THE SCARLET "R": PENAL CODE §290

By Jeffrey Stein and Jeffry Radding (For SLO County Bar Bulletin, 2019)

Joining the Club:

"*I don't want to belong to any club that would have me as a member*." With that, Groucho Marx famously left the Friars Club. Those on California's sex offender registry undoubtedly share Groucho's sentiment. The process for leaving the notorious §290 club, though, is far more complicated. No witty letter of resignation will do. Historically, the path to exiting the registry has been ominous, such that registration is commonly – and in most instances accurately – referred to as a lifetime obligation. For good reason, for many that path is soon to change.

Penal Code §290 *et seq.* is California's statutory sex offender registration scheme. Registration is mandatory upon conviction for a qualifying sex offense, misdemeanor or felony. Even if *not* convicted of a sex crime, a court can impose registration upon finding the underlying offense resulted from sexual compulsion or for sexual gratification.

Registration is the process of maintaining one's personal information – home, fingerprints, and photograph – on file with the law enforcement agency for the community in which one resides. For those with more than one community of residence, registration in each area is required. Moving? Within five days, register in the area of arrival and *un*register from the area of departure. Enrolled or employed at an institute of higher learning? Register there, too. Each birthday brings more than candles and creeping age: one's registration must be updated annually at that time. Homeless? Update every month. Custody from a new misdemeanor or felony is the price for not doing so. The failure to register, the failure to update, and even the failure to *unregister* when moving all are crimes.

The mechanics of registration may seem unremarkable, but for many the collateral consequences can be devastating. Although just a fraction of those registered are considered high-risk offenders, collateral consequences are indiscriminate for all so obligated. Being a registrant limits work and housing opportunities. It can limit government benefits. There also is, of course, the Scarlet "R": the fact of registration is subject to public disclosure on the Internet.

Registration as a public safety tool was born of Prohibition and the Great Depression. Organized crime recognized an opportunity for growth in the disparity between the demand for alcohol and the absence of a lawful supply. In response, major cities adopted "convict registration" (or "gangster") laws, applicable to vice and weapons offenders. Los Angeles implemented them in 1933, at the behest of District Attorney Buron Fitts. Sex crimes, though, were not yet part of the program.

California became the nation's pioneer in sex offender registration. In 1938, the Los Angeles Police Department created a Bureau of Sex Offenses, keeping detailed

records of sex crime convictions. Bureau tracking, it was believed, could facilitate law enforcement efforts in investigating future crimes. In 1940, inspired by the Bureau's work and at the prompting of the local PTA, the Los Angeles City Council added seven sex offenses to its gangster ordinance. In 1947, the concept went statewide. That year, the California Assembly and Senate each unanimously passed AB 2097 to establish a sex offender registry. At 11:30 p.m. on June 20th, the bill landed on the desk of Governor Earl Warren.

In the field of corrections, Richard A. McGee is legendary. McGee served as California's Director of Corrections for twenty-three years. California's current training center for correctional officers is named for him. In retirement, he authored the book, *Prisons and Politics.* On July 2, 1947, in a memo to Governor Warren, McGee offered his thoughts on AB 2097.

McGee recognized registration as testing traditional boundaries of American liberty. "There is no group of offenses so revolting to the public mind as those enumerated in this bill. Any procedure which would in fact control or tend to control these individuals without jeopardizing the liberties of others would seem to be in order. However, there is a principle involved which should not be disregarded. It has never been the practice in America to require citizens to register with the police, except while actually serving a sentence under the Probation or Parole Laws." McGee warned that the proposal "may be opening the door" to problematic expansion.

McGee also described for Governor Warren how sex offenders were not uniform in nature, and not all dangerous, especially given the range of offenses the statute listed. "From the psychological point of view," he wrote, "there are many different kinds of human beings who might" commit any one of those offenses. They included the "pathologically abnormal" and "often dangerous" on one end of the spectrum, to "individuals of low moral character but not necessarily psychologically abnormal." Also problematic, McGee noted, were "old men, drunks, and other individuals who may be mental cases and but necessarily dangerous" along that spectrum, to those "only partially responsible because of intoxication" and those who are "more of a nuisance than a danger" at the other end. "Congenital homosexuals" may be convicted of sodomy, McGee curiously noted in illustrating his point, "but also included in this group, especially in acts with animals, are otherwise emotionally normal but feeble-minded individuals, and adolescent boys who are not necessarily sexually abnormal."

McGee felt lengthening periods of incarceration, probation, or parole to be the better approach to achieving the desired goals. "I am not recommending that this bill be vetoed," the politically aware McGee concluded, "but I believe the Governor should give careful consideration to the bill before signing it."

"There is much in what Mr. McGee says," Governor Warren expressed in a handwritten note, July 7, 1947, "but I believe we should give it a trial." Why not? With that, Penal Code §290 became law.

