I

THERE IS NO BINDING PRECEDENT ON THE CONSTITUTIONALITY OF §290 P.C. AS APPLIED TO DEFENDANTS CONVICTED UNDER P.C. §647, SUBDIVISION (a)

Consideration of the issues raised in the instant appeal was deferred by this Court pending the finality of decision in the California Supreme Court of two cases in which similar issues were involved. Those two cases are now final but will be of no assistance to this Court in determining these issues. In the case of In re Anders (1979) 25 C.3d 414, the constitutionality of Section 290 P.C. (sex registration) as applied to 647(a) defendants was presented to the Supreme Court. That issue had not been raised in the trial court and had not been presented to this Court. The Supreme Court disposed of Anders without even a reference to Section 290 or its constitutionality. In the case of Pryor v. Municipal Court (1979) 25 C.3d 238, the Court acknowledged that the issue had been raised but stated:

> "Defendant's attack on the constitutionality of Penal Code section 290, the sex registration law, is premature; he has not yet been convicted and is not presently subject to registration." Pryor, supra, at footnote 14.

There is no California Supreme Court decision in which the constitutionality of Section 290 as applied to 647(a) defendants has been discussed or decided.

The California Court of Appeal refused to deal with the constitutionality of sex registration under 290 for those who were convicted of Section 288a P.C. (oral copulation). Previous to 1976, the oral copulation statute prohibited consenting adult sex in private. In the case of People v. Zeihm (1974) 40 C.A.3d 1085, the trial judge declared Section 288a unconstitutional and the People appealed. The Court of Appeal reversed the dismissal and because the defendant had not yet been convicted, refused to consider the issue of the constitutionality of Section 290.

In the case of People v. Mills (1978) 81 C.A.3d 171, the defendant had been convicted of Section 288 (lewd and lascivious acts with a child under 14). On appeal he challenged the constitutionality of Section 290 as applied to his conviction. The Court of Appeal rejected his constitutional objections, as applied to a conviction of 288 P.C. and, particularly the facts of his case. The Court specifically pointed out that it was not deciding the constitutionality of 290 as applied to 647(a) defendants. The Court recognized that the constitutional arguments would be much stronger in such a context.

Only one case has held that sex registration for 647(a) defendants is not cruel and unusual punishment. People v. Rodriguez (1976) 63 C.A.3d Supp. 3. In that case the Appellate Department of the San Bernardino Superior Court upheld a conviction under 647(a) of two men who had been kissing in a parked car at 1:00 A.M. This case is not controlling for two reasons. First, the decision of one appellate department is not binding on an appellate department in another county. Second, Rodriguez has been criticized by the Supreme Court in Pryor and has been effectively overruled.

Therefore, the issues herein presented come to this Court withou binding or controlling precedent and this Court is free to decide th issues freshly. Mr. Ripley was convicted of Section 647(a) and was specifically ordered to register pursuant to Section 290 when he was sentenced. There is a case or controversey and the issue is ripe for determination.

II

SEX REGISTRATION FOR 647(a) DEFENDANTS WORKS AN INJUSTICE ON HOMOSEXUAL MALES

It is common knowledge throughout the legal system that Section 647(a) has traditionally been used to regulate homosexual conduct and speech -- almost exclusively so.

In the case of People v. Dudley (1967) 58 Cal.Rptr. 557, this Court indicated that both homosexual solicitation and homosexual conduct is prohibited by 647(a).

Similarly, in People v. Mesa (1968) 71 Cal.Rptr. 594, 597, it was stated:

> "It is manifest that the Legislature believed that subjection in public to homosexual advances or observation in public of a homosexual proposition would engender outrage in the vast majority of people."

