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COMMENT

SB 145: Defending and Applying Discretion to California’s Sex Offender Registry

ELIAS HERNANDEZ*

INTRODUCTION

In January 2019, California Senator Scott Wiener introduced Senate Bill No. 145 (“SB 145”), which amended the Sex Offenders Registration Act.¹ California Governor Gavin Newsom signed the bill in September of 2020, which went into effect on January 1, 2021.² SB 145 equalizes sentencing treatment for members of the LGBTQ³ community, and takes steps to improve the California Sex Offender Registry (hereinafter may be referred to as the “Registry” or the “List”), by expanding a trial judge’s discretion to impose sex offender registration.⁴ Prior to SB 145’s passage and since 1944, “[a] loophole in the law”. . . force[d] anyone convicted of consensual anal [or] oral sex [with a minor], such as gay men or lesbians, to register as a sex offender.”⁵ Judges had no choice but to impose sex offender registration in those circumstances.⁶

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¹ S.B. 145, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2019) (as introduced by Sen. Wiener, Jan. 18, 2019); CAL. PENAL CODE § 290 (“Sections 290 to 290.024, inclusive, shall be known, and may be cited, as the Sex Offender Registration Act.”).

² Cal. S.B. 145.

³ Acronym for the words Lesbian, Gay, Bisexual, Transsexual, and Queer or Questioning.

⁴ S. COMM. ON PUB. SAFETY, SEX OFFENDERS: REGISTRATION, S., 2019-2020 Reg. Sess., at 4 (Cal. 2019), https://spsf.senate.ca.gov/sites/spsf.senate.ca.gov/files/sb_145_analysis.pdf [hereinafter SENATE COMMITTEE ON SEX OFFENDER REGISTRATION].

⁵ Phillip Zonkel, *California’s SB 145 signed into law by Governor Gavin Newsom*, Q VOICE NEWS (Sept. 11, 2020), <https://qvoicenews.com/2020/09/11/california-s-sb-145-signed-into-law-by-governor-gavin-newsom/> (last visited Jul. 1, 2022).

⁶ *Id.*

SB 145 gives trial judges discretion to place a person on the Registry if the offender- a legal adult at the time of the offense- engaged in certain “non-forcible” sexual acts with a minor-fourteen years of age or older and within ten years of age from the adult offender.⁷ “Although minors cannot legally consent to sexual activity, these cases are viewed as ‘voluntary’ because the sexual activity is not forced and the minor is a willing participant.”⁸ Prior to SB 145, a judge’s discretionary power in these situations disproportionately favored heterosexual offenders over offenders in the LGBTQ community.⁹ For example, a twenty-one-year-old man convicted of having vaginal intercourse with his seventeen-year-old girlfriend, would have the opportunity to avoid sex offender registration through judicial discretion, whereas a twenty-one-year-old man having anal sex with his seventeen-year-old boyfriend would not.¹⁰ This sentencing loophole risked devastating consequences for the LGBTQ youth, as the implications of being placed on the Registry are long-lasting and severe.¹¹ SB 145 eliminated this disparity.¹²

Despite the good intentions behind the bill, SB 145 received public outrage¹³ and no bipartisan support.¹⁴ However, misinformation primarily fueled this outrage.¹⁵ Shortly after the bill passed, thousands of social media posts falsely claimed that California passed “pro-pedophilia” legislation.¹⁶ Senator Wiener, believes that intentional misrepresentation by right-wing media and politicians created this false information, in an effort to fuel misinformation and QAnon¹⁷ conspiracy theories.¹⁸ “The

⁷ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ Kendra Clark, Note, *Specters of California’s Homophobic Past: A Look at California’s Sex Offender Registration Requirements for Perpetrators of Statutory Rape*, 52 U.C. DAVIS L. REV. 1747, 1751-52 (2019).

¹¹ See SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 5; see also *No Easy Answers: Sex Offender Laws in the US*, 19 HUMAN RIGHTS WATCH 1, 7, 81-82 (2007), <https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [hereinafter *No Easy Answers*].

¹² SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 3.

¹³ Camille Caldera, *Fact Check: California’s SB-145 eliminates an inequity in sex offender registration*, USA TODAY (Sept. 3, 2020, 2:48 PM), <https://www.usatoday.com/story/news/fact-check/2020/09/03fact-check-california-law-does-not-decriminalize-sex-minors/3456171001/>

¹⁴ KUSI Newsroom, *California state senator opposes controversial SB 145, relating to sex offenders*, KUSI (Sept. 5, 2020), <https://www.kusi.com/california-state-senator-opposes-controversial-sb-145-relating-to-sex-offenders/> [hereinafter Kusi Newsroom]; California Legislative Information https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200SB145 (last visited Oct. 1, 2021) (demonstrating SB 145’s final vote on the senate floor consisting of forty-one “ayes” and twenty-five “noes,” with those “ayes” coming solely from Democrats, and no Republicans).

¹⁵ Caldera, *supra* note 13.

