THE "ROMEO & JULIET" SCENARIO IN THE AFTERMATH OF *JOHNSON V. SUPERIOR COURT*

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INTRODUCTION

The purpose of this article is to address the state of the law in California in the aftermath of *Johnson v. Department of Justice*,[1] in which the California Supreme Court, by a vote of 5-2, overruled *People v. Hofsheier*,[2] and disapproved *People v. Ruffin*,[3] *People v. Thompson*,[4] *People v. Luansing*,[5] *People v. Ranscht*,[6] *In re J.P.*,[7] *People v. Hernandez*,[8] and *People v. Garcia*,[9]

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1. 341 P.3d 1075 (Cal. 2015).
2. 129 P.3d 29 (Cal. 2006).
3. 133 Cal. Rptr. 3d 27 (Ct. App. 2011).
4. 100 Cal. Rptr. 3d 57 (Ct. App. 2009).
5. 97 Cal. Rptr. 3d 836 (Ct. App. 2009).
6. 93 Cal. Rptr. 3d 800 (Ct. App. 2009).
7. 89 Cal. Rptr. 3d 17 (Ct. App. 2009).
8. 83 Cal. Rptr. 3d 29 (Ct. App. 2008).
9. 74 Cal. Rptr. 3d 681 (Ct. App. 2008).

giving retroactive effect to its decision. After discussing the history of California's treatment of nonforcible sexual conduct between an adult and a minor, including the *Hofsheier* decision and cases applying *Hofsheier*'s reasoning to various factual scenarios, and explaining the *Johnson* court's departure from the doctrine of stare decisis and its stated reasons for overruling *Hofsheier*, this article will identify various questions of law and procedure left unanswered by *Johnson* and attempt to answer them.

THE *HOFSHEIER* MAJORITY

In 2003, at the age of 22, Vincent Peter Hofsheier was convicted, by plea, of a felony violation of Penal Code[10] section 288a, subdivision (b)(1), Unlawful Oral Copulation With a Minor, and was ordered to register as a sex offender for the rest of his life.[11] He appealed from his sentence, in particular the order requiring that he register as a sex offender, on the grounds that the order denied him the constitutional guarantee of equal protection under the law, because a person convicted in California of having unlawful sexual intercourse with a minor (§ 261.5) under the same circumstances would not be subject to the mandatory lifelong registration requirements of section 290.[12] The Court of Appeal agreed. This created a split of authority in light of another case, *People v. Jones*,[13] and the California Supreme Court granted review to resolve the conflict. On review, the Supreme Court held, in a vote of 6-1[14] "that to subject Mr. Hofsheier to the mandatory registration requirement of [former] section 290 (a)(1)(A)[15] would deny defendant the equal protection of the laws."[16] The case was remanded to the trial court to determine whether discretionary registration should be ordered under former section 290, subdivision (a)(2)(E).[17]

The opinion, written by retired Justice Joyce L. Kennard, began by discussing the Legislature's historical treatment of various types of sexual

10. Subsequent statutory references are to the Penal Code.

11. *Hofsheier*, 129 P. 3d at 32.

12. *Id.* at 33.

13. 124 Cal. Rptr. 2d 10 (Ct. App. 2002).

14. The only justice who dissented in *Hofsheier* was Justice Marvin Baxter. *Id*. at 43.

15. In 2007, Senate Bill 172 was adopted and became effective as urgency legislation. This bill repealed former section 290, which had become unwieldy, and re-enacted California's Sex Offender Registration Act in the form of 23 separate statutes. Cal. S.B. 172 (2007-2008 Reg. Sess.) § 7-8. Since that time and currently, the list of California convictions for which lifetime sex offender registration is mandatory is codified in subdivision (c) of section 290. The statute which authorizes a sentencing judge to exercise discretion and require lifetime registration upon conviction for any offense not included in subdivision (c) of Cal. Penal Code § 290 (West 2014).

16. *Hofsheirer*, 129 P.3d at 32.

17. *Id*.

acts, beginning in 1850, when oral copulation was treated as the equivalent to sodomy and bestiality, all of which were considered "crime[s] against nature."[18] In 1921, oral copulation became punishable as a felony distinct from sodomy and bestiality, and the offense was punishable by an indefinite prison term of up to fifteen years.[19] For the next half-century, this crime punished all acts of oral copulation, even between consenting adults. In 1975, the Legislature amended the law and decriminalized acts of oral copulation between consenting adults.[20]

The Court described the current version of section 288a, which provides a graduated scale of punishment depending on the circumstances surrounding the act, including the ages of the respective parties and the presence of force or other coercion.[21] At the time of Vincent Hofsheier's offense and currently, subdivision (b)(1) of section 288a, provides: "[A] person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year."[22]

The Court then addressed the crime of "unlawful sexual intercourse," codified in section 261.5, subdivision (a).[23] This statute criminalizes "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor," defined as one who is under the age of 18 years.[24] As with the oral copulation statute, the penalties vary depending, primarily, on the disparity in ages between the adult and the minor.[25]

The Court then reviewed section 290, which requires lifetime sex offender registration for a person convicted of violating section 288a, subdivision (b)(1) but not for a person convicted of violating section 261.5.[26] The Court noted the twofold purpose of section 290; (1) "to assure that persons convicted of the crimes enumerated therein shall be readily available

18. *Id.* at 33 (quoting Act of April 16, 1850, ch. 99, § 48, 1850 Cal. Stat. 229, 234 (codified as amended at Cal. Penal Code § 286 (West 2014)).

19. *Id.* (citing Act of June 3, 1921, ch 848, § 2, 1921 Cal. Stat. 1633, 1633 (codified as amended at Cal. Penal Code § 288a (West 2014)).

20. *Id.* (citing Act of June 3, 1921, ch 848, § 2, 1921 Cal. Stat. 1633, 1633 (codified as amended at Cal. Penal Code § 288a (West 2014)).

21. *Id*.

22. Cal. Penal Code § 288(b)(1) (West 2014).

23. *Hofsheier*, 129 P.3d at 33-34.

24. Cal. Penal Code § 261.5(a) (West 2014).

25. Section 261.5 was originally enacted in 1970. In the statute's original form, all acts of unlawful intercourse with a minor who was not one's spouse were subject to the same punishment. Stats.1970, c. 1301, p. 2406, § 2.

26. Cal. Penal Code § 290 (West 2014).

for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future" and (2) "to notify members of the public of the existence and location of sex offenders so they can take protective measures."[27] The Court noted that a person convicted of section 288a(b)(1) is not only subject to lifetime registration, but also to having his personal identifying information included in the Department of Justice's Megan's Law website, creating the real possibility that he or she will lose his job and have difficulty finding somewhere to live.[28] The Court recognized that the lifetime registration requirement "imposes a 'substantial' and 'onerous' burden."[29] Then, the Court undertook its equal protection analysis.

First, the Court considered whether people convicted of unlawful copulation and people convicted of unlawful sexual intercourse were "similarly situated" for purposes the Sex Offender Registration Act and concluded that they are.[30] Both statutes concern sexual conduct with minors, and both statutes have increased penalties based on the surrounding circumstances, including the disparity in age between the adult and the minor.[31] "The only difference between the two offenses is the nature of the sexual act. Thus persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors 'are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.'"[32]

Next the Court determined the level of scrutiny to apply, concluding that the disparity at issue requires application of the rational relationship test, under which the challenged classification must bear a rational relationship to a legitimate state purpose.[33] The Court noted that the rationale "must be 'plausible'"[34] and "the factual basis for that rationale must be *reasonably conceivable*."[35]

To support the position that a rational basis exists for the aforementioned disparity in treatment, the Attorney General pointed to media reports stating that incidents of oral copulation have increased among adolescents in recent years, due to the fact that oral copulation cannot result in impregnation and the perception among teens that the risk of contracting a sexually transmitted

