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# Chapter 219: Chelsea's Law

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## Chapter 219: Chelsea's Law

*Kevin Walkow*

### *Code Sections Affected*

Penal Code §§ 290.09, 3053.8, and 9003 (new), §§ 220, 236.1, 264, 264.1, 286, 288, 288a, 289, 290.04, 290.05, 290.06, 290.46, 666, 667.61, 1203.067, 2962, 3000, 3000.1, 3008, and 13887 (amended).  
AB 1844 (Fletcher); 2010 STAT. Ch. 219.

### I. INTRODUCTION

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

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

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1. Michael Mello, *Murderer Gets Life Sentence, John Gardner Admitted Killing Teens Amber Dubois and Chelsea King*, ORANGE COUNTY REG., May 15, 2010 (on file with the *McGeorge Law Review*).

2. *Id.*

3. Elliot Spagat, *Killer Heads to Prison Amid Changes to California Laws*, ASSOCIATED PRESS, May 14, 2010, available at [http://www.scpr.org/news/2010/05/14/killer-heads-prison-amid-changes-california-laws/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%253A+893KpccSouthernCaliforniaNews+%2528KPCC%253A+News%2529](http://www.scpr.org/news/2010/05/14/killer-heads-prison-amid-changes-california-laws/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%253A+893KpccSouthernCaliforniaNews+%2528KPCC%253A+News%2529) (on file with the *McGeorge Law Review*).

4. *Id.*

5. Tony Perry, *Killer May Be Suspect in Other Assaults*, L.A. TIMES, May 18, 2010, at A3; Mello, *supra* note 1.

6. Mello, *supra* note 1.

7. Spagat, *supra* note 3.

8. Mello, *supra* note 1; Perry, *supra* note 5.

9. Plea of Defendant at 4, *People v. John Albert Gardner*, No. CD225886 (2010); see also Matthew T. Hall and Dana Littlefield, *Deal with Prosecutors Spares Gardner Death: Sex Offender Admits to Killing Teens Chelsea King and Amber Dubois*, SAN DIEGO TRIB., Apr. 16, 2010, <http://www.signonsandiego.com/news/2010/apr/16/gardner-pleads-guilty-murders-chelsea-amber/> (on file with the *McGeorge Law Review*).

10. Mello, *supra* note 1; Plea of Defendant at 4, *People v. John Albert Gardner*, No. CD225886 (2010).

11. Letter from Mac Taylor, Legislative Analyst, Cal. Legislative Analyst's Office, to Nathan Fletcher, Assembly Member, 75th Dist. (May 12, 2010) [hereinafter Letter from Mac Taylor] (on file with the *McGeorge Law Review*) (noting that ninety thousand registered sex offenders reside in California); see also Spagat, *supra*

Chapter 219, commonly known as “Chelsea’s Law,”<sup>12</sup> which increases penalties for sex crimes, requires lifetime parole for offenders who commit the most egregious crimes, restricts sex offenders from entering parks, and implements the Containment Model for sex offender management.<sup>13</sup> Support for Chelsea’s Law was widespread; Chapter 219 received unanimous approval at every stage of the legislative process.<sup>14</sup> In an eighty member Assembly, fifty-five lawmakers coauthored Chapter 219.<sup>15</sup>

## II. LEGAL BACKGROUND

Chapter 219 enacts new statutes within, and amends numerous sections of, California’s Penal Code.<sup>16</sup> The key provisions of Chapter 219 affect sentencing,

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note 3 (noting the parents of murder victim Amber DuBois also sponsored legislation after her death); California Newswire, *Calif. Bills Championed by Father of Amber Dubois Signed by Governor Arnold Schwarzenegger*, ENEWSCHANNELS (Sept. 27, 2010), [http://enewschannels.com/2010/09/27/enc12281\\_172723.php](http://enewschannels.com/2010/09/27/enc12281_172723.php) (on file with the *McGeorge Law Review*). Assembly Members Pedro Nava and Paul Cook jointly authored three bills on behalf of the Dubois family, which the Governor signed into law, to help law enforcement agencies coordinate to prevent abductions, assist each other in abduction investigations, and recover victims quickly. *Id.*

12. Spagat, *supra* note 3; Mathew T. Hall, *Chelsea’s Law Amended by Committee*, SAN DIEGO TRIB., June 29, 2010, at A7 (on file with the *McGeorge Law Review*.)

13. Press Release, Office of Assembly Member Nathan Fletcher, 2010 Legislation, Chelsea’s Law: Chelsea King Child Predator Prevention Act of 2010, <http://arc.asm.ca.gov/member/75/?p=myLeg> (last visited Mar. 14, 2011) [hereinafter Fletcher on Chelsea’s Law] (on file with the *McGeorge Law Review*).

