additional registration update requirement for homeless sex offenders); VA. CODE ANN. §§ 19.2-298.1 to 19.2-298.4 (Michie Supp. 1997) (requiring an initial registration requirement, annual registration, but lacking additional registration update requirement for homeless sex offenders); WASH. REV. CODE ANN. §§ 9A.44.130 to 9A.44.140 (West Supp. 1997) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); W. VA. CODE §§ 61-8F-1 to 61-8F-9 (Supp. 1996) (requiring an initial registration requirement, but lacking additional registration update requirement for homeless sex offenders); WIS. STAT. ANN. § 175.45 (West Supp. 1996) (requiring an initial registration requirement, annual registration, but lacking additional registration update requirement for homeless sex offenders); WYO. STAT. ANN. §§ 7-19-301 to 7-19-306 (Michie 1997) (same).

51. IOWA CODE ANN. § 692A.1-.15 (West Supp. 1997); NEB. REV. STAT. ANN. § 29-4001-13 (Supp. 1996); 42 PA. CONS. STAT. ANN. §§ 9791 to 9798 (Supp. 1997); R.I. GEN. LAWS §§ 11-37.1 to 11-37.1-19 (Supp. 1996); VT. STAT. ANN. tit. 13, §§ 5401 to 5413 (Supp. 1996).

law enforcement officials indicate that a large percentage of sex offenders on the data base are transient and difficult to track.[52]

In addition to the statutes requiring more frequent registration updates for sexually violent predators, Tennessee requires verification every ninety days,[53] and Texas requires registrants with no permanent address to report to a law enforcement official at least twice a week.[54] These statutory requirements indicate that Tennessee and Texas realize frequent verification of certain sex offenders is necessary.

Because no other state currently requires a ninety day registration update for homeless sex offenders, and only a significant minority[55] recognize the frequent verification necessity for any type of sex offender, an analysis of other jurisdictions would therefore indicate that under the third factor of the *Lynch* test, the ninety day registration update requirement of Chapter 821 may be suspect.

Although the ninety day registration update may be suspect under the third factor of the *Lynch* test because the large majority of states do not impose a similar registration update requirement on homeless sex offenders, the balancing of the *Lynch* factors indicates that Chapter 821 is likely to withstand a constitutional challenge based on cruel and unusual punishment. The danger sex offenders present to society has been recognized, both at the federal and state levels, by the passage of legislation requiring registration.[56] Because transient sex offenders pose a unique problem,[57] it is likely that this danger to society will be considered significant enough to justify a ninety day registration update requirement with a misdemeanor penalty for failure to do so.

4. Legislative Domain

In addition to the *Lynch* test, opponents face a considerable burden in challenging a penalty as cruel and unusual.[58] The doctrine of separation of powers cautions courts to tread lightly when approaching matters within the province of the

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52. *See supra* note 12 and accompanying text (describing the transient nature of sex offenders).

53. TENN. CODE ANN. §§ 40-39-101 to 40-39-108 (Supp. 1996).

54. TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1997).

55. *See supra* notes 50-54 and accompanying text (illustrating the various requirements for sex offenders in the different states).

56. *See* CAL. PENAL CODE § 290(a)(1) (West Supp. 1997) (providing for lifetime registration for certain sex-offenders); *see also supra* note 7 and accompanying text (discussing Megan's Law and federal legislation requiring registration for sexually violent offenders); *supra* note 50 (listing state statutes requiring registration of sex-offenders).

57. *See supra* notes 12-18 and accompanying text (describing the problems experienced by law enforcement agencies in trying to keep track of homeless/transient sex offenders).

58. *See* People v. Wingo, 14 Cal. 3d 169, 174, 534 P.2d 1001, 1006, 121 Cal. Rptr. 97, 102 (1975) (holding that when a defendant convicted under a section encompassing a wide range of conduct challenges a statute as imposing cruel or unusual punishment, judicial review must await an initial determination by the Adult Authority of the proper term in the individual case, or conduct will be measured against the statutory maximum, and also emphasizing that a considerable burden rests on a defendant who challenges a penalty as cruel and unusual).

Legislature.[59] The province of the legislature includes such matters as the definition of crime and the determination of punishment.[60] The legislature is therefore given broad discretion when enacting penal statutes and specifying appropriate punishments.[61] Statutes must be upheld unless they are clearly unconstitutional.[62]

Because the legislature is entrusted with enacting penal statutes and specifying penalties, and the courts will not void such statutes unless they are clearly unconstitutional, it is unlikely that the California Supreme Court will invalidate Chapter 821 as a form of cruel and unusual punishment.

B. Equal Protection

Both the Federal Constitution and the California Constitution require equal protection of the laws for all persons.[63] These constitutional provisions guarantee that people who are similarly situated will be treated similarly under the law.[64] Typically, only race, gender and legitimacy classifications are afforded heightened scrutiny.[65] By default, other social classifications are afforded a "rational basis" scrutiny.[66]

The classification at issue here is homeless sex offenders. Since homeless sex offenders are a group not afforded heightened scrutiny, rational basis scrutiny applies. The rational basis test allows a statute to single out a class for distinctive treatment only if that classification bears a rational relationship to a legitimate governmental purpose.[67]

Protecting society from sex offenders falls within the police powers of the government and can hardly be argued as anything other than a legitimate governmental purpose. The author of Chapter 821 estimates that there are approximately

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59. *See id.* (noting that the doctrine of separation of powers is firmly entrenched in the law of California); *see also* People v. Mills, 81 Cal. App. 3d 171, 176-77, 146 Cal. Rptr. 411, 414 (same).

60. *See Mills,* 8 Cal. App. 3d. at 177, 146 Cal. Rptr. at 414 (commenting that the choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will).

61. *See In re Lynch,* 8 Cal. 3d at 414, 503 P.2d at 922, 105 Cal. Rptr. at 218 (adding that the determination of whether a legislatively prescribed punishment is constitutionally excessive is not a duty which the courts eagerly assume or lightly discharge).

62. *Id.* at 415, 503 P.2d at 922, 105 Cal. Rptr. at 219.

63. *See* U.S. CONST., amend. XIV (providing that no state shall deny to any person within its jurisdiction the equal protection of the laws); *see also* CAL. CONST., art. I, § 7 (same).

64. *See* Britt v. City of Pomona, 223 Cal. App. 3d 265, 274, 272 Cal. Rptr. 724, 729 (1990) (setting out the equal protection provisions in an examination of the constitutionality of a transient occupancy tax).

65. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (declaring that race-based affirmative action plans are subject to strict scrutiny); *see also* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 451 (1988) (noting that heightened scrutiny standard of review "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy").

66. *See* Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) (stating that a rational basis test is used if a classification "neither burdens a fundamental right nor targets a suspect class").

67. *Id.*

900 individuals identified as homeless sex offenders.[68] Law enforcement officials claim that annual registration does not work for transients, because they may move more than 100 times in a year, making it difficult for police to find them.[69] Chapter 821 addresses this problem by requiring transient sex offenders to update their registration every ninety days.[70] This would seem to indicate the existence of a rational relationship between the distinctive treatment of sex offenders without a residence and the legitimate governmental purpose of protecting society from repeat sex offenders by keeping track of prior sex offenders. Therefore, Chapter 821 will likely withstand a constitutional challenge based on equal protection.

C. Ex Post Facto Issues

An ex post facto law is prohibited under both the Federal Constitution[71] and the California Constitution.[72] A law violates the ex post facto clause only if it is a law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.[73]

In order to determine whether Chapter 821 changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed, a determination must be made as to whether Chapter 821 is applied retrospectively.[74] A law is retrospective if it "changes the legal consequences of acts completed before its effective date."[75] The legislature provided that the registration update requirements of Chapter 821 apply to homeless sex offenders who would otherwise be required to register, regardless of the date of the offense.[76] Since Chapter 821 imposes new registration update requirements that were not required when the homeless sex offender committed the sex offense, a retrospective application of Chapter 821 is possible.

The United States Supreme Court established the framework for ex post facto analysis, which is known as the "*Calder* categories."[77] Applying the *Calder* cate-

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68. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 882, July 1, 1997, at 2 (noting the author's claim that Chapter 821 is a modest effort to track approximately 900 individuals who relocate numerous times between their annual registrations).

69. *See* Ryfle & Hernandez, *supra* note 19 (describing the difficulty in tracking transient sex offenders).

70. CAL. PENAL CODE § 290 (a)(1)(B) (amended by Chapter 821).

71. *See* U.S. CONST., art. 1, § 9 (providing that no ex post facto law be passed).

72. *See* CAL. CONST., art. I, §10 (specifying that an ex post facto law may not be passed).

73. *Id.*

74. *See Collins*, 497 U.S. at 40-41.

75. *See* Miller v. Florida, 482 U.S. 423, 430 (1987) (holding that amended sentencing guidelines, applied to crimes which occurred before the effective date of the guidelines, were in violation of the ex post facto clause).

76. *See* CAL. PENAL CODE § 290(a)(1)(B) (enacted by Chapter 821) (providing that if a person who is registering has no residence address, he or she must update his or her registration no less than once every ninety days in addition to the annual registration requirement).

77. *See* Calder v. Bull, 3 U.S. (3 Dallas) 386, 390 (1798) (listing ex post facto laws within the meaning of the U.S. Constitution prohibition).

gories, the United States Supreme Court in *Collins v. Youngblood*[78] summarized that a law violates the ex post facto clause if it "punishes as a crime an act previously committed which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to the law at the time the act was committed . . . ."[79]

The second *Calder* factor which pertains to making the punishment for a crime more burdensome after the completion of the crime is the only factor relevant to this analysis. Chapter 821 increases the burden of registration by requiring a homeless sex offender to register every ninety days.[80] The critical issue then, is whether the ninety day registration requirement of Chapter 821 constitutes an increased punishment prohibited by the State and federal Constitutions.

To determine whether a law constitutes an increased punishment prohibited by the State and federal Constitutions, an analysis must be made to determine if the law is intended to punish an offender for a past act, or whether the restriction on the individual is "a relevant incident to a regulation of a present situation." Absent conclusive evidence of legislative intent as to the penal nature of a statute, an analysis based on the *Mendoza-Martinez* factors[81] is necessary.[82]

The *Mendoza-Martinez* factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[83] These factors may often point in different directions,[84] and must be

78. 497 U.S. 37 (1990); *see id.* at 52 (holding that a Texas statute allowing reformation of improper verdicts was not prohibited by the ex post facto clause).

79. *Id.* at 42-43.

80. CAL. PENAL CODE § 290(g) (amended by Chapter 821).

81. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (finding that statutes divesting an American of his citizenship for leaving or remaining outside the U.S. for purposes of evading military service are unconstitutional without affording procedural safeguards guaranteed by the Constitution).

82. *See In re Reed*, 33 Cal.3d at 920-23, 663 P.2d at 218-20, 191 Cal. Rptr. at 660-62 (applying *Mendoza-Martinez* factors).

83. *See Kennedy*, 372 U.S. at 168-69 (listing the factors traditionally used to determine whether an Act of Congress is penal or regulatory in character).

84. *Id.*

considered in relation to the statute on its face.[85] The task is not simply to count the factors on each side, but to weigh them.[86]

1. Affirmative Disability or Restraint

Chapter 821 requires a registration update every ninety days for transient sex offenders, which is not currently required for sex offender registration.[87] Because the update imposes an additional requirement, it can be considered an affirmative disability or restraint.

2. Historically Regarded as Punishment

Governments often use varying methods of registration as a way for law enforcement agencies to have easy access to necessary information.[88] However, the California Supreme Court held that lifetime registration is a form of punishment in *In re Reed*.[89] Because the lifetime registration requirement has been considered punishment, and the ninety day registration update requirement is an additional method of lifetime registration, it is likely that the update requirement of Chapter 821 would also be considered punishment.

3. Finding of Scienter

Because the registration requirement is dependent upon the conviction of underlying crimes,[90] there will necessarily be a finding of scienter.

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85. *Id.*; *see also In re Reed*, 33 Cal. 3d at 920-22, 663 P.2d at 218-20, 191 Cal. Rptr. at 660-62 (using *Mendoza-Martinez* factors in determining whether misdemeanor lewd or dissolute conduct constituted cruel and unusual punishment).

86. *See* State v. Noble, 829 P.2d 1217, 1217 (Ariz. 1992) (holding that Arizona's sex offender registration statute, ARIZ. REV. STAT. ANN. § 13-8321, is regulatory in nature and not an unconstitutional ex post facto law when applied to defendants convicted after the enactment of the statute for offenses predating the enactment of the statute).

87. *See* CAL. PENAL CODE § 290(a)(1)(B) (enacted by Chapter 821) (providing that if a person who is registering has no residence address, he or she must update his or her registration no less than once every ninety days in addition to the annual registration requirement).

88. *Manning*, 532 N.W. 2d at 248.

89. 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983); *see supra* note 31 and accompanying text (noting that the California Supreme Court held that lifetime registration for sex offenders constitutes a form of punishment in determining whether lifetime registration constituted cruel and unusual punishment).

90. *See supra* note 9 (listing the various offenses which trigger the requirement to register under California Penal Code § 290).

4. Promote Traditional Aims of Punishment

This factor examines whether the law promotes the traditional function of punishment—either retribution or deterrence.[91] Although requiring a homeless sex offender to update his registration information can be viewed as an additional burden on the sex offender, it does not seem to qualify as retribution. The purpose of the requirement is more likely to be considered a means of aiding law enforcement in tracking homeless sex offenders than it is to be considered as punishing the sex offender.

However, an argument can be made that a more frequent registration requirement is a form of deterrence, because a registered sex offender is less likely to commit a crime if police can ascertain his whereabouts. On the other hand, an offender may be deterred by the conviction and punishment he has already received, whether he is required to register or not.[92] Therefore, although deterrence may be possible, such deterrence can be considered *de minimus*,[93] and is secondary to the main goal of aiding law enforcement.

5. Behavior Already a Crime

Because the registration requirement is dependent upon the conviction of an underlying crime, there will necessarily be a finding that the behavior is already a crime.

6. Alternative Purpose

The courts of other states have consistently found that registration of sex offenders serves a regulatory purpose.[94] Similarly, California has held that the fundamental legislative purpose of Penal Code section 290 is to assure that persons convicted of sex crimes shall be readily available for police surveillance at all times.[95] This purpose of aiding law enforcement can be considered an alternative purpose to punishing a registrant for past crimes.

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91. *Manning*, 532 N.W. 2d at 248.

92. *See* State v. Ward, 869 P.2d 1062, 1073 (Wash. 1994) (holding that Washington's statute requiring convicted felony sex offenders to register was not an unconstitutional ex post facto law, as applied to defendants convicted of felony sex offenses prior to the statute's effective date).

93. *See* State v. Costello, 643 A.2d. 531, 533 (N.H. 1994) (noting that any punitive effect of the sex offender registration statute was *de minimus*).

94. *See Manning*, 532 N.W.2d at 244 (upholding Minnesota's sex offender registration statute); *see also Noble*, 829 P.2d 1217, 1217 (Ariz. 1992) (upholding Arizona's sex offender registration statute); *Costello*, 643 A.2d at 531 (validating New Hampshire's sex offender registration statute); People v. Starnes, 653 N.E.2d 4 (Ill. 1995) (affirming Illinois' sex offender registration statute); *Ward*, 869 P.2d at 1062 (upholding Washington's sex offender registration statute).

95. Kelly v. Municipal Court, 160 Cal. App. 2d 38, 45, 324 P.2d 990, 994 (1958).

7. Is Chapter 821 Excessive in Relation to the Alternative Purpose?

The Legislature may prescribe laws to promote the health, safety, and general welfare of the people of California.[96] Broad discretion is thus vested in the Legislature to determine what the public interest demands under particular circumstances.

Will requiring homeless sex offenders to update their registration every ninety days result in individuals being life-long suspects? Even though registered sex offenders may be suspects if another sex offense occurs in the same community, the attention received is due to the prior conviction, and not due to the result of registration as a sex offender.[97] Additionally, even if a sex offender is subject to suspicion, he is still entitled to the constitutional protections, and cannot be arrested solely because of his prior convictions.[98]

Law enforcement officials feel that the annual registration requirement is not workable for homeless sex offenders, who move many times throughout a year.[99] Therefore, in order for registration to be effective, law enforcement must find a way to receive more current information on homeless sex offenders. The critical question regarding registration is how often is "enough," and how often is "excessive"? As originally proposed, Chapter 821 would have required homeless sex offenders to update their registration every thirty days, rather than the current ninety day requirement.[100] The ninety day requirement is certainly less excessive than the thirty day requirement. Since there is no easy answer, and since the Legislature is given broad discretion to determine what the public interest demands under particular circumstances, it is unlikely that the ninety day registration update requirement will be considered excessive.

While some of the *Mendoza-Martinez* factors may point in different directions with regard to the regulatory or punitive purposes of Chapter 821, it is the balancing of the factors against the stated alternative purpose of protecting the public by locating sex offenders that determines whether Chapter 821 violates the ex post facto clause.[101] Since Chapter 821 necessarily applies to those who have been convicted of crimes deemed dangerous by society, the regulatory purpose of aiding law enforcement in locating such offenders seems to weigh heavier than the burden of having to update registration information every ninety days. Therefore, the ninety

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96. *See In re Ramirez*, 193 Cal. 633, 649-50, 226 P. 914, 921 (1924) (commenting that the police power is the "power inherent in the government to enact laws, within constitutional limits, to protect the order, safety, health, morals and general welfare of society").

97. *Ward*, 869 P.2d at 1073.

98. *Id.*

99. *See supra* notes 19-21 and accompanying text (discussing the special problems posed by homeless sex offenders who move many times in a year).

100. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 882, at 2 (July 1, 1997) (noting the California Public Defenders Association believes the ninety day time requirement is more practical for transients to meet than the previously proposed 30 day time requirement).

101. *See supra* notes 81-86 and accompanying text (discussing the balancing process used when analyzing the *Mendoza-Martinez* factors).

day registration update requirement of Chapter 821 is likely to withstand a constitutional challenge.

V. CONCLUSION

While California is unique among the states in enacting an additional registration update for homeless sex offenders as part of its lifetime registration process,[102] it seems unlikely that a constitutional challenge will be upheld. The separation of powers doctrine allows the Legislature to determine the appropriate penalties for crimes unless such statutes are plainly and clearly unconstitutional. It will be difficult to show that the requirements of Chapter 821 are plainly and clearly unconstitutional, particularly since the burden is on the party asserting the challenge.[103] Although the registration requirements of Chapter 821 are additional impositions on an individual who has served his sentence, they appear to be more regulatory in nature than punitive.[104] The burden appears small compared to the compelling state interest in protecting society from sex offenders.[105] Given the climate of public opinion,[106] recent legislative enactments that have been upheld as constitutional,[107] and consistency in other states in holding registration statutes as non-violative of the ex post facto clause,[108] it seems unlikely that a constitutional challenge will prevail.

Although Chapter 821 is likely to survive a constitutional challenge, the question of whether Chapter 821 is a good law still remains: Is Chapter 821 necessary, or is it a hysterical response? The analysis used to determine whether Chapter 821 violates the Federal and California Constitutions also answers the question of whether Chapter 821 is a good law. The benefits to society outweigh the burden to the homeless sex offender. Therefore, Chapter 821 is a good law. To conclude otherwise results in the failure to verify the whereabouts of homeless sex offenders and thereby undermine the very purpose for which the sex offender registration statute is designed—keeping track of convicted sex offenders.

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102. *See supra* note 50 (listing the various state statutes requiring sex offender registration).

103. *See supra* notes 58-62 and accompanying text (noting the difficulty of the party challenging the constitutionality of a penalty).

104. *See supra* notes 94-97 and accompanying text (analyzing whether Chapter 821 promotes the traditional aims of punishment)

105. *See supra* notes 81-101 and accompanying text (listing the *Mendoza-Martinez* factors and discussing their application to Chapter 821).

106. *See supra* notes 1-5 and accompanying text (discussing public outrage over repeat sex-offenders).

107. *See supra* note 5 and accompanying text (describing legislation enacted in response to public furor over repeat sex-offenders).

108. *See supra* note 94 and accompanying text (listing states whose courts have upheld sex-offender registration statutes against ex post facto challenges).

Grand Jury Reform: Making Justice Just

Jay A. Christofferson

Code Sections Affected
Penal Code § 939.71 (new); §§ 939; 939.2; 939.7 (amended).
AB 163 (Baugh); 1997 STAT. Ch. 21

Legislative change is frequently engineered by one who experiences the inadequacies of a particular law. Last year, Assemblyman Scott Baugh endured the inequities of the grand jury system[1] which inspired him to advocate for changing the grand jury procedure.[2] Without the district attorney producing vindicating evidence within his possession, the grand jury indicted Mr. Baugh on election-wrongdoing charges.[3] The trial judge dismissed seventeen of the twenty-two charges because the district attorney failed to produce evidence that would potentially exonerate Mr. Baugh.[4] However, shortly thereafter, the district attorney refiled the majority of original charges, including many of those previously dismissed, and these charges will receive determination shortly.[5]

Although the grand jury is not a necessary aspect of every criminal trial, the grand jury system does serve an important role as the initial step in federal and most state criminal proceedings notwithstanding its lack of many basic procedural trial

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1. *See* CAL. PENAL CODE § 888 (West Supp. 1997) (defining a "grand jury" as a "body of the required number of persons returned from the citizens of the county before the court sworn to inquire of public offenses committed or triable within the county"); *see also id.* § 904 (West Supp. 1997) (detailing the grand jury as having nineteen members in areas smaller than five million and twenty-three for areas larger than five million sitting to determine if sufficient evidence exists to indict the suspect); John Kagel, *California Grand Jury–Two Current Problems*, 52 CAL. L. REV. 116, 116 (1964) (explaining the selection process for grand jury members).

2. *See* Eric Bailey, *Baugh Bill on D.A. Evidence Rule Signed*, L.A. TIMES, June 12, 1997, at B4 (experiencing the inequities of the grand jury from the accused's perspective inspired Baugh to eliminate the unfair procedures of the grand jury).

3. *See Key Players In Plan To Split Democratic Vote*, ORANGE COUNTY REG., June 28, 1997, at A17 [hereinafter *Key Players in Plan to Split Democratic Vote*] (observing that the charges were quickly dismissed by the trial judge).

