I. INTRODUCTION

Gamesmanship is no stranger to an adversarial legal system, particularly in criminal law, when lives may depend on exploiting an opponent’s weaknesses by garnering any legal advantage available. One such tactical tool is the general time waiver, which allows a trial to be set outside of the California statutory right to a speedy trial. If the time waiver is withdrawn, the statutory speedy trial protections are reinstated, with the sanction of dismissal of the criminal charges if the time period expires.

For example, in Arias v. Superior Court of Orange County, the defense attorney successfully petitioned the appellate court for dismissal of the case with prejudice based on a violation of the defendant’s right to a speedy trial. The defendant and his attorney initially filed a general time waiver in open court, then withdrew that waiver by filing a written motion titled “Withdrawal of General Time Waiver.” However, the court and the district attorney did not reset the time for trial within the thirty days required under Penal Code section 1382. At the pretrial hearing, which took place on the last day of the statutory thirty-day period, the defense contended that it was the last day to bring the defendant to trial. While anecdotes suggest that this is not a common practice among defense

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1. See Frank M. McClellan, The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation, 57 DePaul L. Rev. 509, 525 (2008) (“It will require a significant change in the culture of the adversarial system for us to develop a different balance between the lawyer’s interest in promoting social justice and her duty to win.”); Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 Am. L. Rev. 729, 739 (1906) (“If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it.”).
2. See Barker v. Wingo, 407 U.S. 514, 521 (1972) (noting that the deprivation of the right to a speedy trial, as opposed to the other constitutional rights of the accused, may be used for tactical advantage); see also Cal. Penal Code § 1382(a)(2)(A), (a)(3)(A) (West 2009) (defining “time waivers”).
5. Id. at 3, 84 Cal. Rptr. 3d at 265.
6. Id. at 3, 84 Cal. Rptr. 3d at 264.
7. Id.
attorneys, defense counsel in Arias actively advocated its use, publishing a web post detailing how to use this legal tactic to the defense’s advantage.

According to Assembly Member Jeff Miller, the Arias decision allows a “massive loophole in the law that was never intended to exist” and may allow defendants to exploit the system by using “ordinary procedural delays.” Many District Attorney’s offices have lost deputy district attorneys to budgetary cutbacks. “Vertical prosecution” is less common than ever and caseloads are increasing. These factors contribute to a higher risk that withdrawal of a time waiver will be unnoticed if raised only in pleadings.

After the decision in Arias upheld the defendant’s right to withdraw a time waiver through a pleading, Assembly Member Miller, along with various state prosecutors, sought to close this potential loophole by enacting Chapter 424.

II. LEGAL BACKGROUND

A. The Right to a Speedy Trial

Under the California Constitution, both the People and the defendant have a right to a speedy and public trial. The United States Constitution also provides a right to a speedy trial under the Sixth Amendment, which applies to the states through the Fourteenth Amendment. Pursuant to the Sixth Amendment, the

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8. See, e.g., Letter from Barry Broad & Shane Gusman, Cal. Pub. Defenders Ass’n (CPDA), to All Members of the Assembly Pub. Safety Comm. (May 7, 2009) [hereinafter CPDA Letter] (on file with the McGeorge Law Review) (“This bill, which would amend Penal Code section 1382, sweeps with too broad a brush to inappropriately address situation [sic] that rarely occurs. When that rare situation does occur, it shows the case is an unusual one that is better handled, not by legislation, but by the court on a case-specific basis.”).


11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 250, at 2 (May 12, 2009).

12. Id. (defining “vertical prosecution” as when “one deputy handles the case from charging to sentencing”).


14. Id.


17. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’); see also Barker v. Wingo, 407 U.S. 514, 521 (1972) (determining whether the right to a speedy trial was violated).

defendant must be an “accused” before the right to a speedy trial attaches, but once it does, the right is a “fundamental right granted to the accused.”\textsuperscript{19} In order to invoke the Sixth Amendment protections, one must be subject to “formal indictment\textsuperscript{20} or information\textsuperscript{21} or . . . the actual restraints imposed by arrest and holding.”\textsuperscript{22} The Supreme Court of California held that the right to a speedy trial also attaches in misdemeanor prosecutions, either at the time of arrest or at the time of the filing of the complaint, whichever is first.\textsuperscript{23} The California Legislature later amended the Penal Code to codify that the misdemeanor right to a speedy trial attaches when the accused is arraigned\textsuperscript{24} or enters a plea, whichever is later, regardless of when the complaint was filed.\textsuperscript{25}

California Penal Code section 1382 establishes the time within which a defendant must be brought to trial in order to avoid violating the right to a speedy trial, depending on whether the alleged crime is a felony or misdemeanor.\textsuperscript{26} In a felony case, the People have sixty days after the indictment or information to bring the defendant to trial.\textsuperscript{27} In a misdemeanor case, the People have thirty days starting at arraignment if the defendant remains in state custody, and they have forty-five days from arraignment if the defendant is not in custody.\textsuperscript{28} If the defendant does not waive time and is not brought to trial within the time limit, the court must dismiss the case.\textsuperscript{29}

B. The General Time Waiver Under Penal Code Section 1382

A defendant may enter a general time waiver, which waives the defendant’s right to a trial within statutory time limits, and the court is not required to dismiss the charges if trial is set beyond that time period.\textsuperscript{30} However, the defendant retains his right to withdraw that time waiver, which resets the speedy trial

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20. Black’s Law Dictionary defines “indictment” as “[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.” BLACK’S LAW DICTIONARY 842 (9th ed. 2009). \\
21. Black’s Law Dictionary defines “information” as “[a] formal criminal charge made by a prosecutor without a grand-jury indictment. . . . The information is used to prosecute misdemeanors in most states, and about half the states allow its use in felony prosecutions as well.—Also termed bill of information.” \textit{Id.} at 849. \\
24. “Arraignment” is defined as the “initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea.” BLACK’S LAW DICTIONARY, supra note 20, at 123. \\
26. \textit{Id.} § 1382(a)(2)-(3). \\
27. \textit{Id.} § 1382(a)(2). \\
28. \textit{Id.} § 1382(a)(3). \\
29. \textit{Id.} § 1382(a)(2)-(3). \\
\hline
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clock.\textsuperscript{31} In such a case, the People have sixty days from the withdrawal of the time waiver to bring a felony trial or thirty days to bring a misdemeanor trial, regardless of the custody status of the defendant.\textsuperscript{32} If the time period expires, the court must dismiss the charges against the defendant.\textsuperscript{33} The existing law does not specify how the withdrawal of a time waiver should be made, so long as proper notice is given to all parties.\textsuperscript{34} Chapter 424 removes the choice of how to withdraw a general time waiver and requires that an appropriate trial date be set at the time of the withdrawal.\textsuperscript{35}

III. CHAPTER 424

Chapter 424 amends Penal Code section 1382 to require that defendants make all withdrawals of general time waivers in open court, rather than in written pleadings.\textsuperscript{36} Once a time waiver is withdrawn in open court, the court is required to set a trial date and all parties must be properly notified of the trial date.\textsuperscript{37} As under existing law, after the withdrawal of a time waiver in open court, a trial date must be set within thirty days of withdrawal for a misdemeanor charge\textsuperscript{38} and within sixty days for a felony charge.\textsuperscript{39} If the trial date is set outside of the given time limit, with the express or implied consent of the defendant, the defendant must be brought to trial on the date given or within ten days of that date.\textsuperscript{40}

IV. ANALYSIS OF CHAPTER 424

A. Resolving an Ethical Concern Before It Becomes a Problem

While Chapter 424 addresses concerns about the spread of knowledge intended to make the most of a procedural tactic favorable to defendants, it also decides a gray ethical issue by foreclosing the use of a procedural tactic that

\begin{itemize}
\item \textsuperscript{31} CAL. PENAL CODE § 1382(a)(2)(A), (a)(3)(A) (West Supp. 2009).
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id. § 1382(a).
\item \textsuperscript{34} Arias v. Superior Court of Orange County, 167 Cal. App. 4th Supp. 1, 3, 84 Cal. Rptr. 3d 264, 265 (2d Dist. 2008).
\item \textsuperscript{35} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 250, at 1 (May 12, 2009).
\item \textsuperscript{36} ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 250, at 1 (May 7, 2009).
\item \textsuperscript{37} CAL. PENAL CODE § 1382(a)(2)(A), (a)(3)(A) (amended by Chapter 424).
\item \textsuperscript{38} CAL. PENAL CODE § 1382(a)(3)(A) (amended by Chapter 424). Unlike the statutory time limits at the beginning of a criminal case, the custody status of the defendant does not affect the speedy trial time limit. See id.
\item \textsuperscript{39} CAL. PENAL CODE § 1382(a)(2)(A) (amended by Chapter 424). Unlike with misdemeanor charges, the statutory time limit at the beginning of a criminal case is not dependent on the custody status of the defendant. See id.
\item \textsuperscript{40} Id. § 1382(a)(2)(B) (amended by Chapter 424).
\end{itemize}
some view as manipulating the judicial process. The practice had potential to be used in an unethical manner. As an anonymous commenter to Maddox’s web posting noted, “This is a slime tactic that you may not want to advertise. The State Bar may not react with your same glee.”

B. The Debate on How to Measure Efficiency in the Courts

The debate over Chapter 424 centers on the issues of efficiency and the role of the Legislature. The efficiency arguments focus on judicial efficiency and how much notice is necessary when a general time waiver is withdrawn. Chapter 424 will lead to a more efficient judicial process by preventing instances where general time waivers are “filed only in writing and not in open court . . . only to be seen a few days or hours before the 30- or 60-day period lapses.”

On the other hand, Chapter 424 will cost the court system both money and time by forcing the parties to set a hearing in order to withdraw the time waiver, further crowding the courts and causing a “delay and waste of money.” Proper notice must already be given to all the parties when a defendant withdraws the general time waiver, so an additional hearing is unnecessary if the prosecutor or court acts on the notice properly given. However, the Judicial Council supports Chapter 424 because it gives “actual notice” when the waiver is withdrawn. The Orange County District Attorney’s Office asserts that under prior law, notice only needs to be given to “any clerical staff at any branch of the district

41. Letter from June Clark, Senior Att’y, Judicial Council of Cal., to Jeff Miller, Assembly Member, Cal. State Assembly (Apr. 8, 2009) [hereinafter Judicial Council Letter] (on file with the McGeorge Law Review).
42. Maddox, supra note 9 (featuring an anonymous comment to Maddox’s web posting).
43. See CPDA Letter, supra note 8 (“AB 250 is unnecessary and wasteful. That is because, as pointed out, a general waiver already cannot be withdrawn without notice to all parties.”). But see CDAA Letter, supra note 13 (“While deputy district attorneys must be as vigilant as possible, requiring the time waiver to be withdrawn in open court is within the best interest of judicial efficiency.”); Letter from Harriet Salarno, Chair, Crime Victims United of Cal., to Hon. Jose Solorio, Chair, Assembly Pub. Safety Comm. (Apr. 20, 2009) [hereinafter Salarno Letter] (on file with the McGeorge Law Review) (noting that Chapter 424 helps ensure the withdrawal of the general time waiver “is not unintentionally overlooked”); Judicial Council Letter, supra note 41 (“When parties are unaware of a change of this significance, court efficiency suffers . . . . By requiring personal appearances to withdraw the waiver, the court can better manage its calendar.”).
44. CPDA Letter, supra note 8; CDAA Letter, supra note 13.
45. CDAA Letter, supra note 13.
46. CPDA Letter, supra note 8.
48. CPDA Letter, supra note 8.
50. Judicial Council Letter, supra note 41 (noting that the defendant in Arias properly provided notice to the district attorney, whose file stamp was on the file-stamped copy of the withdrawal).
attorney’s office,” which could make it unlikely that the prosecuting attorney will receive the notice in a timely manner. Arguably, support staff members receive motions through written pleadings on a daily basis and those motions are dealt with accordingly.

The Judicial Council notes another efficiency problem under the prior law: “If a prosecutor becomes aware of the withdrawal of the time waiver late in the process, he or she is likely to seek dismissal and then re-file the case in order to avoid violation of the defendant’s speedy trial rights.” This “results in duplicative and avoidable arraignments and preliminary hearings.” However, the CPDA notes that most felony charges may be re-filed one time without prejudice. The CPDA goes further, stating that this legislation is unnecessary when the problem would be solved by either the court or the prosecutor setting a trial date once they receive proper notice of withdrawal of a time waiver.

Despite the contrasting efficiency concerns, the bill’s author emphasizes that Chapter 424 does not “delay or deny justice to anyone . . . . [It] will only apply fundamental fairness and obvious common sense to our court system.”

