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Natural Resource Allocation - Equitable Apportionment Deemed an Appropriate Remedy for Allocation of Transitory Resources between Sovereign States Case Notes

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CASE NOTES

NATURAL RESOURCE ALLOCATION—EQUITABLE APPORTIONMENT DEEMED AN APPROPRIATE REMEDY FOR ALLOCATION OF TRANSITORY RESOURCES BETWEEN SOVEREIGN STATES—*Idaho* ex rel. *Evans v. Oregon*, 103 S. Ct. 2817 (1983).

Chinook salmon and steelhead trout are among the Pacific-Northwest's richest natural resources.[1] The dispute in *Idaho ex rel. Evan v. Oregon*[2] concerned a state's right to an equitable apportionment of these great fish in their migrations through the Columbia-Snake river system.[3] The Snake River rises in Wyoming and flows westward across Idaho, eventually joining the Columbia River in Washington. From this confluence, the Columbia winds its way into the Pacific Ocean, defining the boundary between Oregon and Washington for most of its route.[4] The fish in dispute are hatched in the headwaters of the Columbia and Snake rivers, a sizeable number hatched within Idaho's borders. During their lifetime, the salmon and steelhead migrate downstream, spend several years maturing in the Pacific, and then return upstream to their original hatching area where they spawn and eventually die.[5]

Before the Idaho-bound mature fish reach their spawning grounds, however, they face a series of life-threatening obstacles, including downsteam sport and commercial fishing by both Indian and non-Indian fishermen and a series of eight dams.[6] Idaho claimed that

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1. Idaho *ex rel.* Evans v. Oregon, ___ U.S. ___, 103 S. Ct. 2817, 2819 (1983).
2. *Id.* at 2817.
3. *Id.* at 2819.
4. *Id.* at 2819-20.
5. *Id.* at 2820.
6. *Id.* at 2820-21. About 15% of the fish are killed at each dam. *See also* Note, *United States v. Washington (Phase II); The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469, 473 (1982). Idaho, however, was not able to seek relief from the high mortality rate attributable to the eight dams operated by the Army Corps of Engineers. The United States refused to participate in the action, invoking its sovereign immunity. As a result, Idaho was forced to frame its complaint very narrowly to avoid dismissal for failure to join the United States as an indispensible party under FED. R. CIV. P. 19(b). *See* Idaho *ex rel.* Evans v. Oregon, 444 U.S. 380, 385 (1979).

commercial fishermen[7] from Oregon and Washington were harvesting a disproportionate share of the returning adult fish before they reached Idaho, thereby depriving Idaho citizens of their equitable harvest of salmon and steelhead trout.[8]

Idaho took the dispute to the United States Supreme Court[9] seeking an equitable apportionment of the anadromous (migratory) fish harvested in Oregon and Washington. The Supreme Court granted Idaho leave to file a complaint[10] and appointed a special master to gather evidence and to make recommendations.[11] The master initially recommended dismissal for failure to join the United States as an indispensible party.[12] Idaho's exceptions to this recommendation were sustained by the Court, and the case was remanded to the special master for further proceedings.[13] After conducting a trial, the master issued a final recommendation that the case be dismissed on two grounds: (1) that Idaho had not met its burden of proving sufficient injury caused by downstream fisheries; and (2) that it would be almost impossible to fashion a workable remedy in this case.[14] In response, Idaho filed exceptions to this final recommendation.

In an opinion written by Justice Blackmun, the Supreme Court reviewed the exceptions and held that the special master was correct in finding that Idaho had not met its burden of demonstrating sufficient injury. As a result, the Court found that Idaho was not entitled

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For the same reason, Idaho was unable to seek relief from downstream fishing by Indians pursuant to their treaty rights. Sohappy v. Smith, 529 F.2d 570 (1976). Under the treaty, the Indians are entitled to "up to 50% of the harvestable catch." Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence With the Columbia River Power System*, 11 ENVTL. L. 211, 281 (1981). Because the United States is trustee of the Indian's fishing rights, its refusal to participate restricted Idaho from claiming treaty fishing as a source of injury, further limiting Idaho's ability to allege an injury in its complaint. Idaho *ex rel.* v. Oregon, 444 U.S. at 386.

7. Idaho's complaint named the *commercial* harvest of salmon and steelhead as the main cause of depletion of the fish runs. Just before this action was filed, however, both Washington and Oregon prohibited commercial harvests of summer chinook salmon and steelhead trout. Spring chinook harvests have been allowed only twice since then. 103 S. Ct. at 2822.

8. *Id.* at 2826 (O'Conner J., dissenting).

9. Idaho sought to invoke the Court's original jurisdiction under 28 U.S.C. § 1251(a) which provides in part: "The Supreme Court shall have original jurisdiction . . . of all controversies between two or more states." 103 S. Ct. 2817, 2819. *See generally* 3 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 66 (1977) (original jurisdiction in interstate water disputes).

10. Idaho *ex rel.* Andrus v. Oregon, 429 U.S. 163 (1976).

11. Idaho *ex rel.* Evans v. Oregon, 431 U.S. 952 (1976).

12. Idaho *ex rel.* Evans v. Oregon, 444 U.S. 380, 385 (1980). *See also supra* note 6.

13. Idaho *ex rel.* Evans v. Oregon, 444 U.S. at 385.

14. 103 S. Ct. at 2822.

to an equitable decree apportioning the anadromous fish of the Columbia-Snake river system.[15] As to the master's second finding—that it would be impossible to fashion a workable decree in this case—the Court disagreed, holding that the complexity of the apportionment calculations alone should not prevent the issuance of equitable relief.[16] The action was ultimately dismissed without prejudice to Idaho's right to bring new proceedings if it can show sufficient injury.[17]

The Court began its analysis by examining the applicability of the doctrine of equitable apportionment to the dispute. Equitable apportionment, as traditionally applied, is a judicial means of allocating the contested waters of interstate streams.[18] However, the Court reasoned that the fish in this case were "sufficiently similar" to their river habitat to make this doctrine of water law adaptable to the dispute.[19] The Court noted that under this doctrine, allocation is based on each state receiving its fair share of the common resource, rather than on any preexisting legal rights or entitlements.[20]

The six-member majority next recognized that equitable apportionment rests on the same principles that underlie many of the Court's commerce clause decisions, namely, that "a State may not preserve solely for its own inhabitants natural resources located within its borders."[21] The Court reasoned that even though Idaho did not have any preexisting right to the salmon and steelhead hatched in its waters, it had an equitable right to the fair distribution of this resource.[22] The Court noted that it was manifestly unfair that Washington and Oregon could harvest a disproportionate share of the returning fish before they reached Idaho, and concluded that equitable apportionment was the appropriate remedy to this

15. *Id.* at 2825.

16. *Id.* at 2823-24.

17. *Id.* at 2825. Because the real culprit responsible for the poor fish harvests seems to be the series of dams along the Columbia and Snake Rivers, combined with heavy fishing by Indians pursuant to treaty rights, it appears that Idaho may never be able to demonstrate sufficient injury as long as the United States invokes its sovereign immunity. In this sense, Idaho had, in reality, lost its case in the early procedural stages, when it was prohibited from naming the United States in its complaint. *See supra* note 6.

18. WATERS AND WATER RIGHTS § 132 (R. Clark ed. 1967).

19. 103 S. Ct. at 2822.

20. *Id.* at 2823.

21. *Id.* at 2823. *See, e.g.*, New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); Hughes v. Oklahoma, 441 U.S. 322 (1979); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

22. 103 S. Ct. at 2823.

unfairness.[23]

The Court, however, denied Idaho relief solely on the basis of Idaho's inability to prove sufficient injury.[24] It emphasized that before the Court can enter a decree of equitable apportionment on original jurisdiction, the state seeking apportionment "must prove by clear and convincing evidence some real and substantial injury or damage."[25] In this case, the Court found that Idaho had taken 58.72% of the total anadromous fish harvest from 1975 through 1980, and concluded that this was not indicative of the required degree of injury.[26] Moreover, although there was evidence that Oregon and Washington may have harvested a disproportionate share of the fish over the long run and may have mismanaged the resource in the past, the Court reasoned that equitable relief was directed at ameliorating present harm and preventing future injuries. Therefore, the Court would not grant relief for past injury.[27]

In a dissenting opinion, Justice O'Conner argued that the 1975 through 1980 time period under consideration was too limited and did not accurately reflect Idaho's actual injury.[28] In those years, O'Conner argued, the overall harvest was so small that it would be impossible for Idaho to show substantial harm, as *none* of the states had an appreciable harvest. However, in the years before 1975, the year Idaho filed its complaint, Oregon and Washington harvested a much greater percentage of salmon and steelhead than Idaho.[29] The dissent argued that the Court should consider the downstream practices in years prior to the filing of the complaint as relevant to an accurate measurement of injury, because these past injuries contributed to the present lack of harvestable fish.[30]

Prior to the Court's *Idaho* decision, interstate disputes over natural resources were primarily resolved through negotiation and interstate compacts.[31] In a few cases, however, there existed other avenues of potential redress. If the complaining state could show that, in

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23. *Id.* at 2822.

24. *Id.* at 2824-25.

25. *Id.* at 2824. This burden of proof has been well established in prior cases. *See, e.g.*, Colorado v. New Mexico, ___ U.S. ___, 103 S. Ct. 531, 539 n.13 (1982).

26. 103 S. Ct. at 2825.

27. *Id.* at 2824-25.

28. *Id.* at 2826-27.

29. *Id.* at 2828.

30. *Id.*

31. Before Idaho brought this action for equitable apportionment, it repeatedly sought admittance to the Oregon-Washington Columbia River Fish Compact Act of Apr. 8, 1918, ch. 47, 40 Stat. 515, but was denied on each occasion. 103 S. Ct. at 2821. The Compact was formed to "ensure uniformity in state regulation of Columbia River anadromous fish." *Id.*

depleting the common resource, a neighboring state was in some way restricting interstate commerce[32] or discriminating against out of state citizens,[33] a justiciable constitutional issue might be presented. In addition, an aggrieved state might have been able to claim ownership of the transitory resource, and bring a suit for infringement of a property right.[34] These alternative theories of judicial relief are tenuous at best. In reality, an injured state had little hope for a judicial determination of interstate resource disputes (other than water conflicts) before the *Idaho* decision.

The *Idaho* decision will have greater potential impact on future natural resource disputes than it had on the Columbia-Snake river fish allocation. Because Idaho was prohibited from litigating the major causes of resource depletion[35] and Oregon and Washington no longer permited significant commercial harvests,[36] the allocation issue was rendered virtually moot by the time the Court reached a final decision. This left the Court little alternative but to dismiss Idaho's complaint. In the course of the dismissal, however, the Court made significant advances in interstate natural resource law.

First, the Court's decision significantly expands the scope of application of equitable apportionment.[37] As first promulgated, equitable apportionment appeared to be a mandate for the Court to take judicial cognizance of a broad spectrum of allocative disputes between states.[38] Until now, however, its use has been strictly limited

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32. *See* U.S. CONST. art. I, § 9. In order to get relief under the interstate commerce clause, however, the complaining party would first have to show that the contested resource was actually part of interstate commerce. The Court has not yet decided whether game fish fall within the scope of the commerce clause.

33. *See* U.S. CONST. art. IV, § 2. In order to invoke relief under the privileges and immunities clause, the complaining state would have to show some sort of discrimination against its citizens caused by the fishing regulations of a neighboring state. The Court has been reluctant, however, to apply article IV to recreational activities, such as salmon fishing, because they do not meet the fundamental rights requirement of the privileges and immunities clause. *See, e.g.*, Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978); *see also* M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW, 46-53 (1977).

34. *See generally* M. BEAN, *supra* note 33, at 64. Although once a popular legal theory, state "ownership" of its natural resources is now regarded as a mere fiction, providing little foundation on which to base legal relief. *Id.*

35. *See supra* note 17.

36. *See supra* note 7.

37. *Idaho* does not, however, alter the substantive doctrine of equitable apportionment.

38. In establishing the equitable apportionment doctrine the Court said:

> [w]henever . . . the action of one state reaches, through the agency of natural laws, into territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice

to water disputes. In finding anadromous fish "sufficiently similar" to water to warrant application of the doctrine,[39] the Court begins an expansion of the doctrine which could make it applicable to a wider variety of allocative disputes concerning natural resources. For example, the "sufficiently similar" test could be applied to prevent the depletion by one state of migratory game herds, such as elk and deer, which do not abide by state boundaries. Moreover, air could be held "sufficiently similar" so that one state could be enjoined from putting pollutants into the airstream which later burden neighboring states in the form of air pollution or acid rain. It will be up to the Court to determine the limits of the "sufficiently similar" test in future opinions.

Second, in rejecting the special master's argument that the Court should dismiss the action on the alternate grounds that the technical complexity of fashioning an equitable decree could be prohibitive,[40] the Court expressed a willingness to take judicial cognizance of difficult, technical disputes. Moreover, in an earlier decision on this same action, the Court held that even if it had to retain continuing jurisdiction over the management of the fisheries, that should not prevent it from issuing the requested relief.[41] It should be noted that this activist role of the federal courts in environmental disputes is not necessarily new.[42] The *Idaho* decision is a further indication and affirmation by the Supreme Court of the expansion of the role of the judiciary in the resolution of often complex natural resources and environmental disputes.

Finally, in its explanation of equitable apportionment, the Court emphasized a state's affirmative duty to "conserve and even to augment the natural resources within [its borders] for the benefit of other states."[43] Although this duty to augment is not new,[44] it is significant that for the first time the Court discusses it in reference to resources other than water. According to the dicta of the opinion, if

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between them.

Kansas v. Colorado, 206 U.S. 46, 97-98 (1906).

39. 103 S. Ct. at 2822.

40. *Id.* at 2822.

41. 444 U.S. 380, 390 n.7.

42. *See, e.g.*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) reh'g denied. In this case the district court appointed a "fishmaster" to oversee implementation of the court's decision and retained continuing jurisdiction. *See also* M. BEAN, *supra* note 33, at 62.

43. 103 S. Ct. at 2823 (citing Colorado v. New Mexico, ___ U.S. ___, 103 S. Ct. 531, 546 (1982); Wyoming v. Colorado, 259 U.S. 419, 484 (1922)).

