Chapter 405: The Time No Longer Needs to Fit the Crime for Dying Inmates

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Code Sections Affected
Penal Code §§ 2065, 3550 (new).
SB 1399 (Leno); 2010 STAT. Ch. 405.

I. INTRODUCTION

Inmate Y is suffering from end-stage lung disease. He relies on a ventilator to survive. He is unable to talk, swallow, or move on his own. “He has no bladder control and has very little apparent cognitive function.” Inmate Y requires twenty-four hour nursing care. Regardless of his extreme limitations, the state has two correctional officers guarding him at all times, courtesy of California taxpayers. In approximately eighteen months, Inmate Y cost California taxpayers over $500,000 in medical bills.

Chapter 405 grants medical parole to inmates like Inmate Y, who are the “sickest of the sick.” Audits of the prison system discovered that 39% of prison health care costs are spent caring for inmates, like Inmate Y, who make up only one-half of 1% of the prison population. Because of their illness, these inmates are medically or physically incapacitated and no longer pose a threat to society.

2. Id.
3. Id.
4. Id.
5. Id.
6. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 6 (June 29, 2010) (“Does it make sense for the state to pay for two correctional officers to guard an inmate 24-hours-a-day as the inmate lies comatose or in a permanent vegetative state in a hospital bed?”).
8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 8 (June 29, 2010).
10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 10 (June 29, 2010).
By reducing the need for round the clock guards, California will save millions in custody and transportation costs.\textsuperscript{11}

II. LEGAL BACKGROUND

A. Inmate Constitutional Considerations

In \textit{Estelle v. Gamble}, the United States Supreme Court determined that the government must provide medical care to individuals while they are incarcerated.\textsuperscript{12} In \textit{Estelle}, an inmate sued the prison for inadequate medical care.\textsuperscript{13} The Eighth Amendment to the Constitution expressly precludes the use of cruel or unusual punishment.\textsuperscript{14} The Court held that any “deliberate indifference to serious medical needs of prisoners constitutes” a violation of the Eighth Amendment.\textsuperscript{15} When a state incarcerates an inmate, it has a duty to provide the inmate with any necessary health care.\textsuperscript{16}

B. Inmate Healthcare Costs

The state of California spends billions on incarcerated prisoners each year.\textsuperscript{17} In total, the California Department of Corrections and Rehabilitation (CDCR) spent $9.6 billion to run the prison system.\textsuperscript{18} This spending increases an average of 8\% per year due to rising costs for providing constitutionally mandated inmate medical care.\textsuperscript{19} In 2009 alone, California taxpayers paid nearly $2.5 billion in health care costs for state prisoners.\textsuperscript{20} Former California Governor Arnold Schwarzenegger recently demanded that J. Clark Kelso, the federally appointed receiver who oversees the California prison health care system, reduce inmate health spending by approximately $811 million.\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.} at 8.
  \item \textsuperscript{12} \textit{Estelle v. Gamble}, 429 U.S. 97, 103 (1976).
  \item \textsuperscript{13} \textit{Id.} at 101.
  \item \textsuperscript{14} U.S. \textsc{Const. amend.} VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
  \item \textsuperscript{15} \textit{Estelle}, 429 U.S. at 104.
  \item \textsuperscript{16} \textit{Id.} at 116-17 n.13.
  \item \textsuperscript{17} \textsc{California Prison Health Care Services, Fact Sheet: SB 1399—Senator Leno 2 (2010)} [hereinafter \textsc{Fact Sheet}] (on file with the \textsc{McGeorge Law Review}).
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} \textsc{Assembly Committee on Public Safety, Committee Analysis of SB 1399, at 7 (June 29, 2010)}.
\end{itemize}
The CDCR must ensure that it does not violate a prisoner’s due process rights when he or she needs medical attention.\textsuperscript{22} The prison health care system is “blamed for killing an average of one inmate each week through neglect or malpractice.”\textsuperscript{23} In 2009, the CDCR spent $2.5 billion, 26\% of its budget, on inmate health care.\textsuperscript{24} This amount did not include the custody costs of transporting inmates to the health care facilities.\textsuperscript{25}

Inmate health care costs are also increasing at alarming rates.\textsuperscript{26} The CDCR estimates that health care costs for 2009-2010 will rise an additional 32\%.\textsuperscript{27} This translates to an increase of $424 million from the previous year.\textsuperscript{28} Suppling adequate health care costs approximately $16,000 for the average inmate.\textsuperscript{29} For less healthy inmates, the price rises substantially.\textsuperscript{30} California pays more than $41 million a year in medical bills for thirty-two inmates with the highest needs.\textsuperscript{31}

\textbf{C. Correctional Officer Costs at Healthcare Facilities}

Prior to Chapter 405, the state required two correctional officers to watch over a hospitalized inmate twenty-four hours a day, regardless of how incapacitated the inmate was.\textsuperscript{32} “According to the State Auditor, between 2003 and 2008, medical guard time accounted for 24\% of the prison system’s total guard overtime.”\textsuperscript{33} It costs $2,317 per day for two correctional officers to guard a single inmate at an outside medical facility.\textsuperscript{34} The cost of guarding the inmate is “nearly equal to the actual cost of the medical care . . . .”\textsuperscript{35} This additional cost doubles the taxpayer burden for an inmate’s cost of incarceration.\textsuperscript{36}

\begin{footnotes}
\footnotetext[22]{\textit{See generally} Estelle v. Gamble, 429 U.S. 97 (1976) (holding that inmates have constitutional rights and the State is in charge of maintaining those rights).}
\footnotetext[23]{Thomas, supra note 21.}
\footnotetext[24]{\textit{ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399,} at 7 (June 29, 2010).}
\footnotetext[25]{\textit{FACT SHEET, supra note 17,} at 2.}
\footnotetext[26]{\textit{id.}}
\footnotetext[27]{\textit{id.}}
\footnotetext[28]{\textit{id.}}
\footnotetext[29]{\textit{id.}}
\footnotetext[30]{See \textit{id.} (noting that 1,300 “high cost inmates” have medical bills totaling over $100,000 annually).}
\footnotetext[31]{\textit{id.}}
\footnotetext[32]{\textit{id. at 3.}}
\footnotetext[33]{\textit{id.}}
\footnotetext[34]{\textit{id.}}
\footnotetext[35]{\textit{id.}}
\footnotetext[36]{\textit{id.}}
\end{footnotes}
D. Prior California Legislation

California previously implemented a compassionate release system in an attempt to release its incapacitated prisoners. In 2007, Chapter 740 established a procedure of compassionately releasing inmates when they were “permanently medically incapacitated.” However, this law failed to increase medical releases. In 2009, only two inmates had their sentences amended via this procedure. The CDCR employees and physicians found the definition for determining eligible inmates “very difficult to apply.” Further, after a prisoner was approved, the prisoner would be resentenced by a judge and released from the CDCR’s control. If a prisoner’s health improved, the CDCR would be unable to return that individual to prison. The fact that a prisoner would remain free if their condition improved was a “significant inhibiting factor.”

Senator Leno introduced Chapter 405 to address the problems with this program. California is now among thirty-six other states to have implemented some form of medical release to assist with the financial burden of inmate health care.

III. Chapter 405

Chapter 405 establishes a medical parole program for California. A prisoner is eligible for medical parole if the Chief Medical Officer finds that the prisoner suffers from a “condition that renders [the prisoner] permanently unable to perform activities of basic daily living . . . .” This condition requires that the inmate receive twenty-four hour care, and that the inmate did not suffer from the condition at the time of his or her sentencing hearing.

37. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 15 (Apr. 14, 2010).
38. Id.
39. Id.
40. Id.
41. See id. at 15-16 (“[T]he CDCR . . . ha[s] to find the prisoner is either terminally ill with less than six months to live or permanently medically incapacitated . . . [and] that incapacitation did not exist at the time of the original sentencing.”).
42. Id. at 16.
43. Id.
44. Id. (“This very fact was cited as grounds for a veto the first time this approach was proposed. . . and would appear to act as an inhibiting factor for the numerous decision-makers all the way through the application process.”).
45. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 10 (Apr. 14, 2010).
47. CAL. PENAL CODE § 3350 (enacted by Chapter 405).
48. Id. § 3350(a) (enacted by Chapter 405).
49. Id.
Additionally, the prisoner’s physician must complete a parole plan. At a minimum, this includes the prisoner’s plan for residency and medical care. A two-person panel conducts a medical parole hearing and reviews the plan. The Board of Parole Hearings (BPH) will grant medical parole if it finds that the prisoner does not pose a threat to society. The BPH can require the parolee to accept reasonable conditions, including but not limited to, wearing an electronic monitoring device.

Furthermore, the CDCR must ensure that the prisoner has applied for federal assistance when an inmate has been medically paroled. The State of California is to assume responsibility as the last resort for those parolees who are not eligible for public insurance or are unable to pay. The State shall reimburse providers for medical treatment until the parolee can pay. Additionally, the CDCR shall reimburse the county for the cost of providing a public guardian for any prisoner granted medical parole. The BPH may request a physician to examine the parolee. If the parolee’s medical condition substantially improves, the BPH may revoke the parole and return the person to custody.

IV. ANALYSIS

The Legislature passed Chapter 405 as one of the four bills that Kelso introduced to address cuts in prison health care spending. Kelso emphasized, “this is a budget issue, not compassionate release.” He indicates that the focus of Chapter 405 is on its cost-effectiveness and not on the people.

