Sex Offender Registration for Section 647 Disorderly Conduct Convictions Is Cruel and Unusual Punishment

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INTRODUCTION

Masturbating in public is a crime in California. A conviction for such conduct under Penal Code section 647(a) (disorderly conduct) is a misdemeanor, requiring the convicted perpetrator to register as a sex offender. This added registration requirement was enacted to protect the public from habitual sex offenders and was not intended to serve as a formal punitive sanction. Despite its stated purpose, registration of disorderly conduct offenders has proven to be of limited utility in the prevention of sex crimes and is now judicially recognized as de facto punishment.

Recently, the California Supreme Court has demonstrated a marked inclination to sustain constitutional claims based on the prohibition of cruel or unusual punishment. The In re Lynch decision in 1972 precipitated this judicial proclivity. Focusing primarily on the Lynch development, this Comment reviews California's cruel or unusual punishment law and advances the thesis that the registration requirement for disorderly conduct convictions is cruel and unusual.

CALIFORNIA'S CRUEL OR UNUSUAL PUNISHMENT STANDARD

Historically, the Bill of Rights secured the federal guarantee against cruel and unusual punishment to all citizens. Nevertheless,

1. Such conduct falls within the ambit of several separate Penal Code sections. E.g., Cal. Penal Code § 647(a) (West Supp. 1975) (disorderly conduct); id. § 314 (West 1970) (indecent exposure); id. § 650½ (outraging public decency); id. § 415 (West Supp. 1975) (disturbing the peace). Police discretion is generally responsible for the particular section of the Penal Code under which the action is brought. Discussion will be limited to section 647(a).
2. Cal. Penal Code § 647(a) (West Supp. 1975). It states that every person who either solicits anyone to engage in or engages in lewd or dissolute conduct in any public place is guilty of a misdemeanor.
3. See id. § 290.
4. See notes 34-37 infra and accompanying text.
5. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
the lack of objective standards for ascertaining what is cruel and unusual caused centuries of disuse.⁶ California’s cruel or unusual punishment proscription suffered from a similar lack of use.

Article I, section 6 of the California Constitution proscribes “cruel or unusual” punishments, as contrasted to the United States constitutional standard of “cruel and unusual.” The disjunctive wording prompted speculation that the California draftsmen intended a broader proscription than the federal standard.⁸ In two recent decisions, the California Supreme Court read a good deal of doctrinal significance into this disjunctive wording. The first is the 1972 decision of People v. Anderson,⁹ holding capital punishment cruel and unusual under article I, section 6.¹⁰ The court stated that the proper test for determining whether a punishment is cruel or unusual can be discerned from the “evolving standards of decency that marks the progress of a maturing society.”¹¹ The 1972 opinion of In re Lynch¹² is the second pronouncement. For the first time, the court held that punishment is cruel or unusual when the punishment is disproportionate to the offense committed.¹³

⁷. Cal. Const. art. I, § 6. It provides in pertinent part: “Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishment be inflicted.” (emphasis added). The drafters of the California Constitution intended that cruel as well as disproportionate or unusual punishments should be independently proscribed. See People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, 268-271 (1972); Mosk, The Eighth Amendment Rediscovered, 1 LOYOLA L.A. L. Rev. 4 (1968).
⁹. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972).
¹⁰. Id. at 656, 493 P.2d at 898-99, 100 Cal. Rptr. at 170-71. The Anderson court stated that either cruel or unusual, independently, is sufficient to support a finding of unconstitutionality. In this context, however, capital punishment was found to contravene both legs of the test. Accord, Furman v. Georgia, 408 U.S. 958 (1972). But in 1972, art. I, § 27 was added to the California Constitution purporting to nullify the Anderson holding. However, “nothing in art. I, § 27 indicates that the word ‘unusual’ may no longer be interpreted literally.” People v. Schueren, 10 Cal. 3d 553, 516 P.2d 833, 111 Cal. Rptr. 129, 134 (1973).
¹¹. Id. at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226. The Lynch court
Many viewed Lynch's disproportionality concept as a doctrinal innovation. In truth, this proportionality notion is not new. Rather, the distinguishing feature of In re Lynch is its transformation of the vague proscription of cruel or unusual punishment into a more specific mandate. Lynch particularizes the Anderson standard and announces a modern fundamental canon of decency; the punishment must be proportional to the offense.

Prior to Lynch only one California case in over one hundred years, sustained a cruel or unusual punishment claim under article I, section 6. Since Lynch, however, the California courts have sustained fourteen cruel or unusual claims utilizing the disproportionality analysis. Lynch's progeny clearly indicate that the California courts are propitiously entertaining claims based on the Lynch

struck down the recidivist provision of California Penal Code section 314 which made a second conviction for indecent exposure punishable by one year to life imprisonment.