¹⁶ *Id.*

¹⁷ Kevin Roose, *What is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html> (describing QAnon as a grow-

reality is that sex offenders are a great political target.”¹⁹ Anyone pushing for progressive reform in this field risks being associated with a pro-pedophilia image.²⁰ Yet, the age of consent in California remains eighteen, meaning that sex with a minor is still illegal, and a punishable crime.²¹ Further, the significant law enforcement influence and support²² behind the bill demonstrates that SB 145 is anything but pro-pedophilia legislation.²³ This support comes from law enforcement's recognition that the Registry is currently over-crowded and burdening their efforts to track dangerous sex offenders.²⁴

Among the criticism not based in misinformation are concerns that still need to be addressed. One legitimate concern is how a ten-year age gap between an adult offender and a minor could ever allow for discretion in these circumstances. Consequently, this raises the question of whether this bill could have been delayed until that ten-year gap was reduced. Another valid question is how reducing the amount of people on the Registry could possibly make communities safer.

This Comment defends California's choice of discretion, by demonstrating the immediate need to eliminate the sentencing disparity, to save non-dangerous offenders²⁵ from the far-reaching implications of sex-offender registration. This Comment further calls on California trial judges to exercise their new discretion favorably toward non-dangerous offenders, in order to help law enforcement focus on tracking dangerous sex offenders. Part I discusses California's outdated classifications for certain sexual conduct, and illustrates how recent California Supreme Court cases created the need to correct a sentencing disparity working against the LGBTQ community. Part I also demonstrates that the Registry is currently over-clogged and burdening law enforcement's efforts to track dangerous sex offenders. Part II details the consequences of being placed

ing movement which surfaced in October 2017, encompassing a wide set of “conspiracy theories that allege that the world is run by a cabal of Satan-worshipping pedophiles who are plotting against Donald Trump while operating a global child sex-trafficking ring).

¹⁸ ABC10, *California Senator Scott Wiener talks SB-145, a bill aiming to help LGBTQ community*, YOUTUBE (Sept. 2, 2020), <https://youtu.be/YAvSGJLbU64> [hereinafter *Scott Wiener talks SB-145*].

¹⁹ *No Easy Answers*, *supra* note 11, at 2.

²⁰ *Scott Wiener talks SB-145*, *supra* note 18.

²¹ Caldera, *supra* note 13.

²² SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1.

²³ Caldera, *supra* note 13 (referring to the false social media claims that were posted about the bill).

²⁴ See SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1, 8; see also *No Easy Answers*, *supra* note 11, at 45.

²⁵ Will use the term “non-dangerous offenders” in this Comment to refer to individuals whom should not be placed on the Registry because the facts and circumstances of that person's case demonstrating that they are both not dangerous and not deserving of placement on the Registry.

on the Registry and explains how allowing old and outdated classifications of sex acts to govern judicial discretion dehumanizes the LGBTQ community. Lastly, Part III provides guidance on the use of judicial discretion and recommends further steps to improve California's sex offender registration system.

I. BACKGROUND

A. OUTDATED PERCEPTIONS AND PROBLEMATIC CASE LAW

California created the Sex Offender Registration Act²⁶ in 1947, making it the first state in the nation to require sex offender registry for specified sexual offenses.²⁷ During that period, homosexuality was illegal in California.²⁸ Therefore, homophobic perceptions from this period influenced California's categorization of certain sexual conduct.²⁹ For instance, California originally defined acts traditionally considered heterosexual acts, such as vaginal intercourse, as crimes against the "Person," and crimes against "Public Decency and Good Morals."³⁰ On the other hand, California classified traditionally homosexual acts, such as oral copulation and anal penetration, as "Crimes Against Nature."³¹ Such distinction illustrates California's history of viewing homosexual conduct as "more deviant" than heterosexual conduct.³² These classifications ultimately created a "highly discriminatory" disparity that worked against LGBTQ young adults.³³ This disparity is "a relic from California's homophobic past."³⁴

Two California Supreme Court cases highlight how these outdated classifications have led to unjust outcomes in the present day: *People v. Hofsheier*,³⁵ and *Johnson v. Department of Justice*, which overturned *Hofsheier*.³⁶ SB 145 was enacted in response to *Johnson*.³⁷

²⁶ PENAL § 290.

²⁷ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 4.

²⁸ See Zonkel, *supra* note 5.

²⁹ See Clark, *supra* note 10.

³⁰ *Id.* at 1754.

³¹ *Id.*

³² *Id.*

³³ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 3.

³⁴ Zonkel, *supra* note 5.

³⁵ *People v. Hofsheier*, 37 Cal. 4th 1185 (2006), *overruled by Johnson v. Dep't of Justice*, 60 Cal. 4th 871 (2015).

³⁶ See *Johnson v. Dep't of Justice*, 60 Cal. 4th 871 (2015), *superseded by penal code amendment*, S.B. 145, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2020).

³⁷ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 7.