50. Id. § 3550(c) (enacted by Chapter 405).
51. Id. § 3550(b)-(c) (enacted by Chapter 405) (stating that the placement of the prisoner must comply with the “Victim’s Bill of Rights Act of 2008: Marsy’s Law”).
52. Id. § 3550(f) (enacted by Chapter 405). The panel consists of at least one commissioner; if there is a tie vote, the BPH will hear the case en banc. Id.
53. Id. § 3550(a) (enacted by Chapter 405).
54. Id. § 3550(h) (enacted by Chapter 405).
55. Id. § 3550(i) (enacted by Chapter 405). The CDCR must file documents with the Social Security Administration and the State Department of Health Care Services on behalf of the parolee for benefit claims and pay the state of California’s Medi-Cal costs for inmates. Id. § 2065(b)-(c) (enacted by Chapter 405).
56. See id. § 2065(d) (enacted by Chapter 405) (listing the State Department of Health Care Services’ duties if a medical parolee does not qualify for Medi-Cal).
57. Id.
58. Id.
59. Id. § 3550(h) (enacted by Chapter 405).
60. Id.
61. Thomas, supra note 21.
62. Id.
63. Id.
A. Saving State Spending on Incapacitated Inmates

Inmates, as a population, are generally unhealthy\(^{64}\) and prison administrators in California have struggled to find a cost-effective solution for providing adequate medical care to inmates.\(^ {65} \) This dilemma stems from the conflict between the high cost of providing health care to inmates and the need to maintain security amidst California’s budget crisis.\(^ {66} \) Aging of the current prison population only exacerbates the problem.\(^ {67} \)

Chapter 405 relieves California of the burden as the sole provider of funding the medical costs for the most expensive and unhealthy inmates.\(^ {68} \) Once released, it is unlikely that the prisoners will be able to pay for health insurance on their own.\(^ {69} \) However, the released prisoners will become eligible for federal aid.\(^ {70} \) Even though the state will be paying for some of the inmate’s health care, it will be able to share the cost with the federal government.\(^ {71} \)

The state will also save money by not having to pay two correctional officers to stand guard over inmates who do not pose a threat to society.\(^ {72} \) Guards can return to performing more integral parts of their duties.\(^ {73} \) Supporters estimate the new system will save approximately $200 million each year.\(^ {74} \) Governor Schwarzenegger indicated that Chapter 405 would save money without impairing public safety.\(^ {75} \) While this process will potentially place a burden on the parole system, there is no indication of how much of a financial burden it could become.\(^ {76} \)

\(^ {64} \) RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 88 (2003).
\(^ {65} \) See id. at 87-88 (“Research has shown that health-care expenditures have become the most pressing problem facing correctional administrators.”).
\(^ {67} \) See id. (“There is a strong relationship between aging and the need for assistance with activities of daily living . . . .”).
\(^ {68} \) ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 9 (June 29, 2010).
\(^ {69} \) Id. at 10.
\(^ {70} \) Id. at 9.
\(^ {71} \) Id.
\(^ {72} \) Id.
\(^ {74} \) Id.
\(^ {75} \) Schwarzenegger Signs Bill, supra note 66.
\(^ {76} \) See ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1399, at 3-4 (Aug. 4, 2010) (discussing the fiscal effect of the bill without discussing how much it costs to have a prisoner in the parole system).
B. Is Chapter 405 Overbroad?

The Crime Victims United of California (CVUC) and the Taxpayers for Improving Public Safety opposed Chapter 405 because they found the criteria for eligibility overbroad. They fear that inmates with non-life threatening illnesses, such as “high blood pressure, diabetes, rheumatoid arthritis and more,” would satisfy the requirements for medical parole. The Legislature amended Chapter 405 during bill negotiations to eliminate this concern.

Chapter 405 narrows the parole requirements to “condition[s] that render[] [the prisoner] permanently unable to perform activities of basic daily living.” Tina Chiu, a representative of the VERA Institute of Justice, researched release programs and found the proposed system of Chapter 405 very restrictive. She considers the “threshold for being incapacitated [to be] very high.” Senator Leno argues this concern does not have merit. He notes that medical parole works, and points to the thirty-six other states that have successfully implemented similar programs for proof that Chapter 405 will also succeed.

C. Constitutional Implications

Chapter 405 not only addresses issues regarding a prisoner’s due process right to access appropriate health care, but it also addresses the issue of prison overcrowding. Prior to Chapter 405, the California Supreme Court required the release of certain dangerous inmates due to prison overcrowding. Kelso has already identified eleven prisoners who qualify for medical parole. Chapter 405 will keep the more dangerous inmates in jail while releasing the “sickest of the sick” and freeing up the prison hospital beds.

Opponents of Chapter 405, however, are concerned with the cost that releasing inmates will have on victims and their families. The CVUC indicated that prior to Chapter 405, the laws were already unjust to victims because of the

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77. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 12 (June 29, 2010).
78. Id. at 12-13.
79. Herdt, supra note 73.
80. CAL. PENAL CODE § 3350(a) (enacted by Chapter 405).
81. Herdt, supra note 73.
82. Schwarzenegger Signs Bill, supra note 66.
83. Id.
84. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 10-11 (June 29, 2010).
85. Id. at 12.
86. Id. at 8.
87. Id. at 10, 12.
88. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1399, at 8 (Aug. 4, 2010)
various ways in which inmates are able to reduce their sentences.\textsuperscript{89} For example, there are programs that provide inmates an ability to reduce their sentences to 50\% of the original time.\textsuperscript{90} This reduction of sentences robs “[v]ictims and their families [of] be[ing] able to feel a sense of justice that the time served by the inmate for his or her crime(s) is not only reflective of the sentence imposed but of the crime committed.”\textsuperscript{91}

\textbf{D. Implications on the Parole System}

The CVUC also criticizes Chapter 405 because parole officers are not required to return parolees to prison if the parolee’s condition improves.\textsuperscript{92} Rather, their return is merely discretionary.\textsuperscript{93} The CVUC is concerned that including this provision indicates a likelihood that prisons will release inmates knowing their condition has the possibility of improving.\textsuperscript{94} Senator Dave Cogdill voiced this concern, indicating a lack of preventative measures to ensure that if an inmate recovers, they will return to prison.\textsuperscript{95}

\textbf{V. CONCLUSION}

Chapter 405 allows California to spend its limited resources on education rather than incapacitated inmates.\textsuperscript{96} In 2010, California faced a $20 billion budget shortfall and pressure to drastically lower the prison population.\textsuperscript{97} Chapter 405 will save California money by sharing the cost of healthcare with other organizations, including the federal government, for the sickest inmates.\textsuperscript{98} More importantly, the state will save millions of dollars on not having to pay correctional officers to stand guard over a comatose inmate.\textsuperscript{99} However, Chapter 405 does not automatically release anyone; rather it provides the BPH with authority to grant medical parole.\textsuperscript{100} Thus, the BPH must parole some prisoners in

\begin{flushright}
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 13 (June 29, 2010).
\textsuperscript{93} Id.
\textsuperscript{94} See id. (“The fact that this provision [of allowing for the parole to be revoked if the person’s condition improves] is included raises concern about what offenders would be eligible is [sic] the opportunity for their condition to improve.”).
\textsuperscript{96} Herdt, supra note 73.
\textsuperscript{97} Id.
\textsuperscript{98} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1399, at 9-10 (June 29, 2010).
\textsuperscript{99} Id. at 9.
\textsuperscript{100} CAL. PENAL CODE § 3350(a) (enacted by Chapter 405).
\end{flushright}
order to save California money. The Legislature should revisit this issue if the BPH only paroles a handful of inmates, as this would indicate that Chapter 405 has failed to increase medical releases like its predecessor, Chapter 740.

101. Id.

No Body Armor for Violent Felons: Chapter 21 Reinstates the James Guelff Act

Scott Walker

Code Section Affected
Penal Code § 12370 (amended).
SB 408 (Padilla); 2010 STAT. Ch. 21 (Effective June 2, 2010).

I. INTRODUCTION

In 1994, for reasons unexplained, a drifter named Victor Lee Boutwell went on a rampage—he was armed with two semi-automatic pistols, a fully automatic pistol, two assault rifles, and thousands of rounds of ammunition.¹ Worse still, he was wearing full body armor and a Kevlar helmet.² After stealing two vehicles and evading law enforcement for over two hours, Boutwell confronted police near San Francisco’s Pacific Heights neighborhood.³ Officer James Guelff was the first to respond and immediately drew Boutwell’s fire.⁴ Though Guelff was able to return fire, Boutwell’s body armor stopped the rounds.⁵ Tragically, as the officer reloaded his service revolver, a bullet from Boutwell’s assault rifle ended Guelff’s life.⁶ By the time police managed to kill Boutwell, the gunman had also shot and injured a homeless man, a paramedic, and another officer.⁷

Just three years later, a similar standoff took place during a bank robbery in North Hollywood.⁸ There, Emil Matasareanu and Larry Phillips Jr. robbed a bank armed with semi-automatic handguns and automatic assault rifles.⁹ Like Boutwell, the men also wore body armor.¹⁰ Almost immediately, swarms of law enforcement responded, surrounding the bank.¹¹ Despite being vastly outnumbered, the heavily armed and armored robbers were able to hold officers

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². ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1707, at 3 (Mar. 24, 1998).
⁴. Id.
⁶. Id.
⁷. Margolick, supra note 3.
¹¹. See Ayres, supra note 8 (noting that someone activated the bank’s alarm causing the police to respond rapidly).
at bay for almost an hour—largely due to the protection their body armor afforded. Over the course of the gun battle, the gunmen wounded five civilians and eleven police officers. The standoff ended when authorities fatally wounded both gunmen. Miraculously, only Matasareanu and Phillips died. Chapter 21 seeks to prevent such drawn-out and dangerous standoffs by curing constitutional defects in a law that prohibited violent felons from using body armor.

II. LEGAL BACKGROUND

In 1998, the Legislature enacted the James Guelff Act of 1998 (Guelff Act), which criminalized the ownership, purchase, or possession of body armor by persons convicted of violent felonies. In 2009, the Second District Court of Appeal struck down the Guelff Act on due process grounds, holding that its definition of body armor was unconstitutionally vague. Shortly thereafter, legislators introduced Chapter 21 in an effort to reinstate the Guelff Act.

A. The Guelff Act

The Legislature originally enacted the Guelff Act in response to an increase in incidents involving the use of body armor in the commission of violent crimes, such as the Boutwell standoff and the North Hollywood shootout. The Guelff Act declared it a felony for a person previously convicted of a violent felony to own, purchase, or possess body armor. The drafters enacted the Guelff Act “to help stem the tide of recent criminal incidents which create a dangerously threatening environment for both police officers and citizens,” namely, using body armor in the commission of violent crimes. Many considered the law a

12. See id. ("The police tried to keep the bandits from escaping the bank but were initially outgunned.").
13. Dana Bartholomew, 44 Minutes of Terror; Bank Heist Leaves Scar on Valley Residents, DAILY NEWS OF L.A., Feb. 28, 2007, at N1 (noting that many of the rounds fired by the police simply bounced off the robbers' armor).
15. Ayres, supra note 8. There is some uncertainty as to whether the police actually killed Phillips. This is because Phillips shot himself with a pistol in the same moment that he was struck by an officer’s bullet. North Hollywood Gunbattle Autopsies Out, UNITED PRESS INT’L, Apr. 10, 1997.
17. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 6 (Apr. 22, 2010).
18. CAL. PENAL CODE § 12370(a) (West 2009).
20. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at G-H (Jan. 19, 2010).
22. CAL. PENAL CODE § 12370(a).
23. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1707, at 1 (Mar. 24, 1998). As the Los Angeles City Council observed in a supporting statement, “[t]he department is concerned that as more incidents occur and become known to the public, more persons of criminal intent, including ex-felons, will use body armor in the commission of their crimes. Id. The use of body armor in the commission of crimes
vital public safety measure, and courts and prosecutors continually enforced it for over a decade.\(^\text{24}\) In 2009, despite the apparent value to public safety, the Second District Court of Appeal invalidated the Guelff Act in *People v. Saleem*.\(^\text{26}\)

**B. People v. Saleem and the Constitutionality of the Guelff Act**

In 2007, police officers investigating a suspicious vehicle encountered one of the passengers, Ethan Saleem, wearing a military-style flak jacket.\(^\text{27}\) The officers believed the jacket was body armor within the meaning of the Guelff Act and arrested Saleem after he said he had a previous conviction for voluntary manslaughter.\(^\text{28}\) A jury convicted Saleem of violating the statute.\(^\text{29}\) On appeal, Saleem argued that the Guelff Act was void for vagueness because “its definition of body armor did not give him fair notice of the characteristics making his body vest illegal.”\(^\text{30}\)

The court agreed, explaining, “the core due process concern underlying the void for vagueness doctrine is fair notice.”\(^\text{31}\) Fair notice “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . .”\(^\text{32}\) Therefore, it was necessary to decide whether the Guelff Act’s definition of body armor provided such notice.\(^\text{33}\)

The law defined body armor by reference to a definition found in the Code of Regulations.\(^\text{34}\) The Regulations explain that “body armor” means those parts of a complete armor that provide ballistic resistance to the penetration of the test ammunition for which a complete armor is certified.\(^\text{35}\) The court first observed that this definition was provided in the context of body armor certified for use by law enforcement\(^\text{36}\) and required a determination of whether a particular garment

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\(^{25}\) Senate Appropriations Committee, Committee Analysis of SB 408, at 2 (Jan. 21, 2010).