27. *Hofsheier*, 129 P.3d at 34.
28. *Id.* at 35.
29. *Id.* at 34 (quoting People v. Castellanos, 982 P.2d 211, 217-18 (Cal. 1999)).
30. *Id.* at 36.
31. *Id.* at 37.
32. *Id.* (quoting People v. Nguyen, 63 Cal. Rptr. 2d 173, 178 (Ct. App. 1999)).
33. *Id.*
34. *Id.* (quoting Warden v. State Bar, 982 P.2d 154, 165 (Cal. 1999)).
35. *Id.*

disease is lower with oral copulation than with other sexual acts involving penetration.[36] Based on these reports, the Attorney General asserted that it is "reasonably conceivable" that adults who engage in oral copulation with minors are more likely to reoffend than those who engage in unlawful sexual intercourse with minors.[37] The Court rejected this contention as "fictitious," concluding:

> Requiring all persons convicted of voluntary oral copulation with minors 16 to 17 years of age to register for life as sex offenders, while leaving registration to the discretion of the trial court for those convicted of sexual intercourse with minors of the same ages, cannot be justified by the speculative possibility that members of the former group are more likely to reoffend than those in the latter group. To sustain the distinction, there must be some plausible reason, based on reasonably conceivable facts, why judicial discretion is a sufficient safeguard to protect against repeat offenders who engage in sexual intercourse but not with offenders who engage in oral copulation.[38]

Alternately, the Attorney General argued that the possibility of pregnancy distinguishes voluntary sexual intercourse from voluntary oral copulation, "because requiring the father to register as a sex criminal might stigmatize both the mother and the child, and might harm the father's ability to support his child."[39] Noting that those who engage in sexual intercourse often also engage in oral copulation, the Court rejected this justification for the disparity in treatment and characterized the Attorney General's argument as "a reason why neither voluntary sexual intercourse *nor* voluntary oral copulation should entail mandatory registration."[40]

The Court next noted that the disparity in treatment between those who engage in oral copulation with a minor and those who engage in intercourse with a minor dates back to 1947, with the initial enactment of the sex registration law.[41] At that time, voluntary oral copulation, even between consenting adults, was a crime, and voluntary intercourse was not.[42] The Court characterized the mandatory registration for individuals convicted of voluntary oral copulation as "an exception to the legislative scheme, a historical atavism dating back to a law repealed over 30 years ago that treated all oral copulation as criminal regardless of age or consent."[43] Finding "no

36. *Id.* at 39.
37. *Id.*
38. *Id.*
39. *Id.* at 40.
40. *Id.*
41. *Id.* at 41.
42. *Id.*
43. *Id.*

reason" for the Legislature to conclude that those convicted of voluntary oral copulation with adolescents 16 to 17 years old constitute "a class of 'particularly incorrigible offenders' [citation] who require lifetime surveillance as sex offenders," the Court concluded that the statutory distinction at issue violates the equal protection clauses of the state and federal Constitutions.[44] The case was remanded to the trial court to determine whether, under former section 290, subdivision (a)(2)(E), discretionary registration should be ordered.[45]

THE *HOFSHEIER* DISSENT

As mentioned previously, six justices, including an Associate Justice of the Court of Appeal sitting on temporary assignment, joined in the majority decision in *Hofsheier*. Justice Marvin Baxter dissented, finding a justification for the disparity in treatment based on the nature of the sexual act and its potential real-life consequences—specifically, the potential for impregnation.

> [W]hile both offenses involve voluntary sexual conduct with minors, the Legislature chose to leave the imposition of sex offender registration to judicial discretion in intercourse cases, evidently in recognition of the negative effects of lifetime registration when voluntary intercourse between individuals in an ongoing relationship results in the birth of a child.[46]

Justice Baxter disagreed with the majority's conclusion that individuals who engaged in oral copulation with a minor are similarly situated to individuals who engaged in intercourse with a minor of the same age.[47] But Justice Baxter's chief criticism was with the Court's application of the rational basis test.[48]

He agreed with the rationale offered by the Attorney General that "it is reasonably conceivable that adults who violate section 261.5 are less likely to repeat their offense than adults who violate section 288a(b)(1)."[49] He explained that minors, like adults, distinguish between "going all the way" and other sexual acts.[50] From this, he surmised, it is reasonable to imagine that there are fewer potential minor victims of section 261.5 than section

44. *Id.* (citation omitted).
45. *Id.* at 43.
46. *Id.* (Baxter, J., dissenting).
47. *Id.*
48. *Id.*
49. *Id.* at 46.
50. *Id.*

288a(b)(1).[51] Accordingly, "the Legislature could plausibly conceive that mandatory lifetime registration is not as critical in section 261.5 cases because the adults who commit this crime have less opportunity to do so."[52]

The second possible rationale, according to Justice Baxter, is the potential impact of lifetime registration on innocent parties when a sexual act results in pregnancy and birth of a child.[53] Justice Baxter pointed to the Assembly Committee on Public Safety's Analysis of a 1997 bill which proposed to modify section 290 to add section 261.5 to the list of crimes for which lifetime registration is mandatory.[54] In that context, Justice Baxter noted, the Legislature had expressed concern that teen mothers wouldn't want the fathers of their children to be made subject to lifelong sex registration and that such a change might result in these cases being more difficult to settle before trial.[55]

EQUAL PROTECTION CHALLENGES IN RELIANCE ON *HOFSHEIER*

Following the decision in *Hofsheier*, the Office of the Attorney General sent thousands of letters to individuals convicted of nonforcible oral copulation involving a minor, notifying them of the Court's ruling.[56] Thereafter, equal protection challenges were successfully mounted throughout California in cases factually similar to *Hofsheier* and in other cases, involving voluntary sexual acts with a minor younger than 16 and voluntary sexual acts other than oral copulation with a minor.[57]

There were procedural missteps along the way, but all was clarified by the Supreme Court in 2010 with *People v. Picklesimer*, in which a unanimous Court held that the appropriate procedural vehicle for raising a post-conviction equal protection challenge under *Hofsheier* is a petition for writ of habeas corpus, if the defendant is still in custody as a result of the

51. *Id.*

52. *Id*.

53. *Id.*

54. *Id.*

55. *Id.* at 47.

56. *Still Registering as a Sex Offender? Looking to Stop? This Three Part Series Will Discuss The Different Ways We Can Help You Get Off The Registration Rolls*, SOUTHERN CALIFORNIA DEFENSE BLOG (July 17, 2008), http://www.southerncaliforniadefenseblog.com/2008/07/still_registering_as_a_sex_off_1.html.

57. *See Thompson*, 100 Cal. Rptr. 3d 57 (sodomy with a 17-year-old); *Luansing*, 97 Cal. Rptr. 3d 836 (oral copulation with minor under the age of 16); *Ranscht*, 93 Cal. Rprt. 800 (foreign penetration of a minor); *In re* J.P., 89 Cal. Rptr. 3d 17 (oral copulation by twelve-year old against younger sibling); *Hernandez*, 83 Cal. Rptr. 3d 29 (oral copulation with 14 year-old); *Garcia*, 74 Cal. Rptr. 3d 681 (oral copulation with minor under the age of 16).

conviction, and a petition for writ of mandate if he is not.[58] The Court further clarified that lower courts, upon granting a petition for relief from the mandatory registration requirement, should consider, based on the individualized circumstances of the case at hand, whether a discretionary registration order should be imposed under section 290.006.[59]

For the most part, courts conducting equal protection analyses defined the classes of individuals being treated disparately under the law by comparing the elements of the crime of which they had been convicted and applying the holding of *Hofsheier* only where the crimes were comparable in every way except with regard to the sexual act committed.[60] If the crimes were not sufficiently similar, then the equal protection challenges failed.[61]

One case applied *Hofsheier*'s analysis to sex offender registration in a factual context which did not involve sexual acts with a minor. In *People v. Ruffin*,[62] the Court was faced with a comparison of two statutes prohibiting oral copulation between consenting adults inside a detention facility and

58. People v. Picklesimer, 226 P.3d 348, 354-55 (Cal. 2010).

59. *Id*. at 355. California Penal Code section 290.006 provides, "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."

60. One appellate court declined to extend *Hofsheier*'s holding to a defendant convicted of oral copulation with a person younger than 16 by one more than 10 years older, based on crimes of which the defendant could have been charged and convicted which would have been dissimilar to unlawful intercourse. People v. Manchel, 78 Cal. Rptr. 3d 194 (Ct. App. 2008). Although review was denied by the Supreme Court, this case was widely criticized by other appellate courts. *See Luansing*, 97 Cal. Rptr. 3d at 842; *Ranscht*, 93 Cal. Rptr. 3d at 803; *In re J.P.*, 89 Cal. Rptr. 3d at 22.