1. *People v. Hofsheier*

In *People v. Hofsheier*, the California Supreme Court held that the sentencing disparity at issue did not pass constitutional muster under the Equal Protection Clause.³⁸ *Hofsheier* concerned a twenty-two-year-old man who pled guilty to oral copulation³⁹ with a sixteen-year-old girl.⁴⁰ The defendant demonstrated that his conviction of oral copulation would require sex offender registration whereas someone convicted of unlawful intercourse,⁴¹ under the same facts, could be saved from automatic registry through judicial discretion.⁴²

The California Supreme Court found that adults convicted of oral copulation with a sixteen year old were “sufficiently similar” to adults convicted of having unlawful intercourse with a similarly aged minor.⁴³ The court considered the nature of the sexual conduct to be the only difference between the two offenses.⁴⁴ The court held that it could not find any “rational basis”⁴⁵ for subjecting offenders convicted of oral copulation to mandatory sex offender registration, while not doing so for offenders convicted of unlawful intercourse, under the same circumstances.⁴⁶

The government asserted that it was “‘reasonably conceivable’ that adults who engage in voluntary oral copulation with minors . . . are more likely to repeat their offense than adults who engage in sexual intercourse with minors of the same age.”⁴⁷ The court rejected this claim as being too “speculative” to justify the relationship between the classification and the statutory purpose.⁴⁸ The government then asserted that the possibility of pregnancy distinguished sexual intercourse from oral copulation because a father put on the List would be stigmatized and thus

³⁸ *Hofsheier*, 37 Cal. 4th 1185, 1207-08; The Equal Protection Clause states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

³⁹ CAL. PENAL CODE § 287(a) (defining oral copulation as “the act of copulating the mouth of one person with the sexual organ or anus of another person”); *Copulate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/copulating> (defining “copulate” as a verb to “engage in sexual intercourse”).

⁴⁰ *Hofsheier*, 37 Cal. 4th 1185, 1192.

⁴¹ *People v. Mendoza*, 240 Cal. App. 4th 72, 79 (2015) (defining sexual intercourse as “any penetration, no matter how slight, of the vagina or genitalia by the penis”).

⁴² *Hofsheier*, 37 Cal. 4th 1185, 1194.

⁴³ *Id.* at 1200 (quoting *People v. Nguyen*, 54 Cal. App. 4th 705, 715 (1997)).

⁴⁴ *Id.*

⁴⁵ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 686 (6th ed. 2020) (defining the rational basis test as a test highly deferential to the government and requiring that the government show its actions are “rationally related to a legitimate government purpose”).

⁴⁶ *Hofsheier*, 37 Cal. 4th 1185, 1206-07.

⁴⁷ *Id.* at 1203.

⁴⁸ *Id.* at 1203-04.

prevented from obtaining a job to support the child.⁴⁹ According to the court, this reasoning only provided an argument for why offenders convicted of unlawful intercourse should have the opportunity to benefit from judicial discretion, rather than demonstrating why offenders engaged in oral copulation should not benefit from such discretion.⁵⁰

Thus, even under the most deferential level of scrutiny, the court found no rational basis for the disparity at hand.⁵¹ This decision was the governing law concerning the disparity for only nine years before it was overruled by *Johnson v. Department of Justice* in 2015.⁵²

2. *Johnson v. Department of Justice*

In *Johnson v. Department of Justice*, the California Supreme Court held that there was a rational basis for the disparity.⁵³ The case involved a twenty-seven-year-old offender who pled guilty in 1990 to oral copulation with a minor under the age of sixteen.⁵⁴ After the *Hofsheier* holding, this offender looked to avoid his mandatory placement on the Registry.⁵⁵

Even though courts generally abide by principles of stare decisis, -the principle that “a court must follow earlier judicial decisions when the same points arise again in litigation⁵⁶- the court chose not to do so here.⁵⁷ In this court’s opinion, *Hofsheier*’s rational basis analysis was so faulty and “unworkable” that the court did not feel compelled to follow it.⁵⁸ The court believed that *Hofsheier* proved unworkable because the California Courts of Appeal subsequently extended its holding beyond the narrow facts of that case.⁵⁹ For example, *Hofsheier* was being applied to cases where minors were below the age of sixteen, or where offenders were over the age of thirty.⁶⁰

In revisiting *Hofsheier*’s holding, the California Supreme Court found that “recidivism, teen pregnancy, and child support obligations” provided a rational basis for the disparity at hand.⁶¹ The court first asserted that the State had a legitimate interest in controlling crime and

⁴⁹ *Id.* at 1205.

⁵⁰ *Id.*

⁵¹ *Id.* at 1207.

⁵² *Johnson*, 60 Cal. 4th 871.

⁵³ *Id.* at 887-88.

⁵⁴ *Id.* at 875-76.

⁵⁵ *Id.* at 876.

⁵⁶ *Stare Decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵⁷ *Johnson*, 60 Cal. 4th 871, 880.

⁵⁸ *Id.* at 879 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

⁵⁹ *Id.* at 878.

⁶⁰ *Id.*

⁶¹ *Id.* at 880.

preventing recidivism.⁶² In doing this, the court responded to *Hofsheier*'s claim that the disparity could not be justified by speculating that those convicted of oral copulation would be more likely to reoffend than those convicted of unlawful intercourse with a minor of similar age.⁶³ The court cited studies indicating that pedophiles were more likely to engage in non-intercourse sexual acts because minors were more receptive to engaging in such acts, as opposed to intercourse.⁶⁴ Therefore, according to the court, such offenders are more prone to recidivism than offenders engaging in unlawful intercourse.⁶⁵

Next, the court distinguished offenders by pointing to the "unique potential for pregnancy and parenthood" inherent in unlawful sexual intercourse.⁶⁶ Despite the rejection of this argument in *Hofsheier*, the court emphasized the need for offenders, who fathered children as a result of unlawful sexual intercourse, to support their children.⁶⁷ The court pointed to 1985 statistics, which showed that over three billion dollars was spent by the government to assist families headed by teenagers, and that there was a need to have fathers be accountable for their actions.⁶⁸

Further, the court stressed that to invalidate the law, the challengers must have met a standard highly deferential to the government by "'negat[ing] every conceivable basis' that might support the disputed statutory disparity."⁶⁹ Further, the court reasoned that it did not matter whether a discretionary approach would be just as effective as the current approach, since the government only had to show a rational basis for the disparity.⁷⁰ Therefore, *Johnson* held that the sentencing disparity did not violate the Equal Protection Clause.

