Chapter 34: Hitting Criminal Street Gangs Where It Hurts—Their Wallets

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Code Section Affected
Penal Code § 186.22a (amended).
SB 271 (Cedillo); 2007 STAT. Ch. 34.

I. INTRODUCTION

Imagine that you get into a car accident and your car needs auto-body work.¹ You look through the local advertisements and find a shop that appears to have a good reputation. The auto-body shop does a satisfactory job repairing your car, and you pay them for their services. Little did you know that your hard-earned money has just gone to support a criminal street gang’s enterprise. This is the same street gang that has terrorized your neighborhood and has caused people to feel like “prisoners in their own homes.”² This is the same street gang that has caused residents to remain indoors, to not allow their children to play outdoors, and has prevented relatives from visiting.³ How could a street gang masquerade itself as a legitimate business, and who can prevent this from happening?

II. LEGAL BACKGROUND

A. Leading the Fight Against Gangs

California has been a hotbed for gang activities and gang-related crimes since the 1980s.⁴ It is estimated that there are roughly 250,000 members in over 5,000 gangs in California alone.⁵ Criminal street gangs have been extremely problematic and crippling to the communities they operate in.⁶ “The cost to cities

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¹ This hypothetical is an entirely fictitious creation of the author.
³ Id.
⁴ See CAL. PENAL CODE § 186.21 (West 1999) (“[T]he state of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”); see also Bart H. Rubin, Hail, Hail, the Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute, 66 FORDHAM L. REV. 2033, 2059 & n.203 (1998) (discussing the Street Terrorism Enforcement and Prevention Act).
and victims who suffer from gang violence cost the State and County [two] billion dollars a year. In response to this growing problem, California became a pioneer in developing new anti-gang tactics. In 1988, California enacted the Street Terrorism and Prevention (STEP) Act to eradicate gang violence. In addition to STEP, California developed a novel strategy in attacking gang violence: the civil gang injunction.

B. The Civil Gang Injunction

Civil gang injunctions are rooted in public nuisance laws. Whenever a public nuisance is found to affect an entire neighborhood or community, prosecutors can file an injunction against the specific gang members responsible for the nuisance. After the court issues an injunction, gang members are prohibited from participating in public nuisance activities within a designated safety zone. The safety zone is usually the particular area where the gang has been operating its criminal enterprise.

Prosecutors can obtain a gang injunction under three statutory provisions: Civil Code section 3479, Health and Safety Code section 11570, and Penal

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8. See Matthew Mickle Werdegar, Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs, 51 STAN. L. REV. 409, 411 (1999) (“California, the state with the largest and most entrenched urban gang problem, has been at the forefront of this effort to develop aggressive new anti-gang tactics.”).
9. Riley, supra note 5, at 82; see also CAL. PENAL CODE § 186.22 (West 1999 & Supp. 2007) (describing the punishment of participating in criminal street gang activity and listing offenses that are considered criminal gang activity).
11. See Werdegar, supra note 8, at 409 (“California state courts are . . . using public nuisance laws to enjoin gang members from a range of activities within specified city zones.”).
12. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at 3 (June 18, 2007) (“[P]ublic nuisance activity include[es], but [is] not limited to, shootings, drug dealing, car-jackings, loitering, littering, vandalism, and graffiti.”).
13. See Grogger, supra note 10, at 72 (“As an action in civil court, an injunction begins with a petition to the court for relief from the public nuisance caused by specific gang members.”).
14. See id. (“The prohibited activities vary somewhat, but they typically include a mix of activities already forbidden by law, such as selling drugs or committing vandalism, and otherwise legal activities, such as carrying a cell phone or associating in public view with other gang members named in the suit.”).
15. Id.
16. See CAL. CIV. CODE § 3479 (West 1997) (“Anything which is injurious to health, including . . . the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance.”).
17. See CAL. HEALTH & SAFETY CODE § 11570 (West 2007) (“Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented . . . .”)

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Code section 186.22a.\textsuperscript{18} Since Civil Code section 3479 has the broadest application,\textsuperscript{19} prosecutors most commonly seek gang injunctions under that provision.\textsuperscript{20} Regardless of which provision is used, prosecutors must clearly establish the identity of the particular individuals responsible for creating the nuisance.\textsuperscript{21} In addition, prosecutors must clearly define the geographical scope of the public nuisance, and “courts must consider whether the district attorney has adequately proved that the gang is a public nuisance throughout the entire area.”\textsuperscript{22} “If an injunction’s area is drawn too widely, it should be struck down.”\textsuperscript{23}

C. Limitations on Gang Injunctions

A typical gang injunction consists of a list of prohibited acts, including otherwise legal acts.\textsuperscript{24} In order to be valid, gang injunctions must provide fair notice of what constitutes a violation, and enforcement cannot be arbitrary or discriminatory.\textsuperscript{25} In City of Chicago v. Morales, the U.S. Supreme Court invalidated a Chicago “gang ordinance” prohibiting loitering by gang members.\textsuperscript{26} The Court held the ordinance void for vagueness because it did not provide adequate notice of what constitutes a violation of the ordinance, and it allowed arbitrary enforcement by police officers.\textsuperscript{27}

D. Existing Law

California law states that any building or place used by criminal street gang

\footnotesize{\textsuperscript{18} SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 2 (Apr. 12, 2007); see also CAL. PENAL CODE § 186.22(a) (West 1999 & Supp. 2007) (“Every building or place used by members of a criminal street gang for the purpose of the commission of the offenses listed in subdivision (e) of Section 186.22 or any offense involving dangerous or deadly weapons, burglary, or rape . . . is a nuisance which shall be enjoined, abated, and prevented . . . .”); id. § 186.22(e) (listing a variety of criminal offenses).}

\footnotesize{\textsuperscript{19} SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 2 (Apr. 12, 2007) (“It appears that prosecutors typically rely on Civil Code Section 3479 because that section has the broadest application. . . . Civil Code Section 3479 applies to any public nuisance, not limited to places or buildings.”). The Civil Code specifically refers to the “illegal sale of controlled substances.” CAL. CIV. CODE § 3479.}

\footnotesize{\textsuperscript{20} SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 2 (Apr. 12, 2007).}

\footnotesize{\textsuperscript{21} Grogger, supra note 10, at 72.}

\footnotesize{\textsuperscript{22} Scott E. Atkinson, Note, The Outer Limits of Gang Injunctions, 59 VAND. L. REv. 1693, 1707 (2006).}

\footnotesize{\textsuperscript{23} Id.}

\footnotesize{\textsuperscript{24} Werdegar, supra note 8, at 417.}

\footnotesize{\textsuperscript{25} See Atkinson, supra note 22, at 1728 (“A law may be unconstitutionally vague for either of two reasons: (1) it may provide inadequate notice to enable ordinary people to understand what conduct it prohibits; or (2) it may authorize or encourage arbitrary and discriminatory enforcement.”).}

\footnotesize{\textsuperscript{26} City of Chicago v. Morales, 527 U.S. 41, 64 (1999); see also Atkinson, supra note 22, at 1728 (explaining the ordinance was struck down because it did not give adequate notice of prohibited conduct and it allowed arbitrary enforcement by the police).}

\footnotesize{\textsuperscript{27} Morales, 527 U.S. at 58-64.}
members in the furtherance of committing a criminal offense,\(^{28}\) including burglary and rape, “is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or [a] private nuisance.”\(^{29}\) Existing law states that whenever a court issues an injunction pursuant to one of the statutory provisions listed above, the Attorney General may bring suit for monetary damages “on behalf of the community or neighborhood injured by that nuisance.”\(^{30}\) Any monetary damages shall be paid by the criminal street gang or its members, including any assets owned by the gang that were used to further the nuisance activities.\(^{31}\) Only those “who knew or should have known” of the criminal activity “shall be personally liable for the payment of the damages awarded.”\(^{32}\) Any damages recovered shall be deposited into a separate fund to be used solely for the benefit of the community that was harmed by the nuisance.\(^{33}\)

### III. Chapter 34

Chapter 34 amends section 186.22a(c) of the Penal Code by expanding the group of individuals who may bring suit under this section and allowing local prosecutors to pursue an action for damages due to gang-related activities.\(^{34}\) Specifically, it authorizes any district attorney or prosecuting city attorney to sue for damages on behalf of a community injured by a gang-created nuisance when an injunction has been issued.\(^{35}\)

### IV. Analysis

#### A. Necessity

Criminal street gangs have attained financial success similar to that of organized crime groups.\(^{36}\) The large amount of revenue brought in through their illegal activities has allowed them to acquire real estate and make business investments.\(^{37}\) These gangs have placed a financial strain on the communities they operate in by

\(\begin{align*}
28. & \text{See CAL. PENAL CODE § 186.22(e) (West 1999 & Supp. 2007) (listing criminal activities that are considered offenses).} \\
29. & \text{Id. § 186.22a(a).} \\
30. & \text{Id. § 186.22a(c).} \\
31. & \text{Id.} \\
32. & \text{Id.} \\
33. & \text{Id.} \\
34. & \text{CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at I (Apr. 9, 2007).} \\
35. & \text{CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at I (Apr. 9, 2007).} \\
36. & \text{Orloff Letter, supra note 6.} \\
37. & \text{Id.}
\end{align*}\)
“stifling legitimate business interests, driving real estate prices down and creating a haven for illegal activities.”

Even if a prosecuting attorney is able to shut down the headquarters of a gang within a given community, the reality is that many members of the gang still own property or live within the community. Before the enactment of Chapter 34, only the Attorney General’s office was authorized to bring a suit for damages on behalf of a community injured by a gang nuisance. Unfortunately, due to a lack of resources, the Attorney General’s office has yet to bring any action for damages against an enjoined gang. Chapter 34 remedies that problem by giving this authority to those who are better equipped and have intimate knowledge of the gang’s operation: district attorneys and prosecuting city attorneys.

These local prosecuting attorneys live and work in the communities that harbor such undesirable crime. They have the most familiarity with gang injunctions issued by the court and are able to reduce any delays in enforcement. Giving local prosecuting attorneys the authority to seek damages from gangs responsible for a public nuisance attacks the root of the criminal activity and stifles the economic choke-hold that gangs have on a community. It gives local prosecutors a tool they need to go after a gang’s assets, eliminate their source of funding, and return any monies recovered to the injured community.

Supporters of Chapter 34 believe it is imperative that prosecuting attorneys have sufficient resources to determine the particular gang members and locations listed in the injunction. Chapter 34 provides those resources, in conjunction with a recent amendment to an existing statute, by giving prosecutors access to the criminal database of the California Department of Justice. According to the sponsor of the

38. Id.

39. See Patrick McGreevy, City Seals off House It Says is Base for Gang, L.A. TIMES, Jan. 26, 2007, at B3 (“[T]wo young men who . . . said they were Avenues gang members scoffed at the notion that closing one house would eradicate the gang. . . . ‘We live in this neighborhood. Our families live here. Many of us own property here.’”).

40. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 3 (Apr. 12, 2007).

41. Id.

42. Id. at 3-4.

43. Id. at 3.

44. See id. (“They are the attorneys responsible for obtaining and enforcing the injunctions mentioned in the code section.”).

45. Letter from Michael A. Bolden, Political & Legislative Advocate, Am. Fed’n of State County Mun. Employees, to Assembly Member Jose Solorio, Cal. State Assembly (June 14, 2007) (on file with the McGeorge Law Review).

46. See Orloff Letter, supra note 6 (“Permitting district attorneys and prosecuting city attorneys to sue the gangs that create these conditions attacks the economics of the criminal activity, strips the criminal gangs of their economic power and remedies much of the harm caused to the community.”).

47. Letter from Rockard J. Delgadillo, City Attorney, Office of the City Attorney, L.A., to Assembly Member Jose Solorio, Cal. State Assembly (May 8, 2007) (on file with the McGeorge Law Review).

48. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at 4 (June 18, 2007).

49. Id. at 4-5; see also CAL. PENAL CODE § 11105(b)(5) (amended by 2007 Chapter 34) (requiring the Attorney General to furnish state summary criminal history information to “[c]ity attorneys pursuing civil gang injunctions”).
bill, “[c]riminal history information provides the city attorney with a view of the gang crime committed in certain geographical areas and assists in identifying the gang members responsible for committing those crimes.” Such a provision is important to avoid the constitutional concerns that were present in *Morales*.51

B. Notice and Representation

Sponsors of Chapter 34 note that gang injunction cases are complicated and require specificity in identifying the particular gang that created the nuisance and identifying the harmed community.52 Typically, gangs are not very organized, and it may be difficult to determine the leaders of a gang.53 In cases where it is difficult to identify the gang leader, California law allows members to be served generally.54 In such instances, “if a group of gang members are served on behalf of the gang but are not individually named in the complaint, a collective action problem arises: each member has an incentive to do nothing and to let other members respond to the nuisance suit.”55

Furthermore, California precedent establishes that gang members are not entitled to appointed counsel on matters of injunctions.56 “[A]ny gang members served on behalf of the gang cannot represent the [entire] gang as an unincorporated association,” meaning gang members must fend for themselves.57 Since gang members usually come from low socio-economic backgrounds, it is nearly impossible for them to afford counsel and defend their suits individually.58

C. Standard of Proof

There is concern over Chapter 34’s damage provision because it does not state the standard of proof the prosecution must meet in bringing a civil action.59

50. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at 5 (June 18, 2007).
51. See City of Chicago v. Morales, 527 U.S. 41, 58-64 (1999) (explaining that an ordinance must provide fair notice of what constitutes a violation and that enforcement cannot be arbitrary or discriminatory).
52. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at K (Apr. 9, 2007).
53. See Atkinson, supra note 22, at 1720-21 (“In a 1990 study of Los Angeles gangs, one sociologist concluded that Mexican American gangs are ‘informally organized, without acknowledged leadership.’”).
54. Id. at 1720-21 (citing CAL. CORP. CODE § 18220 (West 2006)).
55. Id. at 1721-22 (“If Member A does nothing, but Members B and C successfully argue . . . the gang’s conduct is not a public nuisance, Member A gets the benefit of B’s and C’s action . . . without having to pay any of the costs of defense. Because Members B and C have the same incentives as Member A, they will also do nothing, and the nuisance suit will probably end up unopposed in court.” (footnote omitted)).
56. Id. at 1722 (citing Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 83 Cal. Rptr. 2d 471, 478 (1999)).
57. Id. at 1722-23; see also Hudson Sangree, Yolo County DA Seeks New West Sacramento Anti-Gang Injunction, SACRAMENTO BEE, July 31, 2007, available at http://www.sacbee.com/101/v-print/story/301519.html (“While agreeing there was significant gang activity in West Sacramento, the appeal court said it was not enough to serve the injunction on only one low-level gang member.”).
58. Atkinson, supra note 22, at 1722-23.
59. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at K-L (Apr. 9, 2007).
In a civil nuisance suit for damages, the prosecution need only prove its case by a preponderance of the evidence.60 However, Chapter 34 provides that a civil action for damages is based on the “criminal activity being abated or enjoined.”61 One could argue “criminal activity” means a crime, particularly considering section 186.22(e)’s description of specific gang crimes that can be enjoined.62 In such a case, the prosecution would be required to prove its case beyond a reasonable doubt.63 However, the subdivision allowing an action for damages does not refer to the subdivision describing specific gang crimes worthy of injunction.64

“If the criminal activity supporting a claim for damages” does not require a criminal conviction, then it does not need to be proved beyond a reasonable doubt.65 However, a lesser standard of proof would conflict with current asset forfeiture law regarding organized crime and drug asset forfeiture.66 Under drug asset forfeiture law, a criminal conviction is required to seize a person’s assets.67 But if drug dealing is considered to be a nuisance, then prosecutors could seize the assets of a gang member without a criminal conviction by bringing suit for damages under Chapter 34.68 Critics may argue that seizing one’s assets by a preponderance of the evidence “punishes a person with less than sufficient proof.”69 However, as a preventative measure, “seizing the profits of drug dealing could reduce the motivation for and benefits of drug dealing.”70

Since the Attorney General has yet to bring an action for damages regarding a gang injunction, it is difficult to say what standard of proof the courts would require for a claim brought under the damage provision of section 186.22a.71 “It is likely that the application of the law will be decided in the appellate courts.”72

60. Id. at L.
61. CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34).
62. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at K-L (Apr. 9, 2007).
63. Id. at L.
64. Id.; see also CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34) (failing to provide that a conviction under Penal Code section 186.22 is required).
65. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at L (Apr. 9, 2007).
66. Id.; see also CAL. HEALTH & SAFETY CODE § 11488.4(i) (West 2007) (explaining that when forfeiture is sought under Health and Safety Code section 11470, the state or local government must prove a violation of the listed offenses beyond a reasonable doubt).
67. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at L (Apr. 9, 2007); see also CAL. HEALTH & SAFETY CODE § 11470.2 (explaining that a prosecutor may, upon conviction of the underlying crime, recover from those who manufacture or cultivate a controlled substance).
68. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at L (Apr. 9, 2007).
69. Id.
70. Id. at M.
71. See id. at K (“Because damages have apparently not been sought pursuant to subdivision (c) of Penal Code Section 186.22a in a gang injunction case, one cannot say how courts would implement the damages provisions.”).
72. Id.
V. CONCLUSION

Cities across America have taken notice of what California has done in combating gang violence. Fort Worth, Texas, is the latest city outside of California to file an injunction against gang members. “It is another tool” and “more of a proactive approach,” claimed Kevin Rousseau, a Tarrant County assistant prosecutor in Fort Worth. Last summer in Wichita Falls, fifteen members of the Varrio Carnales gang were sued in response to escalating violence in the city. Crime has since dropped by thirteen percent in the safety zone, and real estate value has been on the rise. Although these cities have successfully filed gang injunctions, none have brought a suit for damages similar to that authorized by Chapter 34. Pursuing the assets of a criminal street gang allows law enforcement to attack the root of the problem by reducing any economic control gangs have on their neighborhoods. In addition, Chapter 34 compensates the neighborhood or community that was injured by the gang-created nuisance. Looking towards the future, Chapter 34 will be a useful tool in preventing the furtherance of a criminal street gang’s enterprise by eradicating a gang’s business and source of funding, such as an auto-body shop.