C. Did the Arias Court Intend for the Legislature to Resolve the Issue?

One may argue that legislative action is unnecessary and the issue should be left to the courts on a case-by-case basis since attempted abuses of the system are rare. The opposition to Chapter 424 believes that the Arias court did not call for legislative action because “[i]ndividual action by the court will avoid the delay...
and waste of money inherent in [Chapter 424].\(^{60}\) The *Arias* concurrence suggested six ways that the trial courts can prevent cases from falling through the cracks.\(^{61}\) However, the majority ended with the statement, “It is incumbent on the trial courts and the People to provide a defendant with a speedy trial when one is demanded. We leave to those entities creation of the means by which to do so.”\(^{62}\) The California District Attorneys Association asserts that this statement shows the court realized its ruling could affect the courts and invited the Legislature to create an alternate means to protect a defendant’s right to a speedy trial without burdening the People and the trial courts.\(^{63}\)

V. CONCLUSION

After *Arias* upheld a defendant’s right to withdraw a general time waiver through a pleading, prosecutors feared that this practice would increase and those pleadings would go unnoticed.\(^{64}\) Chapter 424 foreclosed the potential for abuse by codifying the rule that general time waivers may only be withdrawn in open court.

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60. *Id.*

61. *See* *Arias v. Superior Court of Orange County*, 167 Cal. App. 4th Supp. 1, 4-5, 84 Cal. Rptr. 3d 264, 266 (2d Dist. 2008) (Prickett, J., concurring). Justice Prickett suggested several options for preventing repeats of the *Arias* situation: (1) trial courts could implement policies for accepting general time waivers and their withdrawals; (2) trial judges could negotiate parameters of general time waivers and their withdrawal with counsel on a case-by-case basis; (3) at the time of the general time waiver, the trial judge should arrange a procedure for calendaring a trial in the event that the general time waiver is withdrawn; (4) the trial court should take action to set a trial date within the statutory period as soon as it receives a withdrawal of general time waiver pleading; (5) district attorneys should implement internal policies to prevent the situation; and (6) the Legislature should consider whether the courts or prosecutors should accept general time waivers. *Id.* at 4-5, 84 Cal. Rptr. 3d at 266.

62. *Id.* at 4, 84 Cal. Rptr. 3d at 265.

63. CDAA Letter, *supra* note 13 (“[T]he Court recognized that its conclusion could have a substantial impact on the operation of trial courts and invited the Legislature to create a means by which a defendant’s constitutional right to a speedy trial is not infringed and service of notice of withdrawal does not place a significant burden on the People and the trial courts to schedule and commence trials within the 30-day period.”).

64. *See* Molfetta Letter, *supra* note 51 (detailing the extent of the burdens on the Orange County District Attorney’s Office).
Chapter 135: Waiving Licensure Requirements to Allow Marriage and Family Therapists to Gain Qualifying Experience

Gregory Hynes

Code Section Affected

Penal Code § 5068.5 (amended).

AB 1113 (Lowenthal and Anderson); 2009 STAT. Ch. 135.

I. INTRODUCTION

As of June 2008, California housed 173,320 inmates, the largest prison population in the United States. In 2006, the Bureau of Justice Statistics estimated that nationwide, nearly one-quarter of state prisoners had a recent history of mental illness. This suggests that California houses more prisoners in need of mental health care than any other state. Prisoners who are mentally ill and left untreated are often not rehabilitated and are likely to be re-incarcerated after release.

Coleman v. Wilson held that prisons must provide access to adequate mental health care to comply with the Eighth Amendment. In response, California developed the Mental Health Services Delivery System and employs an increasing number of social workers to aid mentally ill inmates. However, there are currently about 1,100 empty positions for mental health professionals in the correctional system, which equals the high thirty-two percent vacancy rate of 2008. Overcrowded prisons have caused the state’s prison-related spending to

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2. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 2 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf (on file with the McGeorge Law Review) (explaining that to compute this number, “[o]ffenders were asked about whether in the past 12 months they had been told by a mental health professional that they had a mental disorder or because of a mental health problem had stayed overnight in a hospital, used prescribed medication, or received professional mental health therapy”).


5. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (May 15, 2009).


7. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 2652, at 2 (May 14, 2008). Chapter 135 is a near identical re-introduction of AB 2652 from 2008, and the same concerns from 2008 regarding a lack of mental health professionals within the Department of Corrections and Rehabilitation carried over to 2009. Id.
grow to $10.4 billion in the 2008-2009 fiscal year. Although California currently faces an approximate $26.3 billion deficit, the state continues to try to remove its prison system from federal receivership. A federal receiver has controlled the state prison system since February 14, 2006, because of inadequate care for prisoners. Chapter 135 aims to fill vacant mental health professional positions by allowing a waiver of the licensure requirement for marriage and family therapists (MFTs). This will allow these therapists to gain qualifying experience for licensure in state correctional facilities. Chapter 135’s waiver “provides for greater choice among a greater array of possible mental health professionals,” which, in turn, will give the California Department of Corrections and Rehabilitation (CDCR) the opportunity to use marriage and family therapists to “help address the current shortage of mental health professionals serving in the correctional system.”

II. LEGAL BACKGROUND

Several California Code sections regulate licensure for mental health professionals and dictate license waiver and exemption requirements. The Board of Behavioral Sciences, which exists within the Department of Consumer Affairs, licenses and regulates more than 28,000 MFTs, 10,000 marriage and family therapist interns, 16,000 licensed clinical social workers (LCSWs), and 7,200 associate social workers in California. Currently, there are about 1,100 vacancies for mental health professionals within the CDCR.

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10. See generally Plata v. Schwarzenegger, No. C01-1351 TEH (E.D. Cal. Feb. 14, 2006) (order appointing receiver) (on file with the McGeorge Law Review) (appointing Mr. Robert Sillen as receiver to oversee the medical and mental health treatment of prisoners); see also Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. 2005) (findings of fact and conclusions of law re appointment of receiver) (on file with the McGeorge Law Review) (stating that the CDCR has failed to provide adequate health care, including access to mental health services, to prisoners in violation of their Eighth Amendment rights).
11. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 1-2 (May 15, 2009).
12. Id. at 2
13. Id.
15. Id. at 2.
16. CAMFT Letter, supra note 6, at 1.
A. Coleman v. Wilson

The CDCR must provide all inmates with access to adequate mental health care. Coleman v. Wilson held that the Eighth Amendment of the United States Constitution requires all states “to provide for the basic human needs of prison inmates.” This “obligation to provide for the basic human needs of prisoners includes a requirement to provide access to adequate mental health care.” If a state fails to provide such access, “it transgresses the substantive limits on state action set by the Eighth Amendment.” In order to comply with the holding of Coleman, the CDCR employs, among other health care professionals, psychologists, licensed clinical social workers, and marriage and family therapists to care for the prison inmates’ mental health.

B. Business & Professions Code Sections

The California Business and Professions Code provides the regulatory provisions and licensure requirements for MFTs. Marriage and family therapy, as defined in section 4980.02, is a “service performed with individuals, couples, or groups wherein interpersonal relationships are examined for the purpose of achieving more adequate, satisfying, and productive marriage and family adjustments.” Candidates must complete specific training and coursework to be properly licensed to practice in California. An MFT may not practice such therapy unless the therapist holds a valid license or is specifically exempted from the requirement. However, an unlicensed MFT intern, under the supervision of a licensed MFT, may render services if the intern complies with the requirements of section 4980.44.

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18. Id. at 1297.
19. Id. at 1298.
20. Id.
21. SENATE COMMITTEE ON BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1113, at 4 (June 19, 2009) (“CDCR is under court order to improve services to its mentally ill inmates. Part of the order requires CDCR to decrease its clinicians’ vacancy rate.”).
22. Id. at 2; see also CAL. BUS. & PROF. CODE § 4980 et seq. (West Supp. 2010)
23. CAL. BUS. & PROF. CODE § 4980.02 (West Supp. 2010) (describing marriage and family therapy services as including relationship and pre-marriage counseling).
24. Id. § 4980.37 (West 2003); id. §§ 4980.40, 4980.41 (West 2003 & Supp. 2010); id. § 4980.40.5 (West Supp. 2010).
25. Id. § 4980 (West 2003).
26. Id. § 4980.40 (West 2003 & Supp. 2010); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 2 (June 30, 2009) (stating that an MFT intern can gain experience under the supervision of a licensed clinical social worker, a licensed psychologist, a licensed MFT, or a licensed psychiatrist).
C. Penal Code Sections

The California Penal Code states that each newly committed prisoner must be mentally examined and studied. Based on this examination, the CDCR classifies the inmate and determines the appropriate institution in which to house the prisoner. Prior to the release of certain inmates, a licensed psychiatrist or psychologist will provide a written psychiatric or psychological evaluation of the prisoner to the Community Release Board.

Section 5068.5 of the Penal Code requires all employees who either provide mental health services or who supervise or provide consultation of these services in the California correctional system to be properly licensed to practice in the state. Psychologists employed on or before January 1, 1985, to provide mental health diagnostic and treatment services, and professionals employed on or before January 1, 1989, to supervise or provide consultation on these diagnostic or treatment services are exempt from the licensing requirement, as long as they remain in the same department and class of employment.

Section 5068.5 also permits the Board of Behavioral Sciences to waive the licensing requirement to allow persons, such as students and those who are new to the field, to gain qualifying experience for eventual licensure in California. Specifically, the requirement is waived for those working toward qualification as a psychologist or LCSW in accordance with section 1277 of the California Health and Safety Code.

D. Section 1277 of the Health & Safety Code

Section 1277 of the Health and Safety Code requires that the licensing requirements for all state-employed health professionals cannot be less than those requirements of privately owned health facilities. Each issuing state department applies the same licensing standards to state and other governmental health

27. CAL. PENAL CODE § 5068 (West 2000) (“This [examination] includes the investigation of all pertinent circumstances of the person’s life such as the existence of any strong community and family ties, the maintenance of which may aid in the person’s rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison.”).
28. Id.
29. Id. (stating that inmates who are committed under section 1168(b) of the Penal Code must be evaluated).
30. 2000 Cal. Stat. ch. 356, § 2 (amending CAL. PENAL CODE § 5068.5(a)) (noting that such professionals include those who are physicians, surgeons, psychologists, and other health professionals).
31. Id. (amending CAL. PENAL CODE § 5068.5(b)) (including employees who are on authorized leave, but not those who are intermittent personnel).
32. Id.
33. Id. (amending CAL. PENAL CODE § 5068.5(c)).
34. Id.
35. CAL. HEALTH & SAFETY CODE § 1277(b) (West 2008).
facilities as it does to the privately owned facilities.\footnote{ld. § 1277(d).} However, state departments can waive these licensing requirements for persons “gaining qualifying experience for licensure” as a psychologist, LCSW, or MFT, but only to the extent necessary to gain such experience.\footnote{ld. § 1277(b).} This waiver can last up to three years for a full-time psychologist or four years for a full-time LCSW or MFT, by the end of which the worker must either be licensed or his or her employment will be terminated.\footnote{ld.} The state may grant an additional year to LCSWs and MFTs based on extenuating circumstances.\footnote{ld. § 1277(b).} This waiver can last up to five years for part-time psychologists or six years for part-time LCSWs or MFTs, if they remain continuously employed in their field for that duration.\footnote{ld.} These time limits do not “apply to active candidates for a doctoral degree in social work, social welfare, or social science, who are enrolled at an accredited university, college, or professional school.”\footnote{CAL. HEALTH & SAFETY CODE § 1277(b).} The time limit does begin to apply, however, upon completion of a degree.\footnote{ld.} The time limit does begin to apply, however, upon completion of a degree.

E. Prior Legislation

In 2008, Assembly Member Joel Anderson introduced AB 2652, which was “nearly identical to [Chapter 135].”\footnote{SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 3 (June 30, 2009).} However, AB 2652 was “held in the Assembly Appropriations Committee” and never made it onto the Assembly floor for a vote.\footnote{ld.} Assembly Member Anderson co-authored and introduced Chapter 135.\footnote{ld. at 1.}

III. CHAPTER 135

Chapter 135 amends section 5068.5 of the Penal Code to include marriage and family therapists as a group for which the licensure requirements can be waived to allow these individuals to gain experience within a state correctional facility.\footnote{ld. at 2.} Such persons only qualify for waiver of the licensing requirements in accordance with section 1277 of the Health and Safety Code.\footnote{CAL. PENAL CODE § 5068.5(c) (amended by Chapter 135).} However, those
working towards becoming licensed MFTs are limited to working only within the scope of marriage and family work.  