In contrast to its original ideation -- a single statute comprised of six sentences totaling 333 words -- sex offender registration is now governed by some 35 or more statutes and countless thousands of words. In 1947, §290 identified thirteen qualifying offenses. There are now thirty-eight. In 1947, §290 provided registrant confidentiality, limiting access exclusively to law enforcement officers. Law enforcement now may publicly disclose the information "when necessary to ensure the public safety," and, with a few exceptions, registrants are fully identified on the Department of Justice "Megan's Law" website. In 2006, with a 70% majority, California voters adopted Proposition 83, the "*Sexual Predator Punishment and Control Act*" (aka "***Jessica's Law***"). Among other provisions, Prop 83 prohibited *all* registrants from living within 2000' of any place where children gather, including parks and schools. Until the California Supreme Court ruled that particular provision unconstitutional nine years later, registrants essentially were banned from residing in urban areas of the state, even having to abandon family homes.

In 1949, the crime of "lewd vagrancy," a violation of then-Penal Code §647(5), was added to the list of registerable offenses. The era was one of elevated social discomfort with homosexuality. In 1952, the DSM-1 categorized homosexuality as a "sociopathic personality disturbance." In 1953, President Eisenhower signed Executive Order 10450, prohibiting gays from federal employment. With "lewd vagrancy" subject to registration, Los Angeles records for 1950 document that the primary path to the registry was for having engaged in consensual homosexuality. Even today, the California Sex Offender Management Board (CASOMB) -- the agency with registration oversight – reports that out of 88,000 registrants in communities statewide, only 3.6% are considered high-risk sex offenders.

Earl Warren was right: there *was* much in what Dick McGee said.

<u>Quitting the Club</u>:

The existing statutory scheme does provide a path for terminating the need to register. It is, though, difficult and rarely utilized, requiring an expungement in most cases, as well as a Certificate of Rehabilitation (P.C. §4852.01 *et seq.*). The court's ability to grant relief applies only to a limited list of offenses. All others require a Governor's pardon. Governors don't pardon sex offenders.

Effective January 1, 2021 the process for obtaining relief from the duty to register dramatically improves, the result of SB 384, comprehensive reform legislation adopted in 2017. A diverse coalition endorsed the bill, including such diverse interests as the CASOMB, the California Police Chiefs Associations, the ACLU, and many prosecutor and criminal defense attorney organizations. The unifying factor was the recognition that the existing system was unduly burdening a substantially risk-free population, and that carrying that load depleted law enforcement resources without corresponding benefit, to the *detriment* of public safety. The coalition's breadth increased the prospects of passage by alleviating an historic fear of legislators: that supporting criminal justice reform risks the label "soft on crime" at the next election cycle.

CASOMB planted the seed for eventual reform in its 2010 report to the legislature, recommending that, "California should concentrate state resources on more closely monitoring high and-moderate risk sex offenders." In its 2014 report, the CASOMB succinctly dissected the issue, with themes reminiscent of those Richard McGee voiced:

> "Sex offender management is an extremely complex issue that continues to pose enormous challenges for state policymakers, who struggle to identify and implement effective and evidence-based policies and programs that are not merely reactions to individual tragic events. Myths about sex offenders continue to abound, such as the widespread belief that most victims are targeted by strangers, while in fact it is much more likely to be perpetrated by someone the victims know. These myths continue to influence policymakers and may have detrimental effects on public safety. Successful strategies must take into account current research on sex offender management, most notably the distinctions between various types of sex offenders and the different risk levels they pose to the public."

On October 6, 2017, Governor Jerry Brown signed SB 384 into law. The path for "quitting the club" is built into the statutory structure. Replacing the system of universal lifetime registration, SB 384 categorizes offenses and offenders into three tiers. Associated with each tier is a minimum period of registration. For tier one, that period is ten years. Tier two is twenty years. Tier three registration remains a lifetime obligation.

For tier one and two offenders, following the minimum period, the registrant can apply to the Superior Court in the county of residence for discharge from the registration order. In response to the application, the District Attorney can either concede the issue or request a hearing where any relevant evidence can be presented on the issue of safety.

The District Attorney bears the burden in demonstrating that community safety is significantly enhanced by requiring continued registration. The court considers many factors, including the nature and circumstances of the underlying offense; the age and number of victims; whether any victim was a stranger to the offender (defined as being acquainted for less than 24 hours); criminal and relevant noncriminal behavior before and after conviction; successful completion of a CASOMB-certified treatment program; and the results of various risk assessment tests. Admissible evidence includes declarations, police reports, and any other evidence considered reliable, material, and relevant. The availability of knowledgeable expert testimony and the use of state-approved risk assessment tests can greatly enhance the court's insights, tipping the balance on rulings for applicant seeking relief.

If the court denies the registrant's application, it sets a time, from one to five years, in which it can be renewed. If, on the other hand, the court grants the application, the former registrant can join Groucho in celebrating the joys of non-membership.