73. See Angela K. Brown, Cities Sue Gangs in Bid to Stop Violence, WASH. POST, July 30, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900527.html (on file with the McGeorge Law Review) (“Civil injunctions were first filed against gang members in the 1980s in the Los Angeles area . . . . Since then, cities have used injunctions to target specific gangs or gang members . . . .”).
74. Id.
75. Id.
76. Id.
77. Id.
78. See Brown, supra note 73 (discussing how cities such as Fort Worth and Wichita Falls have brought injunctions against criminal gangs, but failing to mention that a suit for damages has been brought); see also CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34) (authorizing a suit for damages when an injunction has been issued).
80. See CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34) (“The damages recovered . . . shall be deposited into a separate segregated fund for payment to the governing body . . . and that governing body shall use those assets solely for the benefit of the community or neighborhood that has been injured by the nuisance.”); Orloff Letter, supra note 6 (discussing how SB 271 (Chapter 34) will compensate communities).
81. See Orloff Letter, supra note 6 (“Permitting district attorneys and prosecuting city attorneys to sue the gangs that create these conditions attacks the economics of the criminal activity, strips the criminal gangs of their economic power and remedies much of the harm caused to the community.”).
Fixing California Sentencing Law—The Problem with Piecemeal Reform

Stephanie Watson

Code Sections Affected
Penal Code §§ 1170, 1170.3 (new, amended, and repealed).
SB 40 (Romero); 2007 STAT. Ch. 3 (Effective March 30, 2007).

I. INTRODUCTION

On January 22, 2007, the U.S. Supreme Court in Cunningham v. California held California’s determinate sentencing law unconstitutional. The law violated the defendant’s Sixth Amendment right to a jury trial because the law authorized a judge—rather than a jury—to find facts that potentially warranted an increased term. The Court presented California two options with which to remedy its sentencing system. The first option would allow juries to find the facts on which to base an upper sentencing term, and the second option would increase the discretion of the judges to select an appropriate sentencing term. Prison reform advocates found that the Cunningham ruling provided a rare opportunity for thoughtful and effective long-term sentencing reform. California’s legislature, however, recognized that without a constitutional sentencing structure in place, chaos would quickly consume the courts. Thus, the Legislature hastily complied with Cunningham in Chapter 3 by increasing judicial discretion, but did not address long-term prison reform. One might ask whether a prudent response is just as important as a prompt one.

2. Id. (“Because the [determinate sentencing law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.”).
3. Id. (“California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court’s decisions.”).
4. See id. (noting that in response to the newly developing Sixth Amendment case law, states have either required juries to determine any fact that may be used to increase a sentence or granted judges the broad discretion to determine a sentence within a defined statutory range).
5. B. Cayenne Bird, SB40 Is Not a Prison Sentencing Fix Kill this Bill Now!, AM. CHRON., Mar. 21, 2007, http://www.americanchronicle.com/articles/viewArticle.asp?articleID=22554 [hereinafter Bird, Kill this Bill] (on file with the McGeorge Law Review) (“The Supreme Court ruling was a rare ray of hope to everyone whose lives have been devastated under this harshness.”); see also STANFORD CRIMINAL JUSTICE CRT., CALIFORNIA SENTENCING AND CORRECTIONS: SIGNIFICANT ISSUES 6 (2007), http://www.pewpublicsafety.org/pdfs/CA%20Sentencing%20Issues.pdf [hereinafter SIGNIFICANT ISSUES] (on file with the McGeorge Law Review) (“[S]ome argue that to ensure long-term improvements in the California corrections system, the Legislature must reconceive its entire scheme of sentencing statutes.”).
6. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007) (noting that until there is time for a thorough revision of California sentencing law “this bill would bring desperately needed stability to a court system that has been thrown into chaos by the Cunningham decision”).
7. See 2007 Cal. Stat. ch. 3, § 1 (stating the limited intent of the statute as an answer to Cunningham but
II. LEGAL BACKGROUND

A. California’s Past Sentencing Law

Prior to 1976, California operated under indeterminate sentencing, a sentencing philosophy driven by rehabilitation.9 Judges had the “discretion to impose sentences within broadly defined ranges,”10 which essentially set a statutory maximum term of confinement.11 The parole board, however, had the discretion to permit an inmate’s early release.12 Policymakers condemned California’s indeterminate sentencing system because it “lack[ed] uniformity, proportionality, and transparency, and . . . unrealistically promot[ed] rehabilitation as [its] primary goal.”13

In 1976, the California Legislature enacted the Determinate Sentencing Act (DSA) in response to the perceived failure of rehabilitation and lack of uniformity of indeterminate sentencing.14 The DSA described the purpose of California’s new sentencing scheme as punishment rather than rehabilitation.15 The DSA increased uniformity in sentencing structure by “limit[ing] [the] range of sentencing options for each offense”16 and by abolishing discretionary parole release.17 Different crimes were divided into prescribed categories, each category

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8. See Letter from Jeff Adachi, Public Defender, City & County of S.F., to Assembly Member Mark Leno, Cal. State Assembly (Mar. 20, 2007), in Bird, Kill this Bill, supra note 5 [hereinafter Letter from Adachi to Leno] (on file with the McGeorge Law Review) (“[I]t is also imperative that the state of California chooses that resolution wisely and with great care.”).


10. Id.; see, e.g., In re Lynch, 8 Cal. 3d 410, 413, 503 P.2d 921, 922 (1972) (citing the relevant indeterminate sentence as one year to life for a second offense of indecent exposure).


13. Id.


15. Dansky, supra note 9; BEHIND BARS, supra note 14.


Under the determinate sentencing law, the judge retains discretion to: (1) grant or deny probation to an eligible defendant, (2) choose a base term from among the three specified alternate terms, (3) choose a term for some enhancements from among three specified terms, (4) strike additional punishment for most enhancements, and (5) determine whether sentences will run concurrently or consecutively (except when consecutive sentences are mandated by statute).

Id.

17. Dansky, supra note 9.
with its own lower, middle, and upper sentencing term. Under the DSA, a determinate sentence consisted of a base term, plus conduct enhancements, and status enhancements.

California’s Rules of Court articulated the application of determinate sentencing law, which further promoted the sentencing scheme’s uniformity. Before Chapter 3 was passed, California law presumptively imposed the middle term for a convicted defendant unless aggravating or mitigating factors justified imposition of the upper or lower term. The Rules of Court identified those factors and how a judge could use them to determine an appropriate term. During a trial’s sentencing phase, the defense and prosecution could establish any mitigating or aggravating factors by a preponderance of the evidence. The judge would balance those factors and would depart from the presumptive term when warranted.  

B. Supreme Court Sentencing Precedent and Sixth Amendment Jurisprudence

California’s determinate sentencing scheme operated for nearly three decades; nonetheless, the Supreme Court’s decision in Cunningham was not
wholly unexpected. The Court viewed the Sixth Amendment’s guarantee of a jury trial to mean not only that the defendant has a right to present his or her case to a jury, but also that the jury has a right to determine the aggravating circumstance that justify a higher sentence. In 2000, the Court articulated this view in a new line of cases in Sixth Amendment jurisprudence.

The first of these cases was *Apprendi v. New Jersey.* In *Apprendi,* the defendant pled guilty to two weapons charges that would have resulted in a ten-year maximum sentence. The judge, however, sentenced the defendant to twelve years after determining the existence of a hate-crime enhancement by a preponderance of the evidence. The Court in *Apprendi* held that New Jersey’s determinate sentencing law, which permitted the two-year increase, violated the defendant’s Sixth Amendment right: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

*Blakely v. Washington* further developed this rule to define the statutory maximum as the highest sentence that the defendant could receive based solely on the jury’s verdict or the defendant’s guilty plea. In *Blakely,* the defendant pled guilty to second degree kidnapping—with a presumptive term of forty-nine to fifty-three months—but was sentenced to a ninety-month term after the judge found evidence of deliberate cruelty. The Court held that the presumptive term, rather than the maximum term set by the Washington Criminal Code, was the statutory maximum.


30. Amar, supra note 29.

31. *MODEL PENAL CODE: SENTENCING* 3 (Preliminary Draft No. 4, 2005) [hereinafter MPC SENTENCING].


33. *Id.* at 469-70.

34. *Id.* at 471.

35. *Id.* at 490.

36. *Blakely* v. Washington, 542 U.S. 296, 303-04 (2004) (“[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . . [T]he relevant ‘statutory maximum’ . . . . [is] the maximum [the judge] may impose without any additional findings.” (citations omitted)).

37. *Id.* at 299.

38. *Id.* at 298.

39. *Id.* at 303-04 (“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”).
In *United States v. Booker*, the Supreme Court applied its Sixth Amendment analysis to the mandatory Federal Sentencing Guidelines to clarify whether *Blakely* applied to the Guidelines. In a complicated decision, the Court issued two opinions—each supported by a five-to-four majority. First, Justice Stevens presented the “merits opinion,” which held the Guidelines unconstitutional because of the judicial fact-finding used to justify an aggravated sentence. This result—the application of the *Blakely* analysis to the Guidelines—was expected. Justice Breyer delivered the unexpected “remedial opinion,” which made the Guidelines advisory. The Justices agreed that advisory guidelines did not violate defendants’ Sixth Amendment right to a jury

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41. Federal courts needed clarification as to whether *Blakely* applied to the Federal Sentencing Guidelines because, while new sentencing hearings poured into federal courts, a circuit-split emerged. See, e.g., *United States v. Penaranda*, 375 F.3d 238, 247 (2d Cir. 2004) (certifying to the Supreme Court the question of whether to apply *Blakely* to the Federal Sentencing Guidelines because the “various attempts to implement *Blakely* ultimately may prove misguided—or even wholly unnecessary [and] while these judicial approaches are being litigated, defendants, victims, and the public will be left uncertain as to what sentences are lawful”); *United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004) (determining that *Blakely* did not apply to the Federal Sentencing Guidelines, but acknowledging the likelihood that “the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty”); *United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004) (determining that the Federal Sentencing Guidelines “violate the Sixth Amendment as interpreted by *Blakely*” while explicitly acknowledging that the “Supreme Court [may] speedily reverse”).

42. *Booker*, 543 U.S. at 243. The *Blakely* opinion acknowledged that amicus curiae United States noted the differences between Washington’s sentencing scheme and the Federal Sentencing Guidelines, but expressly stated that whether those differences were constitutionally significant was not an issue before the Court. *Blakely*, 542 U.S. at 305 n.9.

43. *Booker*, 543 U.S. at 226 (Stevens, Scalia, Souter, Thomas, Ginsburg); id. at 244 (Breyer, Rehnquist, O’Connor, Kennedy, Ginsburg); *MPC SENTENCING*, supra note 31, at 10 (“Remarkably, only Justice Ginsburg joined both majorities. Eight Members of the Court were in sharp disagreement with one or another of the Court’s major rulings.”).

44. *MPC SENTENCING*, supra note 31, at 11.

45. *Booker*, 543 U.S. at 243 (“All of the foregoing support our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines.”); see also *Amar*, supra note 29 (“[A]pplication of the Guidelines often requires just the type of fact findings that *Blakely* held are unconstitutional: sentence-lengthening judge-made fact findings. These judge-found facts (such as how much money was stolen, how many drugs were possessed, etc.), combined with facts found by the jury or implicit in the guilty plea, determined which Guidelines sentencing range (for example, [twenty to thirty] months) controlled each particular case.”).

46. See *MPC SENTENCING*, supra note 31, at 11 (“The merits opinion, for the most part, rehearsed the reasoning of *Blakely* and produced a constitutional ruling that was anticipated by most observers.”).

47. Id. at 11.

48. *Booker*, 543 U.S. at 245 (“We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory incompatible with today’s constitutional holding. . . . So modified, the federal sentencing statute, as amended, makes the Guidelines effectively advisory,” (citations omitted)); see also *Amar*, supra note 29 (“In lieu of mandatory Guidelines, the Court stated, the Guidelines ranges would now operate as advisory only. U.S. district judges would still be required to calculate sentencing ranges based on jury and judge-made factual findings, but would no longer be bound to impose a sentence in that range. Instead, the Court held, the district judge’s sentence must simply fall between the minimum and maximum set out by Congress in the particular criminal statute, and should be upheld on appellate review so long as it is ‘reasonable.’”).
trial, although the judge rather than the jury decided whether to impose an aggravated sentence.\textsuperscript{49}

In sum, the Supreme Court’s Sixth Amendment jurisprudence opposes the use of presumptive terms that judicial fact-finding can overcome.\textsuperscript{50} Yet the Sixth Amendment permits indeterminate sentencing systems that give judges nearly unlimited sentencing discretion within broad statutory ranges.\textsuperscript{51} Those two ideas are reconciled through the concept of exposure: if a judge can increase a presumptive term, a defendant is exposed to an unknown maximum sentence, while if a judge only has discretion to sentence within a predetermined range, a defendant is exposed to a known maximum sentence. The idea of exposure also explains why it is theoretically possible “to require a sentence in the aggravated range . . . unless the trial court finds the absence of aggravating circumstances,” because a jury determination is not constitutionally required if the sentence is mitigated.\textsuperscript{52}

In 2005, the defendant in \textit{People v. Black} challenged California’s sentencing scheme in light of the U.S. Supreme Court’s new Sixth Amendment jurisprudence.\textsuperscript{53} In \textit{Black}, however, the California Supreme Court held that judicial fact-finding to justify an upper term did not violate the Sixth Amendment.\textsuperscript{54} The court denied \textit{Blakely}’s applicability to California’s existing presumptive sentencing scheme,\textsuperscript{55} emphasizing the scheme’s flexibility.\textsuperscript{56} The U.S. Supreme Court disagreed.\textsuperscript{57}