IV. ANALYSIS OF CHAPTER 135

A. Arguments in Support: MFTs Can Help Fill CDCR Vacancies, Are Equally Capable, and Can Already Earn Qualifying Experience in Other Fields

Most groups that support Chapter 135 also supported AB 2652 in 2008. All of the groups registered in support of Chapter 135 point to the current shortage of mental health professionals licensed by the CDCR and believe that MFTs can help fill these vacancies. They claim that allowing MFT interns to provide mental health services will not only decrease the vacancy rate, but will also “decrease [the] excessive case loads” of the current staff and “provide inmates with timely access to mental health care.” The California Association of Marriage and Family Therapists (CAMFT), a sponsor of Chapter 135, states that the excessive work load causes existing staff to act as “case managers,” rather than providing needed mental health therapy. Further, “[i]nsufficient mental health care leads to recidivism,” which, in turn, “directly affects public safety” and continues to violate the Coleman holding. The California Council of Community Mental Health Agencies and the Mental Health Association in California both assert that when inmates do not have adequate access to these services, they may simply go untreated or be forced to seek outside treatment, leaving the inmate’s family, the government, or the non-profit sector to bear the costs of services. These two groups believe that “prevention is the key” and that this goal can be achieved by allowing MFT interns to perform services within the CDCR.

48. Id. (amended by Chapter 135).
49. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 2652, at 3 (Apr. 1, 2008).
50. See, e.g., CAMFT Letter, supra note 6 (“The purpose of this bill is to expand the available mental health professionals eligible to work within the CDCR.”); Letter from Rusty Selix, Exec. Dir., Cal. Council of Community Mental Health Agencies, to Mary Hayashi, Chair, Assembly Comm. on Bus. & Prof., Cal. State Assembly (Apr. 8, 2009) [hereinafter CCCMHA Letter] (on file with the McGeorge Law Review) (stating that “severe shortages” of mental health professionals currently exist in the CDCR).
51. CAMFT Letter, supra note 6.
52. SENATE COMMITTEE ON BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1113, at 2 (June 19, 2009).
53. CAMFT Letter, supra note 6.
54. Id.
55. CCCMHA Letter, supra note 50; Letter from Rusty Selix, Exec. Dir., Mental Health Ass’n in Cal., to Mary Hayashi, Chair, Assembly Comm. on Bus. & Prof., Cal. State Assembly (Apr. 8, 2009) [hereinafter Mental Health Ass’n Letter] (on file with the McGeorge Law Review).
56. CCCMHA Letter, supra note 50; Mental Health Ass’n Letter, supra note 55.
Opponents of Chapter 135 claim that the scope of MFT practice does not involve the types of issues found with most inmates and that MFTs are not properly trained or qualified to handle such issues. However, CAMFT states that these opponents “inaccurately limit the MFT’s scope of practice” and claims that MFTs work with individuals, couples, and groups to diagnose, assess, give prognoses, and treat mental disorders. This role requires knowledge on topics like “alcoholism and other chemical substance dependency, and psychopharmacology.” Further, health insurance companies typically reimburse MFTs for “diagnosing and treating severe mental illnesses.” Also, MFT Registered Interns’ education and experience requirements are “substantially equivalent” to the requirements for their social worker counterparts. Because of these similarities, CAMFT claims that MFTs are “equally capable of providing the mental health services necessary within correctional settings,” and the California Psychiatric Association states that MFTs “are fully qualified to occupy clinical positions in state prisons that require master’s level licensing.”

Finally, existing law already allows MFT interns to gain qualifying experience in other fields when under the “supervision of a qualified mental health practitioner.” According to the Board of Behavioral Sciences, because MFTs are allowed to gain experience elsewhere and since the State already waives licensure requirements for psychologists and clinical social workers to gain experience in the CDCR, Chapter 135 will merely expand a practice that the Board already considers acceptable. This enables the CDCR to “provide services within its facilities” through MFT interns. Likewise, CAMFT states that Chapter 135 permits “MFT Registered Interns in the process of gaining licensure to work within the CDCR alongside those attempting to gain licensure

58. CAMFT Letter, supra note 6.
59. Id.
60. Id. (listing such diseases as schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorder, panic disorder, obsessive-compulsive disorder, autism, anorexia, bulimia, post-traumatic stress disorder, and traumatic brain injury).
61. Id.
62. Id.
64. Letter from Paul Riches, Exec. Officer, Bd. of Behav. Sci., to Sen. Gloria Negrete McLeod, Cal. State Senate (June 16, 2009) (on file with the McGeorge Law Review) (stating that MFTs are allowed to gain qualifying experience pursuant to the Marriage and Family Therapy Act).
65. Id.
66. Id.
as social workers or psychologists.” As a result of Chapter 135, all registered supporting parties believe that MFT interns will be able to help fill the vacancies of mental health professionals that exist within the CDCR.

B. Arguments in Opposition: MFTs Do Not Possess the Necessary Education, Skill Set, or Scope of Practice, There Are No State-Approved MFT Positions in the CDCR, and Chapter 135 Will Exacerbate Current Problems

Only two groups are registered in opposition to Chapter 135. They claim that MFTs’ scope of practice is too narrow and that they are not appropriately educated or trained to work with “a highly volatile population who generally have multiple diagnoses, including drug addiction.” In addition, the CDCR is currently under “court order to provide mental health services to those most severely affected,” and, under Coleman, psychologists and social workers can only provide services to the general population if those services are temporary. However, the scope of the MFT practice is too narrow to meet the CDCR’s needs, because MFTs aim “to assist individuals to have healthier interpersonal relationships within their families.” Opponents claim that having MFTs work with severe mental illnesses will greatly expand this scope of practice without any new training or education requirements. Essentially, opponents argue that Chapter 135 fails to address the shortage of mental health professionals in the CDCR, because the limited role that MFTs can play does not meet the specific needs of mentally ill inmates.

Both opposing groups also suggest that MFTs, once they receive their licenses after completing the required hours, will be ineffective in the CDCR, because no state-approved position in the CDCR for MFTs currently exists. Opponents suggest that MFTs are best suited to work with the general population or those on parole but that currently no such positions are available. Therefore, a “major overhaul” of the CDCR will be required to include MFTs. Further, MFTs will be unproductive within the CDCR, since no position currently exists and they will have to find

67. CAMFT Letter, supra note 6.
68. See, e.g., id. (stating that waiving licensure requirements for MFT interns “would help reduce the mental health professional shortage currently at issue at the CDCR”).
69. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1113, at 3 (June 30, 2009).
70. Swindell Letter, supra note 57; see also CPA Letter, supra note 57 (claiming that “the skills, training, and education of an MFT [do not] make for a good fit within the prison system”).
71. Swindell Letter, supra note 57.
72. CPA Letter, supra note 57.
73. Id.
74. Swindell Letter, supra note 57.
75. Id.; CPA Letter, supra note 57.
76. Swindell Letter, supra note 57.
77. Id.
outside employment, which is “a poor use of state resources.” However, the California Psychiatric Association points out that “formal job classifications for MFT’s relative to prison employment are in process” and are estimated to be in place by early 2010. Opponents acknowledge that “a proposal is before the Department of Personnel Administration ... but it has not yet been approved,” thus no jobs currently exist.

Finally, the opposition claims that California’s fiscal crisis has created high case loads for current psychologists and social workers, who are already supervising unlicensed interns in their own fields. Adding additional interns for licensed psychologists and social workers will only further increase their workloads. Opponents also claim that adding new intern positions will only worsen California’s fiscal problems, as recently laid off clinical psychologist interns had salaries over $50,000 per year, costing the state over $1 million to employ them. Further, it is claimed that, while vacancies in CDCR currently exist, this is due to a “long history of ... non-competitive salaries, poor work locations and conditions, and low job satisfaction.” Recently, as these issues “began to improve, ... vacancy rates began to drop.” Because of this rate decrease, the California Psychological Association is “confident that the vacancy rates will continue to decrease and CDCR will have a good supply of well-trained clinicians” to meet its demands. In spite of the criticism by opponents, Chapter 135 did not receive a single “no” vote in any committee that reviewed it.

C. Policy Issue: A New Civil Service Classification

As mentioned above, currently there is no civil service classification for MFTs in the state, even though existing law authorizes “licensed ‘health professionals’” to
practice in the CDCR.\textsuperscript{88} Despite the passage of Chapter 135, a decision to create a new state classification for “licensed” or “intern” MFTs depends on the State Personnel Board.\textsuperscript{89} If the Personnel Board implements a new civil service classification, then MFTs may be employed in the CDCR as “other health professional[s]” under Penal Code section 5068.5(a).\textsuperscript{90} Regardless of any new potential classification allowing licensed MFTs to be employed in the prison system, Chapter 135 specifically authorizes unlicensed MFT interns to work in the CDCR to gain qualifying experience for licensure.\textsuperscript{91} A civil servant classification merely provides a position for MFTs after such licensure takes place.\textsuperscript{92}

V. CONCLUSION

Chapter 135 expands the licensure requirement exception already recognized for psychologists and clinical social workers to MFTs. The exception for the licensure requirement allows MFTs to gain qualifying experience in the CDCR.\textsuperscript{93} The CDCR can now choose from a broader range of mental health professionals.\textsuperscript{94} Supporters hope that Chapter 135 will fill some of the 1,100 vacancies within the CDCR.\textsuperscript{95} Opponents state that the education, training, and scope of practice of MFTs will make them ineffective and unprepared for the types of services needed in the prison system.\textsuperscript{96} Whether this criticism is fair or not, Chapter 135 did not receive a single “no” vote in any committee that reviewed it.\textsuperscript{97} Chapter 135 restricts an MFT intern’s scope of practice to that of an MFT, thereby rebutting opponents’ concerns of expanding the MFT’s scope of practice.\textsuperscript{98} Chapter 135’s impact on the vacancies of mental health professionals in the CDCR and its ability to provide access to mental health services in compliance with the Coleman holding remains to be seen.

\begin{itemize}
\item \textsuperscript{88} Senate Committee on Business, Professions and Economic Development, Committee Analysis of AB 1113, at 6 (June 19, 2009).
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Supra note 87.
\item \textsuperscript{97} Supra note 87.
\item \textsuperscript{98} Senate Committee on Business, Professions and Economic Development, Committee Analysis of AB 1113, at 4 (June 19, 2009).
\end{itemize}
Nadia Mahallati

Code Section Affected
Penal Code § 532f (new), § 532f (repealed).
SB 239 (Pavley); 2009 STAT. Ch. 174

I. INTRODUCTION

Terrence and Sonia Tucker profited an estimated $31 million in a mortgage fraud scheme.¹ The Thousand Oaks couple sought out investments from members of their Mormon church and promised returns of twelve percent or higher.² The Tuckers then used that money as down payments to secure mortgages for hundreds of homebuyers without telling lenders the money had been borrowed.³ The Tuckers told homebuyers—many of whom were also fellow church members—that they could purchase a home with one hundred percent financing with the help of short-term loans.⁴ When those loans became due, the Tuckers advised homeowners to use a home equity line of credit (HELOC), which the Tuckers obtained on the homeowners’ behalf.⁵ Funds from the HELOCs were then reinvested back into the scheme.⁶ The plan ultimately collapsed, victimizing thousands of Californians.⁷ The private investors lost their money, the homeowners lost their homes to foreclosure, and the banks suffered losses from the bad loans.⁸

Unfortunately, the Tucker scam is not an isolated event.⁹ Maria Elna Flora of Sacramento swindled nearly $350,000 from retirees in a real estate scam.¹⁰

³  Herdt, supra note 1.
⁴  See Needham, supra note 2 (noting that the Tuckers told homeowners they could purchase homes using conventional loans paired with short term, “high-interest loans called hard money loans”).
⁵  Id.
⁶  See id. ("Instead of paying off the loans for the homeowners . . . the Tuckers would reinvest that money somewhere else into new hard money loans.").
⁷  Herdt, supra note 1.
⁸  Id.
¹⁰  Id.
“Flora, a licensed life insurance agent, sold [legitimate] annuities” but then offered to invest in real estate loans and promised returns between ten and twenty percent.\(^\text{11}\) Although Flora did make some interest payments to investors, the money was never invested, but was instead used to fund her “daily gambling habit.”\(^\text{12}\)

The “brazen” acts of twenty-five year old Eric Pony provide another example of mortgage fraud in California.\(^\text{13}\) Pony, through several different companies, offered refinancing on mortgages to his victims and promised lower interest rates and lower monthly payments.\(^\text{14}\) An appraiser would fraudulently inflate the home’s value, which allowed the homeowner to qualify for a much higher loan.\(^\text{15}\) Then a salesperson would bring loan documents that contained “vastly different” terms than originally promised to the homeowner.\(^\text{16}\) If the homeowner noticed the mistake, he was told to sign and the problem would be corrected later.\(^\text{17}\) Should the homeowner refuse to sign, the company would forge the customer’s signature.\(^\text{18}\)

Although the State charged Terrence and Sonia Tucker, Maria Elna Flora, and Eric Pony with crimes related to their actions,\(^\text{19}\) there was no designated mortgage fraud crime until the California Legislature enacted Chapter 174.\(^\text{20}\) Chapter 174 creates a separate mortgage fraud statute, which “‘send[s] a clear signal to mortgage brokers who defraud homeowners about the penalties for these crimes.’”\(^\text{21}\)

\(^{11}\) See id. (reporting that Flora told potential investors the funds “would be used to make real estate loans to investors willing to pay high interest rates”).