14. The Lynch court developed three techniques for determining disproportionality. See text accompanying note 44 infra.
16. This concept was first stated in a dissenting opinion in O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892). Nevertheless, the genesis of the law is probably Weems v. United States, 217 U.S. 349 (1910). The Weems Court established three criteria for evaluating sentences; (1) punishment should be graduated and proportional to the offense, (2) standards of justice should evolve as public opinion becomes enlightened by justice and (3) the punishment is sufficient if its purposes of deterrence and reformation are fulfilled. Id. at 367, 378, 381.
17. Ex parte Garner, 179 Cal. 409, 177 P. 162 (1918). The court held that a judge should not have unbridled power to summarily commit a citizen to prison for a term of years for constructive contempt. This decision could have been cited by the Lynch court, but was not. Id. at 414-15, 177 P. at 165.
analysis, and will not permit punishment to be inordinately dispro-
portional to the crime.\textsuperscript{19}

In sum, \textit{People v. Anderson}\textsuperscript{20} and \textit{In re Lynch}\textsuperscript{21} establish California’s analytic framework for determining whether a sanction violates the cruel or unusual proscription of article I, section 6. \textit{Anderson} permits the party to argue that the sanction offends contemporary standards of decency. This standard draws upon an evolving contemporary society to define cruel and unusual. \textit{Lynch} allows a party to claim that the punishment is disproportionate to the offense committed. In essence, \textit{Lynch} represents one facet of the \textit{Anderson} standard; a sanction which is disproportionate to the offense committed violates the contemporary standard of decency, and is, therefore, cruel, unusual and unconstitutional.

\textbf{THE CALIFORNIA SEX REGISTRATION LAW: REGISTRATION AS PUNISHMENT}

Section 290 of the Penal Code requires every person convicted


\textbf{19.} For example, in 1973, the California Supreme Court discovered that assault with a deadly weapon with the intent to commit murder is punishable by 1 to 14 years imprisonment, while its lesser included offense, assault with a deadly weapon, carried a potential life sentence. It corrected this anomalous situation by limiting the sentence for assault with a deadly weapon to 14 years. \textit{People v. Schueren,} 10 Cal. 3d 553, 561-62, 516 P.2d 833, 838-39, 111 Cal. Rptr. 129, 134-35 (1973). Similarly, in 1974, a recidivist provision of the Health and Safety Code which automatically precluded parole consideration for 10 years for a second offender narcotics criminal was held to be cruel or unusual. \textit{In re Foss,} 10 Cal. 3d 910, 929, 519 P.2d 1073, 1085, 112 Cal. Rptr. 649, 661 (1974). In 1975, the imposition of four consecutive 14 year terms on four counts of forgery for checks aggregating less than $500 was held to be disproportionate and unconstitutional. \textit{People v. Keogh,} 46 Cal. App. 3d 919, 931-34, 120 Cal. Rptr. 817, 824-25 (1975).

Incidentally, Justice Mosk of the California Supreme Court predicted such a development: “There are straws in the wind to suggest the next section upon which legal fashions focus will be the eighth amendment.” Mosk, \textit{The Eighth Amendment Rediscovered,} 1 LOYOLA L.A. L. REV. 4 (1968). See \textit{Downey v. Perini,} 518 F.2d 1288 (6th Cir. 1975). Sentences of 10 to 20 years and 20 to 40 years imprisonment for possession and sale of marijuana, imposed under Ohio law, were declared excessive, disproportionate, and cruel and unusual under the eighth amendment. This is the first time a circuit court of appeals has held a sentence unconstitutional because of its length. The court compared the sentence imposed for this crime with other crimes in the same and different jurisdictions. This technique is similar to techniques (2) and (3) in \textit{Lynch.} Id. at 1290-92.


of certain sex crimes to register with the appropriate law enforcement agency where he resides. Fifteen different sex crimes of varying severity are specifically enumerated in section 290. These registrable offenses range from forcible rape and child molestation to indecent exposure and disorderly conduct. Regardless of the crime's severity, section 290 makes no distinction in the treatment accorded the registrant. Every registrant must report each change of address, permanent or temporary, within ten days. Such registration is in addition to the punishment prescribed for the underlying offense and failure to comply with this requirement is a misdemeanor. Even though section 290 is silent as to the duration of such registration, courts uniformly release the registrant upon either successful completion of a probationary period or the issuance of a certificate of rehabilitation.