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\textsuperscript{49} MPC SENTENCING, supra note 31, at 12 (“What Booker \textit{I} [the merits opinion] bestowed under the auspices of the Sixth Amendment, Booker \textit{II} [the remedial opinion] took completely away.”).
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\textsuperscript{50} Id. at 17.
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\textsuperscript{51} Id.
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\textsuperscript{52} Id. at 15 (“No jury determination is constitutionally necessary if [fact-finding] drive[s] punishment downward rather than upward.”).
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\textsuperscript{53} See \textit{People v. Black}, 35 Cal. 4th 1238, 1246, 113 P.3d 534, 537 (2005) (“We granted review to determine the effect of \textit{Blakely} on the validity of the trial court’s decisions to impose the upper term sentence . . . .”).
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\textsuperscript{54} Id. at 1244, 113 P.3d at 536.
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\textsuperscript{55} Id. at 1254, 113 P.3d at 543 (“A trial court’s imposition of an upper term sentence does not violate a defendant’s right to a jury trial under the principles set forth in \textit{Apprendi}, \textit{Blakely}, and \textit{Booker}.”).
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\textsuperscript{56} Id. at 1255, 113 P.3d at 543-44.
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Under the California scheme, a judge is free to base an upper term sentence on any aggravating factor that the judge deems significant, subject to specific prohibitions . . . . The judge’s discretion to identify aggravating factors in a case is guided by the requirement that they be “reasonably related to the decision being made.” Thus, section 1170, subdivision (b)’s requirement that the middle term be imposed unless an aggravating factor is found preserves the traditional broad range of judicial sentencing discretion. Although subdivision (b) is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be reasonable.
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\textsuperscript{57} Id. (citation omitted).
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\textsuperscript{57} Cunningham v. California, 127 S. Ct. 856, 871 (2007) (“Contrary to the \textit{Black} court’s holding, our decisions from \textit{Apprendi} to \textit{Booker} point to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum.”).
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C. Cunningham v. California

In *Cunningham v. California*, the U.S. Supreme Court held California’s sentencing scheme nearly indistinguishable from the sentencing schemes invalidated in *Blakely* and *Booker*.\(^{58}\) When the jury in *Cunningham* found the defendant guilty of continuous sexual abuse against a minor—a conviction that would have resulted in a presumptive twelve-year term—the judge found aggravating facts by a preponderance of the evidence and imposed a sixteen-year term.\(^{59}\) Just as in *Blakely*, the Court held that the presumptive term was the relevant statutory maximum.\(^{60}\) Thus, California’s determinate sentencing law violated a defendant’s Sixth Amendment right because aggravating facts that potentially warranted an increased sentence were “found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt.”\(^{61}\)

### III. CHAPTE R 3

Chapter 3 is California’s response to the U.S. Supreme Court’s decision in *Cunningham v. California*.\(^{62}\) The statute took effect immediately in March 2007 as an urgency measure,\(^{63}\) and is designed to stabilize California’s criminal justice system while the Legislature reviews California’s sentencing structure.\(^{64}\)

Chapter 3 aims to comply with the Sixth Amendment\(^ {65}\) by deleting the language in California’s determinate sentencing law that directed courts to impose the middle term absent aggravating or mitigating factors.\(^ {66}\) Judicial discretion to choose the appropriate term—lower, middle, or upper\(^ {67}\)—replaced the presumptive imposition of the middle term of imprisonment.\(^ {68}\) The decision is left entirely to the judge’s discretion and is not dependent upon the establishment

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\(^{58}\) *Id.* at 858.

\(^{59}\) *Id.* at 860.

\(^{60}\) *Id.* at 868.

\(^{61}\) *Id.*


\(^{65}\) *SIGNIFICANT ISSUES*, *supra* note 5, at 2.

\(^{66}\) See CAL. PENAL CODE § 1170(b) (amended by Chapter 3) (“When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.”).

\(^{67}\) *Id.* § 1170.3(a)(2) (enacted and amended by Chapter 3).

\(^{68}\) *Id.* § 1170(b) (amended by Chapter 3) (further stating that the interests of justice drive the courts’ discretion).
of any specific standard of proof.\textsuperscript{69} However, the judge must state a reason for his or her sentencing decision.\textsuperscript{70}

An additional feature of Chapter 3 monitors the effects of the new advisory sentencing policy on convicted felons.\textsuperscript{71} Biannually, beginning in July 2007, the California Department of Corrections and Rehabilitation (CDCR) must update its website with current information on the number of felons sentenced to the upper term.\textsuperscript{72}

The California Judicial Council is responsible for advising the Legislature, on or before January 1, 2008, of the effect and consequences of Chapter 3’s implementation.\textsuperscript{73} This includes, but is not limited to, a revision of California’s Rules of Court.\textsuperscript{74} Chapter 3 also contains a sunset provision,\textsuperscript{75} meaning without further legislative action to extend it, Chapter 3 remains in effect only until January 1, 2009.\textsuperscript{76}

IV. ANALYSIS OF CHAPTER 3

California’s options for responding to \textit{Cunningham} were limited: the Legislature had to either give the fact-finding role in the determinate system to the jury or increase judicial discretion.\textsuperscript{77} According to Chapter 3’s author, the bill did little more than codify the second option\textsuperscript{78} by raising the statutory maximum from the presumptive middle term to the upper term.\textsuperscript{79} Chapter 3 increases
judicial discretion by removing the requirement that judges rely on additional findings before altering a sentence. Not everyone felt the second option was the correct one—a small but vocal opposition found California’s legislative remedy ineffective and possibly unconstitutional.

A. Why Not Codify the First Option?

It was not a foregone conclusion that California would remedy its sentencing scheme with increased judicial discretion. Post-Blakely, states with presumptive sentencing guidelines favored the first option—allowing the trial jury or a bifurcated jury to determine any aggravating sentencing factors beyond a reasonable doubt. This approach, pioneered by the Kansas Legislature in 2002, is known as “Blakelyization.” Blakelyization attracts states where non-jury proceedings impose the majority of sentences. For such states, Blakelyization is cost effective because the additional jury requirement applies to so few cases. According to the American Law Institute, this approach “should be the preferred option among jurisdictions that have realized important gains through the implementation of sentencing reforms.”

As of 2005, only one state decided against Blakelyization—Tennessee. California followed Tennessee’s lead. Chapter 3’s author opposed Blakelyization because the issue of whether a bifurcated jury would be required

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80. Id.
82. See, e.g., Silva, supra note 29, at 241 (listing other possible remedies to a Sixth Amendment violation: holding a single jury trial or a bifurcated jury trial to determine aggravating factors, or imposing the same penalty on every defendant convicted of an offense regardless of aggravating or mitigating circumstances).
83. A bifurcated trial contains two phases: a guilt phase and a sentencing phase. Id.
84. MPC SENTENCING, supra note 31, at 20.
85. Id. at 20. The approach worked well in Kansas. Id. at 20-21. The state did not experience significant disruption because such a small percentage of cases went to trial and the new procedures did not require very much additional time. Id. at 20-21 n.65.
86. Id. at 21 (“The attraction of Blakelyization is greatest in jurisdictions that anticipate they will not have to make use of jury sentencing proceedings very often.”).
87. Id. at 21-22; see also Blakely v. Washington, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting) (“The Court can announce that the Constitution requires at least two jury trials for each criminal defendant—one for guilt, another for sentencing—but only because it knows full well that more than [ninety percent] of defendants will not go to trial even once, much less insist on two or more trials.”).
88. MPC SENTENCING, supra note 31, at 22.
89. Id. at 24 (stating that Tennessee chose Bookerization rather than Blakelyization when it “jettison[ed] formerly presumptive guidelines in favor of an advisory system in order to bypass Sixth Amendment requirements at sentencing”).
90. See infra Part IV.B (describing that California selected Bookerization over Blakelyization as a Sixth Amendment repair to its sentencing scheme).
for sentencing would be hotly contested.\textsuperscript{91} Such a bifurcation would “add substantial costs to an already overburdened court system.”\textsuperscript{92} As a result of budgetary constraints, judges might not grant bifurcated trials, which could lead to the prosecutor presenting evidence of aggravating factors to the same jury that determined guilt or innocence.\textsuperscript{93} Such a practice could be highly prejudicial to the defendant and would increase the number of appeals and possible reversals by appellate courts.\textsuperscript{94} Chapter 3’s author also argued that the increase in judicial discretion would “place[] no additional burden on the courts, the defendant or the prosecutor.”\textsuperscript{95}

In an unusual political alignment, however, Republican Senator McClintock joined Democratic Senator Migden and opposed Chapter 3.\textsuperscript{96} McClintock argued that Chapter 3 should have provided for bifurcated sentencing proceedings to ensure compliance with the Sixth Amendment.\textsuperscript{97} Other Chapter 3 opponents\textsuperscript{98} similarly supported Blakelyization for several reasons.\textsuperscript{99} First, the Supreme Court approved Blakelyization as a solution to California’s sentencing problems.\textsuperscript{100} Second, the fundamental and constitutional right to a jury trial would be protected, and aggravating factors would be proved beyond a reasonable doubt.\textsuperscript{101} Lastly, if Kansas served as any indicator, California’s sentencing system would not be overburdened by additional time required by such jury trials.\textsuperscript{102}

\textsuperscript{91} Assembly Floor, Committee Analysis of SB 40, at 4-5 (Mar. 26, 2007).

\textsuperscript{92} Id. at 4; see also Blakely, 542 U.S. at 319 (O’Connor, J., dissenting) (“If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury’s initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.”); id. at 336 (Breyer, J., dissenting) (“Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources.”).

\textsuperscript{93} Assembly Floor, Committee Analysis of SB 40, at 4 (Mar. 26, 2007).

\textsuperscript{94} Id.

\textsuperscript{95} Id. at 5.

\textsuperscript{96} Ofgang, supra note 63.

\textsuperscript{97} Id.


\textsuperscript{99} See infra notes 100-02 (describing the benefits of Blakelyization).

\textsuperscript{100} Cunningham v. California, 127 S. Ct. 856, 871 n.18 (2007) (expressly approving Tennessee’s approach to increase judicial discretion so a judge can impose any term within a statutory range); see also MPC Sentencing, supra note 31, at 24 (describing Tennessee’s approach as “Bookerization”).

\textsuperscript{101} Id.

\textsuperscript{102} See MPC Sentencing, supra note 31, at 20 (describing the effects of Blakelyization on Kansas’ sentencing system as minimal, due to the small number of criminal cases affected, of which most are resolved with pleas).
One of the first post-*Cunningham* appeals, however, explicitly supported the Legislature’s decision. In *People v. Sandoval*, the California Supreme Court held that while Blakelyization would comply with the Sixth Amendment, the existing system was not compatible with that approach: neither the determinate sentencing scheme nor the Rules of Court contemplated the use of a jury to determine aggravating factors. Problems might arise if prosecutors did not know how to charge and try the factors to a jury, and no comprehensive list of such factors exists. The court concluded, “engrafting a jury trial onto the sentencing process established in the former [determinate sentencing law] would significantly complicate and distort the sentencing scheme.”

B. California Chose Bookerization

If Blakelyization was the most popular legislative response for states with presumptive guidelines, “‘Bookerization’” became “[t]he most celebrated ‘avoidance’ technique.” This approach emerged after *Booker* articulated that judicial fact-finding did not implicate the Sixth Amendment when sentencing guidelines are advisory rather than mandatory. This route circumvents the Court’s developing Sixth Amendment jurisprudence.

Democratic Senator Gloria Romero, a vocal proponent of prison reform, authored Chapter 3. Along with other Democrats, she promoted Chapter 3 as a

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103. See *People v. Sandoval*, 41 Cal. 4th 825, 848, 161 P.3d 1146, 1160-61 (2007) (“Resentencing under such a discretionary scheme is preferable to the alternative of maintaining the requirement that the middle term be imposed in the absence of aggravating or mitigating factors but permitting a jury trial on aggravating circumstances.”).

104. *Id.* at 848-49, 161 P.3d at 1161 (explaining why permitting a jury trial on aggravating factors is incompatible with California’s existing sentencing system).

105. *Id.*

106. *Id.* at 848, 161 P.3d at 1161.

107. MPC *SENTENCING*, supra note 31, at 23; *see also* *id.* at 18-19 (stating that avoidance remodels a sentencing system to escape *Blakely* through one of the Sixth Amendment exceptions in the case law, as opposed to compliance, which modifies the existing system to satisfy the *Blakely* requirements of a jury trial); *Blakely* v. *Washington*, 542 U.S. 296, 320 (2004) (O’Connor, J., dissenting) (“To the extent that [states do not elect to bear the costs of jury trials to determine aggravating factors], there will be an inevitable increase in judicial discretion with all of its attendant failings.”).

108. *United States v. Booker*, 543 U.S. 220, 305 (2005) (Scalia, J., opinion of the Court) (finding an exception to the Sixth Amendment violation if the Federal Guidelines were advisory); *id.* at 233 (Stevens, J., opinion of the Court) (finding that if the Guidelines were advisory, “their use would not implicate the Sixth Amendment”); *id.* at 259-60 (Breyer, J., opinion of the Court) (finding that the constitutional issue would have been avoided if the Guidelines were not binding); *see also* MPC *SENTENCING*, supra note 31, at 23 (“*Booker* tells us that judicial fact-finding under an advisory guidelines system slips past *Blakely’s* Sixth Amendment rule . . . .”).


“stopgap measure” for long-term prison reform—a temporary remedy—complete with a sunset provision.\footnote{Ofgang, supra note 63 (describing Chapter 3 as a stopgap measure); CAL. PENAL CODE § 1170(h), 1170.3(c) (enacted by Chapter 3).} Senator Romero argued the stability that Chapter 3 provides to the sentencing system enables the Legislature to create a sentencing commission to review California’s complex sentencing practices\footnote{See infra notes 126-27 (criticizing the bill’s quick passage).} and to recommend permanent changes.\footnote{Cunningham v. California, 127 S. Ct. 856 (2007). Cunningham was decided on January 22, 2007. Id.} Further, the legislative intent of Chapter 3 characterized the bill as a response to Cunningham because it will maintain stability in the criminal justice system while the Legislature reviews the sentencing structure.\footnote{Only five Assembly Members and two Senators voted against Chapter 3. ASSEMBLY FLOOR, UNOFFICIAL BALLOT (Mar. 26, 2007) (listing DeVore, Hancock, Leno, Ma, and Swanson as voting against Chapter 3); SENATE FLOOR, UNOFFICIAL BALLOT (Mar. 28, 2007) (listing McClintock and Migden as voting against Chapter 3).} The bill’s quick passage, however, became a source of contention.\footnote{2007 Cal. Stat. ch. 3 (“Approved by Governor March 30, 2007. Filed with Secretary of State March 30, 2007.”).} Chapter 3 went into effect only two months after the Supreme Court decided Cunningham.\footnote{Id.} Nearly every member of both houses voted for the bill,\footnote{Id.} and the Governor signed it into law without delay.\footnote{Arnold Schwarzenegger, Cal. State Governor, Transcript of Governor Arnold Schwarzenegger’s Remarks at State Budget Release Press Conference, Jan. 10, 2007, http://gov.ca.gov/index.php?/speech/5116/ (on file with the McGeorge Law Review).} Governor Schwarzenegger commended the Legislature for the bill’s prompt passage\footnote{2007 Cal. Stat. ch. 3 (“Approved by Governor March 30, 2007. Filed with Secretary of State March 30, 2007.”).} and initially supported a sentencing commission in the 2007 budget.\footnote{SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 40, at 9 (Mar. 27, 2007). Among proponents are the California Attorney General, Los Angeles County District Attorney’s Office, California District Attorney’s Association, California Police Chiefs Association, California Peace Officers Association, Chief Probation Officers of California, San Bernardino County Sheriff, and Crime Victims United. Id.} Proponents of Chapter 3 were also pleased with the quick legislative response and showered the bill with accolades.\footnote{See, e.g., id. at 10 (“California’s sentencing scheme will once again function as it was designed to do.”).} One group suggested removing the sunset provision to make

21930 [hereinafter Bird, Say NO] (on file with the McGeorge Law Review) (describing Gloria Romero as a “heroine in prison reform”).
Chapter 3 “more than just a ‘temporary fix.’” The group reasoned that since Chapter 3 “repaired the law, there is no principled justification to ‘break’ it again by imposing a sunset provision that will undo this much-needed legislation.”

Opponents, on the other hand, accused legislators of drastically changing sentencing law with Chapter 3, “moving rapidly to get it approved before much opposition [could] mount.” Critics contended that because most criminal cases in California are resolved by non-jury disposition, such as plea-bargains or dismissal, Chapter 3 is not needed to maintain stability for the remaining cases that are affected by Cunningham. Moreover, uniformity is elusive when some judges sentence defendants to upper terms, while other judges do not. Jeff Adachi, the only elected public defender in California, commented that a defendant’s fate is often determined by “the luck of the draw,” which is only compounded by giving judges complete discretion to sentence.

