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Review of Selected 1994 California Legislation

Crimes

***399** CRIMES; HABITUAL SEXUAL OFFENDERS--ELIMINATION OF SENTENCING CREDITS

[Penal Code § 667.71](#) (Amended). AB 2261 (Peace); 1994 Stat. Ch. 446

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Under prior law, a habitual sexual offender [\[FN1\]](#) sentenced for the minimum term of twenty-five years was eligible to have his or her sentence reduced for good behavior to not less than twenty years. [\[FN2\]](#) Chapter 446 removes the possibility for a reduction in sentence for good behavior if the sentence is under twenty-five years and provides that the offender will not be eligible for parole until he or she has been incarcerated for the minimum twenty-five years. [\[FN3\]](#)

***400** Under existing law, a habitual sexual offender is anyone who has been previously found guilty of rape, [\[FN4\]](#) oral copulation, [\[FN5\]](#) or sodomy [\[FN6\]](#) by force and is convicted again for one of those offenses. [\[FN7\]](#) Chapter 446 adds to the list kidnapping [\[FN8\]](#) with intent [\[FN9\]](#) to commit one of those offenses, or rape by instrument. [\[FN10\]](#)

INTERPRETIVE COMMENT

The purpose of Chapter 446 is to remove habitual sexual offenders from society. [\[FN11\]](#) The fear prompting this legislation is that the criminal justice system has failed because of its lack of effectiveness in keeping these offenders behind bars. [\[FN12\]](#) Specific sentencing provisions would have a large impact on this type of crime, because of the relatively small number of targeted offenders that fit into ***401** the definition of habitual sexual offender. [\[FN13\]](#) An additional problem is the difficulties law enforcement agents have in keeping track of these offenders. [\[FN14\]](#)

Critics of Chapter 446 argue that, because habitual sexual offenders do not have a classic mental illness, they cannot be treated. [\[FN15\]](#) One jurisdiction maintains that habitual sexual offenders possess a type of mental abnormality that is unamenable to treatment. [\[FN16\]](#) Therefore, violent sex offenders cannot be cured, especially involuntarily. [\[FN17\]](#) Due to this abnormality, the individual is more likely to engage in predatory acts of sexual violence. [\[FN18\]](#)

However, proponents believe that the State should try to rehabilitate these offenders. [\[FN19\]](#) By taking measures to treat these offenders now, there will be a better chance to develop effective treatment in the future. [\[FN20\]](#)

[\[FN1\]](#). See [CAL. PENAL CODE § 667.71\(a\)](#) (amended by Chapter 446) (defining habitual sexual offender as someone who has previously served at least one prison term for rape, oral copulation, or sodomy by force); see also id.

§ 667.6(a) (West Supp.1994) (granting a punishment enhancement for repeat offenders); *id.* § 667.8 (West 1988) (granting a punishment enhancement for certain conduct including kidnapping); cf. [COLO. REV. STAT. § 18-3-412 \(1986\)](#) (defining habitual sexual offender); [OHIO REV. CODE ANN. § 2950.01\(a\)](#) (Anderson 1993) (defining habitual sexual offender to include any person who is convicted two or more times in separate criminal actions of specified sex offenses); [UTAH CODE ANN. § 76-3-407 \(1990\)](#) (establishing a sentence enhancement for repeat and habitual sexual offenders); [Funk v. State, 427 N.E.2d 1081, 1086 \(Ind. 1981\)](#) (establishing the constitutionality of the Indiana habitual offender statute); [Rolack v. Commonwealth, 514 S.W.2d 47, 49 \(Ky. 1974\)](#) (maintaining that imposing life sentences under Kentucky's habitual criminal statute is neither cruel nor unusual punishment).