The stated purpose of the sex offender registration law is public protection. It was enacted in 1947 as an emergency measure to

22. CAL. PENAL CODE § 290 (West Supp. 1975). Section 290 lists the following as registrable offenses: id. § 220 (West 1970) (assault with intent to commit rape); id. § 266 (procuring, assignation, and seduction); id. § 267 (abduction for prostitution); id. § 268 (seduction); id. § 285 (incest); id. § 286 (sodomy); id. § 288 (molesting child under 14); id. § 288a (oral sex perversion); id. § 647a(1) (child molestation); id. § 261(2) (forcible rape); id. § 261(3) (rape by use of threats or drugs); id. § 272 (West Supp. 1975) (contributing to the delinquency of a minor); id. § 314 (West 1970) (indecent exposure); id. §§ 647(a), (d) (West Supp. 1975) (disorderly conduct, and mentally disordered sex offenders (MDSO)). Registration requirements include: (a) an information statement signed by the registrant; (b) fingerprints; (c) a photograph; (d) every change of address must be reported within 10 days, and (e) failure to comply is a misdemeanor.

24. Id.
25. See id. § 1203.4. The registrant who proceeds under section 1203.4 is released from all penalties and disabilities resulting from his conviction. Section 1203.4 is applicable to the section 290 registration sanction. Kelly v. Municipal Ct., 160 Cal. App. 2d 38, 44, 324 P.2d 990, 994 (1958).
27. 1949 Cal. Stat. § 2, 1st extra sess., ch. 13 at 27.

The number and nature of sexual crimes has increased within recent months to such an extent as to pose a threat to the health, welfare and safety of the citizenry of this state. . . . To afford immediate protection to the citizens, it is necessary that this act shall take effect immediately. Id. at 28.

Accord, In re Birch, 10 Cal. 3d 314, 321-22, 515 P.2d 12, 16-17, 110 Cal. Rptr. 212, 216-17 (1973); In re Smith, 7 Cal. 3d 362, 367, 497 P.2d 807, 810-11, 102 Cal. Rptr. 335, 338-39 (1972); Abbott v. City of Los Angeles, 53 Cal.
help law enforcement agencies combat the dramatic increase in sex crimes, under the belief that sex offenses were highly recidivis-
tic.\textsuperscript{28} The legislature also believed that compulsory registration would protect society by making the sex offender "readily available" for police surveillance. Since registration merely elicits in-
formation, it was felt that the inconvenience to the registrant was inconsequential when balanced against societal protection.\textsuperscript{29}

Its stated purpose notwithstanding, registration has de facto punitive aspects. A person convicted of a registrable sex offense loses his California teaching credential.\textsuperscript{30} It may also render him subject to inquiry as to whether he is a mentally disordered sex offender.\textsuperscript{31} Unlike other juvenile misdemeanor crimes, registrable sex offenses cannot be sealed at the juvenile's request.\textsuperscript{32} In addition, the registrant may be required to abstain from the use of alcoholic beverages as a condition of probation.\textsuperscript{33} The California Supreme Court recognizes registration's punitive impact and has overturned convictions because of its unusual severity.\textsuperscript{34} In the 1973 decision of \textit{In re Birch},\textsuperscript{35} the court reversed a conviction under Penal Code section 647(a) asserting that the legislature could not rationally conclude that a man observed by the police urinating outside a closed Jack-in-the-Box at 2 a.m. required constant police surveillance to protect society.\textsuperscript{36} The court stated:

\footnotesize
28. See authorities cited note 27 supra. Section 290 is the only criminal registration statute enacted by the California legislature. This is anomalous when other recidivistic crimes receive no such precautions; e.g., arson and narcotic offenses. See Abbott v. City of Los Angeles, 53 Cal. 2d 674, 686-87, 349 P.2d 974, 982-83, 3 Cal. Rptr. 158, 166-67 (1960).
29. 28 OP. CAL. ATT'Y GEN. 178, 179 (1956). Accord, People v. Mackey, 58 Cal. App. 123 (1922). Registration is not a penalty because it is not penal retribution or the suffering in person, rights or property. \textit{Id.} at 130. See Comment, \textit{Compulsory Registration: A Vehicle of Mercy Discarded}, 3 CALIF. W.L. REV. 195 (1967). Section 290 was not enacted as a penalty. "[I]t is believed that it is beneficial to keep an accurate record of the present whereabouts of those convicted of crimes recidivistic in nature." \textit{Id.} at 199.
33. See id. § 1203.02 (West 1970).
36. \textit{Id.} at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216.
Although the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime.\(^{37}\)