A spokesperson for the group United for No Injustice, Oppression or Neglect (UNION) not only criticized Chapter 3, but also expressed disappointment with its author, a politician known for her role in prison reform. The general consensus among opponents was that Chapter 3 was merely a quick fix to the constitutional issues addressed by Cunningham. Cunningham provided what some saw as a perfect opportunity to address the persistent problems that plague California’s prison system—an opportunity that Chapter 3 overlooked.
C. Long-Term Effects of a Short-Term Solution

In hindsight, the Legislature’s decision to address Cunningham’s mandated sentencing changes and prison reform separately\(^{136}\) may have backfired.\(^{137}\) Chapter 3 was expected, even intended, to have a counterpart in prison reform—a sentencing commission.\(^{138}\) When Chapter 3 was passed, Democrats had Governor Schwarzenegger’s full support to create a sentencing commission; all that remained was “to work out the details” and determine “how much teeth that commission [would] have.”\(^{139}\) Two months after Chapter 3 passed, however, the Governor withdrew budgetary support for the sentencing commission and diverted the commission’s funding to build a new execution chamber at San Quentin.\(^{140}\) The political leverage to create a sentencing commission began to erode.\(^{141}\)

Chapter 3’s Bookerization, while ideal for partnership with a sentencing commission,\(^{142}\) was designed as a “stopgap measure.”\(^{143}\) Any effect Chapter 3 population, such that three-judge panels would be formed to determine the release of inmates).

\(^{135}\) See Bird, Kill this Bill, supra note 5 (finding that after the Cunningham ruling “there was hope that the legislature would do the right thing” and reform California’s sentencing laws, but that “SB40 will dash that hope”).

\(^{136}\) Ofgang, supra note 63 (describing that Governor Schwarzenegger first commended the Legislature for quickly passing SB 40 to clarify California’s sentencing standards, and then stated that he “look[ed] forward to working with the legislature” to reform California’s prison system).

\(^{137}\) See infra notes 140-41 (describing the difficulties of implementing prison reform after Chapter 3’s passage).

\(^{138}\) Assembly Floor, Committee Analysis of SB 40, at 5 (Mar. 26, 2007) (“Until such time that a sentencing commission (SB 110) can thoroughly perform its review, [Chapter 3] would bring desperately needed stability to a court system that has been thrown into chaos by the [Cunningham] decision.”); see also MPC Sentencing, supra note 31, at 26-27 (stating that, although advisory guidelines are less certain in effect than presumptive systems, the system gives a state the distinct advantage of allowing for a permanent sentencing commission to better amend guidelines over time).


\(^{142}\) MPC Sentencing, supra note 31, at 26-27.

An advisory guidelines system, while it may be weaker or less certain in its effects than a presumptive system, still gives a state the important advantage of a permanent sentencing commission with research responsibilities, the ability to generate correctional projections as needed by policymakers, and a mandate to amend guidelines over time in response to judicial behavior, the needs of the corrections system, and developing criminological knowledge.

Id.
will have as a more permanent solution to California’s sentencing problems is unknown.144 With the long-term solution of the sentencing commission on hold, the Legislature may extend Chapter 3 past the original 2009 sunset.145 Chapter 3’s actual impact is more relevant than ever.146

Advisory sentencing financially impacts California’s correction budget.147 The cost of the transition from presumptive to advisory sentencing may cost substantially more than additional jury fact-finding.148 The Assembly Committee on Appropriations noted that the annual fiscal impact of Chapter 3 is likely considerable.149 The Committee acknowledged that while many judges, prosecutors, and even defense attorneys did not believe Chapter 3 would drastically change current sentencing practices,150 advisory sentencing tends to increase prison populations.151 An increase in the number of offenders who receive the upper term directly correlates to an increase in California’s prison population.152 Even a relatively minor increase in the percentage of offenders sentenced to the upper term would incur significant cost due to the large number of offenders.153 The Committee estimated Chapter 3 requires at least thirteen million dollars in additional funding for California’s correctional budget.154

143. Ofgang, supra note 63.
144. See supra notes 126-31 and accompanying text (summarizing the views of Chapter 3 opponents).
145. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 40, at 10 (Mar. 27, 2007) (describing the California District Attorney’s Association suggestion that Chapter 3 become a permanent rather than a temporary fix to California’s sentencing scheme).
146. See infra notes 147-59 (predicting that Chapter 3 could significantly impact California’s correction budget and increase the racial disparity in sentencing).
147. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 40, at 1-2 (Mar. 21, 2007).
148. MPC SENTENCING, supra note 31, at 24 (“On policy grounds, substantial costs may attend the switch from presumptive to voluntary sentencing principles–especially from a state perspective.”).
149. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 40, at 1 (Mar. 21, 2007).
150. Id. at 25.
151. Id.; see also Letter from Adachi to Leno, supra note 8.
152. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 40, at 1-2 (Mar. 21, 2007).
153. Id.
Advisory sentencing also potentially amplifies current racial inequities in California’s prisons. In her Blakely dissent, Justice O’Connor noted the transition to determinate sentencing in Washington—guided rather than unguided discretion—correlated to a reduction in racial disparity. She anticipated the regression toward unguided discretion would correlate to an increase in racial disparity in Washington once again. Jeff Adachi suggested that racial disparities in sentencing should be closely monitored due to the “strong probability that [Chapter 3] will result in minority defendants receiving the highest sentence more often than white defendants.”

For example, about 54,000 offenders are projected to receive determinate prison sentences in 2006-07. In 2006, about 10,000 persons sentenced to state prison received a sentence with an upper term. Discounted by a [forty percent] estimate of sentences arrived at via plea, this figure is 6,000. At $43,000 per capita, every [one percent] increase above the 6,000 will cost about $2.6 million. Using 2006 as a base, if SB 40 increases the number of offenders who receive aggravated terms in 2006 by [five percent] (300 inmates), the cost would be about $13 million annually. (This is likely a conservative estimate as it assumes the average sentence increase is only one year served, when many existing sentencing triads contain aggravated terms several years greater than the presumptive middle term.) Also, the number of offenders receiving upper base terms could decrease, though discussions with practitioners suggest there is little reason to believe any increase in the number of lower term sentences will offset the increase in upper term sentences.

Id.

154. Id. at 1. Chapter 3’s opponents suggest that the budget will increase by much more than $13 million. See, e.g., Letter from Adachi to Leno, supra note 8 (estimating a budget increase of “at least $193.5 million”); Bird, Kill this Bill, supra note 5 (estimating the budget increase to be in the “hundreds of millions of dollars”).

155. Adachi, SB 40 Will Not “Fix,” supra note 81; see also Letter from Adachi to Leno, supra note 8 (“The Human Rights Watch Report, ‘Racial Disparities in the Criminal Justice System,’ found that when sentenced for drug offenses in state court, whites serve an average of 27 months while blacks serve an average of 46 months. Thus blacks and other minorities are more likely to receive aggravated sentences than their white counterparts. Racial disparities in the criminal justice system have become such the norm that would-be startling statistics regarding sentencing disparities between white defendants and minority defendants are oft times quickly passed over without a second glance.”).


157. Id. at 315 (“This [former indeterminate sentencing] of unguided discretion inevitably resulted in severe disparities. . . . [and] rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.”).

158. Adachi, Battle Continues, supra note 98.


For over a decade academics have concluded less constrained judicial decision-making may lead to unjustifiable reliance on unstated biases in determining a defendant’s sentence. At least two legal scholars Albonetti (1991), and Steffensmeier et al. (1998) have described how judges, when equipped with limited information for assessing a defendant’s criminal propensity, may act on their own preconceptions. Consequently, those defendants who possess undesirable extralegal characteristics such as lower social and economic status are sentenced more harshly.

Id.
V. CONCLUSION

While Chapter 3 addresses the Sixth Amendment violation in California’s determinate sentencing law, it does little more than that.160 Chapter 3 may not significantly alter California’s sentencing scheme absent long-term sentencing reform.161 California’s Legislature designed Chapter 3 to work in conjunction with a sentencing commission162 that would address issues that extend far beyond Cunningham to issues like prison overcrowding.163 However, that sentencing commission was not passed with Chapter 3.164

Chapter 3 can likely maintain the status quo, but “piecemeal reform always creates a risk that it will patch up the system, allowing it to function, but still badly.”165 Further, because advisory guidelines are unenforceable, the system “must work harder to gain the results that presumptive guidelines regularly achieve.”166 Bookerization may still prove effective as long as: (1) the Legislature rapidly creates the promised sentencing commission;167 (2) the commission is able to implement a long-term, non-partisan, effective and constitutional sentencing scheme in California; and (3) the effects of Chapter 3 do not conflict with the Legislature’s intent to keep sentencing disparities to a minimum.168

160. See 2007 Cal. Stat. ch. 3, § 1 (stating that Chapter 3 will stabilize California’s criminal justice system while sentencing structures are reviewed). Implicit in Chapter 3’s purpose is that any prison reform beyond the immediate Sixth Amendment response is left to a counterpart bill—a sentencing commission. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007).

161. Post-Cunningham, one court has already affirmed this position, finding that changes caused by Bookerization would be insubstantial and “as a practical matter would not substantially alter the [determinate sentencing law] as initially adopted by the Legislature.” People v. Sandoval, 41 Cal. 4th 825, 850, 852, 161 P.3d 1146, 1162, 1164 (2007). The court also believed the increase in judicial discretion would not “undermine the legislative goals of establishing proportionate sentences and reducing disparity.” Id. at 850, 161 P.3d at 1162.

162. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007) (describing that California’s sentencing scheme needs to be reviewed by a sentencing commission, but that Chapter 3 brings needed stability to that scheme “[u]ntil such time that a sentencing commission (SB 110) can thoroughly perform its review”).

163. See Moore, supra note 134 and accompanying text (describing the reality of prison overcrowding in California and the responsive measures being taken to alleviate that problem).


165. Letter from Elizabeth Rindskopf Parker, Dean, Univ. of Pac., McGeorge Sch. of Law, and Michael Vitiello, Professor & Scholar, Univ. of Pac., McGeorge Sch. of Law, to Camilla Kieliger, Admin. Coordinator, Cal. State Judicial Council (July 24, 2007) (on file with the McGeorge Law Review).

166. MPC SENTENCING, supra note 31, at 25.


168. See People v. Sandoval, 41 Cal. 4th 825, 850, 161 P.3d 1146, 1162 (2007) (stating that the California Supreme Court believed that Chapter 3’s increase in judicial discretion over sentencing would not conflict with the Legislature’s goals to reduce sentencing disparity).
Chapter 252: Helping to Manage California’s Overcrowded Jails

Robert Carlin

Code Section Affected
Penal Code § 1203.017 (new).
SB 959 (Romero); 2007 STAT. Ch. 252 (Effective September 26, 2007).

I. INTRODUCTION

Outrage erupted when hotel heiress Paris Hilton was released from a Los Angeles County jail after serving only three days of a forty-five day jail sentence.1 Amidst the general furor, allegations were made that Hilton received special treatment because she was wealthy.2 Whether or not Paris Hilton’s early release resulted solely from special treatment, the phenomenon of misdemeanor offenders being released prematurely is not unusual in California.3 These early releases stem in large part from the overcrowding of California’s prisons and jails, which house populations far in excess of their original capacity.4 To make room for violent or felony offenders, jail officials are often left with little choice but to release low risk offenders, oftentimes far in advance of the completion of their sentences.5

To help manage this growing problem, the Legislature enacted Chapter 252 as an urgency statute.6 Chapter 252 makes it possible for counties to ensure that criminals who are released early serve their full sentence through involuntary, electronically monitored home detention.7

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2. Leonard & Smith, supra note 1.
4. See California’s Overcrowded Prisons Subject of Court Hearing, MADERA TRIB., June 8, 2007, http://www.maderatribune.com/news/newsview.asp?c=216535 [hereinafter Court Hearing] (on file with the McGeorge Law Review) (“California now has 172,000 prisoners living in space designed for fewer than 100,000.”); Letter from M. Steven Zehner, L.A. County, Sacramento Legislative Office, to Senator Gloria Romero, Cal. State Senate (Apr. 9, 2007) [hereinafter Zehner Letter] (on file with the McGeorge Law Review) (“In 2005, . . . 233,000 offenders were released early or were never incarcerated due to local jail overcrowding.”).
II. LEGAL BACKGROUND

A. California’s Continuing Crisis of Overcrowded Prisons and Jails

Overcrowded prisons are nothing new to California.8 County jails fare no better—inmates in at least twenty counties have won lawsuits because of the overpopulated conditions.9 As a result, courts have set mandatory population caps on county jails.10 Currently, several federal courts are also considering imposing statewide population caps on California’s prisons.11

Numerous solutions have been proposed to alleviate California’s overcrowded prisons and jails.12 Governor Schwarzenegger recently approved a massive increase in spending to facilitate the addition of 53,000 beds to California’s prisons and jails.13 Changes in the parole system and increased rehabilitative opportunities for parolees have also been suggested.14 Prior to these remedial measures, the Legislature had enacted a program of voluntary home detention to help counties oversee jail populations that continue to grow and exceed available jail space.15

8. See DATA ANALYSIS UNIT, CAL. DEP’T OF CORR. & REHAB., HISTORICAL TRENDS 1985-2005, at 10a tbl.10 (2006), http://www.cdcr.ca.gov/Research/Offender Information Services Branch/Annual/HIST/HIST2/HIST2d 2005.pdf [hereinafter HISTORICAL TRENDS] (on file with the McGeorge Law Review). In 1985, a population of 47,082 prisoners were housed in facilities designed to accommodate 29,042. Id. By 2005, the population of prisoners had increased to 164,179, while the capacity of the facilities had only grown to 81,008. Id.


10. See Shreema Mehta, Judge Forces LA County to End Jail Overcrowding, NEW STANDARD, Oct. 31, 2006, http://newstandardnews.net/content/index.cfm/items/3834 (on file with the McGeorge Law Review) (discussing the restrictions Judge Pregerson imposed upon Los Angeles County jails after it was revealed that the jails often held thirty-five inmates in temporary holding cells designed to accommodate twenty inmates); see also DO THE TIME, supra note 9, at 17 (discussing the early release of inmates due to overcrowding by Calaveras County, Los Angeles County, and San Bernardino County).


13. Andy Furillo, Governor Signs Prison Bill, SACRAMENTO BEE, May 3, 2007, http://www.sacbee.com/111/story/166239.html (on file with the McGeorge Law Review) (“[S]pace for another 13,000 beds will be added to county jails around the state, which are currently releasing 18,000 inmates a month due to lack of space.”); David Muradyan, California’s Response to Its Prison Overcrowding Crisis, 39 McGEORGE L. REV. 482 (2008).


B. Home Detention in Lieu of Jail

Existing law permits counties to implement a program that allows some inmates\(^\text{16}\) to voluntarily serve the remainder of their sentences under electronically monitored home detention.\(^\text{17}\) Under this program, an inmate must wear an electronic monitoring device, which ensures the inmate remains detained in his or her home.\(^\text{18}\) Exceptions to full-time home detention allow inmates to seek employment or education in the community,\(^\text{19}\) but if the inmate strays from these authorized exceptions he can be subject to additional punishment and removal from the program.\(^\text{20}\) Counties also have discretion to set an administrative fee based upon the inmate’s ability to pay for home detention.\(^\text{21}\)

C. Effectiveness of Voluntary Home Detention

Los Angeles County has compiled statistics based on its implementation of the home detention program.\(^\text{22}\) The program has proven to be extremely cost-efficient; even if the inmate is unable to pay, electronic monitoring costs a mere ten dollars per day, compared to the seventy dollars needed for incarceration.\(^\text{23}\) Furthermore, 55,002 inmates have been released on this program, which has opened up a corresponding number of beds for violent and serious criminals.\(^\text{24}\)

The voluntary home detention program is not without its problems.\(^\text{25}\) The number of inmates applying for voluntary home detention has dropped considerably over the past eight years.\(^\text{26}\) This reduction can be attributed in part

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16. The two classes of inmates eligible to enter the voluntary home detention program are minimum security inmates and low-risk offenders. “Minimum security inmate” means an inmate who, by established local classification criteria, would be eligible for placement in a Type IV local detention facility, as described in Title 15 of the California Code of Regulations, or for placement into the community for work or school activities, or who is determined to be a minimum security risk under a classification plan developed pursuant to Section 1050 of Title 15 of the California Code of Regulations. . . . “Low-risk offender” means a probationer, as defined by the National Institute of Corrections model probation system. Id. § 1203.016(b)(2)-(3); see also CAL. CODE REGS. tit. 15, § 1006 (2005) (defining a Type IV facility as “a local detention facility or portion thereof designated for the housing of inmates eligible under Penal Code Section 1208 for work/education furlough and/or other programs involving inmate access into the community”).