61. People v. Brandao, 137 Cal. Rptr. 3d 672 (Ct. App. 2012) (refusing to apply *Hofsheier* to defendant convicted of annoying and molesting a child, which requires specific intent); *see also* People v. Cavallaro, 100 Cal. Rptr. 3d 139 (Ct. App. 2009), People v. Anderson, 85 Cal. Rptr. 3d 262 (Ct. App. 2008), *and* People v. Singh, 129 Cal. Rptr. 3d 461 (Ct. App. 2011) (all refusing to apply *Hofsheier* to defendants convicted of committing lewd act upon a child, which, unlike unlawful intercourse, requires specific intent); *see also* People v. Kennedy, 103 Cal. Rptr. 3d 161 (Ct. App. 2009) (refusing to apply *Hofsheier* to a defendant convicted of attempting to exhibit harmful matter to a minor via the internet); People v. Honan, 111 Cal. Rptr. 3d 351, 356 (Ct. App. 2010) (refusing to find unconstitutional registration requirement for those convicted of indecent exposure where none exists for those convicted of disorderly conduct by committing a lewd act in public); Shoemaker v. Harris, 155 Cal. Rptr. 3d 76 (Ct. App. 2013) (refusing to find unconstitutional registration requirement for those convicted for possessing child pornography, while other, arguably more culpable offenses, have no similar requirement); People v. Miranda, 132 Cal. Rptr. 3d 315 (Ct. App. 2011) (defendant convicted of sex acts with a victim who cannot give consent due to mental disability not similarly situated to defendant convicted of sex acts with a minor who, by virtue of age, cannot legally give consent); and People v. Valdez, 95 Cal. Rptr. 3d 367 (Ct. App. 2009) (refusing to find unconstitutional disparity between registration requirement for forcible sexual penetration and not for forcible spousal rape).

62. 133 Cal. Rptr. 3d 27 (Ct. App. 2011).

found an equal protection violation. The defendant in *Ruffin* was convicted of violating section 288a, subdivision (e), which prohibits oral copulation between inmates and which, under section 290, requires lifelong sex offender registration.[63] She pointed out that registration is not mandatory upon a conviction for violating section 289.6, subdivision (a)(2), which prohibits oral copulation between a guard and an inmate.[64] Noting that the purpose of both statutes is "to control custodial behavior," and finding no reason why the Legislature would conclude that prison inmates who engage in consensual oral copulation, as opposed to guards who commit acts of oral copulation with prison inmates, are a class of "'particularly incorrigible offenders" requiring mandatory lifetime registration, the Court held that the statutory classification at issue violates the equal protection clauses of both the federal and state constitutions.[65]

JOHNSON V. DOJ

Meanwhile, in San Bernardino County, trouble was brewing. In January, 2011, a man named James Richard Johnson, who had been convicted more than two decades prior of engaging in oral copulation with a 16- or 17-year-old minor (§288a, subd. (b)(1)), petitioned the superior court for a writ of mandamus ordering the Department of Justice to terminate him from its sex offender tracking program.[66] The trial court, mistakenly believing that the case of *People v. Manchel* precluded it from granting relief, denied the petition,[67] and Mr. Johnson appealed to the Fourth District, Division Two. As in *Luansing* and *Ranscht*, the Court of Appeal, in an unpublished opinion, rejected the reasoning of *Manchel* and concluded that subjecting Mr. Johnson to mandatory lifelong registration violated this equal protection rights.[68] Following the Supreme Court's guidance in *Picklesimer*, the Court remanded the matter to the superior court to determine whether discretionary registration should be ordered.[69]

The San Bernardino District Attorney, as counsel for the Real Party in Interest in this writ proceeding, petitioned for review, and on May 1, 2013, review was granted by a unanimous court to resolve the split of authority

63. *Ruffin*, 133 Cal. Rptr. 3d at 27.
64. *Id.* at 30.
65. *Id.* at 31-32.
66. *Johnson*, 341 P.3d at 1079.
67. *Id.*
68. *Id*.
69. *Id.* at 1088.

between *Manchel* and the three cases which had rejected its reasoning.[70] Five months after the completion of briefing, the Supreme Court ordered supplemental briefing on the following questions:

> Should the court overrule *People v. Hofsheier* (2006) 37 Cal.4th 1185?
>
> Among the subsidiary questions counsel may wish to address are the following:
>
> 1. What level of equal protection scrutiny applies to the statutory difference in sex offender registration requirements between those convicted of violating Penal Code section 288a and those convicted of violating Penal Code section 261.5?
>
> 2. Has *Hofsheier* presented practical difficulties of application in the trial and appellate courts?
>
> 3. Has *Hofsheier* been extended beyond the sex offender registration context in ways that could not have been anticipated at the time of the decision?
>
> 4. Absent the limitations on *Hofsheier*'s application asserted in *People v. Manchel* (2008) 163 Cal.App.4th 1108, the validity of which is challenged in the present case, what principles, if any, constrain the application of *Hofsheier*?
>
> 5. Does *Hofsheier*'s equal protection analysis logically extend beyond the context of sex offender registration?
>
> 6. If *Hofsheier*'s holding is overruled, would and should the court's decision apply retroactively to offenders who have been convicted or released from custody since the decision in *Hofsheier* without registration orders or who have obtained relief by writ petition from preexisting registration requirements?[71]

On January 29, 2015, the Court issued its decision.[72] In a vote of 5-2,[73] the Supreme Court found that requiring mandatory registration upon a

70. *Id.* at 1079.

71. Johnson v. Dep't of Justice, 341 P.3d 1075 (Cal. 2015) (No. S209167), California Supreme Court Minutes 2051 (Dec. 18, 2013), http://www.courts.ca.gov/documents/minutes/SDEC1813.PDF

72. *Id.* at 1075.

73. The majority opinion was written by Justice Baxter, the sole dissenter in *Hofsheier*. *Id.* at 1077; People v. Hofsheier, 129 P.3d 29, 43 (Cal. 2006). Joining him were Justices Cantil-Sakauye, Chin, Corrigan, and a lower appellate court justice, sitting on assignment due to the then-unfilled vacancy on the Court resulting from the retirement of Justice Kennard. *Johnson*, 341 P.3d at 1088. Justices Werdegar and Liu joined in a dissenting opinion. *Id.* at 1088, 1101. Before the opinion was issued, Justice Baxter retired, and two new justices, Justices Cuellar and Kruger, began serving their terms. A petition for rehearing was filed, and Justice Cuellar joined with the two dissenters in voting to grant rehearing; however, Justice Kruger joined with the majority, and the petition for rehearing was denied by a vote of 4-3. Johnson v. Cal. Dep't of Justice, No. S209167, 2015 Cal. LEXIS 7701 (Cal. Apr. 22, 2015).

conviction for section 288a does not violate equal protection, overruling *Hofsheier* and disapproved nearly every published case which had followed *Hofsheier*.[74]

THE *JOHNSON* MAJORITY OPINION

The majority opinion began with a statement of the Legislature's purpose in enacting the Sex Offender Registration Act and its "resolve to protect children from sexually inappropriate conduct of all kinds, including sexual intercourse and oral copulation."[75] The majority then went on to observe that, over the decade following *Hofsheier*, appellate courts "have extended *Hofsheier*'s reach to additional sex crimes involving adult offenders and minor victims of various ages and age differences, including crimes involving offenders 30 years or older or victims under 16 years of age."[76] The majority went on to opine that "continued judicial nullification of mandatory registration is denying significant effect to the legislative policy choices embodied in the Sex Offender Registration Act."[77] Although the Court did acknowledge that "stare decisis is the 'preferred course' in constitutional adjudication," it concluded that, because "*Hofsheier*'s flawed constitutional analysis is having a broad impact, and "'correction through legislative action is practically impossible,'" *Hofsheier* must be overruled.[78]

The Court began its analysis by citing *Heller v. Doe*[79] and *People v. Turnage*[80] for the principle that, in evaluating whether a rational basis exists for disparate treatment of similarly situated classes of individuals, courts may engage in "rational speculation", whether or not such speculation "has 'a

74. *Johnson*, 341 P.3d at 1086-87.