44. *See, e.g.*, Colorado v. New Mexico, 103 S. Ct. at 549; Wyoming v. Colorado, 259 U.S. 419, 434 (1922).

Idaho had been able to demonstrate the requisite injury, the Court would not be overstepping its bounds in requiring Oregon and Washington to enhance the Columbia River salmon and steelhead runs.[45] The impact of this duty to augment depends, of course, on how broadly the Court will extend the "sufficiently similar" test of equitable apportionment.

The adaptation of equitable apportionment to the allocation of anadromous fish was simply a logical expansion of the doctrine. Ruling that a coveted interstate resource must be shared in fairness to the interested parties is certainly not revolutionary. Indeed, it was merely an extension of the well established Constitutional principles which prohibit discrimination in interstate commerce. The true difficulty lies in the fashioning of an equitable decree which reflects these principles. Just what is Idaho's fair share of the fish?[46] The Court was able to avoid this question by dismissing Idaho's complaint for failure to meet the burden of proof with regard to its injury. In so doing, the Court was able to make a broad, perhaps unrealistic, statement about its duty to provide equitable relief in even the most complex technical disputes,[47] while side-stepping the rigors of fashioning that relief in the case at bar. In dismissing Idaho's complaint on procedural grounds, the Court gave itself a safe forum to announce an expansion of its rule on complex dispute resolution.

This maneuver suggests a certain brilliance by the majority. By deciding a virtually moot question the Court was able to make new substantive natural resources law without having to face the realities of its own decision. But the Court may not be able to avoid this issue again.[48] If Idaho can ever muster sufficient evidence to show injury, or if other states bring similar allocative claims, the Court will eventually have to wrestle with all of the complex factors and actually decide the equities involved.

Despite the Court's dismissal of Idaho's complaint, its decision in *Idaho* represents a significant addition to the law of natural resources. In holding that equitable apportionment was appropriate to the apportionment of fish as well as water, the Court opened up a potentially new avenue for transitory resource allocation and expressed its willingness to play an active role in contested resource

45. 103 S. Ct. at 2827 (O'Conner, J., dissenting).

46. This is a question raised by the dissent. 103 S. Ct. at 2828.

47. *Id.* at 2824. *See also supra* text accompanying note 41.

48. *See generally* Comment, *Sohappy v. Smith: Eight Years of Litigation Over Indian Fishing Rights*, 56 OR. L. REV. 680 (1977) (describing the difficulty of judicial administration of the Columbia River anadromous fish).

management. In *Idaho*, however, the Court did not have to deal with the complex realities inherent in this expanded, quasi-administrative role. The real test of the Court's judicial activism in resource litigation will come in the future when the Court is called upon to put some teeth into the language of its *Idaho* decision.

Thomas Hunt Squeri

STATE REGULATION OF NUCLEAR ENERGY FOR ECONOMIC REASONS—*Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission,* 103 S. Ct. 1713 (1983).

In 1977, Southern California Edison (SCE) and Pacific Gas and Electric (PG&E) submitted plans for three proposed nuclear energy plants to the California State Energy Resources and Development Commission (Energy Commission) for consideration.[1] These plans failed to win the approval of the Energy Commission, due primarily to the existence of the Warren-Alquist Act of 1974 and its amendments.[2] The Warren-Alquist Act required state certification for all electric power generating plants in California. The amendments, dubbed the "Nuclear Laws," dealt solely with the nuclear industry and were passed in response to the ever-increasing problem of inadequate storage facilities for spent nuclear fuel.[3]

In particular, sections 25524.1(b)[4] and 25524.2[5] of the Act evidence a growing concern on the part of the legislature for the economic feasibility of constructing atomic energy plants. The former section is concerned with the interim storage of spent fuel and the fuel core, requiring an ad hoc determination by the Energy Commission that "adequate" storage facilities will be included in the plant design. Section 25524.2 addresses itself to the permanent disposal of radioactive waste and imposes a moratorium on further certification of nuclear power plants until the Energy Commission "finds that there has been developed, and that the United States through its authorized agency has approved, and there exists a demonstrated tech-

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1. L. A. Daily J., Apr. 21, 1983, at 1, col. 6.

2. CAL. PUB. RES. CODE §§ 25500, 25502, 25504, 25511, 25512, 25514, 25516, 25517, 25520, 25523, 25528, 25532, 25524.1, 25524.2 and 25524.3 (West 1977 & Supp. 1984).

3. Spent nuclear fuel is the high-level radioactive waste that remains after the energy has been generated. Initially water-filled pools were used as storage areas for the interim period between removal and reprocessing of the spent fuel, as well as for temporary holding of the entire fuel core. Because reprocessing techniques are as yet unrefined, contrary to industry projections, the radioactive spent fuel has been allowed to accumulate to its present worrisome levels. The result of this technological lag is that a number of reactors may be compelled to cease operation, as their pools reach storage capacity. For a general discussion of this so-called "clog" in the nuclear cycle, see Cohen, *High Level Radioactive Waste*, 21 NAT. RESOURCES J. 703 (1981).

4. CAL. PUB. RES. CODE § 25524.1(b) (West 1977).

5. *Id.* § 25524.2.

nology or means for the disposal of high-level nuclear waste."[6]

Both companies were subsequently forced to abandon their respective projects. They then filed suit in the United States District Court for California claiming that uncertainties caused by the Nuclear Laws had caused cancellation of their plans. SCE and PG&E sought a declaration that the Warren-Alquist Act was preempted by the Atomic Energy Act[7] and was thus void under the Supremacy Clause. Finding that SCE and PG&E had standing to challenge the statute, the District Court granted judgment for the utilities.[8]

On appeal, the Ninth Circuit Court of Appeals agreed that the petitioners had standing,[9] but held that section 25524.1(b) was not ripe for adjudication. The time for adjudication of section 25524.2, however, was deemed proper.[10] The Ninth Circuit rejected the preemption analysis of the district court and held instead that section 25524.2 was expressly authorized under sections 271 and 274(k) of the Atomic Energy Act and therefore constituted a valid exercise of the state's regulatory . . . power.[11]

The United States Supreme Court granted certiorari on the questions of ripeness and preemption.[12] In a unanimous decision, the Court affirmed the Ninth Circuit Court's findings on both issues.[13] In so doing, the Court reiterated the rules on preemption and ripeness it has developed over the past several years.

In determining the question of ripeness, Justice White, writing for the Court, found section 25524.1(b) unfit for adjudication.[14] Since the Energy Commission must make determinations on a case-by-case basis, the Court reasoned that there is no certainty that the

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6. *Id.* § 25524.2(a). Such a finding on the part of the Energy Commission must be presented to the state legislature where either house can disaffirm it. *Id.* § 25524.2(b).

7. Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. I-IV 1977-1981) (originally enacted 1946).

8. 489 F. Supp. 699 (1980), *rev'd*, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 103 S. Ct. 1713 (1983). The court issued rulings on three points: (1) petitioners had standing to bring the suit; (2) both § 25524.1(b) and § 25524.2 presented questions that were ripe for adjudication; (3) both provisions were preempted by the Atomic Energy Act insofar as they attempted to regulate nuclear power plants. *Id.*

9. 659 F.2d 903, 915 (9th Cir. 1981), *aff'd*, 103 S. Ct. 1713 (1983).

10. *Id.* at 918.

11. *Id.* at 925.

12. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 103 S. Ct. 1713 (1983).

13. *Id.*

14. *Id.* at 1721. The Court utilized two factors by which to measure the provisions: the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration. This was the test set forth by the Court in Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

storage capacity of a nuclear plant will at some future time be judged inadequate.[15] The Court therefore elected to await further developments before reviewing section 25524.1(b). Because postponement of consideration of the validity of the moratorium would only serve to exacerbate industry confusion, however, section 25524.2 was deemed ripe for adjudication.[16]

The Court then turned to the issue of whether the California provision was preempted as a result of previous occupation of the field by Congress or by virtue of conflict with federal legislation.[17]

Upon careful examination of the Atomic Energy Act, its subsequent amendments, and actions taken by the offspring Nuclear Regulatory Commission (NRC), the Court concluded that two areas of nuclear power generation are the exclusive province of the federal government: the operation and construction of the power plants themselves and all radiological safety aspects attendant thereto.[18] This finding contravened contentions presented by both parties. Petitioners had claimed that the federal government was the sole regulator in all areas of nuclear power, not merely those delineated by the Court.[19] Respondents, on the other hand, had argued that a state could place a moratorium on new construction "until its safety concerns are satisfied by the federal government."[20]

In refusing to expand the list of preempted fields as requested by petitioners, the Court relied heavily on two factors. First, the legislature has traditionally allowed states to retain authority in matters pertaining to generation of electricity. Second, there is a notable absence of statutory language enunciating any change in this policy.[21] Especially convincing to the Court was the apparent purpose of the Atomic Energy Act to insure continued state responsibility in making the initial determination regarding actual need, cost, and other re-

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15. 103 S.Ct. at 1720. The Court further held that since § 25524.2 is not preempted by federal law, there is little likelihood that industry behavior would be uniquely affected by whatever uncertainty surrounds the interim storage provision.

16. *Id.* at 1721. The Court was convinced by the "palpable and considerable hardship" that would be visited upon the nuclear industry were the moratorium's validity to remain unconfirmed.

17. Petitioners propounded three arguments for preemption: (1) the federal government, through the Atomic Energy Act, has exclusively occupied the field of nuclear power generation; (2) the statute conflicts with congressional directives, as well as with those of the Nuclear Regulatory Commission (NRC); and (3) the provision poses an obstacle to the expressed federal objective of developing fission as a viable energy source. *Id.* at 1722.

18. *Id.* at 1723.

19. *Id.* at 1722-23.

20. *Id.* at 1726.

21. *Id.*

lated state concerns. States are neither required to authorize the development of nuclear plants, nor are they prohibited from refusing to allow their construction.[22] Section 271 of the Act confirmed this participatory role of the states the Court stated.[23] The Court noted, moreover, that the 1959 Amendments to the Atomic Energy Act underscored the distinction between proper federal and state concerns. For example, section 274(k), as amended, reads: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[24]

While section 274(k), therefore, leaves the states with a certain measure of latitude, the Court made clear that it effectively disposed of any possible state regulation of safety measures.[25] The majority recognized that any attempt by the states to so legislate would conflict with a judgment of the NRC that "nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal."[26] The Court, therefore, found it necessary to inquire whether section 25524.2 was intended to regulate for reasons of safety, or for some "other purpose" as provided under section 274(k).[27]

Petitioners argued that section 25524.2 was clearly rooted in a legislative concern for the safety of its citizens. First, the utilities noted that there already exists a state administrative body in California empowered to make decisions regarding the economic feasibility

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22. *Id.* at 1722.

23. Atomic Energy Act § 271, Pub. L. 89-135, 79 Stat. 851 (1965) (codified at 42 U.S.C. § 2018 (1976)). It declares: "nothing in this Chapter shall be construed to affect the authority of regulations of any [f]ederal, [s]tate or local agency with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities licensed by the Commission . . . ."

24. Atomic Energy Act § 274, Pub. L. 86-373, 73 Stat. 688-91 (1959) (codified at 42 U.S.C. § 2021(k) (1976)).

25. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1726. There are a number of exceptions to this general rule. States maintain an advisory role concerning activities within the NRC's exclusive jurisdiction. Atomic Energy Act § 274, 42 U.S.C. § 2021(l) (1976). The Commission must cooperate with the states even in the formulation of standards for regulation against radiation hazards. Atomic Energy Act § 274, 42 U.S.C. § 2021(a) (1976). In addition, § 274(b) allows the states to contract with the NRC for control over special nuclear material under limited conditions. Atomic Energy Act § 274, 42 U.S.C. § 2021(b) (1976 & Supp.). *But see* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), where the Court summarily affirmed the finding of preemption where Minnesota attempted to regulate radioactive waste discharges for purposes of safety.

26. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1727, 1729-30. This singular concern for public health and safety is reflected as well in the NRC's recent repeal of all provisions relating to the economic considerations involved in certifying a plant for construction. *Id.* at 1724.

27. *Id.* at 1727.

of constructing new reactors.[28] Justice White recognized California's authority to employ this case-by-case method of examination, but also found the targeted problem of waste disposal to be so prevalent as to warrant a general legislative judgment.[29] Second, the utilities claimed that the Nuclear Laws shared a common heritage with Proposition 15, an initiative manifestly based on safety concerns, and thus should be "presumed to have been enacted for the same [safety] purposes."[30] The Court refused to consider this argument as a possible "taint" on section 25524.2, however. Because the initiative was not passed, and thus was not before the court, such a contention was deemed irrelevant.[31]

The Court ended its preemption analysis with two final reasons for accepting California's avowed economic purpose rationale for section 25524.2. First, the Court reiterated its reluctance to inquire into legislative motive. Second, since Congress has evidently permitted the states to retain enough authority to deny certification for economic reasons on a case-by-case basis, the Court stated it is Congress's duty to investigate any possible misuse of this authority.[32]

The second area examined by the Court concerned possible preemption due to conflict with existing federal regulation. Petitioners argued that section 25524.2 was in direct conflict with federal legislation delegating the regulation of nuclear waste disposal to the NRC, as well as with a specific NRC determination.[33] The Court found that since it was possible for the states to comply with both section 25524.2 and the existing federal and NRC directives, no conflict existed.[34] Because the states are not required to construct nuclear power plants in the first place, and the NRC order states only that "it is safe to proceed with such plants, not that it is economically

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28. *Id.* at 1728. That body is the California Public Utilities Commission. *Id.*

29. *Id.* at 1728.

30. *Id.* Proposition 15 was an initiative submitted to California's voters in June of 1976. The proposition barred the construction of any new nuclear power plants until a permanent waste disposal method was developed. As a rationale for the bar, Proposition 15 cited its concern about the threat of harm to "the land or the people of . . . California." *Id.* at n.27.

31. *Id.* Petitioners also argued that if California had been truly concerned with finances, it would have shown more concern for the cost of the technology ultimately selected by the federal government, and would have prohibited construction by the utilities outside the state. Justice White condemned these assertions as "myopic" and "hypothetical." *Id.* at 1727.

32. *Id.* at 1728.