Virtually all published opinions concerning 647(a) have involved homosexual conduct or speech. People v. Rodriguez, supra (homosexual kissing); People v. Williams (1976) 59 C.A.3d 225 (masturbation in a homosexual cruising spot); Pryor v. Municipal Court, supra (homosexual solicitation); People v. Mesa, supra (homosexual solicitation); People v. Dudley, supra (homosexual solicitation); People v. Woodworth (1956) 147 C.A.2d Supp. 831 (homosexual solicitation). Although the court records in Silva v. Municipal Court (1974) 40 C.A.3d 733 and People v. Deyhle (1977) 76 C.A.3d Supp. 1 do not reflect the speech or conduct in question because the only issue in each case involved a demurrer to the complaint, counsel can represent that each involved homosexual situations since counsel was either attorney of record or amicus in each case. This Court may also take judicial notice of its own unpublished opinions and appeals dealing with Section 647(a) to see that the overwhelming majority involved homosexual situations (See People v. James (1977) CR A 15320; People v. Forshbach (1972) CR A 10813; People v. Correa (1970) CR A 9250; People v. Tyson and McDonald (1967) CR A 7112-7113.)

The California Supreme Court noted that:

> "Three studies of law enforcement in Los Angeles County indicate that the overwhelming majority of arrests for violation of Penal Code section 647, subdivision (a) involved male homosexuals." Pryor, supra at 252.

This Court can also take judicial notice that for many years it was a standard practice in the Los Angeles Judicial District to impose conditions of probation on persons convicted of 647(a) or of a lesser offense arising out of a plea bargain in a 647(a) prosecution which stated, "Do not publicly associate with known homosexuals. Do not frequent places where homosexuals congregate."

The fact that 647(a) has resulted in a disproportionate number of prosecutions of homosexual offenders, as opposed to heterosexual men committing lewd conduct, takes on added significance because of the requirement to register under 290. Automatic registration of all persons convicted of 647(a) has a disparate impact on a particular class of people -- homosexual males. Furthermore, since most people in law enforcement and the legal system assume or have assumed that a 647(a) defendant is a homosexual, automatically requiring registration in the community in which the defendant lives or moves into is tantamount to requiring him to announce to the police that he is a homosexual, and thereby subjects him to possible harrassment because of his sexual orientation (as opposed to his status as a misdemeanant).

Forcing someone to disclose his sexual orientation is a violation of the right to privacy guaranteed by the California Constitution, absent a compelling state interest. Of what possible benefit could this be to the police -- certainly not a legitimate state interest. On the rare occasion when a person is convicted of violating 647(a) for heterosexual conduct, automatically requiring him to register in his local community of residence will create an equally cruel result. He will be labeled by the police as a homosexual even though he is not.

Therefore, because forced registration of 647(a) defendants is tantamount to forced disclosure of either actual or perceived sexual orientation thereby infringing on the right to privacy, this Court should strictly scrutinize automatic registration and uphold it only upon a showing that there is a compelling state interest and that there is no narrower manner by which a legitimate interest in registering such persons (if there is a legitimate purpose) could be achieved. The Mills Court recognized that a defendant's right to privacy was invaded by registration, but found that as applied to a convicted child molester, there were sufficient state interests to invade that right. Here, where the gist of the offense is consenting adult sexual behavior which merely offends the sensibilities of plainclothes vice officers in most situations, what compelling interest could there be for registration.

III

ALTHOUGH HOMOSEXUALS HAVE HISTORICALLY BEEN SUBJECTED TO AUTOMATIC PENALTIES AND DISABILITIES, THE LEVEL OF JUDICIAL SCRUTINY AND PROTECTION HAS CHANGED IN RECENT YEARS

Historically, and particularly in America, homosexuals have been subjected to a tremendous amount of discrimination from both the government and private individuals. Until recently, there was little or no recourse against such discrimination.

Homosexuality was an automatic bar to civil service employment (see Morrison v. State Board of Education (1969) 1 C.3d 214, 226, at footnote 17) for many years. Now, however, sexual orientation is not a ground for dismissal (see Singer v. United States Civil Service Commission (1977) 97 S.Ct. 725).