Certainly, the registration of known pedophiliacs,\(^{38}\) rapists and other offenders using force upon their victims may be justified. The serious nature of these offenses demands special treatment. Public protection from this type of sex offender clearly outweighs any harm caused by registration.\(^{39}\) On the other hand, the minor, victimless sex crimes of Penal Code section 647 do not warrant the added registration sanction. Contrary to what the legislature believed in 1949, the registration of these minor sex offenders does not promote public protection.\(^{40}\) Law enforcement agencies are overwhelmed by the vast number of relatively harmless misdemeanor registrants, and this administrative burden diverts valuable police resources from the detection and prevention of more serious sex crimes.\(^{41}\) Consequently, registration in this context not only harms society, but it also inflicts a severe punishment on the registrant. In short, registration is punishment, and its imposition as a sanction must be justified under the principles announced in Anderson and Lynch.

**THE Lynch ANALYSIS: THE REGISTRATION REQUIREMENT IS DISPROPORTIONAL TO THE OFFENSE**

*In re Lynch*\(^{42}\) held that a punishment is cruel or unusual if it

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37. *Id.* at 321-22, 515 P.2d at 17, 110 Cal. Rptr. at 217.
38. A pedophiliac is defined as a person having a preference or an addiction to unusual sexual practices in which children are the preferred object. *Webster's Third New International Dictionary* 1665 (unabr. 15th ed. 1967).
40. *Id.* “Since there does not seem to be any functional value to registration as an aid to enforcement, there is no justification for the resulting stigma.” *Id.* at 738. See Comment, Compulsory Registration: A Vehicle of Mercy Discarded, 3 Calif. W.L. Rev. 195 (1967). The author recommends that since there are no lesser included offenses for the registrable crimes, section 290 should be amended to allow judicial discretion in determining whether a particular defendant should register. *Id.* at 200.
41. See Project, *supra* note 39, at 794.
42. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
is disproportionate to the crime committed. Lynch established three "techniques" for applying this disproportionality concept:

(1) Examine the nature of the offense and the offender with regard to the degree of danger both present to society;
(2) Compare the challenged penalty with other penalties for different offenses in the same jurisdiction; and
(3) Compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions.

Nature Of The Offense: Degree Of Danger To Society

The factors relevant to the first technique include: (1) The violent nature of the offense; (2) the injury to the victim and society; (3) whether there are rational gradations of culpability and (4) a weighing of the statute's penal purposes.

First, the offenses listed in section 647 of the Penal Code are minor crimes of a nonviolent nature. Section 647 defines eight substantive offenses threatening public peace and safety. Ever since the mid-seventeenth century when immoral sexual behavior was first criminalized such offenses were minor misdemeanors. Indeed, more than a century of California statutory law has treated these crimes as minor violations. Other states also regard this

43. Id. at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.
44. Id. at 425-27, 503 P.2d at 930-32, 105 Cal. Rptr. 226-28. It should be observed that this disproportionality concept is in actuality an equal protection argument under the guise of cruel or unusual punishment. This observation will become more apparent in the textual analysis presented under technique (2). See text accompanying note 79 infra.
45. The first three factors were considered by the Lynch court. The fourth factor was added by the court in In re Foss, 10 Cal. 3d 910, 919, 519 P.2d 1073, 1078, 112 Cal. Rptr. 649, 654 (1974).
46. CAL. PENAL CODE § 647 (West Supp. 1975). Section 647 reads, in part:

Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

(a) who solicits anyone to engage in or engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

(d) who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.

See 36 CALIF. S.B.J. 643, 801-02 (1961). For a historical development of California's vagrancy law, see Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 CALIF. L. REV. 557 (1960). The intent of the legislature in redrafting section 647 was to abandon the concept of status and focus upon conduct. Id. at 572. The legislature adopted Professor Sherry's proposed draft in full. 1959-61 REPORT OF ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE, in 2 CAL. APPENDIX TO THE JOURNAL OF THE ASSEMBLY 8 (1961).
48. Section 647 of the Penal Code was first enacted in 1872. Subsection (5) of the then section 647 is the present section 647(a) proscribing lewd
conduct as a minor offense punishable by no more than a small fine and/or a short term of imprisonment.\textsuperscript{49}

When the sex registration law was enacted in 1947, the eight section 647 crimes were not registrable offenses.\textsuperscript{50} An extraordinary session of the legislature in 1949 added two of these offenses to the registration law as an urgency measure to curb the striking increase in sex crimes.\textsuperscript{51} Section 647(a) is the first of these two offenses.\textsuperscript{52} It proscribes two acts—publicly soliciting and publicly engaging in lewd or dissolute conduct.\textsuperscript{53} As applied, section 647(a) is the primary provision for prosecuting public homosexual conduct.\textsuperscript{54} Section 647(d)\textsuperscript{55} is the second offense carrying the added registration requirement. It prohibits loitering around public toilets for the purpose of soliciting or engaging in lewd conduct.\textsuperscript{56}