\(^{12}\) Id.


\(^{14}\) See id. (naming several companies, including Lifetime Financial, Nations Mortgage, and Virtual Escrow, “run by Eric Pony and his family” and operating “predatory lending schemes”).

\(^{15}\) See id. (“Appraisers then inflate home values to qualify the homeowners for much higher loans than are appropriate.”).

\(^{16}\) Id.

\(^{17}\) See id. (“If consumers complain[ed] about the terms, the salespeople [told] them that there [was] a mistake but they should just sign the paperwork to ‘keep this great deal.’”).

\(^{18}\) Id.

\(^{19}\) See Herdt, supra note 1 (“The Tuckers pleaded guilty to federal bank fraud charges.”); The Mortgage Fraud Reporter, supra note 9 (“[P]rosecutors from [Attorney General Brown’s] office have filed grand theft, embezzlement and burglary charges against Maria Elna Flora.”); Brown Press Release, supra note 13 (“The attorney general is seeking civil penalties of $2,500 for each violation of law and full restitution as well as a permanent injunction against operation [of] these businesses. Penalties and restitution are estimated to exceed $20 million.”).

\(^{20}\) See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 1 (June 23, 2009) (explaining that Chapter 174 creates the offense of “mortgage fraud”).

\(^{21}\) Id. at 6 (quoting Senator Trevor Paglan).
II. LEGAL BACKGROUND

Mortgage fraud is “one of the fastest growing white collar crimes” in the country
and has severely impacted the state and national economy. There are
two types of mortgage fraud: fraud for property and fraud for profit. Fraud for
property, also known as fraud for housing, is when the borrower makes “minor
misrepresentations” regarding income or debt but still intends to repay the loan.
Fraud for property makes up twenty percent of all fraud. Fraud for profit is
more cause for concern; it involves multiple misrepresentations through
multiple loans at multiple financial institutions. There are several types of
mortgage fraud schemes, but the most common is illegal property flipping.

A. A Crime Worth Committing

Reports of mortgage fraud have increased over the years, in part because of
the crime’s “low risk, high-yield” nature. From 2000 to 2007, “reports of
suspected mortgage loan fraud submitted by federally insured institutions
increased 1,404%.” In 2002, California was ranked thirtieth in a population-
adjusted measure of suspected mortgage fraud; in 2008, California was ranked
eighth. On the local level, “Los Angeles, San Francisco, and Sacramento ranked

23. See John S. Pistole, Deputy Dir., FBI, Statement Before the H. Comm. on the Judiciary (Apr. 1,
(on file with the McGeorge Law Review) (“Mortgage fraud and related financial industry corporate fraud have
shaken the world’s confidence in the U.S. financial system.”); 2009 Cal. Stat. ch. 174, § 1(a)(2) (“Mortgage
fraud has a profoundly harmful impact on the citizens of this state and its economy.”).
 fraud/mortgage_fraud06.htm [hereinafter MORTGAGE FRAUD REPORT] (on file with the McGeorge Law Review).
26. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 9 (June 23, 2009).
27. See MORTGAGE FRAUD REPORT, supra note 25 (“It is this second category that is of most concern to
law enforcement and the mortgage industry.”).
28. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 9 (June 23, 2009).
29. Id. at 10-11 (listing backward application, air loans, silent seconds, nominee loans, property flips,
foreclosure schemes, and equity skimming as types of mortgage fraud).
30. MORTGAGE FRAUD REPORT, supra note 25. An example of this type of scheme is a flipper
purchasing a house for $20,000 and obtaining a fraudulent appraisal for $80,000. Id. at fig.1. A straw buyer
purchases the house for $80,000 using an eighty percent mortgage of $64,000. Id. The flipper profits $44,000,
and the bank usually forecloses on the house. Id. The bank loses $44,000 when it is left with a $64,000
mortgage on a $20,000 home. Id. For FHA loans, the government absorbs this loss. Id.
31. See id. (noting that the “low-risk, high-yield” crime “tempts many”).
32. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 7 (June 23, 2009).
33. Id. at 6.
first, third and seventh respectively” of the fifty-six FBI regions across the country for mortgage fraud complaints.\textsuperscript{34}

Several federal organizations investigate mortgage fraud, including: the Federal Bureau of Investigation, the Internal Revenue Service, the Department of Housing and Urban Development—Office of Inspector General, and the United States Postal Service.\textsuperscript{35} However, local and state law enforcement is critical in the fight against mortgage fraud.\textsuperscript{36}

\textbf{B. Section 532f Prior to Amendment}

Prior to Chapter 174, section 532f of the Penal Code only applied to one type of mortgage fraud, fraudulent loan documents; the prior law applied to any person violating the general fraudulent loan statute (532a)\textsuperscript{37} “in connection with an application for a loan to be secured by real property.”\textsuperscript{38} For persons other than the loan applicant, punishment was “a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or by both.”\textsuperscript{39} Additionally, the court was required to “determine the amount of any economic loss to a victim caused by the criminal conduct of the defendant and . . . to the extent possible, order the defendant to make restitution to the victim in that amount.”\textsuperscript{40} For the loan applicant, punishment was “a fine not exceeding ten thousand dollars . . . , imprisonment in a county jail not exceeding six months,” or both.\textsuperscript{41}

\textbf{C. A “Patchwork of Laws”}

Because section 532f of the California Penal Code previously only provided misdemeanor punishment for one type of mortgage fraud and did not “preclude the application of any other law that may apply to a transaction,”\textsuperscript{42} prosecutors instead relied on a patchwork of other laws, including some with stricter punishments, to prosecute mortgage fraud.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{34} Id.
\item \textsuperscript{35} MORTGAGE FRAUD REPORT, supra note 25.
\item \textsuperscript{36} See Pistole Statement, supra note 23 (“One of the best tools the FBI has in its arsenal for combating mortgage fraud is its long-standing partnerships with other federal, state and local law enforcement.”).
\item \textsuperscript{37} CAL. PENAL CODE § 532(a) (West 1999); see also infra Part II.C.3 (describing the general fraudulent loan statute).
\item \textsuperscript{38} 1993 Cal. Stat. ch. 482, § 1 (enacting CAL. PENAL CODE § 532f).
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 7 (June 23, 2009) (“Because the existing Penal Code Section 532f only provides misdemeanor punishment, prosecutors, more often than not, will charge a person suspected of mortgage fraud under Penal Code Section 487 (grand theft) or Penal Code Section 532 (general fraud), both of which are punishable as wobblers.”). A “wobbler” is
\end{itemize}
1. **Grand Theft**

Grand theft is “committed . . . [w]hen the money, labor, or real or personal property taken is of a value exceeding four hundred dollars” with certain exceptions for animals and agriculture requiring a lower monetary value to meet the grand theft threshold.\(^{44}\) The punishment for those convicted of grand theft is “imprisonment in the county jail not exceeding one year or in the state prison.”\(^{45}\) Because felonies are defined by punishment in state prison, but misdemeanor punishment can result in imprisonment in jail, or a mere fine, prosecutors can choose to pursue either a felony or misdemeanor charge.\(^{46}\)

2. **General Fraud**

Section 532 of the Penal Code describes fraud as the use of “any false or fraudulent representation or pretense” to obtain another’s money, labor, or real or personal property.\(^{47}\) Fraud can also exist when a person causes another to falsely report “his or her wealth or mercantile character” to obtain credit used to fraudulently gain “possession of money . . . or property, or . . . the labor or services of another.”\(^{48}\) Punishment for violation of section 532 is “in the same manner and to the same extent as for larceny of the money or property so obtained.”\(^{49}\)

3. **Fraudulent Loan Transactions**

Section 532a of the California Penal Code provides that making a written false representation with the “intent that it shall be relied upon, respecting the financial condition, or means or ability to pay . . . for the purpose of . . . the making of a loan or credit” is a public offense.\(^{50}\) Punishment under section 532a is a misdemeanor, “punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than six months, or by both.”\(^{51}\) However, any violation involving the use of a “fictitious name, social security number, business name or business address, or by falsely representing

\(^{44}\) C A L. P E N A L. C O D E § 487 (W est 1999).

\(^{45}\) Id. § 489(b). However, “[w]hen the grand theft involves the theft of a firearm,” punishment is sixteen months, two years, or three years in state prison. Id. § 489(a).

\(^{46}\) Id. § 17(a) (“A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.”).

\(^{47}\) Id. § 532(a).

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) C A L. P E N A L. C O D E § 532a(1).

\(^{51}\) Id. § 532a(4).
[oneself] to be another person or business" is a felony. The felony is
“punishable by a fine not exceeding five thousand dollars ($5,000) or by
imprisonment in the state prison,” or both. Alternatively, the punishment may
be “a fine not exceeding twenty five hundred dollars ($2,500) or by
imprisonment in the county jail not exceeding one year” or both. Additionally,
any other applicable laws may still be applied in accordance with Section 532a.

4. Collection of Records

Section 1326.2 of the Penal Code codifies the process of collecting escrow or
title records that are “relevant and material to an ongoing investigation of a
felony [money laundering] violation . . . or of any felony subject to the
enhancement set forth in Section 186.11.”

The Legislature enacted Chapter 174 in part to “[e]ncourage and facilitate a
shift of prosecution of mortgage fraud cases that otherwise would be prosecuted
under misdemeanor and general felony theft statutes to prosecution under one
specifically dedicated felony mortgage fraud statute.” Chapter 174 specifically
lays out the elements of mortgage fraud to “ensure that acts that should be
prosecuted as felonies are not inappropriately prosecuted as misdemeanors.”

III. CHAPTER 174

Chapter 174 creates a new public offense for mortgage fraud “that may only
be prosecuted . . . when the value of the alleged fraud meets the threshold for
grand theft.” Chapter 174 further establishes new ways for prosecutors to collect
evidence relating to mortgage fraud. The punishment for mortgage fraud is
“imprisonment in the state prison or in a county jail for not more than one year.”

52. Id.
53. Id.
54. Id.
55. See id. § 532a(5) (“This section shall not be construed to preclude the applicability of any other
provision of the criminal law of this state which applies or may apply to any transaction.”).
56. CAL. PENAL CODE § 1326.2 (West 2004); see also infra Part IV.B (comparing section 1326.2 to
Chapter 174).
58. CAL. PENAL CODE § 532f(a) (enacted by Chapter 174).
60. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 1 (June 23,
2009); see also CAL. PENAL CODE § 532f(h) (enacted by Chapter 174 ) (noting that mortgage fraud is
punishable by no more than one year imprisonment in state prison or county jail).
61. CAL. PENAL CODE § 532f(j) (enacted by Chapter 174). The grand theft threshold is satisfied when
the value of the property, labor, or services involved exceeds $400, with certain limited exceptions. Id. § 487(a)
(West 1999).
62. See id. § 532f(c)(1)-(5) (enacted by Chapter 174) (describing the process for production of “any or
all relevant records”); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 7
(June 23, 2009) (noting that Chapter 174 “create[s] greater investigatory tools for law enforcement combating
2010 / Penal

A. The Crime of Mortgage Fraud

Chapter 174 establishes four different ways that a person can commit mortgage fraud. First, a person is guilty if he or she makes a deliberate “misstatement, misrepresentation, or omission during the mortgage lending process” with the intent to have a party rely on it. Second, a person “deliberately us[ing] or facilitat[ing] the use of any [known] misstatement, misrepresentation, or omission” that was intended to be relied upon by any party to the lending process also qualifies as mortgage fraud. Third, any person who receives “proceeds or any other funds in connection with a mortgage loan closing,” knowing the mortgage was a result of a violation described above is also guilty of mortgage fraud. Finally, any person who “files or causes to be filed . . . any [mortgage] document . . . know[n] to contain a deliberate misstatement, misrepresentation or omission” is guilty of mortgage fraud.

B. Production of Evidence

Chapter 174 codifies the methods for production of records for prosecution under this law. A peace officer may submit a written ex parte application to a judge to obtain an order for the production of relevant records from a real estate recordholder when “there are reasonable grounds to believe that the records sought are relevant and material to an ongoing investigation of a felony fraud violation.” The real estate recordholder may notify the customer of the order for production of records unless a court finds that such “notice would impede the [mortgage fraud] crimes”).