4. *See* Bailey, *supra* note 2, at B4 (explaining that the reasoning behind the trial judge's dismissal was that the district attorney had knowledge of significant evidence favoring the accused).

5. *See id.* (reporting that although Baugh was indicted for election wrongdoing, his attorneys presented letters identifying witnesses who could prove his innocence, but they were not called before the grand jury); *see also Key Players in Plan To Split Democratic Vote, supra* note 3, at A17 (recounting that many of the original charges have been refiled by the district attorney).

court rules.[6] Indeed, the grand jury serves two judicial purposes: (1) To protect the innocent from unwarranted criminal prosecution; and (2) to act as an accusatory body that determines if sufficient cause[7] exists to prosecute the suspect.[8] However, despite its salient functions and a California Supreme Court case purportedly to the contrary, the California grand jury remains procedurally inequitable because prosecutors need not produce exculpatory evidence at the grand jury proceeding.[9]

I. INTRODUCTION

Recognition of existing procedural inequities and belated adherence to judicial precedent have spearheaded the push to revamp the grand jury system.[10] Not surprisingly, due to its unfair procedural characteristics, the grand jury has received strident criticism.[11] In particular, one aspect of grand jury procedure has borne the brunt of this criticism: The lack of well-defined guidelines for prosecutors regarding the presentation of exonerating evidence within their knowledge.[12] To improve the

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6. *See* Patrick F. Mastrian III, Note, *Indianhead Poker In the Grand Jury Room: Prosecutorial Suppression of Exculpatory Evidence*, 28 VAL. U. L. REV. 1377, 1377 (1994) (explaining that the grand jury process is devoid of numerous procedural mechanisms afforded the accused in criminal trials such as allowing defense attorneys in the grand jury room); *see also* Mark Kadish, *Behind the Locked Door of An American Grand Jury: Its History, Its Secrecy and Its Process*, 24 FLA. ST. U. L. REV. 1, 1-2 (1996) (describing that historically the grand jury has been an obscure and biased yet constant figure in the criminal procedure process); Robert Johnston, *Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 CRIM. L. & CRIMINOLOGY 157, 161 (1974) (berating the prejudicial actions of prosecutors in the grand jury room when they badger witnesses to constructively bias the grand jury).

7. *See* Cumminskey v. Superior Court, 3 Cal. App. 4th 1018, 1025, 893 P.2d 1059, 1063-64, 13 Cal. Rptr. 551, 555 (1984) (defining sufficient cause as when all evidence taken together, if unexplained or uncontradicted, would, in the jury's judgment, provide cause to believe that a public offense was committed by the individual accused).

8. *See* CAL. PENAL CODE § 923 (West 1976) (determining that the grand jury is to convene at the bequest of the prosecutor or upon their own accord for the investigation and consideration of matters of a criminal nature); *see also* John Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L. Q. 119, 123-24 (1964) (concluding that the jury functions to accuse individuals and to act as evaluators of evidence).

9. *See generally* Johnson v. Superior Court, 15 Cal. App. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (defining "exculpatory evidence" as "evidence tending to negate guilt").

10. *See* CAL. PENAL CODE § 939.71 (added by Chapter 21) (mandating that exculpatory evidence known to the prosecuting attorney must be produced and noting that by modifying the law the legislature intends to codify the holding in *Johnson v. Superior Court*).

11. *See e.g.*, Michael J. Lightfoot, *Symposium: Responsibilities of the Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 69, 72-73 (1996) (noting that where fellow citizens stand between the accused and a criminal charge, the defendant is devoid of the benefits of a lawyer to present her side); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261-63 (1995) (decrying the fact that grand juries act as the prosecutor's rubber stamp and are willing to "indict a ham sandwich" if asked to do so by the government); Laurie Buchan, *The Constitutional Rights of Federal and California Grand Jury Witnesses*, 10 SW. U. L. REV. 895, 912-13 (1978) (pointing to procedural inadequacies—including the prosecutor's non-imperative to present exculpatory evidence—as an anachronism making grand juries ineffective guardians of innocent people).

12. *See* Jonathan R. Bass, *Criminal Procedure: District Attorney's Duty To Inform Grand Jury of Exculpatory Evidence*, 65 CAL. L. REV. 382, 391-92 (1977) (criticizing the narrow interpretation that subsequent California courts have discerned from *Johnson* thereby making it unnecessary to present all exonerating evidence); *see also* Ajit V. Pai, *Should A Grand Jury Subpoena Override A District Court's Protective Order*, 64 U. CHI. L.

effectiveness of the grand jury, the California Legislature has promulgated law that requires prosecutors to inform the grand jury of the nature and existence of exculpatory evidence within their knowledge.[13]

Ostensibly, Chapter 21 removes the most inequitable aspect of the grand jury process by requiring the prosecuting attorney to divulge evidence that exonerates the accused.[14] Opponents of Chapter 21 question the effectiveness of changing the grand jury system for three reasons: (1) The exculpatory evidence requirement is ill-defined and the grand jury retains ultimate discretion in considering exculpatory evidence;[15] (2) the introduction of exculpatory evidence for grand jury consideration will promote mini-trials that the grand jury is ill-equipped to handle;[16] and (3) the district attorney can proceed by information[17] thereby circumventing the grand jury procedure modifications created by Chapter 21.[18] Currently, problems with the California grand jury system create real concerns over procedural shortcomings and inequities. Thus, new laws that afford the accused enhanced protection to diminish the unfairness of a one-sided indictment process are welcomed.[19]

REV. 317, 317-19 (1997) (averring that frequently grand juries are not exposed to exculpatory evidence in the prosecutor's possession).

13. *See* CAL. PENAL CODE § 939.71 (added by Chapter 21) (requiring the prosecutor to inform the grand jury of such exculpatory evidence of which she is aware); *see also* Bass, *supra* note 12, at 391 (questioning what type of evidence needs to be disclosed post-*Johnson*: evidence *tending* to negate guilt or evidence that *certainly* negates guilt).

14. *See* Mastrian, *supra* note 6, at 1378-79 (positing that the screening function of the grand jury requires an increasing openness and fairness on the part of the prosecutor in presenting evidence which guarantees a more complete assessment of all evidence to determine probable cause).

15. *See* Bass, *supra* note 12, at 392-93 (concluding that the *Johnson* holding does not lessen the power of the grand jury to call for the production of exculpatory evidence, nor change the grand jury's ability to disavow such evidence).

16. *See* Richard E. Gerstein & Laurie O. Robinson, *Remedy for the Grand Jury: Retain But Reform*, 64 A.B.A. J. 337, 337-39 (1978) (noting that revelation of all exculpatory evidence known to the district attorney will make the grand jury a de facto trial jury that weighs all evidence and determines guilt rather than solely determining if sufficient evidence exists to indict).

17. *See* BLACK'S LAW DICTIONARY 701 (5th ed. 1988) (defining a "criminal information" as an "accusation exhibited against a person for some criminal offense, without an indictment which is presented by a competent public officer on his oath of office, instead of a grand jury on their oath").

18. *See* CAL. CONST. art. I, § 14 (West 1976) (explaining that a criminal information or an indictment is necessary for convicting an accused); CAL. PENAL CODE § 682 (West 1976) (providing that criminal prosecutions may be initiated by either an indictment by grand jury or by information and preliminary hearing); *see also* Karl Kinoga & Robert F. Jordan, *Some Limitations and Controls of the California Grand Jury System*, 2 S.C. L. Rev. 78, 79 (1962) (reasoning that the district attorney, for strategical reasons, usually bypasses the grand jury in the great majority of criminal prosecutions).

19. *See infra* notes 11-12 (decrying the inequitable procedures endured by the accused in a grand jury trial).

II. GRAND JURY PROCEDURE

Several states require the prosecutor to produce exculpatory evidence in a grand jury proceeding.[20] Because the interests of the accused otherwise go unrepresented at the grand jury stage, the prosecutor's responsibility to seek justice may suffice as the basis for a duty to bring exculpatory evidence to the grand jury's attention.[21]

A. *The Prosecutor's Duty to Reveal Exculpatory Evidence Before Enactment of Chapter 21*

Prior to Chapter 21, California law required the prosecutor to inform the grand jury of any evidence reasonably tending to negate guilt.[22] Nonetheless, the guidelines for determining what evidence reasonably tends to negate guilt remained unclear.[23] California law also allowed the grand jury to weigh all evidence submitted to it and to retain the discretion to order the presentation of additional evidence not submitted by the prosecutor.[24]

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20. *See, e.g.*, COLO. R. PROF. COND. 3.8(d) (West 1994) (requiring the prosecutor to make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the accused's guilt or mitigates the offense); CONN. GEN. STAT. § 54-47 f(f) (West 1997) (mandating that an attorney conducting the investigation shall disclose to the investigatory grand jury any exculpatory information or material in his possession, custody or control concerning any person who is a target of the investigation); N.M. STAT. ANN. § 31-6-11(b) (Michie 1996) (stating that the prosecuting attorney assisting the grand jury shall present evidence that directly negates guilt of the target where he is aware of such evidence); UTAH CODE ANN. § 77-10a-13 (West 1985) (detailing that when the State's attorney or the special prosecutor is personally aware of substantial and competent evidence negating the guilt of a subject or target that might reasonably be expected to lead the grand jury not to indict, he shall present or otherwise disclose the evidence to the grand jury).

21. *See* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6.2 (2d ed. 1996) (describing the responsibilities of a prosecutor to seek justice, not merely to serve as an advocate); *see also* STANDARDS FOR CRIMINAL JUSTICE, 3-3.6 (b) (1980) (declaring that no prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt); *see also* Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and An End To Its Absolute Means*, 59 ALB. L. REV. 1135, 1140, (1996) (warning that the absolute immunity afforded prosecutors in *Imbler v. Pachtman*, 424 U.S. 409, 416-19 (1976), promotes obfuscation, not disclosure of evidence because the prosecutor need not fear prosecution for her non-disclosure of exculpatory evidence).

22. *See* CAL. PENAL CODE § 939.71 (added by Chapter 21) (stating that exculpatory evidence tending to negate guilt within the prosecutor's ken must be produced, but not dictating if this included all evidence or only that which would exonerate the particular parties).

23. *See* People v. Laney, 115 Cal. App. 3d 508, 514, 171 Cal. Rptr. 493, 495 (1981) (finding no violation of the tending to negate guilt standard since the suppressed evidence would not have affected the grand jury's decision to indict); *see also* BEALE, *supra* note 21, at § 6.03 (noting that numerous situations have arisen where unproduced evidence did not foreclose a later indictment).

24. *See* CAL. PENAL CODE § 939.7 (West 1996) (stating that the grand jury shall order the production of exculpatory evidence).

B. Chapter 21

Chapter 21 expands and amends existing law by codifying precedent requiring the prosecutor to present, not merely disclose, exculpatory evidence.[25] Nevertheless, Chapter 21 does not explicitly detail what type of evidence the prosecuting attorney must reveal.[26] Various possible standards exist ranging from evidence that would certainly exonerate the accused, to evidence which might assist the accused's case.[27] Without a clear standard, the prosecutor retains discretion in what material to present to the grand jury.[28] Moreover, inasmuch as the grand jury retains discretion in assessing and allocating relevance to the information it receives, the change effectuated by Chapter 21 fails to alleviate the concern that the witness receive a fair criminal trial. This reality occurs because the jury can ignore or allocate limited relevance to any evidence it receives.

III. THE PROSECUTOR PRESENTING EXCULPATORY EVIDENCE

A. Federal Grand Jury Procedure

Grand jury proceedings do not explicitly implicate the Sixth Amendment.[29] The Supreme Court has held that the "grand jury is a vital procedural and investigative mechanism."[30] The Supreme Court explained, "[the grand jury] has been regarded as the primary security to the innocent against hasty, malicious, and oppressive persecution."[31] In an apparent contradiction, the Supreme Court held in *United States v. Williams*,[32] that a prosecutor need not produce exculpatory evidence for grand jury assessment.[33] In *Williams*, the prosecutor did not divulge evidence that helped to disprove the prosecutor's case despite the evidence being depicted as substantial exculpatory evidence.[34] The Supreme Court reasoned that requiring the prosecutor

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25. *Id.* § 939.71 (added by Chapter 21) (requiring the prosecutor to present exculpatory evidence within the prosecutor's knowledge and inform the grand jury of its duty as pursuant to CAL. PENAL CODE § 939.7).

26. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS of AB 163, at 1 (Apr. 3, 1997) (discussing that the scope of evidence which the prosecutor must disclose, but not defining the exact level required); *see also* BEALE, *supra* note 21, at § 6.03 (concluding that sundry interpretations concerning the scope of exculpatory evidence allows prosecutors the latitude to comply with the law while not disclosing all evidence known to them).

27. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS of AB 163, at 2 (Apr. 3, 1997) (discussing the lack of an exact standard for presenting evidence beneficial to the accused).

28. *Id.*

29. *See* United States v. Mandujano, 425 U.S. 564, 581 (1976) (holding that the right to counsel prescribed by the Sixth Amendment is inapplicable when the subject is summoned to appear before a grand jury).

30. Branzburg v. Hayes, 408 U.S. 665, 687 (1972).

31. Wood v. Georgia, 370 U.S. 375, 390 (1962).

32. 504 U.S. 36 (1992).

33. *See Williams*, 504 U.S. at 51 (describing that the grand jury sits not to determine if the accused is guilty or innocent, but merely to determine if sufficient evidence exists to find probable cause to indict).

34. *Id.* at 39.

to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.[35]

Since the Supreme Court has determined that the Fifth Amendment requirement for grand jury procedure does not supervene state law, the individual states can determine their own criminal procedure mechanisms.[36] Therefore, the standard for producing evidence in grand jury trials remains within the state's purview.[37] Consequently, Chapter 21 does not infringe on Fifth Amendment rights.

B. Chapter 21 and the Presentation of Exculpatory Evidence

Traditionally the grand jury, unlike the trial jury, heard only the prosecutor's side of the case.[38] Many jurisdictions have changed these traditional roles to adapt the grand jury to the realities of the modern criminal justice system.[39] Chapter 21 specifically requires the production of exculpatory evidence by the prosecutor.[40] However, in mandating these changes, Chapter 21 does not address or clarify the type of evidence that should be produced.[41] Chapter 21 also fails to define the grand jury's responsibility in evaluating this evidence.[42]

To identify the scope of evidence the prosecutor must produce, understanding the legislative intent of Chapter 21 is instrumental. The legislative intent behind Chapter 21 is explicit: To codify the holding of *Johnson v. Superior Court.*[43] In *Johnson*, the prosecutor rejected the decision of the magistrate who refused to holdover the defendant after he testified that one of his alleged associates in a narcotics transaction had grossly exaggerated the accused's role in the transaction.[44] Also, the defendant proclaimed that his limited participation had been part of a plan

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35. *Id.* at 51. *But see* United States v. Serubo, 604 F.2d 807, 817 (1979) (categorizing the reasons to compel the prosecutor to produce exculpatory evidence as an indictment can produce devastating personal and professional impact that a dismissal or an acquittal can never undo); Maryland v. Brady, 373 U.S. 83, 87 (1963) (making the suppression by the prosecution of evidence favorable to an accused upon request at the trial stage as violative of due process).

36. *See generally* Hurtado v. California, 110 U.S. 516 (1884) (explicating that states retain the right to determine criminal procedure mechanisms).

37. *Id.*

38. *See* David Stevenson, Note, *The Prosecutor's Duty To Present Exculpatory Evidence To An Indicting Grand Jury,* 75 MICH. L. REV. 1514, 1516 (1977) (comparing the screening values of indictment and information proceedings and determining that the grand jury indictment is a one-sided process because the prosecutor is the sole source of evidence).

39. *See* BEALE, *supra* note 21, at § 6.03 (observing that the modern trend toward opening the grand jury system and necessitating the production of evidence to exonerate the accused comports with protecting the accused's reputation and standing in the community better than previous methods).

40. *See* CAL. PENAL CODE § 939.71 (added by Chapter 21) (mandating that the prosecutor produce exculpatory evidence within her knowledge).

41. *See* Bass, *supra* note 12, at 391-93 (opining that the scope of necessary evidence is not broadly defined by decisions subsequent to *Johnson).*

42. *Id.*

43. 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

44. *Id.* at 253, 539 P.2d at 794, 124 Cal. Rptr. at 34, 35.

to furnish information to a local prosecutor in connection with a plea bargain on another charge.[45] Only the arresting officers gave grand jury testimony and the grand jury did not receive information concerning the defendant's preliminary hearing testimony.[46] The California Supreme Court reasoned that section 939.7 of the Penal Code required the grand jury to "consider evidence within its reach that will explain away the charge."[47] The court reasoned that this requirement imposed a corresponding duty on the prosecutor to inform the grand jury of known exculpatory evidence.[48]

However, the initial question of the scope of evidence implicated by *Johnson*, and by extension Chapter 21, remains confused because court decisions in the subsequent twenty-two years have created a split of opinion concerning the type of evidence the prosecutor must produce.[49] One camp speaks of the obligation to present evidence reasonably tending to negate guilt, a standard analogous to that applied to the prosecutor's due process obligation of disclosure at trial.[50] The other camp has taken a more conservative position, finding that the prosecutor's obligation encompasses a much narrower range of evidence than the due process obligation applicable at trial.[51] Thus, courts applying the latter philosophy require prosecutors to disclose before the grand jury only that exculpatory evidence which clearly negates guilt.[52] Dismissal of an indictment would follow only where the grand jury would not have indicted had it considered the exculpatory evidence.[53]

In an important decision clarifying *Johnson*, the court in *People v. McCalister*[54] provided a narrow interpretation of *Johnson* and revealed another glaring defect in the production of exculpatory evidence requirement.[55] In *McCalister*, the district attorney disregarded a preliminary hearing decision to drop certain charges against the defendant, and instead kept all charges intact.[56] Despite a letter from the defense attorney explaining that evidence within his possession would exculpate his client,

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45. *Id.*

46. *Id.* at 253, 539 P.2d at 795, 124 Cal. Rptr. at 35.

47. *Id.* at 254, 539 P.2d at 796, 124 Cal. Rptr. at 36.

48. *Id.* at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.

49. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 946 (7th ed. 1990) (analyzing the differing approaches to this issue).

50. *Id.*; *see id.* (recapitulating that this standard would require the dismissal of an indictment where the exculpatory evidence in question would have created a "fair probability" of a grand jury decision not to indict).

51. *Id.*; *see id.* at 946-47 (observing that the split in the courts is based on interpreting the scope of the terms "negating guilt").

52. *See* WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 733 (2d ed. 1992) (recognizing that the courts not adhering to the duty to produce all exculpatory evidence rely upon the non-adversarial nature of the grand jury proceeding to defend their position).

53. *Id.*

54. 54 Cal. App. 3d 918, 126 Cal. Rptr. 881 (1976).

55. *See* Bass, *supra* note 12, at 392 (noting that the previous decisions did not establish a concrete test or standard for determining what evidence must be submitted).

56. *McCalister*, 54 Cal. App. at 923, 126 Cal. Rptr. at 883.

the defendant suffered an indictment on all charges presented.[57] The defense attorney moved to have the indictment dismissed because several witnesses were available to testify that the accused did not commit one of the attacks.[58] If true, the testimony would exculpate the accused. However, the grand jury indicted without calling a single witness.[59] The court held that producing this exculpatory evidence was non-imperative because it would not guarantee the defendant's innocence.[60] Furthermore, the court determined that the grand jury should retain apparently unlimited discretion to hear or not to hear any evidence, thereby calling into question the efficacy of *Johnson*.[61] The *McCalister* court's narrow interpretation of *Johnson* undercuts the latter decision's importance because evidence that qualifies as substantially exculpatory can be withheld without prejudicing the grand jury indictment and future criminal convictions.[62] Moreover, the implicit premise of *Johnson*, to promote the presentation of evidence that tends to negate guilt, appears ineffectual because a grand jury can disregard or opt to consider evidence at their discretion.[63] Finally, for practical considerations, determining if the excluded evidence prejudiced the grand jury at the trial court level leaves the accused stigmatized as an indicted criminal thereby damaging personal and professional reputations.[64] In sum, the codification of *Johnson* does not guarantee the presentation of all evidence nor does it compel the grand jury to assess any evidence presented to it.[65]

V. CONCLUSION

Events, frequently trying ones, inspire change. Senator Baugh experienced the inequities of the grand jury firsthand, and thus spearheaded an overhaul of the grand jury system in order to guarantee a fair criminal procedure beginning in the grand

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57. *Id.* at 923, 126 Cal. Rptr. at 884 n.2.

58. *Id.* at 928, 126 Cal. Rptr. at 884.

59. *Id.* at 922, 126 Cal. Rptr. at 883; *see also* People v. Saam, 106 Cal. App. 3d 789, 799, 165 Cal. Rptr. 256, 261 (1980) (finding that the prosecutor's failure to advise the grand jury of the magistrate's dismissal of the charges based on Fourth Amendment violations was not prejudicial to the defendant nor did it improperly influence the grand jury to indict).

60. *McCalister*, 54 Cal. App. at 925, 126 Cal. Rptr. at 885.

61. *See* Bass, *supra* note 12, at 393-95 (commenting that the *Johnson* holding left unclear the scope of evidence required to be presented and the grand jury's ability to consider evidence it deems pertinent).

62. *See id.* (discussing the limited effect of *Johnson* because of the questionable interpretation of its evidentiary scope).

63. *Id.*

64. *See Serubo*, 604 F.2d at 817 (criticizing a system that exonerates an individual only after the stigma of an indictment attaches, thus likely sacrificing an individual's career and character to considerable question); *see also* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) (arguing that grand jury secrecy protects those individuals exonerated by the grand jury from public ridicule which is a worthy goal, but seemingly contradicting the rule of *Williams* that presentation of exonerating evidence by the district attorney is not required).