Homosexuality has traditionally been an automatic bar to service in the military. Now, however, "fitness hearings" are being required in many cases before a discharge will be permitted. Saal v Middendorf (N.D.Cal., 1977) 427 F.Supp. 192.

Previously, all homosexual conduct, though ~~not shown to relate~~ unrelated to fitness, warranted disciplining of a teacher (see Sarac v. Board of Education (1957) 249 C.A.2d 58, 63-64). This type of automatic penalty for homosexuality was only changed in 1969 by the California Supreme Court in Morrison, supra.

Homosexuals had no recourse from automatic termination of employment in the private sector until last year. In Gay Law Students Association v. Pacific Telephone and Telegraph Co. (1979) 156 Cal.Rptr. 14, the Supreme Court changed this and interpreted a section of the Labor Code to authorize both civil and criminal penalties against a private employer who so discriminates.

The point ~~being made~~ here is rather simple and direct. The level of judicial scrutiny regarding sex registration should be greater than it has been in the past. Although strict scrutiny has applied de facto regarding registration of 647(a) defendants because many, if not most, judges simply do not order defendants to register, it is time that this silent policy becomes de jure.

IV

THE REQUIREMENT TO REGISTER IS AUTOMATIC

Section 290 of the Penal Code requires persons convicted of certain enumerated crimes to register with the Chief of Police in the city in which he resides or into which he moves. "The section applies automatically . . . and imposes a lifelong requirement of registration and re-registration absent a court order releasing the registrant from the penalties and disabilities of his conviction under section 1203.4 . . . " Barrows v. Municipal Court (1970) 1 C.3d 821, 825.

Failure to comply with the registration requirement is a misdemeanor and may subject the defendant to an additional prosecution for such a violation. Kelley v. Municipal Court (1958) 324 P.2d 990. If a defendant has been ~~properly~~ given notice of his duty to register and has been ordered by the sentencing court to register, he might also be subject to revocation of probation if he fails to comply with 290. People v. Buford (1974) 42 C.A.3d 975. If the sentencing judge fails ~~to~~ properly comply with the notice requirements of section 290, it would be an abuse of discretion to hold the defendant in violation of probation for his failure to register. Buford, supra, at 986-987.

All persons convicted of 647(a) must register. There are no exceptions. A fifty-year-old man with a perfect record who engaged in a single indiscretion with another consenting adult must automatically register even though there is no liklihood that he will ever commit the same or similar offense. He is barred from presenting evidence to a judge that registration will work a severe hardship on him, damage him psychologically by lumping him with rapists and child molesters, that the incident did not harm anyone, or that it is unlikely that he will ever commit such an offense in the future. Although a judge might be sympathetic to these issues, the law does not provide for any hearing ~~on the~~ interest ~~to society~~ or lack of it having this particular man register.

V

NO PROCEDURE EXISTS TO
EXPUNGE THE RECORD
OF REGISTRATION

"The duty to reregister upon changing one's place of address is a continuing duty, a burden the convicted person carries with him until his dying day. Being thus severely limited in his freedom of movement and continuously under police surveillance . . . the conclusion seems irresistible that this registration requirement is one of the 'penalties and disabilities resulting from the offense or crime of which he has been convicted' from which as a faithful and successful probationer, he is thereafter 'released' by the mandate of section 1203.4" Kelley, supra, at 992.

But, the Kelley Court noted:

> "This release obviously operates prospectively and not retroactively. It does not necessarily revoke or expunge the record of any registration or reregistration that took place during the probationary period." Kelley, at 992, footnote 2.