Both sections 647(a) and (d) serve the same purpose and proscribe identical misconduct.\textsuperscript{57} They differ in that (d) requires the offender to be near a public toilet while (a) does not. The practical effect of this overlap has been the virtual elimination of section 647(d) as a separate substantive offense. In fact, only one convic-
tion resting solely upon section 647(d) has been appealed since 1961. Consequently, the discussion will focus chiefly on section 647(a), but the arguments presented and the conclusion reached apply equally to both sections.

The sexual misconduct prohibited by section 647(a) is nonviolent. Under California law, "lewd or dissolute" conduct means obscene behavior, which is sexual conduct that is "grossly repugnant" and "patently offensive" to "generally accepted notions of what is appropriate" and decent according to contemporary community standards. The solicitation portion of 647(a) is no more than a "request" which has been deemed undeserving of first amendment protection. A single verbal request does not support an inference that the solicitor is a pervert or inexorably given to sexual debauchery. The harm in asking is minimal at most, yet one convicted of solicitation must register as a sex offender. Similarly, masturbating in public is a registrable offense under section 647(a). Certainly, such conduct is socially offensive and demands legal restraint, but this conduct does not rationally support the conclusion that its perpetrator requires constant police surveillance to protect society. Thus, publicly soliciting and engaging in obscene conduct have been and continue to be minor offenses presenting little or no danger to society.

Secondly, section 647(a) is a victimless crime which produces no real harm to the public. Modern clinical studies typically characterize "lewd or dissolute" conduct as a social nuisance, rather than a criminal activity. Findings substantiate that there is no real "victim," and any harm caused is minimal. Furthermore, it is the

58. Id. at 308, 363 P.2d at 305, 14 Cal. Rptr. at 289.
[M]any homosexual acts have come to be regarded as socially offensive rather than especially dangerous...[and] have come to be considered public nuisances. The lack of force, violence, coercion in its perpetration, the absence of a victim per se, and the unlikelihood of any injury to property rights support this conclusion. CAL. DEPT. OF MENTAL HYGIENE, FINAL REPORT ON SEXUAL DEVIATION RESEARCH 88 (1954).
63. See Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968); REPORT OF KARL
consensus of opinion among psychiatrists that sex offenders persist in the same type of behavior; they do not progress to more serious sex crimes.64 This opinion is confirmed by crime statistics.65 In short, this type of sex offender usually injures no one by his conduct.66

Thirdly, the registration requirement does not comport with rational gradations of punishment. A conviction for violating section 647(a) results in two forms of punishment. The first is the discretionary imposition of a small fine and/or a short term of imprisonment.67 This sanction is concededly constitutional. The nondiscretionary registration requirement is the second punitive sanction.68 Section 290 indiscriminantly mandates an automatic sanction upon conviction without regard to the circumstances surrounding the offense. The child molestor felon and the “obscene” misdemeanor receive the same treatment under the registration statute.69

Finally, the registration of these minor sex offenders serves no legitimate penal purpose. Registration was premised on the belief that sex crimes were highly recidivistic and that it was the best means of protecting society from recurrences.70 Psychiatric studies reveal, however, that sex offenders have one of the lowest recidivism rates of all criminal types.71 In addition, an empirical study72 in the Los Angeles area concluded that the current regis-

M. Bowman, in 2 CAL. JOURNAL OF THE ASSEMBLY 47 (1951). Isolated exposures to acts of this nature were likely to cause psychological harm only to a small group of uniquely sensitive women. Id. at 978. See, Project, supra note 39. “[C]omplaints to police regarding lewd solicitations are infrequent . . . thus homosexuals are discreet . . . or citizens are not outraged by this type of behavior.” Id. at 698-99.

65. Id.
66. In re Lynch, 8 Cal. 3d at 425, 503 P.2d at 931, 105 Cal. Rptr. at 227.
68. Id. § 290 (West Supp. 1975).
69. Observe the distinction between Penal Code section 647a—child molestation, and section 647(a)—disorderly conduct.
70. See notes 27-29 supra.
72. Project, supra note 39.
ation system is not justified as an aid in law enforcement.\textsuperscript{73} It was found that the compulsory registration of obscene misdemeanants severely dilutes the effectiveness that registration might otherwise provide in the prevention of child molestation, forcible rape, and other violent sex crimes.\textsuperscript{74} Thus, public protection, the very basis upon which sex offender registration is premised, is not effectuated.