65. *See* Bass, *supra* note 12, at 393 (concluding that the holding in *Johnson* does not resolve the problems of the grand jury system).

jury room.[66] Chapter 21 compels the prosecutor to present all exculpatory evidence within her knowledge.[67] In so doing, California joins a growing number of states transforming the grand jury procedure to create a more open and equitable system.[68] Unquestionably, requiring the prosecutor to produce exculpatory evidence furthers the premise of the grand jury: To achieve a just result.[69] Notwithstanding these changes, Chapter 21 leaves the courts to determine the scope of evidence the prosecutor must produce.[70] Moreover, the grand jury remains the ultimate arbiter in determining what constitutes exonerating evidence and thus producing all exculpatory information does not axiomatically preclude the indictment of innocent people.[71] Despite these unanswered questions and possible limitations, Chapter 21 prospectively will foster a more balanced grand jury process that will afford the accused a greater opportunity to receive a fair grand jury trial.

66. *See supra* notes 1-6 and accompanying text.
67. *See supra* notes 13-15 and accompanying text.
68. *See supra* notes 21, 23-26 and accompanying text.
69. *See supra* notes 27-35 and accompanying text.
70. *See supra* notes 36-37 and accompanying text.
71. *See supra* notes 38-59 and accompanying text.

Increasing Penalties for Bridge Trespassers

Christopher S. Hall

Code Section Affected
Streets & Highways Code § 27174.2 (amended).
SB 4 (Kopp); 1997 STAT. Ch. 379

On November 23, 1996, actor Woody Harrelson and eight companions scaled the Golden Gate Bridge to protest the logging of redwood trees in the Headwaters Forest.[1] The nine protestors suspended themselves with rock climbing gear and hung among the bridge's suspension cables for five and a half hours causing an enormous traffic jam.[2] As a result of the traffic delay, one man missed the birth of his son, a family missed a funeral, and thousands of drivers sat motionless for hours.[3]

I. INTRODUCTION

The Golden Gate Bridge is frequently used as a demonstration site by activists looking to further their cause.[4] The Bridge's sidewalks make it particularly susceptible to demonstrators as well as vandals and thrill seekers because the sidewalks provide an easy entrance for anyone wishing to use the Bridge.[5]

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1. *See* Editorial, *Throw the Book at Them*, S.F. CHRON., Nov. 26, 1996, at A18 [hereinafter *Throw the Book at Them*] (describing how Harrelson and eight other individuals climbed the bridge to bring attention to redwood forests); Vicki Haddock, *Kopp Talks Tough on Bridge Protests; Vows Bill to Make Demonstration Felonies*, S.F. EXAMINER, Nov. 26, 1996, at A1 (explaining that the nine people suspended themselves in rock climbing gear in order to protest a government deal that would save 7,500 acres of ancient redwood trees while leaving the rest of the forest vulnerable to industrial logging).

2. Haddock, *supra* note 1, at A1.

3. *See id.* (describing how the demonstration caused mass frustration, and caused some individuals to miss important events due to the traffic delay); *see also Throw the Book at Them*, *supra* note 1, at A18 (stating the demonstration stranded thousands of motorists on the Golden Gate Bridge for hours).

4. *See supra* notes 1-3 and accompanying text (explaining how a group of demonstrators used the Golden Gate Bridge to protest certain logging practices in California); *see also Aids Protest Closes Golden Gate*, L.A. TIMES, Jan. 31, 1989, at A2 (describing how a group of 80 demonstrators caused the Golden Gate Bridge to be shut down during rush hour traffic in order to protest the government's response to the Aids epidemic); David Holley, *3,000 in L.A. Protest Threat of Nuclear War*, L.A. TIMES, Aug. 7, 1985, at A3 (describing how a group of protesters threw mattresses and watermelons onto the Golden Gate Bridge in order to protest the threat of nuclear war); Marc Lifsher, *2,000 Protesters Boo Pope in Rally at San Francisco Mission*, ORANGE COUNTY REG., Sept. 18, 1987, at A18 (describing how a group of protesters were arrested for blocking a lane on the Golden Gate Bridge to protest the Pope's visit to San Francisco).

5. *Gate Bridge Board Wants Trespassing to Be a Felony*, S.F. CHRON., June 11, 1994, at A23.

Consequently, Bridge officials requested the California Legislature to enact severe penalties for trespassing on the Bridge.[6] The California Legislature responded by enacting Chapter 379 which raises the penalties for trespassing on any district toll bridge.[7]

Proponents of Chapter 379 believe that prior penalties failed to deter would-be trespassers.[8] Although opponents of Chapter 379 argue that it is designed to restrain freedom of expression and disempower protestors, supporters claim that Chapter 379 protects the people's right of free expression while it penalizes those that would subject others to risk of harm.[9] Moreover, supporters believe that Chapter 379 withstands constitutional scrutiny because it is not an attempt to suppress speech but is merely a time, place, and manner restriction on the use of toll bridges as demonstration sites.[10]

II. LEGAL BACKGROUND

Prior to the enactment of Chapter 379, bridge trespassing was a misdemeanor punishable by imprisonment in a county jail for up to six months and/or a fine of up to $1,000.[11] Given the amount of violations, prior penalties obviously did not deter the public from trespassing on bridges.[12] Consequently, Bridge officials sought to increase bridge trespassing penalties to deter potential violators.[13]

The California Legislature responded to the request by enacting Chapter 379, which increases the penalty for bridge trespassing to a jail term of up to one year

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6. *Id.*

7. *See* CAL. STS. & HIGH. CODE § 27174.2 (amended by Chapter 379) (raising the penalties for unauthorized climbing on a district toll bridge to include a possible jail term not to exceed one year, and a possible fine not to exceed $10,000).

8. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 4, at 2 (July 1, 1997) (stating that prior law did not impose a significant enough penalty to act as a deterrent).

9. *See* Bobbie Stein, *Letters to the Editor*, S.F. CHRON., Dec. 16, 1996, at A26 (arguing that free expression and civil disobedience are vital aspects of the American society and Chapter 379 is designed to limit these freedoms). *But see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 4, at 3 (July 1, 1997) (claiming that Chapter 379 does not abridge freedom of expression but penalizes those that would subject others to risk of harm).

10. *See infra* note 35 and accompanying text (declaring that a content-neutral time, place or manner regulation on speech will survive constitutional scrutiny if it is narrowly tailored to serve a significant government interest and leave ample alternative channels of communication).

11. *See* CAL. STS. & HIGH. CODE § 27174.2 (amended by Chapter 379) (stating that any unauthorized person that travels on any portion of a district toll bridge not intended for public use is guilty of a misdemeanor); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 4, at 1 (May 15, 1997) (stating that the punishment for the unauthorized trespass on any district bridge is a jail term of up to six months, a fine of up to $1,000, or both).

12. *See* Maitland Zane, *Actor Remains Defiant at Bridge Protest Hearing; Woody Harrelson Calls for Charges to be Dropped*, S.F. CHRON., Jan. 15, 1997, at A15 (quoting actor Woody Harrelson saying that he would without question stage the protest again); *see also supra* note 4 and accompanying text (describing how the Golden Gate Bridge has been used by demonstrators over the years).

13. *See supra* notes 5-6 and accompanying text (stating that Golden Gate Bridge officials have asked the California Legislature to increase the penalties associated with bridge trespassing).

in a county jail and/or a fine of up to $10,000.[14] Moreover, if a person convicted of bridge trespass is granted probation, he or she is required to perform between 40 and 160 hours of community service in certain specified programs.[15] Although bridge trespassing remains a misdemeanor under Chapter 379,[16] proponents believe that the stricter penalties will provide a more effective deterrent than prior law, while maintaining the public's right to free expression.[17] However, opponents of Chapter 379 argue that the effect of Chapter 379 is to restrain the First Amendment right of protesters.[18]

III. CHAPTER 379 AND THE FIRST AMENDMENT

Chapter 379 has been criticized as placing limitations on the First Amendment right of protesters.[19] Opponents of Chapter 379 argue that Chapter 379 "is designed to curb protesters and restrain First Amendment activities."[20] Moreover, protesters serve a beneficial part in bringing about change in America and their efforts should not be curtailed by legislation enacted to limit their rights.[21]

Both the United States and the California Constitutions guarantee the right of freedom of expression[22] however, this freedom is not without restriction.[23] In *City of Renton v. Playtime Theatres, Inc.*,[24] the United States Supreme Court upheld the constitutionality of a zoning ordinance that prohibits any adult theater from locating within 1,000 feet of a residential zone, church, park or school.[25] The Court explained that the ordinance was merely a time, place, and manner regulation because

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14. *See* CAL. STS. & HIGH. CODE § 27174.2(a) (amended by Chapter 379) (specifying that the penalty for a violation of this section be imprisonment in a county jail for up to one year or a fine of up to $10,000, or both).

15. *See id.* § 27174.2(c) (amended by Chapter 379) (requiring any person convicted of an unauthorized trespass on any district bridge to perform at least 40 hours, but no more than 160 hours, of community service in a homeless shelter, drug abuse programs, or hospice as a condition of probation).

16. *See id.* § 27174.2(a) (amended by Chapter 379) (stating that any unauthorized person who uses any part of a district toll bridge not intended for public use is guilty of a misdemeanor).

17. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 4, at 3 (July 1, 1997) (explaining that Chapter 379 "protects the rights of the public for free expression while it penalizes those who subject others to unreasonable risk, harm, and financial losses").

18. Stein, *supra* note 9, at A26.

19. *Id.*

20. *Id.*

21. *See id.* (stating that while protesters may pose an inconvenience to some, there is more to be lost than gained in imprisoning those engaged in civil disobedience).

22. *See* U.S. CONST. amend. I (stating "Congress shall make no law . . . abridging the freedom of speech"); *see also* CAL. CONST. art. I, § 2(a) (West 1997) (declaring "every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press").

23. *See infra* notes 25-26 and accompanying text (describing the restrictions that the Court may place on the freedom of expression).

24. 475 U.S. 41 (1986).

25. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (holding that an ordinance that bans adult theaters from locating within 1,000 feet of any residential zone, church, park, or school is constitutionally valid).

it did not place an outright ban on adult movie theaters.[26] The Court concluded that time, place, or manner regulations enacted for the purpose of restraining speech based on its content are presumed to violate the First Amendment.[27] However, the Court declared that a content-neutral time, place, or manner regulation will survive constitutional scrutiny if the regulation serves a substantial government interest and leaves ample alternative channels of communication available for the regulated speech.[28]

A content-based restriction focuses on the message associated with the speech, allowing certain messages to be heard but barring others.[29] These restrictions can be based on either subject matter or viewpoint.[30] A content-based restriction receives strict scrutiny from the courts and will only be validated if it furthers a "compelling" state interest and is designed to further that interest in a narrow manner.[31]

In contrast, a content-neutral regulation does not distinguish speech based on subject matter or viewpoint.[32] In order for a regulation to be deemed content-neutral, it must be justified without mention of the speech being regulated.[33] It is enforced uniformly without regard to the content of the speech that is being suppressed and is concerned only with the time, place, or manner of the speech.[34] A content-neutral regulation on speech is valid if it is narrowly tailored to serve a "significant" government interest and leaves adequate alternative channels of communication.[35]

Chapter 379 may properly be classified as a content-neutral regulation because it is applied uniformly without regard to the content of speech incidentally restricted

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26. *See id.* at 46 (stating that an ordinance that does not place an outright ban on adult movie theaters, but only provides limitations on their location should be considered a time, place, or manner regulation).

27. *See id.* at 46-47 (noting that a regulation enacted with the purpose of restraining the content of certain speech is presumed to violate the First Amendment).

28. *See id.* at 47 (declaring the validity of time, place and manner regulations that are not based on the content of the regulated material, so long they are designed to further a substantial government interest and leaves ample alternative channels of communication open for the regulated speech).

29. Barbara Gaal, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 124 (1982).

30. *Id.* at 125.

31. Widmar v. Vincent, 454 U.S. 263, 276 (1981).

32. *See* Casenote, *The Illusion of Residential Privacy: The Doctrine of Time, Place, Manner and Regulation Revisited,* Frisby v. Schultz, 108 S. Ct. 2495 (1988), 12 HAMLINE L. REV. 447, 459 (1989) (describing a content-neutral restriction on speech as one that makes no distinction on the basis of message, ideas, or subject matter, and does not discriminate in its application and is not arbitrarily enforced).

33. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

34. Gaal, *supra* note 29, at 125.

35. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981) (stating that courts will approve a regulation on speech if the restriction is not based upon the content of the speech, furthers a significant government interest, and leaves ample alternative channels of communication available through the enforcement of the regulation).

by its enforcement.[36] Chapter 379 requires all persons to refrain from trespassing on portions of district toll bridges not intended for public use, not just demonstrators.[37] Thus, to survive constitutional scrutiny, Chapter 379 must be shown to be narrowly tailored to further a significant government interests and leave ample alternative channels of communication.[38]

Proponents of Chapter 379 believe that Chapter 379 serves a significant government interest by protecting the public from dangers associated with bridge trespassing.[39] Bridge trespassers threaten the safety of motorists, bicyclists, pedestrians, and themselves.[40] For example, bridge demonstrators frequently cause traffic delays by blocking bridge access during their demonstrations.[41] In *Cox v. State of Louisiana*,[42] the United States Supreme Court stated that traffic control on public streets is a governmental responsibility necessary to ensure order.[43] Furthermore, the Court noted that demonstrators do not have the right to ignore traffic regulations and stage protests that cause traffic jams.[44] Thus, the control of traffic is a significant government interest for the purpose of assessing a content-neutral time, place or manner regulation.[45]

Moreover, proponents of Chapter 379 argue that it leaves ample alternative channels for communicating ideas.[46] Proponents explain that Chapter 379 merely prohibits unauthorized people from trespassing on any portion of a district toll bridge not intended for public use.[47] Chapter 379 does not make it unlawful to use a toll bridge in a demonstration, it merely requires the protestors refrain from trespassing on certain parts of a bridge that are not open to the public.[48] Demonstrators

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36. *See* Gaal, *supra* note 29, at 125 (describing a content-neutral regulation as one applied uniformly without regard to the speech that is being suppressed); *see also* CAL. STS. & HIGH. CODE § 27174.2(a) (amended by Chapter 379) (stating that "every person" who climbs on any portion of a district toll bridge not intended for public use is guilty of a misdemeanor).

37. *See* CAL. STS. & HIGH. CODE § 27174.2 (amended by Chapter 379) (requiring all persons to refrain from trespassing on portions of district toll bridges not intended for public use).

38. *See supra* note 35 and accompanying text (requiring a content-neutral, time, place, or manner regulation on speech to be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication to survive constitutional scrutiny).

39. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 4, at 2 (July 1, 1997) (stating that bridge trespassers endanger the public and cause significant delays to motorists).

40. *Id.*

41. *See supra* note 4 and accompanying text (describing how protestors have frequently caused traffic jams by protesting on the Golden Gate Bridge).

42. 379 U.S. 536 (1965).

43. *Id.* at 554.

44. *Id.* at 554-55.

45. *See id.* at 554 (stating that an individual's free speech right does not trump traffic regulations designed to ensure public convenience).

46. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 4, at 3 (July 1, 1997) (stating that Chapter 379 protects the public's right to free expression, but penalizes those that subject others to unreasonable risks).

47. *See* CAL. STS. & HIGH. CODE § 27174.2(a) (amended by Chapter 379) (stating that any unauthorized person who climbs on any railing, cable, suspender rope, tower, or superstructure on a toll bridge is guilty of a misdemeanor).

48. *Id.*

are free to picket on the sidewalks of any bridge or use any other part of the bridge that is not restricted to authorized personnel. Thus, Chapter 379 leaves ample alternative avenues for communication of information for the purposes of assessing a content-neutral, time, place or manner regulation on speech.

IV. CONCLUSION

The California Legislature approved Chapter 379 at the requests of Golden Gate Bridge officials as an attempt to reduce frustrations and concerns over the use of the Bridge as a demonstration site.[49] Chapter 379 should survive constitutional scrutiny because it is a content-neutral, time, place, or manner restriction that is narrowly tailored to serve a significant government interest and leaves ample alternative channels for communication of information.

Furthermore, by increasing the penalties for bridge trespassing, Chapter 379 will act as an effective deterrent. By hitting would-be trespassers where it really hurts—in the pocket book—protestors will more likely find an alternative demonstration site and stay off district toll bridges.

49. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 4, at 2 (July 1, 1997) (stating that the use of the Bridge as a demonstration site threatens to public safety and causes substantial traffic delays).

Moving Beyond Three Strikes Through California's Firearm Sentencing Enhancements

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Code Section Affected
Penal Code § 12022.53 (new).
AB 4 (Bordonaro); 1997 STAT. Ch. 503

I. INTRODUCTION

The advent of the Three Strikes provision sent an unequivocal message to the habitual offenders of society.[1] Chapter 503 seeks to send a similar message to criminals: use a firearm while committing a felony, and you're going to jail for a very long time.[2] Chapter 503 requires an additional sentencing enhancement for individuals who personally use, discharge or cause great bodily injury to another through the use of a firearm in the commission or attempted commission of a specified felony.[3]

Chapter 503 will likely face constitutional challenges based on alleged violations of cruel and unusual punishment, jury trial rights, and double jeopardy.[4] However, courts will likely reject these constitutional challenges.[5] In a society where criminals increasingly use firearms in the perpetration of felonies, the courts are likely to recognize that Chapter 503 represents a rational deterrent and retributive response toward violent crime.[6]

II. COMPARISON BETWEEN PREVIOUS LAW AND CHAPTER 503

Prior to the adoption of Chapter 503, California law specified that an individual who was armed[7] with a firearm, in the commission of a felony, was punished by an

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1. Michael Bryan Reynolds, *'10-20-Life' Another Step Toward Cutting Crime*, FRESNO BEE, Feb. 6, 1996, at B5.

2. *See infra* notes 22-23 and accompanying text (commenting on Chapter 503's deterrent and retributive benefits).

3. *See infra* notes 13-17 and accompanying text (discussing the sentencing enhancements of Chapter 503).

4. *See* discussion *infra* Part IV (observing the constitutional challenges that Chapter 503 may face).

5. *See* discussion *infra* Part IV (arguing that Chapter 503 will withstand constitutional attack).

6. *See infra* notes 22-23 and accompanying text (arguing the societal benefits of Chapter 503).

7. *See* People v. Bland, 10 Cal. 4th 991, 1002, 898 P.2d 391, 398, 43 Cal. Rptr. 2d 77, 84 (1995) (declaring that a purposeful or effective nexus or link must exist between the firearm and the offense for an individual to be "armed with a firearm in the commission" of a crime); People v. Smith, 9 Cal. App. 4th 196, 204, 11 Cal. Rptr. 2d

additional year onto their sentence,[8] or if the firearm was an assault weapon, the enhancement would be an additional three years.[9] Prior law further required that one who used[10] a firearm in the commission or attempted commission of a felony would be punished by an additional three, four, or ten years.[11] However, if the felony was

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645, 649 (1992) (stating that defendant is armed for purposes of sentencing enhancement statute if he is in physical possession of the weapon or if he may easily reach the weapon); People v. Mendival, 2 Cal. App. 4th 562, 574, 3 Cal. Rptr. 2d 566, 574 (1992) (discussing that an individual is "armed" if the individual knowingly has the firearm available for either offensive or defensive use); People v. Wandick, 227 Cal. App. 3d 918, 928, 278 Cal. Rptr. 274, 281 (1991) (deciding that an individual whose weapon was "available" satisfies meaning of "armed"); People v. Reaves, 42 Cal. App. 3d 852, 856-57, 117 Cal. Rptr. 163, 166 (1974) (determining that if the weapon is simply carried or is available for use in either an offensive or defensive capacity, then the individual is "armed"); *see also Bland*, 10 Cal. 4th at 999, 898 P.2d at 396, 43 Cal. Rptr. 2d at 82 (holding that for the purposes of California Penal Code § 12022(a), a defendant who could resort to a firearm to further crime fulfills requirement of being "armed with a firearm in the commission . . . of a felony" for purposes of sentencing enhancement); People v. Nelums, 31 Cal. 3d 355, 360, 644 P.2d 201, 204, 182 Cal. Rptr. 515, 518 (1982) (noting that a firearm does not need to be loaded for an individual to be armed, if weapon was designed to shoot and supports reasonable appearance of its ability to fire); *see generally Mendival*, 2 Cal. App. 4th at 574, 3 Cal. Rptr. 2d at 574 (declaring that for the purpose of sentencing enhancement statute, two people may be "personally armed" with a single firearm).

8. CAL. PENAL CODE § 12022(a)(1) (West Supp. 1997); *cf.* MICH. COMP. LAWS ANN. § 750.227b (West Supp. 1997) (determining that an individual who carries or has in his possession a firearm during the commission of specified felony is guilty of a felony mandating imprisonment for two years); S.C. CODE ANN. § 16-23-490 (Law Co-op Supp. 1996) (providing that an additional sentence of five years is imposed for one who possesses a firearm or visibly displays what appears to be a firearm during the commission or attempted commission of a violent crime).

9. CAL. PENAL CODE § 12022(a)(2) (West Supp. 1997); *cf.* GA. CODE ANN. § 16-11-160 (1996) (declaring that an individual who possesses or uses a machine gun, sawed-off rifle, sawed-off shotgun, or firearm equipped with a silencer during the commission or attempted commission of specified felonies shall be sentenced for 10 additional years); IND. CODE ANN. § 35-50-2-13 (Michie Supp. 1996) (providing that an individual who is convicted of dealing a controlled substance may be sentenced up to five additional years if individual used or possessed a firearm, an additional 10 years if the firearm was a sawed-off shotgun or an additional 20 years if the firearm was a machine gun or firearm equipped with a silencer); OR. REV. STAT. § 161.610 (1995) (requiring an enhanced sentence of 10 years if a machine gun, short-barreled rifle, short-barreled shotgun, or firearm equipped with a silencer is used or threatened to be used during the commission of a felony).