17. CAL. PENAL CODE § 1203.016(a).
18. Id. § 1203.016(b)(3).
19. Id. § 1203.016(f).
20. Id. § 1203.016(d); id. § 4532(b) (West 2000).
21. Id. § 1203.016(g).
22. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 959, at N-M (June 19, 2007).
24. Id.
25. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 959, at K-M (June 19, 2007) (discussing the difficulties a voluntary home detention program can encounter when prisons face severe overcrowding).
26. Id. at M. In 1997-1998, 16,659 inmates applied. By 2005-2006, the number of applicants had
to the cost of the program to inmates. Many inmates also understand that the population caps on county jails effectively means that there is little chance they will serve all, or in some cases any, of their sentences.

III. CHAPTER 252

Chapter 252 takes immediate action to help counties do their part to stem the looming prison and jail overcrowding crisis. It gives each county’s board of supervisors discretion to implement an involuntary home detention program to be administered by a correctional administrator. The board of supervisors is also empowered to enact “reasonable rules and regulations” for the involuntary home detention program.

Under the program, one day of home detention is equivalent to one day of incarceration, and participating inmates must be provided with the rules of detention upon request. Home detention requires electronic monitoring, which will not be charged to participating inmates. The correctional administrator may grant certain privileges to inmates in home detention, and the supervising peace...
officer can terminate home detention if the supervisor has “reasonable cause to believe” the inmate is violating the rules of detention or if electronic monitoring ceases to function properly.\textsuperscript{35}

The correctional administrator has sole discretion to determine the eligibility of inmates for participation in the home detention program based upon the criteria established in Chapter 252.\textsuperscript{36} Judicial recommendation for placement in the home detention program will be given great weight, and the court may prohibit an inmate’s participation in the program.\textsuperscript{37} If the correctional administrator overrides the recommendation of the court and denies an inmate participation in the program, the administrator must give specific reasons to the defendant in writing.\textsuperscript{38} The correctional administrator will provide information about the participant to the Corrections Standards Authority and, upon request, to the appropriate law enforcement agencies.\textsuperscript{39} Such information will only be used to measure the effects of the home detention program upon the community.\textsuperscript{40}

Chapter 252 also enacts several provisions to govern the implementation of home detention programs.\textsuperscript{41} First, no private or public agency may operate a home detention program without a written contract with the correctional administrator.\textsuperscript{42} The correctional administrator may only enter into such contracts with the approval of the board of supervisors.\textsuperscript{43} The home detention program prohibits any private or public agency from employing anyone participating in

\begin{footnotesize}
\begin{enumerate}
\item Id. § 1203.017(c) (enacted by Chapter 252). Termination of home detention requires “general or specific authorization of the correctional administrator” and may be effected “without a warrant of arrest.” Id.
\item Id. § 1203.017(d) (enacted by Chapter 252).
\item Id. § 1203.017(e) (enacted by Chapter 252).
\item Id. § 1203.017(d)(2) (enacted by Chapter 252) (“[N]otice of denial or removal shall include the participant’s appeal rights, as established by program administrative policy.”). These same procedural protections are accorded to “all persons removed from program participation.” Id.
\item Id. § 1203.017(h)(1) (enacted by Chapter 252).
\item Id. § 1203.017(h)(2) (enacted by Chapter 252). A law enforcement agency is one located in “a city or unincorporated area where an office is located to which persons on involuntary home detention report.” Id. § 1203.017(h)(1) (enacted by Chapter 252).
\item Id. § 1203.017(h)(3) (enacted by Chapter 252).
\item See id. § 1203.017(i) (enacted by Chapter 252) (explaining that “[i]t is the intent of the Legislature that home detention programs established under this section maintain the highest public confidence, credibility, and public safety” and explaining how the program will be implemented to further these standards).
\item Id. § 1203.017(i)(1) (enacted by Chapter 252).
\item Id. (enacted by Chapter 252).
\end{enumerate}
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the program.\textsuperscript{44} Second, the normal booking process for sentenced offenders cannot be circumvented, and all participants must be supervised.\textsuperscript{45}

There are several additional requirements for privately operated home detention programs.\textsuperscript{46} Every contract with a private agency must contain several provisions.\textsuperscript{47} For example, the private agency must comply with all standards established by state correctional agencies.\textsuperscript{48} Furthermore, the respective liabilities of the private agency and the county must be established by contract.\textsuperscript{49} The contract must require that the private agency demonstrate financial responsibility\textsuperscript{50} to the board of supervisors.\textsuperscript{51} In doing so, the private agency ensures it can “fully indemnify the county for [any] reasonably foreseeable public liability.”\textsuperscript{52} Finally, each contract must also provide that the correctional administrator may terminate the contract if the contractor fails to demonstrate financial responsibility.\textsuperscript{53} Failure of a private agency to comply with the statutory provisions or the terms of the contract may be grounds to terminate the contract.\textsuperscript{54} Private agencies that violate the contract terms will be given sixty days notice before the possible termination of the contract.\textsuperscript{55} If the failure to comply presents a serious threat to public safety, shorter notice or immediate termination of the contract is permitted.\textsuperscript{56}

IV. ANALYSIS OF CHAPTER 252

Several cities and law enforcement groups have endorsed Chapter 252.\textsuperscript{57} One

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\textsuperscript{44} Id. (enacted by Chapter 252).
\textsuperscript{45} Id. § 1203.017(i)(2) (enacted by Chapter 252).
\textsuperscript{46} See id. § 1203.017(i)(3)(A)-(G) (enacted by Chapter 252) (establishing the requirements for privately operated home detention programs).
\textsuperscript{47} Id. § 1203.017(i)(3)(B)(i)-(v) (enacted by Chapter 252) (outlining the provisions that each contract must include).
\textsuperscript{48} Id. § 1203.017(i)(3)(B)(i) (enacted by Chapter 252).
\textsuperscript{49} Id. § 1203.017(i)(3)(B)(ii) (enacted by Chapter 252).
\textsuperscript{50} See id. § 1203.017(k)(1)-(3) (enacted by Chapter 252) (“For purposes of this section, ‘evidence of financial responsibility’ may include, but is not limited to, certified copies of any of the following: (1) A current liability insurance policy. (2) A current errors and omissions insurance policy. (3) A surety bond.”).
\textsuperscript{51} Id. § 1203.017(i)(3)(B)(ii)-(iv) (enacted by Chapter 252).
\textsuperscript{52} Id. § 1203.017(i)(3)(B)(ii) (enacted by Chapter 252).
\textsuperscript{53} Id. § 1203.017(i)(3)(B)(v) (enacted by Chapter 252).
\textsuperscript{54} Id. § 1203.017(i)(3)(E) (enacted by Chapter 252).
\textsuperscript{55} Id. § 1203.017(i)(3)(F) (enacted by Chapter 252).
\textsuperscript{56} Id. § 1203.017(i)(3)(G) (enacted by Chapter 252).
of the strongest supporters of Chapter 252, Los Angeles County, has significantly reduced its jail overcrowding by implementing a voluntary home detention program. But the voluntary nature of the existing regime is also its primary weakness. With an expanding jail population, many inmates have learned that they can merely wait, and the existing population caps alone will force officials to release them early. Federal judges seem poised to impose mandatory prison caps on all of California’s correctional facilities, which would in turn burden county jails all the more. Supporters believe that Chapter 252 is a vital tool for allowing communities to mitigate the effects of a severely burdened correctional system.

The sole opposition to Chapter 252, Protection and Advocacy, Inc. (PAI), is not opposed to the idea of home detention per se. Rather, PAI is concerned


58. See supra Part II.C (describing Los Angeles’ successes in implementing a voluntary home detention program).

59. See supra notes 25-28 and accompanying text (discussing the difficulties that Los Angeles encountered in administering a voluntary home detention program).

60. See HISTORICAL TRENDS, supra note 8, at 10a tbl.10 (showing the growth in prison population from roughly 47,000 in 1985 to over 160,000 in 2005); DuBois Letter, supra note 57 (“[C]ounty inmates choose to serve only [ten percent] of their time in jail in lieu of electronic monitoring for their entire sentence as imposed by the courts. They know that they will serve little or none of their sentences and will be released without supervision.”).


If federal judges cap prison populations, local jails will be forced to absorb more offenders. Offenders who would normally go to state prison will remain in sheriffs’ custody if a state population cap is imposed. Sheriffs will have to release even more local offenders to accommodate prisoners released from state prisons.

Id.

63. DuBois Letter, supra note 57 (“We support SB 959 [Chapter 252] because it gives counties the flexibility they need to deal with severe overcrowding in jails.”); see also Court Hearing, supra note 4 (“California now has 172,000 prisoners living in space designed for fewer than 100,000.”).


Protection & Advocacy, Inc. (PIA), [is] a non-profit advocacy organization mandated to advance the human and legal rights of people with disabilities . . . . PIA opposes this bill because the bill does not discuss the criteria used for selecting sentenced misdemeanor inmates for home detention, nor does the bill explain how services are set-up or paid for.

Id.; see also Prot. & Advocacy, Inc., PIA’s History, Role, and Funding, http://pai-ca.org/about/history.htm (last
about how jails will implement an involuntary home detention program.\textsuperscript{65} PAI’s primary concern is the potential for the abuse of inmates placed into involuntary home detention who need expensive medical or psychiatric care.\textsuperscript{66} Jails are currently required to provide both basic and emergency medical care to all inmates,\textsuperscript{67} but the availability of home detention creates an opportunity for correctional facilities to avoid this obligation by placing individuals into involuntary home detention without paying for proper care.\textsuperscript{68} However, Chapter 252 explicitly requires that privately operated home detention programs comply with the same regulations governing work-furlough programs.\textsuperscript{69}

V. CONCLUSION

Although Chapter 252 is not a panacea for California’s overcrowded prisons and jails, it does give the most burdened counties a powerful tool to reduce overcrowding in jails and protect the public.\textsuperscript{70} If it achieves the same results as the voluntary home detention program, counties will have a cost-effective means of ensuring that low-risk offenders, like Paris Hilton, serve their full sentences and at the same time safeguard the public by keeping serious and violent offenders off the streets.\textsuperscript{71}
Getting the Full Report on Proposed Conservators

Alanna Lungren

Code Section Affected
Penal Code § 11105 (amended).
SB 340 (Ackerman); 2007 STAT. Ch. 581.

I. INTRODUCTION

The American legal feature of guardianship dates back to colonial Massachusetts. In 1641, state law permitted Massachusetts to exercise its parens patriae power and appoint individuals to oversee the affairs of a minor, an insane citizen, or an incompetent person.1 Modernly, the office of the public guardian in each California county, along with other county departments, provides guardians and conservators for people and estates as permitted by the Probate Code and the Welfare and Institutions Code.2 The power to appoint an individual to oversee the affairs of a minor or a dependent adult remains within a superior court or probate court’s discretion, and those appointed are subjected to the court’s regulatory power and control.3 Guardians and conservators take care of the most vulnerable in society and, because of this, should be subject to a thorough investigation before appointed.4 According to supporters of Chapter 581, a complete

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   The Public Guardian-Conservator serves as conservator of a person and/or estate of individuals needing protective intervention. The two types of conservatorship, Lanterman-Petris-Short (LPS) and probate, can only be established by order of the superior court. As probate conservator, Public Guardians are involved in all aspects of their clients’ lives, including financial management, housing, medical care, placement, and advocacy. As LPS conservator, Public Conservators are responsible for directing the mental health treatment and placement of their clients.

   Id.

2. See generally Cal. State Ass’n of Counties, supra note 1 (“The services of the Public Guardian may be provided through a separate county department, an elected official, or incorporated into a larger department such as health or human services. Public Conservator services are oftentimes provided by the Public Guardian, but the responsibilities may be shared with mental health departments.”).

3. CAL. PROB. CODE § 2102 (West 2002).

4. See SENATE FLOOR, COMMITTEE ANALYSIS of SB 340, at 4-5 (Sept. 8, 2007).

   The Public Guardian’s Office is charged with the responsibility to oversee the LPS conservatorship for the most vulnerable of our society. The LPS conservatorship provides for the care and treatment of persons who are deemed ‘gravely disabled’ due to severe mental health issues.

   . . . Unlike probate conservators, the Public Guardian’s Office does not have the authority to obtain criminal history information on proposed conservators, such as criminal records for theft, abuse or narcotics activity.

   Id.
evaluation of a proposed guardian or conservator’s suitability is more likely when an investigator has direct access to criminal history information.\textsuperscript{5}

II. BACKGROUND

A. Probate and Lanterman-Petris-Short Act Conservatorships

Guardians and conservators appointed under the Probate Code may serve as a fiduciary to the minor or ward,\textsuperscript{6} not only overseeing the estate of the minor, but also the person.\textsuperscript{7} The court appoints conservators or guardians for those who “are, by definition, unable to provide for their basic care needs and are particularly vulnerable to abuse.”\textsuperscript{8}

Probate conservatorship is a private professional industry, and California requires conservators to register with the state.\textsuperscript{9} Registration as a professional conservator in California simply requires a few hundred dollars and a felony-free criminal record.\textsuperscript{10} Conservatorships permitted under the Lanterman-Petris-Short (LPS) Act and pursuant to the Welfare and Institutions Code may be appointed by the court for gravely disabled adults or minors,\textsuperscript{11} or if a probate conservator has been previously appointed, the court may appoint the existing conservator.\textsuperscript{12}

The LPS Act’s objective in the appointment of conservators for gravely disabled persons is to provide “individualized treatment, supervision, and placement.”\textsuperscript{13} In advance of the judicial appointment of a conservator under the Welfare and Institutions Code, prior law did not permit court investigators searching for information on proposed conservators to directly access their California criminal history information.\textsuperscript{14} This restriction was “ unlike probate

\textsuperscript{5} See id. at 5 (“Senate Bill 340 [Chapter 581] will authorize the Public Guardian [sic] the ability to receive background information such as drug arrests, or other criminal behavior on the proposed conservator. This information is vital[] to the Court when making a decision on the recommended conservators.”).

\textsuperscript{6} CAL. PROB. CODE § 2101 (West 2002).

\textsuperscript{7} See CAL. WELF. & INST. CODE § 5350 (West 1998 & Supp. 2007) (“A conservator of the person, of the estate, or of the person and the estate may be appointed for any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism.”); CAL. PROB. CODE § 2101 (“The relationship of guardian and ward and of conservator and conservatee is a fiduciary relationship that is governed by the law of trusts, except as provided in this division.”).

\textsuperscript{8} SENATE FLOOR, COMMITTEE ANALYSIS OF SB 340, at 5 (Sept. 8, 2007).


\textsuperscript{10} See id. (“Conservators are appointed by probate courts but otherwise face less state regulation than Seeing Eye dog trainers and hairdressers. Anyone without a felony conviction who pays a $385 state registration fee can go into the business.”).

\textsuperscript{11} CAL. WELF. & INST. CODE § 5350 (West 1998 & Supp. 2007).

\textsuperscript{12} Id. § 5350(b)-(c).

\textsuperscript{13} Id. § 5350.1 (West 1998); see also id. § 5008(h)(1)(A) (West 1998) (defining the term “gravely disabled” to include “a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter”).

\textsuperscript{14} ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 340, at 1-2 (July 11, 2007).
conservators, [in that] the Public Guardian’s Office does not have the authority to obtain criminal history information on proposed conservators, such as criminal records for theft, abuse or narcotics activity.”

B. Existing Law Permitting Access to Criminal Histories

Under existing law, the Attorney General provides certain agencies and officers direct access to state summary criminal history information. The information gathered from a criminal history check includes a person’s identification information, photographs and date of arrests, booking numbers and charges, convictions, and other documented information. Although courts have direct access to this criminal history information themselves, the court investigators working to collect relevant information on the proposed guardians or conservators are only able to receive this information indirectly.