[FN2]. 1993 Cal. Legis. Serv. ch. 590, sec. 2, at 2558-59 (enacting [CAL. PENAL CODE § 667.71](#)); see [Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273-74 \(1940\)](#) (upholding a sentencing statute that allows commitment procedures to be brought against habitual sexual offenders and finding that the law does not deny equal protection of the laws); [People v. Preciado, 116 Cal. App. 3d 409, 412, 172 Cal. Rptr. 107, 108-09 \(1981\)](#) (holding that the mandatory imposition of consecutive sentences for violent rapes does not constitute cruel and unusual punishment and that the severity of the sentence is directly proportional to the number of offenses and the violence of the crimes); see also [People v. Warner, 20 Cal. 3d 678, 689, 574 P.2d 1237, 1243, 143 Cal. Rptr. 885, 891 \(1978\)](#) (stating that the protection of society is the paramount concern in sentencing); cf. [UTAH CODE ANN. § 76-3-407 \(1990\)](#) (providing additional prison terms for repeat and habitual sexual offenders); [Johnson v. State, 537 N.E.2d 1191, 1193 \(Ind. 1989\)](#) (stating that aggravating circumstances do not limit the evidence which the judge may consider in determining the proper sentence to proscribe; however, they may serve as guidelines); [People v. Carmickle, 360 N.E.2d 794, 797 \(Ill. 1977\)](#) (explaining that the Illinois Constitution requires penalties to be decided according to the seriousness of the offense and that all the circumstances should be examined by the judge with the objective of returning the offender to society as a responsible citizen). See generally [People v. Valencia, 207 Cal. App. 3d 1042, 1045, 255 Cal. Rptr. 180, 182 \(1989\)](#) (providing that the court should not be given the power of discretion to order concurrent enhancement terms); [People v. Wallace, 169 Cal. App. 3d 406, 411, 215 Cal. Rptr. 203, 206 \(1985\)](#) (holding that no federal equal protection violation necessarily occurs when a defendant is charged under the harsher statute when two sentencing enhancement statutes overlap); [People v. Weaver, 161 Cal. App. 3d 119, 128, 207 Cal. Rptr. 419, 425 \(1984\)](#) (holding that it is not unconstitutional to enhance a sentence by adding 15 years because of three prior serious felony convictions).

[FN3]. [CAL. PENAL CODE § 667.71\(b\)](#) (amended by Chapter 446); cf. [Graham v. West Virginia, 224 U.S. 616, 631 \(1912\)](#) (holding that the Eighth Amendment, prohibiting cruel and unusual punishment, is not violated by recidivist statutes authorizing heavier or enhanced sentences for subsequent offenses); [People v. Crockett, 222 Cal. App. 3d 258, 265, 271 Cal. Rptr. 500, 504 \(1990\)](#) (holding that enhancements based upon prior convictions are intended to deter recidivism by increasing penalties for subsequent offenses), rev. denied, 1990 Cal. LEXIS 4423 (1990); [People v. Karsai, 131 Cal. App. 3d 224, 242, 182 Cal. Rptr. 406, 417 \(1982\)](#) (providing that violent offenders and the danger from recidivism and multiplicity of offenses are so outrageous that severe punishment will not shock the conscience and offend fundamental notions of human dignity).

[FN4]. See [CAL. PENAL CODE § 261 \(West Supp.1994\)](#) (defining the crime of rape); *id.* § 263 (West 1988) (defining the act of rape as sexual penetration, however slight, followed by the victim's outrage and feeling that he or she was raped); *id.* § 264.1 (West 1988) (providing punishment for rape or penetration of genital or anal openings by foreign object, and acting in concert); see also [Karsai, 131 Cal. App. 3d at 232, 182 Cal. Rptr. at 411](#) (explaining that actual vaginal penetration is not required to constitute rape).

[FN5]. See [CAL. PENAL CODE § 288a \(West Supp.1994\)](#) (defining oral copulation).

[FN6]. See *id.* § 286 (West Supp.1994) (defining sodomy and providing liability for sodomy).

[FN7]. [CAL. PENAL CODE § 667.71](#) (amended by Chapter 446). See generally *id.* § 288 (West Supp.1994) (providing a person shall be guilty of a felony for a lewd and lascivious act with a child under 14 years of age); [People v. Loignon, 160 Cal. App. 2d 412, 420, 325 P.2d 541, 545 \(1958\)](#) (stating that the terms in [California Penal Code § 288](#)

are not unconstitutionally vague).

[FN8]. See [CAL. PENAL CODE § 207 \(West Supp.1994\)](#) (defining kidnapping).

[FN9]. See [People v. Bradley, 15 Cal. App. 4th 1144, 1154, 19 Cal. Rptr. 2d 276, 283 \(1993\)](#) (maintaining that inferences may be made to determine intent in the words spoken and conduct of the accused) rev. denied, 1993 Cal. App. LEXIS 535 (1993); *id.* (stating that intent is found when the defendant sets out to use whatever force necessary to complete the sexual act against the will of the victim); [People v. Bryant, 10 Cal. App. 4th 1584, 1595-96, 13 Cal. Rptr. 2d 601, 606 \(1992\)](#) (explaining that additional facts must be proven if the defendant does not admit that his or her intent was to perform a sexual act); *id.* at 1601, 13 Cal. Rptr. at 610 (stating that if there is intent to commit the sexual act, the court must sentence the offender under the proper provision dealing with intent to commit the sexual act).