Although penal purpose is a factor,

if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.\textsuperscript{76}

The nondiscretionary registration penalty is excessive. As imposed on 647(a) type sex offenders, its potential detriment to the individual is great, while there is no offsetting benefit to society. Continuing to inflict registration on disorderly conduct offenders, when the fundamental premise of societal protection is known to be nonexistent, is tantamount to a sanction for status\textsuperscript{78}—the status of a homosexual.\textsuperscript{77}

In summary, these four factors under the first Lynch proportionality technique amply reveal that the harm posed by these "obscene" crimes is negligible. Section 647(a) constitutes a victimless, minor, nonviolent crime which "gains nothing" for the offender and "injures nobody."\textsuperscript{78} The registration sanction annexed to this crime is clearly disproportionate to the degree of danger this offense and its typical offender present to society.

\textbf{Disproportionate Punishment In The Same Jurisdiction}

The second Lynch technique is a comparative evaluation of the sanctions for different crimes in the same jurisdiction.\textsuperscript{79} Similar

\textsuperscript{73} Id. at 794.

\textsuperscript{74} Id.

\textsuperscript{75} Furman v. Georgia, 408 U.S. 238, 222 (1972), (Brennan, J., concurring).

\textsuperscript{76} Robinson v. California, 370 U.S. 660, 666-67 (1962). A California statute making it a criminal offense for a person to be addicted to narcotics was held to be cruel and unusual because it inflicts punishment on status—the condition of being addicted, not on overt acts. \textit{Id.} at 666; \textit{In re Foss}, 10 Cal. 3d 910, 922, 519 P.2d 1073, 1080, 112 Cal. Rptr. 649, 656 (1974).

\textsuperscript{77} Section 647(a) proscribes any lewd or dissolute conduct, but its invocation is primarily aimed at regulating public homosexual conduct. \textit{See} \textit{Project, supra} note 39, at 737.

\textsuperscript{78} 8 Cal. 3d at 423, 503 P.2d at 931, 105 Cal. Rptr. at 227.

\textsuperscript{79} Id. at 426, 503 P.2d at 931, 105 Cal. Rptr. at 227. This type of analysis
punishment for similar crimes is the constitutional norm. Thus,
if the Court finds the apparent dangers of one criminal activity to be substantially less serious than the apparent dangers of crimes carrying equal penalties, or if the Court cannot find a substantial difference between a crime carrying a severe punishment and crimes carrying minor punishments, it must act on that basis to find the challenged punishment disproportionate.\textsuperscript{80}

Such an evaluation of the registration requirement with punishments for both similar and more serious offenses points toward the conclusion that the requirement is unconstitutional.

A comparison of the registration sanction with similar offenses supports a finding of unusual disproportionality. Section 647(b),\textsuperscript{81} enacted at the same time as section 647(a), prohibits soliciting or engaging in prostitution. The distinction between (a) and (b) is that the (b) offender is attempting to gain monetary satisfaction in return for her obscene behavior. While (a) and (b) carry the same possibility of fine and/or imprisonment, only the (a) offender is required to register.\textsuperscript{82} Consequently, the legislature must believe that by asking for or receiving money, the offender is exonerated from registration. The actual reason for this disparity is unclear, unless, of course, prostitution is believed by the legislature to be a more "normal" offense.

This anomaly also has resulted in questionable law enforcement practices. A much used enforcement tactic, especially in situations involving prostitution, is the following: In violating section 647(b), prostitution, a person also violates section 647(a), solicitation. The person is charged with both crimes. Rather than run the risk of registration, most prefer to "cop" to prostitution, pay the $50 fine and be done with it. But the predominant view of police officers is that homosexual offenders should register. Therefore, homosexuals will be charged under section 647(a) only.\textsuperscript{83}

\textsuperscript{80} Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN. L. REV. 838, 863 (1972).
\textsuperscript{81} CAL. PENAL CODE § 647(b) (West Supp. 1975), which states that every person who solicits or engages in any act of prostitution is guilty of a misdemeanor.
\textsuperscript{82} See id. § 290.
\textsuperscript{83} See Project, supra note 39, at 737. In addition, the Project recom-
Other provisions proscribing similar misconduct are section 311.684 which prohibits obscene live conduct performed in public, and section 650½85 which punishes acts outraging public decency. Both of these offenses are misdemeanors and nonregistrable.86 For the same "obscene" misconduct, a person could conceivably be convicted under sections 311.6, 647(a), 647(b) and 650½ of the Penal Code.87 In general, police discretion is responsible for the particular section with which an individual is charged. Ironically, only the 647(a) offender must register. This situation invites abuses of prosecutorial discretion, especially since police officers feel that homosexuals should be made to register.88