\(^{26}\) People v. Saleem, 102 Cal. Rptr. 3d 652, 670 (Cal. Ct. App. 2d Dist. 2009).

\(^{27}\) Id. at 669. An expert in the Saleem trial testified that such flak jackets were intended to protect against “shrapnel from exploding mines and hand grenades, not bullets.” Id. Nevertheless, the vest bore a label identifying it as “body armor.” Id. at 670.

\(^{28}\) Id. at 655-56.

\(^{29}\) Id. at 655.

\(^{30}\) Id. at 664.

\(^{31}\) Id. at 669.

\(^{32}\) Id. at 660.

\(^{33}\) Id. at 667.

\(^{34}\) See Cal. Penal Code § 12370(a) (West 2009); Cal. Code Regs. tit. 11, § 942(e).

\(^{35}\) Cal. Code Regs. tit. 11, § 942(e) (2010).

\(^{36}\) Saleem, 102 Cal. Rptr. 3d at 658-59.
met the prescribed certification standards.\textsuperscript{37} The court held this determination was beyond the common experience of most people since the definition required expert knowledge of ballistics and bullet resistant materials.\textsuperscript{38}

The court explained that, under the Regulations’ technical definition, “only an expert would know if any particular protective body vest was proscribed by [the Guelff Act].”\textsuperscript{39} Moreover, “[e]ven if Saleem had read [the Guelff Act] and the Regulations, he could not have reasonably ascertained his vest possessed the characteristics making it illegal . . . .”\textsuperscript{40} Accordingly, the court reversed Saleem’s conviction.\textsuperscript{41}

III. CHAPTER 21

Chapter 21 redefines “body armor” as “any bullet-resistant material intended to provide ballistic and trauma protection for the person wearing the body armor.”\textsuperscript{42}

IV. ANALYSIS

After the Court of Appeal held the Guelff Act unconstitutional, Chapter 21’s proponents sought to reinstate the law by redefining body armor in terms that ordinary people would understand.\textsuperscript{43} By adopting a more common-sense definition taken from the Penal Code, proponents believe Chapter 21 will resurrect the popular law.\textsuperscript{44}

A. The New Definition of “Body Armor”

Chapter 21 borrows the new definition of body armor from a related section of the Penal Code rather than the Code of Regulations.\textsuperscript{45} Under the Regulations’ definition, a person needed expert knowledge of ballistics, bullet-resistant materials, and certification standards in order to determine whether the statute proscribed a particular garment.\textsuperscript{46} By contrast, the new definition requires no such

\textsuperscript{37} Id. at 669.  
\textsuperscript{38} Id.  
\textsuperscript{39} Id. at 667.  
\textsuperscript{40} Id. at 670.  
\textsuperscript{41} Id.  
\textsuperscript{42} CAL. PENAL CODE § 12370(f) (amended by Chapter 21).  
\textsuperscript{43} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 4-6 (Apr. 22, 2010).  
\textsuperscript{44} Id.  
\textsuperscript{45} CAL. PENAL CODE § 12022.2(c) (West 2009) (“As used in this section, ‘body vest’ means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer.”).  
\textsuperscript{46} Saleem, 102 Cal. Rptr. 3d at 669. Curiously, as the Saleem court observed, there is no explanation for why the technical definition was incorporated over other existing definitions such as the “body vest” definition ultimately adopted by Chapter 21. Id. at 666 n.5.
expert knowledge since the plain language conveys a generalized notion of body armor that most people would understand—“any bullet-resistant [garment] intended to provide ballistic and trauma protection . . .” While this new definition is broader than the previous definition, the authors expect the general enforcement scheme to remain unchanged.

B. General Acceptance of the Guelff Act, Then and Now

Prior to Saleem, many regarded the Guelff Act as an important public safety measure. As a result, the state enforced the law for over a decade notwithstanding the vague definition. In fact, the goal of keeping body armor from violent felons gained such widespread support that Congress enacted a similar federal law in 2001. Accordingly, once the Court of Appeal held the Guelff Act unconstitutional, law enforcement groups swiftly called for the law’s reinstatement.

Given the general acceptance of the prior law, it is not surprising that Chapter 21 was similarly well-received. The Legislature passed it unanimously at every stage without any registered opposition. Outside the Legislature, however, Chapter 21 did face some limited opposition. For example, Gerald Peters, the attorney who represented the defendant in Saleem, said the call to reinstate the Guelff Act was “‘a propaganda campaign to convince people that police are going to die.’” Consequently, Chapter 21 may face future constitutional challenges—perhaps on Second Amendment grounds—as has been the case with laws creating similar restrictions.

47. CAL. PENAL CODE § 12370(f) (amended by Chapter 21).
48. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 5 (Apr. 22, 2010).
49. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 408, at 2 (Jan. 21, 2010) (“This bill does not expand the reach of state law, as it was enacted, only as it can be enforced currently. In the absence of People v. Saleem, this law and its sentencing expenses would have continued as had been practice for more than a decade.”).
50. E.g., SENATE COMMITTEE ON PUBLIC SAFETY, ANALYSIS OF SB 408, at G (Jan. 19, 2010) (referring to SB 408 as a “critically important public safety measure”); Begin, supra note 24 (discussing police outrage over the repeal of SB 408).
51. SENATE APPROPRIATIONS COMMITTEE, ANALYSIS OF SB 408, at 2 (Jan. 21, 2010) (noting that the Guelff Act had been enforced successfully for more than a decade).
53. Begin, supra note 24. For example, shortly after the Saleem ruling, pressure from San Francisco Police Chief George Gascon and the Los Angeles Police Protective League, among others, led Attorney General Jerry Brown to petition the California Supreme Court to review the lower court’s decision. Id.
55. Id.
56. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 7 (Apr. 22, 2010).
57. Begin, supra note 24.
58. See, e.g., United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) (involving a constitutional challenge on Second Amendment grounds of a law prohibiting the possession of firearms by a person subject to a temporary protective order). The U.S. Supreme Court recently framed a discussion of Second Amendment
V. CONCLUSION

Chapter 21 essentially reinstates the Guelff Act by revising the definition of body armor. Although the law was well received and successfully enforced from 1998 to 2009, the Court of Appeal held it unconstitutional in 2009 because it found the definition of body armor to be impermissibly vague. Chapter 21 overcomes this constitutional defect by replacing the previously vague and overly-technical definition with an explicit, common-sense definition. In this way, Chapter 21’s proponents believe the new definition will provide sufficient notice of the types of body armor prohibited, thereby satisfying constitutional due process notice requirements.

Although the revised definition may face new constitutional challenges in the courts, given the definition’s plain language and common-sense approach, Chapter 21 is likely to withstand such challenges. Rather, the more debatable issue will likely be whether a particular garment falls within the new definition of body armor.

protections in terms of interpersonal conflict and self-defense, interpreting the phrase “bear arms” to mean to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.” District of Columbia v. Heller, 128 S. Ct. 2783, 2793 (2008) (quoting Muscarello v. United States, 524 U.S. 125, 130 (1998)). Thus, given this focus on self-defense, an argument can be made that the right to bear arms encompasses the use of body armor since arms and armor are arguably complementary means of self-defense.

59. Senate Appropriations Committee, Committee Analysis of SB 408, at 2 (Jan. 21, 2010).
60. Id. at 1-2.
62. See Cal. Penal Code § 12370(f) (amended by Chapter 21) (redefining “body armor” as “any bullet-resistant material intended to provide ballistic and trauma protection for the person wearing the body armor”).
63. See Senate Committee on Public Safety, Committee Analysis of SB 408, at G-J (Jan. 19, 2010) (proposing that the new definition will overcome the problems identified in Saleem without specifically discussing due process fair notice requirements).
64. See Saleem, 102 Cal. Rptr. 3d at 666 n.5 (appearing to suggest, indirectly, that the adoption of the definition of body vest found in Penal Code section 12022.2(c) could overcome the constitutional notice problems posed by the previous definition).
65. See id. at 658-59. (implicitly recognizing that a conviction based on the former version of the Guelf Act required a given piece of body armor to satisfy the statutory definition).
Chapter 219: Chelsea’s Law

Kevin Walkow

Code Sections Affected

Penal Code §§ 290.09, 3053.8, and 9003 (new), §§ 220, 236.1, 264, 264.1, 286, 288, 288a, 289, 290.04, 290.05, 290.06, 290.46, 666, 667.61, 1203.067, 2962, 3000, 3000.1, 3008, and 13887 (amended).

AB 1844 (Fletcher); 2010 STAT. Ch. 219.

I. INTRODUCTION

Seventeen year-old Chelsea King disappeared on February 25, 2010, while jogging in a neighborhood park.1 Raped and strangled, Chelsea’s body was found five days later in a shallow grave near Lake Hodges, California.2 Her blood and semen-stained clothing led authorities to thirty-one year-old John Albert Gardner, III.3 Chelsea King was not Gardner’s first victim.4 A registered sex offender, Gardner was previously incarcerated in 2000 for attacking a thirteen year-old girl.5 He was paroled after serving five years of a six-year sentence.6 Following his arrest for the murder of Chelsea King, Gardner led authorities to the remains of fourteen year-old Amber Dubois.7 Gardner abducted Amber in 2009, while she was walking to school.8 He raped Amber, and then stabbed her to death.9 Gardner also pled guilty to a separate attempted rape, which failed when his victim escaped.10

In the wake of Chelsea’s murder, her family initiated a campaign to change the penalization of sex offenders in California.11 This campaign resulted in

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2. Id.
4. Id.
7. Spagat, supra note 3.
8. Mello, supra note 1; Perry, supra note 5.
11. Letter from Mac Taylor, Legislative Analyst, Cal. Legislative Analyst’s Office, to Nathan Fletcher, Assembly Member, 75th Dist. (May 12, 2010) [hereinafter Letter from Mac Taylor] (on file with the McGeorge Law Review) (noting that ninety thousand registered sex offenders reside in California); see also Spagat, supra
Chapter 219, commonly known as “Chelsea’s Law,” which increases penalties for sex crimes, requires lifetime parole for offenders who commit the most egregious crimes, restricts sex offenders from entering parks, and implements the Containment Model for sex offender management. Support for Chelsea’s Law was widespread; Chapter 219 received unanimous approval at every stage of the legislative process. In an eighty member Assembly, fifty-five lawmakers coauthored Chapter 219.