63. CAL. PENAL CODE § 532f(h) (enacted by Chapter 174).
64. Id. § 532f(i)(1) (enacted by Chapter 174) (defining a “person” as “any individual, partnership, firm, association, corporation, limited liability company, or other legal entity”).
65. Id. § 532f(a) (enacted by Chapter 174).
66. Id. § 532f(a)(1) (enacted by Chapter 174); see also id. § 532f(i)(2) (enacted by Chapter 174) (noting that “mortgage lending process” refers to the process of seeking or obtaining a mortgage loan, including but not limited to solicitation, application, origination, negotiation, third-party provider services, underwriting, signing and closing, and funding the loan).
67. Id. § 532f(a)(1) (enacted by Chapter 174).
68. Id. § 532f(a)(2) (enacted by Chapter 174).
69. CAL. PENAL CODE § 532f(a)(3) (enacted by Chapter 174).
70. Id. § 532f(a)(4) (enacted by Chapter 174).
71. See id. § 532f(c)(1)-(5) (enacted by Chapter 174) (describing the process of obtaining relevant records).
72. The statute defines relevant records as items including “purchase contracts, loan applications, settlement statements, closing statements, escrow instructions, payoff demands, disbursement reports, or checks.” Id. § 532f(c)(3) (enacted by Chapter 174).
73. The statute defines a “real estate recordholder” as “any person, licensed or unlicensed,” that is “a title insurer . . . an underwritten title company, or an escrow company” or who “functions as a broker or salesperson” or “engages in the making or servicing of loans secured by real property.” Id. § 532f(h)(4)(a)-(c) (enacted by Chapter 174).
74. Id. § 532f(c) (enacted by Chapter 174).
If notification is withheld, “the peace officer . . . or law enforcement agency that obtained the records shall notify the customer by delivering a copy of the ex parte order to the customer within 10 days of the termination of the investigation.”

All records produced must include an affidavit of the custodian of the records stating that “[t]he affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records,” providing the identity of the records and description of their preparation, and stating that any copies of records are true copies.

Chapter 174 does not prevent “real estate recordholder[s] from voluntarily disclosing information or providing records to law enforcement upon request” or “from initiating contact with, and thereafter communicating with and disclosing records to, appropriate state or local agencies concerning a suspected violation of any law.” Additionally, Chapter 174 removes liability for any “real estate recordholder, or any officer, employee, or agent of the real estate recordholder” for either “[d]isclosing information in response to an order pursuant to [Chapter 174]” or “[c]omplying with an order under [Chapter 174] not to disclose to the customer the order, or the dissemination of information pursuant to the order.”

IV. ANALYSIS

Chapter 174 is California’s effort to assist law enforcement’s prosecution of mortgage fraud. The foreclosure crisis revealed just how common fraudulent lending practices have become. Nationwide, reports of mortgage fraud have increased “more than 1,400% between 2000 and 2008.” Each year billions of dollars are lost as a consequence of mortgage fraud. Chapter 174 creates a specific mortgage fraud statute and provides investigators with greater tools to conduct their investigations.
A. Dedicated Mortgage Fraud Statute

It is essential that California strengthen its laws regarding mortgage fraud. By combining the “two major types of mortgage fraud, grand theft and fraud or false pretenses,” law enforcement will no longer have to rely on the patchwork of other laws to prosecute these types of cases. The Legislature, in enacting Chapter 174, made clear its intention to create a mortgage fraud statute that “carries the same penalties as the currently utilized general felony theft statutes.” Since Chapter 174 combines existing laws, it does not “define as criminal acts that are not criminal under existing laws.” Further, it “does not represent a penalty increase, nor does it expose anyone to felony liability that is not already exposed.”

The “consistent terms concerning loans secured by real property” found in a single mortgage fraud section will make the law clearer. A designated mortgage fraud statute helps law enforcement determine if a mortgage crime has actually occurred. Chapter 174 lays out four specific ways a person may be found guilty of mortgage fraud. The new mortgage fraud law also sends a “clear signal” to dishonest brokers about the penalties for their actions. The District Attorney for the City and County of San Francisco believes Chapter 174 “will go a long way to help fight against mortgage fraud.”

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86. Id. at 6.
87. Id.
88. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at L (Apr. 28, 2009).
89. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 14 (June 23, 2009) (“Under current law, prosecutors must rely on a patchwork of laws relating to grand theft, fraudulent loan transactions and general fraud to prosecute mortgage fraud.”); see also supra Part II.C (discussing the different laws prosecutors use).
91. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at L (Apr. 28, 2009).
92. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 7-8 (June 23, 2009) (quoting the California District Attorneys Association).
93. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at M (Apr. 28, 2009).
94. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 6 (June 23, 2009) (“A separate and revised mortgage fraud statute is needed to . . . enhance the ability of law enforcement to make efficient determinations as to whether mortgage loan crimes have occurred, and if so, to prosecute those crimes.”).
95. See CAL. PENAL CODE § 532f(a)(1)-(4) (enacted by Chapter 174) (describing four ways for a person to commit mortgage fraud).
96. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 6 (June 23, 2009) (noting that Chapter 174 will “send a clear signal to mortgage brokers who defraud homeowners about the penalties for these crimes.”).
97. Id. at 15.
B. Increased Investigatory Tools

Mortgage fraud requires intensive investigation, and time is of the essence.\textsuperscript{98} Unfortunately, the process of collecting the necessary documents is very time consuming, and as more companies go out of business it becomes even harder to collect information.\textsuperscript{99} Chapter 174 expands investigatory power while retaining much of the same language as existing California law.\textsuperscript{100} Chapter 174 allows investigators to collect “any or all relevant records” in a felony\textsuperscript{101} fraud investigation.\textsuperscript{102} This expands both the type and scope of documents that can be collected under existing law; section 1326.2 of the Penal Code only allows the collection of escrow or title records for the investigation of felony money laundering or multiple fraud and embezzlement felonies.\textsuperscript{103}

Additionally, Chapter 174 lowers the standard of proof necessary to obtain documents, requiring only “reasonable grounds to believe that the records sought are relevant and material to an ongoing investigation of a felony fraud violation.”\textsuperscript{104} Prior law required “specific and articulable facts” to show reasonable grounds that the records are relevant to an investigation.\textsuperscript{105} Some believe this expansion of investigatory power will “significantly enhance the ability of law enforcement to make efficient determinations as to whether crimes have occurred, and if so, to prosecute those crimes.”\textsuperscript{106}

\textsuperscript{99} See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 16 (June 23, 2009) (“This process has become even more time-consuming and frustrating for victims and investigators by the avalanche of mortgage fraud cases and the increasing number of companies that are going out of business.”).
\textsuperscript{100} Id. at 8 (describing Chapter 174 as incorporating much of the language of current law).
\textsuperscript{101} Barker v. Cal.-Western States Life Ins. Co., 252 Cal. App. 2d 768, 772, 61 Cal. Rptr. 595, 599 (5th Dist. 1967) (“It is settled that if an offense is punishable either as a felony (by imprisonment in the state prison) or as a misdemeanor (by imprisonment in the county jail), it is deemed a felony for all purposes up to the imposition of sentence.”).
\textsuperscript{102} CAL. PENAL CODE § 532f(c)(1) (enacted by Chapter 174).
\textsuperscript{103} Id. § 1326.2(a) (West 2004); id. §§ 186.10, 186.11 (West 1999).
\textsuperscript{104} Id. § 532f(c)(1) (enacted by Chapter 174).
\textsuperscript{105} Id. § 1326.2(a) (West 2004).
\textsuperscript{106} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 8, 14, 16 (June 23, 2009) (noting the support of the Santa Clara District Attorney’s Office and the Los Angeles County District Attorney’s Office).
C. Opposition to Chapter 174

Taxpayers for Improving Public Safety (TiPS)\textsuperscript{107} contends that Chapter 174 “will do little to resolve past conduct.”\textsuperscript{108} Since California’s prisons are overcrowded, TiPS does not think the state should “devote such a limited resource to the incarceration of the individuals targeted by this legislation.”\textsuperscript{109}

D. Effects of a Wobbler

As introduced, Chapter 174 provided only for felony punishment by “imprisonment in the state prison for two, three, or four years.”\textsuperscript{110} Further, those convicted of two or more violations of mortgage fraud in a single proceeding would have been subject to an “enhancement of an additional two, three, or five years in the state prison.”\textsuperscript{111} However, the bill was later amended to become a wobbler, with punishment of “imprisonment in the state prison or in the county jail for not more than one year.”\textsuperscript{112} This was done in part “to reflect [the] current practice” of prosecuting mortgage fraud as an alternative felony or misdemeanor.\textsuperscript{113} Wobblers give prosecutors flexibility and power; defendants may be more likely to plead guilty to a misdemeanor charge than go to trial and risk a harsher felony conviction.\textsuperscript{114} Plea bargains “help[] prosecutors dispose of cases efficiently, maintain control over caseloads, and avoid the risk of acquittal”\textsuperscript{115} and are an “essential component of the administration of justice.”\textsuperscript{116}

Should a mortgage fraud case go to trial, the trial court has discretion under section 17 of the Penal Code to reduce the charge to a misdemeanor by

\textsuperscript{107} Taxpayers for Improving Public Safety (TiPS), http://www.forpublicsafety.com/ (last visited Mar. 9, 2010) (on file with the McGeorge Law Review) (“We are a unique coalition of victims of crime, offenders, and their advocates who represent California taxpayers with the shared interest of improving public safety.”).

\textsuperscript{108} \textit{Assembly Committee on Public Safety, Committee Analysis of SB 239}, at 16 (June 23, 2009).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} See \textit{SB 239 as Introduced on February 24, 2009, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0201-0250/sb_239_bill_20090224_introduced.pdf} (on file with the McGeorge Law Review) (noting punishment in section 532f(h)).

\textsuperscript{111} \textit{Id.} (describing the enhancement in section 532f(i)(1)).

\textsuperscript{112} CAL. PENAL CODE § 532f(h) (enacted by Chapter 174).

\textsuperscript{113} \textit{Assembly Committee on Public Safety, Committee Analysis of SB 239}, at 7 (June 23, 2009).

\textsuperscript{114} See Russell Covey, \textit{Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining}, 91 MARQ. L. REV. 213, 229 (2007) (“Where a defendant commits a so-called ‘wobbler’ offense, the difference between going to trial and pleading guilty might mean the difference between a felony theft conviction carrying substantial prison time and a misdemeanor theft conviction and probation.”).


\textsuperscript{116} See Santobello v. New York, 404 U.S. 257, 260 (1971) (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).
“imposing a punishment other than imprisonment in the state prison.” In deciding whether to impose a misdemeanor punishment, the trial court looks at “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.” Trial courts may use their discretion to impose the harsher felony punishment in more egregious cases and reserve misdemeanor punishment for less culpable defendants.

V. CONCLUSION

Incidents of mortgage fraud have increased at an alarming rate. Fraud for profit schemes are “one of the most tragic by-products of California’s economic downturn.” The Legislature enacted Chapter 174 to strengthen California law relating to mortgage fraud.

Chapter 174 creates a separate mortgage fraud statute, with clearly defined elements, which sends a “clear signal” to potential criminals about the consequences of their actions and aids law enforcement in determining if a mortgage fraud crime has been committed. Chapter 174 also treats mortgage fraud as a wobbler, giving prosecutors and trial courts flexibility in prosecuting mortgage fraud cases. Because prompt collection of documents is vital in the prosecution of mortgage fraud cases, Chapter 174 allows more types of documents to be collected with a decreased standard of proof than the law provides for in other felony investigations.