14. Assembly Floor Vote of AB 1844, Unofficial Ballot (Aug. 30, 2010) [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_18011850/ab\\_1844\\_vote\\_20100830\\_0423PM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_18011850/ab_1844_vote_20100830_0423PM_asm_floor.html); List of Assembly Bill 1844 Supporters, Office of Assembly Member Nathan Fletcher (June 10, 2010); *see also* SENATE FLOOR, ANALYSIS OF AB 1844, at 10-11 (Aug. 28, 2010) (identifying support from U.S. Senator Dianne Feinstein; U.S. Senator Barbara Boxer; State Superintendent of Public Instruction Jack O’Connell; Office of the Attorney General; Peace Officers Research Association of California; California State Sheriffs Association; Crime Victims United; Children’s Advocacy Institute; The Innocence Mission; Child Abuse Prevention Center; Concerned Women for America; San Diego County Board of Supervisors; Los Angeles County Board of Supervisors, San Diego District Attorney; San Diego Mayor Jerry Sanders; San Francisco District Attorney; San Bernardino District Attorney; San Bernardino County Sheriff-Coroner; Los Angeles District Attorney; San Bernardino County Sheriff; San Diego County Sheriff; City of Escondido; City of La Mesa; City of Poway; City of San Marcos; City of Vista; State Public Affairs Committee of the Junior Leagues of California; California State Parent Teacher Association; La Mesa Chamber of Commerce; Ramona Chamber of Commerce; Lakeside Union School District; Grossmont Union High School District; Ramona Unified School District Board Member Rodger Dohm; Grossmont Union High School District Member Gary Woods; Helix Water Board Member Kathleen Hedburg). *But see* Letter from Ignacio Hernandez, Cal. Att’y for Criminal Justice (CACJ) to Sen. Mark Leno, Chair, S. Comm. on Pub. Safety, (May 21, 2010) (on file with the *McGeorge Law Review*) (criticizing Chapter 219 as overbroad and as an inefficient use of limited resources); Letter from Francisco Lobaco, Legislative Dir., Am. Civil Liberties Union (ACLU) to Members, S. Comm. on Pub. Safety (June 22, 2010) (on file with the *McGeorge Law Review*) (arguing that Chapter 219 will “exacerbate already severe [prison] overcrowding,” and “produce “enormous additional fiscal cost[s] to the state.”) The ACLU also considered the penalty of life without the possibility of parole for non-murder crimes “disproportionate and excessive.” *Id.*

15. CAL. CONST. art. IV, § 2(a); *see also* Assemb. B. 1844, Leg. 2009-2010 Reg. Sess. (Cal. 2010) (indicating that twelve Senators also coauthored Chapter 219).

16. CAL. PENAL CODE §§ 290.09, 3053.8, 9003 (enacted by Chapter 219); *id.* §§ 220, 236.1, 264, 264.1, 286, 288, 288a, 289, 290.04-290.06, 290.46, 666, 667.61, 1203.067, 2962, 3000, 3000.1, 3008, 13887 (amended

parole and probation, risk assessment, and restrictions on the movement of registered sex offenders.<sup>17</sup>

## A. California Sentencing Laws

### 1. The Foundation for Indeterminate Sentences & Aggravating Circumstances

Before the Determinate Sentencing Act of 1976, all felonies in California were punishable by indeterminate sentences.<sup>18</sup> Under the indeterminate sentencing scheme, convicted felons were subject to a sentencing range (*e.g.* twenty-five years to life), rather than a specific term of imprisonment.<sup>19</sup> Additionally, the parole board was ultimately responsible for determining the length of each sentence.<sup>20</sup> Indeterminate sentences are still used today, however, they apply only to the most serious crimes.<sup>21</sup>

Existing California law provides that some sex crimes are punishable by a single “life” term of imprisonment.<sup>22</sup> Although classified as “life,” these terms are actually indeterminate sentences ranging from a few years to life imprisonment.<sup>23</sup> Under California’s “habitual sex offender law,” individuals who have been convicted of specified sex crimes, and are subsequently convicted of one or more of those same crimes, are sentenced to twenty-five years to life.<sup>24</sup>

The California Penal Code also defines “one-strike” offenses, which are punishable by a term of either fifteen or twenty-five years to life.<sup>25</sup> These specified sex crimes include rape, spousal rape, sexual penetration, lewd or lascivious acts, sodomy, oral copulation, and continuous sexual abuse of a child.<sup>26</sup>

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by Chapter 219).

17. See *supra* note 16; SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2 (Aug. 8, 2010) (summarizing the statutory changes proposed by Assembly Bill 1844).

18. *Cunningham v. California*, 549 U.S. 270, 276-77 (2007); CAL. LEGISLATIVE ANALYST’S OFFICE, OVERVIEW OF CUNNINGHAM V. CALIFORNIA AND RELATED LEGISLATION (Nov. 9 2010) available at [http://www.lao.ca.gov/handouts/crimjust/2010/Cunningham\\_11\\_9\\_10.pdf](http://www.lao.ca.gov/handouts/crimjust/2010/Cunningham_11_9_10.pdf) [hereinafter OVERVIEW OF CUNNINGHAM] (on file with the *McGeorge Law Review*).

19. *Cunningham*, 549 U.S. at 276-77; OVERVIEW OF CUNNINGHAM, *supra* note 18, at 1.

20. *Cunningham*, 549 U.S. at 277.

21. *Id.* at 277 n.3. For example, first-degree murder is punishable by a sentence of twenty-five years to life. CAL. PENAL CODE § 190(a) (West 2010).