33. *Id.* at 1729. The Court noted that in Natural Resources Defense Council v. NRC, 582 F.2d 166, 168-69 (2d Cir. 1978), the NRC had been requested to discontinue licensing of reactors until a permanent disposal method for high-level waste was approved. There, the NRC concluded, that given the progress toward the development of disposal facilities and the availability of interim storage, it could continue to license new reactors.

34. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1729.

wise to do so," the Court reasoned that California's economically-grounded moratorium is not in conflict with federal legislation.[35] The Court stated that this conclusion is bolstered by express reliance in section 25524.2 on federal government in selecting an adequate technology, demonstrating that there is no attempt by the state to dictate acceptable standards.[36]

Petitioners next challenged section 25524.2 as conflicting with recent federal legislation, specifically the Nuclear Waste Policy Act of 1982, which represented a financial commitment by Congress to research on radioactive waste disposal. This claim was found wanting for two reasons: (1) the House had considered an amendment that the bill "satisfy any legal requirements for the existence of an approved technology,"[37] but had rejected such language in an effort "to insure that there be no preemption;" and (2) the Act could be interpreted as relating only to disposal problems of existing nuclear power plants.[38] The Court was furthermore unconvinced that the state provisions in any way frustrated the federal objective of promoting nuclear energy.[39]

While the judgment of the Court was unanimous, Justice Blackmun authored an opinion concurring only in part with the majority.[40] He primarily emphasized that the Court's declaration proscribing state enforcement of a moratorium based on a safety rationale was merely dictum.[41] Because California was not motivated by safety concerns, Justice Blackmun found the suggestion "unnecessary to the Court's holding."[42] Furthermore, he disagreed with the essence of the dictum and asserted that Congress merely intended to encourage nuclear power generation as one of many alternative energy options.[43] The states would then be invited to balance all factors, including safety, in determining the optimum system for their provinces.[44] Such a reading would not only survive the preemption tests, but would provide a more consistent and tangible foundation than the "elusive test of legislative motive."[45]

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35. *Id.* at 1729-30.
36. *Id.* at 1730.
37. *Id.*
38. *Id.*
39. *Id.* at 1731-32.
40. *Id.* at 1732 (Blackmun, J., concurring).
41. *Id.* (Blackmun, J., concurring).
42. *Id.* (Blackmun, J., concurring).
43. *Id.* at 1734 (Blackmun, J., concurring).
44. *Id.* at 1733 (Blackmun, J., concurring).
45. *Id.* at 1735 (Blackmun, J., concurring).

As noted by the Court, there are essentially only two justifications for the finding of preemption: either Congress has occupied the field, or the law in question conflicts with a constitutional or congressional provision.[46]

The former area, sometimes referred to as jurisdictional preemption, requires a determination of congressional intent to occupy the respective field.[47] The existence of this intent can be evinced either specifically, as with language within the legislation expressing such a design, or by inference. In *Rice v. Santa Fe Elevator Corp.*,[48] the Court delineated three factors from which it may be inferred that Congress meant to occupy the field: (1) the pervasiveness of the regulation; (2) the dominance of the federal interest; and (3) the nature of the subject matter.[49] Recent decisions have suggested a disinclination towards finding this implied intent and have required instead a "clear and manifest purpose" on the part of Congress to maintain exclusive regulatory authority.[50] In *New York State Department of Social Services v. Dublino*,[51] the Court asserted its preference for the specific intent standard: "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so."[52] Such a view would appear to reject the assumption upon which the *Rice* factors are based—that Congress is presumably not concerned with possible preemption of state laws when drafting legislation.[53]

A further development in occupation preemption has been the shift away from a presumption of preemption to a more state-directed perspective.[54] This reflects an increasing tendency of the Court to accord more weight to state interests and to balance these interests against the need for federal regulation. The Court has been

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46. *See supra* text accompanying note 17. *See generally* Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679, 688 (1979). For an examination of the preemption doctrine as applied to state efforts to regulate nuclear power in general, see Murphy & LaPierre, *Nuclear Moratorium Legislation in the States: A Case of Express Preemption*, 76 COLUM. L. REV. 392 (1976).

47. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

48. *Id.*

49. *Id.*

50. *See, e.g.*, New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)); *accord* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). *Compare* Goldstein v. California, 412 U.S. 546, 554-55 (1973).

51. 413 U.S. 405 (1973).

52. *Id.* at 413 (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1959)).

53. *See*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 645-46 (1975).

54. *See, e.g.*, Goldstein v. California, 412 U.S. 546 (1973).

most protective of the states when the statutory scheme is cooperative in nature and details a common purpose with the federal legislation.[55] In general, it appears that the Court is in favor of finding against preemption and inviting congressional intervention in the field.[56]

The second possible basis for a finding of preemption is when the state legislation conflicts with either the provisions or the purpose of a federal law. Although previous courts have asserted that a potential conflict is sufficient, *Florida Lime & Avocado Growers, Inc. v. Paul*[57] established that an actual conflict must exist, and that it must be physically impossible to comply with both regulations. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,[58] the Court concluded that a reconciliation of state and federal laws, whenever possible, is preferable to the complete invalidation of one of the laws due to conflict.

State legislation can also be preempted if it conflicts with the purpose of the federal regulations by providing an obstacle to the accomplishment of congressional objectives.[59] A conflict peripheral to the federal act's main objective is not enough; it must be of substance and have more than an incidental effect on the operation of the act.[60] This requirement reflects the Court's increased attentiveness to state interests, to an extent where protection thereof may outweigh certainty in achievement of federal goals.[61]

Although the Court, in deciding *PG&E*, used the established tests from *Rice* and *Florida Lime,* these standards provided only a framework in which the Court assumed a degree of flexibility. As in previous cases,[62] the Court employed the traditional analytical tools of preemption law, but found no preemption. In questioning whether the field was occupied by Congress, the Court readily found a state-directed presumption because Congress had regulated in an area traditionally occupied by the states. This presumption could only be overcome by a showing of specific intent on the part of Congress to act as sole authority in the field.[63] In so deciding, the Court refused

55. *Dublino*, 413 U.S. at 421.
56. *Goldstein*, 412 U.S. 546.
57. 373 U.S. 132, 142-43 (1963).
58. 414 U.S. 117 (1973).
59. Hines v. Davidowitz, 312 U.S. 52, 66 (1941).
60. *Dublino*, 413 U.S. at 423, n.20.
61. Kewanee Oil Co. v. Bricon Corp., 416 U.S. 470, 491-93 (1974).
62. *See, e.g., Goldstein*, 412 U.S. at 546; *Dublino*, 413 U.S. at 405.
63. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1723 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

to consider whether intent could by inferred by implementing the *Rice* factors, and thus placed a heavy burden on the federal government.

The justices were, however, willing to "infer" the intent of Congress to leave questions concerning the generation of electricity and the economics of power plant construction, to the states.[64] This inference was motivated in part by the customary judicial abhorrence of regulatory vacuums, as well as by careful statutory analysis of sections 271 and 274 of the Atomic Energy Act. The Court was consistent and precise in its interpretation of both state and federal legislative language. Because concern for the economic health of the state was not a safety-related purpose, the Court found California's law protected under section 274(k) of the Atomic Energy Act.[65] Perhaps most significant was the Court's reliance on the avowed motive of the California legislature.[66] If the history of section 25524.2, particularly the influence of Proposition 15, had been given as much attention as that of the Atomic Energy Act, the Court could possibly have reached a contrary result.

This flexibility of analysis was also apparent in the examination of the conflict between state and federal legislation and the finding that no actual conflict existed. The justices were clearly impressed with the California provision that complemented the federal act by expressly leaving the development and choice of waste disposal technologies to the federal government. This attitude echoes the sentiment of *Merrill Lynch*—that reconciliation is to be preferred to harsh invalidation.[67] In the instant case, the Court sought to reconcile section 25524.2 with the recently enacted Nuclear Waste Policy Act of 1982.[68] It accomplished this reconciliation in part because Congress was not explicit in its language and because "it is certainly possible to interpret the Act as directed at existing reactors."[69]

In determining that the federal objective was not frustrated by the California statute, the Court essentially balanced the desirability of an all-out promotion of nuclear energy against the interest held by the state. Finding that promotion was not to be accomplished "at all

64. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724.

65. *Id.* at 1725.

66. *Id.* at 1728.

67. 414 U.S. at 127.

68. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730. *See generally* Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1982).

69. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730.

costs,"[70] the Court implicitly recognized the greater value in the maintenance by a state of its economic welfare.[71] Since Congress had apparently granted the states the authority to protect this interest, the Court emphasized that it was merely affirming already-ensconced powers.[72]

A noteworthy aspect of the opinion is the repeated and explicit invitation to Congress to "rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective."[73] This laissez-faire attitude of the Court towards state laws that might possibly be contrary to congressional designs is illustrative of the trend of the Burger Court in preemption cases in general. Additionally, while it forces Congress to give attention to the states when promulgating legislation, it also underlines the significant power of Congress to redraw at will the line between the states and the federal government.

Because California's legislation was found to be inspired by concern for the economic welfare of the state, rather than the physical welfare of its citizens, section 25524.2 was not preempted by federal legislation. *PG&E* thus informs both Congress and the states that the NRC is not the sole regulator in nuclear power concerns. The states retain authority in those areas they traditionally occupied, including the generation of electricity, and in its accompanying considerations such as need, reliability, economic questions, and presumably any other aspect that is not safety-related in purpose. While this seemingly arms the states with numerous anti-nuclear legislative techniques, such an expectation may be premature. The federal legislature clearly has the power to curtail this authority, either through legislation aimed directly at the states, or by fighting economics with economics. Whichever course Congress chooses, at least the Court will have achieved its dual objective of alerting Congress to the validity of certain state-held powers under existing federal regulation, while protecting state interests in accordance with the letter of this law.

Elizabeth Viney

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70. *Id.* at 1731.
71. *Id.*
72. *Id.* at 1731-32.
73. *Id.* at 1732.

SEARCH AND SEIZURE—*AGUILAR-SPINELLI* TWO-PRONGED TEST ABANDONED—CORROBORATED ANONYMOUS TIP PROVIDED SUFFICIENT PROBABLE CAUSE UNDER TOTALITY OF CIRCUMSTANCES ANALYSIS—*Illinois v. Gates,* 103 S. Ct. 2317 (1983).

On May 3, 1978, the Bloomingdale Police Department[1] received an anonymous, handwritten letter advising them that a local couple, Lance and Sue Gates, were making their living selling drugs.[2] The letter described in some detail how the couple often traveled to Florida separately and then drove back together with the drugs. The letter stated that the couple planned to make another trip to Florida within a few days and would be bringing back "over $100,000 in drugs."[3] In addition, the letter alleged that at present there was "over $100,000 worth of drugs in [the Gates'] basement."[4]

The Chief of Police referred the letter to Detective Charles Mader to pursue the anonymous tip. Working with agents of the Drug Enforcement Administration, state officials, and police officers, Detective Mader learned that Lance Gates flew to Florida on May 5th, met his wife at a motel, and was observed leaving West Palm

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1. Illinois v. Gates, 103 S. Ct. 2317, 2325 (1983). Bloomingdale, Illinois is a suburb of Chicago located in DuPage County.

2. The letter read as follows:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue, his wife, drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs [sic] dealers, who visit their house often.
>
> Lance & Susan Gates
> Greenway
> in Condominiums

103 S. Ct. at 2325.

3. *Id.*

4. *Id.* There was nothing in the letter to indicate how the anonymous author obtained his information.

Beach with his wife in the family car the following morning, presumably headed for Bloomingdale.[5] Based on this information, Detective Mader submitted an affidavit in support of his application for a search warrant, together with a copy of the anonymous letter, to a judge of the Circuit Court of DuPage County, Illinois.[6]

A warrant to search the Gates' residence and automobile was issued. When the Gates returned to their home in Bloomingdale, approximately twenty hours after they had been observed leaving West Palm Beach, the waiting police searched the car and the house pursuant to the warrant. The police found approximately 350 pounds of marijuana in the trunk of the car and discovered more marijuana, weapons, and other contraband in the Gates' home.[7]

Defendant's motion to quash the arrest and to suppress the evidence seized by the police was granted on the basis that there was no showing that the author of the anonymous letter had obtained the information in a reliable manner. Thus, the warrant was invalid under the requirements set forth in the Supreme Court's decisions in *Aguilar v. Texas*[8] and *Spinelli v. United States.*[9] The state appealed, but the decision was affirmed by both the Illinois Appellate Court[10] and the Supreme Court of Illinois.[11]

The United States Supreme Court granted certiorari to consider whether the respondents' rights under the fourth amendment had been violated by a search conducted pursuant to a warrant issued on

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5. *Id.* at 2325-26. Detective Mader found out from the Illinois Secretary of State that an Illinois driver's license had been issued to one Lance Gates with a Bloomingdale address. Detective Mader obtained a more recent address through a confidential informant from certain financial records, and from a police officer assigned to O'Hare Airport, he learned that a "L. Gates" had made a reservation for an airline flight to Palm Beach, Florida, on May 5. Surveillance of the flight by agents of the Drug Enforcement Administration confirmed that Gates had boarded the flight in Chicago and upon arrival in Florida proceeded by taxi to a nearby motel, where he went to a room registered to a Susan Gates. At 7:00 a.m. the next day, according to DEA agents, Gates and an "unidentified woman" left the motel in a Mercury bearing Illinois license plates and drove northbound "on an interstate frequently used by travelers to the Chicago area." A check of the vehicle license number on the Mercury revealed that the license was registered to a Hornet station wagon owned by the Gates. *Id.*

6. *Id.* at 2326.

7. *Id.*

8. 378 U.S. 108 (1964).

9. 393 U.S. 410 (1969). The two-pronged test of *Aguilar* and *Spinelli*: "Although an affidavit may be based on hearsay information . . . the magistrate must be informed of some of the *underlying circumstances* from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was *'credible' or his information 'reliable.'* " *Aguilar*, 378 U.S. at 114; *Spinelli*, 393 U.S. at 413.