What does this mean in practical terms? A homeowner who lives in Los Angeles but who is convicted of lewd conduct arising out of a "raid" on a gay bathhouse in San Diego, must register as a sex offender with the Chief of Police in Los Angeles. After his probationary period, he can apply for relief under 1203.4 in the San Diego court. However, he will continue to be a registered sex offender in Los Angeles until his dying day, and as long as he does not move to another address, all the information on file with the Los Angeles police remains current. Relief under 1203.4 does not help this man vis-a-vis registration. Another man lives in a small community of 1,000 people. He goes to the "big city" and gets into trouble when he solicits an undercover vice officer to have sexual relations with him. He can't afford to stay and fight his case and so he pleads guilty to the charge. Although he was told of the duty to register by the judge accepting the plea, he simply didn't realize the significance of registration. When he arrives home and comes to his senses, he understands that he must register with the

police department in this little community or worry about being prosecuted for failing to do so. Rather than go on record with the police as "the local pervert", he opts to move to a larger city where registration will not work as serious a hardship on him or his family. The hardship stories are almost as numerous as the number of defendants who are required to register.

Once registered, always registered! The defendant's name, photograph, and other relevant information goes on record with the local police and is sent to the state Department of Justice within three days after the local registration occurs. Although a defendant may be relieved from giving the local authorities updated information concerning his new residence, he must nonetheless continue to be registered with them regardless of relief under 1203.4.

VI

REGISTRATION IS A SEVERE PENALTY

The California Supreme Court has recognized the "severity of this sanction" and labeled it "unusual and onerous" and "the ignominious badge." In re Birch 10 C.3d 314, 321-322.

"A person . . . required to so register suffers a multitudinous of disabilities in addition to the shame and ignominy of being so publicized." People v. Mills, supra, at 177. The Mills Court agreed with the defendant:

> "[T]hat registration as a sex offender has de facto punitive aspects about it cannot be doubted." Mills at 177.

"[T]he 'penalties and disabilities' of the registration requirements of section 290 are criminal in character." Kelley, supra at 994. The Court further noted that until the enactment of 290, a person convicted of 647(a) incurred a maximum possible penalty of a fine of $500 and imprisonment in the county jail for not more than six months, or both. "Section 290 added a life sentence of compulsory police registration and reregistration. That, clearly, is the imposition of a criminal penalty in the strictest and

narrowest sense of that term." Kelley, supra at 994.

If registration is a punishment as the courts have held (as it must seem to defendants) then, as applied to 647(a) defendants, it is "cruel and unusual punishment" under the Federal Constitution and "cruel or unusual punishment" under the California Constitution. Arguments on this point were included in attachments to Appellant's Opening Brief several months ago, and so they need not be recited here once more.

VII

AUTOMATIC REGISTRATION FOR 647(a) DEFENDANTS VIOLATES EQUAL PROTECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS

Persons convicted of soliciting a lewd act must register; persons convicted of such a solicitation for money or other consideration never have to register. Persons who engage in lewd conduct in a public place and who are so convicted must register; persons who do the same act for money or other pecuniary gain--even as a business--need not register. All those who violate 647(a) must always register; all those convicted of 647(b) never have to register. What type of madness is this?

In discussing an equally absurd situation, the Supreme Court refused to interpret 647(a) as applying to live theatrical performances. "[A] serious equal protection problem would evolve if we were to interpret section 647, subdivision (a) as respondent urges . . . It would be arbitrary and vexatious to require that persons in petitioner's position should be subject to the registration requirement, while those who have violated the laws against obscenity by selling and exhibiting obscene movies, books, and pictures to minors or who employ minors for the purpose of such distribution (§§ 311.2, 311.3, 311.4) should not be subject to such a burden." Barrows, supra at 827.

This same equal protection problem emerges in a comparison of the duty to register under 647, subdivision (a) and the lack of it under subdivision (b).