In response to reported instances of abuse and neglect of conservatees, the Judicial Council of California formed a Probate Conservatorship Task Force to improve the practices and administration of probate conservatorships. Supporters of Chapter 581 believe that more diligent and informed investigations in connection with probate conservatorships and of proposed LPS conservators will assist the court in appointing appropriate individuals to take care of the most vulnerable citizens in California’s communities.

III. CHAPTER 581

Chapter 581 expands the list of agencies the Attorney General must furnish with state summary criminal history information. For example, Chapter 581

15. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 340, at 5 (Sept. 8, 2007).
16. See CAL. PENAL CODE § 11105(b)-(c) (West 2000 & Supp. 2007). Two subdivisions of the statute address when the Attorney General is required to or may release state summary criminal history information. One subdivision requires the Attorney General to provide state summary criminal history information to certain agencies. See id. § 11105(b) (stating that “[t]he Attorney General shall furnish state summary criminal history information” to the listed individuals and entities). The other subdivision gives the Attorney General discretion to provide such information to certain other agencies upon a showing of a “compelling need.” See id. § 11105(c) (stating that “[t]he Attorney General may furnish state summary criminal history information . . . upon a showing of a compelling need” to the listed individuals and entities).
17. Id. § 11105(a).
18. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 340, at 1-2 (July 11, 2007).
20. See Letter from Daniel A. Pone, Senior Attorney, Jud. Council of Cal., to Senator Dick Ackerman, Cal. State Senate (Apr. 2, 2007) [hereinafter Pone Letter] (on file with the McGeorge Law Review) (discussing the importance of access to criminal history information in all conservatorship and guardianship cases).
21. See CAL. PENAL CODE § 11105(b)(19)-(21) (amended by Chapter 581) (including “[a]n officer providing conservatorship investigations pursuant to” specified sections of the Welfare and Institutions Code,
allows court investigators evaluating proposed conservators for the gravely disabled under the LPS Act to have direct access to state summary criminal history information. In addition, officers conducting court investigations in connection with probate conservatorships and guardianships are entitled to access state summary criminal history information. Further, Chapter 581 expands this access “to a probation officer, domestic relations officer, other agency designated to investigate potential dependency cases, or court investigator providing investigative services in guardianship proceedings relating to a minor child.”

IV. ANALYSIS

The Judicial Council of California formed a Probate Conservatorship Task Force and included in their preliminary recommendations the need for court investigators to have direct access to the Department of Justice’s criminal history reports. The Judicial Council of California, the policymaking body of California courts, stated in letters supporting Chapter 581 that “access to criminal history information is just as important in probate guardianship and conservatorship cases, so that the courts will know whether the proposed guardians and conservators are fit to serve in this critical role.”

“[a] court investigator providing investigations or reviews in conservatorships pursuant to” specified sections of the Probate Code, and “[a] person authorized to conduct a guardianship investigation pursuant to Section 1513 of the Probate Code” in the subdivision requiring the Attorney General to furnish summary criminal history information; see also SENATE FLOOR, COMMITTEE ANALYSIS OF SB 340, at 2-4 (Sept. 8, 2007) (explaining existing law and the changes that SB 340 (Chapter 581) makes). Chapter 581 also requires the Attorney General to furnish state summary criminal history information to “[c]ity attorneys pursuing civil gang injunctions . . . or drug abatement actions.” CAL. PENAL CODE § 11105(b)(5) (amended by Chapter 581). For more information on the recent amendment allowing city attorneys to pursue civil gang injunctions, see Philip Lee, Chapter 34: Hitting Criminal Street Gangs Where it Hurts–Their Wallets, 39 McGeorge L. Rev. 577 (2008).

22. CAL. PENAL CODE § 11105(b)(19) (amended by Chapter 581); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 340, at 1 (July 11, 2007).
24. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 340, at 4 (Sept. 8, 2007); see also CAL. PENAL CODE § 11105(b)(21) (amended by Chapter 581) (requiring the Attorney General to release criminal history information to “[a] person authorized to conduct a guardianship investigation pursuant to Section 1513 of the Probate Code”); CAL. PROB. CODE § 1513 (West 2002) (“[A] court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate.”).
25. Pone Letter, supra note 20; see also PROB. CONSERVATORSHIP TASK FORCE, JUD. COUNCIL OF CAL., FINAL REPORT OF THE PROBATE CONSERVATORSHIP TASK FORCE 27 (2007), http://www.courtinfo.ca.gov/jc/documents/reports/102607itemD.pdf (on file with the McGeorge Law Review) (stating, in the final report, that “[j]udges should be provided with criminal and credit background checks before appointment of either a professional or nonprofessional conservator”).
27. Pone Letter, supra note 20.
Chapter 581 expands the list of agencies entitled to receive state summary criminal history information from the Department of Justice.28 Through this direct access, the reports submitted by the investigators to the court will include any relevant criminal history, “such as criminal records for theft, abuse or narcotics activity,”29 that the court should consider when deciding whether to appoint the proposed person as either a fiduciary or personal guardian for a ward, or a conservator over the gravely disabled.30

Supporters believe that greater protection of those who are conserved, in terms of more thorough investigations of their proposed conservators, is critical.31 By definition, those determined gravely disabled due to mental illnesses, such as schizophrenia, can be vulnerable to abuse.32 Supporters believe that Chapter 581 is one way to ensure their safety and promote the goals of conservatorships.33 Notably, no organization opposed Chapter 581.34

V. CONCLUSION

Prior to Chapter 581, court investigators evaluating proposed LPS conservators for the gravely disabled did not have direct access to the proposed conservator’s criminal history information.35 Because LPS conservatees are vulnerable to abuse by the very nature of their condition, it is vital that courts are fully informed as to the criminal history, if any, of a proposed conservator.36
With Chapter 581, the court is in a better position to appoint the appropriate person to care for the vulnerable dependent adult or child and preserve the goal of such a conservatorship.37

37. See Pone Letter, supra note 20 (discussing the importance of access to criminal history information in all conservatorship and guardianship cases); see also CAL. WELF. & INST. CODE § 5001 (West 1998) (explaining that the LPS Act “shall be construed to promote the legislature’s intent,” “[t]o provide individualized treatment, supervision, and placement services by a conservatorship program for gravely disabled persons” and “[t]o protect mentally disordered persons and developmentally disabled persons from criminal acts”).
Firearm Microstamping: A “Bullet with a Name On It”

David Muradyan

Code Section Affected
Penal Code § 12126 (amended).
AB 1471 (Feuer); 2007 STAT. Ch. 572.

I. INTRODUCTION

The civilization to introduce the earliest form of writing, cuneiform, also introduced the idea of fingerprinting. Some time between 1792-1750 B.C., scribes in Babylon began pressing their fingerprints into clay tablets to prevent forgeries. This early practice laid the foundation for the modern approach to identifying people by the distinct features of their fingerprint. Like a fingerprint, a microstamp is a distinct identifying mark that can be imprinted on the casing of a bullet. A microstamp allows a ballistics specialist to match a particular ejected cartridge casing with a particular gun. Unlike fingerprint technology, however, microstamping has yet to be widely adopted. Enter Chapter 572.

II. LEGAL BACKGROUND

There are at least 192 million privately-owned firearms in the United States, including sixty-five million handguns. In all, approximately thirty-five to thirty-

1. Bullet with a Name On It, DISCOVER, Nov. 1999, at 27 [hereinafter Bullet].
3. Id.
4. See id. (discussing the earliest applications of fingerprinting and the spread of these applications from Babylon to China—the first to use friction ridges for personal identification—and Japan, to India, and, finally, to Britain).
6. Id.
six percent of households in America have a gun, and twenty-two percent have a handgun.\(^9\) In 2004, firearm-related incidents accounted for the deaths of 29,569 people in the United States, including 11,624 homicides, 16,750 suicides, 649 accidental deaths, and 311 justifiable homicides.\(^10\) By contrast, homicides involving firearms took the lives of seventy-three people in England and Wales,\(^11\) and 172 people in Canada.\(^12\) Indeed, the firearm death rate in the United States is eight times the “pooled rate” for other high-income countries, and the United States “has the highest overall firearm mortality rate.”\(^13\) For Americans nineteen years old and younger, firearm homicide was the second leading cause of death, behind only automobile accidents.\(^14\) The “overall firearm-related death rate among U.S. children aged [less than] 15 years was nearly 12 times higher than among children in the other 25 [industrialized] countries combined.”\(^15\) Financially, gun violence costs the nation about $100 billion a year in direct and indirect costs.\(^16\)

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A. The Problem

While California already has some of the strictest gun laws in the country, more technologically-advanced tools would aid law enforcement in solving crimes that otherwise would go unsolved. According to the California Department of Justice, roughly 2,400 homicides are committed each year, about sixty percent with a handgun. Based on sales data in California, close to seventy percent of handguns sold were semiautomatic pistols, the type of gun affected by Chapter 572. Unfortunately, about forty-five percent of gun-related crimes in California are “cold cases” because “there are no witnesses and no leads.” Further, straw purchasers, a group also affected by Chapter 572, were responsible for “nearly a third of the illegally diverted firearms in all ATF [Bureau of Alcohol, Tobacco and Firearms] investigations initiated” in an approximately two year span.

B. Existing Law

With limited exceptions, existing law prohibits the sale or manufacture of an unsafe handgun. An unsafe handgun is defined as “any pistol, revolver, or other


18. See Letter from Gregory J. Ahern, Sheriff-Coroner, Alameda County Sheriff’s Office, to Assembly Member Mike Feuer, Cal. State Assembly (June 14, 2007) [hereinafter Ahern Letter] (on file with the McGeorge Law Review) (“Microstamping makes perfect sense as a cutting edge, fast, and effective way for . . . law enforcement investigators and forensic experts to identify, locate, and convict murderers and violent felons.”).


20. Id.


Under current law, a “straw purchase” occurs when the actual buyer of a firearm uses another person, the “straw purchaser,” to execute the paperwork necessary to purchase a firearm from an FFL [federal firearms licensee]. The “straw purchaser” violates the GCA [Gun Control Act of 1968] by making a false statement with respect to information required to be kept in the FFL’s records.

24. Id. at n.4.

25. CAL. PENAL CODE § 12125(a) (West 2000 & Supp. 2007); see also id. § 12125(b) (discussing exceptions, including, among other things, the sale of firearms to any police department).
firearm capable of being concealed upon the person” which does not meet certain safety requirements. For example, a pistol is an “unsafe handgun” if, among other things, it does not meet the firing and drop safety requirements and does not include “a positive manually operated safety device.” The California Department of Justice compiles, publishes, and maintains a listing of all handguns that “have been determined not to be unsafe handguns, and [therefore] may be sold in this state.” In addition, the state maintains a “complete record,” which tracks, among other things, the “dealers’ records of sales of firearms.” The Attorney General also keeps and maintains a handgun registry with identifying information about firearms and their registered owner.

C. The Solution

Microstamping technology was “[d]eveloped in the 1990s by New Hampshire inventor Todd Lizotte,” who is also a board member of NanoMark, the company that owns the patent to the “ballistic tagging technology.” This technology allows gun manufacturers to place “an identification mark on each cartridge casing ejected from a properly outfitted firearm at the moment of firing each bullet” and is an alternative to ballistic fingerprinting. Unlike microstamping, with “current ballistics [fingerprinting] technology, detectives must recover a weapon to link an owner to a crime scene or must compare markings on shell casings with bullets fired from guns recovered later.”

Initially, microstamping was utilized in the medical and computer technology fields. After the Beltway sniper attacks in 2002, gun control advocates insisted on implementing this technology inside firearms to match shell casings to their owners. Microstamping technology imprints microscopic identifying information, such as the make, model, and serial number, onto the cartridge casing when a firearm is discharged.


26. Id. § 12126.
27. Id. § 12126(b).
28. Id. § 12131(a).
29. Id. § 11106(a) (West 2000 & Supp. 2008).
30. Id. § 11106(c).
31. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at I, M (June 26, 2007); Jason Tsai, Etched Bullets Interest Law Enforcement: Lasering May Help Solve Gun Crimes, RECORD (Bergen County, N.J.), Sep. 25, 2006, at A1; NanoMark, supra note 5.
32. NanoMark, supra note 5 (“[B]allistic fingerprinting’ technology is the computer automation of the science practiced by Forensic Firearms Examiners.”).
34. Tsai, supra note 31.
35. Id.
III. CHAPTER 572

Beginning January 1, 2010, the definition of “unsafe-handgun” will include any semiautomatic pistol without a microstamping feature. Chapter 572 requires all new models of semiautomatic pistols to be designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired.

Chapter 572 also contains provisions regarding the method and technology used to microstamp, requiring the California Department of Justice to certify that the authorized microstamping method is available to more than one manufacturer and is not restricted by patent. Alternatively, the Attorney General may approve a microstamping method different than that set forth in Chapter 572, provided the new method is at least as reliable and effective “in identifying the specific serial number of a firearm from spent cartridge casing discharged by that firearm” and is likewise not burdened by patent.

IV. ANALYSIS

Prior to 2007, no state had taken the step of requiring semiautomatic pistols to include microstamping technology. Chapter 572 makes California the first state to require gun manufacturers to develop semiautomatic handguns that leave an identifying mark (e.g., microstamp) on each bullet fired. Prior to Chapter 572’s enactment, ballistics experts could match bullets with the corresponding guns only if they had a weapon for comparison. Chapter 572 enjoyed tremendous support from various organizations and groups. Perhaps the strongest

37. CAL. PENAL CODE § 12126 (amended by Chapter 572) (stating that “unsafe handgun’ means any pistol, revolver, or other firearm capable of being concealed upon the person” that, among other things, fails to meet certain safety requirements).
38. Id. § 12126(b)(7) (amended by Chapter 572); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at K (June 26, 2007).
39. CAL. PENAL CODE § 12126(b)(7) (amended by Chapter 572) (“The microscopic array of characters . . . shall not [include] the name of the maker, model, manufacturer’s number, or other mark of identification . . . .”); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at K (June 26, 2007).
40. CAL. PENAL CODE § 12126(b)(7) (amended by Chapter 572).
41. Id. (amended by Chapter 572) (“Approval by the Attorney General shall include notice of that fact via regulations adopted by the Attorney General for purposes of implementing that method . . . .”).
42. Yi, supra note 7.
44. Bullet, supra note 1.
45. See, e.g., Letter from Marc Lerner, Chair, Am. Acad. of Pediatrics-Cal. Comm. on State Gov’t
support came from law enforcement organizations, including support from many city police chiefs and county sheriffs.\textsuperscript{46} All told, more than sixty-five police chiefs and sheriffs supported the bill, along with law enforcement associations such as the Peace Officers Research Association of California.\textsuperscript{47}

\textsuperscript{46} See, e.g., Ahern Letter, supra note 18 (thanking Mike Feuer for authoring AB 1471); Letter from Leroy D. Baca, Sheriff, County of Los Angeles, to Assembly Member Mike Feuer, Cal. State Assembly (Apr. 18, 2007) (on file with the \textit{McGeorge Law Review}) (explaining that, because in many cases of murder in Los Angeles County “the only evidence left at the scene were expended cartridge casings,” AB 1471 (Chapter 572) would increase the probability of investigators solving heinous murders and finding the perpetrator); Letter from William M. Lansdowne, Chief of Police, City of San Diego, to Assembly Member Mike Feuer, Cal. State Assembly (June 18, 2007) (on file with the \textit{McGeorge Law Review}) (“Firearm microstamping technology will provide law enforcement with a critical lead in finding armed criminals or ‘straw buyers’ who illegally traffic weapons to prohibited purchasers.”); Letter from Wayne G. Tucker, Chief of Police, City of Oakland, to Assembly Member Mike Feuer, Cal. State Assembly (July 2, 2007) (on file with the \textit{McGeorge Law Review}) (questioning AB 1471’s (Chapter 572) effectiveness in tracing crime scene bullet casings back to the criminal because “criminals will go to any lengths to illegally obtain handguns and use them in the commission of their crimes”).