II. LEGAL BACKGROUND

Chapter 219 enacts new statutes within, and amends numerous sections of, California’s Penal Code. The key provisions of Chapter 219 affect sentencing,
parole and probation, risk assessment, and restrictions on the movement of registered sex offenders.\footnote{See supra note 16; SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2 (Aug. 8, 2010) (summarizing the statutory changes proposed by Assembly Bill 1844).}

\section*{A. California Sentencing Laws}

\subsection*{1. The Foundation for Indeterminate Sentences & Aggravating Circumstances}

Before the Determinate Sentencing Act of 1976, all felonies in California were punishable by indeterminate sentences.\footnote{Cunningham v. California, 549 U.S. 270, 276-77 (2007); CAL. LEGISLATIVE ANALYST'S OFFICE, OVERVIEW OF CUNNINGHAM V. CALIFORNIA AND RELATED LEGISLATION (Nov. 9 2010) available at http://www.lao.ca.gov/handouts/crimjust/2010/Cunningham_11_9_10.pdf [hereinafter OVERVIEW OF CUNNINGHAM] (on file with the McGeorge Law Review).} Under the indeterminate sentencing scheme, convicted felons were subject to a sentencing range (e.g. twenty-five years to life), rather than a specific term of imprisonment.\footnote{Id. at 277 n.3. For example, first-degree murder is punishable by a sentence of twenty-five years to life. CAL. PENAL CODE § 190(a) (West 2010).} Additionally, the parole board was ultimately responsible for determining the length of each sentence.\footnote{See, e.g., CAL. PENAL CODE § 209(b) (providing the crime of "aggravated kidnapping" is punishable by imprisonment for life with the possibility of parole).} Indeterminate sentences are still used today, however, they apply only to the most serious crimes.\footnote{Id. § 288.7(b) (providing the crime of "sexual penetration" as specified, is punishable by a term of fifteen years to life). Generally, persons serving indeterminate sentences are evaluated by the California Board of Parole Hearings to determine their fitness for release and the appropriate conditions of parole. Cal. Dep’t of Corr. & Rehab., About CDCR: Divisions and Boards, Board of Parole Hearings, http://www.cdc.ca.gov/BOPH/ (last visited Mar. 14, 2011) (on file with the McGeorge Law Review).}

Existing California law provides that some sex crimes are punishable by a single “life” term of imprisonment.\footnote{Id. at 277.} Although classified as “life,” these terms are actually indeterminate sentences ranging from a few years to life imprisonment.\footnote{See supra note 16; SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2 (Aug. 8, 2010) (summarizing the statutory changes proposed by Assembly Bill 1844).} Under California’s “habitual sex offender law,” individuals who have been convicted of specified sex crimes, and are subsequently convicted of one or more of those same crimes, are sentenced to twenty-five years to life.\footnote{Id. § 667.71(a)-(b).}

The California Penal Code also defines “one-strike” offenses, which are punishable by a term of either fifteen or twenty-five years to life.\footnote{Id.} These specified sex crimes include rape, spousal rape, sexual penetration, lewd or lascivious acts, sodomy, oral copulation, and continuous sexual abuse of a child.\footnote{Id. § 667.71(c).}
For these particular sex crimes, a sentence of twenty-five years to life is imposed if one or more of the aggravating factors listed in section 667.61(d) are present.\textsuperscript{27} If one of the aggravating factors in section 667.61(e) is present, a sentence of fifteen years to life is imposed.\textsuperscript{28} However, this increases to twenty-five years to life in the presence of two or more factors.\textsuperscript{29}

2.\textsuperscript{30} \textit{Determinate Sentencing & Judicial Discretion}

In 1976, the California Legislature enacted the Determinate Sentencing Act, largely replacing the use of indeterminate sentences.\textsuperscript{30} Under California’s determinate sentencing scheme, statutorily defined offenses specify a sentencing “triad” of three possible terms of imprisonment—a lower, middle, or upper term.\textsuperscript{31} For example, first-degree robbery is punishable by three, four, or six years in a state prison.\textsuperscript{32} The choice of the appropriate term within each triad is left to the discretion of the court.\textsuperscript{33} Most felonies are subject to determinate sentences,\textsuperscript{34} including a number of violent sexual offenses relevant to Chapter 219.\textsuperscript{35}

\textsuperscript{27} \textit{Id.} § 667.61(d) (listing aggravating factors to include kidnapping, infliction of aggravated mayhem or torture, previous specified convictions, or if the offence was committed during a first-degree burglary or in concert, as specified).

\textsuperscript{28} \textit{See id.} § 661.61(e) (listing aggravating factors to include kidnapping, use of a deadly weapon, infliction of great bodily injury, tying or binding the victim, administering a controlled substance, previous convictions of specified crimes, or if the offense was committed during commission of a burglary or in concert, as specified).

\textsuperscript{29} \textit{Id.} § 667.61(a),(e).

\textsuperscript{30} \textit{See} Cunningham v. California, 549 U.S. 270, 276-77 (2007) (discussing the adoption of California’s Determinate Sentencing Law); \textit{OVERVIEW OF CUNNINGHAM, supra note 18, at 1 (“Roughly seventy-seven percent of state prison inmates are currently serving determinate sentences.”)).

\textsuperscript{31} \textit{CAL. PENAL CODE §§ 1170(a)(1),(3), 1170.3(a)(2); Cunningham, 549 U.S. at 277; see also Stephanie Watson, Fixing California Sentencing Law: The Problem with Piecemeal Reform, 39 \textit{McGeorge L. Rev.} 585, 587 n.18 (2008) (the grouping of a lower, middle, and upper term is known as a “triad”).}

\textsuperscript{32} \textit{CAL. PENAL CODE § 213(a)(1)(B).}

\textsuperscript{33} \textit{Id.} § 1170(b).

\textsuperscript{34} \textit{OVERVIEW OF CUNNINGHAM, supra note 18, at 1.}

\textsuperscript{35} \textit{SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2 (Aug. 8, 2010) (Chapter 219 makes “numerous changes to statutes governing sex offenses and sex offenders.”). Prior to Chapter 219, sentencing triads associated with felony offenses were limited to:}

- \textit{Rape:} §§ 261-262, 264 (imposing a term of three, six or eight years).
- \textit{Rape, in concert:} § 264.1 (imposing a term of five, seven, or nine years).
- \textit{Sodomy:} § 286(c) (imposing a term of three, six, or eight years).
- \textit{Sodomy, in concert:} § 286(d) (imposing a term of five, seven, or nine years).
- \textit{Specified lewd or lascivious acts:} § 288(a)-(b) (imposing a term of three, six, or eight years).
- \textit{Oral Copulation:} § 288a(a) (imposing a term of three, six, or eight years).
- \textit{Oral copulation in concert:} § 288a(d) (imposing a term of five, seven, or nine years).
- \textit{Sexual penetration:} § 289(a) (imposing a term of three, six, or eight years).
- \textit{Assault with intent to commit other specified crimes:} § 220(a)-(b) (imposing a term of two, four, or six years).
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B. Parole Supervision for Specified Sex Offenders

Generally, persons convicted under California’s determinate sentencing scheme are subject to parole supervision for three years.36 However, persons convicted of a specified violent felony sex offense are subject to parole supervision for five years.37 For those persons convicted under either a “one-strike” or “habitual sex offender” statute, the parole period is ten years.38

C. Sex Offender Registration & Movement Restrictions

California law requires persons convicted of a felony or misdemeanor sex offense to register with the local law enforcement agency where they reside.39 Additionally, movement restrictions apply to individuals registered pursuant to the Sex Offender Registration Act.39 In 2006, California voters passed Proposition 83, establishing new requirements for sex offenders.40 Specifically, it is unlawful for a registered sex offender to reside within 2,000 feet of a school or park regularly attended by children.42 Existing law also authorizes local governments to enact local ordinances further restricting registrant residency.43 Furthermore, Proposition 83 requires paroled felony sex offenders to wear Global Positioning System (GPS) devices for the remainder of their lives.44

D. Risk Assessment & the California Sex Offender Management Board

In 2006, the Legislature established the State-Authorized Risk Assessment Tool for Sex Offenders Review Committee (SARATSO Review Committee).45 The SARATSO Review Committee selects the risk assessment tools used to evaluate sex offenders in California.46 The statutory purpose of the committee is

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36. CAL. PENAL CODE § 3000(b)(1).
37. Id. § 677.5(b)-(c) (West 2010) (listing offenses of rape, sodomy, oral copulation, lewd or lascivious acts, sexual penetration, and in concert rape); id. § 3000(b)(1) (noting, however, that the parole authority may elect to waive parole upon good cause).
38. Id. §§ 667.61, 667.71, 3000(b)(3).
39. Id. § 290(b) (West 2010).
40. Id. §3003.5(b) (West 2006).
42. CAL. PENAL CODE § 3003.5(b).
43. Id. § 3003.5(c).
44. Id. § 3004(b).
45. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, DIVISION OF ADULT PAROLE OPERATIONS, STATE AUTHORIZED RISK ASSESSMENT TOOL FOR SEX OFFENDERS (SARATSO) COMMITTEE, http://www.cdcr.ca.gov/Parole/SARATSO_Committee/SARATSO.html (last visited Oct. 13, 2010) (on file with the McGeorge Law Review); see also CAL. PENAL CODE § 290.05(a) (noting The SARATSO Review Committee is comprised of a representative of the State Department of Mental Health, the Department of Corrections and Rehabilitation, the Attorney General’s Office, and of the Chief Probation Officers of California).
46. CAL. PENAL CODE § 290.04(a)(2). The risk assessment tool selected by the committee is known as
to ensure the tool selected “reflects the most reliable, objective and well-established protocols for predicting sex offender risk recidivism . . . .”47 Prior to the enactment of Chapter 219, the SARATSO Review Committee selected the STATIC-99 risk assessment scale as the sole assessment tool used to evaluate adult males.48

In 2006, the Legislature also created the California Sex Offender Management Board (CASOMB).49 The Board’s statutory duty is to “address any issues, concerns, or problems related to the community management of adult sex offenders,” and to “achieve safer communities by reducing victimization.”50 Additionally, CASOMB is required to perform a comprehensive review of sex offender management practices, make recommendations to improve those practices, and submit its findings to the Legislature and Governor.51 In January 2010, CASOMB issued its final recommendations, advocating for a statewide implementation of the Containment Model for sex offender management.52

E. The Containment Model & Sex Offender Management

The Containment Model is a widely recognized approach to sex offender management designed to promote community safety and reduce sex offender recidivism.53 The Containment Model is guided by five core philosophies: victim