75. *Id.* at 1077.

76. *Id.* at 1078.

77. *Id.*

78. *Id.* (first quoting *United States v. Dixon*, 509 U.S. 688, 712 (1993), and then quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

79. 509 U.S. 312 (1993). *Heller v. Doe* involved an equal protection challenge to Kentucky's disparate standards of proof for civilly committing individuals gravely disabled due to a mental illness and individuals gravely disabled due to mental retardation. Notably, the decision in that case was extremely fractured, with Justices Kennedy, Rehnquist, White, Scalia, and Thomas joining in the majority, with Justice O'Connor writing separately, concluding that the differential standard of proof is irrational, but concurring in the part of the opinion that addressed the ability of close relatives to participate as parties to the proceedings in one type of commitment procedure but not in the other. Justices Blackmun, Souter, and Stevens dissented. In other words, with regard to the application of the rational basis standard, the vote was 5-4. The California Supreme Court's decision in *Turnage*, also authored by Justice Baxter, relied heavily on the majority opinion in *Heller*.

80. 281 P.3d 464, 471 (Cal. 2012).

foundation in the record.'"[81] A party must ''negative every conceivable basis'" that might support the disputed statutory disparity", and, if a plausible basis exists, a "court may not second-guess its "'wisdom, fairness, or logic.'"[82]

The Court found *Hofsheier*'s equal protection analysis to be "erroneous."[83] The majority concluded that "sexual predators are more successful in manipulating minors to engage in oral copulation, as opposed to sexual intercourse," referencing a study, published pre-*Hofsheier*, which, according to the Court, indicated "that pubescent minors may be more receptive to engaging in oral sex, which does not risk pregnancy and which many such minors believe is lower in risk for sexually transmitted diseases."[84] The Court also concluded that "pedophiles" are more likely to engage in sexual acts other than intercourse with pre-pubescent victims, citing another article which states, "'[t]ypically, pedophiles engage in fondling and genital manipulation more than intercourse,' except in cases of incest, forcible encounters, and when pedophiles prefer older children."[85] In

81. *People v. Turnage*, 281 P.3d at 471.

82. *Id.*

83. Johnson, 341 P.3d at 1083.

84. *Id*. at 1084 (citing Halpern-Felsher et al., *Oral Versus Vaginal Sex Among Adolescents: Perceptions, Attitudes, and Behavior*, No. 4 PEDIATRICS 845 (2005)). As reflected by its title, this article, published a decade prior to the *Johnson* decision, discussed perceptions of a test group of 580 ninth-graders (mean age: 14.54) regarding risks and benefits of certain types of sexual activity with a boyfriend/girlfriend. Halpern-Felsher et al., *supra*, at 846. The researchers cautioned,

> our findings should be interpreted with caution because it is conceivable that they could be limited to young adolescents with relatively low levels of sexual experience. Clearly, more research is needed on older adolescents to investigate how risk perceptions change as adolescents mature and gain more exposure to and have more experience with oral as compared with vaginal sex.

Id. at 850. The researchers also cautioned that, given the age of the subjects and their relative lack of sexual experience, "it is possible that participants included other behaviors, such as French kissing, in their interpretation of the term 'oral sex.'" *Id.* Given these limitations, the children interviewed reported having engaged in oral sex at a *slightly* higher rate than vaginal sex (19.6% vs. 13.5%). *Id.* at 487. The same is true with regard to their professed intentions regarding future sexual activity, with 31.5% reporting an intention to engage in oral sex in the next 6 months and 26.2% reporting an intention to engage in vaginal sex in the next six months. *Id.* The *Hofsheier* Court had been presented with similar data and had found it to be of little relevance, due to the fact that the questioning involved sexual activity with similar-aged peers and due to the absence of empirical data tending to show that adults who engage in voluntary oral copulation with a minor tend to reoffend at higher rates than adults who engage in intercourse with a minor. *Hofsheier*, 129 P.3d at 39.

85. *Johnson*, 341 P.3d at 1084 (citing Hall et al., *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROCEEDINGS 457, 458 (Apr. 2007)). This article was designed to assist physicians in understanding Pedophilia, its rate of occurrence, and the characteristics of both pedophiles and sexually abused children. The article focused on those who engage in sexual conduct with very young prepubescent children as opposed to "hebophiles" and "ephebophiles", those attracted to

light of these two propositions, the Court reasoned, the Legislature "could plausibly assume that predators and pedophiles engaging in oral copulation have more opportunities to reoffend than those engaging in sexual intercourse, and, for that reason, are especially prone to recidivism and require ongoing surveillance."[86]

The majority then discussed why *Hofsheier* was incorrect in observing that "the nature of the sexual act" is the "only difference" between unlawful intercourse and nonforcible oral copulation.[87] The act of intercourse, said the Court, "nearly always carries" the potential for pregnancy, while engaging in non-intercourse sexual activity never does.[88] Reviewing the history of section 261.5, the Court noted that the Legislature had chosen to codify unlawful sexual intercourse separately from California's "rape" statute (§ 261) due to "the social stigma associated with the rape label" and the need for offenders to "more readily obtain employment and support children conceived as a result of such intercourse."[89] This history, the majority concluded, "confirms that the potential for pregnancy and parenthood has, in fact, influenced legislative decisionmaking regarding unlawful intercourse with minors."[90]

The Court next noted that, in order to offset the amount of money spent by the State "to assist families headed by teenagers" impregnated by adult males, many of whom "are repeat offenders who have fathered more than one child by different teenage mothers, yet accept little or no responsibility for their actions or for the support of their children," the crime of unlawful sexual

female or male pubescent children, and "child molesters," "loosely defined as any individual who touches a child to obtain sexual gratification." Since lewd touching involving a minor younger than fourteen is punishable under section 288, a statute not comparable in is elements to section 261.5, the Court's reliance on this study of Pedophiles in assessing the disparate treatment of those convicted of violating section 288a, subdivision (b) and those convicted of unlawful sexual intercourse was misplaced.

86. *Johnson*, 341 P.3d at 1084. This fictitious perception of higher recidivism rates had been one of the justifications advanced by the Attorney General in *Hofsheier* and was embraced by Justice Baxter in his dissenting opinion. *Hofsheier*, 129 P.3d at 48 (Baxter, J. dissenting).

87. *Johnson*, 341 P.3d at 1084 (quoting *Hofsheier*, 129 P.3d 29).

88. *Id.* In *Hofsheier*, the Court found this argument to be unpersuasive, given the fact that persons who engage in oral copulation often also engage in sexual intercourse and vice versa. *Hofsheier*, 129 P.3d at 48.

89. *Johnson*, 341 P.3d at 1085 (citing Harold F. Bradford, State Bar of Cal. Legis. Rep., analysis for Assem. Com. on Criminal Procedure of Sen. Bill No. 497 (1970 Reg. Sess.), undated, p. 1); Sen. Com. on Judiciary, analysis of Sen. Bill No. 497 (1970 Reg. Sess.); Sen. Beilenson, sponsor of Sen. Bill No. 497 (1970 Reg. Sess.), letter to Governor, Aug. 26, 1970.

90. *Id.* In addition to the specter of recidivism, the potential for impregnation and childbearing had been advanced by the Attorney General in *Hofsheier* as a justification for the disparity in treatment and had been embraced by Justice Baxter in his dissent. *Hofsheier*, 129 P.3d at 48 (Baxter, J. dissenting).

intercourse has graduated civil penalties depending on the disparity in age between the offender and the minor.[91] Statutes punishing other types of nonforcible sexual acts involving minors do not include such penalties.[92]

After noting these two facts, the Court concluded that a rational basis exists for requiring lifetime registration for those convicted of non-intercourse sexual conduct with a minor and allowing courts to make individualized discretionary determinations about registration in cases involving unlawful intercourse, "where, for instance, registration might cause economic or other hardship to a child born to the minor victim and the adult offender."[93] The Court overruled *Hofsheier* to the extent it is inconsistent with this conclusion and disapproved the cases following *Hofsheier*.[94]

The *Johnson* majority then turned to the retroactive effect of its decision, noting that "[a] decision of a court overruling a prior decision is typically given full retroactive effect."[95] The Court then acknowledged that it had the authority to restrict retroactive application of its decision "on grounds of equity and public policy."[96] Noting that, in the case at hand, the defendant had "taken no action in justifiable reliance on the overruled decision," having pled guilty prior to *Hofsheier*, the court concluded, "[i]n circumstances such as these, there is no unfairness or inequity in rejecting an equal protection challenge based on our overruling of *Hofsheier*."[97] The Court specifically declined to decide whether the overruling of *Hofsheier* applies retroactively in *all* cases.[98]

91. *Johnson*, 341 P.3d at 1085 (quoting Stats.1996, ch. 789, § 2, subd. (a), p. 4161).