The *Johnson* holding governed judicial discretionary powers in this area prior to the enactment of SB 145.⁷¹ Senator Scott Wiener and other California senators introduced SB 145 as a direct response to what they viewed as an unjust holding in *Johnson*.⁷²

⁶² *Id.* at 881.

⁶³ *Id.* at 883.

⁶⁴ *Id.* at 883-84.

⁶⁵ *Id.* at 884.

⁶⁶ *Id.* at 880.

⁶⁷ *Id.* at 885.

⁶⁸ *Id.*

⁶⁹ *Id.* at 881 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

⁷⁰ *Id.* at 889.

⁷¹ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 7.

⁷² *Id.*

B. SB 145

SB 145 addresses non-forcible criminal sexual acts⁷³ between a legal adult and a minor who is fourteen years of age or older, but within ten years of the adult's age.⁷⁴ Crimes of sexual conduct with a minor under the age of fourteen are punishable under a separate code section, which automatically mandates sex offender registration upon conviction.⁷⁵ The ten year age gap permitting discretion under the bill is “an existing category in the law” that has been present for “about a hundred years.”⁷⁶ Prior to SB 145's enactment, the Sex Offender Registration Act criminalized and required registration for offenses involving certain voluntary sexual acts between a legal adult and a minor within this age range.⁷⁷ Those voluntary acts included non-forcible sodomy,⁷⁸ oral copulation, and sexual penetration.⁷⁹ California defined “sexual penetration” as anything other than vaginal penetration by a penis.⁸⁰ However, the law did not require sex offender registration for a legal adult convicted of engaging in vaginal intercourse—vaginal penetration by a penis—with a minor in this age range.⁸¹

The prior law's distinction resulted in a disparity in the way LGBTQ community members were sentenced, in comparison to their heterosexual counterparts, since heterosexual persons are generally more likely to engage in vaginal intercourse.⁸² On the other hand, LGBTQ community members, specifically cisgender⁸³ gay men and women, are more likely to engage in sexual acts that are not vaginal intercourse, such as oral

⁷³ See *People v. Soto*, 51 Cal. 4th 229, 233 (2011) (explaining that “unlike the crime of rape, there is no requirement that . . . lewd acts be committed ‘against the will of the victim.’”).

⁷⁴ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 3.

⁷⁵ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 2, 3 n.1, 2; CAL. PEN. CODE § 288.; PENAL § 290; This Comment does not discuss California Penal Code section 288, which concerns sexual conduct between an adult and a minor under the age of 14. Hereinafter, this Comment may omit the “fourteen or older” and “within ten years of the adult offender's age” qualifiers in reference to California Penal Code section 290 and SB 145 for ease of discussion. Reader can infer these qualifiers throughout the remainder of this Comment.

⁷⁶ *Scott Wiener talks SB-145*, *supra* note 18.

⁷⁷ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1; PENAL § 290(a)(c) (effective until January 1, 2021, repealed as of that date).

⁷⁸ CAL. PEN. CODE § 286(a) (defining sodomy as “sexual conduct consisting of contact between the penis of one person and the anus of another person.”).

⁷⁹ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1; PENAL § 290(a)(c) (effective until January 1, 2021, repealed as of that date).

⁸⁰ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 5.

⁸¹ *Id.* at 3.

⁸² *See Id.*

⁸³ *What Do Transgender and Cisgender Mean?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-do-trans-gender-and-cisgender-mean> (last visited on Sept. 8, 2021) (demonstrating that men and women who identify with the gender they were assigned to at birth are considered cisgender).

copulation or sexual penetration.⁸⁴ Under the prior law, if a twenty-four-year-old male offender had vaginal intercourse with a fifteen-year-old girl, the offender would not automatically be required to register as a sex offender.⁸⁵ However, under the same law, if a nineteen-year-old male offender had anal sex with a seventeen-year-old male, the adult would automatically be required to register.⁸⁶ Further, if a twenty-three-year-old male had vaginal intercourse with a fourteen-year-old female, that offender could be saved from registry by judicial discretion; whereas an eighteen-year-old female engaging in oral sex with her seventeen-year-old girlfriend could not be saved by judicial discretion.⁸⁷

SB 145 thus amended the existing sex offender law by exempting persons convicted of non-forcible sodomy, oral copulation, or sexual penetration with a minor, fourteen years-old or older, from having to automatically register as a sex offender.⁸⁸ Instead, since SB 145, the trial court now has discretion to determine whether an individual under this category will register as a sex offender.⁸⁹ This discretion only applies if the adult is not more than ten years older than the minor at the time of the offense, the minor is at least fourteen years of age, and if the conviction is the only one requiring the person to register.⁹⁰ It is important to emphasize that SB 145's passage does not mean that offenders in the category will escape sex offender registry.⁹¹ It only means that judges now can look at the facts and circumstances of an individual case to determine if registry is needed.⁹²

C. CALIFORNIA'S OVER-CLOGGED REGISTRY

Originally, California created the sex offender registry to assist law enforcement in tracking down dangerous offenders.⁹³ However, the massive amount of people placed on the Registry has made it an ineffective investigative tool.⁹⁴ The Registry's ineffectiveness as an investigative tool is the reason why law enforcement showed strong support for and sought to influence the bill.⁹⁵ Groups such as the California District At-

⁸⁴ See SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 3.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1.