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47. Id. § 290.04(a)(1).
48. Id. § 290.04(b)(2); CAL. SEX OFFENDER MGMT BD., AN ASSESSMENT OF CURRENT MANAGEMENT PRACTICES OF ADULT SEX OFFENDERS IN CALIFORNIA REPORT: INITIAL REPORT 104 (2008), available at http://www.casomb.org/reports.htm (hereinafter CASOMB ASSESSMENT) (reviewing the literature on the Containment Model and explaining that “the Static-99 is a risk assessment instrument that has been shown to have a recognized ability to predict sexual recidivism”); see also CAL. SEX OFFENDER MGMT TASK FORCE, CAL. DEP’T OF CORR. AND REHABILITATION, MAKING CALIFORNIA COMMUNITIES SAFER: EVIDENCE-BASED STRATEGIES FOR EFFECTIVE SEX OFFENDER MANAGEMENT, FULL REPORT 117 (2007) (hereinafter TASK FORCE REPORT), available at http://www.casomb.org/reports.htm (on file with the McGeorge Law Review) (noting the STATIC-99 applies only to males because “[t]here is a lack of well-validated risk assessment measures for juvenile and female sex offenders”). “Static risk assessments use primarily static or unchangeable risk factors (e.g., number of prior sex offenses, age of the offender, gender of victims, and relationship to victims).” Id.
49. CAL. PENAL CODE § 9001(a). CASOMB is a seventeen member board comprised of the Attorney General, the Secretary of the Department of Corrections and Rehabilitation, the Director of Adult Parole Services, the Director of Mental Health, one state judge, and representatives from law enforcement, prosecuting attorneys, probation officers, criminal defense attorneys, county administrators, city managers, licensed mental health professionals, and recognized experts in the field of sexual assault. Id. § 9001(b)(1)-(3).
50. Id. § 9002(a).
51. Id. § 9002(a)(1)-(2). CASOMB is required to address issues of supervision, treatment, housing, transition to communities, and interagency coordination. Id. § 9002(a)(2).
52. CAL. SEX OFFENDER MGMT BD., RECOMMENDATIONS REPORT 104 (2010) [hereinafter CASOMB RECOMMENDATIONS], available at http://www.casomb.org/reports.htm (on file with the McGeorge Law Review). Governor Schwarzenegger’s High-Risk Sex Offender Task Force also endorsed the Containment Model. Id. at 32-33.
protection and public safety; multidisciplinary collaboration; comprehensive risk management; informed public policies; and quality control measures. Successful implementation of the Containment Model requires multiple accountability tools, including specialized supervision, risk assessment, sex offender-specific treatment, and polygraph examinations. When these tools are employed together, the Containment Model strategies have proven effective at mitigating sex offender recidivism. The Containment Model is the leading sex offender management practice among other states and jurisdictions.

III. CHAPTER 219

Chapter 219 makes several changes to California law, including increased sentences for sex crimes, increased parole periods, a new restriction to prevent sex offenders from entering parks, and implementation of the Containment Model for sex offender management.

54. STRATEGIES 18 (2007); see also CASOMB ASSESSMENT, supra note 48, at 103.


In the Containment Model, a specially trained case management team carries out the day-to-day work of risk reduction. The team includes a probation or parole officer, a treatment provider, and a polygraph examiner, who act together to decrease or eliminate an individual’s privacy, opportunity, and access to potential or past victims. Limiting opportunities for reoffending requires that the team have accurate information about an individual’s past and potential victims and high-risk behavior unique to that sexual abuser. To solicit and verify this information, post conviction polygraphs are added to the sex-offense-specific treatment of the probationer or parolee. The combination is powerful. The threat or actuality of the polygraph exam increases the scope and accuracy of sexual history information the offender gives in treatment, provides a method to verify whether he or she is currently engaging in high-risk or assaultive behavior, and contributes to breaking through the denial many sex offenders demonstrate as part of their offense pattern. The supervising probation or parole officer supports this combined treatment-polygraph process by using the information to manage risk and to levy consequences.

56. CASOMB ASSESSMENT, supra note 48, at 103-06. Specialized supervision requires professional training and a reduced caseload limited to sex offenders. Id. at 104. Risk assessment entails the evaluation of every sex offender using a “valid assessment instrument, specific to sexual offenders.” Id. Additional accountability tools identified by CASOMB include conditions of parole or probation, plethysmography, short-term sanctions, community notification, and GPS tracking. Id. at 105-06.

57. Id. at 103.

58. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2 (Aug. 8, 2010) Chapter 219 also eliminates the sunset date for California Sexual Violence Services Fund and requires a $100,000 fine for human trafficking “involving a commercial sex act” of a victim under age eighteen. CAL. PENAL CODE § 236.1(g) (amended by Chapter 219).
A. Increased Sentencing Model

1. Increased Indeterminate Sentencing & Added Aggravating Circumstances

Chapter 219 enhances indeterminate sentences for “one-strike” sex crimes against minors, and adds two new circumstances to the list of aggravating factors in section 667.61(d) that are punishable by either twenty-five years to life or life without the possibility of parole.59

To begin, Chapter 219 amends the law to distinguish between “one-strike” sex crimes generally, and “one-strike” crimes against minors.60 In the latter instance, Chapter 219 imposes sentences of twenty-five years to life or life without the possibility of parole, depending on the circumstances.61 Specifically, for adults convicted of specified sex offenses against a victim under age fourteen (in which certain aggravating circumstances are present), Chapter 219 requires a penalty of life without the possibility of parole.62 If the offender is under age eighteen, the penalty is twenty-five years to life.63

Similarly, the when victim is between ages fourteen and seventeen, Chapter 219 again requires a penalty of life without the possibility of parole for the forcible crimes discussed above (but excluding offenses for lewd or lascivious acts or continuous sexual abuse of a child) when the offender is convicted as specified.64 As before, if the offender is under age eighteen, the penalty is twenty-five years to life.65

Additionally, Chapter 219 adds new circumstances to the list of aggravating factors in section 667.61(d) that are punishable by twenty-five years to life for a single offense, or life without the possibility of parole for multiple offenses.66

59. CAL. PENAL CODE § 667.61(d)(6)-(7) (amended by Chapter 219) (expanding the list of aggravating factors to include offenses where the defendant personally inflicted bodily harm on a victim under age fourteen, or as otherwise specified); see supra notes 25-29 and accompanying text (providing a summary of the predicate sex offenses and aggravating circumstances relevant to Chapter 219).

60. Compare id. § 667.61(a) (amended by Chapter 219) (requiring a general penalty of twenty-five years to life for persons convicted of specified sex offenses (in which one or more of the circumstances listed in section 667.61(d), or two or more of the circumstances in section 667.61(e), are present)), with id. § 667.61(j)(1) (amended by Chapter 219) (requiring a penalty of life without the possibility of parole as the penalty for the same offenses if the victim is under the age of fourteen).

61. See id. § 667.61(j)(1) (amended by Chapter 219) (requiring a penalty of life without the possibility of parole for adults convicted of specified sex offenses against a child under the age of fourteen as specified, or twenty-five years to life when the offender is under age eighteen).

62. Id.; see supra notes 25-29 and accompanying text (providing a summary of the predicate sex offenses and aggravating circumstances relevant to Chapter 219).

63. CAL. PENAL CODE § 667.61(j)(1) (amended by Chapter 219) (imposing life without the possibility of parole or twenty-five years to life respectively).

64. Id. § 667.61(j)-(n) (amended by Chapter 219) (specifying that a sentence of life without the possibility of parole is imposed when one or more of the circumstances listed in section 667.61(d) are present, or two of the circumstances in section 667.61(e) are present).

65. Id. 667.61(d) (amended by Chapter 219).

66. Id. § 667.61(d)(6)-(7) (amended by Chapter 219); see supra notes 25-29 and accompanying text (providing a summary of the predicate sex offenses and aggravating circumstances relevant to Chapter 219).
Specifically, Chapter 219 adds “bodily harm” against a minor under age fourteen, and “infliction of great bodily injury,” to the list of aggravating factors. 67

2. Enhanced Determinate Sentences for Crimes Against Minors

Chapter 219 increases determinate sentences for sex offenses. 68 Specifically, it amends the law to distinguish between sex crimes generally and sex crimes where the victim is a minor. 69 Harsher penalties are enforced in the latter instance. 70 Chapter 219 also implements a sentencing scheme that further differentiates between sex crimes against a victim under the age of fourteen, and sex crimes in which the victim is between the ages of fourteen and seventeen. 71 Under this scheme, stronger penalties are levied for crimes against children under age fourteen. 72

In particular, Chapter 219 enhances penalties for crimes of rape, rape in concert, sodomy, in concert sodomy, specified lewd or lascivious acts, oral copulation, sexual penetration, and assault with intent to commit other specified sex crimes. 73

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67. Id.; see also id. § 667.61(k) (amended by Chapter 219) (defining bodily harm as “any substantial physical injury resulting from the use of force that is more than the force necessary to commit an offense specified in subdivision . . . [667.61(c)]”); id. § 667.61(d)(6) (amended by Chapter 219) (listing great bodily injury among the aggravating factors subject to twenty-five years to life for a single offense).

68. CAL. PENAL CODE §§ 220, 264, 264.1, 286, 288, 288a, 289 (amended by Chapter 219); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010).

69. Id. § 264(a) (amended by Chapter 219) (imposing term of three, six, or eight years for crime of rape against adults); id. § 264(c)(1)-(2) (amended by Chapter 219) (specifying term of nine, eleven, or thirteen years for crime of rape against a minor under age fourteen, and term of seven, nine, or eleven years when victim is between ages fourteen and seventeen).