92. However, section 290.3 requires that certain fines be imposed upon conviction of any offense specified in subdivision (c) of section 290, which would include oral copulation with a minor, to be imposed, collected, and transferred to the Department of Justice Sexual Habitual Offender Fund, the DNA Identification Fund, and to maintain local DNA testing laboratories. It is difficult to see how the fact that the fines are codified in a statute other than section 288a demonstrate that a rational basis exists for treating those who engage oral copulation more harshly than those who engage in intercourse.

93. *Johnson*, 341 P.3d at 1085.

94. *Id.* at 1087.

95. *Id.* (citing Barber v. State Pers. Bd., 556 P.2d 206, 208 (Cal. 1976)).

96. *Id.* (citations omitted).

97. *Id*. at 1087-88.

98. *Id.* at 1088 n.11.

THE *JOHNSON* DISSENT[99]

In her dissenting opinion, Justice Werdegar asserted that *Hofsheier*'s holding had rested "on a sound equal protection analysis."[100] She further asserted that the "statutory discrimination" between oral copulation and sexual intercourse "does not rest on a rational ground of legislative distinction"; rather, it "is an anachronistic holdover from a period (before 1975, when California laws on consensual adult sex acts were liberalized) when oral copulation and sodomy were regarded as abhorrent sexual perversions closely associated with homosexuality and were therefore outlawed regardless of the participants' ages."[101] Pointing to the Legislature's actions subsequent to 1975, she accused the majority of having invented "fictitious purposes that could not have been within the contemplation of the Legislature."[102]

The dissenting opinion recounted, in detail, the steps the *Hofsheier* court had taken in conducting its analysis, its reliance in long-settled equal protection principles, and its careful examination of legislative history related to oral copulation and other sexual acts, historically viewed as "deviant."[103] Pervasive throughout this legislative history is the moral or religious view that "vaginal intercourse is the only morally acceptable form of penetrative sexual behavior. . . . Deeply intimate sexual acts are only available to straight people. Those straight people who engage in 'normal' sex can meet our moral strictures, as embodied in our laws, but *homosexuals never can.*"[104] Also pervasive is the "predominant view" that "homosexual offenders should be registered."[105] In contrast, Justice Werdegar noted, heterosexual intercourse with pubescent minors has historically been viewed "as proceeding from morally and psychologically normal impulses."[106]

99. A significant portion of the dissenting opinion was devoted to applying principles of *stare decisis* to the case at hand, resulting in the conclusion that reexamination of the *Hofsheier* decision is not warranted. This portion will not be summarized further herein as it is not material to this article.

100. *Johnson*, 341 P.3d at 1089 (Werdegar, J. dissenting).

101. *Id.*

102. *Id.* at 1089 (quoting Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985)).

103. *Id.* at 1095-98.

104. *Id.* at 1096 (quoting J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 77 (2011)) (emphasis in original).

105. *Id.* (citing Gallo *et al*., *Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV 643, 689 (1966) [study of enforcement of section 288a against gay people which included interview with law enforcement officials]).

106. *Id.* at 1097 (citing Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV 295, 309).

> What is clear is that even in 1970, when all oral copulation was still banned as a sexual perversion, sexual intercourse with a minor was deemed unworthy of social stigma. The difference in attitude towards oral copulation and sexual intercourse reflected in section 290's differential registration requirement is thus a continuation of historical attitudes: while sexual intercourse with minors was an offense, the act itself was a normal one not considered deserving of any social stigma; oral copulation, in contrast, was an unnatural act typically engaged in by homosexuals.[107]

The dissenting opinion went on to note that, even after liberalization of laws prohibiting consensual sexual acts other than intercourse, "the mandatory registration requirement applicable to these particular sex acts remained on the books, a vestige of bygone social and legal discrimination."[108] "It is in this sense that we have termed the distinction drawn in section 290 between unlawful sexual intercourse and oral copulation 'a historical atavism.'"[109]

Given that the disparity at issue "has origins in irrational homophobia, continues to impact gay people in a differentially harsh way . . . and involves severe restrictions on liberty and privacy," the dissent cautioned that "[c]areful attention" should be given as to "whether a posited reason is plausible and realistic," so as to avoid approving "a statutory discrimination that may still bear the taint of irrational prejudice against homosexuals."[110]

With regard to the majority's proposed justification regarding a disparate perception of recidivism between those who engage in oral copulation and those who engage in intercourse, the dissent pointed out evidence to the contrary in the legislative materials; specifically, the findings of section 261.5 that many men who engage in unlawful intercourse with minors are "'repeat offenders' who 'prey upon minor girls.'"[111] What the historical record *does* show, however, is that oral copulation was disfavored by the legislature, in comparison to intercourse, because the former was regarded as a perversion engaged in by homosexuals and the latter was not.[112]

107. *Id.*

108. *Id.* at 1098.

109. *Id.* (quoting *Hofsheier*, 129 P.3d at 42).

110. *Id.* (citing *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008)). All three justices in the *Johnson* majority who had been on the Court in 2008 had dissented in the *In re Marriage Cases*, finding no constitutional right to same-sex marriage, "because marriage is, as it always has been, the right of a woman and an unrelated man to marry each other," *In re Marriage Cases*, 183 P.3d at 464 (Baxter, J. dissenting), and no equal protection violation, because the statutes defining marriage further the legitimate purpose of "preserv[ing] the traditional understanding of the institution," *id.* at 470 (Corrigan, J. dissenting). The fourth justice in the *Johnson* majority, Chief Justice Cantil-Sakauye, had not yet been appointed to the Supreme Court when *In re Marriage Cases* was decided.

111. *Johnson*, 341 P.3d at 1099 (quoting Stats. 1996, ch. 789, §2, p. 4161).

112. *Id.*

The dissent next addressed the majority's claim that the legislative history of section 261.5 reflects legislative concern for the well-being of children conceived as a result of these crimes.[113] Justice Werdegar pointed out that the bill in which these concerns were discussed had not addressed the treatment of section 288a offenders.[114] Accordingly, while the bill is helpful in explaining why the Legislature has declined to subject all section 261.5 offenders to mandatory registration, "it does not support the claim that the same considerations require a different treatment of all section 288a offenders as predators deserving of mandatory lifetime registration."[115] Moreover, historically, the disparate treatment of those convicted of oral copulation was based, not on the possibility of pregnancy, but "because it was regarded as unnatural and perverted and was associated with homosexuals."[116] The majority's treatment of "the distinction in section 290 as reflecting a contemporary judgment about the need to register those who engage in oral copulation with minors, but not those who engage in sexual intercourse," is "highly fictitional."[117]

THE AFTERMATH OF *JOHNSON*

Several months following the *Johnson* decision, the first official law enforcement directive was issued regarding retroactive application of *Johnson* to those who, unlike Mr. Johnson, had taken action in justifiable reliance on *Hofsheier*.[118] This directive came in the form of a September 16, 2015 memorandum from the California Department of Corrections and Rehabilitation, Division of Adult Parole Operations, on the subject, "Procedures for Compliance With *People v. Johnson*'s Reversal of *People v. Hofsheier*," Directive No. 15-08.[119]

According to the memo, CDCR case records staff have identified parolees "who *may* have a duty to register pursuant to the *Johnson* decision and are notifying the District Attorney's office for the county in which an offender was convicted."[120] According to the memo, "County District Attorneys have the authority to determine if a parolee has a duty to

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1100.

117. *Id.* (quoting Brown v. Merlo, 506 P.2d 212, 219 n.7 (Cal. 1973)).