119. See id. (noting that trial courts may look at “the nature and circumstances of the offense, [and] the defendant’s appreciation of and attitude toward the offense”).
120. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 6 (June 23, 2009) (noting that, in a ranking of states, California jumped from thirtieth to eighth for incidents of mortgage fraud for the period of 2002 to 2008).
121. Id. (quoting Senator Trevor Paglam).
122. Id. (“‘It is crucial that California law is strengthened to assist law enforcement in the handling of mortgage fraud cases.’”).
123. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 6 (June 23, 2009) (“A separate and revised mortgage fraud statute is needed to send a clear signal to mortgage brokers who defraud homeowners about the penalties for these crimes.”).
124. Id.
125. See Covey, supra note 114, at 227 (noting that defendants sometimes plead guilty to a misdemeanor in wobbler offenses to avoid felony conviction); see also CAL. PENAL CODE § 17(b)(1) (West 1999) (giving the trial court discretion to reduce a wobbler to a misdemeanor offense).
126. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 1 (June 23, 2009) (“Time is of the essence in the investigative stage of real estate fraud-related cases.”).
127. See CAL. PENAL CODE § 532f(c)(1) (enacted by Chapter 174) (allowing the collection of “any or all relevant records” when there are “reasonable grounds to believe that the records sought are relevant and material to an ongoing investigation of a felony fraud violation”); see also supra Part IV.B (comparing Chapter 174 to section 1326.2 of the Penal Code).
With the elements,\(^{128}\) punishment,\(^{129}\) and process for collecting vital documents\(^{130}\) all codified in a single section of the Penal Code, prosecutors no longer have to rely on a patchwork of laws to prosecute mortgage fraud cases.\(^{131}\) This increased efficiency for law enforcement\(^{132}\) may prevent another Tucker\(^{133}\) scam.\(^{134}\)

\(^{128}\) CAL. PENAL CODE § 532f(a)(1)-(4) (enacted by Chapter 174).
\(^{129}\) Id. § 532f(h) (enacted by Chapter 174).
\(^{130}\) Id. § 532f(c)(1)-(3) (enacted by Chapter 174).
\(^{131}\) ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 14 (June 23, 2009).
\(^{132}\) See id. at 2 (noting that the prior “statutory scheme hamper[ed] the ability of law enforcement to efficiently . . . determine whether crimes [had] occurred”).
\(^{133}\) See Herdt, supra note 1 (describing a $31 million mortgage fraud scheme run by Terrence and Sonia Tucker).
\(^{134}\) See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 239, at 6 (June 23, 2009) (describing Chapter 174 as California’s response to “one of the most tragic by-products of California’s economic downturn—the proliferation of fraud for profit actions that have brought significant financial harm to distressed borrowers and the nation’s financial markets”).
Chapter 15: See You Later, Alligator? Not Until 2015

Brooke Tomlinson

Code Section Affected
Penal Code § 653o (amended).
SB 609 (Hollingsworth); 2009 STAT. Ch. 15.

I. INTRODUCTION

Of all the alligator species that once roamed the earth, only two remain: the American alligator and the Chinese alligator, found only in their namesake countries.\(^1\) To its detriment, the American alligator produces a high-quality, highly coveted hide, making it an obvious target for hunters during the early twentieth century.\(^2\) By 1967, the alligator population had plummeted due to the high demand for leather skins, causing the United States Congress to list the species as endangered under federal law and to eventually prohibit the hunting and sale of alligator products.\(^3\) Due to strict regulation of the species under the Endangered Species Act, the American alligator population rapidly recovered, and the federal government permitted states to authorize or prohibit American alligator trade.\(^4\) Most states lifted their bans against alligator hunting and sales,\(^5\) and the American alligator soon dominated the crocodilian international trade market.\(^6\) Only one state, however, maintained its ban against the import of not just the American alligator, but of all crocodilian species—California.\(^7\)

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1. See Reptile Knowledge, The American Alligator—Alligator Mississippiensis, http://www.reptileknowledge.com/crocodilia/american-alligator.php (last visited Jan. 4, 2010) (on file with the McGeorge Law Review) (“Even though the reptile family of crocodiles have been around since the Cretaceous period (80 million years ago), there are actually only two species of alligator. One is the Alligator sinensis (Chinese) that is only found in the Yangtze River Basin, and the other is the Alligator mississippiensis (American) that is found in the southeastern United States.”).


3. Id.


5. See Assembly Committee on Water, Parks and Wildlife, Committee Analysis of SB 1485, at 1 (June 27, 2006) (“All states except California that previously prohibited the sale of manufactured alligator products have repealed those prohibitions.”).

6. See id. at 4 (“Of the 23 crocodilian species, nine are in commercial world trade, four of which account for 96% of the total trade, as follows: American Alligator 61%, Nile Crocodile 23%, New Guinea Crocodile 7%, and Saltwater Crocodile 5%.”).

7. Id. at 1 (stating that all states, except California, had repealed their bans against the sale of alligator products).
II. LEGAL BACKGROUND

A. Federal Law

In 1966, the United States Congress passed the Endangered Species Preservation Act (ESPA), providing limited protection to endangered native species.⁸ The ESPA focused on habitat protection, but ignored the impact of wildlife takings, allowing the hunting and killing of endangered species.⁹ “Due to concern over poorly regulated harvests,” the American alligator was listed as endangered under the ESPA in 1967.¹⁰ Even so, legal poaching of the species continued until the enactment of the Endangered Species Act of 1973 (ESA).¹¹

The ESA prohibits the hunting or killing of endangered species, including the American alligator¹² and was enacted to counter the consequences of economic development on surrounding plant and animal populations.¹³ Because of the species’ “esthetic, ecological, educational, historical, recreational, and scientific value,” the ESA aims to conserve the ecosystems of endangered species¹⁴ and provides individual states with financial assistance to develop and maintain conservation programs.¹⁵ The United States has also entered into treaties with other countries for the purpose of protecting threatened and endangered species.¹⁶

Violations of the ESA are sanctioned by both civil and criminal penalties, and the fine amount depends on which section is violated.¹⁷ A person who knowingly violates or attempts to violate ESA sections that prohibit the import, export, taking, selling, destruction, or importation of a protected species to a non-designated port may be subject to civil fines of $25,000, criminal fines of

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¹¹ 30 Years of ESA, supra note 2.

¹² See 16 U.S.C. § 1532(19) (2000) (“The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”); id. § 1538(a)(1) (prohibiting the taking of endangered animals); 30 Years of ESA, supra note 2 (“With the passage of the Endangered Species Act of 1973, American alligator hunting became illegal.”).


¹⁴ Id. § 1531(a)(3), (b).

¹⁵ Id. § 1531(a)(5).

¹⁶ Id. § 1531(a)(4) (listing the treaties as: the Migratory and Endangered Bird Treaty with Japan; the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; the International Convention for the Northwest Atlantic Fisheries; the International Convention for the High Seas Fisheries of the North Pacific Ocean; the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and migratory bird treaties with Canada and Mexico).

¹⁷ Id. § 1540(a)-(b).
$50,000, and up to one year imprisonment.\textsuperscript{18} A person who knowingly violates any other section of the ESA may be civilly fined $12,000, criminally fined $25,000, and sentenced up to six-months imprisonment.\textsuperscript{19} A person who violates any section, without knowledge, may be fined $500.\textsuperscript{20}

Exceptions to the ESA authorize acts that would otherwise be unlawful.\textsuperscript{21} The Secretaries of Commerce, Interior, or Agriculture\textsuperscript{22} may issue permits to allow such acts if they are intended for scientific purposes or are “incidental to, and not the purpose of” the Act.\textsuperscript{23} To receive a permit, the applicant seeking the exception must submit to the Secretary a conservation plan, which specifies the impact of the violation on protected species, the steps necessary to minimize the impact, and any available alternative plans.\textsuperscript{24}

An endangered species may be reclassified as “threatened due to similarity of appearances” if it no longer faces extinction, but closely resembles a species that is endangered.\textsuperscript{25} In 1987, the American alligator was reclassified as “threatened due to similarity of appearance” after evidence showed it was no longer biologically threatened, but resembled the endangered American crocodile.\textsuperscript{26} To maintain its protection of the American crocodile, the ESA continues to regulate the American alligator,\textsuperscript{27} but gives states the option to legalize the harvest and sale of alligator meat or parts.\textsuperscript{28}

B. California Law

Even though federal law granted all states the authority to legalize the sale of the American alligator in 1987, California continued to prohibit the importation of all protected and non-protected alligator and crocodile species.\textsuperscript{29} In 2006,

\begin{quote}
18. Id. §§ 1538, 1540(a)(1), (b)(1).
20. Id. § 1540(a)(1).
21. Id. § 1539.
22. Id. § 1532(15) ("'Secretary' means . . . the Secretary of the Interior or the Secretary of Commerce . . . except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.").
23. Id. § 1539(a)(1).
27. Id.
29. See SENATE COMMITTEE ON NATURAL RESOURCES AND WATER, COMMITTEE ANALYSIS OF SB 609, at 1 (Apr. 28, 2009) (“In 2006, the Legislature passed and the Governor signed SB 1485 . . . that removed the criminal prohibition against the importation in California of products and parts of alligators and crocodiles.”).
\end{quote}
California temporarily lifted the prohibition—allowing the importation and sale of those species not protected under the Endangered Species Act—but the legislation authorizing such importation contained a 2010 sunset date.30

III. CHAPTER 15

Chapter 15 makes two amendments to existing law.31 First, it extends the sunset date for the above-referenced sections to January 1, 2015,32 postponing the criminalization of dead alligator or crocodile importation by five years.33 Second, Chapter 15 specifies that it does not authorize the importation of any endangered alligator or crocodilian species that would violate federal law or an international treaty.34

IV. ANALYSIS

A. Support

Oddly, one of the strongest supporters of the 2006 bill that lifted the prohibition on the importation of crocodile and alligator parts in California was former Governor of Louisiana, Kathleen Blanco.35 Because California was the only remaining state banning importation, the Governor argued that California was impeding trade and harming Louisiana’s citizens36 and that lifting the ban “would encourage sustainable use management of alligator populations.”37 The manufacture and sale of products made from alligator skins and parts is an important source of revenue for Louisiana’s economy, and California, with its penchant for expensive accessories, could represent an important market for these products.38 Therefore, to benefit the Louisiana economy and conserve wetlands, the California Legislature lifted the ban but included the 2010 sunset date in response to concerns of over-harvesting.39

30. 2006 Cal. Stat. ch. 660, § 1 (amending CAL. PENAL CODE § 653o); see also BLACK’S LAW DICTIONARY 1574 (9th ed. 2009) (defining a “sunset law” as “[a] statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed”).
31. See CAL. PENAL CODE § 653o(b)(1)-(2) (amended by Chapter 15) (listing the two amendments enacted by Chapter 15).
32. Id. § 653o(b)(1) (amended by Chapter 15).
33. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 609, at 1 (June 16, 2009).
34. CAL. PENAL CODE § 653o(b)(2) (amended by Chapter 15).
35. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 609, at 2 (June 16, 2009).
36. Id. at 1-2.
37. Id.
38. See id. (“The state of Louisiana argued that permitting the sale of alligator and crocodile products in California would . . . benefit local communities and economic recovery in Louisiana.”).
39. Id.
Since the passage of the 2006 bill, Louisiana has received $30 million annually from the alligator industry.\textsuperscript{40} The Louisiana Department of Wildlife and Fisheries manages the alligator program,\textsuperscript{41} overseeing 1.5 million farm-raised and wild alligators that produce 300,000 skins per year.\textsuperscript{42} The Department intends to “develop a sustained use management program which, through regulated harvest, would provide long term benefits to the survival of the species, maintain its habitats, and provide significant economic benefits to landowners, alligator farmers and alligator hunters.”\textsuperscript{43} Since the Department’s inception in 1972, more than 700,000 wild alligators have been harvested, and more than 2.7 million farm raised alligators have been sold, producing approximately $495 million in direct economic benefit to Louisiana.\textsuperscript{44} The Department’s sustainability program has also prospered. In 2008, only eighty-two violations were recorded from “a total of 300,000 to 500,000 alligator eggs collected.”\textsuperscript{45} Supporters of the program believe that the legalized, regulated alligator trade “has reduced the pressure for illegal trade of protected species.”\textsuperscript{46}