70. Id. § 264(c)(1)-(2).

71. Id.

72. Id.

73. Chapter 219 specifically enhances the penalty for crimes committed against victims under age eighteen, with stricter penalties when the victim is under fourteen. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010). Under the Penal Code, enhanced sentencing triads include (for a summary of prior sentencing triads, see supra note 35):

- **Rape**: § 264(c)(1)-(2) (amended by Chapter 219) (specifying that forcible rape is now punishable by a term of nine, eleven, or thirteen years when committed against a minor under age fourteen, and seven, nine, or eleven years when the victim is between ages fourteen and seventeen).
- **Rape, in concert**: § 264.1(b)(1)-(2) (amended by Chapter 219) (specifying that in concert forcible rape now is punishable by a term of ten, twelve, or fourteen years when committed against a minor under age fourteen, and seven, nine, or eleven years when the victim is between ages fourteen and seventeen).
- **Sodomy**: § 286(c)(2)(B)-(C) (amended by Chapter 219) (specifying that forcible sodomy is now punishable by a term of nine, eleven, or thirteen years when committed against a minor under age fourteen, and seven, nine, or eleven years when the victim is between ages fourteen and seventeen).
- **Sodomy, in concert**: § 286(d)(2)-(3) (amended by Chapter 219) (specifying that forcible sodomy in concert is now punishable by a term of ten, twelve, or fourteen years when committed against a minor under age fourteen, and seven, nine, or eleven years when the victim is between ages fourteen and seventeen).
B. New Sex Offender Parole Requirements & Movement Restrictions

Beyond sentencing enhancements, Chapter 219 also requires lifetime parole for offenders convicted of “one-strike” or “habitual sex offender” sex crimes, kidnapping with intent to commit specified sex offenses, and other specified sex offenses.\(^74\) Additionally, Chapter 219 requires a twenty-year period of parole for registered sex offenders, and those convicted of specified sex crimes against a person under age fourteen.\(^75\) The Board of Parole Hearings has the power to continue parole beyond twenty years if it determines that offenders continue to pose a risk to their communities.\(^76\) Lastly, a ten-year period of parole is required for persons convicted of specified sex offenses against adult victims.\(^77\)

Chapter 219 also enacts a new movement restriction that prohibits specified sex offenders from entering parks.\(^78\) Specifically, persons convicted of specified crimes against a victim under age fourteen are required to register pursuant to the Sex Offender Registration Act, and may not “enter any park where children regularly gather” without the “express permission of his or her parole agent.”\(^79\)

- **Specified lewd or lascivious acts**: § 288(b)(1)-(2) (amended by Chapter 219) (specifying that forcible lewd or lascivious acts are now punishable by a term of five, eight, or ten years when committed against a victim under age fourteen, as well as for forcible lewd or lascivious acts committed by a caretaker against a dependant).
- **Oral copulation**: § 288a(c)(2)(B)-(C) (amended by Chapter 219) (specifying that forcible oral copulation is now punishable by a term of eight, ten or twelve years when committed against a person under age fourteen, and six, eight, or ten years when the victim is between ages fourteen and seventeen).
- **Oral copulation, in concert**: § 288a(d)(2)-(3) (amended by Chapter 219) (specifying that forcible oral copulation in concert is now punishable by a term of ten, twelve, or fourteen years when committed against a person under age fourteen, and eight, ten, or twelve years when the victim is between ages fourteen and seventeen).
- **Sexual penetration**: § 289(a)(3)(B)-(C) (amended by Chapter 219) (specifying that forcible sexual penetration is now punishable by a term of eight, ten or twelve years when committed against a person under age fourteen, and six, eight, or ten years when the victim is between age fourteen and seventeen).
- **Assault with intent to commit specified sex crimes**: § 220(a)(2) (amended by Chapter 219) (imposing a sentence of five, seven, or nine years for assault against a person under age eighteen with intent to commit rape, sodomy, oral copulation, or a violation of sections 264.1 (rape, in concert), 288 (lewd or lascivious acts), or 289 (sexual penetration)).

\(^74\) Id. § 3000(b)(2)-(3) (amended by Chapter 219) (referencing “other” crimes of rape, sodomy, oral copulation, lewd or lascivious acts, sexual penetration, or rape, spousal rape, or sexual penetration in concert); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 14 (June 29, 2010); ASSEMBLY FLOOR, CONCURRENCE ANALYSIS ON AB 1844, at 2 (Aug. 24, 2010).

\(^75\) Id.; Press Release, Office of Assembly Member Nathan Fletcher, Statement by Assembly Member Nathan Fletcher at Senate Public Safety Committee Hearing on AB 1844 (June 29, 2010) [hereinafter Fletcher Statement at Senate Public Safety Committee] (on file with the McGeorge Law Review).

\(^76\) Id.; CAL. PENAL CODE § 3000(b)(4)(A) (amended by Chapter 219) (referencing crimes of rape, sodomy, lewd or lascivious acts, continual sexual abuse of a child, and other specified crimes against a person under age fourteen).

\(^77\) CAL. PENAL CODE § 3000(b)(2) (amended by Chapter 219).

\(^78\) Id. § 3053.8 (enacted by Chapter 219).

\(^79\) Id. § 3053.8(a) (enacted by Chapter 219). Restriction applies to offenses specified in sections 261,
As a condition of an offender’s parole, this condition remains in effect its duration.\textsuperscript{80}

\textbf{C. Containment Provisions: Assessment, Treatment, & Collaboration}

Chapter 219 requires the SARATSO Review Committee to select an actuarial instrument to measure “dynamic risk factors” and the “risk of future sexual violence” by January 1, 2012.\textsuperscript{81} Chapter 219 further specifies that the STATIC-99 is the official \textit{static} tool for adult males.\textsuperscript{82} The SARATSO Review Committee must periodically evaluate the static, dynamic, and future violence tools, and consider whether any of them should be changed.\textsuperscript{83} Chapter 219 specifies that annual training is required for professionals charged with implementing both the dynamic and future violence tools.\textsuperscript{84}

Chapter 219 requires those offenders who are convicted of specified offenses and granted probation or parole to participate in an approved sex-offender management program.\textsuperscript{85} Within each program, certified professionals must assess every registered sex offender with both the dynamic risk and the future risk assessment tools.\textsuperscript{86} Chapter 219 further specifies that a certified sex offender management professional must communicate with each offender’s parole or probation officer on a regular basis to convey information regarding the offenders’ risk assessment scores and general progress within the program.\textsuperscript{87}

\textsuperscript{80} \textit{Id.} § 3053.8(a) (enacted by Chapter 219).
\textsuperscript{81} \textit{Id.} § 290.04(b)(2) (amended by Chapter 219). Chapter 219 further specifies that the tool used to measure dynamic risk factors will be known as the “SARATSO dynamic tool for adult males,” while the tool used to measure risk of future violence will be known as the “SARATSO future violence tool for adult males.” \textit{Id.; see} TASK FORCE REPORT, supra note 48, at 117 (defining actuarial risk assessment as: “[a] risk assessment based upon risk factors which have been researched and demonstrated to be statistically significant in the prediction of re-offense or dangerousness.”). In contrast to “static” risk factors, “dynamic” risk factors change over time. \textit{Id.} at 80. Dynamic risk factors may be “stable” (slow to change, e.g. social skills, impulsivity, or hostility toward women) or “acute” (changing rapidly with circumstance, e.g. mood, substance abuse, or victim access). \textit{Id.} at 80, 104; \textit{see also} Martin Rettenberger et al., \textit{The Reliability and Validity of the Sexual Violence Risk-20 (SVR-20): An International Review}, 4:2 SEXUAL OFFENDER TREATMENT 4 (2009), available at http://www sexual-offender-treatment.org/2-2009_01.html (on file with the McGeorge Law Review) (defining sexual violence as “actual, attempted, or threatened sexual contact with another person that is nonconsensual,” and explaining that risk is “conceptualized in terms of nature, severity, imminence, frequency, and likelihood of future sexual violent acts” (internal citations omitted)).
\textsuperscript{82} \textit{Cal. Penal Code} § 290.04(d) (amended by Chapter 219); \textit{see supra} note 48 (defining static risk assessment).
\textsuperscript{83} \textit{Cal. Penal Code} § 290.04(f) (amended by Chapter 219).
\textsuperscript{84} \textit{Id.} § 290.09(b)(1) (enacted by Chapter 219).
\textsuperscript{85} \textit{Id.} § 290.09(a)(1)-(2) (enacted by Chapter 219).
\textsuperscript{86} \textit{Id.} § 290.09(b)(1) (enacted by Chapter 219).
\textsuperscript{87} \textit{Id.}
Additionally, Chapter 219 requires the California Department of Justice to make offenders’ dynamic and future risk scores available online.\(^8\)

Lastly, Chapter 219 specifies that a prisoner must undergo mandatory treatment by the California Department of Mental Health if one independent professional, in the course of evaluating whether the prisoner meets the criteria as a “mentally disordered offender,” concludes that a prisoner satisfies the conditions for treatment.\(^9\)

**IV. ANALYSIS**

Chapter 219 enacts wide-ranging reforms designed to improve sex offender management in California. The tragic deaths of Chelsea King and Amber Dubois exposed what lawmakers believed were “serious flaws” in the California Penal Code.\(^90\) Assembly Member Nathan Fletcher, explained that the purpose of Chapter 219 is to enact a “disciplined and comprehensive” scheme to reform California’s management of violent sex offenders. To achieve this goal, Chapter 219 increases penalties, requires lifetime parole for the most serious crimes, and implements the Containment Model for sex offender management.\(^92\) The policy implications of Chapter 219 are substantial and far-reaching. The scope of this analysis, however, is limited to considerations of sentencing, parole, movement, the Containment Model, and fiscal effects.

**A. Sentencing: The “Cornerstone” of Chelsea’s Law**

1. **Indeterminate Sentences & Life Terms**

Chapter 219’s requirement of a life sentence without the possibility of parole for forcible sex offenses with expanded aggravating factors is the “cornerstone” of Chelsea’s Law, and highlights a stark legislative conclusion.\(^94\) As Assembly Member Fletcher explained, “[o]ne of the guiding principles of Chelsea’s Law has been the belief that the worst offenders—those who violently and sexually assault children—cannot be rehabilitated.”\(^95\) To this end, life without the

\(^8\) Id. § 290.09(b)(2) (enacted by Chapter 219). The Megan’s Law sex offender database is available at http://www.meganslaw.ca.gov.

\(^9\) CAL. PENAL CODE § 2962 (amended by Chapter 219); CALIFORNIA SEX OFFENDER MANAGEMENT BOARD, RESPONSE TO GOVERNOR ARNOLD SCHWARZENEGGER’S REQUEST FOR REVIEW OF THE JOHN GARDNER CASE, at 23 (May 1, 2010) [hereinafter CASOMB RESPONSE] (on file with the McGeorge Law Review).

\(^90\) Fletcher Statement at Senate Public Safety Committee, supra note 76.

\(^91\) Fletcher on Chelsea’s Law, supra note 13.

\(^92\) Id.

\(^93\) See generally id. (“AB 1844 is a disciplined and comprehensive legislative proposal that makes significant changes to the way California deals with sex offenders.”).

\(^94\) SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010).

\(^95\) Fletcher Statement at Senate Public Safety Committee, supra note 76. A letter written by the San
possibility of parole serves two goals. First, life without the possibility of parole is a preventative measure. Dangerous sex offenders, if incarcerated, are incapable of committing new crimes. Second, the penalty of life without the possibility of parole ensures that victims of sex offenders “will not have to live in terror that their attacker will be freed . . .”

2. Increased Determinate Sentences

Chelsea’s Law increases determinate sentences for forcible sex crimes and amends the Penal Code to distinguish between forcible and non-forcible sex crimes against minors. These changes suggest a legislative acknowledgement that an offender who commits a forcible sex crime has the capacity to inflict greater harm, and that sex offenders should serve longer sentences if they demonstrate a willingness to attack children. In total, Chapter 219 increases the penalties for seventeen triads, or fifty-one individual sentences. The breadth of Chapter 219 is designed to provide district attorneys with new tools, and promote public safety and justice for victims.