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VIII

AUTOMATIC REGISTRATION FOR 647(a) DEFENDANTS VIOLATES THEIR RIGHT TO TRAVEL

The California Court of Appeal has recognized the existence of a right to intrastate travel. In the case of In re White (1979) 158 Cal.Rptr. 562, 567, the Court stated:

> "We conclude that the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law . . ." It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.'" Citing King v. New Rochelle Municipal Housing Authority (2nd Cir., 1971) 442 F.2d 646, 648.
>
> "Many other fundamental rights such as free speech, free assembly, and free association are often tied in with the right to travel. It is simply elementary in a free society. Freedom of movement is basic in our scheme of values." White, supra at 567.

Noting that the right to travel is not absolute, the court in White strictly scrutinized a condition of probation restricting the free movement of a convicted prostitute and held the restriction unconstitutional because it was not the least restrictive alternative to accomplish the goal sought to be achieved.

Having to register as a sex offender, a person is "thus severely limited in his freedom of movement". Kelley v. Municipal Court, supra at 992. (Emphasis added).

The Court in Mills, supra, also acknowledged that registration severely limits a person's right to travel, but in the context of that case (sexual molestation of a seven-year-old girl), a defendant may forfeit his right to travel.

Many persons convicted of 647(a) would probably prefer not to move into a small community if they would therefore have to register as a sex offender upon arrival. Hence they would give up their right to intrastate travel in order to avoid the additional embarrassment and possible harrassment that would accompany such a move. Although the registration record is supposed to be confidential, the Mills Court recognized that "its public availability to a degree" invades the registrant's right to privacy. Mills, supra at 181.

Particularly in a small community, police officers may serve many dual functions. If someone comes into the department to register, all of the officers will know this. No doubt this knowledge will affect their interactions with the registrant when they meet him at the grocery store, church, and at other times and places in the community when those officers are off duty.

Such an invasion of the right to travel should not be allowed to remain, absent a compelling state interest. While such a compelling interest may exist for knowledge of the whereabouts of child molesters (Mills, supra, at 180), what interest can there be to know the whereabouts of someone who solicited an undercover vice officer to engage in consenting adult activity, albeit in a quasi public place, or who massaged his penis for five seconds in a restroom with only an undercover officer watching, albeit a touching for a sexual purpose.

IX

AUTOMATIC REGISTRATION FOR 647(a) DEFENDANTS VIOLATES DUE PROCESS OF LAW

Automatically requiring persons convicted of 647(a) to register violates the Due Process Clauses of both the California and United States Constitutions because 1) it is irrational, 2) infringes on fundamental rights of privacy and travel and is not supported by a compelling state interest, and 3) creates an unconstitutional conclusive presumption and does not afford a hearing prior to

registration whereby the defendant could offer mitigating circumstances and the state could demonstrate the need for registration in each particular case.

Before the Court can properly address the Due Process issue, the purpose of sex registration should be discussed.

> "Individuals convicted of one of the enumerated crimes have been deemed by the Legislature to have a propensity to commit such anti-social crimes in the future and thus are the subject of continual police surveillance. Whenever any sex crime occurs in his area, the registrant may very well be subjected to investigation." In re Birch, supra, at 321.

Registration was thus intended to serve the purpose of having certain people subjected to constant police surveillance, "in order to prevent them from committing similar crimes against society in the future." Barrows, supra, at 827.

Virtually all of the offenses which are subject to registration fall into one of three categories: 1) sexual conduct with a child, 2) sexual conduct involving force or violence, and 3) sexual conduct ordinarily involving private citizen complaining witnesses. Only subdivisions (a) and (d) of Section 647 fall outside of these three categories.

Those involving sex with children include: 266, 267, 288, 288a, 286, and 647a (child molesting).

Those involving sex by force or violence include: 261(2), 261(3), 286, 288a, and 220 (assault with intent to commit one of the foregoing).

As I am sure the People will agree, Section 314.1 (indecent exposure) is usually prosecuted upon the testimony of a private citizen complaining witness rather than an undercover police officer. Although the police usually make the arrest, the private citizen was the victim and it is upon his or her testimony that the case rests.