10. *See* People v. Masbruch, 13 Cal. 4th 1001, 1006, 920 P.2d 705, 708, 55 Cal. Rptr. 2d 760, 763 (1996) (holding that a firearm is to be deemed as "used" if it served as an aid in the completion of the essential elements of the crime, even if only displayed at outset of criminal activity); People v. Granado, 49 Cal. App. 4th 317, 324-25, 56 Cal. Rptr. 2d 636, 641 (1996) (explaining that no "use" occurred if weapons-related conduct was incidental and unrelated to offense); People v. Camacho, 19 Cal. App. 4th 1737, 1747, 24 Cal. Rptr. 2d 286, 291 (1993) (recognizing that use of firearm does not require the actual production of harm, it only requires conduct which produces fear of harm or force by the means or display of the firearm); People v. Steele, 235 Cal. App. 3d 788, 791, 286 Cal. Rptr. 887, 889 (1991) (deciding that a firearm does not have to be loaded at time of crime to be in "use" for purposes of sentencing enhancement provision); *see also* Londale H., 5 Cal. App. 4th 1464, 1467, 7 Cal. Rptr. 2d 501, 503 (1992) (stating that the legislative intent of the statute is best served by broadly construing the term "use"); People v. Bush, 50 Cal. App. 3d 168, 176-77, 123 Cal. Rptr. 576, 581 (1975) (providing that the word "uses" is not synonymous with the word "armed" in affording additional punishment for felony conviction); *see generally Masbruch*, 13 Cal. 4th at 1007, 920 P.2d at 709, 55 Cal. Rptr. 2d at 764 (stating that whether a defendant "used" a firearm is a question of fact for the trier of fact); *Mendival*, 2 Cal. App. 4th at 575, 3 Cal. Rptr. 2d at 574 (deciding that whether firearm is available for the use of an individual is a jury question).

11. CAL. PENAL CODE § 12022.5(a)(1) (West Supp. 1997); *cf.* ARK. CODE ANN. § 16-90-120(a) (Michie Supp. 1995) (requiring that one who employs a firearm in the commission or escape of a felony may be subject to an additional 15 years onto their sentence); IDAHO CODE § 19-2520 (1997) (providing an additional 15 years onto maximum sentence for an individual who is convicted of display, use, threat or attempted use of a firearm or other deadly weapon in the commission or attempted commission of specified felonies); IND. CODE ANN. § 35-50-2-11

carjacking or attempted carjacking, the added punishment was four, five, or ten years.[12]

Chapter 503, in addition to current law, imposes an augmented ten-year sentence for a person who, in the commission of a specified felony,[13] personally uses a firearm.[14] Chapter 503 also requires a twenty-year sentence enhancement for an individual who intentionally and personally discharges a firearm during the commission of a specified felony.[15] Chapter 503 also directs an additional twenty-five-years to life sentence enhancement for one who in the commission of a specified felony proximately causes great bodily injury[16] through the intentional and personal discharge of a firearm to any person other than an accomplice.[17] Chapter 503's enhancements do not apply to the lawful use or discharge of a firearm by a public officer[18] or to a person in lawful self-defense, lawful self-defense of another, or lawful defense of property.[19]

III. LEGISLATIVE INTENT AND FISCAL EFFECT OF CHAPTER 503

Most felonies that are committed are done through the use of a firearm.[20] Consequently, the number of injuries and fatalities associated with firearms are

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(Michie Supp. 1996) (declaring that one who uses a firearm in the commission of a felony resulting in death or serious bodily injury, kidnaping or a Class B felony may be sentenced to an additional five years); MD. ANN. CODE art 27, § 281A (Supp. 1996) (declaring that an individual who uses, wears, carries, or transports a firearm in connection with the felony of drug trafficking is subject to an additional sentence ranging from five to 20 years); OR. REV. STAT. § 161.610 (1995) (requiring a five year minimum sentence for one who uses or threatens to use a firearm during the commission of a felony).

12. CAL. PENAL CODE § 12022.5(a)(2) (West Supp. 1997).

13. *See id.* § 12022.53(a) (enacted by Chapter 503) (specifying that Chapter 503's sentencing enhancement applies to the following felonies: murder, mayhem, kidnaping, robbery, carjacking, assault with intent to commit a specified felony, assault with a firearm on a peace officer or firefighter, rape, rape or penetration by a foreign object in concert, sodomy, lewd act on a child, oral copulation, penetration by a foreign object, assault by a life prisoner, assault by a prisoner, holding a hostage by a prisoner, any felony punishable by death or imprisonment for life or any attempt to commit one of the above crimes other than an assault).

14. *Id.* § 12022.53(b) (enacted by Chapter 503); *see id.* (stating that the firearm does not need to be in working condition or loaded for this sentencing enhancement to apply).

15. *Id.* § 12022.53(c) (enacted by Chapter 503).

16. *See id.* § 12022.7(e) (West Supp. 1997) (defining "great bodily injury" to mean "a significant or substantial physical injury"); *see also* People v. Armstrong, 8 Cal. App. 4th 1060, 1066, 10 Cal. Rptr. 2d 839, 841 (1992) (explaining that "great bodily injury" is bodily injury that is substantial or significant, not trivial or moderate); People v. Wilson, 218 Cal. App. 2d 564, 566, 32 Cal. Rptr. 406, 408 (1963) (stating that the question of great bodily injury is determined by trier of fact); People v. Bradley, 71 Cal. App. 2d 114, 120, 162 P.2d 38, 41 (1945) (indicating that in consideration of elements that constitute "great bodily harm," a jury may consider the character of the means used, the manner and the purpose of instrument used, and may consider other circumstances).

17. CAL. PENAL CODE § 12022.53(d) (enacted by Chapter 503).

18. *Id.* § 12022.53(*l*) (enacted by Chapter 503).

19. *Id.*; *see* Reynolds, *supra* note 1, at B5 (asserting that the initiative will not backfire against citizens who use guns in self-defense).

20. *See* Stephen J. Leibovic, *Handguns Threaten Public Health*, RICHMOND TIMES DISPATCH (Richmond, Va.), Oct. 9, 1996, at A12 (stating that handguns are the most commonly used weapon in violent crimes).

much higher than those not involving the use of firearms.[21] The intent in promulgating Chapter 503 is to provide a deterrent toward the use of handguns in the commission of felonies,[22] and to provide a retributive response for those who do use one.[23] However, opponents contend that Chapter 503 will not serve as an effective crime deterrent.[24]

The enactment of Chapter 503 will result in additional fiscal expenditures[25] because the criminal justice system must pay for the increased costs of incarceration and construction of new prisons.[26] Critics of Chapter 503 argue that this money

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21. *See* James P. Sweeney, *Assembly Set to Reject Handgun Ban*, COPLEY NEWS SERV., June 4, 1997 (stating that more than 20,000 people are killed each year with handguns and that nearly 5,000 are in California); *see also* Leibovic, *supra* note 20, at A12 (arguing that in 1995 more than $4 billion was spent on medical related costs for firearm-related injuries); Ren Yanshi, *A Look at the U.S. Human Rights Record*, XINHUA NEWS AGENCY (Beijing), Mar. 4, 1997 (citing that one million crimes occur each year involving firearms, more than 20,000 people are shot and killed, and an additional 110,000 were injured by firearms in 1994).

22. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 4, at 2-3 (Apr. 15, 1997); *see Masbruch*, 13 Cal. 4th at 1006, 920 P.2d at 709, 55 Cal. Rptr. 2d at 764 (asserting that the purpose behind Dangerous Weapons' Control Law section governing firearm sentencing enhancements is to deter the use of firearms in the perpetration of violent crimes); *Bland*, 10 Cal. 4th at 1001, 898 P.2d at 398, 43 Cal. Rptr. 2d at 84 (declaring that the legislative intent behind firearm sentencing enhancement is to deter criminals engaged in felonies from creating risk of death or injury); People v. Jackson, 32 Cal. App. 4th 411, 422, 38 Cal. Rptr. 2d 214, 220 (1995) (stating that the goal behind firearm sentencing enhancement statutes is to deter those from creating the potential for death or bodily injury from the presence of a firearm in the commission of a crime); Reynolds, *supra* note 1, at B5 (observing that states that have passed rigid anti-crime law have experienced a greater decrease in respective crime rates); James P. Sweeney, *Initiative Takes Aim at Outlaws with Guns*, SAN DIEGO UNION-TRIB., Oct. 18, 1995, at A1 (indicating that clear language of enhancements will serve to deter criminals).

23. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 4, at 2 (Apr. 15, 1997) (quoting the author who stated, "For far too long, criminals have been using guns to prey on their victims. AB 4 will keep these parasites where they belong . . . in jail. . . . [W]e are sending . . . [a] clear message: If you use a gun to commit a crime, you're going to jail, and you're staying there."); *see also* Christopher Tasy, *'Severe Measures,'* FRESNO BEE, Mar. 3, 1996, at B6 (arguing that sentencing enhancement serves to keep criminals away from the populace more so than it serves as a deterrent).

24. *See* Pete Kuiper, *Various Methods, Besides Initiatives, Work Against Crime*, FRESNO BEE, Feb. 10, 1996, at B7 (arguing that threat of longer sentences will not deter the criminal 'nothing more to lose' mentality); Rory Little, *Costly '10-20-Life' Initiative Won't Cut Crime*, FRESNO BEE, Jan. 26, 1996, at B7 (indicating that no evidence exists showing that longer sentences will decrease crime because criminals don't know or care what the law says); Patience Milrod, *'10-20-Life' Isn't a Sensible Method for Cutting Crime*, FRESNO BEE, Feb. 16, 1996, at B7 (indicating that no evidence supports the deterrent power of enhancements).

25. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 4, at 1 (May 14, 1997).

26. *See id.* (estimating that the annual cost of increased incarceration to be about $17 million and construction costs to be $45 million within 10 years, topping $150 million for incarceration and $225 million for construction within 20 years and resulting in more than $220 million in annual costs for incarceration and more than $500 million in construction costs in 30 years); *see also* Dan Bernstein, *Wilson Signs Bill Adding Time for Gun Crimes, Warns Gangs*, SACRAMENTO BEE, Sept. 26, 1997, at A3 (noting that Chapter 503 will result in harsher sentences for about 500 defendants next year); Milrod, *supra* note 24, at B7 (predicting that additional millions of dollars will need to be spent in costs for county criminal justice agencies). *But see* Cindi Hamilton, *'Basic Principles,'* FRESNO BEE, Feb. 28, 1996, at B4 (explaining that the cost of keeping criminals in prison is much less than the cost of crime); Mike Reynolds, *Readers Can Join 10-20-Life Movement*, FRESNO BEE, Jan. 17, 1996, at B5 (inferring that crime reduction will heighten real estate values, business profits, schools, parks and the tax base).

would be better spent on more effective methods of crime prevention[27] and on other social programs.[28]

IV. CONSTITUTIONAL ISSUES

A. *Cruel, Unusual and Disproportionate Punishment*

The Federal and California Constitutions prohibit the use of cruel and/or unusual punishment,[29] or punishment that is grossly disproportional to the crime committed.[30] Chapter 503's sentencing enhancements are clearly more severe than under prior law.[31] For example, an individual who commits an assault and inflicts great bodily injury through the discharge of a firearm would receive a sentence of twenty-five years to life under Chapter 503, while one who commits the same offense with a machete would receive a maximum sentence of seven years under prior law.[32] Additionally, prior law permitted the court to strike enhancement allegations,[33] Chapter 503 does not grant the court this discretion.[34] The disproportionality of Chapter 503's sentencing enhancements thus may be subject to constitutional attack.[35] However, defendants face a considerable burden in challenging

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27. *See* Milrod, *supra* note 24, at B7 (arguing that a far more effective and less expensive method toward reducing crime would be to reconstitute our mental health system). *But see* Matthew Trbovich, *'The Real Questions,'* FRESNO BEE, Feb. 23, 1996, at B6 (arguing that incarceration better serves the function of crime deterrence than reconstituting our mental health system).

28. *See* Kuiper, *supra* note 24, at B7 (asserting that a punitive approach diverts funds from programs that benefit victims); Milrod, *supra* note 24, at B7 (arguing that increased cost of sentencing enhancements will result in sacrifices to public health, education and quality of life). *But see* Reynolds, *supra* note 1, at B5 (reporting that social programs inadequately deter crime).

29. *See* U.S. CONST. amend. VIII (providing that, "cruel and unusual punishments [shall not be] inflicted"); CAL. CONST. art. I, § 17 (declaring that, "cruel or unusual punishment may not be inflicted . . . .").

30. *See* Enmund v. Florida, 458 U.S. 782, 797 (1982) (explaining that the punishment may not be unconstitutionally disproportionate to the circumstances of the conduct of the defendant); Rodriguez, 14 Cal. 3d 639, 653, 537 P.2d 384, 394, 122 Cal. Rptr. 552, 562 (1975) (requiring that an offender's culpability in the circumstances of a case may not be disproportionate to the sentence).

31. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 4, at 4 (Apr. 15, 1997) (declaring that the court has no discretion with Chapter 503 sentencing enhancements); *see also* CAL. PENAL CODE § 12022.53(h) (enacted by Chapter 503) (requiring that, "the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section"); *id.* § 12022.53(g) (enacted by Chapter 503) (stating that probation or sentencing suspension is not permitted for an enhanced sentence under Chapter 503).

32. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 4, at 3-4 (Apr. 15, 1997); *see* Bill Ainsworth, *Wilson Signs Bill Putting Gun Criminals Away Longer*, COPLEY NEWS SERV., Sept. 26, 1997 (stating that under Chapter 503, "a criminal who brandishes a gun but doesn't use it in a crime would get a far lengthier prison stay than a convict who seriously injures a victim with a knife or other weapon").

33. People v. Romero, 13 Cal. 4th 497, 529-530, 917 P.2d 628, 647-648, 53 Cal. Rptr. 2d 789, 808-809 (1996).

34. CAL. PENAL CODE § 12022.53(i) (enacted by Chapter 503).

35. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 4, at 2 (May. 14, 1997) (arguing that "[c]hoice of weapon seems a dubious basis for such disparate punishment").

a punishment as cruel or unusual[36] because of the deference that courts give to the Legislature in determining the definition of crime and scope of punishment.[37] Thus, because of the potential societal benefits[38] in an age where criminals frequently use firearms, the deference to afford Chapter 503 is especially strong.[39] Furthermore, Chapter 503's punishment requirements are very similar to the previously adopted three strikes provision,[40] and these laws have not yet been found to violate the Eighth Amendment.[41] For instance, in *People v. Cepeda*,[42] the court held that an aggregate eight year sentence under three strikes is not cruel and unusual punishment under the individual circumstances of the crime and held that the crime is not grossly proportionate to the punishment so as to shock the conscience.[43] Therefore, the courts should determine that Chapter 503's sentencing enhancements do not constitute cruel or unusual punishment.

B. Jury Trial Rights

The Constitution guarantees a criminal defendant the right to a jury trial.[44] Previously, courts have held that the trier of fact should determine factual questions relevant to sentencing enhancements.[45] Yet today, the vast majority of decisions

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36. *See* People v. Weddle, 1 Cal. App. 4th 1190, 1196, 2 Cal. Rptr. 2d 714, 718 (1991) (noting that successful challenges based on proportionality are extremely rare); People v. Wingo, 14 Cal. 3d 169, 174, 534 P.2d 1001, 1006, 121 Cal. Rptr. 97, 102 (1975) (requiring that a penalty must appear clearly, positively, and unmistakably unconstitutional to be questioned).

37. *See Wingo*, 14 Cal. 3d at 174, 534 P.2d at 1006, 121 Cal. Rptr. at 102 (noting that in upholding the doctrine of separation of powers, the courts will not "lightly encroach" in matters reserved for the Legislature); Dennis M., 70 Cal. 2d 444, 453, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 6 (1969) (declaring that the validity of statutes will not be questioned "unless their unconstitutionality clearly, positively, and unmistakably appears").

38. *See supra* notes 20-23 and accompanying text (discussing potential societal benefits of sentencing enhancements).

39. *See* People v. Thompson, 24 Cal. App. 4th 299, 304-305, 29 Cal. Rptr. 2d 847, 850 (1994) (noting that the Legislature is given some leeway and ability to experiment in determining scope of punishment especially when the Legislature has determined that the "crime is particularly dangerous to human life," and "the penalty . . . is calculated to advance a critically important social policy for the protection of the public at large").

40. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 4, at 2-3 (Apr. 15, 1997) (noting the similarity between Chapter 503's sentencing enhancements and three strikes' most severe provision).

41. *See* People v. Cartwright, 39 Cal. App. 4th 1123, 1134-37, 46 Cal. Rptr. 2d 351, 356-58 (1995) (declaring that increasing severity of defendant's sentence was not grossly disproportionate to the current offense when viewed in light of his individual circumstances and criminal history and therefore does not constitute cruel and unusual punishment in violation of the Eighth Amendment).

42. 49 Cal. App. 4th 1235, 57 Cal. Rptr. 2d 246 (1996).

43. *Id.* at 1240, 57 Cal. Rptr. 2d at 249.

44. *See* U.S. CONST. amend. VI (providing that, "in all criminal procedures, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *see also* CAL. CONST. art. I, § 16 (requiring that, "trial by jury is an inviolate right and shall be secured to all").

45. *See* People v. Hernandez, 46 Cal. 3d 194, 206, 757 P.2d 1013, 1020, 249 Cal. Rptr. 850, 857 (1988) (stating that sentencing enhancement could not be applied unless it had been "pled and proven before the trier of fact"), *superseded on other grounds by* CAL. PENAL CODE §§ 207, 208 (West 1996); People v. Jackson, 37 Cal. 3d 826, 835, 694 P.2d 736, 741, 210 Cal. Rptr. 623, 628 (1985) (mandating that enhanced term for subsequent felony could not be imposed absent proof of each fact required for enhancement), *overruled on other grounds by* People

have determined that no constitutional guarantee or precedent exists for a jury to determine the application of sentencing enhancements.[46] Therefore, following the weight of decisions in this matter, the courts should conclude that Chapter 503 does not violate any constitutional rights concerning a trial by jury.

C. *Double Jeopardy*

It may be argued that Chapter 503 violates the Double Jeopardy Clause of both the United States and California Constitutions.[47] The prohibition against double jeopardy protects individuals from being charged with the consecutive violation of the same law or violation of laws that are so related that the prohibited conduct by one statute is necessarily included within prohibited conduct by the other.[48] Chapter 503's sentencing enhancements may be likened to punishing a defendant twice for the same offense, because Chapter 503 requires punishment once for the original crime and additionally for the felony with the use of a handgun.[49] Yet, the sentencing enhancements of Chapter 503 do not represent a separate crime or offense for which a defendant is being tried.[50] Rather, they represent additional punishments for offenses for which the defendant has already been convicted.[51] Further, Chapter

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v. Harrell, 207 Cal. App. 3d 1439, 255 Cal. Rptr. 750 (1989); People v. Najera, 8 Cal. 3d 504, 509-10, 503 P.2d 1353, 1357, 105 Cal. Rptr. 345, 349 (1972) (requiring a jury determination as to whether defendant used a firearm to provide for sentencing enhancement); *see also* CAL. PENAL CODE § 12022.53(j) (enacted by Chapter 503) (providing that the necessary facts relevant to sentencing enhancement must either be admitted by defendant or found true by the trier of fact).

46. *See* McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) (providing that no constitutional guarantee exists for jury sentencing); Spaziano v. Florida, 468 U.S. 447, 459 (1984) (holding that the Sixth Amendment does not guarantee a jury determination of the appropriate punishment an individual receives); People v. Wiley, 9 Cal. 4th 580, 588, 889 P.2d 541, 546, 38 Cal. Rptr. 2d 347, 352 (1995) (arguing that no federal or California constitutional requirement grants a defendant a right to a jury trial for sentencing enhancements). *Cf.* Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (opining that, "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury").

47. *See* U.S. CONST. amend. V (prohibiting that "any person be subject for the same offense to be twice put in jeopardy of life or limb"); CAL. CONST. art. I, § 15 (providing that "persons may not twice be put in jeopardy for the same offense"); *see also* CAL. PENAL CODE § 654 (West 1988) (stating that, "an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other").

48. Dennis B., 18 Cal. 3d 687, 691, 557 P.2d 514, 517, 135 Cal. Rptr. 82, 85 (1976).

49. *See* People v. Harbolt, 56 Cal. App. 4th 294, 298, 65 Cal. Rptr. 2d 397, 400 (1997) (noting that in a three strikes offense, the prosecution is barred from relitigating circumstances of previous crime so defendant's double jeopardy rights are not violated).

50. *See* People v. Kelley, 52 Cal. App. 4th 568, 576, 60 Cal. Rptr. 2d 653, 658 (1997) (holding that double jeopardy rights are violated if each offense contains an element the other does not).

51. *See* People v. Waite, 146 Cal. App. 3d 585, 593, 194 Cal. Rptr. 245, 250 (1983) (stating that an enhancement is neither an independent crime or offense); *Bush*, 50 Cal. App. 3d at 176, 123 Cal. Rptr. at 581 (determining that enhancement of punishment for individual convicted of crime does not separately define separate crime); People v. Provencher, 33 Cal. App. 3d 546, 551, 108 Cal. Rptr. 792, 795 (1973) (indicating that sentence enhancement does not amount to double punishment); People v. Henry, 14 Cal. App. 3d 89, 92, 91 Cal. Rptr. 841, 842-43 (1970) (explaining that imposition of five-year sentencing enhancement in addition to punishment for armed

503 requires that only one additional term of imprisonment be imposed for each crime a person commits.[52] Therefore, any challenges to the Constitution's double jeopardy clause would likely be defeated.

V. CONCLUSION

The strict sentencing provisions of Chapter 503 are intended to send a clear message to criminals regarding the use of firearms in the commission of specific felonies:[53] (1) Personal use of a firearm will result in a sentence enhancement of ten additional years;[54] (2) personal and intentional discharge of a firearm during the commission of a felony brings an enhancement of twenty years;[55] and (3) personal and intentional discharge of a firearm that causes great bodily injury will result in an enhancement of twenty-five years to life.[56]

Despite Chapter 503 being the most severe law regarding sentencing enhancements in California,[57] it does not violate the constitutional provision prohibiting cruel and unusual punishment because of its similarity to the Three Strikes law, and the societal concerns that Chapter 503 addresses.[58] Additionally, because the constitution does not guarantee a jury trial in applying sentencing enhancements, no consequent violation should be found.[59] Finally, these enhancements are not classified as separate offenses, but merely as sentence augmentation for existing offenses.[60] Thus, Chapter 503 would not result in double jeopardy infringements. Therefore, Chapter 503's sentencing enhancements should withstand any constitutional challenges because of the societal urgency in combating firearm related felonies.[61]

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robbery does not constitute double punishment or double jeopardy).