22. See, *e.g.*, CAL. PENAL CODE § 209(b) (providing the crime of “aggravated kidnapping” is punishable by imprisonment for life with the possibility of parole).

23. *Id.* § 288.7(b) (providing the crime of “sexual penetration” as specified, is punishable by a term of fifteen years to life). Generally, persons serving indeterminate sentences are evaluated by the California Board of Parole Hearings to determine their fitness for release and the appropriate conditions of parole. Cal. Dep’t of Corr. & Rehab., About CDCR: Divisions and Boards, Board of Parole Hearings, <http://www.cdcr.ca.gov/BOPH/> (last visited Mar. 14, 2011) (on file with the *McGeorge Law Review*).

24. CAL. PENAL CODE § 667.71(a)-(b).

25. *Id.*

26. *Id.* § 667.71(c).

For these particular sex crimes, a sentence of twenty-five years to life is imposed if one or more of the aggravating factors listed in section 667.61(d) are present.<sup>27</sup> If one of the aggravating factors in section 667.61(e) is present, a sentence of fifteen years to life is imposed.<sup>28</sup> However, this increases to twenty-five years to life in the presence of two or more factors.<sup>29</sup>

## 2. *Determinate Sentencing & Judicial Discretion*

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

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

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

29. *Id.* § 667.61(a),(e).

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

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

32. CAL. PENAL CODE § 213(a)(1)(B).

33. *Id.* § 1170(b).

34. OVERVIEW OF CUNNINGHAM, *supra* note 18, at 1.

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

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

*B. Parole Supervision for Specified Sex Offenders*

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

*C. Sex Offender Registration & Movement Restrictions*

California law requires persons convicted of a felony or misdemeanor sex offense to register with the local law enforcement agency where they reside.<sup>39</sup> Additionally, movement restrictions apply to individuals registered pursuant to the Sex Offender Registration Act.<sup>40</sup> In 2006, California voters passed Proposition 83, establishing new requirements for sex offenders.<sup>41</sup> Specifically, it is unlawful for a registered sex offender to reside within 2,000 feet of a school or park regularly attended by children.<sup>42</sup> Existing law also authorizes local governments to enact local ordinances further restricting registrant residency.<sup>43</sup> Furthermore, Proposition 83 requires paroled felony sex offenders to wear Global Positioning System (GPS) devices for the remainder of their lives.<sup>44</sup>

*D. Risk Assessment & the California Sex Offender Management Board*

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

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36. CAL. PENAL CODE § 3000(b)(1).

37. *Id.* § 677.5(b)-(c) (West 2010) (listing offenses of rape, sodomy, oral copulation, lewd or lascivious acts, sexual penetration, and in concert rape); *id.* § 3000(b)(1) (noting, however, that the parole authority may elect to waive parole upon good cause).

38. *Id.* §§ 667.61, 667.71, 3000(b)(3).

39. *Id.* § 290(b) (West 2010).

40. *Id.* § 3003.5(b) (West 2006).

41. 2006 Cal. Legis. Serv. Prop. 83 (West).

42. CAL. PENAL CODE § 3003.5(b).

43. *Id.* § 3003.5(c).

44. *Id.* § 3004(b).

45. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, DIVISION OF ADULT PAROLE OPERATIONS, STATE AUTHORIZED RISK ASSESSMENT TOOL FOR SEX OFFENDERS (SARATSO) COMMITTEE, [http://www.cdcr.ca.gov/Parole/SARATSO\\_Committee/SARATSO.html](http://www.cdcr.ca.gov/Parole/SARATSO_Committee/SARATSO.html) (last visited Oct. 13, 2010) (on file with the *McGeorge Law Review*); see also CAL. PENAL CODE § 290.05(a) (noting The SARATSO Review Committee is comprised of a representative of the State Department of Mental Health, the Department of Corrections and Rehabilitation, the Attorney General's Office, and of the Chief Probation Officers of California).

46. CAL. PENAL CODE § 290.04(a)(2). The risk assessment tool selected by the committee is known as

to ensure the tool selected “reflects the most reliable, objective and well-established protocols for predicting sex offender risk recidivism . . . .”<sup>47</sup> Prior to the enactment of Chapter 219, the SARATSO Review Committee selected the STATIC-99 risk assessment scale as the sole assessment tool used to evaluate adult males.<sup>48</sup>

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

### E. The Containment Model & Sex Offender Management

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

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the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO). *Id.* § 290.04(a)(1).

47. *Id.* § 290.04(a)(2).