118. Memorandum from the State of California Department of Corrections and Rehabilitation to Regional Parole Administrators, District Administrators, Unit Supervisors, Parole Agents, Support Staff (Sept. 16, 2015) (on file with author).

119. *Id.*

120. *Id.*

register."[121] Parole staff is not to require identified parolees to register "until ordered by the court or upon being notified by the District Attorney."[122] Once this occurs, the parole agent is to notify the parolee of his duty to register, complete the necessary forms with the parolee, and then verify the parolee's registration with local law enforcement.[123] All of these parolees are to be placed on a "Global Positioning System Caseload" and are to be monitored by GPS for the entire period of parole, as required by section 3000.07, subdivision (a).[124] The special conditions of parole must be modified to include all conditions typically required for those who are required to register under section 290.[125]

This directive gives rise to several questions, which I will attempt to answer in the next section of this article: (1) Does the County District Attorney "have the authority to determine if a parolee has a duty to register" under *Johnson*?; (2) Does notification by the District Attorney that a person has a registration requirement create a legal duty to act? The answers to these questions give rise to additional questions: (1) If notification by the District Attorney or other law enforcement officer is insufficient to make a person who took some action in reliance on *Hofsheier* subject to retroactive application of *Johnson*, through what procedural mechanism, if any, can such a person be brought before a court of competent jurisdiction for a legal determination regarding whether he or she should be included in the sex offender registry? (2) In making such a determining, which provisions of the state and federal constitutions come into play?

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

ANSWERING THE UNANSWERED QUESTIONS

A. Only a Judicial Officer Has the Authority to Determine if Johnson Retroactively Applies to Any Individual, and Absent Such a Determination, Notification By Law Enforcement Has No Legal Effect

The Department of Corrections and Rehabilitation is incorrect in asserting that County District Attorneys have the authority to determine whether *Johnson* applies retroactively to a person convicted of an offense listed in section 290, subdivision (c) in reliance on *Hofsheier*.

Article III, section 3 of the California Constitution declares, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[126] Article VI, section 1 of the California Constitution provides, "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record."[127] While some agencies do utilize judicial power under special constitutional authority through direct grants or delegation of power to the Legislature, the Attorney General and the various district attorneys are part of the executive branch and may not exercise judicial power.[128]

Whether or not *Johnson* should apply retroactively to a person who was convicted of a section 290, subdivision (c) offense in reliance on *Hofsheier* is a question of law, and questions of law are decided by judicial officers, not district attorneys.[129]

B. District Attorneys Are Not Authorized to Notify an Individual Convicted of an Offense Included in Subdivision (c) of Section 290 of His or Her Registration Requirement Under Section 290

The District Attorney has exclusive authority with regard to requesting warrants for the arrest of those who are required to register and prosecuting

126. Cal. Const. art. III.

127. Cal. Const. art. VI, § 1.

128. Cal. Const. art. V, § 13; Esteybar v. Mun. Court, 485 P.2d 1140, 1144 (Cal. 1971); People v. Eubanks, 927 P.2d 310, 315 (Cal. 1996) ("the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings").

129. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); People v. Brady, 40 Cal. 198, 218 (1870) ("Ever since the Federal Government has been in operation it has been the practice to test the constitutionality of State laws, and enforce the limitations upon the powers of the States by judicial decisions.").

such individuals for failing to comply with registration requirements.[130] These are the only powers or duties assigned to the District Attorney under the Sex Offender Registration Act (SORA).

Under section 290, subdivision (b), a person convicted of any one of a number of specified sex crimes, listed in subdivision (c), is subject to a lifetime duty to register as a sex offender.[131] Various provisions of the SORA provide that a registrant must register or re-register based on differing triggering events. For example, a registrant must register annually, within five working days of his birthday,[132] within five working days of establishing residence in any city or unincorporated area in California,[133] of changing his residence,[134] or upon entering the state, if the registrant is transient,[135] and within five working days from release from incarceration, placement or commitment, or release on probation.[136]

The Act has a "preregistration" requirement. Upon incarceration, placement, or commitment, or prior to release on probation, any person who is required to register under the Act must "preregister."[137] The "preregistering official shall be the admitting officer at the place of incarceration, placement, or commitment, or the probation officer if the person is to be released on probation."[138] The County District Attorney is not an official authorized to "preregister" an individual who is required to register.

In addition to the pre-registration requirements, the SORA has specific notification requirements, set forth in section 290.017. Subdivision (a) of section 290.017 provides that a person released from incarceration or from a

130. Cal. Penal Code § 290.015(c) (West 2014). No warrant of arrest may issue except on a showing of probable cause that the offense described in the declaration in support of the warrant has been committed. Cal. Penal Code §817(a) (West 2014). Accordingly, it would be unethical for a District Attorney to seek a warrant for the arrest of any person, knowing that the person has taken some action in reliance on *Hofsheier* and has not been given notice after a judge of competent jurisdiction has determined that he is required to register.

131. Cal. Penal Code § 290(b) (West 2014).

132. Cal. Penal Code § 290.012 (a) (West 2014).

133. Cal. Penal Code § 290 (b); Cal. Penal Code § 290.010 (West 2014).

134. Cal. Penal Code § 290.013(a) (West 2014).

135. Cal. Penal Code § 290.011(a) (West 2014). A transient registrant must also re-register every thirty days while he remains transient and must register annually within five working days of his birthday. Cal Penal Code § 290.011(a), (c) (West 2014). Should he move to a residence, he must register within five working days, regardless of the last date on which he updated his registration, and again within five working days of again becoming transient. Cal. Penal Code § 290.011(b) (West 2014). He must also register within five working days of moving out of the state. Cal. Penal Code § 290.011(f) (West 2014).

136. Cal. Penal Code § 290.011(a); Cal. Penal Code § 290.015(a) (West 2014).

137. Cal. Penal Code § 290.016(a) (West 2014).

138. *Id.*

place of confinement or hospital who is required to register must be notified of his duty to register prior to release "by the official in charge of the place of confinement or hospital."[139] A person released on formal probation shall be notified "by the probation department,"[140] and a person released on summary probation or discharged upon paying a fine shall, prior to release, be informed "by the court."[141] Nowhere in section 290.017 is the District Attorney even mentioned. Accordingly, notification from the District Attorney that a person "is now required to register" triggers no legal duty on the part of the "notified" person.

C. A Person Who Has Taken Action in Justifiable Reliance on Hofsheier *May Be Brought Before a Court of Competent Jurisdiction for a Determination Whether Individual Considerations Weigh Against or in Favor of Ordering Retroactive Application of Johnson Only Via a Civil Mandamus Action*

There is no procedural mechanism through which a person who has taken action in justifiable reliance on *Hofsheier*, even one who is on probation for a nonforcible non-intercourse sex offense involving a minor, may lawfully be brought before the criminal court in which judgment was rendered for a determination as to whether his or her individual considerations weigh against or in favor of retroactive application of *Johnson*. While those who are still on probation may be brought before the sentencing judge on a noticed motion to modify conditions of probation under section 1203.3, it is well-settled that sex offender registration under section 290, subdivision (c) is *not* a condition of probation.[142] Nor is it "an authorized sentence," which the trial court would be able to correct at any time.[143] It is a collateral consequence of a judgment.[144] And, post judgment, a freestanding motion does not vest the court with jurisdiction to address a collateral consequence.[145]

139. Cal. Penal Code § 290.017(a) (West 2014).

140. Probation officers and parole agents have certain obligations with respect to an individual under their supervision "who is required to register as a sex offender." Cal. Penal Code §290.85 (West 2014). But these duties and this authority does not extend to those who are not required to register or those who might or might not be required to register.

141. Cal. Penal Code § 290.017(c), (d) (West 2014).

142. *Picklesimer*, 266 P.3d at 354.