52. CAL. PENAL CODE § 12022.53(f) (enacted by Chapter 503).

53. *See supra* notes 22-23 and accompanying text (observing the societal response and benefits from Chapter 503's implementation).

54. *See supra* note 14 and accompanying text.

55. *See supra* note 15 and accompanying text.

56. *See supra* note 17 and accompanying text.

57. *See supra* notes 31-34 and accompanying text (noting the severity of Chapter 503's sentencing requirements).

58. *See supra* notes 36-43 and accompanying text (arguing that Chapter 503 does not violate constitutional prohibitions against cruel or unusual punishment).

59. *See supra* notes 44-46 and accompanying text (discussing constitutional jury trial implications in light of Chapter 503's passage).

60. *See supra* notes 50-52 and accompanying text (distinguishing between criminal offenses and sentencing enhancements).

61. *See supra* notes 20-24 and accompanying text (observing the societal necessity in fighting firearm related felonies)

New Residents and Collectors Must Register Their Out-of-State Handguns: Making a (Government) List and Checking it Twice

Michael J. Daponde

Code Section Affected

Food and Agricultural Code § 5343.5 (new); Penal Code §§ 11106, 12001, 12026.2, 12072, 12076, 12077, 12082 (amended).
AB 991 (Shelley); 1997 STAT. Ch. 462

I. INTRODUCTION

The biblical prophet Isaiah envisioned a future in which swords were beaten into plows and nations no longer waged war.[1] Conversely, the ancient Chinese military theorist Sun-tzu thought of armed warfare as essential to the existence of humankind.[2] For centuries, these competing schools of thought have been engaged in philosophical and intellectual combat over the function of weapons in society.

In early America, our ancestors bore arms as a means of survival in a new and dangerous world.[3] Frequent attacks by wild animals and savage peoples, coupled with fledgling bodies of authority from which to draw protection, made arming oneself a requisite to existence.[4] It was only natural that our nation's founders included "the right of the people to keep and bear arms" in the Bill of Rights.[5] But they did so with a caveat of sorts.[6] Written in a time where the fear of a dominant central government was offset only by the fear of the union crumbling in its infancy,[7] the Second Amendment links the right to bear arms with the objective of maintaining a "well regulated Militia" in order to secure "a free State."[8] And so the debate goes: Does the Second Amendment grant the personal right to bear arms to

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1. *Isaiah* 2:4 (King James).
2. SUN-TZU, THE ART OF WAR 167 (Ralph D. Sawyer trans., Barnes & Noble Books 1994).
3. *See* Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 96 (1997) (explaining the dangers of eighteenth century life); *see also* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 139 (Harvard University Press 1994) (referring to "the perils of frontier life").
4. Dowd, *supra* note 3, at 96; *see* MALCOLM, *supra* note 3, at 139 (remarking that the earliest American settlers "enact[ed] measures for their individual and mutual protection").
5. U.S. CONST. amend. II.
6. *See* William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236, 1236 (1994) (discussing the confusion caused by the Second Amendment's wording).
7. *See* MALCOLM, *supra* note 3, at 152-54 (noting the conflicting opinions of the nation's leaders around the time of the Constitutional Convention with regard to the state and federal roles in controlling a standing army and militias).
8. Van Alstyne, *supra* note 6, at 1236.

each and every American,[9] or does it merely impose a restriction on the federal government's power to prevent the forming and arming of state militias?[10]

Today, the debate over gun control includes terms such as "background checks" and "waiting periods."[11] In California, all gun purchasers are required to submit to a background check which involves a 10-day waiting period.[12] Similarly, the Brady Act of 1993 created the requirement for background checks and waiting periods on a federal level, sparking national debate.[13] A recent Supreme Court decision, however, declared unconstitutional the portion of the Act which required state officials to carry out federal law in conducting these checks.[14] In the opinion, the Supreme Court managed to avoid taking sides in the debate over the Second Amendment by basing its decision on other provisions of the Constitution.[15] But Justice Thomas, in his concurring opinion, may have tilted the hand of the high Court when he suggested that the determination of the right to bear arms may need to be settled soon.[16]

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9. *See generally id.* (suggesting that the Second Amendment will develop into a personal right once case law begins to fall into place); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-American 1st Reconsideration*, 80 GEO. L.J. 309 (1991) (examining the historical correlation between the right to bear arms and the plight of the African-American in this country and supporting the individual rights theory); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (arguing that the framers intended the right to bear arms to be personal).

10. *See* United States v. Miller, 307 U.S. 174, 177 (1939) (establishing that the Second Amendment only applies to firearms reasonably related to preserving a well-regulated militia in determining that ownership of a sawed-off shotgun was not protected by the Constitution); Presser v. Illinois, 116 U.S. 252, 264-65 (1886) (holding that the Second Amendment did not limit the power of the states); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the Second Amendment "has no other effect than to restrict the powers of the national government" in reversing the convictions of Ku Klux Klan members convicted of depriving African-American citizens of their right to bear arms); *see also* Dowd, *supra* note 3, at 83-86 (suggesting that the first clause of the Second Amendment, referring to the need for a well-regulated militia, limits the second clause, the right to bear arms); *see generally* Carl T. Bogus, *Race, Riots and Guns*, 66 S. CAL. L. REV. 1365 (1993) (arguing that the Second Amendment does not grant a personal right); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (supporting the collective right theory).

11. *See, e.g., National Press Club Newsmaker Luncheon Debate Between Rep. Charles Schumer (D-NY) and Wayne LaPierre, National Rifle Association*, (C-SPAN television broadcast and National Public Radio radio broadcast, July 17, 1997) (debating the merits of gun control laws).

12. CAL. PENAL CODE § 12072(c)(1) (West 1996 & Supp. 1997).

13. 18 U.S.C.A. § 922 (West 1996 & Supp. 1997); *see generally* Marc Christopher Cozzolino, Note, *Gun Control: The Brady Handgun Violence Protection Act*, 16 SETON HALL LEGIS. J. 245 (1992) (examining the debate surrounding the Brady Bill).

14. Printz v. United States, 117 S. Ct. 2365, 2379 (1997).

15. *See id.* at 2379 (deciding that even though the Commerce Clause authorized Congress to regulate interstate commerce, it did not, via the Necessary and Proper Clause, authorize Congress to direct the actions of state officials).

16. *See id.* at 2386 (Thomas, J., concurring) (explaining that the debate over the meaning of the Second Amendment has been fervent among legal commentators and suggesting that the high court may wish "to determine whether Justice Story was correct when he wrote that the right to bear arms 'has been justly considered, as the palladium of the liberties of a republic'" (quoting 3 J. STORY, COMMENTARIES § 1890, p. 746 (1833)).

Now, as the 60th anniversary of the last Supreme Court ruling on the Second Amendment approaches,[17] we potentially find ourselves on the cusp of a new defining era in the evolution of the United States Constitution.[18] California's Chapter 462 may hang in the balance.

Chapter 462 amends a relatively new California law which requires registration with the Department of Justice of all sales of firearms purchased in the state.[19] Maintenance of such a record of gun owners is designed to help law enforcement personnel investigate crimes and prosecute criminals.[20] There are some, however, who believe that registration today can lead to confiscation tomorrow.[21] The National Rifle Association warns its members that registration laws could ultimately result in law-abiding NRA members losing their firearms, if subsequent laws are passed that ban the possession of previously legal weapons and permit the state to use its registration list to enforce the new law.[22] Similarly, the National Association of Federally Licensed Firearms Dealers has issued propaganda through the Internet stating that a 1960's New York City law requiring citizens to register long guns resulted in a government list of gun owners which was used by city officials in 1991 to confiscate weapons that had become banned.[23]

The Supreme Court has declared some registration requirements unconstitutional including, a federal law that required an individual to send a reply card to the Post Office prior to receiving communist propaganda[24] and a state law that required voters either to pay a poll tax or to register at least six months prior to any election in which they intended to participate.[25] The court reasoned that such laws

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17. *See generally* United States v. Miller, 307 U.S. 174 (1939) (holding that the Second Amendment only applies to firearms reasonably related to preserving a well-regulated militia).

18. *See* Van Alstyne, *supra* note 6, at 1238-41 (comparing the state of the First Amendment in the early twentieth century to that of the Second Amendment today, there having been little case law regarding the First Amendment until Chief Justice Holmes and Justice Brandeis began shaping it in the 1920's).

19. CAL. PENAL CODE § 11106 (West 1996 & Supp. 1997).

20. *Id.*

21. *See* James B. Jacobs & Kimberly A. Potter, Symposium, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 93 n.2 (1995) (quoting the NRA Member Guide as stating "[a]ny type of . . . registration scheme . . . ultimately could result in the prohibition and/or confiscation of legally owned firearms"); *see also* American Firearms Network, Problems with Gun Registration and Licensing (visited July 22, 1997) <http://www.amfire.com/afistatistics/factsheet.html> (suggesting that a New York City gun registration law did eventually lead to confiscation).

22. Jacobs, *supra* note 21, at 93 n.2.

23. American Firearms Network, *supra* note 21.

24. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (establishing that a federal law requiring an addressee to apply in writing to receive mail presumed to be communist propaganda, restrained freedom of speech and was unconstitutional).

25. *See* Harman v. Forssenius, 380 U.S. 528, 538-42 (1965) (holding that a Virginia law requiring voters to file, six months prior to an election, a notarized or witnessed certificate attesting that they had lived continuously in the state from the time of their original voter registration and did not intend to depart prior to the upcoming election, created the same disenfranchising effect that the Twenty-Fourth Amendment sought to abolish).

would deter some individuals from exercising their constitutional rights and potentially deprive others of participation in our democracy entirely.[26]

Should the high Court decide that the Second Amendment does indeed grant a personal right to bear arms,[27] the next logical question would be: Is it an abridgement of that personal right for the State of California to require its citizens to register gun ownership?

II. How Chapter 462 Affects California Law

Prior to the passage of Chapter 462, California law required state licensed gun dealers to submit all applications for the purchase of firearms to the Department of Justice in order to ensure that the applicant was not a member of a class prohibited from owning guns, such as convicted felons or the mentally incompetent.[28] The statute further provided that applicants wait at least ten days before taking possession of their firearms.[29] In conducting these background checks, the Attorney General was authorized to maintain a record of those gun owners who purchased weapons capable of being concealed upon the person.[30]

Chapter 462 keeps this language intact and fills an apparent void in these laws by requiring the registration of firearms such as pistols, revolvers or other concealable weapons purchased outside of California and brought into the state.[31] This is intended to cover persons moving into the state who possess handguns purchased in other states as well as licensed collectors who acquire curio or relic handguns outside of California.[32]

Today, there are approximately 30-35 million handgun owners in the United States,[33] comprising approximately 13% of the population.[34] During a twelve month period from July, 1995 to June, 1996, there were about 440,000 driver's licenses issued to new California residents.[35] If 13% of these newcomers owned just one handgun each, then over 57,000 unregistered concealable firearms may have crossed the state line during that period. While many gun owners do choose to

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26. *Harman*, 380 U.S. at 538-42; *Lamont*, 381 U.S. at 307.

27. *See Printz*, 117 S. Ct. at 2386 (Thomas, J., concurring) (suggesting that the Supreme Court may wish "to determine whether Justice Story was correct when he wrote that the right to bear arms 'has been justly considered, as the palladium of the liberties of a republic.'" (quoting 3 J. Story, Commentaries § 1890, p. 746 (1833)).

28. Cal. Penal Code § 12072 (West 1996 & Supp. 1997).

29. *Id.* § 12072(c)(1) (West 1996 & Supp. 1997).

30. *Id.* § 11106 (West 1996 & Supp. 1997).

31. *Id.* § 12072 (amended by Chapter 462).

32. *See* Assembly Committee on Public Safety, Committee Analysis of AB 991, at 2 (Apr. 22, 1997) (commenting that persons who move to California with handguns are not subject to registration requirements while California residents who purchase handguns in-state are).

33. American Firearms Network, *supra* note 21.

34. *See* U.S. Bureau of Census, U.S. Census of Population: 1920-1990, vol. I (reporting that as of April 1, 1990 the U.S. resident population was 248,709,873).

35. Assembly Committee on Public Safety, Committee Analysis of AB 991, at 4 (Apr. 22, 1997).

voluntarily register their guns when they become California residents,[36] Chapter 462 ensures that all new residents will be required to do so within 60 days of moving into the state, or else be subject to a criminal misdemeanor.

III. THE PERSONAL RIGHT TO BEAR ARMS

The Second Amendment's stipulation that the right to bear arms may be contingent upon a need for a well regulated militia[37] combines with the Supreme Court's history of relative silence on the subject[38] to keep the debate over the right to bear arms lively amongst American jurists.[39] The growing body of support for the notion that the Second Amendment grants an individual liberty to every American citizen, rather than a collective right of the people, has its roots deeply entrenched in a wide ground of reasoning.[40] Some commentators suggest that our English heritage, rich in gun owning tradition, provides the basis for this personal right.[41] Others rely on the Amendment's placement in the Bill of Rights, neatly tucked between other individual liberties—the freedom of speech[42] and the right to privacy[43]—along with the amendment's Legislative history[44] as proof that the authors intended this right to be personal.[45] Still others argue that the right to bear arms is protected not only from federal infringement, but also from state intrusion via the Fourteenth Amendment, thereby affording it the same status as other personal liberties.[46]

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36. *Id.*

37. U.S. CONST. amend. II.

38. Only three United States Supreme Court decisions have directly ruled on the meaning of the Second Amendment. *See supra* note 10 (stating the Court's holding in each).

39. *See Printz*, 117 S. Ct. at 2386 n.2; *see also supra* notes 9 & 10 (citing several commentators arguing for various interpretations of the Second Amendment).

40. *See generally* Van Alstyne, *supra* note 6 (suggesting that the Second Amendment will develop into a personal right); Cottrol & Diamond, *supra* note 9 (supporting the individual rights theory); Levinson, *supra* note 9 (arguing that the framers intended the right to bear arms to be personal).

41. *See* Dowd, *supra* note 3, at 96 (referring to the English common law right to keep arms for self-defense); *see also* MALCOLM, *supra* note 3, at 138 (including among the "fundamental principles of English jurisprudence . . . the right of Protestants to keep and use weapons"). *See generally* David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) (reviewing MALCOLM, *supra* note 3, and analyzing the British origins of gun ownership).

42. U.S. CONST. amend. I.

43. U.S. CONST. amend. IV. The Third Amendment, granting the right to be free from quartered soldiers, has been scarcely relevant in the enormous body of law written since its inception.

44. *See* Levinson, *supra* note 9, at 640 (explaining that the debates surrounding the Second Amendment's passage contained references to self-protection).

45. *See* Van Alstyne, *supra* note 6, at 1239-41 (suggesting that a Second Amendment jurisprudence resembling that of the First Amendment is ripe for development).

46. *See generally* Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981) (arguing that the Second Amendment is protected by the Fourteenth Amendment from state interference).

Of course, the thought that the Second Amendment grants no such personal liberty has a wide following as well.[47] On the only occasions where the Supreme Court has chosen to speak on the subject,[48] it held that the Second Amendment merely restricted the federal government. It created no individual right to keep and bear arms[49] and it did not prohibit the states from passing gun control laws.[50] Thus, this following has some not-yet-overturned-but-relatively-ancient "law of the land" in its corner.

But suppose for a moment that Justice Thomas has in fact issued an invitation on behalf of the Court to hear such a case,[51] is it possible that the high Court would end the debate over the Second Amendment, or start a series of new debates?

IV. REGISTRATION OF A CONSTITUTIONAL RIGHT?

For the purpose of this legislative note, let us suppose that the Supreme Court has just handed down a monumental decision declaring that the right to keep and bear arms is an individual liberty, to be enjoyed by all Americans, and not merely a check on Congress or a collective right of the citizenry. Where would that leave Chapter 462 and the law it amends which require California residents to register this newfound personal right with the State Department of Justice?[52]

The Supreme Court has consistently indicated that virtually any requirement of individuals to register with the government prior to exercising a constitutional right infringes on that right and is therefore unconstitutional.[53] The high Court has gone

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47. *See generally* Bogus, *supra* note 10 (arguing that the Second Amendment does not grant a personal right).

48. *See* cases cited *supra* note 10.

49. *See Cruikshank*, 92 U.S. at 553 (explaining that the Second Amendment "has no other effect than to restrict the powers of the national government").

50. *See Presser*, 116 U.S. at 265 (stating that the Second Amendment "is a limitation only upon the power of Congress . . . and not upon that of the States").

51. *See supra* note 16 and accompanying text (suggesting the Supreme Court may want to take up the issue).

52. CAL. PENAL CODE § 11106 (amended by Chapter 462).

53. *See Lamont*, 381 U.S. at 307 (establishing that a federal law requiring an addressee to apply in writing to receive mail presumed to be communist propaganda restrained freedom of speech and was unconstitutional); Thomas v. Collins, 323 U.S. 516, 532 (1945) (declaring that a statute requiring labor organizers to register with the state prior to soliciting membership imposed a previous restraint on an individual's rights of free speech and free assembly); *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n, 116 S. Ct. 2374, 2391 (1996) (explaining that an F.C.C. regulation requiring cable television subscribers to submit written notice prior to viewing indecent programming would deter viewing and restrain First Amendment rights); Marchetti v. United States, 390 U.S. 39, 48-49 (1968) (holding that the federal law requiring persons to record earnings from illegal gambling activities with the federal government for occupational tax purposes created the "real and appreciable . . . hazard of self-incrimination" that made it unconstitutional); *Harman*, 380 U.S. at 538-42 (holding that a Virginia law requiring voters to file, six months prior to an election, a notarized or witnessed certificate attesting that they had lived continuously in the state from the time of their original voter registration and did not intend to depart prior to the upcoming election created the same disenfranchising effect that the Twenty-Fourth Amendment sought to abolish). *But see* Marston v. Lewis, 410 U.S. 679, 680 (1973) (upholding a state voter registration statute on the ground that it furthered the legitimate state objective of ensuring fair elections); Dunn v. Blumstein, 405 U.S. 330, 349 (1972) (same).

so far as to determine that a person's right to be free from self-incrimination[54] was so great that it operated as a complete defense to a federal law requiring citizens to report income earned from illegal gambling to the federal government.[55] The Court held that a registration requirement which created a "real and appreciable . . . hazard of self-incrimination" undermined the liberties guaranteed in the Fifth Amendment.[56]

At times though, the Court has qualified its holdings. On more than one occasion, the high Court stated that restrictions on individual rights may be justified where public safety so demanded.[57] In another case, the Supreme Court held that a law requiring voters to register at least 30 days before an election was constitutional because, in order to ensure fair elections, the state needed a time period in which it could compile an accurate voter record.[58] The Court said that the right to vote did not entitle a citizen to demand a ballot on election day.[59]

Where might the right to keep and bear arms[60] fit into this line of reasoning? Surely, the misuse, abuse, or mere irresponsible exercise of the right to keep and bear arms presents a far graver threat to society than does the misuse of most other constitutional rights such as free speech or the right to vote. But, does the potential for such danger justify California's need to maintain a record of law-abiding citizens who have chosen to exercise their Second Amendment rights with proper care?[61]

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54. U.S. CONST. amend V.

55. *See Marchetti*, 390 U.S. at 48-49 (holding that the federal law requiring persons to record earnings from illegal gambling activities with the federal government for occupational tax purposes created the "real and appreciable . . . hazard of self-incrimination" that made it unconstitutional).

56. *Id.*

57. *See, e.g., Thomas*, 323 U.S. at 530 (stating that a "clear and present danger" threatening the safety of the general public *may* give rise to restrictions on personal liberties, but only in the gravest of circumstances); *see also* Bates v. Little Rock, 361 U.S. 516, 524 (1960) (explaining that only a compelling state interest may withstand the constitutional scrutiny of the significant abridgement of an individual's personal rights).

58. *See Dunn*, 405 U.S. at 349 (providing that the interests in preventing voter fraud were such that a registration cut-off date prior to an election was appropriate in order for officials to prepare voter records, so long as the period reflected a reasonable amount of time to conduct such business).

59. *Id.*

60. U.S. CONST. amend. II.

61. CAL. PENAL CODE § 11106 (amended by Chapter 462) (West 1996 & Supp. 1997).

V. THE BACKGROUND CHECK AND PUBLIC SAFETY

When it comes to public safety, the needs of the many often outweigh the needs of the few.[62] An individual's wish that his or her constitutional rights be free from state intrusion will usually yield to the demands of society as a whole, particularly where public safety is threatened.[63] Unfettered gun ownership has proven to present just such a threat, where it is not uncommon for persons to commit crimes shortly after purchasing a firearm.[64]

The public need to prevent guns from reaching the wrong hands has led to such things as background checks and waiting periods. Investigating an individual's confidential history prior to permitting gun ownership would seem to constitute not only an invasion of that person's privacy,[65] but also an unnecessary impediment on a personal liberty.[66] In addition, requiring a would-be gun owner to file an application with the Department of Justice before taking possession of his or her firearm[67] seems tantamount to requiring the addressee of communist political pro-

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62. *See Thomas*, 323 U.S. at 530 (stating that a restriction on an individual's personal rights may be justified where public safety is threatened by a "clear and present danger"); *see also Bates*, 361 U.S. at 524 (explaining that only a compelling state interest may withstand the constitutional scrutiny of the significant abridgement of an individual's personal rights); Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273, 276 (1984) (holding that an individual's right of privacy must sometimes give way to "a state's fundamental right to enact laws which promote public health, welfare and safety").