48. *Id.* § 290.04(b)(2); CAL. SEX OFFENDER MGMT BD., AN ASSESSMENT OF CURRENT MANAGEMENT PRACTICES OF ADULT SEX OFFENDERS IN CALIFORNIA REPORT: INITIAL REPORT 104 (2008), available at <http://www.casomb.org/reports.htm> [hereinafter CASOMB ASSESSMENT] (on file with the *McGeorge Law Review*) (reviewing the literature on the Containment Model and explaining that “the Static-99 is a risk assessment instrument that has been shown to have a recognized ability to predict sexual recidivism”); see also CAL. SEX OFFENDER MGMT TASK FORCE, CAL. DEP’T OF CORR. AND REHABILITATION, MAKING CALIFORNIA COMMUNITIES SAFER: EVIDENCE-BASED STRATEGIES FOR EFFECTIVE SEX OFFENDER MANAGEMENT, FULL REPORT 117 (2007) [hereinafter TASK FORCE REPORT], available at <http://www.casomb.org/reports.htm> (on file with the *McGeorge Law Review*) (noting the STATIC-99 applies only to males because “[t]here is a lack of well-validated risk assessment measures for juvenile and female sex offenders”). “Static risk assessments use primarily static or unchangeable risk factors (e.g., number of prior sex offenses, age of the offender, gender of victims, and relationship to victims).” *Id.*

49. CAL. PENAL CODE § 9001(a). CASOMB is a seventeen member board comprised of the Attorney General, the Secretary of the Department of Corrections and Rehabilitation, the Director of Adult Parole Services, the Director of Mental Health, one state judge, and representatives from law enforcement, prosecuting attorneys, probation officers, criminal defense attorneys, county administrators, city managers, licensed mental health professionals, and recognized experts in the field of sexual assault. *Id.* § 9001(b)(1)-(3).

50. *Id.* § 9002(a).

51. *Id.* § 9002(a)(1)-(2). CASOMB is required to address issues of supervision, treatment, housing, transition to communities, and interagency coordination. *Id.* § 9002(a)(2).

52. CAL. SEX OFFENDER MGMT BD., RECOMMENDATIONS REPORT 104 (2010) [hereinafter CASOMB RECOMMENDATIONS], available at <http://www.casomb.org/reports.htm> (on file with the *McGeorge Law Review*). Governor Schwarzenegger’s High-Risk Sex Offender Task Force also endorsed the Containment Model. *Id.* at 32-33.

53. CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEP’T OF JUSTICE, THE COMPREHENSIVE ASSESSMENT PROTOCOL: A SYSTEMWIDE REVIEW OF ADULT AND JUVENILE SEX OFFENDER MANAGEMENT

protection and public safety; multidisciplinary collaboration; comprehensive risk management; informed public policies; and quality control measures.<sup>54</sup> Successful implementation of the Containment Model requires multiple accountability tools, including specialized supervision, risk assessment, sex offender-specific treatment, and polygraph examinations.<sup>55</sup> When these tools are employed together, the Containment Model strategies have proven effective at mitigating sex offender recidivism.<sup>56</sup> The Containment Model is the leading sex offender management practice among other states and jurisdictions.<sup>57</sup>

### III. CHAPTER 219

Chapter 219 makes several changes to California law, including increased sentences for sex crimes, increased parole periods, a new restriction to prevent sex offenders from entering parks, and implementation of the Containment Model for sex offender management.<sup>58</sup>

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

54. *See generally* Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 265 (2003) (presenting a comprehensive overview of the Containment Model).

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

*Id.* at 266.

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

56. *Id.* at 103.

57. *Id.*

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



A. *Increased Sentencing Model*

1. *Increased Indeterminate Sentencing & Added Aggravating Circumstances*

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

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

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

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

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

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

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

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

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

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

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

66. *Id.* § 667.61(d)(6)-(7) (amended by Chapter 219); see *supra* notes 25-29 and accompanying text (providing a summary of the predicate sex offenses and aggravating circumstances relevant to Chapter 219).

Specifically, Chapter 219 adds “bodily harm” against a minor under age fourteen, and “infliction of great bodily injury,” to the list of aggravating factors.<sup>67</sup>

## 2. *Enhanced Determinate Sentences for Crimes Against Minors*

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

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

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

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

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

70. *Id.* § 264(c)(1)-(2).

71. *Id.*

72. *Id.*

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

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

*B. New Sex Offender Parole Requirements & Movement Restrictions*

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

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

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

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

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

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

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

78. *Id.* § 3053.8 (enacted by Chapter 219).

79. *Id.* § 3053.8(a) (enacted by Chapter 219). Restriction applies to offenses specified in sections 261,

As a condition of an offender's parole, this condition remains in effect its duration.<sup>80</sup>

C. *Containment Provisions: Assessment, Treatment, & Collaboration*

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

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

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262, 264.1, 269, 286, 288a, 288, 288.5, 288.7, 289, 667.51(c), 667.61(j)(k)(l), or 667.71. *Id.* § 3053.8(b) (enacted by Chapter 219).

80. *Id.* § 3053.8(a) (enacted by Chapter 219).

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

82. CAL. PENAL CODE § 290.04(d) (amended by Chapter 219); see *supra* note 48 (defining static risk assessment).

83. CAL. PENAL CODE § 290.04(f) (amended by Chapter 219).

84. *Id.* § 290.09(b)(1) (enacted by Chapter 219).

85. *Id.* § 290.09(a)(1)-(2) (enacted by Chapter 219).

86. *Id.* § 290.09(b)(1) (enacted by Chapter 219).