10. People v. Gates, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980).

11. People v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1981).

the basis of a partially corroborated, anonymous informant's tip.[12] After hearing oral arguments on this issue, the Court requested the parties to return and address the additional question of whether the exclusionary rule should be modified by allowing a good-faith exception.[13]

In a six-three decision,[14] the Court ruled that: (1) the exclusionary rule modification issue would not be considered, since it had not been "pressed or passed upon" in the courts below;[15] (2) the "two-pronged test" developed under *Aguilar* and *Spinelli* would be abandoned in favor of a "totality of circumstances" approach;[16] and (3) under the "totality of the circumstances" approach, the corroboration of the details in the anonymous letter was sufficient to provide the judge with a "substantial basis" for concluding that probable cause to search the respondents' vehicle and residence existed.[17]

The Court announced that it would not consider the issue of whether the exclusionary rule should be modified since the issue had not been presented to the Illinois courts.[18] Justice Rehnquist noted that at every level in the Illinois judicial system the defendants had expressly claimed that the fourth amendment had been violated by the acts of the Illinois police, and therefore the evidence seized should be excluded. However, while the state had challenged this claim, it had never raised or addressed the issue of whether the exclusionary rule should be modified.[19]

The confusion stemmed, in part, from the Court's inability to

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12. 103 S. Ct. at 2321.

13. 103 S. Ct. 436 (1982) (*mem.*). The Court suggested that the modification of the exclusionary rule established in Weeks v. United States, 232 U.S. 383 (1914), and later applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961), would be to not exclude evidence obtained in a reasonable belief that the search and seizure was not in violation of the fourth amendment. 103 S. Ct. 436.

14. Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices Blackmun, Powell, and O'Connor joined. Justice White filed an opinion concurring with the judgment; Justice Brennan filed a dissenting opinion in which Justice Marshall joined; Justice Stevens filed a dissenting opinion in which Justice Brennan joined. 103 S. Ct. at 2317.

15. 103 S. Ct. at 2321 (citing McGoldrick v. Compagnie Generale, 309 U.S. 430, 435-36 (1940). "But it is . . . the settled practice of this Court . . . that it is only in exceptional cases . . . that it considers questions . . . not pressed or passed upon in the courts below." *Id.*

16. *See infra* note 22.

17. 103 S. Ct. at 2334 (citing Jones v. United States, 362 U.S. 257, 269 (1960)).

18. 103 S. Ct. at 2321. This was the argument of the dissent to the order of the Court on November 29, 1982, 103 S. Ct. 436, (Stevens, J., joined by Brennan, J. and Marshall, J., dissenting). Justice Stevens stated that it was the "Court's settled practice of not permitting a party to advance a ground for reversal that was not presented below." 103 S. Ct. at 2321.

19. *Id.* at 2323.

determine whether or not the exclusionary rule modification issue had been clearly "pressed or passed upon" below. The Court admitted that it could not clearly distinguish whether the issue would involve an enlargement of an issue already presented or an entirely new question.[20] However, the Court has since heard two cases involving the issue of whether the exclusionary rule should be modified by a good faith exception.[21]

The Court next addressed the issue of whether the Illinois courts had applied the proper test in determining whether the search warrant was valid. The Illinois courts had ruled that the affidavit submitted by the Bloomingdale police had failed to meet the "two-pronged test" derived from the United States Supreme Court's decisions in *Aguilar* and *Spinelli.*[22] The United States Supreme Court in *Gates* concluded that the "two-pronged test" should be abandoned in favor of the more practical "totality of the circumstances" approach.[23] The issue addressed in *Aguilar* and *Spinelli* was whether the facts and circumstances presented in an affidavit based on an informant's tip were sufficient to support a finding of probable cause to issue a search warrant, in accordance with the requirements of the fourth amendment.[24] In *Aguilar,* the Court held that an affidavit based on the hearsay information provided by an informant's tip must apprise the magistrate of the informant's basis of knowledge,

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20. *Id.* at 2322. The issue is whether the facts in *Gates* would be a sufficient basis on which to establish a good faith exception to the exclusionary rule. Since the state had not argued this issue and set forth facts to justify their position, the Court was left with insufficient facts on which to base a ruling. To rule otherwise would have involved the "framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances" with the consequent threat of "untoward practical ramifications." *Id.* at 2324-25.

21. On July 5, 1984, the Supreme Court decided the following cases: Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Leon, 104 S. Ct. 3405 (1984) (both cases holding that the exclusionary rule should not be applied when evidence is obtained by officers acting in good faith reliance on a search warrant issued by a detached and neutral magsitrate but subsequently determined to be invalid).

22. 103 S. Ct. at 2327. The "veracity" prong of *Aguilar*, 378 U.S. 108, could not be satisfied since the letter provided neither a basis for concluding that the informant was credible, nor an indication of the informant's "basis of knowledge." The Illinois court understood *Spinelli*, 393 U.S. 410, to permit an inference of reliability if the informant provided sufficient detail to support such an inference. The Illinois courts concluded that there had been no showing of probable cause. 103 S.Ct. at 2327.

23. *Id.* at 2332.

24. The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. art. IV.

and the informant must be credible.[25] In *Spinelli,* the Court ruled that if the informant's tip failed to meet either the "basis of knowledge" or the "veracity" test of *Aguilar,* probable cause could still be established by independent corroboration of the details to the extent that a magistrate could infer that the informant had obtained his information in a reliable manner.[26]

Moreover, the *Spinelli* Court stated that the informant's tip should contain sufficient detail so that in the absence of a "basis of knowledge" statement, the magistrate could rely on something more substantial than a casual underworld rumor or a general accusation.[27] The *Spinelli* Court cited *Draper v. United States*[28] as a "suitable benchmark" for determining the sufficiency of detail.[29]

The Court in *Gates* agreed with the Illinois Supreme Court that an informant's veracity, reliability and basis of knowledge were all highly relevant. However, the Court declared that these elements were not separate and independent requirements to be rigidly applied. Rather, these elements were closely intertwined issues to be considered in making a common-sense, practical determination whether there was probable cause to justify the issuance of a search warrant.[30]

Thus, the Court attempted to steer a narrow course by providing adequate guidance. The Court further attempted to avoid a perceived tendency of lower courts to seize upon specific terms and ignore the fact that probable cause is a "fluid concept" which cannot be reduced to a concise set of legal rules.[31] Citing Justice Rutledge's opinion in *Brinegar v. United States,*[32] the Court stated that probable cause dealt with probabilities and factual and practical considerations, not merely technical considerations.[33]

As a result, the Court reaffirmed the totality of circumstances

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25. 378 U.S. at 113-14.

26. 393 U.S. at 417-18.

27. *Id.* at 416 *quoted in Illinois v. Gates,* 103 S. Ct. at 2327 n.3.

28. 358 U.S. 307 (1959), *cited with approval in Gates,* 103 S. Ct. at 2334.

29. 393 U.S. at 416. In *Draper,* a reliable informant had given police an extremely accurate and detailed description of defendant's predicted activities, manner of dress, and the fact he would be carrying narcotics. Police observed the defendant, verified the informant's description, and then searched the defendant without a warrant. Defendant's motion to suppress was denied. 358 U.S. 307.

30. 103 S. Ct. at 2327-28.

31. *Id.* at 2328-29 & n.6.

32. 338 U.S. 160 (1949) (federal officers had probable cause to stop and search, without a warrant, an automobile driven by someone known to be engaged in the unlawful trade of transporting and selling liquor).

33. 103 S. Ct. at 2328 (quoting *Brinegar,* 338 U.S. at 175).

approach which it reasoned was more consistent with the traditional analysis in making probable cause determinations.[34] The Court further suggested that the task of the issuing magistrate was simply to make a practical, common-sense determination, based on all of the circumstances set forth in the affidavit, that there was a "fair probability" that a search would reveal evidence of a crime.[35] The Court stated that the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.[36]

The third issue considered by the Court was whether a partially corroborated tip from an anonymous informant provided a substantial basis for finding probable cause to issue a search warrant. The Supreme Court had never before considered whether a tip from an anonymous informant could be used by police to establish probable cause.[37] Unlike tips provided by confidential informants whose identities are known to police and whose credibility can be determined in part by previous experience, the veracity of anonymous informants is unknown and undeterminable.[38]

Applying the totality of the circumstances analysis, the Court found that probable cause for a warrant authorizing the search of the Gates' vehicle and residence was established by the anonymous letter which had been partially corroborated by Detective Mader's efforts.[39] The Court reasoned that the showing of probable cause in *Gates* was as compelling as that in *Draper v. United States,*[40] which the Court cited as the "classic case on the value of corroborative efforts of police officials."[41]

The Court noted that an affidavit relying on hearsay is not necessarily insufficient as long as there is a substantial basis for crediting the information.[42] The information must be reasonably corrobo-

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34. 103 S. Ct. at 2332. As examples of this "traditional analysis," the Court cites Jones v. United States, 362 U.S. 257, 271 (1960) (duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed); United States v. Ventresca, 380 U.S. 102, 109 (1965) (courts should not interpret affidavit in a technical, rather than a common-sense manner); and Brinegar v. United States, 338 U.S. 160, 176 (1949) (the rule of probable cause is a practical, nontechnical conception).

35. 103 S. Ct. at 2332.

36. *Id.* (citing *Jones v. United States*, 362 U.S. at 271).

37. Silverberg, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in Illinois v. Gates*, 20 AM. CRIM. L. REV. 99, 101 (1982).

38. 103 S. Ct. at 2332.

39. *Id.* at 2334-35.

40. *Id.* at 2334; *Draper*, 358 U.S. 307.

41. 103 S. Ct. at 2334.

42. *Id.* at 2335 (citing *Jones*, 362 U.S. at 269, 271). Although hearsay is generally not

rated by the police,[43] and the informant's credibility must be subject to the scrutiny of the court.[44] Thus, the Court reasoned that while the facts obtained by Detective Mader's independent investigation, standing alone, suggested that the Gates were involved in drug trafficking, their true value was in indicating that the informant's other assertions were more likely to be true.[45] Although the Court admitted that this degree of corroboration might have failed to satisfy the veracity prong of *Spinelli,* it was sufficient to make a practical, common-sense determination of probable cause.[46] In addition, the Court noted that the anonymous letter contained detailed facts and conditions neither easily obtained nor easily predicted.[47]

One commentator has suggested that anonymous tips can provide a sufficient basis for finding probable cause if the tips are "specific" and the corroborated details are "incriminating," as opposed to "innocent."[48] The Illinois Supreme Court found that the verification of details in the anonymous letter was simply the "corroboration of innocent activity."[49]

The United States Supreme Court, however, dismissed the necessity of making such a distinction, declaring that the relevant inquiry was not whether the particular conduct was "innocent" or "guilty," but rather, the degree of suspicion aroused by particular types of non-criminal acts.[50] The Court reasoned that innocent behavior frequently will be sufficient for a showing of probable cause and, in the interest of citizen's security, a more rigorous definition of probable cause should not be imposed.[51] The Court concluded, therefore, that anonymous tips, containing a range of details not easily obtained, which were "reasonably corroborated," and which aroused

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considered legally competent evidence in a criminal trial, *Draper*, 358 U.S. 307, 311, there is a difference between the amount of proof required to prove guilt in a criminal case and the amount required to show probable cause for arrest or search. Brinegar v. United States, 338 U.S. 160, 173 (1949).

43. 103 S. Ct. at 2334 (quoting *Jones*, 362 U.S. at 269).

44. 103 S. Ct. at 2332.

45. *Id.* at 2334-35. Interestingly, the independent investigation only revealed that the Gates had gone to and then departed from West Palm Beach, Florida. No drugs or transactions were observed. Still, the Court noted that "[i]n addition to being a popular vacation site, Florida is well-known as a source of narcotics and other illegal drugs." The Court admitted that this activity was "as suggestive of a pre-arranged drug run, as it is of an ordinary vacation trip." *Id.*

46. *Id.* at 2335.

47. *Id.*

48. Silverberg, *supra* note 37, at 124 n.233.

49. 103 S. Ct. at 2335 n.13.

50. *Id.*

51. *Id.*

a sufficient "degree of suspicion," provided a substantial basis for determining probable cause.[52]

Justice White concurred in the judgment of the Court, but stated that the Court should and could have addressed the exclusionary rule and good faith issue. Justice White explained that he would have reached the conclusion that the search was valid using the *Aguilar-Spinelli* approach.[53] In a lengthy statement, Justice White reasoned that the exclusionary rule issue was properly before the Court and disagreed with the majority's interpretation of the statute conferring jurisdiction in the case.[54] Further, he stated that the record was adequate to determine whether the Bloomingdale Police acted in good faith and that any deficiencies could be resolved on remand.[55] Justice White noted that the exclusionary rule was adopted as a judicial remedy and cautioned that, at times, its application may operate to discourage reasonable and proper investigative actions by police.[56]

The Court's decision to forego considering whether the exclusionary rule should be modified by a good faith exception undoubtedly surprised many who had anticipated a landmark ruling on this issue.[57] Equally surprising, however, was the Court's decision to abandon the twenty year-old, two-pronged test of *Aguilar-Spinelli* and to adopt a totality of circumstances approach to determine whether there was sufficient probable cause to issue a search warrant.[58] Although the Court did not consider the exclusionary rule modification issue, its adoption of the totality of circumstances approach will have significant impact on the application of the rule.

The Court noted that the fourth amendment indicates a "strong

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52. *Id.* at 2334-36.

53. *Id.* at 2347 (White, J., concurring).

54. *Id.* at 2336-37 (White, J., concurring). Justice White noted that in determining whether § 1257(3) prevented the Court from deciding federal constitutional claims raised for the first time at the Supreme Court's level, it was well established that no particular form of words or phrases is essential. The claim of invalidity must simply be brought to the attention of the state court with "fair precision" and in due time.

55. *Id.* at 2339 (White, J., concurring).

56. *Id.* at 2342 (White, J., concurring).

57. The Supreme Court has subsequently addressed the good faith issue in two cases involving a search warrant later determined to be invalid. Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Leon, 104 S. Ct. 3405 (1984). *See supra* note 21, *infra* notes and accompanying text.