The cases and studies mentioned in Section II of this brief demonstrate, and I am sure the People will agree, that the overwhelming majority of 647(a) and 647(d) cases rest upon the testimony

of a plainclothes vice officer observing solitary masturbation or consensual conduct of a homosexual nature not involving children.

Is a legitimate state purpose being served by registration of certain types of sex offenders? We must again inquire into the legislative purpose of registration of certain classes of people. It seems rather clear that the legislative purpose was primarily to keep certain people under surveillance: 1) child molesters, 2) rapists, 3) "flashers", and 4) "queers".

Although it has been noted by the Joint Legislative Committee for Revision of the Penal Code (see Introductory Notes attached as an exhibit to Appellant's Opening Brief) that all 290 registration is outmoded by the availability of computerized information systems, an argument might be made that felony child molesting and rape are sufficiently dangerous crimes so that registration is not irrational. At least the legislative purpose behind such a requirement could be considered "legitimate." However, one might question the motives of the Legislature in requiring registration for 647(a) convicted defendants. In Pryor v. Municipal Court, supra, the Supreme Court examined the legislative purpose behind 647(a) and stated that it was "designedly drafted to grant police and prosecutors a vague and standardless discretion." Pryor, supra at 248. Since the original legislative purpose behind the drafting of 647(a) was not legitimate, does this not also taint sex registration for 647(a) defendants with an aura of illegitimacy? Registration was one of the few methods of determining when a homosexual was in one's community and this was probably one of the considerations behind forced registration for convicted 647(a) defendants.

If the purpose behind forced registration for 647(a) defendants has been illegitimate, then it should be declared unconstitutional for this reason. However, assuming that the purpose was some unknown legitimate reason, we must still inquire into whether it is rational by today's standards. The traditional test for the validity of an enactment is whether the ends sought are appropriate and the regulations prescribed reasonable. Galyon v. Municipal Court (1964) 40 Cal.Rptr. 446, 448.

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"As applied to a law, 'reasonableness' is manifestly not what extremists upon one side or the other would deem fit and fair . . . . reasonableness is what 'from the calm sea level' of common sense, applied to the whole situation, is not illegitimate in view of the end attained." In re Hall ( ) 50 C.A. 786, 790.

A statute valid when enacted may become invalid by a change in conditions to which it is applied. Galyon, supra, at 449. Due weight must be given to new and changed conditions. As the Court there stated, "The reasonable objective of the statute upon its enactment may have been a valid exercise of the police power but because of the changed conditions during the last 91 years perforce requires us to determine that there is no reasonable objective to be reached by the statute." Galyon, supra, at 449. The change in conditions to which the Court was referring was the "changed concept of public morality in the innumerated areas." Galyon at 449.

Here too there have been drastic changes in concepts of public morality concerning homosexuality and concerning the crime of soliciting or engaging in lewd conduct. Pryor overturned some 72 years of previous appellate decisions and reviewed the constitutionality of 647(a) afresh.

Whether forced registration for those convicted of 647(a) was ever rational or reasonable is not the issue here and need not be debated. Changed conditions concerning this issuehave virtually brought about a consensus in the legal community (including prosecutors and judges who do everything in their control to assist the defendant in avoiding registration) that automatic registration for persons so convicted of such a petty offense is unreasonable.

Furthermore, because registration unquestionably infringes on the right to privacy and the right to travel, automatic registration for 647(a) convicted defendants can only be upheld if a compelling state interest is found. Appellant is at a loss as to what that compelling interest might be.

Finally, by determining that all 647(a) defendants who are convicted are dangerous and in need of constant police surveillance the Legislature has created an unconstitutional conclusive pre-

sumption. "On the whole, modern courts of justice are slow to recognize presumptions as irrebutable, and are disposed rather to restrict than to extend their number. To conclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be justified by the clearest expediency and the soundest policy; and some presumptions of this class ought never to have found their way into it." Bull v. Bray (1891) 89 C. 286, 295.