87. *Id.*

Additionally, Chapter 219 requires the California Department of Justice to make offenders' dynamic and future risk scores available online.<sup>88</sup>

Lastly, Chapter 219 specifies that a prisoner must undergo mandatory treatment by the California Department of Mental Health if one independent professional, in the course of evaluating whether the prisoner meets the criteria as a "mentally disordered offender," concludes that a prisoner satisfies the conditions for treatment.<sup>89</sup>

#### IV. ANALYSIS

Chapter 219 enacts wide-ranging reforms designed to improve sex offender management in California. The tragic deaths of Chelsea King and Amber Dubois exposed what lawmakers believed were "serious flaws" in the California Penal Code.<sup>90</sup> Assembly Member Nathan Fletcher, explained that the purpose of Chapter 219 is to enact a "disciplined and comprehensive" scheme to reform California's management of violent sex offenders.<sup>91</sup> To achieve this goal, Chapter 219 increases penalties, requires lifetime parole for the most serious crimes, and implements the Containment Model for sex offender management.<sup>92</sup> The policy implications of Chapter 219 are substantial and far-reaching.<sup>93</sup> The scope of this analysis, however, is limited to considerations of sentencing, parole, movement, the Containment Model, and fiscal effects.

##### A. Sentencing: The "Cornerstone" of Chelsea's Law

###### 1. Indeterminate Sentences & Life Terms

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

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88. *Id.* § 290.09(b)(2) (enacted by Chapter 219). The Megan's Law sex offender database is available at <http://www.meganslaw.ca.gov>.

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

90. Fletcher Statement at Senate Public Safety Committee, *supra* note 76.

91. Fletcher on Chelsea's Law, *supra* note 13.

92. *Id.*

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

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

95. Fletcher Statement at Senate Public Safety Committee, *supra* note 76. A letter written by the San

possibility of parole serves two goals.<sup>96</sup> First, life without the possibility of parole is a preventative measure.<sup>97</sup> Dangerous sex offenders, if incarcerated, are incapable of committing new crimes.<sup>98</sup> Second, the penalty of life without the possibility of parole ensures that victims of sex offenders “will not have to live in terror that their attacker will be freed . . . .”<sup>99</sup>

## 2. Increased Determinate Sentences

Chelsea’s Law increases determinate sentences for forcible sex crimes and amends the Penal Code to distinguish between forcible and non-forcible sex crimes against minors.<sup>100</sup> These changes suggest a legislative acknowledgement that an offender who commits a forcible sex crime has the capacity to inflict greater harm, and that sex offenders should serve longer sentences if they demonstrate a willingness to attack children.<sup>101</sup> In total, Chapter 219 increases the penalties for seventeen triads, or fifty-one individual sentences.<sup>102</sup> The breadth of Chapter 219 is designed to provide district attorneys with new tools, and promote public safety and justice for victims.<sup>103</sup>

Some scholars criticize California’s determinate sentencing laws as being overly complex and inconsistent in legal theory.<sup>104</sup> In an article scrutinizing California’s sentencing practices, Professors Michael Vitiello and J. Clark Kelso observed that California’s determinate sentences are the product of multiple layers of legislative tinkering that accumulated over a thirty-year period.<sup>105</sup> Courts

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Diego District Attorney observed: “Unlike other criminals, in many cases, sex offenders cannot be rehabilitated. Chelsea’s law will make sure these are the offers that will be housed in prison until they die.” SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 22 (June 29, 2010).

96. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010) (referencing Assemblyman Fletcher’s stated need for Chapter 219).

97. *Id.* (citing Assembly Member Fletcher’s statement that life without the possibility of parole is necessary to ensure “potential victims. . . [are not] . . . needlessly harmed by those we know to be extremely dangerous.”).

98. *Id.* (referencing Assemblyman Fletcher’s stated need for Chapter 219).

99. *Id.*

100. *Id.*

101. *Id.* (citing Assembly Member Fletcher’s statement that “while all sex crimes are awful, these crimes are a red flag that the perpetrator is capable worse. The Legislature should acknowledge that”).

102. Fletcher Statement at Senate Public Safety Committee, *supra* note 76 (aggregating changes to lower, middle, and upper terms).

103. *Id.*

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

105. *Id.*

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

Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 920-21 (2004).

are equally critical of California's determinate sentences, qualifying the scheme as "mind-numbing," "complicated," "labyrinthine" and a "legislative monstrosity, which is bewildering in its complexity."<sup>106</sup> In 1991, the Senate Judiciary Committee observed:

Existing law contains over thirty possible sentencing triads for felony offenses. The sentencing formulas are complex, inconsistent and confusing. A judge is often required to complete a worksheet which can be more complicated than an IRS form in order to calculate the proper sentence.<sup>107</sup>

Nonetheless, the California Legislature passed Chapter 219 with unanimous support, implying that, at least in its own estimation, Chapter 219 enacts "a proportionate sentencing scheme" consistent with the interests of public safety.<sup>108</sup>

### B. New Sex Offender Parole Requirements

Chapter 219 enacts increased parole periods for specified offenses, indicating a legislative concern that paroled sex offenders continue to pose risks to public safety.<sup>109</sup> Chapter 219 broadens the scope of lifetime parole requirements to include offenders convicted of specified sex crimes against children under age fourteen, where before this penalty was limited only to persons convicted of first or second-degree murder.<sup>110</sup> Additionally, Chapter 219 doubles the parole period for specified offenses, increasing parole supervision from five to ten years for crimes against adults, and ten to twenty years for crimes against a minor under age fourteen.<sup>111</sup> Much like the rationale for imposing the penalty of life in prison

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106. *Id.* (citing *Comty. Release Bd. v. Super. Ct.*, 91 Cal.App.3d 814, 154 Cal. Rptr. 383, 384 n.1 (1979)); *People v. Reyes*, 212 Cal.App.3d 852, 260 Cal. Rptr. 846, 850 (1989); *People v. Sutton* 113 Cal.App.3d 162, 169 Cal. Rptr. 656, 656 (1980)).