58. *See generally*, Winter, *The Exclusionary Rule*, 69 A.B.A.J. 137 (1983); Denniston, *Exclusionary Rule Reconsidered*, CAL. LAW., (Apr. 1983) at 40. Both articles predicted that the two-pronged test would remain intact following *Gates*. Since the anonymous letter in *Gates* would fail to satisfy the test, the articles suggested that the Court would use the good-faith exception to compensate for the deficiency.

preference" for searches conducted pursuant to a search warrant.[59] By abandoning the *Aguilar-Spinelli* test in favor of the expanded totality of circumstances analysis, the Court sought to grant local magistrates greater flexibility in determining whether or not to issue a warrant.[60]

The exclusionary rule is invoked by a successful motion to suppress evidence obtained in violation of the fourth amendment's prohibition against unreasonable searches and seizures. By granting magistrates greater discretion to determine whether there is sufficient probable cause to issue a warrant, the Court intended to increase the likelihood that law enforcement officers will obtain a warrant prior to conducting searches.[61] Since searches conducted pursuant to a warrant can comport with fourth amendment requirements, the ruling in *Gates* will make motions to suppress more difficult to sustain.[62] In addition, the Court emphasized that reviewing courts should pay great deference to the magistrate's determination of probable cause,[63] and not subject the sufficiency of the affidavit to the scrutiny of a de novo review.[64]

The controversy surrounding the exclusionary rule centers on the issue of whether the rule serves to deter police from violating the fourth amendment,[65] or whether it instead serves to impede the task of law enforcement.[66] The issue has been the subject of substantial debate; however, there is little empirical data.[67]

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59. 103 S. Ct. at 2331 & n.10.

60. 103 S. Ct. at 2332.

61. *Id.* at 2331. The Court expressed concern that if affidavits were subjected to tough scrutiny, "police might well resort to warrantless searches" in the hope that consent or some other exception might develop. *Id.*

62. *Id.* The Court noted that "the possession of a warrant . . . greatly reduces the perception of unlawful or intrusive police conduct . . . ."

63. *Id.* (citing *Spinelli,* 393 U.S. at 419).

64. 103 S. Ct. at 2331.

65. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 346 (1982) ("[E]xclusion occurs for the purpose . . . of 'removing the incentive' to disregard the fourth amendment so that 'the frequency of future violations will decrease'."). *Id.* (quoting Stone v. Powell, 428 U.S. 465, 492 (1976)).

66. 103 S. Ct. at 2331; *see also id.* at 2330 n.9.

67. *See Exclusionary Rule Reconsidered, supra* note 57, at 45-46. "[N]o empirical researcher . . . has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ." *Id.* (quoting the Court in United States v. Janis, 428 U.S. 433, 452 n.22 (1976)).

The article describes several studies, including one published in 1979 by the General Accounting Office, that revealed that fourth amendment problems were the primary reason for failure to prosecute in less than one half of one percent of unprosecuted federal cases. On the other hand, Justice White cites similar studies in support of his contention that the exclusion-

While addressing the issue of whether an anonymous informant's tip can provide a substantial basis for determining probable cause, the Court settled some questions, but raised others. The majority emphasized that although the *Aguilar-Spinelli* two-pronged test has been abandoned, an informant's "basis of knowledge," "veracity," and "reliability" are still relevant considerations.[68] It may be assumed that a particular set of facts that would have satisfied the *Aguilar-Spinelli* test would clearly meet the *Gates* totality of circumstances test. The question remains, however, whether and to what degree lower courts will uniformly apply the new doctrine.

The significance of the Court's decision in *Gates* may have been temporarily overshadowed by the Court's failure to address the exclusionary rule modification issue. By rejecting the "two-pronged test" established by *Aguilar-Spinelli* in favor of a totality of circumstances analysis, and declaring that the issuing magistrate's decision was not to be subject to de novo scrutiny by reviewing courts, the *Gates* decision further reduced the impact of the exclusionary rule and allowed the Court to reach the same result as if it had adopted a good faith exception.[69]

The Supreme Court has subsequently addressed the exclusionary rule issue if the police officers acted in good faith,[70] and has held that if officers demonstrate a *reasonable*, good faith reliance on a search warrant that is later determined to be invalid, the exclusionary rule will not be applied. The Court concluded that the "marginal or nonexistent benefits produced by suppressing evidence ob-

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ary rule impedes the task of law enforcement. 103 S. Ct. at 2342 n.13 (White, J., concurring). Recognizing the conflict in the studies, the article suggests that since there appears to be no reliable information available, the Supreme Court could reasonably conclude that the rule could be modified with no real harm to fourth amendment rights. *Exclusionary Rule Reconsidered, supra* note 57, at 46.

68. 103 S. Ct. at 2327.

69. In *Massachusetts v. Upton*, the Supreme Court reaffirmed its adoption of the totality of the circumstances analysis, declaring that the two-pronged test had been *explicitly* rejected as "hypertechnical" and "divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' " Massachusetts v. Upton, 104 S.Ct. 2085, 2087 (1984) (citing Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302 (1949)). As in *Gates*, *Upton* involved an informant who had wished to remain anonymous. The Court observed that although none of the single pieces of evidence, considered separately, was conclusive, they "fit neatly together and, so viewed, support[ed] the magistrate's determination that there was a 'fair probability that contraband or evidence of a crime' would be found . . . ." 104 S.Ct. at 2088. The Court thus reaffirmed its acceptance of anonymous informants' tips if they were reasonably corroborated to provide a total showing of probable cause.

70. United States v. Leon, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard, 104 S.Ct. 3424 (1984).

tained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[71]

Because both *Leon* and *Sheppard* involved warrants, the question may be raised as to whether the Court is likely to apply the *Gates* analysis to warrantless searches. In *United States v. Ross*,[72] the Court held that a search conducted pursuant to an exception to the warrant requirement is not unreasonable if the underlying facts would have justified the issuance of a warrant, even though a warrant was not obtained.[73] The question may also be raised as to whether the Court will extend the good faith exception spelled out in *Leon* and *Ross* to warrantless searches.

Taken together, *Ross*, *Gates*, and *Leon* would seem to provide a basis for arguing that the exclusionary rule should not be applied if the officer involved had a good faith belief under the totality of circumstances that the underlying facts would have justified the issuance of a warrant. If the warrantless search was conducted pursuant to a tip from an anonymous informant, as in *Gates*, reasonable corroboration and the application of these three cases may be found sufficient to justify the search.

Even if the Court limits application of the good faith exception to only searches conducted with warrants, the adoption of the totality of the circumstances analysis in *Gates* signifies the Court's continuing intent to lessen the severity of the exclusionary rule.

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71. *Leon*, 104 S.Ct. at 3421.

72. 456 U.S. 798 (1982). Detectives, acting on a reliable informant's tip that a certain individual was selling narcotics from a certain car and that the narcotics were being kept in the trunk of the car, stopped and searched the car and trunk and discovered the narcotics in the trunk.

73. *Id.* at 809.

CRUEL OR UNUSUAL PUNISHMENT—MANDATORY REGISTRATION OF MISDEMEANANT SEX OFFENDERS CONVICTED UNDER DISORDERLY CONDUCT STATUTE VIOLATED CRUEL OR UNUSUAL PUNISHMENT PROVISION OF CALIFORNIA CONSTITUTION—*In re Reed,* 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

On April 11, 1979, Allen Eugene Reed, an adult homosexual, entered a public restroom, greeted an undercover vice officer and briefly masturbated in the officer's presence.[1] Reed was arrested and charged with soliciting "lewd and dissolute conduct" from an undercover vice officer in a public restroom in violation of Penal Code section 647(a).[2]

In a jury trial on January 23, 1980, the defendant was convicted of a section 647(a) violation.[3] Reed was given a suspended sentence, fined $630, and put on a twenty-four month probation. He was also informed of his duty to register as a sex offender under Penal Code section 290.[4]

Reed appealed the criminal conviction,[5] and filed a writ of habeas corpus. His writ of habeas corpus was denied by both the trial court[6] and the court of appeals.[7] Reed then filed a new petition for a writ of habeas corpus with the Supreme Court of California. In *In re Reed,* the California Supreme Court overturned the lower

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1. *In re* Reed, 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

2. CAL. PENAL CODE § 647(a) (Deering 1983) provides: "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor. (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any place open to the public or exposed to public view."

Unless otherwise indicated, further statutory references are to the Penal Code.

3. People v. Reed, No. M-9186 (Newhall Dist. Los Angeles Mun. Ct., Jan. 23, 1980).

4. CAL. PENAL CODE § 290 (Deering 1983); *see infra* note 14.

5. People v. Reed, 114 Cal. App. 3d Supp. 1, 170 Cal. Rptr. 770 (1980).

6. *In re* the Application of Thomas F. Coleman, No. 000 095, (Appellate Department, Los Angeles Super. Ct., April 7, 1981).

7. The unpublished court of appeals decision denied the writ of habeas corpus based on the doctrine of res judicata. The California Supreme Court in its decision noted that the doctrines of law of the case and res judicata did not bar petitioner from relitigating claims rejected by courts below.

> It is axiomatic that habeas corpus is an extraordinary and collateral action that lies to review a claim of denial of substantive constitutional rights that may have been affected by the integrity of the factfinding process . . . or a claim that attacks not the judgment itself, but the legality of the punishment.

33 Cal. 3d at 918 n.2, 663 P.2d at 216 n.2, 191 Cal. Rptr. at 658 n.2 (citations omitted).

court and held that mandatory registration under section 290 for sex offenders convicted of section 647(a) misdemeanors violated article I, section 17 of the California Constitution and was void as cruel or unusual punishment. As part of the court's decision, the appellant's probation conditions were ordered changed to eliminate the section 290 registration, and the writ of habeas corpus was finally denied.[8]

In *Reed,* the petitioner did not challenge the validity of his conviction under section 647(a), nor the entire validity of the requirement of section 290 registration of sex offenders. Instead, Reed contended that lifelong section 290 registration for a section 647(a) misdemeanant constituted "cruel or unusual punishment and violate[d] the equal protection clause, infringe[d] on petitioner's rights to privacy and interstate travel, and denie[d] [petitioner] due process of law."[9] However, the *Reed* court rested its decision entirely on the constitutional ground prohibiting cruel or unusual punishment.[10]

The *Reed* court first examined the history of both section 647(a)[11] and section 290. Justice Mosk, writing for the majority, cited *Pryor v. Municipal Court,*[12] the major opinion defining appli-

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8. *Id.* at 926, 663 P.2d at 223, 191 Cal. Rptr. at 665-66. A California Supreme Court rehearing was denied on July 25, 1983.

9. *Id.* at 918, 663 P.2d at 216-17, 191 Cal. Rptr. at 658-59.

10. *Reed* invoked California's constitutional provision instead of the eighth amendment. There is a substantive difference between the California provision and the eighth amendment. California's constitution bans cruel *or* unusual punishment, while the eighth amendment forbids cruel *and* unusual punishment. People v. Anderson, 6 Cal. 3d 628, 636, 493 P.2d 880, 885, 100 Cal. Rptr. 152, 157 (1972).

See also Falk, *The State Constitution: A More Than "Adequate" Non-federal Ground,* 61 CALIF. L. REV. 273 (1973).

11. The 1955 amended version of section 647(5) provided that "every lewd or dissolute person . . . [is] a vagrant." 1955 Cal. Stat. ch. 169, section 2 at 638-39 (repealed 1961). Since this version punished people for their status and not their conduct, the California legislature enacted section 647(a) to replace section 647(5). *See* People v. Allington, 103 Cal. App. 2d 919-20, 229 P.2d 495, 500-01 (1951). This change made § 647(a) California's first non-commercial sexual solicitation prohibition. *See* Note, *Pryor v. Municipal Court: California's Narrowing Definition of Solicitation for Public Lewd Conduct,* 32 HASTINGS L. J. 461, 464-72 (1980).

12. 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979).

In *Pryor* the court held the phrase "lewd and dissolute" impermissibly vague and provided the following construction for the section:

> The terms "lewd" and "dissolute" in this section are synonymous and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by this conduct.

Id. at 256-57, 599 P.2d at 647, 158 Cal. Rptr. at 341.

The *Pryor* court's rationale for this construction of § 647(a) was not explained. The court did not disclose why it decided that the enumerated acts are lewd, but recognized that the underlying purpose of § 647(a) is to protect the unwilling from being forced to view offensive

cation of section 647(a), and asserted that the *Pryor* instruction was the current and proper interpretation of section 647(a).[13]

Section 290 describes the mandatory registration procedure which automatically follows from convictions for certain sex-related crimes.[14] The court emphasized that the purpose of section 290 registration is to assure that persons convicted of the crimes enumerated in the statute should be readily available for police surveillance at all times because the legislature deems them to be likely recidivists.[15]

The court then addressed the central issue of the case, does section 290 mandatory sex offender registration of section 647(a) misdemeanants violate the constitutional prohibition against cruel or unusual punishment found in article I, section 17 of the California Constitution?[16]

The majority first discussed whether section 290 registration is a form of punishment within the meaning of this constitutional pro-

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conduct. *Id.* at 255, 599 P.2d at 646, 158 Cal. Rptr. at 340.

13. 33 Cal. 3d at 918, 663 P.2d at 217, 191 Cal. Rptr. at 659.

14. Section 290 registration is required for the following sex-related crimes: § 647(d) (loitering in or about public restrooms); § 266 (procurring females under the age of 18 for prostitution); § 272 (contribution to the delinquency of a minor); § 288 (lewd and lascivious conduct with a child under the age of 14); § 288(a) (oral copulation with a minor); § 314(1) (indecent exposure); § 285 (incest); § 286 (sodomy); § 220 (assault with the intent to commit rape, sodomy, oral copulation, etc.); and § 216 (forcible rape).

The registration procedure mandated in § 290 requires citizens convicted of the above listed offenses to register within ten days with the chief of police in each city where they reside. The offender must provide a signed informational statement, fingerprints, and a photograph which are sent to the California Department of Justice. Failure to comply is a misdemeanor. Conviction under the enumerated offenses automatically imposes a lifelong registration obligation. 33 Cal. 3d at 919, 663 P.2d at 217, 191 Cal. Rptr. at 659.

Pursuant to § 1203.4, an offender may be released from this registration requirement upon compliance with the statutory conditions. No procedure exists, however, to expunge the initial registration. *Id.*; Kelly v. Municipal Court, 160 Cal. App. 2d 38, 41, 324 P.2d 990, 992 (1958).