Some scholars criticize California’s determinate sentencing laws as being overly complex and inconsistent in legal theory. In an article scrutinizing California’s sentencing practices, Professors Michael Vitiello and J. Clark Kelso observed that California’s determinate sentences are the product of multiple layers of legislative tinkering that accumulated over a thirty-year period.

Diego District Attorney observed: “Unlike other criminals, in many cases, sex offenders cannot be rehabilitated. Chelsea’s law will make sure these are the offers that will be housed in prison until they die.”

96. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 22 (June 29, 2010).
97. Id. (citing Assembly Member Fletcher’s statement that life without the possibility of parole is necessary to ensure “potential victims. . . [are not] . . . needlessly harmed by those we know to be extremely dangerous.”).
98. Id. (referencing Assemblyman Fletcher’s stated need for Chapter 219).
99. Id.
100. Id.
101. Id. (citing Assembly Member Fletcher’s statement that “while all sex crimes are awful, these crimes are a red flag that the perpetrator is capable worse. The Legislature should acknowledge that”).
102. Fletcher Statement at Senate Public Safety Committee, supra note 76 (aggregating changes to lower, middle, and upper terms).
103. Id.
104. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 23 (June 29, 2010).
105. Id.

The numerous ‘drive by’ sentencing laws have eroded whatever coherence was achieved in 1976. That is, when the media have reported particularly heinous crimes or trends in criminal behavior, the Legislature has often enacted enhancement provisions. Multiple enhancement statutes . . . . Often, the crime bill was a reaction to the “crime of the month,” a crime that was hyped in the media.

are equally critical of California’s determinate sentences, qualifying the scheme as “mind-numbing,” “complicated,” “labyrinthine” and a “legislative monstrosity, which is bewildering in its complexity.” In 1991, the Senate Judiciary Committee observed:

Existing law contains over thirty possible sentencing triads for felony offenses. The sentencing formulas are complex, inconsistent and confusing. A judge is often required to complete a worksheet which can be more complicated than an IRS form in order to calculate the proper sentence.

Nonetheless, the California Legislature passed Chapter 219 with unanimous support, implying that, at least in its own estimation, Chapter 219 enacts “a proportionate sentencing scheme” consistent with the interests of public safety.

B. New Sex Offender Parole Requirements

Chapter 219 enacts increased parole periods for specified offenses, indicating a legislative concern that paroled sex offenders continue to pose risks to public safety. Chapter 219 broadens the scope of lifetime parole requirements to include offenders convicted of specified sex crimes against children under age fourteen, where before this penalty was limited only to persons convicted of first or second-degree murder. Additionally, Chapter 219 doubles the parole period for specified offenses, increasing parole supervision from five to ten years for crimes against adults, and ten to twenty years for crimes against a minor under age fourteen. Much like the rationale for imposing the penalty of life in prison

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107. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 23 (June 29, 2010).

108. Id. at 24.

109. Id. at 18; CASOMB RESPONSE, supra note 89, at 3 (explaining that paroled sex offenders comprise ten percent of all registered sex offenders, and that seventy-five percent of paroled sex offenders are not monitored).

110. CAL. PENAL CODE § 3000.1(a)(2) (amended by Chapter 219) (specifying that lifetime parole is required for habitual sex offenders, persons convicted of kidnapping as specified, aggravated sexual assault of a child, and other specified crimes); see generally CAL. PENAL CODE § 3000(b)(3) (West 2010) (specifying a parole period of ten years for habitual sex offenders and persons convicted of “one-strike” offenses); Memorandum from App. Div., L.A. (Los Angeles) Co. Dist. Att’y’s Office to Steve Cooley, L.A. Dist. Att’y, L.A. Co. Dist. Att’y’s Legis. Office, at 3, 5 (Apr. 21, 2010) [hereinafter L.A. Dist. Memorandum] (on file with the McGeorge Law Review). The term “lifetime” parole is deceptive—for first-degree murder, a lifetime parolee is discharged after seven years and thirty days. CAL. PENAL CODE § 3001.1(b) (amended by Chapter 219) (specifying circumstances for discharge from lifetime parole). Id. The California Board of Parole Hearings, however, may choose to continue parole if there is good cause. Id. The same practice is used for persons convicted of second-degree murder, though discharge occurs after five years. Id.

111. See supra note 110.
without the possibility of parole, increasing the parole periods for eligible offenders reflects a determination that paroled sex offenders who evince a willingness to attack children should be monitored upon release from prison. \(^{112}\)

Interestingly, Chapter 219’s parole provisions may be subject to a federal equal protection challenge for disparate treatment among sex and non-sex offenders. \(^{113}\) Specifically, Chapter 219’s lifetime parole provisions treat persons convicted of murder differently than persons convicted of sex crimes. \(^{114}\) Penal Code section 3000.1 specifies that persons convicted of murder are subject to a parole period of seven years for first—and five years for second—degree murder. \(^{115}\) In contrast, persons convicted of sex crimes against a minor under age fourteen are subject to lifetime parole. \(^{116}\) Similarly, persons convicted of lewd or lascivious acts against a minor under age fourteen and persons convicted of kidnapping are both subject to the same maximum sentence of eight years. \(^{117}\) Upon release, however, the former is subject to lifetime parole, while the latter is subject to a three-year parole period. \(^{118}\)

\section*{C. New Sex Offender Movement Restrictions}

In addition to sentencing and parole increases, Chapter 219 also excludes sex offender registrants from parks. \(^{119}\) John Gardner attacked Chelsea King while she was jogging in a neighborhood park. \(^{120}\) The exclusion of sex offenders from parks signifies a legislative attempt to avoid similar tragedies. \(^{121}\) The exclusionary zone, Assembly Member Fletcher explained, restricts sex offenders ability to loiter in parks, “where they could otherwise wait and target new victims.” \(^{122}\)

\begin{itemize}
  \item 112. Fletcher Statement at Senate Public Safety Committee, supra note 76.
  \item 113. See L.A. Dist. Memorandum, supra note 110, at 8 (“Although the differences in recidivism between the class of sexual offender and the class of other criminals do exist, the California Supreme Court did not find it so apparent in the context of an equal protection attack on the indefinite commitment of sexually violent predators [in People v. McKee, 47 Cal. 4th 1172, 1210 (2010)].”).
  \item 114. Id.
  \item 115. CAL. PENAL CODE § 3000.1(b) (amended by Chapter 219); L.A. Dist. Memorandum, supra note 110, at 8.
  \item 117. CAL. PENAL CODE § 288(a) (amended by Chapter 219) (imposing a maximum term of eight years for conviction of a lewd or lascivious act); id. § 208(a) (amended by Chapter 219) (also imposing a maximum term of eight years for kidnapping); L.A. Dist. Memorandum, supra note 110, at 8.
  \item 118. L.A. Dist. Memorandum, supra note 110, at 8.
  \item 119. CAL. PENAL CODE § 3053.8(a) (enacted by Chapter 219).
  \item 120. Mello, supra note 1.
  \item 121. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010); see also Fletcher Statement at Senate Public Safety Committee, supra note 76 (“[Chapter 219]… ensures the worst offenders will not be entering parks and allows us to monitor and enforce this provision with GPS tracking.”).
  \item 122. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010).
\end{itemize}
As originally introduced, Chapter 219 excluded all sex offenders from parks. As amended in the Senate in deference to concerns raised by the Sex Offender Management Board, as enacted, Chapter 219 creates a new misdemeanor offense that restricts those sex offenders who are subject to a twenty-year parole from visiting parks that are regularly attended by children, unless they have prior approval from their parole officers.

D. A Containment Model for Sex Offender Management

The Containment Model is considered the best practice in sex offender management. As explained by Assembly Member Fletcher, the Containment Model implemented by Chapter 219 "focuses on multi-agency collaboration, victim protection, intense community monitoring, specific treatment, supervision and polygraph testing." Where it has been employed in other states, this model has proven effective at reducing sex offender recidivism.

Treatment for sex offenders by certified specialists is a significant component of the Containment Model. In contrast to the policies of most states, California did not offer treatment for sex offenders prior to Chapter 219. Chapter 219 requires participation in a certified “sex offender management program” as a condition of probation or parole. It also mandates that certified sex offender management professionals attend training provided by SARATSO.

124. Fletcher Statement at Senate Public Safety Committee, supra note 76 (“In the place of instituting a statewide exclusionary zone for all sex offenders, we have listed to the recommendation of the Sex Offender Management Board.”); see generally Letter from Members of the Cal. Sex Offender Mgmt. Bd. to Assemb. Nathan Fletcher (2010), available at http://www.casomb.org/reports.htm (follow “CASOMB Letter Regarding Chelsea’s Law (AB 1844)” hyperlink) (on file with the McGeorge Law Review) (expressing concerns about the effects of residency restrictions).
125. CAL. PENAL CODE § 3053.8(a) (enacted by Chapter 219).
126. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 32 (June 29, 2010). Both CASOMB and the HRSO Task Force have endorsed implementation of the Containment Model. Id.
127. Fletcher Statement at Senate Public Safety Committee, supra note 76; CASOMB RESPONSE, supra note 89, at 13.
128. CASOMB RESPONSE, supra note 89, at 13.
129. Id. In the Containment Model, sex offender treatment is envisioned as follows: Sex offender treatment targets the thoughts, feelings, denial, minimalizations, motivations, justification, and lifelong behaviors and thought patterns that are, in fact, fused to the sexual assault itself. The supervising officer works closely with the treatment provider to learn the offender’s long-term patterns that precede actual assaults. These details, vitally necessary to assess risk but historically outside the scope of criminal justice system intervention, are at the center of therapy. . . .

An essential role of treatment is to obtain the method-of-operation details needed by criminal justice officials to develop risk management plans as well as to assist sex offenders in developing internal controls over their offending behaviors.

English et al., supra note 54, at 272-73 (citation omitted).
130. Id.
131. CAL. PENAL CODE § 290.09(c)-(d) (enacted by Chapter 219).
and communicate these assessment scores to offenders’ parole or probation officers.  

A second component of Chapter 219’s Containment Model is polygraph testing. According to the Sex Offender Management Board, polygraph testing is a “critical element in effective supervision . . . .” Polygraph testing allows supervisors to verify adherence to conditions of parole, as well as “truthfulness in treatment.” Additionally, it offers new insights into an offender’s mental state, and provides an objective metric to evaluate progress.

A third component of the Containment Model is the use of dynamic and future risk assessments. As explained by the Sex Offender Management Board, “[a] dynamic assessment instrument measures risk based on current changing facts about an offender . . . [that] can be empirically measured at any point in time . . . .” Closely related is the requirement for an actuarial instrument that measures offenders’ risk of future sexual violence. The STATIC-99 neither accounts for psychopathy nor assesses offenders’ capacity for future violence. The incorporation of dynamic and future risk assessments will provide law enforcement agencies with a more accurate evaluation of the dangerousness of sex offenders.