\textsuperscript{47} \textit{James P. Sweeney & Michael Gardner, Handgun Tracking Law Gets Approved: State Will Be First to Use Ammo-Stamp Technology, SAN DIEGO UNION-TRIB.,} Oct. 14, 2007, at A1 (noting that over sixty-five sheriffs and police chiefs supported this measure); Press Release, Brady Campaign to Prevent Gun Violence, California Legislature Sends Landmark Crime-Fighting Bill to the Governor (Sept. 10, 2007), http://www.bradycampaign.org/media/release.php?release=928 (on file with the \textit{McGeorge Law Review}) (noting support from multiple law enforcement associations, including the Peace Officers Research Association of California); see also Letter from Jim Hudson, Chief, L.A. County Police Chiefs’ Ass’n, to Assembly Member Mike Feuer, Cal. State Assembly (June 26, 2007) (on file with the \textit{McGeorge Law Review}) (questioning AB 1471’s (Chapter 572) effectiveness in tracing crime scene bullet casings back to the criminal because “criminals will go to any lengths to illegally obtain handguns and use them in the commission of their crimes”).
A number of different organizations and groups opposed Chapter 572.48 Chapter 572’s most notable opponents, including gun rights advocates like the National Rifle Association (NRA) and the National Shooting Sports Foundation (NSSF), relied heavily on a UC Davis study in arguing that the technology used in Chapter 572 is flawed.49 According to the study, the engraved codes on the firing pin, which create the microstamp, can easily be altered with household tools.50

Supporters of Chapter 572, however, noted that the study utilized “vintage” firearms, which were at least ten to fifty years old, yet Chapter 572 requires manufacturers to microstamp only new models of semiautomatic pistols.51 According to Paul Hemke, President of the Brady Campaign to Prevent Gun Violence, recent models of firearms used in the study perform better, showing “remarkable results.”52 The UC Davis study also tested handguns, rifles, and shotguns; however, Chapter 572 only adds the microstamping requirement to semiautomatic pistols.54 Another criticism of the study was that it used firing pins

48. See, e.g., Letter from Marc Halcon, President, Cal. Ass’n of Firearm Retailers, to Assembly Member Mike Feuer, Cal. State Assembly (Apr. 2, 2007) (on file with the McGeorge Law Review) (opposing AB 1471 (Chapter 572) because it would place an unrealistic and heavy burden on firearm retailers and gun purchasers); Letter from Jason Rhine, Dir. of Advocacy, Cal. Outdoor Heritage Alliance, to Assembly Member Mike Feuer, Cal. State Assembly (June 18, 2007) (on file with the McGeorge Law Review) (opposing AB 1471 (Chapter 572) primarily because it would target innocent owners, considering “90% of all traced crime guns changed hands at least once,” and “80% of firearms used by criminals had moved through illegal, untraceable channels prior to their illicit use”); Letter from Bob Templeton, President, Crossroads of the West Gun Shows, to Assembly Member Mike Feuer, Cal. State Assembly (Apr. 2, 2007) (on file with the McGeorge Law Review) (expressing concern over liabilities for gun show operators); Letter from Gerald H. Upholt, Legislative Liaison, Cal. Rifle & Pistol Ass’n, Inc., to Assembly Member Mike Feuer, Cal. State Assembly (Mar. 29, 2007) (on file with the McGeorge Law Review) (urging the state to wait until a recently passed state law revision commission reorganizes the state’s “voluminous and complex” firearms law before enacting any new firearm legislation).


52. EFSGV Press Release, supra note 51.


54. CAL. PENAL CODE § 12126(b)(7) (amended by Chapter 572).
which were not optimized,\textsuperscript{55} something required by Chapter 572.\textsuperscript{56} Firearms that utilize an optimization protocol produce accurate and reliable microstamps.\textsuperscript{57}

Opponents of Chapter 572 also expressed concern that the new law requires gun manufacturers to completely reconfigure the manufacturing and assembly processes,\textsuperscript{58} which could increase the price of handguns.\textsuperscript{59} According to experts, this technology would cost manufacturers somewhere between fifty cents and eight dollars per gun to implement.\textsuperscript{60} Some opponents of the law even suggested that manufacturers would stop selling new semiautomatic handguns in California.\textsuperscript{61} In fact, since Chapter 572’s enactment into law, at least one manufacturer has stopped firearm sales in California.\textsuperscript{62}

In addition, opponents argued that criminals could alter a firearm with a microstamping feature by removing, defacing, or replacing the firing pin.\textsuperscript{63} Chapter 572, however, requires etching to occur in at least two different places inside the pistol, which presumably would make it more difficult for a criminal to alter.\textsuperscript{64} Further, according to supporters, “firing pins equipped with

\textsuperscript{55} EFSGV Press Release, supra note 51; Feuer Press Release, supra note 53.

\textsuperscript{56} Feuer Press Release, supra note 53; see also Press Release, NanoMark Technologies, New Test Affirms Validity of Microstamping Technology (May 24, 2007), http://www.csgv.org/atf/cf/%7B5B3F6A35-4C75-41EE-BDD4-4BD3A3B59010%7D/Lizotte%20Test%20Release%205-25-07.pdf [hereinafter NanoMark Press Release] (on file with the McGeorge Law Review) (noting that the success of microstamping, in part, depends on whether the firearm’s firing pins have been optimized to the “dynamic behavior of the firearm”).

\textsuperscript{57} MicroStamping Network, What is Microstamping?, http://www.microstamping.net/what.html (last visited Feb. 22, 2008) (on file with the McGeorge Law Review) (“The optimization protocol identifies the ideal character geometry, location, size and placement to match the firearm’s dynamics that reliably transfer in the identical way as the unintentional microstructures.”).

\textsuperscript{58} See, e.g., Press Release, Nat’l Shooting Sports Found., Firearms Industry Warns: Passage of Microstamping Bill is Tantamount to Gun Ban (June 25, 2007), http://www.nssf.org/news/PR_idx.cfm?AoI=generic&PRloc=common/PR/&PR=062507a.cfm (on file with the McGeorge Law Review) (“Many manufacturers will choose to abandon the California market rather than incur substantial costs associated with complying with microstamping legislation, which would include purchasing (at monopolistic prices) very expensive equipment and patented technology and completely redesigning their manufacturing processes, plant and equipment.” (quoting Lawrence G. Keane, NSSF Senior Vice President and General Counsel)); NRA Press Release, supra note 49 (noting that Chapter 572 would require a complete redesign of the manufacturing process).

\textsuperscript{59} Tsai, supra note 31 (noting that the technology “could cost up to $150 per firearm”).


\textsuperscript{61} Sweeney & Gardner, supra note 47 (quoting Sam Paredes of Gun Owners of California as saying manufacturers “are simply going to stop selling any new semiautomatics in the state”); see also Kenneth J. St. Onge, Number One With A Bullet: West Coast Law Change Could Stamp Out Gunmakers’ Profits, HARTFORD BUS. J., Aug. 27, 2007, http://www.hartfordbusiness.com/news2610.html (on file with the McGeorge Law Review) (noting that this measure may force gun manufacturers to simply not sell guns in California due to high costs).


\textsuperscript{63} Yi, supra note 7.

\textsuperscript{64} Id.; CAL. PENAL CODE § 12126(b)(7) (amended by Chapter 572).
microstamping technology” would be difficult to alter as they “are nearly as hard as diamonds.” Therefore, even if criminal were to successfully file the pin down, it would effectively prevent the gun from firing.

However, at least one independent peer-reviewed study from a professional society of firearm examiners found that microstamp markings could be removed without rendering the firearm inoperable. The study also found the technology unreliable, concluding that the implementation of the technology will be complicated. But, according to the co-inventor of the technology, the reason that this test produced poor results and markings not “fully legible” was because the study did not use a more sophisticated method to “read the markings[,] known as, ‘Scanning Electron Microscopy.’”

The most recent test conducted by NanoMark Technologies, the manufacturer of the microstamping technology, showed tremendous success and accuracy. The co-inventor of the technology credited the success to several factors, including “optimizing the technology to the dynamic behavior of the firearm and the use of appropriate imaging technology to extract the code data off the cartridges.”

Perhaps Chapter 572’s biggest challenge will be dealing with the fact that “a large number of crimes are committed with stolen guns.” This can result in innocent people, who had their guns stolen, being implicated for crimes they did not commit. Opponents also claim that innocent people can be framed or implicated if a criminal collects microstamped cartridge casings from abandoned shooting ranges and “seeds” the crime scene with evidence. However, when investigating a gun crime, ballistics examiners can differentiate between new and recycled cartridges. Still, such planting of evidence could present potential dangerous implications.

65. Tsai, supra note 31.
66. Id.
68. Id.
69. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at M (June 26, 2007) (noting that the Krivosta study used a less sophisticated method known as “Optical Microscopy Stereo with Polarization”); see also Iowa State Univ. Materials Sci. & Eng’g Dep’t, What is the S.E.M.?, http://mse.iastate.edu/microscopy/whatssem.html (last visited Feb. 22, 2008) (on file with the McGeorge Law Review) (discussing the many advantages of “scanning electron microscope,” including “higher magnification, larger depth of focus, [and] greater resolution”).
70. NanoMark Press Release, supra note 56.
71. Id.
72. Tsai, supra note 31.
73. Yi, supra note 7.
74. NRA Press Release, supra note 49. But see COAL. TO STOP GUN VIOLENCE & EDUC. FUND TO STOP GUN VIOLENCE, MICROSTAMPING TECHNOLOGY: PRECISE AND PROVEN 6 (2008), http://www.csgv.org/artcf%7B23E96A35-4C75-41EE-BDDD4BD3A3B59010%7D/CSGV%20Microstamping%20Memo%20Jan%202008.pdf [hereinafter MICROSTAMPING TECHNOLOGY] (on file with the McGeorge Law Review) (noting that reports of “seeding” are rare, especially since “most criminals fail to do things as simple as wearing gloves to hide fingerprints”).
75. MICROSTAMPING TECHNOLOGY, supra note 74, at 6 (“There is a standardized procedure for identifying the characteristics of a recycled cartridge, which include the orientation of ballistics markings, the
chain-of-custody evidentiary issues because, as with ballistics imaging, “any information derived from the technology [is] essentially worthless.”

Acknowledging that Chapter 572 raises chain-of-custody issues, the law’s author contends that information acquired from the discharged casing would still “provide an extremely useful lead for investigators to follow in their attempts to solve gun-related crimes.”

Despite some of Chapter 572’s shortcomings, the value of the legislation is clear. In 2004, “of the more than 1,400 homicides committed with handguns in California,” forty-five percent of the cases went cold and no arrests were ever made. Often the only evidence left at crime scenes are bullet cartridge casings. For example, in drive-by shootings, where the only evidence at the crime scene is usually the spent cartridge, Chapter 572 provides law enforcement with a valuable evidentiary tool to help solve crimes. Microstamping should also help reduce gun trafficking through straw purchasers, who are responsible for nearly one-third of the firearms illegally diverted to felons. Because the casings found at crime scenes can be traced back to guns purchased by a straw purchaser, the straw purchaser is far less likely to risk criminal penalties by selling to felons. Moreover, since California already has an existing gun database, the state

use of reload primers, and mismatched bullets/projectiles and powder residue.”).

76. BLACK’S LAW DICTIONARY 244 (8th ed. 2004) (defining “chain-of-custody” as “[t]he movement and location of real evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court”).

Chain of custody requires testimony of continuous possession by each individual having possession, together with testimony by each that the object remained in substantially the same condition during its presence in his possession. All possibility of alteration, substitution or change of condition need not be eliminated. For example, normally an object may be placed in a safe to which more than one person had access without each such person being produced. However the more authentication is genuinely in issue, the greater the need to negate the possibility of alteration or substitution.

Id. (quoting MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 402 (3d ed. 1992)).


78. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at K-L (June 26, 2007); see also Samantha Young, Lawmakers Approve Bills Related to Bullets, Gas Prices, S.F. CHRON., Sept. 10, 2007, http://www.sfchron.com/cgi-bin/article.cgi?f=/n/a/2007/09/10/state/n191427D10.DTL&type=politics (on file with the McGeorge Law Review) (“Even if the owner did not commit a crime, at least this bill would provide law enforcement with one more lead in determining who did commit the crime.” (quoting Assembly Member Lloyd Levin, a Democrat representing Van Nuys)).


81. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at I (June 26, 2007).

82. FOLLOWING THE GUN, supra note 23, at 18.

83. Letter from Suzanne Verge, President, L.A. Chapter, Brady Campaign to Prevent Gun Violence, to Assembly Member Mike Feuer, Cal. State Assembly (Apr. 2, 2007) (on file with the McGeorge Law Review); see also Hsu, supra note 60 (“[AB 1471 (Chapter 572)] would deter gun owners and retailers from selling to unlicensed purchasers for fear of being tracked by police.”).

84. See CAL. PENAL CODE § 11106(c) (West 2000 & Supp. 2007) (discussing California’s requirement for a registry which would contain, among other things, information about registered owners of firearms and the
would have “no extra administrative responsibilities” in implementing Chapter 572.  

Some in the gun industry are concerned that other jurisdictions will follow California’s lead. Indeed, some cities are considering requiring use of this technology, hoping to stem a recent tide of firearm violence. States such as Massachusetts and Rhode Island have also introduced similar legislation, and microstamping legislation patterned after the California law has been introduced at the federal level.

V. CONCLUSION

Chapter 572 makes California the first state to utilize microstamping technology. Starting in 2010, the law requires new semiautomatic pistols to imprint microscopic characters identifying its make, model, and serial number onto each cartridge casing when the gun is fired. Although there are legitimate concerns regarding Chapter 572’s effectiveness, such as whether criminals will circumvent the microstamping technology by altering their weapon or stealing another’s, microstamping will give law enforcement an additional tool to solve the large number of homicides committed with semiautomatic handguns each year in California. Specifically, microstamping will enable law enforcement to

85. Smalley, supra note 33 (noting that for states that already have gun databases with the buyers’ names and the serial numbers of the weapons they are purchasing, there would be no additional administrative responsibilities).
86. Yi, supra note 7 (noting concerns from the California Association of Firearms Retailers).
87. Smalley, supra note 33 (noting that the City of Boston is also considering implementing microstamping technology in response to an increase in firearm violence); Fran Spielman, Daley Gun Control Plan Has New Twists: Mayor Wants Trigger Locks, Various Bans, CHI. SUN-TIMES, Feb. 20, 2008, at N12.
88. Young, supra note 78.
90. Yi, supra note 7.
91. See CAL. PENAL CODE § 12126(b)(7) (amended by Chapter 572). A handgun is defined as “unsafe” if it is not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired. Id. (amended by Chapter 572)
92. Yi, supra note 7 (explaining that opponents argued “that the firing pin can be removed and defaced, or simply replaced”).
93. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1471, at H (June 26, 2007).
accurately link spent cartridge casings found at the crime scene to a particular handgun, just like a fingerprint.\textsuperscript{94}
One Gang Czar to Rule Them All

Alanna Lungren

Code Sections Affected
Penal Code §§ 13827, 13827.1, 13827.2 (new).
AB 1381 (Núñez); 2007 STAT. Ch. 459.

I. INTRODUCTION

Los Angeles, the largest city in California, encompasses nearly 500 square miles and is home to over 700 gangs and 40,000 habitually violent gang members. In Los Angeles County, thirty-eight percent of homicides in 2005 were gang-related. Combined, San Francisco and Oakland’s gang-related homicide rate reached thirty-eight percent in 2005, trailed by Fresno at twenty-five percent. These numbers, although stripped of their emotional weight on paper, represent the very real epidemic of rising gang violence across California and illustrate the need for effective and coordinated solutions.

One response cities such as Los Angeles have taken is allocating committees of experts to study the growing problem. The non-profit organization, the Advancement Project, completed such a study for the Los Angeles City Council’s Ad Hoc Committee on Gang Violence and Youth Development. The report included findings that seventy-five percent of youth gang homicides in California occur in Los Angeles County, making the region a significant contributor to the state’s overall gang violence problem. Further, in the Los Angeles area, the most difficult challenge in the fight against gang-related violence and increasing gang membership is the lack of a comprehensive and coordinated approach between public and private anti-gang strategies.

2. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1381, at 4 (June 1, 2007).
4. Id.
5. See id. (stating that the “number and size [of gangs] have increased dramatically in recent years”).
8. See id. (describing the city’s three phase Gang Activity Reduction Strategy Project).
9. PHASE 3 EXECUTIVE SUMMARY, supra note 6, at 1.
Throughout the course of the state’s and its cities’ efforts to curb rising gang violence, public and private organizations employed a range of prevention, suppression, and intervention strategies. The broad spectrum of efforts to quell the rising gang-related violence in the Los Angeles area included the creation of specialized law enforcement units, such as the Community Resources Against Street Hoodlums (CRASH) unit and the Gang Unit in the Probation Department of Los Angeles County. Throughout the implementation of such specialized gang units, officers often collected information on persons associated with gangs on index cards—developing this intelligence gathering into a gang-suppression strategy. The suppression-focused solutions resulted from tax cuts in the late 1970s, which decreased much of the funding for the area’s gang prevention and intervention programs.