63. *Id.*

64. *See* Ken Herman, *Florida Concealed Weapons Law: It's a Draw*, HOUSTON POST, Jan. 22, 1995, at A1 (describing a man who had an altercation about an hour after purchasing a gun); Mike Kelly, *Gun Law Loophole*, THE RECORD, June 14, 1994, at B1 (explaining how a person previously institutionalized as a paranoid schizophrenic was able to purchase a gun in Arizona where he only needed a driver's license and a second form of photo I.D.); *Harrison Man Goes on Trial*, CHARLESTON GAZETTE, Feb. 19, 1994, at A9 (detailing the actions of a man who shot a 16 year old girl hours after purchasing a firearm); *Man Kills Wife, Self With Just-Purchased Gun*, U.P.I., Nov. 26, 1991 (reporting that the gun used in a homicide/suicide had been purchased less than an hour before); Katie Long, *Mother Skirted 15-day Law to Buy Gun*, ATLANTA J. AND CONST., Jan. 11, 1991, at G1 (noting that a woman had killed her mentally ill son and then herself just three days after purchasing a handgun); *State Sets Three New Executions*, U.P.I., June 19, 1987 (recounting the crimes of a death-row inmate where he shot and killed a police officer just hours after purchasing the gun).

65. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977) (explaining that the right of privacy includes the right to avoid the disclosure of personal matters); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (characterizing the "right to be let alone" as "the right most valued by civilized men"); Cozzolino, *supra* note 13, at 265-66 (asserting that a background check before a handgun purchase may infringe upon the purchaser's right of privacy, specifically the Fifth Amendment aspect of privacy, the right to be free from self-incrimination). *But see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 597 (1976) (Brennan, J., concurring) (reasoning that the responsibility of the press to report matters of public concern outweighed appellee's right to keep information surrounding the rape of his daughter private); *Kathleen K.*, 150 Cal. App. 3d at 996, 198 Cal. Rptr. at 276 (holding that an individual's right of privacy must sometimes give way to "a state's fundamental right to enact laws which promote public health, welfare and safety"); People v. Mills, 81 Cal. App. 3d 171, 181, 146 Cal. Rptr. 411, 417 (1978) (establishing that a state's interest in preserving public health, safety and welfare supercedes an individual's right of privacy).

66. As previously indicated in Part IV., for the purposes of this Legislative Note, assume that the Second Amendment grants a *personal* right to bear arms to individual citizens, as opposed to a *collective* "right of the people." U.S. CONST. amend. II.

67. CAL. PENAL CODE § 12072 (West 1996 & Supp. 1997).

paganda to submit a written request before receiving his or her mail.[68] In *Lamont v. Postmaster General*,[69] the Supreme Court held that the "official act" of returning a reply card, as a prerequisite to receiving communist mail, amounted to an unconstitutional abridgement of the addressee's First Amendment right.[70]

However, with gun-purchaser background checks, such an obstacle to the exercise of a constitutional right serves a greater societal good. It enables the government to prevent known classes of individuals, such as convicted felons, drug abusers and the mentally handicapped, from arming themselves and posing a potential danger to the public.[71] Unlike the scenario in *Lamont*, where the reply card was a mere formality operating only as a means of detaining communist mail,[72] the background check actually stops guns from entering the wrong hands.[73]

VI. THE WAITING PERIOD AND PUBLIC SAFETY

Requiring a gun purchaser to wait ten days before receiving his or her firearm[74] serves a dual purpose in the preservation of public welfare. First, a period of ten days is ample time for a gun dealer to send a purchaser's application to the Department of Justice and for a thorough check into the purchaser's background to be conducted.[75] Second, by mandating a cooling off time of sorts, the law may avert some potentially grievous circumstances.

The Supreme Court has determined that individuals do not have a constitutional guarantee that the demand for a ballot on election day will produce one.[76] Rather it declared that the societal interest in preserving the sanctity of elections warranted the minor hindrance of registering some time in advance.[77] Similarly, society has an interest in preventing individuals, acting on emotions such as anger, revenge or

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68. *See Lamont*, 381 U.S. at 302 (explaining the portion of the Postal Service and Federal Employees Salary Act which required all mail fitting the description of "communist political propaganda" be detained and the addressee notified, and such mail remain detained until the addressee requested delivery in writing).

69. 381 U.S. 301 (1965).

70. *Id.* at 305.

71. CAL. PENAL CODE § 12072 (West 1996 & Supp. 1997).

72. *Lamont*, 381 U.S. at 302.

73. CAL. PENAL CODE § 12072 (West 1996 & Supp. 1997); *see* John D. McClain, *Gun Checks are Working, Study Says Organization Lauds Brady Law's Effects*, ROCKY MOUNTAIN NEWS, Sept. 21, 1997, at A2 (reporting that background checks reduce interstate gun trafficking); Naomi Paiss, *Brady Background Checks Cause Dramatic Decrease in Gunrunning, New Study Shows*, U.S. NEWSWIRE, Sept. 19, 1997 (stating that "[s]tates that began conducting background checks on handgun purchases when the Brady Act was implemented in 1994 are as much as 86 percent less likely to be sources of guns used in crimes in other states than they were prior to [the Brady Act]"); Jerry Zremski, *Study Says Brady Law Reduced Guns Entering State*, BUFFALO NEWS, Sept. 21, 1997, at B5 (citing Bureau of Alcohol, Tobacco and Firearms statistics that background checks pursuant to the Brady Act prevented 173,000 handgun purchases between 1994 and 1996).

74. CAL. PENAL CODE § 12072 (West 1996 & Supp. 1997).

75. *Id.*

76. *Dunn*, 405 U.S. at 349; *Marston*, 410 U.S. at 680.

77. *Id.*

fear, from obtaining firearms while in an irrational or enraged state of mind. Such a societal benefit warrants the minor delay a California citizen experiences in exercising his or her right to bear arms.

VII. THE DEPARTMENT OF JUSTICE LIST

The Department of Justice is authorized to maintain a record of California citizens who purchase concealable firearms.[78] Chapter 462 further authorizes the Department of Justice to add to the record the names of persons moving into the state with similar weapons.[79] This raises the issue: Does a state have a legitimate public safety concern, so serious and imminent as to warrant the compilation of a list of law-abiding citizens who have chosen to exercise their personal right to bear arms by owning handguns? The question remains largely unanswered in other areas of law.

In *Lamont*, the plaintiff challenged, the placement of his name on a government list of persons receiving communist mail.[80] But before the case reached the high Court, Congress amended the law, removing the provision authorizing the government list.[81] Even though the Supreme Court was not asked to decide that issue, it recognized the "almost certain . . . deterrent effect" that a law which stigmatized the receipt of communist literature could have on individuals.[82] The author of the majority decision, Justice Douglas, implied that the government's mere condemnation of such literature created a fear tantamount to being placed on a list of traitors.[83]

Similarly, in *Denver Area Educational Telecommunications Consortium v. Federal Communication Commission*,[84] the Supreme Court was asked to rule on a federal law which required cable operators to block "patently offensive" sex channels, unblocking them only upon written request by the subscriber.[85] The Court recognized that the written request requirement created a fear in viewers that they would be placed on a subscriber list[86] despite the fact that the law contained no

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78. CAL. PENAL CODE § 11106 (West 1996 & Supp. 1997).

79. *Id.* (amended by Chapter 462).

80. *See Lamont*, 381 U.S. at 304 (discussing that plaintiff amended his complaint to include the constitutional challenge).

81. *See id.* at 305 (explaining that the federal law in question was amended before trial and the Postmaster General was no longer authorized to maintain a list of communist propaganda recipients).

82. *Id.* at 307.

83. *See id.* (commenting that some persons wishing to receive communist mail may not do so out of fear for their jobs or that the federal government would label them traitors).

84. 116 S. Ct. 2374 (1996).

85. *Denver Area Telecomm. Consortium*, 116 S. Ct. at 2380; *id.* at 2394.

86. *Id.* at 2391.

provision authorizing such a list.[87] The Court viewed this fear as a legitimate restriction on the would-be viewer's First Amendment right.[88]

While the Supreme Court has acknowledged that an individual's exercise and enjoyment of a constitutional right may be somewhat suffocated by the collection of names by the government or some other entity, it has never ruled directly on whether the maintenance of such lists is constitutional.[89] It is natural to assume that if California purported that its list of handgun owners operated to prevent a "clear and present danger" from threatening public safety,[90] or quelled a legitimate public concern,[91] or carried out some administrative function,[92] then the law would most likely survive judicial scrutiny, provided California could establish the necessity of such an interest. However, the law permitting the Department of Justice to maintain a list of handgun owners was passed "[i]n order to assist in the investigation of crime, the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property."[93] Is the state's need for this type of aid to law enforcement of such paramount importance that it supersedes an individual's right to handgun ownership, free of any deterrence or apprehension?

Typically, only the most serious public interests will outweigh a person's right to enjoy constitutional liberties.[94] Where background checks and waiting periods seem to pass the public safety test by averting a potential serious and imminent threat,[95] a government list of handgun owners appears to fall short. The Attorney General's record of gun owners does not keep firearms out of the wrong hands,[96] and it doesn't prescribe a temporary antidote to irrational behavior.[97] Rather, it turns law-abiding handgun owners into possible murder suspects or the subjects of criminal investigation.[98] Moreover, Chapter 462 requires California's newest residents to take their places in the police line-up.[99]

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87. *Id.* at 2392, 2430.

88. *Id.* at 2391.

89. *Id.*; *see Lamont*, 381 U.S. at 303-05 (explaining that the constitutional question surrounding the government's maintenance of a list was not decided because, prior to oral argument, the statute was amended, deleting that provision).

90. *See Thomas*, 323 U.S. at 530 (stating that a restriction on an individual's personal rights may be justified where public safety is threatened by a "clear and present danger").

91. *See Nebraska Press Ass'n*, 427 U.S. at 597 (Brennan, J., concurring) (reasoning that the responsibility of the press to report matters of public concern outweighed appellee's right to keep information surrounding the rape of his daughter private).

92. *See Marston*, 410 U.S. at 680 (granting deference to Arizona's legislative decision to cut off voter registration at 50 days prior to an election in order to meet the state goal of compiling an accurate voter record).

93. CAL. PENAL CODE § 11106 (West 1996 & Supp. 1997).

94. *Thomas*, 323 U.S. at 530.

95. *See supra* Part V (examining the constitutionality of background checks).

96. *See* CAL. PENAL CODE § 12072 (West 1996 & Supp. 1997) (explaining that convicted felons, drug abusers and the mentally incompetent are prohibited from possessing firearms).

97. *See supra* Part VI (examining the constitutionality of waiting periods).

98. *See* CAL. PENAL CODE § 11106 (West 1996 & Supp. 1997) (stating that the purpose of the Attorney General's record of handgun owners is criminal investigation, arrest and prosecution).

99. CAL. PENAL CODE § 12072 (amended by Chapter 462).

It is likely that some prospective gun purchasers will be dissuaded by this procedure, in much the same way the Supreme Court in *Lamont* predicted persons would be deterred by the communist mail law.[100] On the other hand, the federal law in *Lamont* was not purported to be an aid to law enforcement (i.e. the tracking down of communist spies). Moreover, the high Court was protecting a right declared to be unfettered[101] and uninhibited.[102] Here, the need for the swift and speedy apprehension of criminals provides a mitigating public safety concern.[103] The longer a criminal remains at-large, the greater the chance of further criminal activity.[104] More importantly, the right to keep and bear arms is not likely to attain the level of relative limitlessness that we have come to associate with its freedom of speech counterpart.[105] Thus, the state's interest in public safety is likely to outweigh whatever deterrent effect a government list of handgun owners may create.

VIII. CONCLUSION

It is entirely plausible that the Supreme Court will soon end the long-standing debate over exactly what rights are granted by the Second Amendment.[106] Should the high Court resolve the issue on the side of personal liberty,[107] then the right to bear arms may experience some alterations, and begin resembling its Bill of Rights brethren.[108] Considering the potential dangers associated with gun ownership,[109] the courts are unlikely to release the Second Amendment from its shackles completely.

Nonetheless, a personal right to bear arms will certainly impact many current gun control laws. Chapter 462 and the law it amends are likely candidates for judicial challenge. Government lists of handgun owners can serve as obstacles to an individual exercising his or her right to bear arms. Such lists can intimidate the prospective gun purchaser concerned about reputation or privacy. They can place the gun owner in fear of being wrongly accused of a crime or having his or her

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100. *Lamont*, 381 U.S. at 307.

101. *Id.* at 305.

102. *See id.* at 307 (citing *New York Times v. Sullivan* as establishing that the First Amendment contemplates "uninhibited, robust and wide-open debate and discussion").

103. *See* Cozzolino, *supra* note 13, at 245 n.3 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, Handgun Crime Victims: A Special Report (July 8, 1990), which reported that almost half of the nation's murder victims were killed with a handgun, and that an additional 15,000 people were wounded each year by handguns).

104. *Id.*

105. *See supra* note 64 (illustrating the dangers of unrestricted gun ownership).

106. *See Printz*, 117 S. Ct. at 2386 (Thomas, J., concurring) (explaining that the debate over the meaning of the Second Amendment has been fervent among legal commentators and suggesting that the high court may wish "to determine whether Justice Story was correct when he wrote that the right to bear arms 'has been justly considered, as the palladium of the liberties of a republic' (quoting 3 J. STORY, COMMENTARIES § 1890, p. 746 (1833)").

107. *Id.*

108. *See generally* U.S. CONST. amend. I-X (setting forth the Bill of Rights).

109. *See* source cited *supra* note 103.

weapons confiscated. However, the purpose these lists serve, to expedite the arrest and prosecution of criminals, would seem to tip the scales in favor of public safety.

The conclusion of one debate is likely to be the beginning of many new ones as the Second Amendment transforms. California law may play a significant role in its shaping.

Parolees No Longer Walk Following Serious Felonies—Incarceration Mandatory

Michael J. Daponde

Code Sections Affected
Penal Code § 1203.085 (amended).
AB 133 (Scott): 1997 Stat. Ch. 160

I. INTRODUCTION

The California "Three Strikes" law, largely acclaimed and highly criticized, at times appears to be in a state of disrepair.[1] For example, prior to 1996, some repeat felons were averting incarceration through probation sentences[2] even when they were already on probation at the time of their second felony conviction.[3] This problem arose largely because of the poor drafting of the "Three Strikes" law.[4] Last year, lawmakers plugged this hole by passing Chapter 719[5] which eliminated probation sentencing (thus, mandating incarceration) where the offender was already on probation for a "non-strike" felony at the time of the new offense and committed a "serious or violent" felony.[6]

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1. *See* Michael Vitiello, *Three Strikes: Can We Return To Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 410-14 (1997) (discussing how public fervor fueled by the murders of two young girls forced the "Three Strikes" legislation and initiative upon California lawmakers relatively unamended and filled with drafting errors); *see also id.* at 397-99, nn.14, 19 (citing Bill Jones, *Three Strikes and You're Out*, 26 U. WEST L.A. L. REV. 243 (1995) and Phil Wyman & John G. Schmidt, Jr., *Three Strikes You're Out (It's About Time)*, 26 U. WEST L.A. L. REV. 249 (1995), as ardently advocating in favor of "Three Strikes," and William M. Thornbury, *What is the Meaning of Three Strikes and You Are Out Legislation?*, 26 U. WEST L.A. L. REV. 303, 303-04 (1995), and Jeff Brown, *Why California's "Three Strikes Law" is Terrible Legislation*, 26 U. WEST L.A. L. REV. 269 (1995), as presenting unfavorable opinions of the "Three Strikes" law).

2. *See* BLACK'S LAW DICTIONARY 1202 (6th ed. 1990) (defining "probation" as a sentence imposed for the "commission of [a] crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration").

3. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 893, at 3 (May 14, 1996) (indicating that it is not uncommon for some offenders to be serving two or three probation sentences at the same time).

4. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 3 (Feb. 25, 1997) (explaining that prior to the passage of Chapter 719, the silence of "Three Strikes" with regard to probationers who committed a "strike" resulted in some judges granting additional probation sentences to these repeat offenders). *See generally* Vitiello, *supra* note 1 (discussing the many flaws created by hasty drafting of "Three Strikes").

5. 1996 Cal. Legis. Serv. Ch. 719, sec. 1, at 3214-17 (West) (amending CAL. PENAL CODE § 1203).

6. *See* CAL. PENAL CODE § 667.5(c) (West 1982 & Supp. 1997) (including in the definition of violent felonies: murder, voluntary manslaughter, mayhem, rape, sodomy by force, oral copulation by force, lewd acts on a child, any felony inflicting great bodily harm, robbery of an inhabited dwelling, arson, attempted murder,

In 1997, legislators needed to address a new hole in "Three Strikes"created by Chapter 719.[7] Chapter 719 required prison time for *probation* violators committing serious or violent offenses but left the possibility of probation open to *parole* violators perpetrating the same crimes.[8] Thus, probationers who committed "strike" level offenses received mandatory jail sentences, while parolees who carried out the same crimes could be sentenced to probation. Since both probation and parole serve as an offender's conditional last chance to avoid prison,[9] California lawmakers decided to treat them the same for "Three Strikes" sentencing purposes by enacting Chapter 160.[10] Chapter 160 makes a strike for a parolee equivalent to that of a probationer—each will carry a mandatory prison sentence.[11]

Proponents of Chapter 160 argue that it makes sense for these two offenders to suffer similar fates for similar offenses, since both are criminal repeaters.[12] On the other hand, opponents believe that such rigid sentencing laws deprive judges of their discretionary function.[13] They argue that the judiciary performs an important role in weighing special or mitigating circumstances prior to issuing sentences.[14] Further, opponents fear that inflexible sentencing guidelines will lead to overcrowded prisons.[15] To some, Chapter 160 fills a void. To others, it unnecessarily constrains the judiciary.

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kidnaping and carjacking, among others); *see also id.* § 1192.7(c) (West 1982 & Supp. 1997) (including in the definition of serious felonies: murder, voluntary manslaughter, mayhem, rape, sodomy by force, oral copulation by force, lewd or lascivious acts on a child, any felony punishable by the death penalty, any felony inflicting great bodily harm, any felony in which the defendant used a firearm or other dangerous or deadly weapon, attempted murder, assault with intent to commit rape or robbery, assault with a deadly weapon on a peace officer, assault by a life prisoner on a nominate, assault with a deadly weapon by an inmate, explosives, burglary of an inhabited dwelling, robbery, kidnaping, carjacking and selling or furnishing a minor with one of a number of controlled substances, among others).

7. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 1-2 (Feb. 25, 1997) (observing that Chapter 719 amended the probation statute without amending the parole statute, creating an imbalance in the law).

8. *Id. See infra* Part II. (explaining the differences between probation and parole).

9. *See* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 893, at 4 (May 14, 1996) (expressing that felony probation should serve as an ultimatum to the offender).

10. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 1 (Feb. 25, 1997) (stating that Chapter 719 created an "anomaly" in the law).

11. *Id.* at 1-2.

12. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 7 (May 20, 1997).

13. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 4 (Feb. 25, 1997).

14. *Id.*

15. *Id.*; SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 893, at 8 (May 14, 1996).

II. PAROLE V. PROBATION

In California, parole is part of the defendant's determinate sentence.[16] When a person is sentenced to prison, a parole term is automatically attached to the prison term,[17] and parole begins once the inmate is released from prison.[18] Under most circumstances, the period of parole is not more than three to five years.[19] During that time, the parolee is required to report to a parole officer and to abide by the rules of parole, usually established by the Board of Prison Terms.[20] Any violation of these rules may lead to a revocation of parole and the parolee may be required to complete his or her prison term.[21]

Probation is itself a sentence and, depending on the circumstances surrounding the offense and the history and criminal record of the individual, may serve as a substitute for a prison term.[22] Like parolees, persons on probation are required to report to a probation officer and to abide by the rules of their probation, usually prescribed by the sentencing judge or probation officer.[23] Similarly, a violation of these rules could lead to automatic incarceration.[24] However, unlike parole, probation is a sentence available only at the discretion of the judge, on a case-by-case basis.[25]

III. EXISTING LAW AND CHAPTER 160

Following the enactment of Chapter 719 in 1996, judges were stripped of the discretion to determine whether extenuating or mitigating circumstances warranted probation in cases where the defendant committed a serious or violent crime while serving a probation sentence.[26] But Chapter 719 failed to address similar conduct

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16. *See* CAL. PENAL CODE § 3000 (a)(1) (West 1982 & Supp. 1997) (stating that "[a] sentence . . . shall include a period of parole"); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 2 (Feb. 25, 1997).

17. *Id.*

18. CAL. PENAL CODE § 3000(a)(1) (West 1982 & Supp. 1997).

19. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 2 (Feb. 25, 1997) (explaining that parole may be extended beyond the statutory limit where parolees escape from custody and become fugitives).

20. CAL. PENAL CODE § 3000(b)(6) (West 1982 & Supp. 1997).

21. *Id.* § 3000(b)(7) (stating that the Board of Prison Terms is "[t]he sole authority to issue warrants for the return to actual custody of any state prisoner released on parole").

22. *Id.* § 1203(e) (West 1982 & Supp. 1997) (describing persons ineligible for probation sentences).

23. *Id.* § 1202.8 (West 1982 & Supp. 1997).

24. *Id.* § 1203.1(a) (West 1982 & Supp. 1997).

25. *Id.* § 1203(b)(3); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 893, at 6 (May 14, 1996).

26. Chapter 719 eliminated the possibility of a probation sentence where the offender committed a "serious or violent" felony while on probation for a "non-strike" felony at the time of the new offense. CAL. PENAL CODE § 1203(k) (West 1982 & Supp. 1997).

by parolees.[27] Thus, judges retained a degree of autonomy in weighing the specific circumstances surrounding a particular case where a parolee committed a repeat offense.

Prior to Chapter 160, the California Penal Code prohibited a sentence of probation, hence eliminating judicial discretion in sentencing, under two circumstances: (1) Where an individual was convicted of a *violent* offense while on parole for any felony; or (2) where an individual was convicted of any felony while on parole for a *violent* felony.[28] The law was silent as to serious felonies. Chapter 160 added serious felonies to the list of offenses for which incarceration is mandatory.[29]

IV. LIMITING JUDICIAL DISCRETION

The primary concern of those opposed to Chapter 160 is that, without a judge weighing all of the circumstances surrounding each individual case, justice will be administered blindly.[30] Many feel that the judge's role in sentencing is crucial, particularly where circumstances may warrant the avoidance of a prison term.[31] Indeed, the strict application of "Three Strikes" has produced plenty of anecdotal evidence to support this notion.