⁸⁷ See *Id.*

⁸⁸ *Id.* at 3.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Id.* at 4.

⁹² *Id.*

⁹³ *Id.* at 8.

⁹⁴ See *No Easy Answers*, *supra* note 11, at 45.

⁹⁵ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 8.

torneys Association and the California Police Chiefs Association are just some of the law enforcement agencies that verified their support for SB 145.⁹⁶ Even more notable, the Los Angeles District Attorney's Office helped contribute language that ultimately made up the bill.⁹⁷

The law enforcement support makes sense when considering the harrowing truth about the struggle to keep track of sex offenders. On a national scale, sex offender registries have become overburdened.⁹⁸ In 2007 there were over 600 thousand individuals listed on sex offender registries nationally, yet only 129 law enforcement agencies were responsible for monitoring those individuals.⁹⁹ In California, this problem is no better.¹⁰⁰ A Human Rights Watch report demonstrated that in 2003, California had lost track of 33 thousand convicted sex offenders.¹⁰¹ These 33 thousand individuals made up forty-four percent of the 76,350 offenders on the List.¹⁰² "[T]here [are] so many of them out there, it's hard to keep track," commented an officer in charge of tracking Sacramento's sex offender registrants.¹⁰³ According to Senator Wiener, one in four-hundred Californians are registered sex offenders.¹⁰⁴ When considering that California has over 39 million people today,¹⁰⁵ the massive quantity of individuals making up the List is quite alarming. Law enforcement does not have time or resources to track each and every individual who has been placed on the List.¹⁰⁶ The vast magnitude of people that California law enforcement has been tasked with tracking has essentially made the List useless.¹⁰⁷

II. THE IMMEDIATE NEED TO CORRECT THE SENTENCING DISPARITY

California had an immediate need to prevent non-dangerous offenders from the severe consequences of mandatory sex offender registration. When California introduced and passed the bill, SB 145 received a great amount of backlash.¹⁰⁸ Although a lot of criticism was based on misin-

⁹⁶ *Id.* at 1.

⁹⁷ *See Id.*

⁹⁸ *See No Easy Answers*, *supra* note 11, at 45.

⁹⁹ *Id.*

¹⁰⁰ *See Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 46.

¹⁰³ *Id.*

¹⁰⁴ *Scott Wiener talks SB-145*, *supra* note 18.

¹⁰⁵ *QuickFacts California*, US CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> (last visited Sept. 10, 2021).

¹⁰⁶ *See No Easy Answers*, *supra* note 11, at 45.

¹⁰⁷ *See Id.*

¹⁰⁸ Caldera, *supra* note 13.

formation,¹⁰⁹ some critics were legitimately concerned that SB 145 was rushed.¹¹⁰ California Republican Senator Jim Nielsen demonstrated this concern by urging a “no vote” at the Senate Floor Session in August 2020.¹¹¹ Senator Nielsen stated:

I have just got to ask the Senate, in terms of a very sensitive issue, that if we are going to do it right with our youth then let's do it right. Let's not do it fast and hasty and ill thought out just because somebody decides it needs to be done now. It does not need to be done now.¹¹²

Despite this concern, the reality is that SB 145 had to be passed “now.”¹¹³ Senator Nielsen failed to consider the severe consequences of waiting, which are demonstrated when looking at the implications of placement on the Registry for non-dangerous and non-deserving offenders.

A. CONSEQUENCES OF PLACEMENT ON THE LIST

Although California originally intended for its registry to be an investigative tool, its registry transitioned into a punishment tool.¹¹⁴ While few people sympathize with sex offenders,¹¹⁵ the specific issue here is in preventing non-deserving persons from those tools of punishment. That is because, in California, individual sex offender registration is not distinguished based on the severity of each person's crime.¹¹⁶ Regardless of the type of conviction, every individual who is put on the List must meet registration requirements.¹¹⁷ These requirements include annual registration, providing law enforcement with address information, and criminal charges for failing to comply.¹¹⁸ To supplement sex offender registration, California enacted Megan's Law in 1996, which allows the public to

¹⁰⁹ Caldera, *supra* note 13.

¹¹⁰ See Video and Audio: Senate Floor Session, held by California State Senate, at 10:19:00 (Aug. 31, 2020), <https://www.senate.ca.gov/media-archive> (type “8/31/2020” in “Start Date” and “End Date” fields, click “Search,” click “watch” or “listen” corresponding to 8/31/2020).

¹¹¹ *Id.*

¹¹² *Id.* (referring to Senator Nielsen's comments).

¹¹³ *Id.* (referring to Senator Nielsen's comments).

¹¹⁴ See SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4.

¹¹⁵ See *No Easy Answers*, *supra* note 11, at 78.

¹¹⁶ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 5.

¹¹⁷ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1-2; PENAL § 290.012(a).