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

108. *Id.* at 24.

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

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

111. *See supra* note 110.

without the possibility of parole, increasing the parole periods for eligible offenders reflects a determination that paroled sex offenders who evince a willingness to attack children should be monitored upon release from prison.<sup>112</sup>

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

### C. New Sex Offender Movement Restrictions

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

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112. Fletcher Statement at Senate Public Safety Committee, *supra* note 76.

113. See L.A. Dist. Memorandum, *supra* note 110, at 8 (“Although the differences in recidivism between the class of sexual offender and the class of other criminals do exist, the California Supreme Court did not find it so apparent in the context of an equal protection attack on the indefinite commitment of sexually violent predators [in *People v. McKee*, 47 Cal. 4th 1172, 1210 (2010)].”).

114. *Id.*

115. CAL. PENAL CODE § 3000.1(b) (amended by Chapter 219); L.A. Dist. Memorandum, *supra* note 110, at 8.

116. CAL. PENAL CODE § 3000.1(a)(2) (amended by Chapter 219); L.A. Dist. Memorandum, *supra* note 110, at 8.

117. CAL. PENAL CODE § 288(a) (amended by Chapter 219) (imposing a maximum term of eight years for conviction of a lewd or lascivious act); *id.* § 208(a) (amended by Chapter 219) (also imposing a maximum term of eight years for kidnapping); L.A. Dist. Memorandum, *supra* note 110, at 8.

118. L.A. Dist. Memorandum, *supra* note 110, at 8.

119. CAL. PENAL CODE § 3053.8(a) (enacted by Chapter 219).

120. Mello, *supra* note 1.

121. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 17 (June 29, 2010); see also Fletcher Statement at Senate Public Safety Committee, *supra* note 76 (“[Chapter 219]... ensures the worst offenders will not be entering parks and allows us to monitor and enforce this provision with GPS tracking.”).

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



As originally introduced, Chapter 219 excluded *all* sex offenders from parks.<sup>123</sup> This provision was amended in the Senate in deference to concerns raised by the Sex Offender Management Board.<sup>124</sup> As enacted, Chapter 219 creates a new misdemeanor offense that restricts those sex offenders who are subject to a twenty-year parole from visiting parks that are regularly attended by children, unless they have prior approval from their parole officers.<sup>125</sup>

#### D. A Containment Model for Sex Offender Management

The Containment Model is considered the best practice in sex offender management.<sup>126</sup> As explained by Assembly Member Fletcher, the Containment Model implemented by Chapter 219 “focuses on multi-agency collaboration, victim protection, intense community monitoring, specific treatment, supervision and polygraph testing.”<sup>127</sup> Where it has been employed in other states, this model has proven effective at reducing sex offender recidivism.<sup>128</sup>

Treatment for sex offenders by certified specialists is a significant component of the Containment Model.<sup>129</sup> In contrast to the policies of most states, California did not offer treatment for sex offenders prior to Chapter 219.<sup>130</sup> Chapter 219 requires participation in a certified “sex offender management program” as a condition of probation or parole.<sup>131</sup> It also mandates that certified sex offender management professionals attend training provided by SARATSO

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123. Assemb. B. 1844, Leg. 2009-2010 Reg. Sess. (Cal. 2010).

124. Fletcher Statement at Senate Public Safety Committee, *supra* note 76 (“In the place of instituting a statewide exclusionary zone for all sex offenders, we have listed to the recommendation of the Sex Offender Management Board.”); see generally Letter from Members of the Cal. Sex Offender Mgmt. Bd. to Assemb. Nathan Fletcher (2010), available at <http://www.casomb.org/reports.htm> (follow “CASOMB Letter Regarding Chelsea’s Law (AB 1844)” hyperlink) (on file with *the McGeorge Law Review*) (expressing concerns about the effects of residency restrictions).

125. CAL. PENAL CODE § 3053.8(a) (enacted by Chapter 219).

126. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844, at 32 (June 29, 2010). Both CASOMB and the HRSO Task Force have endorsed implementation of the Containment Model. *Id.*

127. Fletcher Statement at Senate Public Safety Committee, *supra* note 76; CASOMB RESPONSE, *supra* note 89, at 13.

128. CASOMB RESPONSE, *supra* note 89, at 13.

129. *Id.* In the Containment Model, sex offender treatment is envisioned as follows:

Sex offender treatment targets the thoughts, feelings, denial, minimalizations, motivations, justification, and lifelong behaviors and thought patterns that are, in fact, fused to the sexual assault itself. The supervising officer works closely with the treatment provider to learn the offender’s long-term patterns that precede actual assaults. These details, vitally necessary to assess risk but historically outside the scope of criminal justice system intervention, are at the center of therapy.