In one case, a Riverside homeless man received a sentence of 29 years to life when he was convicted of shoplifting cologne samples, a razor kit and a flashlight from K-Mart.[32] His other strikes consisted of two robberies in the 1970's and a residential burglary in 1987.[33] In another case, a 27-year old man received his "third" strike when he stole a slice of pepperoni pizza.[34] Before the notorious pizza caper, the man had been convicted of robbery, attempted robbery, unauthorized use of a motor vehicle and possession of a controlled substance.[35] These prior offenses elevated the misdemeanor to a felony pursuant to "Three Strikes" and the man was sentenced to 25 years to life.[36] An Alameda man who was previously convicted of

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27. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 1-2 (Feb. 25, 1997).

28. CAL. PENAL CODE § 1203.085 (West 1982).

29. *Id.* § 1203.085 (amended by Chapter 160).

30. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 4 (Feb. 25, 1997) (suggesting that opponents of AB 133 believe that the independent trier of fact is in the best position to determine whether a particular defendant deserves probation rather than a prison term).

31. *See id.* at 4-5 (listing the American Civil Liberties Union, California Attorneys for Criminal Justice, and the California Public Defenders Association as opponents making the argument against limiting judicial discretion).

32. *See* Steven Pressman & Jennifer Kaae, *Three Strikes: The Law Was Intended to Send a Clear Message to Repeat Criminals. But No One Agrees What the Message Is.*, CAL. LAW., Oct. 1996, at 32, 38 (discussing the disparate results of "Three Strikes" sentencing throughout the state, and portraying the effect it had on four individuals).

33. *Id.*; *see* CAL. PENAL CODE § 1170.12(a)(3) (West 1982 & Supp. 1997) (stating that "[t]he length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of the sentence").

34. Vitiello, *supra* note 1, at 396 n.8.

35. *Id.*

36. *Id.*

robbery and armed robbery received a sentence of 35 years to life for his unarmed robbery of a Wendy's restaurant.[37] Another man was sentenced to 25 years to life for stealing a drill from a garage following two convictions for residential burglaries, one of which predated the Reagan Administration.[38] Finally, a San Diego man is currently serving his sentence of 115 years to life for possession of .06 grams of heroin.[39] His first two strikes were dealt simultaneously in one 1985 charge.[40] They consisted of two residential burglary counts.[41]

The opposition to "Three Strikes" may use such cases to illustrate the dangers of relinquishing judicial discretion, but there are those who believe that this is exactly how justice ought to be carried out.[42] Many "Three Strikes" supporters are average Americans who are troubled by the prospect of criminals returning to the streets after serving light sentences only to strike again.[43] They view judicial discretion in sentencing as something that is just not working.[44] Others simply believe that individual judges are cursed with many of the same biases and prejudices as others in society.[45] In their view, removing the power to sentence from the hands of one individual (the judge) and placing it in the hands of many (the legislature) creates a more balanced approach to punishment.[46]

Despite this apparent judicial hand-tying, the power to dismiss a prior strike offense remains a discretionary weapon in the trial judge's arsenal.[47] "Three Strikes" explicitly permits the prosecuting attorney to move to dismiss a defendant's prior felony convictions "in the furtherance of justice."[48] In *People v. Superior Court (Romero)*,[49] the Supreme Court of California held that a court may

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37. Pressman & Kaae, *supra* note 32, at 38; *see* CAL. PENAL CODE § 1170.12(c)(2)(A) (West 1982 & Supp. 1997) (detailing the methods courts must use to determine the minimum term of a third strike sentence, the maximum always being life imprisonment).

38. Vitiello, *supra* note 1 at 396, n.8; *see* CAL. PENAL CODE § 1170.12(a)(3) (West 1982 & Supp. 1997) (stating that length of time between offenses is not determinative).

39. *See* Pressman & Kaae, *supra* note 32, at 38.

40. *Id.*

41. *Id.*

42. *See* Vitiello, *supra* note 1, at 430-31 n.206 (quoting California Attorney General Dan Lungren as stating that the goal of the state is to follow through on promises of tough punishment).

43. *See* Meredith McClain, Note, *Three Strikes and You're Out: The Solution to the Repeat Offender Problem?*, 20 SETON HALL LEGIS. J. 97, 120 n.112 (1996) (citing Edwin E. Meese III, *Three Strikes Laws Punish and Protect*, INSIGHT, May 1994, at 20, to support the proposition that citizens generally don't trust discretionary sentencing laws).

44. *Id.*

45. *See* Lois G. Forer, *Justice by the Numbers: Mandatory Sentencing Drove Me From the Bench*, WASH. MONTHLY, Apr. 1992, at 12 (conceding that mandatory sentencing guidelines were originally created to prevent racist or crusader judges from doling out punishment unfairly).

46. *Id.*

47. *See* People v. Superior Court (Romero), 13 Cal. 4th 497, 508, 917 P.2d 628, 632, 53 Cal. Rptr. 2d 789, 793 (1996) (construing § 1385(a) of the California Penal Code as permitting the court to dismiss a defendant's prior criminal convictions for the purposes of sentencing).

48. CAL. PENAL CODE § 1170.12(d)(2) (West 1982 & Supp. 1997).

49. 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996).

dismiss prior felony allegations "in the interest of justice" without requiring a prosecutorial motion, if the "Three Strikes" penalty would be too harsh.[50] The *Romero* court reasoned that requiring a judge to gain the prosecutor's approval prior to taking such action independently would seriously undermine the judicial system and the separation of powers doctrine.[51] Thus, the court held that such power granted to the prosecuting attorney by statute must be implicitly granted to the judiciary as well.[52]

"Three Strikes" authorizes the striking of a strike "in the furtherance of justice,"[53] and *Romero* established that such power is vested in the judiciary.[54] This may not give judges a license to exercise unfettered discretion, but neither does it bind them to the strict application of "Three Strikes" where conditions mitigate the need for harsh punishment. In fact, in *Romero*, the trial court judge dismissed two of the defendant's three prior convictions—first degree burglary of an inhabited dwelling and attempted burglary of an inhabited dwelling—both "serious" felonies,[55] thus eliminating a third strike situation.[56] For his crime of possession of a controlled substance, the defendant received a six-year sentence[57] rather than the twenty-five years to life he would have received under "Three Strikes."[58]

The law upon which the *Romero* court relied does not, however, permit prior violent offenses to be dismissed.[59] Otherwise, the judiciary is free to act independently when considering circumstances that would make mandatory sentences for minor third strike crimes unfair. Judges may dismiss any prior, non-violent felony conviction in the name of justice.[60]

However, if justice demands that a person convicted of a felony while serving parole for a serious offense be sentenced to probation, it is not likely that a court could fully exercise this "*Romero* discretion." The law permits a court to strike a

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50. *Id.* at 508, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793.

51. *See Romero*, 13 Cal. 4th at 512, 917 P.2d at 635, 53 Cal. Rptr. 2d at 796 (explaining that the judiciary must remain independent in order to be effective, and that while the legislature retains certain authority exclusive of the judiciary, it may not empower the executive (i.e. the prosecutor) with leverage over the judiciary).

52. *Id.*

53. CAL. PENAL CODE § 1170(d)(2) (West 1982 & Supp. 1997); *see Romero*, 13 Cal. 4th at 508, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793.

54. *Id.* at 512, 917 P.2d at 635, 53 Cal. Rptr. 2d at 796.

55. *See* CAL. PENAL CODE § 1192.7(c) (West 1982 & Supp. 1997) (including these felonies in the definition of serious crimes).

56. *Romero*, 13 Cal. 4th at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793.

57. *See id.* (explaining that the court issued a six-year sentence to the defendant, representing the upper term for possession of a controlled substance plus a one-year enhancement for each prior, non-serious felony conviction pursuant to California Penal Code § 667.5(b)).

58. *Id.* at 506, 917 P.2d at 631, 53 Cal. Rptr. 2d at 792.

59. CAL. PENAL CODE § 1385 (West 1982 & Supp. 1997) (prohibiting judges from striking prior California Penal Code § 667 convictions).

60. *See* CAL. PENAL CODE § 1170.12(d)(2) (West 1982 & Supp. 1997) (stating that a prosecuting attorney may move to dismiss a defendant's prior felony convictions "in furtherance of justice"); *id.* § 1385 (West 1982 & Supp. 1997) (permitting judges to strike prior serious felony convictions for purposes of sentencing).

prior offense.[61] It says nothing about the court dismissing the felony for which an offender is still serving time. Technically, parolees have not completed their sentence.[62] And Chapter 160 prohibits the granting of probation to such offenders.[63] Where mitigating circumstances exist, a judge, although unable to grant probation to the parolee, may use the power to strike prior felonies to ensure that the punishment fits the crime.[64] In these situations, laws created by the Legislature and signed by the Governor serve to buffer judicial discretion in order to promote consistent public policy throughout the state.

V. OVERCROWDED PRISONS

Regardless of what message harsh sentencing laws may send,[65] or how fair or unfair these laws may seem,[66] some critics point to a lack of prison space as the chief drawback to administering such a parochial sentencing structure.[67] Many "Three Strikes" sentences keep criminals in prison long past their prime offending years.[68] This creates a two-fold problem: (1) No longer a threat to society, these criminals occupy valuable prison space that could be used for more likely recidivists, often released early from less strict sentences due to overcrowding;[69] and (2) the annual costs associated with housing prisoners is driven up as aging inmates require more frequent and more expensive medical attention.[70]

California's prison population rose from 22,500 in 1979 to 138,000 in 1996.[71] The Department of Corrections reported that prisons were at 181% of "design"

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61. *Romero*, 13 Cal. 4th at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793; CAL. PENAL CODE § 1170.12(d)(2) (West 1982 & Supp. 1997); *id.* § 1385 (West 1982 & Supp. 1997).

62. CAL. PENAL CODE § 3000(a)(1) (West 1982 & Supp. 1997) (indicating that parole is part of a sentence); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 2 (Feb. 25, 1997).

63. CAL. PENAL CODE § 1203.085 (amended by Chapter 160); *see supra* notes 26-28 and accompanying text (explaining that Chapter 160 filled a gap in California sentencing law by placing parolees on even ground with probationers).

64. *See Romero*, 13 Cal. 4th at 508, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793 (discussing a prior case in which it was determined that a judge may use discretion to dismiss a defendant's prior felony convictions "in the interest of justice").

65. *See* Vitiello, *supra* note 1, at 431 n.206 (citing authorities in support of tougher sentencing laws that send a tough message to criminals).

66. *See supra* text accompanying notes 32-41 (discussing individual cases where the punishment seemed to significantly outweigh the crime).

67. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 133, at 4 (Feb. 25, 1997); Vitiello, *supra* note 1, at 443.

68. Vitiello, *supra* note 1, at 443.

69. *Id.*

70. *See* McClain, *supra* note 43, at 120 n.115 (citing statistics that indicate the cost of housing prisoners over the age of 65 could be as high as $100,000 per year).

71. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 893, at 8 (May 14, 1996).

capacity in 1996.[72] By mandating prison terms for parolees convicted of subsequent offenses, Chapter 160 will add to this growing problem.[73]

The judiciary may use its discretion however, by considering extenuating circumstances, to ensure that the least dangerous parolees receive the shortest prison terms, limiting the potential for elderly inmates driving up prison costs.[74] The number of recidivists that will be displaced from prisons by parole violators under Chapter 160 is almost impossible to ascertain, but the most dangerous offenders are not likely to be among the early releases.[75] Moreover, every parole violator is, in essence, a recidivist[76] anyway. By eliminating the possibility of probation for these repeat offenders, Chapter 160 will continue to congest the California state prisons while carrying out consistent public policy.

VI. CONCLUSION

Chapter 160 fills a gap in the "Three Strikes" law by requiring a prison sentence for parole violators committing serious offenses, whereas probation was previously available.[77] Moreover, it places parole violators in the same class as probation violators,[78] for whom prison terms are mandatory for the commission of serious felonies.[79] In so doing, Chapter 160 may hinder judicial discretion to a certain extent and will continue to shuttle criminals to already prisons, however it also helps to clarify the message lawmakers have been trying to send since the passage of "Three Strikes"—California is going to be tough on repeat offenders.

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72. *Id.*

73. CAL. PENAL CODE § 1203.085 (amended by Chapter 160) (creating mandatory incarceration where probation was previously available).

74. *See Romero*, 13 Cal. 4th at 508, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793 (discussing a prior case in which it was determined that a judge may use discretion to dismiss a defendant's prior felony convictions "in the interest of justice"); *see also* CAL. PENAL CODE § 1170.12(d)(2) (West 1982 & Supp. 1997) (stating that a prosecuting attorney may move to dismiss a defendant's prior felony convictions "in furtherance of justice"); *see also supra* Part IV (discussing the amount of discretion judges are left with following the enactment of Chapter 160).

75. CAL. PENAL CODE § 2933.5 (West 1982 & Supp. 1997).

76. *See* BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (defining "recidivist" as a repeat criminal offender).

77. CAL. PENAL CODE § 1203.085 (amended by Chapter 160).

78. *Compare id.* § 1203(k) (West 1982 & Supp. 1997) (eliminating the possibility of probation for *persons already serving probation* for a felony at the time of the commission of a new violent or serious felony), *with id.* § 1203.085 (amended by Chapter 160) (eliminating the possibility of probation for *persons on parole* for a felony at the time of the commission of a new violent or serious felony, or *persons on parole* for a violent or serious felony at the time of the commission of a new felony).

79. *Id.* § 1203(k) (West 1982 & Supp. 1997).

Providing Stalking Victims With Emergency Protective Orders: "All the Signs Were There"

Kimberly Jean Wedding

Code Sections Affected
Family Code § 6274 (new); Penal Code § 646.91 (new).
AB 350 (Firestone); 1997 STAT. Ch. 169

I. INTRODUCTION

In retrospect, Kim Springer explains that it all began on July 4, 1992, when she and co-worker Mark Hilbun went on an office outing to the county fair-grounds.[1] The next day, Hilbun began making phone calls professing his love for Kim and leaving presents for her at her door.[2] Kim rejected his advances, but he continued to pursue her, resulting in Hilbun's termination from the post office and his arrest for harassment.[3]

Subsequently, Kim decided not to pursue the harassment case after Hilbun promised to leave Kim alone and get help for his manic depression.[4] Even after his arrest, Hilbun continued harassing Kim, with her breaking point being a letter that was sent to her by Hilbun, in which he threatened: "I love you. I'm going to kill us both and take us both to hell."[5] Kim immediately sought the help of law enforce-

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1. Rene Lynch, *Postal Worker Details Harassment By Hilbun; Grand Jury: Woman Describes Fixation, Bizarre Behavior By Co-Worker Accused of Killing His Mother and Best Friend*, L.A. TIMES, Apr. 30, 1994, at A1 (providing a summary of grand jury transcripts of Kim Springer's testimony regarding Mark Hilbun).

2. *Id.*

3. *See id.* (stating that Springer "spurned his advances" after Hilbun telephoned her after the July 4th outing in 1992); *see also id.* (providing a chronology of harassment by Hilbun testified by Springer at a grand jury investigation); Frank Messina & Eric Lichtblau, *Ex-Mail Carrier Kills 2 in O.C.; Attack Follows Similar Incident in Michigan*, L.A. TIMES, May 7, 1993, at A1 (stating that Hilbun had followed and harassed Kim while she delivered the mail on her postal route); Lynch, *supra* note 1, at A1 (stating that Kim had notified postal officials about Hilbun's harassment and that this behavior led to his firing); *see also* Messina, *supra*, at A1(reporting that Hilbun had been fired in December because he had stalked a female co-worker).

4. *See* Eric Bailey, *State's Landmark Stalking Law Could Have Put Hilbun Behind Bars; Legislation: The Woman He Attacked Chose Not To File Complaint Earlier. She Asked Police For Help Wednesday But Didn't Have the $182 Court Filing Fee*, L.A. TIMES, May 7, 1993, at A18 (stating that Hilbun's case was dismissed when Kim was informed that Hilbun was undergoing treatment for his manic depressive illness); Messina, *supra* note 3, at A1(reporting that in return for Kim dropping the charges against Hilbun for harassment, Hilbun had agreed to leave Kim alone and cease his harassment of her).

5. Bailey, *supra* note 4, at A18.

ment, who suggested that Kim get a restraining order.[6] However, after filling out the paperwork for the protective order, Kim realized that she did not have the money to pay the $182 filing fee.[7] She decided to wait and file the papers on payday, only five days away.[8] But payday came too late, because on that day, Hilbun entered the post office and began shooting randomly.[9] Hilbun's rampage killed one co-worker and injured another at the end of the rampage.[10] Kim was left physically unharmed, but emotionally distraught, after hiding beneath her mail case during the shooting.[11] Hilbun was later convicted for the murder of two people and the attempted murder of seven others.[12]

Co-workers of Kim now wonder whether law enforcement could have prevented Hilbun's attack.[13] Kim's boyfriend argues that "all the signs were there" and that the incident should never have occurred.[14]

Perhaps most troubling is that while law enforcement had recognized the seriousness of the situation by suggesting that Kim obtain a restraining order, she

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6. *See* Dan Weikel & Marla Cone, *Postal Workers Wonder If Attack Could Have Been Prevented*, L.A. TIMES, May 8, 1993, at A26 (noting that Kim had called the Orange County Sheriff's Department to report that she was being harassed by Hilbun and that a deputy had suggested that Kim obtain a restraining order and that she contact her local police department).

7. *See* Bailey, *supra* note 4, at A18 (stating that Kim's boyfriend told reporters that she delayed the filing of the restraining order "because she did not have the necessary $182 filing fee").

8. *See* Miles Corwin, *When the Law Can't Protect; Despite Recent Advances, the Legal System Still Has Trouble Apprehending Stalkers. As the Dana Point Case Shows, Officials Are Often Forced To Wait Too Long Before They Can Take Action*, L.A. TIMES, May 8, 1993, at A1 (reporting that Kim had decided to obtain a restraining order, but had waited to file the order until she could afford the filing fee).

9. *See* Michael Granberry, *Terrorized Post Office Worker Sues Her Union; Courts: Kim Springer Claims Officers Suppressed 'Damaging Information' About the Man Accused of Stalking Her and Shooting Two of Her Co-Workers*, L.A. TIMES, May 4, 1994, at B1 (providing a summary of Hilbun's attack on co-workers on May 6, 1993).

10. *Id.*

11. *See id.* (reporting that Kim had "desperately hid under her mail case in fear of her life, causing her to suffer serious emotional and psychological injuries"); *see also* Michael Granberry, *A Lifetime Sentence; Post Office Rampage Survivor Fears She'll Never Be Free of Anguish*, L.A. TIMES, May 25, 1994, at B1 (stating that Kim "feels a deep rooted survivor's guilt . . . for all the people who died or who suffered injury" because of the "twisted passion" Hilbun had for her).

12. *See* Anna Cekola, *Ex-Postal Worker Is Convicted Of Murder; Trial: Jurors Now Must Decide if He Was Sane When He Killed His Mother and a Friend and Tried To Slay Seven Others in Orange County*, L.A. TIMES, Aug. 7, 1996, at A3 (stating that Hilbun was convicted of murder and attempted murder); *see also* Anna Cekola, *Plea Bargain To Give Ex-Postal Worker Life Term Without Parole In 2 Slayings*, L.A. TIMES, Nov. 16, 1996, at A18 (reporting that Hilbun was sentenced to life without the possibility of parole after being convicted of murdering two people); Eric Lichtblau & Eric Young, *Suspect In Slayings Remains At Large; Rampage: Dana Point Deliveries Are Suspended and Guards Are Stationed At Post Office In Wake of the Killings— Officers Are Stymied In Search for O.C. Man*, L.A. TIMES, May 8, 1993, at A1 (reporting that Hilbun had stabbed to death his mother and her dog prior to the rampage at the post office and afterwards had shot and robbed numerous other people).

13. *See* Weikel, *supra* note 6, at A26 (discussing the questions that Kim Springer's co-workers are asking regarding whether or not law enforcement was at fault for not taking more precautions against Hilbun, who was known by the police to have extreme psychiatric problems).

14. *Id.*

did not have money to pay the filing fee for the order.[15] Although no one will ever know whether a restraining order would have prevented the entire situation, most law enforcement agencies require a stalking victim to obtain a restraining order before they become involved in stalking case.[16]

Recognizing the need for law enforcement to be able to provide emergency protection to stalking victims, the Legislature enacted Chapter 169. This law allows a peace officer to issue an ex parte emergency protective order (EPO) to a person whom the peace officer reasonably believes is being stalked.[17] If this procedure had been available to Kim Springer when she first contacted law enforcement regarding Hilbun's behavior, law enforcement would likely have been able to issue her an EPO and perhaps, deter Hilbun's rampage.

II. LEGAL BACKGROUND

A. *Stalking Legislation and Legal Protections Available to Victims Prior to Chapter 169*

In 1990, following the high-profile murder of actress Rebecca Schaeffer, California was the first state in the nation to enact anti-stalking legislation.[18] A person commits the crime of stalking when he or she "willfully, maliciously, and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family."[19] The purpose of such legislation is to deter the crime of stalking before it escalates into violence, thus protecting potential victims before they are attacked.[20]

Stalking victims may seek protection from their stalkers by securing temporary restraining orders from the courts.[21] However, in order to secure a permanent restraining order, a judge must conclude that there is clear and convincing evidence

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15. *See* Bailey, *supra* note 4, at A18 (stating that Kim's boyfriend had told reporters that she had delayed the filing of the restraining order "because she did not have the necessary $182 filing fee).

16. *See* Denise Marie Siino, *Stalking Their Prey; A Criminal's Obsession Is a Victim's Nightmare. Prosecution, Though Hard, Is Possible When Law Enforcement Gets Cooperation, O.C. Experts Say*, L.A. TIMES, Nov. 12, 1996, at E1 (providing an interview with Westminster Police Detective Mike Proctor, who stated that he urges stalking victims to obtain restraining orders because "when the stalker violates the order, it gives police more evidence in the case they are building").

17. CAL. PENAL CODE § 646.91(a) (enacted by Chapter 169).

18. 1990 Cal. Stat. ch. 1527, sec. 1, at 7143 (enacting CAL. PENAL CODE § 646.9); *see* Nanette Diacovo, *Notes and Comments: California's Anti-Stalking Statute: Deterrent or False Sense of Security?*, 24 SW. U. L. REV. 389, 390 (1995) (explaining that after the murder of Rebecca Schaeffer and the media attention that followed, the California Legislature passed an anti-stalking bill in less than five weeks).