¹¹⁸ *Id.*; PENAL § 290.

access information about registered sex offenders.¹¹⁹ By 2003, this information was accessible online, where people could easily find an offender's address, photograph, and list of offenses.¹²⁰

Sex offender registration and Megan's Law requirements have had major consequences for those on the List.¹²¹ Some of these consequences include hostility, fear, and loathing from community members.¹²² People who make it on the List endure significant privacy concerns and endure the social stigma that comes with being branded as a sex offender.¹²³ Regardless of the crime that put an individual on the List, the individual is restricted on where they can live.¹²⁴ Further, because of background checks and employer refusal to hire sex offenders, an individual on the List also faces burdens in finding and maintaining employment.¹²⁵ Although in California an offender can petition for removal from the List, such a person would have to wait ten or twenty years for that opportunity.¹²⁶ By that time, the "destructive" consequences of placement on the List would have already occurred.¹²⁷

Notably, there are legitimate public policy reasons for subjecting certain individuals to these measures; specifically, for dangerous sex offenders.¹²⁸ However, this public policy goal is not met by subjecting non-dangerous persons to these severe consequences and wasting resources on tracking them.¹²⁹ Here, LGBTQ persons are specifically at risk of unjustly receiving these severe consequences, because the previous law disproportionately targeted this community.¹³⁰ This demonstrates why there was urgent necessity to pass SB 145. Any delay in passing this legislation to eliminate the sentencing disparity would have resulted in more LGBTQ persons being discriminatorily harmed.¹³¹ The new law allows judges to effectively save the lives of young LGBTQ members who would otherwise have their lives ruined by the conse-

¹¹⁹ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1-2; PENAL § 290.46; *see also* CAL. MEGAN'S LAW WEBSITE, <https://www.meganslaw.ca.gov> (last visited Feb. 5, 2020).

¹²⁰ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 5; *see also* CAL. MEGAN'S LAW WEBSITE, <https://www.meganslaw.ca.gov> (last visited Feb. 5, 2020).

¹²¹ *No Easy Answers*, *supra* note 11, at 78.

¹²² *Id.*

¹²³ *Id.* at 79-80.

¹²⁴ *Id.* at 7.

¹²⁵ *Id.* at 81-82.

¹²⁶ PENAL § 290(d); *Scott Wiener talks SB-145*, *supra* note 18.

¹²⁷ *Scott Wiener talks SB-145*, *supra* note 18.

¹²⁸ *Scott Wiener talks SB-145*, *supra* note 18 (Senator Wiener explaining the need to reserve the sex offender registry for those offenders "who are an actual threat to society.").

¹²⁹ *See* SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 8.

¹³⁰ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 3.

¹³¹ *See Id.*

quences and implications of these requirements.¹³² Therefore, California legislators did have to act “now”,¹³³ and acted appropriately in doing so.

B. IMPLICATIONS OF ALLOWING OLD PERCEPTIONS TO GOVERN

Allowing outdated principles to continue to form the foundation of California's sex offender registration system is dehumanizing to the LGBTQ community.¹³⁴ As mentioned above, California originally classified oral copulation and anal penetration as “Crimes Against Nature.”¹³⁵ This outdated classification directly correlates with the different definitions for “sexual penetration” and “vaginal penetration.”¹³⁶ Such a distinction, based on principles formed back in 1944,¹³⁷ is dehumanizing. By allowing such a distinction to remain, California essentially tells its LGBTQ community that they are not human and their expression of love goes against the natural order.

It is for these reasons that SB 145 had to be passed “now.”¹³⁸ California is still free to perfect its sex registry system through subsequent legislation. However, the disparity was long overdue for an overhaul.¹³⁹ As the government noted in *Hofsheier*, being placed on the sex offender registry places a stigma on the person, despite the severity of his or her actual crime.¹⁴⁰ California could not allow that stigma to unfairly discriminate against the LGBTQ community any longer.¹⁴¹

III. POST-SB 145 PASSAGE: THE NEXT STEPS

California courts should exercise their new discretion generously to help law enforcement revive the Registry as an investigative tool. As mentioned previously, the massive number of people placed on the Registry has made ineffective what was originally meant to be an effective investigative tool.¹⁴² Additionally, there are more offenders on the List

¹³² See *Id.* at 4.

¹³³ Senate Floor Session, *supra* note 108.

¹³⁴ See *Generally* Clark, *supra* note 10.

¹³⁵ *Id.* at 1754 (discussing California's statutory rape laws).

¹³⁶ See *Generally* SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4.

¹³⁷ See *Generally* SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 5; Zonkel, *supra* note 5.

¹³⁸ Senate Floor Session, *supra* note 108 (referring to Senator Nielsen's comments).

¹³⁹ See *Hofsheier*, 37 Cal. 4th 1185, 1206 (explaining that since these distinct classifications for certain sexual conduct had been in place since 1947, it was “apparent that the legislature [was] not engaged in a process of fine-tuning its sex offender registration statutes.”).

¹⁴⁰ See *Id.* at 1205.

¹⁴¹ See *Generally* SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4.

¹⁴² See *No Easy Answers*, *supra* note 11, at 45; See also SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 4.

than the state can adequately track.¹⁴³ While SB 145 doesn't remove any non-deserving offenders from the Registry,¹⁴⁴ it is an initial preventative step toward un-clogging it.