Other sex-related crimes exist for which registration is not required: § 311.4 (child pornography); § 261.5 (statutory rape); § 281 (bigamy); § 286.5 (bestiality); § 273g (lewdness in the presence of a child); § 266d - i (pimping and pandering); and § 647(b) (soliciting and engaging in acts of prostitution).

15. 33 Cal. 3d at 918, 663 P.2d at 217, 191 Cal. Rptr. at 659 (quoting Barrows v. Municipal Court, 1 Cal. 3d 821, 825-26, 464 P.2d 483, 485-86, 83 Cal. Rptr. 819, 821-22 (1970)).

See also In re Smith, 7 Cal. 3d 362, 367, 497 P.2d 807, 811, 102 Cal. Rptr. 335, 339 (1972). The court reasoned that petitioners who sunbathed naked on an isolated stretch of public beach did not require the constant section 290 police surveillance that would result automatically from a section 314.1 violation. The court held, therefore, that their actions were not in violation of section 314.1.

16. 33 Cal. 3d at 920-21, 663 P.2d at 218-19, 191 Cal. Rptr. at 660-61.

vision.[17] Rejecting the respondent's distinction between "penalty" as found in section 1203.4[18] and "punishment" as found in the constitutional provision, the *Reed* court noted that these terms do not represent two legally different types of punishment. Article I, section 17 of the California Constitution gives standards for measuring the constitutionality of all penal legislation. The court stated that all statutory penalties, including those addressed by section 1203.4, must meet these same constitutional standards.[19]

In determining that section 290 registration was a form of punishment within the constitutional meaning, the justices considered the multiple factors listed in *Kennedy v. Mendoza-Martinez.*[20] The enumerated *Mendoza-Martinez* factors include:

> 1) Whether the challenged sanction involves an affirmative disability or restraint;
> 2) Whether the challenged sanction has historically been regarded as a punishment;
> 3) Whether the sanction comes into play only on a finding of scienter;
> 4) Whether operation of the sanction will promote the traditional aims of punishment—retribution and deterrence;
> 5) Whether the behavior to which the sanction applies is already a crime;
> 6) Whether an alternative purpose exists to which the challenged sanction may rationally be connected; and
> 7) Whether the sanction appears excessive in relation to the alternative purpose assigned to it.

The court acknowledged that all of the factors are important, but that an inquiry into each may lead in different directions. Thus, the factors are to be considered cumulatively as well as individually. They are, the court remarked, "a number of relevant considerations," and not a "checklist of absolute requirements."[21]

In applying the first prong of the *Mendoza-Martinez* test, the

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17. *See supra* note 10.

18. CAL. PENAL CODE § 1203.4, in relevant part provides that if a defendant has fulfilled the conditions of his probation, a court may, in its discretion and in the interests of justice, dismiss the accusation or information against the defendant and relieve him from "all penalties and disabilities" resulting from the offense for which he has been convicted.

19. 33 Cal. 3d at 919 n.4, 663 P.2d at 218 n.4, 191 Cal. Rptr. at 660 n.4.

20. 372 U.S. 144, 168-69 (1963). This potpourri of factors includes many diverse judicial approaches to determine what is punishment. *See* Navasky, *Deportation as Punishment,* 27 U. KAN. CITY L. REV. 213 (1959); Note, *Toward a Constitutional Definition of Punishment,* 80 COLUM. L. REV. 1667 (1980).

21. 33 Cal. 3d at 921, 663 P.2d at 219, 191 Cal. Rptr. at 661.

court found that section 290 mandatory registration is an "affirmative disability or restraint."[22] In reviewing California cases dealing with the registration statute, the court focused on the vocabulary used to describe section 290 registration in previous case law.[23] The *Reed* court reasoned that because past California opinions used words suggestive of punishment, restraint, and disability in referring to section 290, the registration must indeed be a punishment.[24]

Secondly, the majority observed that in as much as the purpose of sex offender registration was to assure that persons convicted of certain crimes are readily available for police surveillance, registration could submit offenders to "command performance at lineups."[25] Thus, the effect of the registration was an affirmative disability and restraint.[26]

The court further emphasized the affirmative disability imposed

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22. *Id.* at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660.

It should be noted that the *Reed* court in finding § 290 an "affirmative disability or restraint," did not deal with the effect which the registration will have on the *individual petitioner* in his particular circumstances. Instead, the court generalized, taking notice only of the hardship likely to be experienced by all or most § 290 registrants. The court's analysis omitted any distinguishing personal circumstances which would intensify or lessen this hardship for Reed in particular. In doing so, the *Reed* court remained as objective as possible and established a generalized model for lower courts to use in evaluating the first *Mendoza-Martinez* factor.

23. In Kelly v. Municipal Court, 160 Cal. App. 2d 38, 324 P.2d 990 (1958), the registration was described as one of the "penalties or disabilities" imposed on certain convicted misdemeanants. *Id.* at 41, 324 P.2d at 992 (1958). Here, registration under § 290 was included under § 1203.4 as one of the "penalties or disabilities" resulting from the offense or crime for which the petitioner had been convicted.

In *In re* Birch, the registration was termed an "ignominious badge carried by the convicted sex offender for a lifetime." 10 Cal. 3d 314, 321-22, 515 P.2d 12, 15, 110 Cal. Rptr. 212, 216-17 (1973). In *Birch* the court vacated a § 647(a) conviction to which the petitioner had pleaded guilty. The record did not indicate that the defendant/petitioner had been informed either of his right to counsel or the fact that his conviction would require him to register under § 290 for a lifetime as a sex offender.

24. 33 Cal. 3d at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660.

25. *Id.* at 921, 663 P.2d at 218, 191 Cal. Rptr. at 660 (quoting Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice"*, 21 U.C.L.A. L. REV. 1191, 1222 (1974)). Justice Richardson's dissent contests this notion stating that the majority's scenario of command performance lineups is "frightening but fictional. . . . Nothing contained in § 290 requires that registrants cooperate with police or attend compulsory police lineups or otherwise waive their constitutional rights." *Id.* at 927-28, 663 P.2d at 224, 191 Cal. Rptr. 666. He suggests that any "compulsion or restraint" experienced by § 290 registrants is due not to the registration, but to other factors such as a prior probation condition or the existence of probable cause. *Id.*

It could be argued, however, that registration itself, together with the legislature's recidivism assumption, may constitute sufficient probable cause for a fictional scenario like the one imagined by the majority.

26. *Id.* at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660.

by the registration by noting that once initial registration is completed, no legal mechanism exists to expunge the original registration.[27] Section 1203.4 may be invoked to terminate the requirement of future registration, but the initial registration is a complete and unalterable part of the police records in the city where the offense occurs.[28]

In examining the second *Mendoza-Martinez* factor, the *Reed* court found that the sex offender registration "may not have historically been regarded as punishment," but that this fact was not dispositive.[29] Relying on *Trop v. Dulles,*[30] the court denied that the government had the power to devise any punishment within its imagination, and asserted that "any technique outside the bounds of traditional penalties is constitutionally suspect."[31] The *Reed* court asserted that the fact that a sanction does not fall within the historical definition of punishment indicates not only that the sanction *is* punishment, but that it is *constitutionally suspect* punishment.[32]

The *Reed* court quickly found that section 290 registration satisfied the third, fourth and fifth *Mendoza-Martinez* factors. The re-

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27. *Id.*

28. *Id.* at 920-21, 663 P.2d at 218-19, 191 Cal. Rptr. at 660-61; *see generally supra* notes 14 and 23 and accompanying text.

Justice Richardson's dissent minimizes the burden of registration stating that § 290 registration information is only available to police officials and "kept *confidential*" with "*no exceptions for employers.*" *Id.* at 928, 663 P.2d at 224, 191 Cal. Rptr. at 666 (emphasis in original).

29. *Id.* at 921, 663 P.2d at 219, 191 Cal. Rptr. at 661.

The fact that sex offender registration has not historically been regarded as punishment should reflect more on the inadequacy of the historical measurement than on the conclusions drawn from it. Methods of punishment have changed through time, moving from infliction of physical pain to more abstract deprivations. *See* M. FOUCAULT, DISCIPLINE AND PUNISHMENT 7-22 (1977). Since the notion of acceptable punishment changes with "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), a test which judges punishment only by looking at the past will be accurate only when evaluating historically traditional sanctions. The historical approach is of little help in gray areas such as the one presented in *Reed*.

30. 356 U.S. 86 (1958).

31. 33 Cal. 3d at 921, 663 P.2d at 219, 191 Cal. Rptr. at 661 (quoting Trop v. Dulles, 356 U.S. 86, 99-100 (1958)). The punishments termed "traditional penalties" by the *Trop* court included "fines, imprisonment and even execution." *Id.*

32. The reasoning in this analysis, and the one suggested in the court's quotation from Weems v. United States, 217 U.S. 349, 378 (1910), skip over an essential step.

The *Trop* court, in stating that a non-traditional punishment was "constitutionally suspect" meant that it was suspect as cruel and unusual punishment forbidden by the constitution. This assumes, though, that the sanction in question is *punishment* within the meaning of the constitution. Given the ambiguity surrounding the characterization of the sanction in *Trop*, the *Reed* court's reliance on *Trop* and *Weems* seems misplaced since it utilized these cases in its analysis of whether § 290 registration is *punishment* and thus subject to evaluation under the constitutional provision.

gistration "comes into play only on a finding of scienter,"[33] since the California Supreme Court in *Pryor v. Municipal Court*[34] has construed section 647(a) to require "lewd intent and specific sexual touching."[35]

Examining the fourth factor, the *Reed* court stated that such registration promotes the traditional aims of punishment—deterrence. The legislature enacted section 290 with the intention of deterring recidivism by making past offenders readily available for police surveillance.[36]

The court satisfied the fifth *Mendoza-Martinez* factor by finding that the conduct to which the section 290 registration applies, section 647(a) violations, was already a criminal offense.[37]

The majority examined the sixth and seventh *Mendoza-Martinez* factors together. The *Reed* court found that an alternate non-punitive purpose for the statute existed, namely as a law enforcement tool.[38] Usually, if a rational connection can be found between a statute and a non-punitive purpose, the statute will not be held to be punitive.[39] Here, however, the justices balanced the non-punitive purpose against the harshness of the statute's effect. The court reasoned that even though section 290 registration served a non-punitive purpose,[40] the fact that the registration was an ineffective law enforcement tool invalidated this purpose in reference to the *Mendoza-Martinez* test. Thus, in light of the statute's harsh effects, the court found that the registration statute was punitive under the last

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33. 33 Cal. 3d at 922, 663 P.2d at 219, 191 Cal. Rptr. at 661 (quoting *Mendoza-Martinez*, 372 U.S. at 168).

34. 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979). *See supra* note 12 and accompanying text.

35. 33 Cal. 3d at 921-22, 663 P.2d at 219, 191 Cal. Rptr. at 661.

36. *See* Barrows v. Municipal Court, 1 Cal. 3d 821, 825-26, 464 P.2d 483, 485-86, 83 Cal. Rptr. 819, 821-22 (1970). Note that the *Reed* court addresses only the deterrence issue as a "traditional aim of punishment," and not deterrence and retribution as does the Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). 33 Cal. 3d at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660. California has expressly rejected retribution as a legitimate objective of criminal punishment. People v. Anderson, 6 Cal. 3d 628, 651, 493 P.2d 880, 896, 100 Cal. Rptr. 152, 168 (1972). It is, therefore, correctly omitted from the *Reed* analysis.

37. 33 Cal. 3d at 921-22, 663 P.2d at 219, 191 Cal. Rptr. at 661.

38. *Id.* at 922, 663 P.2d at 219-20, 191 Cal. Rptr. at 661-62.

39. *Id.* This rational relation criterion was applied in Flemming v. Nestor, 363 U.S. 603 (1960). There, a section of the Social Security Act was challenged as retrospective punishment, void under the ex post facto clause of the U.S. Constitution. The section terminated old age benefits to aliens for a list of specific reasons. The Court reasoned that if a rational connection could be found between the statute and a non-punitive purpose, the statute would not be considered punitive and thus not violative of the ex post facto clause.

40. See *Reed*, 33 Cal. 3d at 922 n.7, 663 P.2d at 219 n.7, 191 Cal. Rptr. at 661 n.7 for a discussion of the inefficiency of § 290 registration as a law enforcement tool.

factor.[41]

After its survey of the seven *Mendoza-Martinez* factors, the *Reed* court concluded that section 290 sex offender registration was a form of punishment within the meaning of article I, section 17 of the California Constitution.[42]

The court's second major line of analysis explored whether article I section 17 was violated by requiring section 290 sex offender registration of section 647(a) misdemeanants. The court began by noting that the definition for what constitutes cruel or unusual punishment is a "flexible and progressive standard,"[43] which acquires new meaning as society becomes more "enlightened" and "humane."[44] The *Reed* court applied the proportionality test for determining cruel or unusual punishment, which was developed and explicated in *In re Lynch.*[45]

In adopting this proportionality standard, the *Reed* court applied the three techniques outlined in *Lynch* for determining what constitutes gross disproportionality between a crime and its punishment. The court examined (1) the nature of the offense and/or offender with special regard to the degree of danger both present to

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41. *Id.* at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662.

42. *Id.* at 922, 663 P.2d at 220, 191 Cal. Rptr. at 662.

43. *Id.*

44. *Id.* at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)). This refers to the historical development of the concept of cruel and unusual punishment, from an early prohibition of physical torture, O'Neil v. Vermont, 144 U.S. 323, 337-39 (1892) (Stevens J., dissenting); *In re* Kemmler, 136 U.S. 436-47 (1890); Hobbs v. State, 133 Ind. 404, 408-10, 32 N.E. 1019, 1021 (1893), to the modern view that punishment should be evaluated in light of "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

45. 8 Cal. 3d 410, 503 P.2d 162, 105 Cal. Rptr. 217 (1972).

The proportionality standard is derived from Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892), later adopted by the majority in Weems v. United States, 217 U.S. 349 (1910). In *Weems*, a government official was convicted in the Philippines for making two false entries in his cash book. The Philippine statute for this offense required a minimum sentence of 12 years imprisonment in chains with hard and painful labor in addition to fines, loss of civil liberties and perpetual surveillance. The Court held both that the methods used were cruel and unusual, and that the sentence was grossly disproportionate to the crime committed, and thus also cruel and unusual. *Id.* at 377.