143. *Id.*

144. *Id.*

145. *Id.* Certain post judgment motions have been authorized by the Legislature. For instance, a defendant can move, post judgment, for reduction of a felony "wobbler" offense to a misdemeanor under section 17, subdivision (b), or to vacate a conviction and withdraw a guilty plea under section

In *Picklesimer,* the Court held that the correct procedural vehicle for resolving legal questions regarding the propriety of a person's inclusion in the sex offender registry is a petition for writ of mandate, subject to the procedural and jurisdictional requirements of Code of Civil Procedure section 1086.[146] Because placement or exclusion of a person in the state sex offender registry is a ministerial act, contingent only on whether the person is legally required to register, such a petition should name the Department of Justice, the agency responsible for maintaining the registry, as the Respondent.[147] The People, by and through their attorney, the District Attorney for the respective County, would be the Real Party in Interest.[148] From this analysis and holding, it follows that mandamus is the correct procedural vehicle for seeking a legal determination regarding the retroactive application of *Johnson* to a person who is *not* included in the state's sex offender registry, and that, in such an action, the Petitioner would be the People of the State of California, by and through the District Attorney, the Respondent would be the Department of Justice, and the Real Party in Interest would be the individual sought to be made subject to the mandatory registration requirement.

D. District Attorneys Have No Authority to Bring a Civil Mandamus Action Seeking an Order Directing a Person's Inclusion in the Sex Offender Registry

Generally, the duties of a County District Attorney are specified in Chapter 1, Part 3, Title 3 of the Government Code, beginning with section 26500.[149] As "the public prosecutor," the District Attorney "shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses."[150] In addition, he or she may "sponsor, supervise, or participate in any project or program to improve the administration of justice."[151] As public prosecutor, the district attorney "shall institute proceedings . . . for the arrest of persons charged with or reasonably suspected of public offenses" and may attend to magistrates faced with arrest warrants when required and give advice to the grand jury in cases presented

1203.4, or to have evidence seized in his case tested for DNA under section 1405. *See* Cal. Penal Code § 1203.4 (West 2015); Cal. Penal Code § 1405 (West 2011).

146. *Picklesimer*, 266 P.3d at 355.

147. *Id.*

148. *Id.* n.5.

149. Cal. Gov't Code § 26500 (West 2008).

150. *Id.*

151. Cal. Gov't Code §26500.5 (West 2008).

for its consideration.[152] The district attorney must also represent the county in mental health proceedings.[153]

The district attorney is entitled to bring a civil action in the name of the people only when necessary "to abate a public nuisance in his county."[154] Actions to abate nuisances are authorized by Code of Civil Procedure section 731.[155] Civil Code section 3479 defines "Nuisance" as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."[156] It is inconceivable that a reverse-*Picklesimer* mandamus action seeking a judicial determination regarding retroactive application of *Johnson* as to any particular individual could ever be characterized as an action to abate a public nuisance.

E. Additional Substantive Considerations Regarding Retroactive Application of Johnson to Those Convicted in Reliance on Hofsheier.

Aside from the procedural issues discussed above, equitable and constitutional concerns mitigate against retroactive application of *Johnson* to those who have taken some action in reliance on *Hofsheier*. With regard to

152. Cal. Gov't Code § 26501 (West 2008); Cal. Gov't Code § 26502 (West 2008).

153. Cal. Gov't Code § 26530 (West 2008).

154. Cal. Gov't Code § 26528 (West 2008). In addition to the aforementioned duties as public prosecutor, upon request, the District Attorney must represent the court or a judge in an action in which the court or judge, in his official capacity, is a party defendant. Cal. Gov't Code § 26524 (West 2008). Furthermore, in a county that does not have a "county counsel," the district attorney is required to render various legal services to the county, including acting as legal adviser to the board of supervisors, rendering legal services to school districts and other local public entities and to associations which contract with the county to operate a county fair, defend all suits brought against the state in his or her county or against his or her county, prosecute actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or his or her county, prepare legal papers and forms necessary for the voting of school bond issues within the county and advise any board of education, board of school trustees, or high school board in relation to such issues, defend or prosecute any action brought by or against the auditor or treasurer for the purpose of testing the validity or constitutionality of any act of the Legislature or the board of supervisors or of any order providing for payment of county funds, and, if the board of supervisors unlawfully orders any amount paid for any purpose and the amount is actually paid, must institute suit in the name of the county to recover the money paid plus damages. Cal. Gov't Code § 26520 (West 2008); Cal. Gov't Code § 26520.5 (West 2008); Cal. Gov't Code § 26526 (West 2008); Cal. Gov't Code § 26529 (West 2008); Cal. Gov't Code § 26522 (West 2008); Cal. Gov't Code § 26523 (West 2008); Cal. Gov't Code § 26525 (West 2008).

155. Cal. Civ. Proc. § 731 (West 2015).

156. Cal. Civ. § 3479 (West 2016).

those who pled guilty in reliance on *Hofsheier*, due process guarantees are implicated. The Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the Government from depriving "any person of life, liberty, or property, without due process of law."[157] It is well-settled that plea bargaining in criminal cases implicates due process guarantees.[158]

For more than thirty years, California courts have recognized that "due process requirements apply not only to the taking of the plea, but also to implementation of the bargain."[159] "It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy."[160] "This does not mean that any deviation from the terms of the agreement is constitutionally impermissible."[161] The variance must be "'significant' in the context of the plea bargain as a whole to violate the defendant's rights."[162]

Whether or not lifelong registration as a sex offender and all it entails will result from the entry of a guilty plea, is certainly "significant" in the context of a plea bargain. Even before the enactment of Megan's Law and the ensuing internet publication and dissemination of photographs and personal identifying of convicted sex offenders, even before the adoption or enactment of a plethora of laws restricting where registered sex offenders can lawfully live and be present, the California Supreme Court recognized that sex offender registration imposes a "substantial" and "onerous" burden on offenders and their families.[163] That burden is exponentially greater now.[164] Where a defendant reasonably relied, to his detriment, on a prosecutor's agreement that he or she would not be required to register as a sex offender as a consequence of his guilty plea, due process principles require that the promise be fulfilled and that the agreement be enforced.

Doe v. Harris[165] does not compel a different result. *Doe v. Harris* held that "plea agreements are deemed to incorporate the reserve power of the

157. U.S. Const. amend. XIV; Cal. Const. art. I § 7.

158. Santobello v. New York, 404 U.S. 257, 262 (1961) ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled").

159. People v. Arata, 60 Cal. Rptr. 3d 160, 166 (Ct. App. 2007) (citing People v. Mancheno, 654 P.2d 211 (Cal. 1982)).

160. *Id.*

161. *Id.* (quoting People v. Walker, 819 P.2d 861, 867 (Cal. 1991)).

162. *Id.* (quoting *Santobello*, 404 U.S. at 262).

163. People v. Castellanos, 982 P.2d 211, 218 (Cal. 1999).

164. *See, e.g.*, Cal. Penal Code § 290.46 (West 2014); Cal. Penal Code 3003.5(b)-(c) (West 2014).

165. 302 P.3d 598 (Cal. 2013).

state to amend the law or enact additional laws for the public good and in pursuance of public policy."[166] The Court's analysis and its decision incorporated only laws amended or enacted by a legislative body.[167] It did not consider the impact of post-plea changes in decisional law. More important, *Doe v. Harris* dealt with "implied" terms of plea agreements not *express promises* as were specifically negotiated, stated on plea forms and in minute orders, and even "stipulated" to by the parties entering plea bargains in reliance on *Hofsheier*.[168] In fact, the Court specifically declined to address whether its holding would apply in cases such as *People v. Arata*, in which "the parties understood that the defendant's decision to plead guilty was motivated by a specific statutory benefit . . . and thus had implicitly agreed the defendant would receive that benefit."[169] For this reason, *Doe v. Harris* did not disapprove or overrule *Arata*; nor did it even address the due process principles underpinning the *Arata* decision.

In addition to the foregoing due process concerns, state and federal ex post facto prohibitions may also bar retroactive application of *Johnson* to those who committed a sex offense between March 6, 2006 and January 29, 2015 and entered a guilty plea in reliance on *Hofsheier*. While it is true that the California Supreme Court has consistently held, since 1999, that the confidential duty to register, without more, does not constitute "punishment" for purposes of the ex post facto clause,[170] the state of the law as it exists today compels a contrary result.