The facts and statistics reveal that having more individuals on the List does not necessarily equate to better safety.¹⁴⁵ To the contrary, it appears that having such a large group of individuals on the List diminishes safety by diluting the resources of law enforcement.¹⁴⁶ For example, as detailed previously, every single person on the List must go through tracking procedures.¹⁴⁷ Therefore, law enforcement is wasting resources on non-dangerous individuals.¹⁴⁸ SB 145 helps to mitigate that waste of resources by ensuring that non-dangerous individuals are not unnecessarily placed on the List.¹⁴⁹ There seems to be little investigative utility for placing a twenty-one year old on the Registry who had sexual relations with his seventeen-year-old boyfriend.¹⁵⁰ These are not dangerous individuals who require close monitoring.¹⁵¹ The addition of such individuals on the List would do nothing more than further hinder law enforcement resources, preventing officers from tracking the truly dangerous sex offenders, whom the list was meant to monitor.¹⁵²

During a Senate floor hearing, Senator Melendez suggested that a better approach to the sentencing disparity would be to simply make the mandatory registration requirement also apply to vaginal intercourse.¹⁵³ In other words, this would make sex offender registration equally harsh among heterosexual sexual activity and homosexual sexual activity.¹⁵⁴ Under Senator Melendez's theoretical approach, California could have both ended LGBTQ discrimination under California Penal Code section 290 and maintained a stance that is tough on sex crimes.¹⁵⁵

However, Senator Melendez's approach would serve to further clog law enforcement's time and resources toward non-dangerous sex of-

¹⁴³ See *No Easy Answers*, *supra* note 11, at 45.

¹⁴⁴ See Cal. S.B. 145.

¹⁴⁵ See *No Easy Answers*, *supra* note 11, at 46.

¹⁴⁶ See *Id.*

¹⁴⁷ SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1-2; PENAL § 290.012(a).

¹⁴⁸ See SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 1-2; PENAL § 290.012(a).

¹⁴⁹ See *Id.*

¹⁵⁰ See *Id.* at 8.

¹⁵¹ See *Id.*

¹⁵² See *Id.*

¹⁵³ Senate Floor Session, *supra* note 108, at 10:17:36 (referring to statement of Senator Melendez).

¹⁵⁴ See *Id.*

¹⁵⁵ See *Id.*

fender registrants.¹⁵⁶ Since law enforcement spends resources on tracking each member of the List,¹⁵⁷ Melendez's approach would serve to theoretically double the amount of resources that law enforcement agencies are already have to spend on non-dangerous persons in SB 145 type situations.¹⁵⁸ Thus, Senators Melendez's argument is neither a better approach, nor should it be considered as a course of action that the California legislature should take. Instead, judges should apply their new discretion liberally so that it aligns with law enforcement efforts.

A. FACTORS TO GUIDE DISCRETION

Here, factors can guide trial judges' discretion to decisions which align with the goal of reviving the utility of the Registry as an investigative tool. This guidance is important when considering that judges could simply exercise their discretion in a way that leads to the same disparate impact as was present before SB 145 was enacted. Guidance on discretion is also important so that judges do not fail to place dangerous offenders on the List.

The need to guide judicial discretion also presents itself when reflecting upon the high standard of review necessary to overturn a trial judge's exercise of discretion.¹⁵⁹ That extremely high bar is "abuse of discretion," which is only found if the trial judge exercised discretion in an "arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."¹⁶⁰ This standard is highly deferential to a judge's decision and demonstrates that it is crucial for trial judges get it right the first time, since the likelihood of successful appeals are grim.¹⁶¹

Proper judicial guidance may be found by looking at another one of the legitimate concerns, related to the ten-year age gap¹⁶² permissible under the bill. In an interview, California Senator Grove criticized the ten-year gap allowing for discretion.¹⁶³ She stated that a ten-year age gap is unjustifiable and that "we got to protect our children."¹⁶⁴ Senator Grove commented that she did not "know any mother or father out there that would condone or support a bill that would allow a twenty-four year-

¹⁵⁶ *See Id.*

¹⁵⁷ *Scott Wiener talks SB-145, supra* note 18.

¹⁵⁸ *See Scott Wiener talks SB-145, supra* note 18.

¹⁵⁹ *See People v. Bryant*, 60 Cal. 4th 335, 390 (2014) (illustrating the high judicial standard of review.).

¹⁶⁰ *People v. Bryant*, 60 Cal. 4th 335, 390 (2014).

¹⁶¹ *See People v. Bryant*, 60 Cal. 4th 335, 390 (2014).

¹⁶² Cal. S.B. 145.

¹⁶³ Kusi Newsroom, *supra* note 14.

¹⁶⁴ *Id.*

old to have sex with your child.”¹⁶⁵ Senator Grove’s hypothetical creates a set of facts that do not seem as justifiable as those posed earlier in this Comment.¹⁶⁶ Her hypothetical poses the question of whether a proponent of SB 145 would still support discretionary registration if the facts were changed such that the minor was fourteen years-old and the adult was twenty-four years-old.¹⁶⁷ Therefore, Senator Grove’s hypothetical brings up the broader question of how to guide trial judges’ discretion in determining whether or not to put certain statutory offenders on the Registry.¹⁶⁸

Two factors that trial judges should look at to guide their use of discretion are: (1) the age between the offender and the minor, and (2) the offender’s relationship to the minor. Hypotheticals demonstrate the proper use of these factors. The first hypothetical, the best-case scenario, might involve a twenty-one-year-old adult and a seventeen-year-old minor. This adult should not be placed on the List.¹⁶⁹ When reflecting upon the original investigative purpose of the List, a young man having sexual relations with a young woman, only four years younger, is not the type of predatory conduct that was meant to be monitored by the Registry.¹⁷⁰ When reflecting upon Senator Grove’s hypothetical, a worst-case scenario, where a twenty-four-year-old offender has sexual relations with a fourteen-year-old minor,¹⁷¹ there is likely dangerous predatory conduct occurring that justifies placement on the Registry.