In the trial court, Appellant requested a hearing prior to being ordered to register so that he could show the court that forced registration would work him an injustice and would be of no great benefit to the state. The trial judge stated:

> "The statute is very clear. It says people convicted of the statute must register. The statute provides no hearing." Reporter's Transcript, pages 5-6.

It is a violation of Due Process for the Legislature to employ a conclusive presumption that is not adequately supported by the facts, and is, therefore, unwarranted. Atkisson v. Kern Housing Authority (1976) 59 C.A.3d 89; Stanley v. Illinois (1972) 405 U.S. 645.

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States (1969) 395 U.S. 6, 36.

In People v. Stevenson (1962) 58 C.2d 794, a rebuttable presumption in a criminal case was held to be unconstitutional since it applied to many situations where there was no rational basis for the fact presumed.

In one situation the California Supreme Court recognized that:

> "It would be irrational to impose upon an actor in a theatrical performance or its director a lifetime requirement of registration as a sexual offender because he may have performed or aided in the performance of an act, perhaps an obscene gesture, in a play. It is an errant concept we cannot attribute to the legislature that persons

convicted of such an offense will require constant police surveillance in order to prevent them from committing similar crimes against society in the future." Barrows, supra, at 826-827.

The United States Supreme Court has established a method of analyzing whether a statute creates an unconstitutional conclusive presumption. In Bell v. Burson (1971) 402 U.S. 539 the Court established a five-step process. If we apply it to forced registration for all 647(a) offenders, it appears as follows:

(1) Assumption of some statutory purpose by the court (person is likely to commit similar serious crime in the future and in order to protect society the person should register so he can be under constant police surveillance);

(2) Identification of some characteristic by the statute (convicted of an enumerated crime such as section 647(a));

(3) Attachment of certain consequences which flow from this characteristic by the statute (automatic duty to register with local police);

(4) Determination by court that all persons with this characteristic need not be subjected to this burden in order to achieve the state's purpose, assuming the purpose is legitimate;

(5) Court's conclusion: the individual must be allowed a hearing as to the appropriateness of his bearing the burden under the statute.

Using this analysis it is clear that Section 290 creates an unconstitutional conclusive presumption as applied to Section 647(a) All 647(a) convicted defendants are not in need of constant police surveillance -- probably none are.

The Court should declare Section 290 unconstitutional as applied to Section 647(a). If the Legislature agrees with the decision of the Court, that will end the matter. If it determines that some 647(a) defendants should register, it can set up procedures for hearings on the issue and establish criteria as to who should register and who should not.

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X

ASSUMING ARGUENDO THAT REGISTRATION IS A COLLATERAL DISABILITY AND NOT A PUNISHMENT WE REACH THE SAME RESULT

Whether forced registration is classified as a "punishment" or a "collateral disability" does not matter for purposes of the Due Process analysis. California cases dealing with loss of professional licensing or credentials illustrate that one may not automatically suffer such a disability merely because of his status or even because of a criminal conviction. Each case must be analyzed on its own merits taking into consideration all relevant circumstances. The hearing must go further than merely taking into account that the person was convicted of a crime.

The case which broke new ground on this issue is Morrison v. State Board of Education (1969) 1 C.3d 214. "In determining whether discipline is authorized and reasonable, a criminal conviction has no talismanic significance." Morrison, supra, at footnote 4.

In H.D. Wallace § Assoc. v. Dept. of Alcohol (1969) 76 Cal. Rptr. 749, 752, the Department revoked the liquor license of a man simply on the basis of his convictions for drunk driving and public drunkenness. In reversing the Department's action, the Court of Appeals stated:

> "In this case the Department apparently believed that Mr. Hughes' past conduct might raise a future problem. The net effect was revocation of the license upon conjecture or speculation. There was no evidence that his convictions for sobriety on and off the highway had any actual effect upon the conduct of the licensed business . . . "

More recent cases of the California Supreme Court establish that the Court will not adopt an unfitness per se rule, even when the conduct in question resulted in a conviction. Board of Education v. Jack M. (1977) 19 C.3d 691 (no conviction but determination by trial court that he did commit a crime); Newland

v. Board of Governors of California Community College District (1977) 19 C.3d 705 (conviction of 647(a)).