19. CAL. PENAL CODE § 646.9 (West Supp. 1996).

20. Diacovo, *supra* note 18, at 390.

21. CAL. CIV. PROC. CODE § 527(a) (West Supp. 1997) (authorizing the courts to issue a temporary restraining to prohibit harassment which remains in effect for fifteen days).

of unlawful harassment.[22] Although permanent restraining orders remain in effect for only three years, the victim may petition for renewal, which requires another hearing.[23]

In 1993, California created domestic violence EPOs, which may be issued to victims of domestic violence and child abductions.[24] Domestic violence EPOs are issued when: (1) a judicial officer believes that there are reasonable grounds to believe that an immediate and present danger of domestic violence exists or that a child is in immediate and present danger of abuse or abduction; and (2) that the EPO is necessary to prevent the occurrence or recurrence of the abuse or abduction.[25] California law requires service of the EPO by the law enforcement officer who requested the EPO and mandates that it expire within a specific time period.[26]

B. Chapter 169

Assembly member Brooks Firestone believes that "stalking has become one of the more serious and often violent crimes committed in the State of California."[27] Accordingly, Firestone introduced legislation modeled after existing EPO procedures used in domestic violence cases to make EPOs available to stalking victims.[28] Specifically, Chapter 169 allows a judicial officer to issue an EPO when a peace officer states reasonable grounds to believe that a person is in immediate and present danger of stalking and that the order is necessary to prevent the occurrence or reoccurrence of stalking activity.[29]

The EPO created by Chapter 169 for stalking cases has the same expiration periods as domestic violence EPOs and also requires service by the law enforcement officer requesting the EPO upon the restrained person.[30] Furthermore, Chapter 169 provides that violations of the EPO by the restrained person allows the prosecution of the stalker under criminal contempt or stalking laws.[31]

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22. *Id.* § 527.6(d) (West Supp. 1997).

23. *Id.*

24. 1993 Cal. Legis. Serv. ch. 219, sec. 154, at 1385 (West) (enacting CAL. FAMILY CODE § 6250) (allowing a judicial officer to issue an EPO where a law enforcement officer asserts reasonable grounds to believe that a person is in immediate and present danger of domestic violence or that a child is in immediate and present danger of abuse or abduction).

25. CAL. FAM. CODE § 6251 (West Supp. 1997) (declaring the required findings for the issuance of an EPO).

26. *See id.* § 6271 (West 1994) (requiring service by the law enforcement officer who requested the EPO); *id.* § 6256 (West 1994) (providing expiration periods for an EPO on the seventh calendar day, or at the close of business on the fifth court day, following the day of its issuance).

27. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 350, at 2 (Apr. 16,1997).

28. *Id.*

29. CAL. PENAL CODE § 646.91(a) (enacted by Chapter 169); *id.* § 646.91(c)(2) (enacted by Chapter 169).

30. *Id.* § 646.91(f) (enacted by Chapter 169) (providing expiration periods of at the close of judicial business on the fifth court day following the day of its issuance or the seventh calendar following the day of its issuance); *id.* § 646.91(g)(1) (enacted by Chapter 169) (requiring service by the requesting law enforcement officer).

31. *Id.* § 646.91(n) (enacted by Chapter 169).

III. IMPORTANCE OF CHAPTER 169

Following the passage of domestic violence EPO legislation, the Los Angeles County District Attorney's Office discovered that the orders were found to "de-escalate potentially violent situations."[32] The EPOs require immediate separation of the abuser and victim, and provide victims with protection while awaiting the issuance of a permanent restraining order. Chapter 169 strives to de-escalate potentially violent stalking activity in the same way.[33]

While it is worth noting that the Legislature in 1993 amended the restraining order statute and no longer required stalking victims to pay filing fees,[34] there was no provision for issuance of EPOs until now. Kim Springer's situation perfectly demonstrates the need for EPOs. Although the filing fee could have been waived, Kim still would have been left without protection from the time that she notified the police until the time that she was able to fill out the paperwork for the order and receive a court date. This process can normally take at least 24 hours.[35] If an EPO had been issued to Kim when she reported to the police that Hilbun had threatened to kill her, she would have been entitled to protection during the time in which she was securing a permanent restraining order.

Increased occurrences of workplace violence supply additional support for EPOs and their availability to stalking victims and companies.[36] Although stalking victims try to avoid their stalkers by moving or changing their phone numbers, the stalker will always be able to find their victim at work,[37] just as Mark Hilbun found Kim at work at the post office. Workplace harassment often consists of barrages of phone calls, waiting outside the office for the victim, interfering with clients, and making false statements about the victim to his or her supervisors.[38]

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32. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 350, at 2 (Apr. 16, 1997).

33. *Id.*

34. 1993 Cal. Legis. Serv. ch. 383, sec. 1, at 2408 (West) (amending CAL. CIV. PROC. CODE § 527); *see* Daniel M. Weintraub, *Wilson Signs Get-Tough Bills Aimed At Stalking; Legislation: One Measure Widens Definition of the Crime—Others Stiffen Criminal and Civil Penalties*, L.A. TIMES, Sept. 30, 1993, at A28 (reporting that legislation which eliminated a $182 filing fee for restraining orders was inspired by the case of Kim Springer and her inability to get funds for a restraining order).

35. *See* Carla Rivera & Bill Billiter, *Men Obsessed Can Turn Love Into a Tragedy; Domestic Violence: Deaths, Injury and Anguish Have Been the Fruits of Soured Relationships In Orange County Recently, and Experts Caution Women To Look For Warning Signs*, L.A. TIMES, Oct. 29, 1989, at B1 (advising women that they "should allow one full day . . . to take care of everything" because the process they must follow to secure a restraining order is long and complicated).

36. *Id.*

37. *See* Stuart Silverstein, *Stalked By Violence On the Job; Domestic Abuse Is Spilling Over Into the Workplace—Victim's Job Performance Can Suffer, and They May Risk Being Fired—At Worst, the Outcome Can Be Deadly For Them and For Co-Workers*, L.A. TIMES, Aug. 8, 1994, at A1 (quoting a stalking victim who stated that "a stalker knows . . . if they can't catch you at home, they can catch you at work").

38. *See id.* (discussing the types of harassment that stalking and domestic violence victims encounter while at work).

Workplace violence has caused much concern for company security directors, with 94% of them ranking "domestic violence as a 'high' security problem at their companies."[39] Moreover, homicide is the leading cause of death for women at work.[40] Thus, workplace violence experts have stated that it is "imperative that the Legislature . . . provide victims with some measure of relief for the helplessness they experience at the hands of the stalker."[41] Chapter 169 aims to provide this relief to victims by allowing the issuance of an EPO when a police officer recognizes that the victim is in immediate danger and has been stalked in accordance to the stalking statute.[42]

IV. PRACTICALITY OF CHAPTER 169

It is important for stalking victims who receive EPOs not to have a false sense of security that they will be safe from their stalker.[43] An EPO is not a "bullet-proof vest, and it is not a cop in your front yard."[44] Furthermore, EPOs may trigger a violent reaction in the stalker once they are received.[45] Many stalking victims have been murdered days within days of the assailant receiving the EPO.[46] Therefore, violence experts argue that the effectiveness of an EPO will often depend on how seriously the stalker will take the order.[47] Accordingly, the order may provide the victim no protection against certain stalkers.[48]

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39. Michael G. Wagner, *More Stalkers Taking Violence To the Workplace*, SACRAMENTO BEE, Sept. 4, 1994, at A3.

40. *See id.* (reporting figures from the U.S. Department of Labor that stated that "homicide was the most common cause of death at work for women, claiming nearly four out of 10 of the 481 women killed on the job").

41. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 350, at 2 (Apr. 16, 1997).

42. *See id.* at 1 (discussing the provisions of AB 350).

43. *See* Bob Hohler, *Court's Shield Can Draw A Bullet*, BOSTON GLOBE, Oct. 7, 1992, at Metro:1 (reporting that the availability of restraining orders and the willingness of courts to issue them "may be lulling some women . . . into a false sense of security at the most dangerous times of their lives").

44. Bryanna Latoof, *Domestic-Violence Cases On the Rise*, ST. PETERSBURG TIMES, May, 21, 1990, at Pasco:1 (quoting a domestic violence counselor, who tells domestic violence victims the realities of a restraining order and its limitations).

45. *See* Hohler, *supra* note 43, at Metro:1 (reporting that there had been murders committed by men who had received a restraining order only days before and that many abusers become violent after being told that they are barred from making any type of communication with the victim, who is often a wife or girlfriend); *see also* Carolyn Nielsen, *Restraining Orders Can Make Difference; Although Often Derided As "Too-Little-Too-Late," A Study Finds That Most Alleged Batterers Believe They Will Face Consequences*, PRESS ENTERPRISE, Feb. 2, 1997, at A4 (quoting a prosecutor for the district attorney office, who stated that "there are a sizeable number of cases where there was a shooting while there was a restraining order in place").

46. *Id.*

47. *See* Nielsen, *supra* note 45, at A4 (discussing how the perception of the batterer and his or her decision to abide by the restraining order will often determine the order's effectiveness).

48. *Id.*

Women's groups worry about the perception that the orders "are not worth the paper they are written on"[49] and they argue that often times the orders do help.[50] Most importantly, the issuance of EPOs and restraining orders allow the police to construct a "paper trail" necessary to prove a pattern of conduct needed for stalking prosecutions.[51]

Experts argue that EPOs can be more effective in reducing instances of stalker violence by improving police training.[52] If police training classes were to include methods on how to recognize potentially violent stalking situations, they would likely be more willing to issue EPOs.[53] Such intervention should reduce the likelihood of future violence involving the victim and her stalker.[54]

IV. CONCLUSION

Chapter 169 allows law enforcement to issue EPOs in cases where 'all the signs' of stalking are there. Although the order itself will not be shield against the stalker and any potential violent situations, it does help the police and the district attorney prove a pattern of conduct, which will make a successful prosecution under the stalking statutes more likely.

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49. *See* Hohler, *supra* note 43, at Metro:1 (quoting a coordinator for a battered women's group in Boston, who argues that we don't hear about the many orders that actually do work for the victims).

50. *See id.* (discussing that women's groups are still recommending that victims file for restraining orders because is some instances, the abusers or stalkers will cease their behavior).

51. *See* Nielsen, *supra* note 45, at A4 (noting that experts believe that restraining orders can help prosecutors prove abuse by establishing a "paper trail").

52. *Id.* (stating that police officers "need training to learn how to identify those situations" in which an EPO will be effective).

53. *Id.* (discussing the benefits of improved police training).

54. *Id.*

Restricting Bail Adjustments for Persons Charged with a Serious Felony

Christopher S. Hall

Code Sections Affected
Penal Code § 1275 (amended).
AB 728 (Bowler); 1997 STAT. Ch. 34

I. INTRODUCTION

In May, 1992, approximately 63% of accused state felons were released prior to their cases being heard.[1] Of those released, approximately a third were either re-arrested for a new offense, has a bench warrant issued for their arrest for failing to appear as scheduled, or committed some other violation that resulted in the revocation of their pretrial release.[2] Moreover, 8% of all accused felons released prior to the disposition of their cases were still fugitives after one year.[3] These figures demonstrate a serious problem that occurs when felons are released on bail prior to the disposition of their case.

According to research conducted by the Bureau of Justice Statistics, there is a correlation between the amount of bail required for release and the likelihood that a defendant will remain detained until the disposition of his or her case.[4] When a defendant is charged with a violent felony and his or her bail is set at $20,000 or more, 82% of such defendants remained in detention until the disposition of their case.[5] When bail is set below $20,000, the percentage of defendants charged with a violent felony detained until disposition of their case drops dramatically.[6] Thus, one conclusion that can be made is that bail should be set high to successfully

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1. Brian A. Reaves & Jacob Perez, *Pretrial Release of Felony Defendants, 1992*, BUREAU OF JUST. STAT. BULL., Nov. 1994, at 1; *see id.* at 3 (noting the three types of pretrial release programs, which are: "nonfinancial" release, where the accused is released without posting bail; "financial" release, which requires the defendant to post the full bail amount prior to release; and "emergency" release, where the defendant has no financial or nonfinancial conditions placed on release, but who was ordered released because of jail overcrowding).

2. *Id.* at 1.

3. *See id.* (stating that 8% of defendants with state felony charges filed against them failed to appear as scheduled and remained fugitives after one year).

4. *See infra* notes 5-6 and accompanying text (showing the correlation between higher bail and the likelihood that a defendant will remain in custody until the disposition of his or her case).

5. *See* Reaves, *supra* note 1, at 4 (noting that when bail was set at $20,000 or greater, only 18% of defendants charged with a violent offense were released prior to the disposition of their case).

6. *See id.* (noting that when bail was set between $10,000 and $19,999, 62% of felons were detained until their case was resolved, between $2,500 to $9,999, 48%, and under $2,500, 34%).

detain serious felons until the disposition of their case. This will facilitate the probability that the defendant will be present at all required court appearances and refrain from committing new offenses.[7]

Chapter 34 was designed to make it more difficult for a defendant charged with a serious felony to be released on bail lower than that established by the applicable bail schedule.[8] Specifically, Chapter 34 requires a showing of "unusual circumstances" before a person charged with a serious felony may have his or her bail reduced below the amount established by the bail schedule.[9] Chapter 34 specifies that a defendant cannot establish unusual circumstances by showing that he has made all prior court appearances and has not committed any new offenses.[10] Proponents of Chapter 34 believe that the public has the right to expect a defendant's compliance with orders to appear for their cases and to expect a defendant to refrain from committing more offenses while released on bail.[11] Proponents argue that defendants should not be rewarded for such minimal conduct.[12]

Opponents of Chapter 34 believe that many defendants charged with serious felonies can be released without bail with little risk that they will fail to appear.[13] Moreover, opponents of Chapter 34 argue that the requirements set forth in Chapter 34 will increase the overcrowding of local jails and add to the workload of the courts.[14]

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7. *See* In Re Ruef, 7 Cal. App. 750,752, 96 P. 24, 25 (1905) (stating that bail should not be used to punish the defendant, but only to insure his attendance to all court proceedings which he is required to attend).

8. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 728, at 1-2 (June 19, 1997) (stating the purpose of AB 728 is to "make it more difficult for a person charged with a serious felony to receive bail lower than established by the schedule").

9. *See* CAL. PENAL CODE § 1275 (amended by Chapter 34) (requiring the court to find the presence of unusual circumstances before the bail of a person charged with a serious felony may be reduced below the established bail schedule amount).

10. *See id.* (stating that "unusual circumstances" does not include the fact that a defendant has made all prior court appearances and has not committed any new offenses).

11. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 728, at 2 (June 19, 1997) (noting that a defendant should be expected to comply with court orders pertaining to his or her case and refrain from committing new offenses while released on bail).

12. *See id.* (noting that defendants should not be rewarded with lower bail because they have shown minimal good conduct required by society).

13. *See id.* (claiming that many defendants charged with serious felonies may be released without bail with little or no risk of failing to appear).

14. *See id.* (arguing that requiring a showing of unusual circumstances for bail to be reduced for the broad class of defendants effected by Chapter 34 will increase the problem of jail overcrowding and will add to the workload of overburdened courts).

II. LEGAL HISTORY

A felony is any crime punishable by death or imprisonment in a state prison.[15] A subset of felonies are those that are deemed "serious felonies."[16] Murder, voluntary manslaughter, rape, kidnaping and robbery are among the felonies that are considered "serious."[17] Chapter 34 requires a showing of unusual circumstances before a defendant charged with a serious felony may have his or her bail reduced below the amount established by the applicable bail schedule.[18]

Bail is a device used by the courts to ensure the appearance of the defendant at all required court dates.[19] Bail should not be used as a tool to punish a defendant during the period before his or her conviction.[20] Prior to the enactment of Chapter 34, a judge or magistrate enjoyed discretion in reducing bail of a defendant charged with a serious felony.[21] In lowering the amount of bail, the judge was only required to consider the public's protection, the seriousness of the offense charged, the defendant's prior criminal record, and the likelihood the defendant would make all required court appearances.[22] After these required considerations, the judge was free to set bail at any amount he or she deemed appropriate.[23]

Proponents of Chapter 34 believe that a court's ability to lower bail for defendants charged with a serious felony should have greater restrictions because of the likelihood that such defendants will fail to appear.[24] Thus, Chapter 34 requires a showing of unusual circumstances before any defendant charged with a

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15. *See* CAL. PENAL CODE § 17 (West 1996) (describing a felony as any crime punishable by death or imprisonment in a state prison, and noting that all other crimes are either misdemeanors or infractions).

16. *See id.* § 1192.7(c) (West 1996) (defining a "serious felony" by means of an all inclusive list of felonies that are considered "serious").

17. *Id.*

18. *See id.* § 1275(e) (amended by Chapter 34) (requiring a court to find unusual circumstances in order to reduce the amount of bail below the bail schedule if the defendant is charged with a serious felony).

19. *See supra* note 7 and accompanying test (stating that the primary purpose of bail is to force the defendant's attendance at all required court appearances).

20. *See* In Re Ruef, 7 Cal. App. 750,752, 96 P.24, 25 (1905) (stating "bail should not be extracted for the purpose of punishing a person charged with a crime").

21. *See* CAL. PENAL CODE § 1269c (West Supp. 1998) (declaring that a magistrate is authorized to set bail at any amount that he or she considers sufficient to assure the defendant's appearance).

22. *See id.* § 1275(a) (amended by Chapter 34) (stating that in setting the amount of bail for any offense, the judge will base his or her decision on considerations of public protection, the seriousness of the offense charged, the defendant's previous criminal record, and the likelihood of the defendant making all required court appearances, with the public safety being the primary concern).

23. *See supra* note 21 and accompanying text (discussing the fact that a judge or magistrate has the authority to set bail at any amount he or she deems sufficient to ensure the defendant's appearance at trial).

24. *See supra* note 3 and accompanying test (stating that 25% of accused state felons that were released on bail had bench warrants issued against them for failing to appear); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 728, at 2 (June 19, 1997) (arguing that the bail of a person charged with a serious felony should not be reduced unless the existence of unusual circumstances can be proven).

serious felony may have his bail reduced below the amount established by the applicable bail schedule.[25]

III. THE EFFECT OF CHAPTER 34 ON LOCAL JAILS

Jails are locally operated detention facilities that hold defendants both before and after adjudication.[26] Jails usually house inmates sentenced to a year or less, but are also responsible for holding defendants awaiting trial and convicted felons awaiting room in prisons.[27] As of June 18, 1996, the Nation's jails housed over 500,000 offenders.[28] This number represents a 2.3% increase from midyear 1995.[29] However, the jail population growth rate was down from the previous year's rate of 4.2 %.[30] The Nation's 1995 jail population growth rate was the lowest it had been in the previous ten years, which had an annual average growth rate of 6.6%.[31] However, Chapter 34 may have the effect of reversing this downward trend and causing unprecedented jail overcrowding.[32]

Jail capacity was also down from the previous year, rating at 92%.[33] Rated capacity represents the maximum number of inmates that rating officials have allocated to a particular jail.[34] In 1995, 93% of the Nation's jail capacity was occupied.[35] However, many California county jails were above their rated capacity.[36] In fact, Orange County had the highest percentage of rated capacity in the Nation at 139%, followed by San Diego County at 119%.[37] Opponents of Chapter 34 argue that requiring the existence of unusual circumstances to reduce

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25. CAL. PENAL CODE § 1275(e) (amended by Chapter 34).

26. *See* Darrel K. Gilliard & Allen J. Beck, Ph.D., *Prison and Jail Inmates at Midyear, 1996*, BUREAU OF JUST. STAT. BULL., Jan. 1997, at 5 (defining jails as locally operated detention facilities that house defendants before and after adjudication).

27. *See id.* (noting that in addition to housing inmates sentenced to a year or less, jails also house numerous other categories of people, including defendants waiting to be arraigned, parole and probation violators, inmates awaiting transfer to State or Federal prison, mentally ill persons awaiting transfer to health facilities, and juveniles awaiting transfer to juvenile authorities).

28. *See id.* (stating that at midyear, 1996, the jails held approximately 518,492 offenders).

29. *See id.* (noting that the number of offenders housed in jails grew 2.3% from midyear 1995 to midyear 1996).

30. *See id.* (stating that from midyear 1994 to midyear 1995 the Nation's jail growth rate increased 4.2%).

31. *See id.* (noting that the jail population growth rate is approximately a third of the annual average from 1985 to 1996).

32. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 728, at 2 (June 19, 1997) (stating that opponents of Chapter 34 believe that it will have adverse effects on the California's jails by causing overcrowding).

33. *See* Gillard, *supra* note 28, at 7 (stating that as of June 30, 1996, 92% of rated jail capacity was occupied).

34. *Id.*

35. *See id.* tbl. 8 (noting that since 1989 the percent of rated capacity occupied by inmates has continued to decline).

36. *See id.* tbl. 9 (noting that Orange County, San Diego County, and Sacramento County were all above their rated capacity).

37. *Id.*

the bail of a defendant charged with a serious felony will only add to the already seriously overcrowded jails in California.[38]

IV. CONCLUSION

Chapter 34 attempts to make it more difficult for defendants charged with a serious felony to get their bail reduced from the amount required by the applicable bail schedule.[39] Chapter 34 will add to the current problem of jail overcrowding because defendants charged with serious felonies are more likely to remain in custody until trial if unusual circumstances must be proven before their bail is reduced.[40] Thus, the advantage of keeping defendants charged with a serious felony off the streets until their case is adjudicated comes at the price of forcing local governments to build additional facilities in order to alleviate California's already overcrowded jails.

38. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 728, at 2 (June 19, 1997) (stating that Chapter 34 will increase the overcrowding of California jails).

39. *See id.* at 1-2 (declaring the purpose of Chapter 34 is to increase the difficulty in reducing bail for defendants charged with a serious felony).

40. *See supra* notes 5-6 and accompanying text (describing the effect that having bail set at a higher level has on the likelihood that a defendant charged with a serious felony will remain in custody until the disposition of his or her case).