In contrast, but another snapshot of the anti-gang effort, Father Gregory J. Boyle, founder of the organization Jobs for a Future/Homeboy Industries, focuses on “at-risk and gang-involved youth[s]” in order to “provide training, work experience, and . . . the opportunity for rival gang members to work side by side.” These examples of anti-gang strategies, although mere fragments of the overall effort, show the range that both public and private entities employ in the larger challenge of eradicating the gang epidemic.

The Advancement Project conducted an extensive survey of Los Angeles’ gang epidemic and the region’s efforts to combat the problem. The key finding pronounced in its report was the need for coordination among local and regional anti-gang efforts. And what is true in Los Angeles is likely true across the state. The mandate of the Office of Gang and Youth Violence Policy under
Chapter 459 is to meet the challenge of California’s gang epidemic by creating an office which can coordinate the state’s anti-gang efforts and serve as a clearinghouse for comprehensive strategies and best practices.21

II. BACKGROUND

Although there has been a general decline in crime across California’s communities, gang related crime appears to disregard this trend, in some regions rising to extraordinary levels of violence.22 Gang-related crime and violence extends beyond urban areas, reaching into neighborhoods previously considered safe.23 Individual cities and neighborhoods respond to the violence and gang presence in a variety of ways—with no one gang problem in one part of the state exactly similar to another community’s challenge.24 Because of the diversity among different communities’ gang problems, intervention and prevention strategies should be tailored to gang issues unique to that region.25 Although various organizations pursue different methods, they all share the same goal: to reduce the number of gangs, gang members, and incidents of gang violence.26 However, shared goals may not be enough.27 Many believe that California needs a statewide government entity dedicated to the task of “reducing and preventing violence and gang activity,” a bureau which did not exist prior to the enactment of Chapter 459.28

(21) To develop a citywide Gang Activity Reduction Strategy. In its Phase I report, AP noted certain key findings based on an examination of circumstances in Los Angeles but nonetheless equally applicable to the state as a whole.

21. See Senate Floor, Committee Analysis of AB 1381, at 2 (Sept. 8, 2007).
22. Assembly Floor, Committee Analysis of AB 1381, at 5 (Sept. 12, 2007).
23. Id.
24. Id.
25. Id. at 6.
26. See Senate Floor, Committee Analysis of AB 1381, at 6 (Sept. 8, 2007) (“California lacks a governance structure that administers the available funds and tracks the outcomes and effectiveness of programs that are aimed at reducing and preventing violence and gang activity.”).
27. Press Release, Cal. Dep’t of Corr. & Rehab., Governor Schwarzenegger Announces Initiative to Combat Gang Violence (May 25, 2007), http://www.cdc.ca.gov/News/2007%5F%5FPress%5F%5FReleases/Press 20070525.html [hereinafter CDCR Press Release] (on file with McGeorge Law Review) (“[T]he Governor has met with mayors, law enforcement, faith-based and community organizations, local officials and legislators to discuss how communities across the state are fighting gangs . . . . At every meeting the Governor heard about the same problems: lack of coordination between state and local agencies and programs, lack of funding, and lack of a comprehensive approach to anti-gang efforts.”).
28. Senate Floor, Committee Analysis of AB 1381, at 6 (Sept. 8, 2007); see also Cal. Penal
The state’s response to the call for effective solutions and leadership in the anti-gang effort includes Governor Schwarzenegger’s comprehensive gang initiative, called the California Gang Reduction, Intervention, and Prevention Program (CalGRIP).\textsuperscript{29} The 2007 measure directs more than $31 million in state and federal funding toward local anti-gang efforts, including intervention, suppression and prevention[,] . . . [which] will provide important job training and education programs, while at the same time giving tools to local law enforcement that will allow them to closely track gang leaders and make our streets safer[]\textsuperscript{30}

These tools, such as stricter penalties for witness intimidation, should allow for an increase in the number of civil and criminal prosecutions of gang members.\textsuperscript{31} Further, CalGRIP’s measures include plans to assign more California Highway Patrol (CHP) officers to gang zones to increase patrol presence.\textsuperscript{32} CalGRIP also “centralizes information for all law enforcement” by allocating funds for a law enforcement database, as well as for “a new, centralized Criminal Intelligence and Analysis Unit to gather gang intelligence from all thirty-three state prisons and disseminate th[e] information to local law enforcement.”\textsuperscript{33}

CalGRIP’s mandates include the development of a list of community entities that offer rehabilitation and job training for ex-gang members\textsuperscript{34} and grant programs, supported by federal and state funds, to increase youth summer programs, at-risk youth initiatives, and job training placements for youths and adults.\textsuperscript{35} The CalGRIP measures also provide tax credits for qualifying businesses in “Enterprise Zones” that hire certain program-certified former gang

\textsuperscript{29} See Josh Richman, \textit{Governor Rolls Out Anti-Gang Plan in Oakland Visit}, \textit{OAKLAND TRIB.}, May 25, 2007, at LOCAL. [T]he governor’s California Gang Reduction, Intervention and Prevention (CalGRIP) program involves better tracking of gang leaders in prison and on parole; letting prosecutors and city attorneys sue gang members for damages; doing more to protect gang-crime witnesses; creating a county-designation system to focus federal funds on high-intensity gang areas; and assigning 100 California Highway Patrol officers to gang-infested local streets.

\textit{Id.}


\textsuperscript{31} See CDCR Press Release, supra note 27 (stating that CalGRIP permits civil suits and gives law enforcement tools to track gang members and protect witnesses).

\textsuperscript{32} \textit{Id.} (“Under CalGRIP, 100 California Highway Patrol officers will rotate though [sic] 90 day deployments in HIGAs.”).

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.}
The task of overseeing CalGRIP falls to the state gang czar created by Chapter 459 and appointed by the Governor. The state director and the CalGRIP Advisory Committee, consisting of experienced law enforcement officials, community leaders, and education leaders, should help to further the objectives of the Office of Gang and Youth Violence Policy (OGYVP) and “help build comprehensive, long-term strategies to fight gang violence.”

III. CHAPTER 459

Chapter 459 creates the Office of Gang and Youth Violence Policy (OGYVP) within the Governor’s Office of Emergency Services. Authored by Assembly Speaker Fabian Núñez, Chapter 459 dedicates the OGYVP to “reducing violence and the proliferation of gangs and gang violence in California communities.”

The office created by Chapter 459 seeks to promote public awareness on successful strategies to eradicate gang violence, and operate as a “clearinghouse” for best practices, strategies, designs, and models that organizations can access to support their localized efforts in the fight against gang-dominated communities. Under Chapter 459, the OGYVP must compile a statewide information database on California gang membership, which could include data on as many as 420,000 individuals. Chapter 459 requires the OGYVP to “establish an Internet Web site . . . that provides an Internet hyperlink to the various grants administered by the Office of Emergency Services.” Additionally, Chapter 459 mandates the OGYVP to help governmental and nongovernmental organizations with anti-gang programming, and to create long-lasting coordination strategies between

36. Id.
37. See id.
39. CAL. PENAL CODE § 13827(a) (enacted by Chapter 459).
40. Id. § 13827(b)(2) (enacted by Chapter 459).
41. Id. § 13827(b)(4)(A)-(J) (enacted by Chapter 459).
42. Id. § 13827(b)(4)(A) (enacted by Chapter 459); Fighting Gangs, supra note 3 (“According to the Department of Justice (DOJ), there are more than 420,000 gang members statewide.”).
43. CAL. PENAL CODE § 13827.2 (enacted by Chapter 459).
44. Id. § 13827(b)(4)(D) (enacted by Chapter 459).
“state, local, and regional entities.”

Further, Chapter 459 requires that the director be appointed by the Governor and “report directly to the office of the Governor.” Chapter 459 mandates that the OGYVP provide the Legislature with a report of its recommendations, upon collaborating with state and local stakeholders, for identifying the OGYVP’s “mission, role, and responsibilities as a statewide entity dedicated to reducing violence and the proliferation of gangs and gang violence in California.”

IV. ANALYSIS OF CHAPTER 459

The Legislature enacted Chapter 459 to streamline and buffer with resources the previously divided initiatives, programs, and government efforts working to stem gang violence. Prior law did not provide California with an adequate structure to assist and inform gang prevention, intervention, and suppression efforts of private and public entities. Chapter 459 creates a brain center from which the entire state can draw support and share guidance regarding the gang epidemic facing California’s communities. Instead of each county, city, or municipality reacting alone to gang proliferation and increased gang violence,

45. Id. § 13827(b)(4)(E) (enacted by Chapter 459).
46. Id. § 13827.1(a) (enacted by Chapter 459).
47. 2007 Cal. Stat. ch. 459, § 3(b)(3).
48. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1381, at 3 (May 16, 2007). Prior to Chapter 459, gang-related initiatives and programs were receiving funding administered by separate sources. Id. The Office of Emergency Services administered funding to the following: (1) the Multi-Agency Gang Enforcement Consortium, a Fresno County-based program focused on gang crime arrests that receives funding from the General Fund; (2) the Gang Violence Suppression Program, a county-run grant program funded by the General Fund to develop coordinated gang responses by the criminal justice system to gang issues; (3) CALGANG, a database of cross-jurisdictional gang information maintained by the Department of Justice and funded by the General Fund; (4) the Anti-Gang Initiative, a federal grant program coordinated by the Office of the U.S. Attorney; and (5) the Six City Anti-Gang Initiative, a federal grant program coordinated by the Office of the U.S. Attorney for specific recipients. Id. at 3-4. In addition, the Corrections Standards Authority administered funding to the following: (1) the Community Delinquency Prevention/Title V Prevention Grants for At-Risk Youth, funded federally and targeted at youth delinquency; (2) the Juvenile Justice Delinquency Prevention program, a federally funded program that supports gang prevention and intervention efforts; (3) the federally funded Juvenile Accountability Incentive, designed to provide grants for the formation of advisory boards aimed at preventing youth participation with gangs; and (4) the Juvenile Justice Crime Prevention Act, which receives money from the General Fund and allows each county to determine the gang-focus. Id. at 4-5. Finally, the Department of Justice administered funds from the General Fund to the Gang Suppression Enforcement Teams, allowing them to provide state agent-assistance to local law enforcement. Id. at 5-6.
49. See id. at 3 (“Current gang efforts are divided between several departments . . . .”); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1381, at 6 (Sept. 8, 2007) (“California lacks a governance structure that administers the available funds and tracks the outcomes and effectiveness of programs that are aimed at reducing and preventing violence and gang activity.”).
50. See ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1381, at 1 (May 16, 2007) (“This bill creates the Office of Statewide Violence and Gang Prevention (OSVGP) within the Office of Emergency Services, and requires the Office to coordinate and assist schools, parents, community groups and law enforcement agencies with information and strategies to address gang involvement and violence.”).
Chapter 459 seeks to assist individual communities with educational resources, increased awareness of available funding, tools to evaluate strategies, and information on best practices.\(^{51}\)

Supporters of Chapter 459 focus on the need for such an office, praising the coordinated approach and commending the consolidation of responsibility in the anti-gang effort.\(^{52}\) In addition, supporters believe Chapter 459 creates an increased level of accountability through the existence of a “high profile point of focus for ... oversight and coordination.”\(^{53}\) Since the Office of Criminal Justice Planning, which dissolved in 2003 for mismanagement of funds, there has not been an “obvious entity in which to house the administration of gang prevention programs.”\(^{54}\) Many of those programs relating to federal and state grants under the Office of Criminal Justice Planning’s administration shifted governing offices.\(^{55}\) For example, grant programs funding juvenile drug courts, mental health services, truancy prevention programs, and others that lack a gang-centered mission, shifted from the Office of Criminal Justice Planning to the Corrections Standard Authority (CSA), and others shifted to the Office of Emergency Services (OES).\(^{56}\)

Some critics of Chapter 459 question the necessity of a statewide office dedicated to gang and youth violence prevention assuming control over grants
and programs that do not relate solely to gang issues.\(^{57}\) Those opposed to a complete consolidation of juvenile justice grants assert the efficiency of the CSA’s administration of some of the federal funding programs that could potentially fall within the scope of the OGYVP.\(^{58}\)

However, these concerns appear to be addressed in Chapter 459’s mandate that the OGYVP, in defining its grant administering responsibilities among others, collaborate with state and local stakeholders to determine the most effective and appropriate role for the office in this regard.\(^{59}\) There is no one-size fits all solution to the gang problem across the state, and Chapter 459 reflects this understanding through its emphasis on collaboration.\(^{60}\)

For that reason, it appears that the OGYVP’s purpose would be to serve as a place for local organizations to go to when in need of recent studies, current data, funding resources, and information sharing about successful programs in other areas of the state, rather than as a statewide office directing the actions of localized efforts.\(^{61}\) If the OGYVP succeeds in its objectives to collaborate with law enforcement, faith-based, community, and educational leaders on the most effective ways to guide gang prevention, intervention, and suppression resources and practices, then there will exist an unprecedented state-level powerhouse of leaders and information dedicated to the revitalization of neighborhoods, and of lives, once dominated by gang violence.\(^{62}\)

\(^{57}\) Letter from David Steinhart, Program Dir., Commonweal, to Assembly Member Mark Leno, Cal. State Assembly (May 14, 2007) (on file with the McGeorge Law Review).

\(^{58}\) Id.

\(^{59}\) CAL. PENAL CODE § 13827(b)(4)(A)-(J) (enacted by Chapter 459); see also Governor Press Release, supra note 30 (explaining that “the Governor also appointed . . . CalGRIP Advisory Committee members,” who represent a broad spectrum of stakeholders from across California).

\(^{60}\) See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS of AB 1381, at L-M (July 10, 2007).

Given the enormously complex nature of the gang and violence problems facing California, the author and/or the Committee may wish to discuss whether the initial focus of the new Office this bill proposes should be narrowed to developing, in collaboration with a wide range of local stakeholders, a comprehensive blueprint for its mission as a statewide entity dedicated to violence and gang prevention in California. As currently drafted, the bill contemplates a broad range of initiatives relevant to the problems of gangs and violence. However, the state might better marshal its resources and ultimate effectiveness if the statewide entity created to address these issues is itself developed in concert with local partners.

\(^{61}\) Id. at C (noting that the OGYVP should “[p]rovide public education on effective programs, models, and strategies for the control of violence and serving [sic] as a clearinghouse for information on gang violence prevention issues, programs, resources, and research”).

\(^{62}\) See CDCR Press Release, supra note 27 (“‘A growing number of Californians are living a nightmare trapped inside their homes, afraid to come out unless they absolutely have to . . . . So today I am announcing a coordinated, multi-faceted, anti-gang initiative that focuses on the three strategies everyone agrees work best: suppression, intervention, and prevention.’” (quoting Governor Arnold Schwarzenegger)).
Prior to Chapter 459, with the exception of the disbanded Office of Criminal Justice Planning, no California office dedicated to gang violence prevention existed.63 Regional and local organizations, both private and public, offered services and extended efforts to reduce gang domination of neighborhoods and of youth gang involvement.64 The OGYVP’s goal to “eradicate the root causes and conditions that trigger street gang activity and support entrenched neighborhood violence” may prove elusive.65 But, with the energy of a commissioned office, plus the effort and cooperation from many experienced advisors, the OGYVP just might succeed in its mission to allow individual cities and communities to address their own specific needs, while simultaneously coordinating violence and gang prevention, intervention, and suppression efforts.66

63. See Richman, supra note 29 (indicating that a “multipronged statewide effort to crack down on gang violence . . . is unprecedented”).
64. See PHASE 1 REPORT, supra note 11, at 33-67 (discussing public and private efforts to end gang activity in Los Angeles).
66. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1381, at 4-5 (June 4, 2007).
““This bill will serve all these communities by creating a clearing house that can provide them with information on programs and research, help in accessing existing federal and state resources they are unaware of, and help create a network for local governments, private and non-profit service providers, educators, law enforcement, and individuals looking to get involved in their community.””
Id. (quoting Assembly Member Fabian Núñez).