To continue the positive effects of California’s legalized importation on Louisiana’s alligator industry, Louisiana’s current Governor, Bobby Jindal, sponsored Chapter 15 to extend the sunset date for five additional years.\textsuperscript{47} More than forty groups have also pledged their support, the majority of which are leather and handbag companies, real estate associations, and chambers of commerce.\textsuperscript{48} According to these supporters, a sunset date is not necessary because illegal trade has diminished.\textsuperscript{49} However, the California Legislature believes that the sunset date is necessary to maintain public scrutiny and motivate supporters to further decrease illegal trade activity.\textsuperscript{50}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Louisiana Department of Wildlife & Fisheries, Louisiana’s Alligator Program, http://www.wlf.louisiana.gov/experience/lawildlife/nongame/alligators.cfm (last visited Jan. 4, 2010) [hereinafter Louisiana’s Alligator Program] (on file with the \textit{McGeorge Law Review}).
\item \textit{SENATE COMMITTEE ON NATURAL RESOURCES AND WATER, COMMITTEE ANALYSIS OF SB 609}, at 2 (Apr. 28, 2009).
\item Id.
\item Id.
\item \textit{ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 609}, at 2 (June 16, 2009).
\item Id.
\item \textit{SENATE COMMITTEE ON NATURAL RESOURCES AND WATER, COMMITTEE ANALYSIS OF SB 609}, at 2 (Apr. 28, 2009).
\item Id.
\item \textit{ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 609}, at 2-3 (June 16, 2009).
\item Id. at 3-4, Supporters of Chapter 15 include the following: American Tanning & Leather Company, A-One Couture, Inc., California Retailers Association, Momentum Luggage and Leisure Bags, and Poway Chamber of Commerce. Id.
\item \textit{SENATE COMMITTEE ON NATURAL RESOURCES AND WATER, COMMITTEE ANALYSIS OF SB 609}, at 3 (Apr. 28, 2009).
\item Id. at 3.
\end{enumerate}
\end{footnotesize}
Whether or not a sunset date is necessary or desirable, the extension benefits both Louisiana and California.\textsuperscript{51} Prolonged legalized importation allows California retailers and restaurants to continue selling alligator meat, while supporting Louisiana’s businesses and residents.\textsuperscript{52} The extended sunset date also promotes Louisiana’s sustainable management program.\textsuperscript{53} Because private landowners own eighty-one percent of Louisiana’s coastal alligators, the management program depends on landowners to conserve the alligator’s natural habitats.\textsuperscript{54} Private landowners benefit economically from the amount of alligators harvested from their lands, and this potential income serves as an incentive to maintain the wetlands.\textsuperscript{55} Naturally, the more states that allow alligator importation—like California—the higher the demand for alligator meat and parts will be, thus supplying a higher monetary incentive for landowners to sustain their alligator populations.\textsuperscript{56}

B. Opposition

Opponents present two arguments against Chapter 15.\textsuperscript{57} First, opponents argue that the extended importation of non-protected species may threaten protected species.\textsuperscript{58} This same concern was raised against the 2006 bill that established the January 1, 2010, sunset date.\textsuperscript{59} Because of the resemblance between protected and non-protected alligators and crocodiles, California may “unwittingly accept the importation of critically endangered species.”\textsuperscript{60} Farmers may also resort to collecting wild alligators, due to desires and demands to produce and sell more alligator products, which could lead to more harvesting of

\textsuperscript{51} See \textit{Senate Committee on Natural Resources and Water}, \textit{Committee Analysis of SB 609}, at 2 (Apr. 28, 2009) (stating that Louisiana Governor Bobby Jindal believes Chapter 15 will benefit California’s businesses and support the Louisiana economy).

\textsuperscript{52} See \textit{id.}

\textsuperscript{53} See \textit{Assembly Committee on Water, Parks and Wildlife}, \textit{Committee Analysis of SB 609}, at 3 (June 16, 2009).

\textsuperscript{54} See Louisiana’s Alligator Program, \textit{supra} note 41 (“Since Louisiana’s coastal alligator habitats are primarily privately owned . . . our sustained use management program provides direct economic benefit and incentive to private landowners . . . to protect the alligator . . . and enhance the alligator’s wetland habitats.”).

\textsuperscript{55} See \textit{id.} (explaining that alligator eggs and harvests have brought in “millions of dollars of revenue to landowners,” which is an incentive for landowners to maintain the wetland habitats).

\textsuperscript{56} See \textit{Assembly Committee on Water, Parks and Wildlife}, \textit{Committee Analysis of SB 609}, at 3 (June 16, 2009) (explaining supporters’ belief that the economic benefit of selling alligator parts for an extended time in California, per Chapter 15, will promote the sustainable management program).

\textsuperscript{57} See \textit{Senate Committee on Natural Resources and Water}, \textit{Committee Analysis of SB 609}, at 2, 4 (Apr. 28, 2009) (listing opponents as Paw PAC and the Los Angeles County District Attorney).

\textsuperscript{58} \textit{id.} at 2.

\textsuperscript{59} See \textit{Assembly Committee on Water, Parks and Wildlife}, \textit{Committee Analysis of SB 1485}, at 2 (June 27, 2006) (“[A]lligators and crocodiles that are killed commercially can closely resemble other crocodile species that are protected.”).

\textsuperscript{60} \textit{id.}
threatened and endangered species. Opponents' second argument is that Chapter 15 “contribute[s] to the inhumane treatment of animals.” In 2006, opponents argued that lifting the ban against importation would profit the “uneconomic factory farms” that harvest alligators and exploit wild populations. Opponents claim that alligator harvesters resort to cruel practices, while supporters counter that harvesters are genuinely concerned with the humane killing of the species.

C. Clarification

The 2006 sunset law stated: “Commencing January 1, 2010, it shall be unlawful to import into this state for commercial purposes . . . any crocodile or alligator.” Because the ESA only prohibits the importation of protected species, Chapter 15 clarifies that importing an endangered alligator or crocodile into California also violates federal law.

Although this safeguard intends to further protect endangered species, its effectiveness is discredited by the difficulty in identifying the crocodilian species that produces a specific hide. Therefore, a California importer may, in good faith, accept a hide or finished product made from an endangered animal—such as the American crocodile—defeating Chapter 15’s clarification.

D. Desperate Times Call for . . .

Like many retail markets, Louisiana’s alligator industry is suffering from the poor economy. Alligator farmers are financially dependent upon a luxury

61. Id.
62. SENATE COMMITTEE ON NATURAL RESOURCES AND WATER, COMMITTEE ANALYSIS OF SB 609, at 2 (Apr. 28, 2009).
63. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 1485, at 2 (June 27, 2006).
64. See Jerome Burdi, Gator Hunters Taunt Protesters as Season Starts, SUN-SENTINEL (Fla.), Aug. 15, 2009 (on file with the McGeorge Law Review) (explaining protesters’ claim that alligator hunting practices are inhumane because harvesters paralyze the alligators upon capture, leaving the animals alive for several hours without having their brains or spinal cords severed and describing supporters’ claim that the harvesters, because of their respect for the animals, follow humane harvesting procedure).
68. See SENATE COMMITTEE ON NATURAL RESOURCES AND WATER, COMMITTEE ANALYSIS OF SB 1485, at 3 (Aug. 27, 2006) (“[I]t is very difficult to identify the crocodilian species that a hide comes from, especially in a finished product.”).
69. See id. (“California can, ‘unwittingly accept the importation of critically endangered animal parts [that have been] labeled as parts from unprotected species.’”). Because the American alligator and American crocodile are distinguished by their snouts, it is harder to identify which species an imported skin is from when an importer receives only the skin. National Parks Conservation Association, American Alligator, http://www.npca.org/marine_and_coastal/marine_wildlife/alligator.html (last visited Jan. 4, 2010) (on file with the McGeorge Law Review).
70. See Alligator Farming Struggles Along with Economy, HOUMA TODAY, Apr. 9, 2009,
item—alligator skins—that are sold to high-end, luxury stores, such as Gucci, Louis Vuitton, and Versace. Because few consumers have “extra cash to spend on alligator skin belts and shoes,” high-end stores can rely on existing inventory to fill current orders without placing new orders from the farmers. This leaves Louisiana’s farmers with “a lot of alligators and few options,” because “if they’re not buying, [alligator farmers are] not selling.” Although alligator meat is in demand, farmers cannot run their operations on the sale of meat alone, which fetches about $6.50 per pound. A single alligator skin sells for $180 to $245.

If there was ever a time that California’s support of the Louisiana alligator markets was imperative, it is probably now. In fact, prior to Chapter 15’s enactment, the Louisiana Fur and Alligator Advisory Council pledged to “[d]evelop a strategy and coordinate the effort to maintain the legal importation of alligator and crocodile products into California” past the 2010 sunset date. If California closes its doors to alligator importation, the Louisiana farmers—and economy—will suffer a greater loss.

V. CONCLUSION

Prior to Chapter 15, the California Legislature lifted the state’s prohibition on alligator and crocodile importation until 2010. Because of the positive effects that this legalized importation has had on Louisiana’s alligator industry, Louisiana businesses, politicians, and landowners have called for an extended sunset date. In response, Chapter 15 legalizes alligator and crocodile importation until January 1, 2015—allowing an additional five years for California retailers to support the alligator industry and for Louisiana farmers to
reap the benefits—before it will again be prohibited. Chapter 15 also amends prior law to further protect species listed as endangered under the Endangered Species Act or other federal and international laws. It clarifies that the extended sunset date does not override the federal prohibition on the importation and sale of endangered alligators and crocodiles and that any such importation or sale will be in violation of applicable federal or international laws. Although supporters argue that the extended sunset date is necessary to promote the sustainability of the once-endangered American alligator and the Louisiana economy, opponents argue that it further harms the species and those species that closely resemble it. Whether legalized importation of the hides will endanger or restore crocodilian species is a question that only time can solve.

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81. See CAL. PENAL CODE § 6530(b)(1) (amended by Chapter 15) (“Commencing January 1, 2015, it shall be unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any crocodile or alligator.”).

82. See id. § 6530(b)(2) (amended by Chapter 15) (clarifying that the importation or sale of species protected under federal or international law is not permitted by Chapter 15 and will be in violation of such federal or international laws).

83. Id.

84. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 609, at 3 (June 16, 2009).
Chapter 266: California’s Initiative to Stop Inhalant Abuse Among Minors

Edmund Yan

Code Section Affected
Penal Code § 381c (new).
AB 1015 (Torlakson); 2009 STAT. Ch. 266.

I. INTRODUCTION

Nitrous oxide and other toxic substances are found in many common household products, such as paint, hairspray, glue, and air fresheners. When used as intended, these products serve a useful purpose and pose no threat to the health and safety of individuals. Unfortunately, one can use them improperly as inhalants, causing intoxication, dizziness, and other mind-altering effects that can lead to seizures, permanent brain damage, and even death. Many young children who use inhalants perform poorly in school and increase their chances of becoming addicts of “harder” drugs as they get older. Both frequent and first-time users can die from what is called Sudden Sniffing Death Syndrome—a lethal effect that is caused by an irregular heart rate stimulated by inhalants. “The National Inhalant Prevention Coalition (NIPC) reports approximately 100 to 125 inhalant deaths per year.”

Notably, inhalant abuse is becoming a common problem among minors in the United States. A 2008 study “found that among students surveyed, 15.7% of eighth graders, 12.8% of tenth graders, and 9.9% of twelfth graders reported use of inhalants.” One of the most popular inhalants for minors are whippits, which

2. See id. at 2 (providing a list of common household products that are not only useful for practical purposes but can also be abused as inhalants).
4. See SDLRC, supra note 1, at 2 (explaining the correlation between inhalant use and problems in school).
5. See NIPC, supra note 3 (“[M]any [minors who use inhalants] may progress to ‘harder’ drugs in their teens or even use them concurrently with inhalants.”).
6. SDLRC, supra note 1, at 2.
7. NIPC, supra note 3. But since there can be other related but unreported deaths, this statistic does not provide an accurate picture of the problems surrounding inhalant use. Id.
8. See SDLRC, supra note 1, at 1 (“One in five students in the country has abused an inhalant by the eighth grade.”).
9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1015, at 4 (Apr. 13, 2009); Monitoring the Future, Figure 12—Inhalants: Trends in Annual Use, Risk, and Disapproval, Grades 8, 10, and 12, http://www.monitoringthefuture.org/data/08data/fig08_12.pdf (last visited Jan. 18, 2010) (on file with the
are small metal canisters containing nitrous oxide, or “laughing gas,” commonly used as a whipping agent in whipped cream bottles.\(^\text{10}\) Children can easily buy whippits because they cost merely $0.25 to $0.50 each and are available at any “mom and pop” store.\(^\text{11}\) As a result, affordable and legal devices like these allow young children to become more susceptible to inhalant abuse.\(^\text{12}\)

A major problem leading to inhalant abuse among minors is the lack of information and knowledge about its risks.\(^\text{13}\) Many schools and communities do not offer awareness programs, and “adults are not sufficiently aware of the [inhalant abuse] problem.”\(^\text{14}\) Moreover, children themselves are unaware of the consequences.\(^\text{15}\) A 2008 study discovered that about forty percent of eighth- and tenth-graders do not believe using inhalants once or twice can pose great physical risks.\(^\text{16}\) In reality, single or isolated usages can lead to serious harm or death.\(^\text{17}\)

Chapter 266 aims to prevent and reduce inhalant abuse among young children by prohibiting the sale or distribution of products that contain nitrous oxide to minors.\(^\text{18}\)

II. LEGAL BACKGROUND

A. Federal Law

The Controlled Substances Act (CSA) regulates the use, possession, and distribution of many types of drugs and other substances.\(^\text{19}\) The CSA and other federal laws, however, do not regulate most of the common products used as

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12. Id.


14. SDLRC, supra note 1, at 2.

15. Id.

16. Monitoring the Future, supra note 9.\(^\text{15}\)


18. CAL. PENAL CODE § 381c(b) (enacted by Chapter 266).

inhalants, such as spray paint, placing the burden of regulation on state legislatures.  