Therefore, trial judges should look at the age gap between the offender and the minor as one major factor in determining whether an offender should be placed on the Registry. Specifically, the farther apart in age a minor is from his or her partner, the more heavily this factor should weigh in favor of placement on the Registry. However, the trial judge should also take into consideration the minor’s proximity to the age of eighteen. The closer in proximity that a minor is to the age of eighteen, the more a trial judge should weigh the age factor against registry. This would create a sliding scale where a wider age gap may warrant discretion where an older minor is involved.

The next major factor that trial judges should consider is the relationship between the minor and the adult offender. Studies show that ninety percent of the time, sex crimes against children are done by some-

¹⁶⁵ *Id.*

¹⁶⁶ *See Id.*

¹⁶⁷ *See Id.*

¹⁶⁸ *See Id.*

¹⁶⁹ *See* SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 8.

¹⁷⁰ *See Id.*

¹⁷¹ *See* KUSI Newsroom, *supra* note 14.

one the child knows.¹⁷² Therefore, looking at the relationship between the minor and the adult offender could provide insight into the propensity of an adult offender to engage in predatory conduct.¹⁷³ The trial judge should look at whether the adult knows the minor because of a hierarchal relationship. Such hierarchal relationships may arise where the adult offender has an apparent position of authority over the minor, such as a teacher to a student or a coach to a student-athlete. A trial judge could weigh such positions of power in favor of registry because they indicate predatory conduct that may be worth monitoring, depending on the other surrounding circumstances.

B. CALIFORNIA'S NEXT STEPS TOWARD REFORMING ITS REGISTRY

SB 145 takes one small step toward reviving the utility of the Registry because it helps to eliminate unnecessary cases to which law enforcement will have to dedicate resources.¹⁷⁴ However, the work is far from done. California's legislature has additional steps it needs to take to revive the utility of the Registry.

For example, Minnesota provides a helpful model to guide California's next steps in this area.¹⁷⁵ Minnesota developed an individualized sex offender registration and community notification program.¹⁷⁶ Rather than mandating sex offender registration based on a specific crime, convicted sex offenders in Minnesota, after serving their prison sentence, are assessed by a panel of law enforcement personnel and treatment providers.¹⁷⁷ This panel then assess the offender's level of dangerousness based on the type of conviction, as well as other factors, to determine whether or not registry is necessary.¹⁷⁸ Further, rather than the ten or twenty years that California sex offenders have to wait for a petition opportunity, Minnesota sex offenders have the opportunity to be reassessed by the panel every two years.¹⁷⁹ Minnesota's community notification program includes a "need to know" limitation with more disclosure to the public where the offender is determined to be dangerous.¹⁸⁰ Minnesota's progressive sex offender system sheds light on what California's system should strive to be.

¹⁷² *No Easy Answers*, *supra* note 11, at 4.

¹⁷³ *Id.*

¹⁷⁴ *See* SENATE COMMITTEE ON SEX OFFENDER REGISTRATION, *supra* note 4, at 8.

¹⁷⁵ *See Generally No Easy Answers*, *supra* note 11, at 63.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 63-64.

¹⁷⁹ *Id.* at 63.

¹⁸⁰ *Id.* at 64.

CONCLUSION

California's choice to pass SB 145, has eliminated an unjust sentencing disparity for the LGBTQ community and is one step toward reviving the Registry as an investigative tool. It was necessary to save non-dangerous and non-deserving persons from the severe implications of placement on California's registry. Further, a sex-offender registration system based on outdated principles dehumanizes LGBTQ persons and is unacceptable in modern society.

Although SB 145 is most notable for being a victory among the LGBTQ community, it is also an important step towards reviving the utility of the Registry and, consequently, a step toward increased overall community safety. These rationales could be a way to find common ground with those critics who might otherwise have opposed the bill. Since the safety of children¹⁸¹ is a legitimate concern, then the facts and data in this Comment demonstrate that children are actually safer when law enforcement can use its limited resources to target truly dangerous predators, rather than spread itself thin by focusing on non-predatory individuals.

Trial judges should use their newfound discretion carefully and consider age and relationship as factors to determine the necessity of sex-offender registration. These factors will help guide courts in placing only dangerous predators on the List and furthering the goal of reviving the utility of California's sex offender registry. Lastly, although the passing of SB 145 is an important step in the right direction, many more progressive steps are needed to revive the utility of the Registry. A personalized risk assessment system, like in Minnesota,¹⁸² is the ideal future of the California sex offender registration system.

¹⁸¹ KUSI Newsroom, *supra* note 14 (Referring to Republican Senator Grove's comment that we must "protect our children.").

¹⁸² See *No Easy Answers*, *supra* note 11, at 63.