...

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

English et al., *supra* note 54, at 272-73 (citation omitted).

130. *Id.*

131. CAL. PENAL CODE § 290.09(c)-(d) (enacted by Chapter 219).

and communicate these assessment scores to offenders' parole or probation officers.<sup>132</sup>

A second component of Chapter 219's Containment Model is polygraph testing.<sup>133</sup> According to the Sex Offender Management Board, polygraph testing is a "critical element in effective supervision . . . ."<sup>134</sup> Polygraph testing allows supervisors to verify adherence to conditions of parole, as well as "truthfulness in treatment."<sup>135</sup> Additionally, it offers new insights into an offender's mental state, and provides an objective metric to evaluate progress.<sup>136</sup>

A third component of the Containment Model is the use of dynamic and future risk assessments.<sup>137</sup> As explained by the Sex Offender Management Board, "[a] dynamic assessment instrument measures risk based on current *changing* facts about an offender . . . [that] can be empirically measured at any point in time . . . ."<sup>138</sup> Closely related is the requirement for an actuarial instrument that measures offenders' risk of future sexual violence.<sup>139</sup> The STATIC-99 neither accounts for psychopathy nor assesses offenders' capacity for future violence.<sup>140</sup> The incorporation of dynamic and future risk assessments will provide law enforcement agencies with a more accurate evaluation of the dangerousness of sex offenders.<sup>141</sup>

#### *E. Dollars & Sense: Legislative Priorities & Fiscal Implications*

The cost of implementing Chapter 219 is significant in light of California's present lack of financial resources.<sup>142</sup> Chapter 219 was signed into law amidst a multi-billion dollar budget deficit, underscoring its importance to lawmakers and Governor Schwarzenegger.<sup>143</sup> Chapter 219's passage resulted in tens of millions

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132. *Id.*

133. CASOMB RESPONSE, *supra* note 89, at 14.

134. *Id.*

135. *Id.*

136. CAL. HIGH RISK SEX OFFENDER (HRSO) TASK FORCE, CAL. DEP'T OF CORR. AND REHAB. 16-17 (2006) (observing "...remarkable success for holding offenders accountable and reducing public risk. The use of polygraph examinations on sex offenders has been cited as an extremely effective way to obtain detailed information about habits and offending patterns....").

137. CASOMB RESPONSE, *supra* note 89, at 16.

138. *Id.*

139. *Id.*

140. *Id.*; see also TASK FORCE REPORT, *supra* note 48, at 39 (noting the STATIC-99 applies only to males because "[t]here is a lack of well-validated risk assessment measures for juvenile and female sex offenders").

141. Fletcher Statement at Senate Public Safety Committee, *supra* note 76.

142. MAC TAYLOR, CAL. LEG. ANALYST'S OFFICE, THE 2010-11 BUDGET: OVERVIEW OF THE GOVERNOR'S BUDGET 3 (2010), available at [http://www.lao.ca.gov/reports/2010/bud/budget\\_overview/bud\\_overview\\_011210.pdf](http://www.lao.ca.gov/reports/2010/bud/budget_overview/bud_overview_011210.pdf) (observing a \$18.9 billion deficit).

143. Cf. Adam Nagourney, *California Lawmakers Pass Overdue Budget*, N.Y. TIMES, Oct. 7, 2010, [http://www.nytimes.com/2010/10/08/us/08california.html?\\_r=1&scp=3&sq=california%20budget&st=cse](http://www.nytimes.com/2010/10/08/us/08california.html?_r=1&scp=3&sq=california%20budget&st=cse) (on file with the *McGeorge Law Review*) (observing a \$19 billion budget deficit, and a budget agreement reducing

of dollars in immediate spending, notwithstanding the fact that it was signed into law during the longest budget standoff in California history.<sup>144</sup>

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

### 1. Incarceration Costs

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

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spending by \$7.5 billion, including \$3.5 billion reduction to public schools).

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

145. MAC TAYLOR, *supra* note 142, at 4.

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

147. Letter from Mac Taylor, *supra* note 11, at 3.

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

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

150. *Id.*

151. *Id.*

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

153. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 2-3 (Aug. 8, 2010). Pleas may also increase incarceration time. Mathew T. Hall and Dana Littlefield, *supra* note 9 (noting John Gardner pleaded guilty to the murders of Amber Dubois and Chelsea). In exchange for his admission, prosecutors agreed not to seek the death penalty. Gardner was sentenced to two consecutive life terms without the possibility of parole. *Id.*

The fiscal effect of increased indeterminate sentencing is also difficult to quantify, but potentially substantial.<sup>154</sup> An increase from fifteen years to life to twenty-five years to life is only significant if the Board of Parole Hearings would have granted parole under the previous statutory scheme.<sup>155</sup> Under prior law, an offender sentenced to fifteen years to life could still serve a life sentence if the Board of Parole Hearings denied parole.<sup>156</sup> Any increased cost that can be attributed to longer indeterminate sentences will occur in the future; that is, when an offender might have obtained parole under prior law.<sup>157</sup> Thus, the fiscal effect will not have an immediate impact on prison expenses or overcrowding concerns.<sup>158</sup>

## 2. Containment Model Implementation Costs

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

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

At present, California does not provide sex offender treatment to probationers or parolees, and there are no state-approved sex offender management programs.<sup>164</sup> Therefore, Chapter 219's requirement that sex

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154. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 1-2 (Aug. 8, 2010).