B. Other States’ Laws

Currently, thirty-eight other states have laws similar to Chapter 266 that criminalize the sale or distribution of nitrous oxide and other volatile substances to minors. Some states go further to protect minors, making it a crime to offer to sell toxic substances to minors. Minnesota even requires businesses to post signs saying that it is illegal to sell butane lighters to minors, and Texas mandates businesses selling toxic substances to pay license fees to fund prevention programs.

C. California Law

The California Legislature recognized the dangers associated with inhalant abuse when it enacted section 381 of the Penal Code. This law prohibits anyone from possessing material containing toxic substances, such as nitrous oxide, with the intent to use it as an inhalant for intoxication. Proving intent, however, is difficult, and law enforcement officers are unable to enforce this law unless they actually observe abusers inhaling the toxic substance. In re Alonzo C. illustrates the legal obstacles that stand in the way of preventing inhalant abuse. In this case, officers responded to a 911 call alleging that minors were “sniffing glue or paint in [an] alley.” When officers arrived, they arrested one of the minors, whose breath smelled like chemicals and whose nostrils and hands showed traces of silver paint. The circumstances surrounding the arrest provided reasonable cause to believe that the detained minor had been intentionally sniffing paint—

22. See SDLRC, supra note 1, at 3 (reporting that Illinois prohibits individuals from knowingly selling, offering, or delivering inhalants to minors).
23. Id. at 4.
24. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1015, at 3-4 (Apr. 13, 2009).
25. CAL. PENAL CODE § 381(b) (West 1999).
26. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1015, at 4 (Apr. 13, 2009) (emphasizing the “infirmity” of existing law).
28. Id. at 710, 151 Cal. Rptr. at 193.
29. Id.
misdemeanor under section 381.\textsuperscript{30} Unfortunately, since the minor had not sniffed in the officers’ presence, the court ruled that the minor did not violate the statute.\textsuperscript{31}

Besides its enforcement problems, existing law does not explicitly prevent minors from obtaining inhalants, placing them at the risk for abuse.\textsuperscript{32} Before Chapter 266, there was no California law that prohibited the sale or distribution of nitrous oxide or other toxic substances to minors,\textsuperscript{33} who are most at risk for inhalant abuse.\textsuperscript{34} Chapter 266 attempts to protect minors from such abuse.

\section*{III. Chapter 266}

Chapter 266, responding to the limitations of prior California law, prohibits the sale or distribution of any device or canister containing nitrous oxide to any person under the age of eighteen.\textsuperscript{35} Individuals who violate this statute are guilty of a misdemeanor.\textsuperscript{36} Moreover, businesses that knowingly and repeatedly violate this section may have their business licenses suspended for up to one year.\textsuperscript{37} Since Chapter 266 focuses on illegal uses of nitrous oxide, it does not apply to certain persons who administer nitrous oxide for medical or dental care\textsuperscript{38} or to the sale of nitrous oxide that is used as a propellant in food products.\textsuperscript{39}

\section*{IV. Analysis of Chapter 266}

\subsection*{A. Legal Limitations of Chapter 266}

Chapter 266 is limited because it only proscribes the sale and distribution of products that store nitrous oxide.\textsuperscript{40} It does not regulate manufactured goods that

\begin{footnotesize}
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\item \textsuperscript{30} \textit{id.} at 715, 151 Cal. Rptr. at 196-97.
\item \textsuperscript{31} \textit{See id.} ("[T]he officer did not have reasonable cause to believe that that misdemeanor took place in his presence.").
\item \textsuperscript{32} \textsc{Assembly Committee on Public Safety, Committee Analysis of AB 1015}, at 4 (Apr. 13, 2009) (explaining that existing law prior to Chapter 266 "[did] not adequately curtail access of nitrous oxide by youth").
\item \textsuperscript{33} Delgadillo Press Release, \textit{supra} note 10 ("Remarkably, there is currently no law in California that makes it illegal to sell or provide this lethal substance to minors.").
\item \textsuperscript{34} \textsc{Assembly Committee on Public Safety, Committee Analysis of AB 1015}, at 3-4 (Apr. 13, 2009).
\item \textsuperscript{35} \textsc{Cal. Penal Code} § 381c(b) (enacted by Chapter 266).
\item \textsuperscript{36} \textit{See id.} § 381c(b)-(c) (enacted by Chapter 266) ("The court shall consider ordering the person to perform community service as a condition of probation. It is a defense to this crime that the defendant. . . reasonably believed that the minor involved in the offense was at least 18 years of age.").
\item \textsuperscript{37} \textit{See id.} § 381c(e) (enacted by Chapter 266) (providing, however, an exception that exempts an owner who makes a good faith attempt to prevent illegal sales or distribution by his employees).
\item \textsuperscript{38} \textit{id.} § 381c(f) (enacted by Chapter 266).
\item \textsuperscript{39} \textit{id.} § 381c(g) (enacted by Chapter 266).
\item \textsuperscript{40} \textit{id.} § 381c(b) (enacted by Chapter 266).
\end{itemize}
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contain other forms of toxic compounds that minors can also use as inhalants.\textsuperscript{41} Although nitrous oxide is one of the most popular inhalants among minors, children between the ages of twelve and fifteen frequently turn to other forms of toxic substances found in glue, shoe polish, hairspray, and lighter fluid when they begin using inhalants.\textsuperscript{42} Thus, minors who cannot buy nitrous oxide because of Chapter 266 can still purchase other volatile substances to inhale.\textsuperscript{43} Moreover, children can persuade their parents to help them purchase whippets or other inhalants that Chapter 266 restricts.\textsuperscript{44} Because it is so limited in what it actually does, Chapter 266 may not be effective in preventing inhalant abuse among minors.\textsuperscript{45}

\textbf{B. Learning from Australia}

Australia presents a model of success for California to consider.\textsuperscript{46} Similar to Chapter 266, many jurisdictions in Australia have laws that explicitly regulate inhalant use.\textsuperscript{47} In fact, Australia went even further in its regulation of inhalant abuse when it recently enacted legislative measures to further protect minors.\textsuperscript{48} For instance, police officers in Victoria, Australia, are allowed to search minors who they reasonably believe possess volatile substances for inhalant use and consequently have the power to seize the chemical products.\textsuperscript{49} Unlike current California laws, these regulations in Australia use proactive measures to discourage inhalant use.\textsuperscript{50}

Some, however, disagree on the effectiveness of criminalizing the use of inhalants.\textsuperscript{51} Instead of helping young children, regulations on inhalant use tarnish the lives of minors by handing them criminal records that place their employment

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\item \textsuperscript{41} \textsc{Cal. Penal Code} § 381c (enacted by Chapter 266).
\item \textsuperscript{42} See \textsc{National Institute on Drug Abuse, NIDA InfoFacts: Inhalants, http://drugabuse.gov/Infofacts/inhalants.html} (last visited Jan. 22, 2010) [hereinafter NIDA] (on file with the \textsc{McGeorge Law Review}) ("Adolescents tend to abuse different products at different ages.").
\item \textsuperscript{43} See \textsc{NIPC, supra} note 3 (listing other commonly abused products like cement and magic markers).
\item \textsuperscript{44} See \textit{id.} (explaining that inhalant products are useful everyday products and thus it is difficult to prevent access to them).
\item \textsuperscript{45} \textit{id.} ("In 2002, more than 22.8 million Americans reported ever having used an inhalant . . . .").
\item \textsuperscript{47} See \textit{id.} at 65 (describing laws prohibiting anyone from possessing petrol for purposes of inhalation).
\item \textsuperscript{48} \textit{id.}
\item \textsuperscript{49} \textit{id.}; see also \textsc{Cal. Penal Code} § 381(b) (West 1999) (allowing arrest and seizure only if officers actually observed inhalation).
\item \textsuperscript{50} See NIAT, supra note 46, at 65 (stating that the strength of these regulations “is that it allows the immediate source of harm to be removed”).
\item \textsuperscript{51} \textit{id.} ("There is significant opposition from both the health and law enforcement sectors to the criminalisation [sic] of inhalant use.").
\end{itemize}
opportunities at risk. More importantly, these laws may give the public a false sense of security and deter schools and parents from taking further action to prevent inhalant use.

C. Education Programs to Answer the Shortcomings of the Law

Despite Chapter 266, minors will continue to have easy access to inhalants unless the Legislature bans the sale of all products capable of inhalant abuse. Some claim that the correct response to discourage children from abusing inhalants is not to simply limit access to volatile substances, but to educate them about their harmful effects. In Virginia, one community reduced the rate of inhalant abuse by forty-four percent within eighteen months after it instituted the Substance Abuse Free Environment program. Likewise, thirty-five percent of children and young adults who participated in a one-year treatment program in South Dakota stopped abusing inhalants. Overseas, Singapore’s preventive education programs have successfully reduced the number of inhalant abuse arrests.

It is not enough, however, to educate children only; educating parents about inhalants is just as important. A study by the Partnership for a Drug-Free America found that children are fifty-percent less likely to experiment with inhalants if parents talk to them about the issue. Programs should teach parents ways to discuss with their children the risks and harms of inhalant use and provide parents with guidance to address abuse.

52. See id. (stating that criminalization also may force minors to seclude themselves from society).
53. See id. (explaining that these laws relieve “the community of a sense of responsibility for doing something about” children’s inhalant use).
55. See NIPC, supra note 3 (explaining that many children do not see inhalants as being harmful because abusable products are so common).
57. SDLRC, supra note 1, at 5 (stating that a thirty-five-percent success rate is a “very good rate of success for this type of program”).
59. See Alliance for Consumer Educ., supra note 13 (explaining how parents who are aware of the issue can monitor the problem).
60. The Partnership for a Drug-Free America, 20th Annual Teen Study Shows 25 Percent Drop in Meth Use over Three Years; Marijuana Down 30 Percent over Ten Years (Apr. 30, 2009), http://www.drugfree.org/Portal/About/NewsReleases/20th_Annual_Teen_Study (on file with the McGeorge Law Review); see also Alliance for Consumer Educ., supra note 13 (explaining how one community reduced the rate of inhalant abuse by making adults aware of the problem).
61. See Lockyer, supra note 17 (recommending many tips to parents so they can better prevent their children from using inhalants).
regulations to stop inhalant use, educating parents allows them to attack the problem in a deeper, more personal way.\textsuperscript{62}

Nonetheless, many feel that educating children about inhalant abuse increases the chance of experimentation and use.\textsuperscript{63} The biggest concern is that awareness may incite curiosity among children who are not engaged in, and may not even know about, the use of inhalants.\textsuperscript{64} But many abusers wish they had known of the harmful effects before they began their use, and such knowledge might have helped dampen their interest in using volatile substances before it even began.\textsuperscript{65} It is necessary to educate children about inhalant use even if knowledge may provoke experimentation, because knowledge allows children to make the right decision.\textsuperscript{66}

V. CONCLUSION

Inhalant-users enjoy the rush and euphoria that volatile substances provide, but many users fail to realize the physical consequences.\textsuperscript{67} The damaging effects of inhalant use can also go beyond physical harm.\textsuperscript{68} Chapter 266 is only a small step in the legislative change that may or may not provide the solution to alleviate the problem of inhalant abuse among minors.\textsuperscript{69} Promoting education and awareness regarding inhalant use may be the best way to deter minors,\textsuperscript{70} but the feasibility and success of such a program depends on the state’s financial capabilities to institute these essential improvements.\textsuperscript{71} At this moment, existing laws and programs addressing only “hard” drugs cannot effectively prevent inhalant use.\textsuperscript{72} Chapter 266 is an essential improvement in the law that aims to prevent inhalant abuse among minors, but the Legislature must provide more effective and hands-on, proactive solutions to reinforce Chapter 266.\textsuperscript{73}

\textsuperscript{62} See NIAT, supra note 46 (explaining that parents are the ones most able to identify the best ways to assist their children).

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} See NIPC, supra note 3 (“[B]ecause abusable products are so common, many youth do not perceive them as harmful and do not understand the consequences of using them.”).

\textsuperscript{67} Id. (explaining the effects and harms of inhalants).

\textsuperscript{68} SDLRC, supra note 1, at 2.

\textsuperscript{69} NIDA, supra note 42.

\textsuperscript{70} See Alliance for Consumer Educ., supra note 13 (stating that by making adults aware, one community reduced inhalant abuse by forty-four percent).


\textsuperscript{72} See SDLRC, supra note 1, at 5 (explaining why drug use and inhalant use are different and therefore warrant different approaches).

\textsuperscript{73} See Delgadillo, supra note 10 (reporting that the City of Los Angeles is developing a comprehensive anti-inhalant school program).