E. Dollars & Sense: Legislative Priorities & Fiscal Implications

The cost of implementing Chapter 219 is significant in light of California’s present lack of financial resources. Chapter 219 was signed into law amidst a multi-billion dollar budget deficit, underscoring its importance to lawmakers and Governor Schwarzenegger. Chapter 219’s passage resulted in tens of millions...
of dollars in immediate spending, notwithstanding the fact that it was signed into
law during the longest budget standoff in California history.\textsuperscript{144}

In full, Chapter 219 will likely cost the state hundreds of millions of dollars
over the course of implementation.\textsuperscript{145} This figure includes the cost of
incarceration for longer sentences, enhanced parole supervision, and the cost of
implementing the Containment Model.\textsuperscript{146}

1. Incarceration Costs

Longer sentences and incarceration significantly contribute to the cost of
Chapter 219.\textsuperscript{147} The marginal cost of incarcerating one additional inmate is
$23,000 per year.\textsuperscript{148} The number of inmates who will serve longer sentences as a
result of Chapter 219, however, is indeterminable for two reasons.\textsuperscript{149} First,
projecting future costs is difficult because the number of people who commit
qualifying crimes fluctuates year-to-year.\textsuperscript{150} Second, it is unclear how increased
sentences will affect the relationship between convictions and plea bargains.\textsuperscript{151}
Both the Senate Public Safety Committee and Senate Appropriations Committee
indicate that harsher penalties for sex crimes may facilitate more plea bargains.\textsuperscript{152}
While it is currently unforeseeable how an increased number of plea agreements
will affect net incarceration time, to the extent that the possibility of harsher
sentences may encourage more plea bargains in which lesser sentences will be
imposed, Chapter 219 may ultimately affect net incarceration time.\textsuperscript{153}

144. \textit{Id.; see also} \textit{SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 5}
(Aug. 8, 2010) (citing funds to procure new actuarial instruments for risk assessments, train practitioners, and
research sex offender treatment programs).

145. \textit{MAC TAYLOR, supra note 142, at 4.}

146. \textit{SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 1 (Aug. 8, 2010).}

147. Letter from Mac Taylor, \textit{supra note 11, at 3.}

148. Email from Jacqueline Wong-Hernandez, Senate Appropriations Consultant, California Senate to
author (Apr. 4, 2011) (on file with the \textit{McGeorge Law Review}). The marginal cost is California’s cost to
incarcerate an additional inmate. \textit{Id.} Due to fixed overhead costs in both prisons and California Department of
Corrections and Rehabilitation (CDCR) offices, the marginal cost of adding or subtracting a small number of
inmates (i.e. not enough to shut down a prison or open a new one) is $23,000. \textit{Id.} (also noting that CDCR often
arrives at a marginal cost of $49,000 per inmate by dividing its total budget by the number of inmates without
consideration of fixed—or “sunk”—costs).

149. \textit{SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 3 (Aug. 8, 2010).}

150. \textit{Id.}

151. \textit{Id.}

152. \textit{Id.} at 2-3; \textit{SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 24 (June
29, 2010).}

153. \textit{SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2-3 (Aug. 8,
2010).} Pleas may also increase incarceration time. Mathew T. Hall and Dana Littlefield, \textit{supra note 9} (noting
John Gardner pleaded guilty to the murders of Amber Dubois and Chelsea). In exchange for his admission,
prosecutors agreed not to seek the death penalty. Gardner was sentenced to two consecutive life terms without
the possibility of parole. \textit{Id.}
The fiscal effect of increased indeterminate sentencing is also difficult to quantify, but potentially substantial.\textsuperscript{154} An increase from fifteen years to life to twenty-five years to life is only significant if the Board of Parole Hearings would have granted parole under the previous statutory scheme.\textsuperscript{155} Under prior law, an offender sentenced to fifteen years to life could still serve a life sentence if the Board of Parole Hearings denied parole.\textsuperscript{156} Any increased cost that can be attributed to longer indeterminate sentences will occur in the future; that is, when an offender might have obtained parole under prior law.\textsuperscript{157} Thus, the fiscal effect will not have an immediate impact on prison expenses or overcrowding concerns.\textsuperscript{158}

2. \textit{Containment Model Implementation Costs}

Chapter 219’s immediate costs stem from the requirement that SARATSO Review Committee select an actuarial assessment tool for measuring sex offender dynamic and future risk factors within one year.\textsuperscript{159} “This process will likely involve hiring experts to consult on product selection and implementation, in addition to the actuarial instrument cost.”\textsuperscript{160} In total, these new assessment tools are expected to cost the state millions of dollars.\textsuperscript{161}

Chapter 219 charges the SARATSO Review Committee with the responsibility of adopting an assessment tool and training the professionals who will administer it.\textsuperscript{162} Additional costs are associated with training both state and county employees (e.g. parole agents and probation officers), as well as contracted mental health providers and other specialists, to administer the assessments.\textsuperscript{163}

At present, California does not provide sex offender treatment to probationers or parolees, and there are no state-approved sex offender management programs.\textsuperscript{164} Therefore, Chapter 219’s requirement that sex

\textsuperscript{154} SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 1-2 (Aug. 8, 2010).
\textsuperscript{155} Email from Jacqueline Wong-Hernandez, Senate Appropriations Consultant, California Senate to author (Oct. 14, 2010) (on file with the McGeorge Law Review).
\textsuperscript{156} Id.
\textsuperscript{157} SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 3 (Aug. 8, 2010) (providing that the cost of increasing a sentence from fifteen years to life to twenty-five years of life will not be realized until the sixteenth year of incarceration, when an offender might have been paroled under prior law).
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 5.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 1, 5.
\textsuperscript{162} CAL. PENAL CODE § 290.05(a)-(c) (amended by Chapter 219).
\textsuperscript{163} Email from Jacqueline Wong-Hernandez (Oct. 14, 2010), supra note 155.
\textsuperscript{164} CASOMB RESPONSE, supra note 108, at 13.
offenders participate in an approved sex offender management program as a condition of probation or parole will also generate significant costs.\textsuperscript{165}

Initial development costs for compliance with these requirements are expected to amount in millions of dollars.\textsuperscript{166} Once these organizations are in place, the state expects annual administration costs in the hundreds of thousands of dollars.\textsuperscript{167} In effect, Chapter 219 requires the state to investigate such programs, adopt administrative guidelines, and presumably train and contract with service providers, each of which entails new costs.\textsuperscript{168}

\section*{3. Cost Mitigation & Petty Theft}

Although outside the scope of sex offender management considerations, it bears noting that Chapter 219 was signed into law amidst a multi-billion dollar budget deficit and a prison-overcrowding crisis.\textsuperscript{169} It is within this context that Chapter 219 makes changes to sentencing for the crime of petty theft with a prior conviction, and represents an attempt to mitigate Chapter 219’s impact on state resources and California prisons.\textsuperscript{170}

Chapter 219 changes sentencing for the crime of petty theft with a prior conviction.\textsuperscript{171} Under Chapter 219, subject to specified exceptions,\textsuperscript{172} an individual charged with petty theft may only be sentenced to state prison if he or she has been convicted three or more times of one of the predicate offenses.\textsuperscript{173} Individuals who qualify under a specified exception, however, may still be sentenced to state prison for petty theft with only one prior qualifying conviction.\textsuperscript{174}

The Legislature’s desire to mitigate Chapter 219’s implementation costs led to this change in sentencing for petty theft with a prior conviction.\textsuperscript{175} In the 2008-2009 fiscal year, 1,329 individuals were sentenced to prison for petty theft with

\begin{thebibliography}{99}
\bibitem{165} CAL. PENAL CODE § 290.09(a)(1) (enacted by Chapter 219); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 5 (Aug. 8, 2010).
\bibitem{166} Id.
\bibitem{167} Id. (identifying fiscal implications for compliance with Chapter 219).
\bibitem{168} Fletcher on Chelsea’s Law, supra note 13; Nagourney, supra note 143.
\bibitem{169} Fletcher on Chelsea’s Law, supra note 13.
\bibitem{170} CASOMB RESPONSE, supra note 89, at 6 (noting that under previous law, every person who has been convicted of petty theft, grand theft, auto theft, burglary, carjacking, robbery, or receiving stolen property, and is at any subsequent point convicted of petty theft, can be sentenced to either up to one year in county jail, or to state prison for more than one year).
\bibitem{171} CAL. PENAL CODE § 666(b)(1) (amended by Chapter 219); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010) (nothing this change does not apply to registered sex offenders, or persons with a prior serious or violent felony convictions).
\bibitem{172} SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010); Hall, supra note 12.
\bibitem{173} SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010); Hall, supra note 12.
\bibitem{174} Hall, supra note 12.
\bibitem{175} Hall, supra note 12.
\end{thebibliography}
fewer that three prior qualifying offenses. Using this figure as a baseline, the Senate Appropriations Committee estimated that Chapter 219’s change to petty theft could allow annual savings of $32 million in future incarceration costs. Thus, to the extent that individuals convicted of petty theft with fewer than three prior qualifying offenses are sentenced to jail instead of state prison, this provision does, in fact, aid the state in avoiding future costs.

Again, it should be noted that petty theft sentencing is unrelated to sex offender management. The savings from the change to petty theft sentencing could be realized irrespective of Chapter 219’s other provisions. As a practical matter, however, the changes to petty theft sentencing do mitigate the expense of otherwise implementing Chapter 219.

V. CONCLUSION

Chapter 219, commonly known as Chelsea’s Law, was introduced in response to the horrific crimes committed by John Gardner. It represents an attempt by the Legislature to improve public safety by reforming California’s approach to sex offender management. To achieve this goal, Chapter 219 increases penalties for sex crimes, requires lifetime parole for offenders who commit the most egregious crimes, restricts sex offenders from entering parks, and implements the Containment Model for sex offender management. The reforms implemented by Chapter 219 constitute a substantial change to California’s approach to community safety, and place California at the forefront of dynamic risk assessment management practices. Although these changes amount to an overhaul to sex offender management in California, Chapter 219’s long-term impact on public safety and its ultimate cost to the state of California remain unclear.

176. Senate Committee on Appropriations, Committee Analysis of SB 1844, at 6 (Aug. 8, 2010). It is unknown how many of these persons are registered sex offenders, and also have prior serious or violent felony convictions. Id.
177. Id.
178. Id.
179. Email from Jacqueline Wong-Hernandez (Oct. 14, 2010), supra note 155. The change to petty theft sentencing allows the state to avoid incarceration costs in one sentencing area, while incurring new costs in another—increased sentencing for sex offenses. Id.
180. Id.
182. Mello, supra note 1; Perry, supra note 5.
183. See Fletcher Statement at Senate Public Safety Committee, supra note 76 (“Chelsea’s Law is an attempt to . . . take significant steps to reform our system and protect our children.”).
184. Fletcher on Chelsea’s Law, supra note 13.
185. Id.
186. Compare Senate Committee on Public Safety, Committee Analysis of SB 1844 (June 29, 2010) (discussing policy implications of Chapter 219), with Senate Committee on Appropriations, Committee Analysis of SB 1844 (Aug. 8, 2010) (discussing fiscal implications of Chapter 219).