As long ago as 1983, the California Supreme Court recognized that California's Sex Offender Registration Act was sufficiently punitive in its effect as to implicate article I, section 17 of the California Constitution—the ban against cruel, unusual, or disproportionate punishment.[171] The Court reached this conclusion by applying the following seven factors, identified by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*[172] (hereinafter "the *Mendoza-Martinez* factors") as being crucial to any ex post facto analysis:

- whether the sanction involves an affirmative disability or restraint,
- whether it has historically been regarded as a punishment,
- whether it comes into play only on a finding of scienter,

166. *Harris*, 302 P.3d at 603.

167. *Id.*

168. *Id.* at 605.

169. *Id.* at 604-05 (citing *Arata*, 60 Cal. Rptr. 3d at 166).

170. *Castellanos*, 982 P.2d at 212.

171. *In re* Reed 663 P.2d 216, 218-20 (Cal. 1983) (*overruled by In re* Alva, 92 P.3d 311 (Cal. 2004)).

172. 372 U.S. 144, 168-69 (1963).

- whether its operation will promote the traditional aims of punishment – retribution and deterrence,
- whether the behavior to which it applies is already a crime,
- whether an alternative purpose to which it may rationally be connected is assignable for it, and
- whether it appears excessive in relation to the alternative purpose assigned.

In 1999, the California Supreme Court took another look at sex offender registration, this time in the context of state and federal constitutional prohibitions again ex post facto punishment.[173] The Court again applied the *Mendoza-Martinez* factors and concluded that, although registration imposed a substantial burden on offenders, registration requirements (as they existed at that time) were not so exceedingly punitive in their effect so as to constitute "punishment" for purposes of the ex post facto clause.[174]

Since 1999, things have changed. The burden of being required to register as a sex offender in California has become increasingly onerous. In 2005, with the enactment of Penal Code section 290.46, Megan's Law, the "confidential" duty to register, analyzed in *Castellanos*, ceased to exist for all required to register based on a felony conviction.[175] These registrants are publicly "outed" on a free-of-charge, user-friendly internet website maintained by the government, and their photographs and personal identifying information, including satellite hybrid views of their homes, are maintained on the Megan's Law website for the course of the offender's life.[176]

The enactment of Megan's Law and ensuing "outing" of registered sex offenders changed everything. It severely impacts registrants' ability to secure employment and provide for their families. Many lose their jobs and their homes.[177] Low-income offenders and their families are now categorically excluded from state and federal affordable housing programs.[178] Homeless offenders are denied access to shelters.[179] Mentally-ill offenders are categorically excluded from licensed mental health treatment facilities, and chronically drug and alcohol-dependent offenders are categorically

173. *Castellanos*, 982 P.2d at 212.
174. *Id.* at 218-19.
175. *See* Cal. Penal Code § 290.46 (b)(1) (West 2014).
176. *See* Cal. Penal Code § 290.46 (b)(1).
177. Carpenter, *supra* note 107, at 300 n.15.
178. *Id.* n.14.
179. *Id.*

excluded from residential treatment programs.[180] And, in 2006, with the adoption of Proposition 83 ("Sexual Predator Punishment and Control Act: Jessica's Law"), the consequences of being required to register as a sex offender became even more onerous. On November 8, 2006, it became "unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."[181] Local governments have adopted restrictions on where offenders lawfully may be present, creating restricted zones around schools, parks, libraries, daycare centers, amusement centers, arcades, and playgrounds within the City's limits.[182] Some cities and counties have enacted "loitering" ordinances directed at registered sex offenders. And, under the authority of section 3003.5, subdivision (c), local governments have created their own laws, further restricting where sex offenders may lawfully reside.[183] Cumulatively, these laws have substantially increased the punitive effect of being required to register as a sex offender.

As it exists today, the duty to register along with its consequences is punishment for purposes of ex post facto analysis. Applying the *Mendoza-Martinez* factors, the analysis looks something like this:

- does the sanction impose an affirmative disability or restraint – yes; in addition to the already substantial burden placed on offenders by the registration requirements of Penal Code sections 290 through 290.023, the notification provisions of section 290.4 and 290.45, and the internet publication provisions of section 290.46, registration now carries the additional consequences of restrictions on where an offender may lawfully reside and where he or she may lawfully be present;

- has the sanction historically been regarded as a punishment – yes; in California, registration has been annexed to a criminal conviction for more than sixty years, and throughout nearly all of that period, has been regarded by California courts as punishment. And even if sixty years is an insufficient quantum of time to be "historical," certainly public shaming,

180. This is due in large part to facility policies of categorically excluding registered sex offenders. Such policies are likely due to the anticipated reaction of community leaders and residents who, upon learning that a registered sex offender is housed in a licensed facility, may complain to licensing authorities or lobby for closure of the facility. When combined with onerous residence restrictions applicable to registered sex offenders, such policies practically eliminate all access to these facilities. Respondents' Brief at 12, *In re* Taylor, 290 P.3d 1171 (2013) (No. S206143).

181. Cal. Penal Code § 3003.5(b) (West 2011).

182. Carpenter, *supra* note 107, at 335.

183. Cal. Penal Code 3003.5(c) (West 2011).

banishment and exile, all of which are at least likely to result from the duty to register, have historically been regarded as punishment;[184]

- does the sanction come into play only on a finding of scienter – yes, registration comes into play only on a finding of scienter;[185]
- does the sanction operate to promote the traditional aims of punishment – retribution and deterrence – yes; registration, notification, and internet dissemination provisions, along with residence and presence restriction are designed to prevent the commission of future crimes against minors. They are intended not only to deter would-be offenders from committing sex crimes by making the consequences more onerous, but also to create a diminished sense of privacy for past offenders and enhance law enforcement's ability to supervise and monitor persons previously convicted of a sex offense;
- is the behavior to which the sanction applies already a crime – yes; registration is predicated on a criminal conviction.
- is the sanction excessive in relation to the alternative purpose to which it may rationally be connected – yes; registration, notification provisions, internet dissemination provisions, residency restrictions, and presence restrictions which treat all registered sex offenders alike, regardless of the nature or the remoteness of their offense, regardless of whether their offense involved a minor, regardless of their individualized assessment of risk and which operate to exclude all offenders, around-the-clock, from all areas of a geographic region where children congregate are excessively broad and excessively punitive with regard to any alternative purpose to which they may rationally be connected.

Notwithstanding the result of the Court's analysis in *Castellanos* in 1999, there can be no question that today, based on the current state of the law in California, the lifelong duty to register as a sex offender is "punishment".[186]

184. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349, (1910).

185. *In re Reed*, 663 P.2d 216 (Cal. 1983) (*overruled on other grounds by In re* Alva, 92 P.3d 311 (Cal. 2004)).

186. *See* Doe v. Alaska, 189 P.3d 999, 1019 (Alaska 2008) (Alaska's Sex Offender Registration Act, identical in many ways to California's but without residence or presence restrictions, held to violate constitutional prohibition against ex post facto application of laws); Starkey v. Oklahoma, 305 P.3d 1004 (Okla. 2013) (Oklahoma's SORA found to violate ex post facto prohibitions when provisions are retroactively applied); Doe v. Dep't. of Pub. Safety and Corr. Serv., 62 A.3d 123, 143 (Md. 2013) (Maryland sex offender statute violated ex post facto clause of state constitution); State v. Letalien, 985 A.2d 4, 7 (Me. 2009) (ex post facto violation to apply retroactively the enhanced requirements of SORNA of 1999 when, by so doing, the application revises and enhances sex offender registration requirements that were a part of the offender's original sentence).

CONCLUSION

Based on the foregoing authorities and analysis, it is my opinion that: (1) there is a class of individuals against whom *Johnson* does not necessarily retroactively apply, specifically those who took action in justifiable reliance on *Hofsheier*; (2) that judicial officers, and not District Attorneys or other law enforcement officials such as probation officers and parole agents, are solely vested with the power of making a legal determination regarding retroactive application of *Johnson* against any particular individual; (3) that criminal courts lack jurisdiction, once a judgment is final, to order a person to register pursuant to section 290, subdivision and that such an order may be pursued only via civil mandamus; (4) that there is not statutory authority for District Attorneys to initiate such proceedings; and (5) that any order permitting retroactive application of *Johnson* against individuals who took action in justifiable reliance on *Hofsheier* would implicate due process guarantees and ex post facto prohibitions.