Of even greater significance, the legislature thoroughly revised these statutes in the same session and in the same enactment that the registration law was amended.89 Hence, there is no doubt the legislature purposely intended that 647(a) type offenders should receive more severe treatment than perpetrators of similar offenses. Nevertheless, as previously demonstrated under the first Lynch technique, this disparity in treatment has no legitimate foundation. In light of the new sex law legalizing private homosexual conduct between consenting adults,90 this relatively harsh registration sanction associated with section 647(a) is especially pronounced, and constitutionally more difficult to justify.

A comparison to the penalties imposed for more serious sex crimes yields an even more convincing case for disproportionality. The legislature did not intend that all sex crimes be registrable.91

...
Some serious offenses involving sexual misconduct with children remain completely untouched by the registration law. Although registration is required for a forcible rape conviction, it is not compelled for the crimes of acting in concert to commit forcible oral copulation or the abduction to compel marriage or defilement. While these crimes of sexual violence threatening human life do not trigger the added registration requirement, it is unerringly applied to the far less serious 647(a) offense. Surely such disparate treatment is indefensible.

Comparative Punishment In Other Jurisdictions

The last Lynch technique is an examination of the sanctions imposed in other jurisdictions for substantially similar offenses. The underlying assumption is that the prescribed penalty for this offense in a majority of other jurisdictions is "usual" and therefore, probably constitutional. In other words, if sex offender registration deviates substantially from the national norm, it might reasonably be concluded that it was the product of an overzealous and ill-considered legislative response to a grave social problem.

Each state has enacted omnibus provisions proscribing substantially the same conduct prohibited by section 647(a). In general,
these statutes are within the vagrancy laws and are invoked to regulate public homosexual conduct.\textsuperscript{97} Without exception, the offense constitutes only a minor misdemeanor.\textsuperscript{98} Interestingly, only three states,\textsuperscript{99} other than California, require sex offender registration. Of these three, only Arizona has a comparable mandatory registration requirement.\textsuperscript{100} Thus California's registration requirement is clearly unusual and comparatively harsh making the argument for disproportionality persuasive.

In conclusion, the \textit{Lynch} analysis demonstrates that the California registration sanction inflicts disparate treatment on the 647(a) type offender. Examination under the first technique shows that "obscene" misconduct constitutes only a minor crime, not likely to be repeated, and of little harm to society. The comparative evaluations under \textit{Lynch}'s second and third techniques reveal that the "obscene" offender receives excessively harsh treatment as contrasted to other sex offenders in California and other states. These findings, taken alone, dictate the conclusion that registration, as applied to these offenders, is inordinately disproportionate, and therefore, repugnant to the \textit{Anderson} standard of contemporary decency. Moreover, the ensuing analysis, independent of the \textit{Lynch} decision, provides an alternative argument for finding the registration requirement in this context cruel or unusual.

\textbf{The Anderson Standard: Registration Offends Contemporary Standards Of Decency}

\textit{People v. Anderson}\textsuperscript{101} held that punishment is cruel or unusual

\textsuperscript{97} For an interstate comparison of sanctions used in regulating public homosexual conduct, see Project, \textit{supra} note 39, at 657-85.

\textsuperscript{98} Even though each state has its own statutory definition of misdemeanor, it is clear that the actual penalties imposed are substantially similar. \textit{See Cal. Penal Code} §§ 17(a), 19a (West 1970). \textit{See also Papa-christou v. City of Jacksonville, 405 U.S. 156, 157-58, nn.1-2 (1972).}


\textsuperscript{100} \textit{Ariz. Rev. Stat. Ann.} §§ 13-1271 to 13-1274 (West Supp. 1974). Nevada's sex registration law is restricted to felonies. Ohio's sex registration law is similar to Nevada's with one additional requirement—one must be convicted of two or more sex crimes in separate transactions to be compelled to register. \textit{See statutes cited note 99 supra.}

if it offends the "evolving standards of decency that mark the progress of a maturing society." The Anderson court principally employed an infrequency factor to determine cruelty and unusualness. The fact that a punishment is infrequently imposed is some evidence that it is cruel, unusual and offensive to contemporary decency. To support a finding of infrequency, reliable statistical data is necessary. Due to the nondiscretionary imposition of registration and its virtual uniqueness to California law, no such empirical data exists. Consequently, Anderson's infrequency factor is not particularly appropriate to the decency inquiry associated with registration, but infrequency is not the sole test. There exist other strong judicial and legislative indications that the registration requirement contravenes contemporary decency.