[FN10]. [CAL. PENAL CODE § 667.71\(a\)](#) (amended by Chapter 446); see *id.* § 289 (West Supp.1994) (defining rape by an instrument).

[FN11]. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2261, at 2 (May 17, 1994); see [Hendking v. Smith, 781 F.2d 850, 852 \(11th Cir.1986\)](#) (stating that sex offenders experience a continual recurring physiological urge, therefore requiring the imposition of effective restraint); see also Ken Chavez, Wilson, Lungren: Keep "Career Criminals" in Jail, SACRAMENTO BEE, Dec. 7, 1993, at A3 (discussing Governor Pete Wilson's promises to revamp sentencing laws to keep habitual offenders in prison); *id.* (stating that Governor Pete Wilson believes criminals should not be rewarded for "good time").

[FN12]. Jake Henshaw, GANNETT NEWS SERV., Dec. 6, 1993, available in LEXIS, News Library, Curnws File; see *id.* (reporting the Sonoma County Sheriff's statement that the apprehension of a recent parolee, Richard Allen Davis, the suspected kidnapper and murderer of Polly Klaas, was a law enforcement success, but a failure of the current justice system).

[FN13]. See [CAL. PENAL CODE § 13885 \(West Supp.1994\)](#) (providing the Legislature's finding that a substantial and disproportionate amount of sexual offenses are committed by a relatively small number of repeat offenders); Rob Haeseler, Polly Was Among 85,361 Missing Across U.S., S.F. CHRON., Dec. 7, 1993, at A4 (providing that throughout the state of California alone, there are 54,000 sex offenders and 6000 serious habitual offenders and that kidnappings are among the hardest crimes to solve because of the lack of physical evidence and lack of contact with the kidnapper).

[FN14]. Don Martinez, Sex-offender Database Has Difficulties California Often Fails to Keep List Updated, DALLAS MORNING NEWS, Jan. 23, 1994, at 1A; see *id.* (stating that the number of sex offenders in California, currently numbered at 64,397, is likely to be inaccurate because offenders fail to notify the authorities as they move around); *id.* (challenging that the database tracking sexual offenders is only 24% accurate).

[FN15]. Norm Maleng, Law Gives Public Right to Treat Sex Offenders, SEATTLE TIMES, Aug. 24, 1993, at B5. But see *id.* (providing that statements regarding the ineffectiveness of treatment misses the point, which is that these individuals are not rational people and suffer from mental abnormalities and personality disorders which drive them to commit acts too horrible to contemplate by the rest of society).

[FN16]. [WASH. REV. CODE §§ 71.09.010-.902](#) (West 1992 & Supp.1994); see *id.* (laying out the Community Protection Act that allows the state of Washington to commit habitual offenders against their will, even after they have served their sentences); see also [In re Personal Restraint of Young, 857 P.2d 989, 996-1004 \(Wash. 1993\)](#) (concluding that [Washington Revised Code §§ 71.09.010-.902](#) does not violate the Due Process Clause of the United States Constitution because of the dangerous nature of the offenders); *id.* (commenting that the uniqueness of this law is that it uses civil law to address the dangerous mental illness aspects of the habitual offender); Gary Gleb, Comment,

[Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings, 39 UCLA L. REV. 213 \(1991\)](#) (discussing Washington's violent sexual predator law and relevant United States Constitutional issues); Note, [Hate is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes, 106 HARV. L. REV. 1314 \(1993\)](#) (discussing the constitutionality of sentence enhancement for hate crimes); Robb London, Strategy on Sex Crimes is Prison, then Prison, N.Y. TIMES, Feb. 8, 1991, at B16 (discussing habitual sexual offenders and civil commitments).

[FN17]. [In re Young, 857 P.2d at 1003.](#)

[FN18]. Id.

[FN19]. London, supra note 16; see also [In re Young, 857 P.2d at 1003](#) (examining the Washington Community Protection Act, and stating that just because an illness is difficult to treat does not mean that it is not an illness and, therefore, untreatable and that the facilities are compatible with treatment and not prison).

[FN20]. London, supra note 16.

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