Just as fitness is a question of ultimate fact (Jack M., supra at 698, footnote 3) so too is whether persons are in need of constant police surveillance because they pose a danger to the community and are likely to repeat a similar offense. Since this is a question of ultimate fact and not a matter of law because of some per se rule, there must be an evidentiary hearing on this issue before registration is required. While a conclusive presumption that rapists or child molesters might withstand constitutional attack, there can be no conclusive presumption in this regard for lewd conduct misdemeanants.

In Newland, the Court stated:

> "We reject defendant's suggestion that a fitness hearing would serve no purpose on defendant's theory that all persons convicted of lewd conduct in a public place are unfit to teach as a matter of law." Newland at 714, footnote 11.

Surely, if the Supreme Court has rejected a per se rule with respect to teaching in public schools by persons convicted of 647(a) a per se registration rule should also be rejected.

CONCLUSION

Registration under Section 290 as applied to persons convicted of Section 647(a) should be declared unconstitutional.

The court should strictly scrutinize the application of 290 to 647(a) defendants because: 1) registration is automatic, 2) it works a serious hardship on a particular class of people, i.e., homosexual males, and 3) it infringes on fundamental rights such as the right to privacy and the right to travel.

If registration is considered punishment, it is cruel or unusual as applied to 647(a) defendants, and is therefore unconstitutional.

Registration for 647(a) defendants but not for 647(b) defendants who commit the same act except for money violates equal protection.

Automatic registration for 647(a) defendants is irrational and violates Due Process. It violates personal privacy by forcing them to disclose their sexual orientation. It further violates their privacy by subjecting them to police surveillance and to some public disclosure. It infringes on their right to travel. There does not appear to be compelling state interest for such infringements when the only crime a person has been convicted of is 647(a).

A conclusive presumption has been created by the Legislature because no evidence may be introduced that registration is unjust in a particular case. There is no balancing of the rights of the individual and the interests of the state. That balancing was done years ago by a Legislature which had improper motives (see Pryor v. Municipal Court as to improper Legislative motives in the drafting of 647(a)). Times have changed and so has society's attitude about homosexuals and the court's attitude and judgment about 647(a).

The court should declare this archaic procedure of automatic registration for lewd conduct defendants unconstitutional. The Legislature may amend it they wish.

Dated: February 9, 1980

Respectfully submitted:

THOMAS F. COLEMAN

(VERIFICATION 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of ..... } ss.

I, the undersigned, say: I am the .....

.....

.....

in the above entitled action; I have read the foregoing .....

.....

and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which

therein stated upon my information or belief, and as to those matters that I believe it to be true.

.....

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on ..... (date) at ..... (place), California

.....

(Signature)

(PROOF OF SERVICE BY MAIL 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

I am a resident of employed in the county aforesaid, I am over the age of eighteen years and not a party to the within

entitled action, my business address/residence address is

1800 North Highland Avenue, Suite 105, Los Angeles, CA 90028

On February 13, 1980, I served the within Appellant's Opening

Brief

on the below interested parties

in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

United States mail at Los Angeles, California

addressed as follows:

Los Angeles City Attorney
Appellate Section
13th Floor, City Hall East
Los Angeles, CA 90012
Attention: Randy Schrader

Commissioner Richard Kolostian
Van Nuys Municipal Court
6230 Sylmar Avenue
Van Nuys, CA 91401

I certify (or declare) under penalty of perjury,* that the foregoing is true and correct.

Executed on February 13, 1980 (date) at Los Angeles (place), California

.....

(Signature)

MARSHA OLDAKER

* Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.