California courts have recognized that registration is punishment and are reluctant to directly impose it. In addition, courts have indirectly limited the imposition of registration by narrowing the scope of section 647(a). "Lewd" no longer reaches all socially offensive conduct, but only that conduct which is sexually motivated and grossly repugnant. Evidently, the judiciary dislikes section 647(a)'s registration feature. Hence, the judiciary's clear recognition that registration is a punitive sanction and its reluctance to uphold registrable convictions are definite indications that registration offends contemporary decency.

A comparative examination of the sanctions imposed in other jurisdictions furnishes further evidence. Such an examination provides an objective measure of contemporary decency in other states. California and Arizona stand alone in the imposition of registration as an additional sanction. Thus, on a national level, sex offender registration is unusual and infrequently applied.

Perhaps the most damning evidence that registration violates con-

104. Cases cited note 103 supra. "[T]he rule clearly emerges that a person does not expose his private parts 'lewdly' . . . unless his conduct is sexually motivated." In re Smith, 7 Cal. 3d 362, 366, 497 P.2d 807, 810, 102 Cal. Rptr. 335, 338 (1972).
105. See text accompanying note 100 supra.
temporary standards of decency is the new California sex law.\textsuperscript{106} This new law removes criminal sanctions for adulterous cohabitation, sodomy, and oral copulation performed by consenting adults in private.\textsuperscript{107} The legislature has, in effect, legalized \textit{private} homosexual conduct. In essence, the new law serves as a legislative pronouncement of the evolving standards of contemporary decency, significantly relevant in the area of homosexual behavior.

Of even greater importance is the coincidental impact of the new sex law on section 647(a). Section 647(a) remains the chief prosecutorial weapon to punish \textit{public} homosexual conduct, and the new sex law has little, if any, direct effect. Indirectly, however, the impetus of the new pronouncement will most likely produce substantial changes in the application of section 647(a). While \textit{private} consensual homosexual behavior is legalized by the new enactment, section 647(a) punishes the mere \textit{public} solicitation to engage in such conduct. This legal paradox poses the immediate question of whether the solicitation portion of section 647(a) can constitutionally coexist with the new law.\textsuperscript{108} Notwithstanding this constitutional issue, being made to register for publicly inviting someone to engage in conduct now countenanced by society is certainly unusual, if not foolish.

Accordingly, compulsory registration for section 647(a) offenses is unacceptable. Its punitiveness, uniqueness and foolishness compel the conclusion that it is repugnant to contemporary standards of decency. Consequently, \textit{Anderson}\textsuperscript{109} demands the invalidation of the registration requirement for section 647(a) convictions.

\textbf{CONCLUSION}

The California Supreme Court has recently shown a proclivity for sustaining claims based on the constitutional prohibition of cruel or unusual punishment. With this in mind, there is a persuasive case, based on the principles propounded in the \textit{Anderson-Lynch} decisions,\textsuperscript{110} that the registration requirement for disorderly conduct convictions is cruel \textit{and} unusual. Registration is cruel. Its

\begin{itemize}
  \item \textsuperscript{106} See \textsc{West's California Legislative Service}, ch. 71 at 144 (1975).
  \item \textsuperscript{107} Id. at 146–47. California Penal Code sections 269a, 269b, 286.1, and 288b were repealed. Section 288a was substantially amended.
  \item \textsuperscript{108} The new sex law's underlying thrust will subject the \textit{act of soliciting} to first amendment challenges despite the traditional interpretation that solicitation is not being proscribed as speech, but as conduct.
  \item \textsuperscript{109} \textit{People v. Anderson}, 6 Cal. 3d 628, 403 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972).
  \item \textsuperscript{110} Id.; \textit{In re Lynch}, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
\end{itemize}
nondiscretionary application provides absolutely no opportunity to consider the particular nature of the offender, the relative danger the offense presents to society, or the circumstances giving rise to the conviction. Its value as a preventive device is virtually non-existent. Consequently, registration is an unjustified penalty imposed solely on the status of being a homosexual. Furthermore, registration is _unusual_ when compared with the treatment afforded other sex offenders in California and other jurisdictions. In effect, the registration of 647(a) offenders precludes any societal benefit that registration might otherwise provide in the prevention of more serious sex crimes. Its “ignominious badge” is unwarranted and therefore can only damage this type of registrant. The continued imposition of registration on these minor offenders is unconstitutionally cruel _and_ unusual.

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