The California courts adopted this standard in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), recognizing that "punishments of excessive severity for ordinary offenses may be both cruel and unusual." *Id.* at 654, 493 P.2d at 897, 100 Cal. Rptr. at 169. A few months after the *Anderson* holding, the court in *In re* Lynch held that a life sentence was not a cruel or unusual method of imposing punishment, but that a life sentence was cruel and unusual because it was "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226. Thus, disproportionality between crime and punishment became another constitutional avenue for challenging punishment.

society;[46] (2) the challenged penalty as compared with those imposed in the same jurisdiction for more serious crimes; and (3) the challenged penalty as compared with those imposed for the same offense in different jurisdictions.[47]

In applying the first of the *Lynch* techniques, the court examined the nature of the offense and found the defendant's infraction minor by contemporary standards.[48] The court remarked that even common-place actions performed in a public place when accompanied by the requisite touching may suffice for a section 647(a) conviction.[49] The court bolstered its notion of changing contemporary standards by noting that a 1975 statute[50] had made homosexual activity by itself no longer criminal.[51]

The *Reed* court next examined the degree of danger present to society in section 647(a) violations and noted that there are usually no victims of this crime.[52] The court pointed out that *Pryor* required that an offender know or have reason to know that someone might be offended by his conduct.[53] The *Reed* court concluded that this "offended person" requirement did not suggest that a section 647(a)

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46. 8 Cal. 3d at 425-26, 503 P.2d at 930, 105 Cal. Rptr. at 226.

In analyzing the nature of the offense and offender, the *Lynch* court examined many factors: 1) the facts of the case demonstrating the triviality of the crime; 2) the effect of the crime—whom it injured and whom it benefitted; 3) whether the crime was violent or nonviolent; 4) whether the crime was victimless; and 5) whether there were rational gradations of culpability that could be made on the basis of the injury to the victim or society in general. *Id.*

In *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974), the California Supreme Court added another consideration to the analysis, namely was the challenged punishment consistent with the penalogical ends of rehabilitation, deterrence, and isolation of dangerous offenders from society. *Id.* at 916, 519 P.2d at 1078, 112 Cal. Rptr. at 654.

See also Grajewski, *Prohibiting Cruel or Unusual Punishment: California's Requirement of Proportionate Sentencing after Wingo and Rodriquez,* 10 U.S.F.L. REV. 524, 549 (1976) [hereinafter cited as *Proportionate Sentencing*].

47. 33 Cal. 3d at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662 (quoting and summarizing from *In re* Lynch, 8 Cal. 3d at 425-29, 503 P.2d at 930-33, 105 Cal. Rptr. at 226-29).

48. 33 Cal. 3d at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662.

49. *Id.* The triviality of the offense for which § 647(a) conviction is appropriate bears out this notion. *See In re* Anders, 25 Cal. 3d 414, 599 P.2d 1364, 158 Cal. Rptr. 661 (1979) (petitioner masturbated in private, enclosed pay toilet); *In re* Birch, 10 Cal. 3d 314, 515 P.2d 12, 10 Cal. Rptr. 212 (1973) (petitioner urinated against parking lot retaining wall late at night after he was refused use of Taco Bell restroom which had been cleaned for the day); People v. Rodriquez, 63 Cal. App. 3d Supp. 3, 133 Cal. Rptr. 765 (1976) (two men arrested for hugging and kissing in parked car in early morning).

50. 1975 Cal. Stat. ch. 71 and 877 at 144 and 2246.

51. *But see* People v. Rodriquez, 63 Cal. App. 3d Supp. 1, Supp. 5, 133 Cal. Rptr. 765, 767 (1976), where the court remarked that invidious discrimination did not exist in a § 647(a) conviction even though the officer who arrested two males found hugging and kissing testified that he would probably not have arrested a heterosexual couple doing the same.

52. 33 Cal. 3d at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662.

53. *Id.* (citing *Pryor*, 25 Cal. 3d at 256, 599 P.2d at 647, 158 Cal. Rptr. at 340).

overture was *dangerous* to either a specific observer or to society at large. This point was further reinforced by the fact that in most convictions of this sort, the requisite "offended party" is a single undercover vice officer. Thus, there is no victim in the traditional sense.[54]

In its analysis of the nature of the offender and the danger to society, the court next analyzed the specific facts[55] of the *Reed* case and found both the petitioner's offense and typical section 647(a) offenses to be minor.[56] The *Reed* court also examined the petitioner as an individual, characterizing him as a stable adult homosexual with no prior arrest history. Thus, the court found that the petitioner posed no grave threat to society, either in his person or by his action; rather he had exhibited a "relatively simple sexual indiscretion."[57]

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54. 33 Cal. 3d at 923-24 n.9, 663 P.2d at 220-21 n.9, 191 Cal. Rptr. at 662-63 n.9 (citing Project, *The Consenting Adult Homosexual and the Law: An Emperical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 647, 698 (1966)). The study further clarified the victimless aspect of Y 647(a) crimes, stating that complaints to police regarding lewd solicitation are infrequent, and therefore any relationships between complaints and later arrests is indirect. Rarely does a specific complaint from an offended victim result in the arrest of that specific violator. More often arrests are made by undercover vice officers whose presence substitutes as the requisite "offended party." *But see* People v. Reed, 114 Cal. App. 3d Supp. 1, Supp. 4, 170 Cal. Rptr. 770, 771 (1980) (discussion of officer as offended party in early appeal of this case).

55. The court also pointed out a significant conflict of evidence at the trial level. Contrary to the undercover officer's assertion, petitioner denied that he had solicited the officer. It is agreed, however, that the petitioner masturbated in the officer's presence. 33 Cal. 3d at 924, 663 P.2d at 221, 191 Cal. Rptr. at 663. Although not noted in the supreme court opinion, an early appeal of Reed's criminal conviction stated that the defendant had made some effort to hide his activities from others who entered the restroom. This is presented as an unsuccessful argument against the *Pryor* "offended person" requirement. In *Pryor* the petitioner argued that the officer, who was the only witness, "tried to give the appearance that he was not offended . . . ." People v. Reed, 114 Cal. App. 3d Supp. 1, Supp. 4, 170 Cal. Rptr. 770, 771-72 (1980).

56. *See supra* note 49; *Lynch*, 8 Cal. 3d at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226 (analysis of *Lynch* facts in this context); *see also*, 6 LOY. L.A.L. REV. 416, 419 n.25 (1973) (listing factual analysis regarding cruel and/or unusual punishment examination).

57. 33 Cal. 3d at 924, 663 P.2d at 221, 191 Cal. Rptr. at 662. Both the *Reed* and the *Lynch* courts, in considering the nature of the offense and/or offender, discuss the petitioner as an individual—his background, job, marital history, familial circumstances, prior police record, etc. *Lynch*, 8 Cal. 3d at 437-38, 503 P.2d at 939-40, 105 Cal. Rptr. at 235-36. Mindful of this contingency, a petitioner for a writ of habeas corpus has two options in challenging his punishment as cruel or unusual under the proportionality standard. He can argue that his sentence is invalid either because the law under which it was imposed is unconstitutional in all circumstances, or because the sentence as applied to him specifically and individually is not appropriate. If the latter determination is made, the court will be declaring the statute itself constitutionally valid, but its *application* to the particular defendant disproportionate because of specific elements in the defendant's personal history, police record or the circumstances surrounding the crime.

The distinction between a ruling that sustains a statutory penalty, but holds it excessive in application to a specific defendant and one which overturns statutory penalties found dispro-

In final examination of a section 647(a) offender's danger to society, the *Reed* court distinguished the petitioner's narrow claim that from the assertion raised in *People v. Mills*, section 647(a) misdemeanants cannot be presumed dangerous sex offender recidivists deserving of the permanent police surveillance intended under section 290.[58] In *Mills,* the court rejected the defendant's assertion that sex offenders per se are not recidivists and hence should not come under the section 290 purview.[59] Thus, in all aspects of the first *Lynch* examination technique, the justices found the nature of the offense and the offender not to be dangerous to society.

The *Reed* court next applied the second *Lynch* inquiry technique, an *intrastate* comparison. Using the intrastate comparison technique, the court compared penalties imposed in California for more serious crimes with the challenged penalty for a section 647(a) violation.[60] The court developed three arguments in finding the section 290 registration requirement disproportionate: (1) arguably more serious sex-related misdemeanors do not require registration; (2) other sex-related criminals who could benefit from police surveillance are not required to register; and (3) serious felonies not related to sex do not require registration.[61]

In addressing the first argument, the court listed several "arguably more serious sex-related misdemeanors" which do not require registration.[62] In measuring the seriousness of the crimes compared

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portionate to any defendant is explored in Corrigan, *California's Cruelty Criteria: Evaluating Sentences After In re Lynch*, 25 HASTINGS L.J. 636, 645-48 (1974). This article asserts that in California, attacks on sentences are more often successful when they maintain the law to be unconstitutional under all circumstances, rather than as applied to only a specific defendant. *Id.*

58. 81 Cal. App. 3d 171, 146 Cal. Rptr. 411 (1978).

59. 33 Cal. 3d at 924, 663 P.2d at 221, 191 Cal. Rptr. at 663 (summarizing People v. Mills, 81 Cal. App. 3d at 177, 146 Cal. Rptr. at 411). In *Mills,* the defendant was charged with a § 288 violation, a felony. As a defense, he challenged the application of § 290 to all sex related crimes which trigger its sanctions. See *supra* note 14 for list of sex related crimes which automatically trigger § 290, and those which do not.

60. 33 Cal. 3d at 924, 663 P.2d at 221, 191 Cal. Rptr. at 663. The *Lynch* court asserted that the legislature should be depended on to act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments set forth in its own statutes. *Id.* (quoting from *Lynch*, 8 Cal. 3d at 431, 503 P.2d at 935, 105 Cal. Rptr. at 231). Assuming this is true, if a court finds that crimes which appear more serious are punished less severely than the challenged penalty, the challenged penalty must be constitutionally suspect. 33 Cal. 3d at 924, 663 P.2d at 221, 191 Cal. Rptr. at 663.

61. 33 Cal. 3d at 925, 663 P.2d at 221-22, 191 Cal. Rptr. at 664.

62. See *supra* note 14 for list of crimes not requiring § 290 registration.

Although the court did not reveal the standards by which it measured these crimes "more serious," some helpful generalizations may be drawn from the nature of the list itself.

Although the court introduced its list with the label "more serious sex related *misdemean-*

with section 647(a), the *Reed* court considered the element of coercion of the victim by the offender. Many of the crimes that the court listed as "arguably more serious" than section 647(a) involved abuse of power or status between persons of unequal physical, mental or socio-economic stature.[63] Reed's crime involved neither coercion nor a powerless victim; yet, offenders are required to register. Reed's registration under this measurement seemed disproportionate to the crime.

The court next argued that one purpose of section 290 registration, easy police surveillance to discourage recidivism, is more suitable as a deterrent for other crimes if registration is not required. The court pointed out that prostitution, a section 647(b) violation, is not subject to the section 290 registration penalty, but that prostitution is more likely to be repeated than are section 647(a) violations which require registration.[64] The suggestion underlying this statement is that if the legislature did not see fit to impose section 290 registration for crimes and criminals inclined to recidivism by the nature of their offense, then the imposition of section 290 registration on less likely recidivists, like section 647(a) offenders, is constitutionally suspect as being disproportionate.

The state's counter-argument did not persuade the court. The

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ors," most of the crimes listed are actually felonies under the California Penal Code. The pimping and pandering crimes (§§ 266d - 266i) are all felonies, as are subdivisions (b) and (c) of § 311.4, prohibiting the use of a known minor for child pornography. Only § 311.4(a), the use of a known minor for sale and distribution of pornography, is a misdemeanor. Additionally, the court lists rape (§ 264), which is a felony in any form. The court, it appears, was using the legal distinctions between felony and misdemeanor in judging the listed crimes "more serious." Since the sex related felonies listed did not require § 290 registration, while § 647(a), a misdemeanor, did, the court found the § 290 requirement disproportionate and therefore constitutionally suspect. 33 Cal. 3d at 924, 663 P.2d at 221, 191 Cal. Rptr. at 664.

63. The sex-related crimes that the court listed as "more serious" than § 647(a) involved perpetrators who were more powerful, committing crimes against powerless or innocent persons such as incompetents, minors, or individuals otherwise dependent on the offender.

For "more serious" crimes perpetrated against minors, see CAL. PENAL CODE § 309 (admitting or keeping a minor in a house of prostitution); § 311.4 (employment of a minor for distribution of obscene matter or production of pornography); § 173g (lewd conduct in the presence of a child) (Deering 1983).

For "more serious" crimes committed against incompetents, see CAL. PENAL CODE § 261(1) (rape of incapable person); § 261(3) (rape of incapacitated person); § 261(4) (rape of unconscious person); § 261(5) (rape of deceived person); § 261(6) (rape of threatened person) (Deering 1983).

For "more serious" crimes committed against individuals otherwise dependent on the offender, see CAL. PENAL CODE § 266d (receipt of money for placing person in custody for purpose of cohabitation); § 266e (payment for prostitution or placing another in an immoral house); § 266f (selling person for immoral purpose); § 266g (placing one's wife in house of prostitution); § 266i (pandering) (Deering 1983).

64. 33 Cal. 3d at 925, 663 P.2d at 222, 191 Cal. Rptr. at 664.

respondent attempted to mitigate the disproportionality between section 647(a) violations which require registration, and section 647(b) violations which do not. Respondent noted that prostitution could be regulated under section 647(a) or (b).[65] This suggested that section 290 registration of prostitutes, likely recidivists, under section 647(a) constituted a sound reason for maintaining the registration requirement for all section 647(a) offenses. The court rejected this reasoning, pointing out that in practical terms, section 647(b) would more likely be utilized.[66]

The *Reed* court finally demonstrated the relative severity of the challenged punishment by observing that "[m]ore serious crimes not related to sex, such as robbery, burglary and arson do not require registration."[67] The court again pointed out the disproportionality in California between punishment for felonies with victims, which terminates at the end of the prison term, and punishment for the victimless section 647(a) offense for which the "misdemeanant must carry the onus of sex offender registration for a lifetime."[68]

The third *Lynch* proportionality technique utilized by the *Reed* court was a comparison of the challenged penalty with penalties imposed in different jurisdictions for the same offense, an interjurisdictional comparison.[69] The court first pointed out the infrequency with which cities and states enact statutes or ordinances similar to section

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65. Sections 647(a) and (b) provide:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place exposed to the public view.
>
> (b) Who solicits or who engages in any act of prostitution . . . includ[ing] any lewd act between persons for money or other consideration.