155. Email from Jacqueline Wong-Hernandez, Senate Appropriations Consultant, California Senate to author (Oct. 14, 2010) (on file with the *McGeorge Law Review*).

156. *Id.*

157. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 3 (Aug. 8, 2010) (providing that the cost of increasing a sentence from fifteen years to life to twenty-five years of life will not be realized until the sixteenth year of incarceration, when an offender might have been paroled under prior law).

158. *Id.*

159. *Id.* at 5.

160. *Id.*

161. *Id.* at 1, 5.

162. CAL. PENAL CODE § 290.05(a)-(c) (amended by Chapter 219).

163. Email from Jacqueline Wong-Hernandez (Oct. 14, 2010), *supra* note 155.

164. CASOMB RESPONSE, *supra* note 108, at 13.

offenders participate in an approved sex offender management program as a condition of probation or parole will also generate significant costs.<sup>165</sup>

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

### 3. Cost Mitigation & Petty Theft

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

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

The Legislature's desire to mitigate Chapter 219's implementation costs led to this change in sentencing for petty theft with a prior conviction.<sup>175</sup> In the 2008-2009 fiscal year, 1,329 individuals were sentenced to prison for petty theft with

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165. CAL. PENAL CODE § 290.09(a)(1) (enacted by Chapter 219); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 5 (Aug. 8, 2010).

166. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 4 (Aug. 8, 2010).

167. *Id.*

168. *Id.* (identifying fiscal implications for compliance with Chapter 219).

169. Fletcher on Chelsea's Law, *supra* note 13; Nagourney, *supra* note 143.

170. Fletcher on Chelsea's Law, *supra* note 13.

171. CASOMB RESPONSE, *supra* note 89, at 6 (noting that under previous law, every person who has been convicted of petty theft, grand theft, auto theft, burglary, carjacking, robbery, or receiving stolen property, and is at any subsequent point convicted of petty theft, can be sentenced to either up to one year in county jail, or to state prison for more than one year).

172. CAL. PENAL CODE § 666(b)(1) (amended by Chapter 219); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010) (nothing this change does not apply to registered sex offenders, or persons with a prior serious or violent felony convictions).

173. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010); Hall, *supra* note 12.

174. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010); Hall, *supra* note 12.

175. Hall, *supra* note 12.

fewer than three prior qualifying offenses.<sup>176</sup> Using this figure as a baseline, the Senate Appropriations Committee estimated that Chapter 219's change to petty theft could allow annual savings of \$32 million in future incarceration costs.<sup>177</sup> Thus, to the extent that individuals convicted of petty theft with fewer than three prior qualifying offenses are sentenced to jail instead of state prison, this provision does, in fact, aid the state in avoiding future costs.<sup>178</sup>

Again, it should be noted that petty theft sentencing is unrelated to sex offender management.<sup>179</sup> The savings from the change to petty theft sentencing could be realized irrespective of Chapter 219's other provisions.<sup>180</sup> As a practical matter, however, the changes to petty theft sentencing do mitigate the expense of otherwise implementing Chapter 219.<sup>181</sup>

## V. CONCLUSION

Chapter 219, commonly known as Chelsea's Law, was introduced in response to the horrific crimes committed by John Gardner.<sup>182</sup> It represents an attempt by the Legislature to improve public safety by reforming California's approach to sex offender management.<sup>183</sup> To achieve this goal, Chapter 219 increases penalties for sex crimes, requires lifetime parole for offenders who commit the most egregious crimes, restricts sex offenders from entering parks, and implements the Containment Model for sex offender management.<sup>184</sup> The reforms implemented by Chapter 219 constitute a substantial change to California's approach to community safety, and place California at the forefront of dynamic risk assessment management practices.<sup>185</sup> Although these changes amount to an overhaul to sex offender management in California, Chapter 219's long-term impact on public safety and its ultimate cost to the state of California remain unclear.<sup>186</sup>

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176. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 6 (Aug. 8, 2010). It is unknown how many of these persons are registered sex offenders, and also have prior serious or violent felony convictions. *Id.*

177. *Id.*

178. *Id.*

179. Email from Jacqueline Wong-Hernandez (Oct. 14, 2010), *supra* note 155. The change to petty theft sentencing allows the state to avoid incarceration costs in one sentencing area, while incurring new costs in another—increased sentencing for sex offenses. *Id.*

180. *Id.*

181. See SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844, at 5 (Aug. 8, 2010) (citing potential savings of \$32 million).

182. Mello, *supra* note 1; Perry, *supra* note 5.

183. See Fletcher Statement at Senate Public Safety Committee, *supra* note 76 ("Chelsea's Law is an attempt to . . . take significant steps to reform our system and protect our children.").

184. Fletcher on Chelsea's Law, *supra* note 13.

185. *Id.*

186. Compare SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1844 (June 29, 2010) (discussing policy implications of Chapter 219), with SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1844 (Aug. 8, 2010) (discussing fiscal implications of Chapter 219).