CAL. PENAL CODE § 647(a)-(b) (Deering 1983).

66. 33 Cal. 3d at 925, 663 P.2d at 222, 191 Cal. Rptr. at 664.

67. *Id.*

68. *Id.*

69. The assumption behind the *Lynch* interjurisdictional comparison is simply that most jurisdictions will have prescribed punishment within Constitutional boundaries. Thus, examination of statutes interjurisdictionally will create a constitutional standard against which the penalty challenged in California may be measured. *Id. See also In re* Lynch, 8 Cal. 3d 410, 427, 503 P.2d 921, 932, 105 Cal. Rptr. 217, 228 (1972).

A problem may arise in application of this technique stemming from differences in various state constitutions. The doctrine of independent state grounds allows a state to base its decision or statute on state constitutions. These constitutions vary and may legitimately offer more protection than the Federal Constitution does. Falk, *The State Constitution, A More than "Adequate" Non Federal Ground*, 61 CALIF. L. REV. 273, 275-76 (1973). This sliding constitutional scale must be considered to discern whether the particular states examined extend greater or lesser protection than California does, and how this constitutional variation affects the issue under examination.

290.[70] As a second step, the justices discussed existing similar statutes in comparison with the section 647(a) penalty of registration. The court found California's statute to be the most severe.[71]

Using the three *Lynch* techniques, the *Reed* court concluded that the penalty of the lifelong stigma of sex offender registration was "out of all proportion to the crime for which the petitioner was convicted."[72] The court then held that section 290 registration for section 647(a) violators was unconstitutional under article I, section 17 of the California Constitution.[73]

Reed delineates the proper scope and application of the *Lynch* test. *Lynch* held that a statutory penalty that is grossly disproportionate to the crime committed violates the California constitution provision against "cruel or unusual punishment."[74] The *Lynch* ruling, therefore, provided a new foundation for habeas corpus appeals to challenge seemingly harsh penalties.[75] Subsequent California Supreme Court decisions shifted the focus of the *Lynch* proportionality doctrine, however, softening the collision between the courts and the California legislature.[76] With the passage of the Uniform Determi-

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70. "Only four states require registration for serious sex offenses, not including disorderly conduct. Only 13 cities of the 384 surveyed had sex offender registration laws." 33 Cal. 3d at 925, 663 P.2d at 222, 191 Cal. Rptr. at 664; *see* R. DOCKER & L. KAMMLER, CRIMINAL REGISTRATION STATUTES IN THE UNITED STATES (1963).

71. By comparison, the court found that in 1978 Arizona repealed a similar law; that Nevada's law is limited to felonies, while § 647(a) is misdemeanor; that Ohio's law is likewise limited to felonies, but also requires prior sex crime conviction before registration is invoked; and that the Massachusetts statute is less stringent in its requirements, demanding only that registrants notify authorities about the institution from which they have been released. *Id.* at 925, 663 P.2d at 222, 191 Cal. Rptr. at 664.

72. 33 Cal. 3d at 926, 663 P.2d at 222, 191 Cal. Rptr. at 665.

73. *Id.*

74. *Lynch*, 8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.

75. The *Lynch* holding, especially the comparative *Lynch* techniques, for a time forced open prison doors. Offenders, taking advantage of the inconsistencies in California's statutory penalties, brought habeas corpus writs to challenge disproportionality between the maximum statutory penalty and the crime. *See In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); *In re* Jones, 35 Cal. App. 3d 531, 110 Cal. Rptr. 765 (1973); Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5, 11 (1978) [hereinafter cited as *Numbers Game*].

76. Before 1977, the California courts sentenced defendants to prison for "the term prescribed by law" but not for a definite number of years. The actual sentence was made by the Adult Authority. Under *Lynch* the court decided to utilize the statutory maximum in evaluating the proportionality of punishment to crime. This was an unrealistic decision since the statutory maximum was seldom the actual sentence, and even less frequently the actual time served. In California, a defendant sentenced under a constitutionally valid statute is not entitled to individual relief. People v. Olson, 173 Cal. App. 2d 535, 537, 343 P.2d 379, 380 (1959). Thus, any finding of disproportionality between a statutory maximum punishment and the actual crime committed forced the conclusion that the statute was unconstitutional on its

nate Sentencing Act of 1976,[77] the legislature limited the discretion of the judiciary by enacting statutory guidelines to assure uniformity of sentences among offenders who commit the same offense under similar circumstances.[78] *Lynch* relied on disproportionality between statutory maximums and the individual petitioner's crime. Because the Uniform Determinate Sentencing Act forces the court to tailor the individual sentence to the individual facts of the crime, the Pandora's box of statutory invalidation opened by *Lynch* seems to have been closed.[79]

Where, then, is the proper place for the *Lynch* test as resurrected in *In re Reed*? *Reed* illustrates the usefulness of the *Lynch* test for penalties other than imprisonment, such as fines, denial of rights and imposition of additional duties.[80] The *Lynch* test may also be invoked to challenge sections of the California Penal Code not affected by the Uniform Determinate Sentencing Act, such as misdemeanant sentencing, alternative dispositions for felonies, and sentencing of the most serious felonies.[81] Further, *Reed* clearly illustrates that the *Lynch* test will serve as a stimulus to the legislature to reconsider its present piecemeal system of penalties. It will also serve as an effective tool in preventing or correcting future legislative enactments that vault penalties for highly visible and notorious crimes out of proportion with crimes of equal seriousness in response to

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face. Inevitably, this led to much activity in the courts as statutory penalties were challenged. In People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975), the court sidestepped this conundrum by holding that the proportionality of a statutory penalty is to be evaluated against the *actual* term fixed by the Adult Authority, rather than against the statutory maximum. *Id.* at 182, 534 P.2d at 1011, 121 Cal. Rptr. at 107. Thus, after *Wingo*, determination of disproportionality often allowed the statutory penalty established by the legislature to stand, while invalidating the Adult Authority term. *See also In re* Rodriquez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

77. *See* § 350 of Senate Bill 42 of the 1975-1976 session of the legislature (Stats. 1976, Ch. 1139) (codified as CAL. PENAL CODE § 667.5 as added, § 1168 as amended, Article I of Chapter 4.5 (commencing with § 1170) as added, § 12022 as amended, § 12022.5 as amended, § 12022.6 as added and § 12022.7 as added).

78. Apart from imposing a consecutive sentence, imposing an upper or lower term, or striking enhancements, courts are given no real discretion to set terms based on the widely varying culpability involved in the human conduct we denote as criminal. The prison and parole authorities that once had such a power have it no longer. *See Numbers Game, supra* note 75, at 105.

79. *See, e.g.*, Oppenheimer, *Computing a Determinate Sentence . . . New Math Hits the Courts*, 51 CAL. ST. B.J. 604 (1976).

80. CAL. EDUC. CODE § 44010 (West 1983), for example, which provides for the revocation of teaching certificates for persons convicted under § 647(a), may be subject to a *Lynch* test challenge.

81. CAL. PENAL CODE §§ 128, 190.1, 190.3, 209, 218, 219 and 4500 (Deering 1983); *see also Numbers Game, supra* note 75, at 22.

public demands for harsher penalties. The *Reed* decision illustrates that the *Lynch* test, a controversial and valuable tool in monitoring punishment, has been tempered but not buried.

Perhaps more important in the *Reed* decision is the standard of judicial review *Reed* suggests for proportionality decisions. Generally, the constitutionality of legislation has been determined by application of one of two tests: the rational basis test or the compelling state interest test.[82] The rational basis test determines whether the legislation bears a rational relation to a legitimate end. Courts using the rational basis test will usually "uphold legislation if any justification, however feeble, may be suggested."[83] The compelling state interest test, on the other hand, is used when legislation affects a fundamental right or a suspect class, and determines whether the law is indispensable in achieving a compelling state goal.[84] To satisfy this stringent test, a state must establish that its goal is not only legitimate and compelling, but also that it has employed the least restrictive means possible to attain its legislative end.[85]

The *Reed* court does not appear to follow either judicial standard. The judicial hypothesizing often found in support of a statute when courts use the rational basis test is absent in *Reed.* Indeed, the court rejected the "feeble" reasons[86] offered by the state which would usually suffice in application of the rational basis test. The court also questioned the efficacy of the section 290 sex offender registration instead of simply accepting it as the state's justification for the statute.[87] The *Reed* court's omission of the rational basis standard set forth in *Lynch*[88] evinces that *Reed* does not adhere to the rational basis test.

The *Reed* court also did not utilize the compelling state interest test. Nowhere are the words "compelling state interest" used in the

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82. *See* Michelman, *The Supreme Court 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 93 (1969) [hereinafter cited as *The Supreme Court 1968 Term*]; Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as *The Supreme Court 1971 Term*].

83. *See Proportionate Sentencing, supra* note 46, at 545.

84. *The Supreme Court 1968 Term, supra* note 82, at 93.

85. *See generally* Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

86. *See supra* notes 64-66 and accompanying text (court rejects state's argument that prostitutes could be arrested under § 647(a)).

87. 33 Cal. 3d at 922 n.7, 663 P.2d at 219-20 n.7, 191 Cal. Rptr. at 661-62 n.7.

88. The standard offered in *Lynch* is as follows: "Here as in other contexts mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." 8 Cal. 3d 410, 414-15, 503 P.2d 921, 923, 105 Cal. Rptr. 212, 219 (1972) (citations omitted).

decision nor are the petitioner's interests, with which section 290 interferes, termed "fundamental."[89] Although the petitioner's complaint addressed the issue of his right to privacy, the *Reed* court's disposition of the case on the cruel or unusual punishment grounds does not reach this potential substantive due process issue.[90]

Justice Richardson criticized the court's failure to adhere to a rational basis standard in his dissent. He rephrased the standard that had been consistently used in appraising the constitutionality of statutes. "Legislation is presumed to be constitutional and must be upheld unless its invalidity 'clearly, positively and unmistakably' appears."[91] Richardson stated that instead of presuming the constitutionality of the statute in question, the court presumed facts supporting the invalidity of section 290. He developed his argument by showing where the court theorized and inferred facts to invalidate the statute rather than uphold it.[92]

Justice Kraus, in his brief dissent, also faulted the majority on the same issue. Both dissenting justices questioned the appropriateness of the *Reed* court's analysis, noting that it does not fit within the confines of a rational basis standard.

The proportionality challenge in *Reed* should perhaps be judged under the standard of judicial review termed the "intensified rational basis model."[93] The court demands reasonable arguments from both sides. The intensified rational basis model places the state and the petitioner on more equal footing than does the slanting ground of either the rational basis test or the compelling state interest standard. Because the compelling state interest standard would likely result in a massive undoing of criminal penalties if applied in proportionality examinations, and because the rational basis stan-

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89. The petitioner, a homosexual, is arguably a member of a "discrete and insular minority," United States v. Carolene Products Co., 204 U.S. 144 n.10 (1938), deserving of the special solicitude of the judicial branch via utilization of the compelling state interest test. Studies indicate that the vast majority of § 647(a) arrests are of male homosexuals. Pryor v. Municipal Court, 25 Cal. 3d at 252, 599 P.2d at 644, 158 Cal. Rptr. at 338.

See Proportionate Sentencing, *supra* note 46, at 556-57 (arguments made for and against application of the rational basis and compelling state interest tests in the area of determining proportionality of sentences).

90. 33 Cal. 3d at 918 n.3, 663 P.2d at 217 n.3, 191 Cal. Rptr. at 659 n.3.

91. 33 Cal. 3d at 927, 663 P.2d at 223, 191 Cal. Rptr. at 665.

92. *Id.* at 927-30, 663 P.2d at 223-25, 191 Cal. Rptr. at 665-67.

Justice Richardson examines the majority's presentation of facts regarding their premises and finds all of these facts to be unsupported by the record. He faults the majority's assertions that § 290 involves substantial "compulsion and restraint," that the section is directed toward "relatively minor" offenders, and that it is not an effective law enforcement tool. *Id.*

93. *See generally The Supreme Court 1971 Term*, *supra* note 82, at 18.

dard would result in rubber stamp approval of most statutory penalties, the intensified rational basis model seems the most appropriate in judging the proportionality of penalties. A more clearly defined explanation of this standard is required, however, if courts are to utilize it effectively in proportionality examinations.

CONCLUSION

Reed has firmly established the *Mendoza-Martinez* factors in California law as the composite test for determining what is punishment and the *Lynch* technique for inquiring whether a disproportionality exists between a crime and its punishment.

Reed, through application of the *Mendoza-Martinez* factors, held that section 290 registration of section 647(a) offenders is punishment in the constitutional sense. In discussing whether the sanction involved an affirmative disability or restraint, the *Reed* court pursued a generalized analysis rather than one that focused specifically on the individual petitioner. The court's use of the historical *Mendoza-Martinez* factors led to the conclusion that section 290 was a constitutionally suspect punitive measure. The court found that all of the other *Mendoza-Martinez* factors, considered separately and collectively, indicated that section 290 was a punishment within the constitutional meaning.

Under the *Lynch* proportionality analysis, the *Reed* court found the nature of the section 647(a) offense/offender to be a minor danger. Under the *intrajurisdictional* comparison inquiry, other more serious crimes in California were found to be punished less severely. Under the *interjurisdictional* comparison, California's statute was found to be the most severe of a group of similar statutes from other states. This analysis resulted in the *Reed* court holding that section 290 registration for section 647(a) misdemeanants was cruel or unusual punishment because the punishment was found to be grossly disproportionate to the crime.

As is illustrated in *Reed,* the *Lynch* test maintains a place in assuring the proportionality between crime and punishment, even after being tempered by the cases which followed it. *Reed* further suggests that the standard of review to be applied in California examinations of proportionality is the intensified rational basis model, an appropriate one for the aims of the proportionality analysis, but one which requires a clearer statement by the California courts.

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