CRIMINAL REGISTRATION ORDINANCES AND THE CONSEQUENCES OF JUDICIAL CONSIDERATION

In Colonial Massachusetts, under the General Laws of 1672, the letter "B" was branded on the forehead of every convicted burglar or highway robber, and a "Vagabond Quaker" could be punished by branding on the shoulder.[1] This ignoble ancestor finds its modern counterpart in criminal registration ordinances which, according to a well-documented survey,[2] have been adopted by at least forty-seven cities and five States in an attempt to aid law enforcement agencies in the prevention and detection of recidivistic behavior.[3] This comment treats the recent decision in *Lambert v. California*[4] to determine its effect on these ordinances and on other legislation not requiring proof of awareness for conviction. Attention is also given to some unresolved questions concerning the validity of criminal registration laws.

The Decision and Its Effect On Criminal Registration Ordinances

The defendant, Virginia Lambert, was arrested on a street corner by two officers who, giving no reason, took her to a police station where she was searched and interrogated for two hours. When no other criminal conduct was revealed she was charged with failure to register as a "convicted person"[5] as required by a city ordinance:

> It shall be unlawful for any convicted person to be or remain in the City of Los Angeles for a period of more than five days, without, during such five-day period, registering with the Chief of Police in the manner hereinafter prescribed.[6]

At the time of arrest the accused had been a resident of Los Angeles for seven years and had been convicted in 1951 of forgery, a felony

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[1] Mass. Colonial Laws 12-13, 62-63 (Whitmore 1887).

[2] Note, *Comprehensive Review of Registration Laws for Felons*, 103 U. Pa. L. Rev. 60 (1954) (hereinafter cited as *Comprehensive Review*).

[3] *Id.* at 60, 65. This study was conducted under a special grant and much information was gathered by direct contact or correspondence with officials and members of police forces of municipalities throughout the nation. Questionnaires were sent to 406 cities, of which 246 responded.

Ohio cities having such ordinances as of 1954 are Akron, Canton, Cincinnati, Columbus, Lorain, Shaker Heights and Springfield; *id.* at 108.

[4] 355 U.S. 225 (1957). *Lambert* appears to be the only reported case on the subject.

[5] A "convicted person" is "Any person who, subsequent to January 1, 1921, has been or hereafter is convicted of an offense punishable as a felony in the State of California, or who has been or who is hereafter convicted of any offense in any place other than the State of California, which offense, if committed in the State of California, would have been punishable as a felony. . . ." Los Angeles Municipal Code §52.38 (1946).

[6] Los Angeles Municipal Code §52.39 (1946).

in California.[7] She was fined $250 and placed on probation for three years, no willfulness, express or implied, having been shown with regard to her failure to register. Noting the subjective innocence of the accused and the absence of any circumstances which should have forewarned her of a duty to register, the Supreme Court held that the action of the State courts violated the due process requirement of the Fourteenth Amendment:

> Notice is required in a myriad of situations where a penalty or forefeiture might be suffered for mere failure to act. . . . The principle is equally appropriate where a person, *wholly passive* and *unaware of any wrongdoing,* is brought to the bar of justice for condemnation in a criminal case. . . .
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> We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction *under the ordinance can stand.*[8] *(Emphasis added.)*

Criminal registration ordinances had their sources in fear of increasing professionalism in crime and were first enacted in five California and Florida cities in 1933, the Los Angeles ordinance being one of these.[9] Generally, the ordinances require those who have been convicted of certain crimes or of certain classes of crime to register with the local police, providing information concerning their criminal history and current activities. "The stated objective of criminal registration laws is to aid the police in preventing criminal activities and apprehending the perpetrators thereof,"[10] but "the actual practices show that the theory is merely the facade for police harassment of individuals who have been convicted of a crime."[11]

What effect will the *Lambert* decision have upon the avowed purpose and the actual use of these ordinances? It has been said that the principle of the decision requires that police officers not make arrests under the ordinance unless they can prove the citizen knew of the law and that, therefore, the purpose of registration laws is rendered in-

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[7] Brief of Amicus Curiae for Appellant, pp. 3, 4, Lambert v. California, *supra* note 4. "The pervasive thrust of the ordinance is illustrated by the fact that India's Prime Minister Nehru would apparently have to register if he came to Los Angeles. In 1922, as the result of picketing . . ., Mr. Nehru was sentenced to 18 months' imprisonment for extortion, an offense which would have been punishable as a felony in California." *Id.* at 36.

[8] 355 U.S. at 228, 229.

[9] *Comprehensive Review, supra* note 2 at 61, 108.

[10] *Id.* at 96. See, *e.g.,* CODE OF THE CITY OF COLUMBUS §34.16 (1952), where it is declared in part: "many of the crimes herein defined are being committed by habitual and dangerous criminals traveling from place to place throughout the United States . . . and because the undisclosed presence of such criminals within the city will constitute a serious menace . . . it is the intention of the council in the exercise of the police powers of the city to preserve by this article the public peace, welfare and safety . . ."

[11] *Id.* at 102.

effective.[12] This reasoning is clearly erroneous since it is not the duty of a police officer to consider whether the person whom he is arresting has the knowledge requisite for conviction. Yet it must be admitted that theoretically the decision will tend to reduce the number of actual registrations because the difficulty of proving subjective state of mind is apparent; and the amount of this reduction will measure the degree to which the avowed purpose has been undermined. But practically, having amended their ordinances to incorporate the *Lambert* rule,[13] if actual registration is desired cities will have to publicize the registration requirement through means available to them, and the resulting increased registration might well counterbalance the failure to register by those shrewd enough to understand the implications of the new rule.

It appears that a major, though unexpressed purpose of the framers of this legislation was to rid their cities of "undesirables" by forcing them to move to locations where registration was unnecessary,[14] and in the same manner to prevent the further influx of such persons. Apparently the rule of the principal case will not tangibly hinder this effect of the ordinances.

In practice the requirement of criminal registration has been used in many ways, for example; to detain a person for investigation of a more serious crime for which there is insufficient evidence to hold him, to suspend proceedings conditioned on defendant's leaving town, to force co-operation by threatening prosecution, and to incarcerate undersirables.[15] "The pattern of selective prosecution which was discerned in some communities enables local authorities to use the ordinances as an additional effective harassing weapon."[16] The validity of these practices will be considered *infra*, but assuming for discussion that they are valid, their effectiveness is plainly not limited by a requirement that knowledge be proved at the trial stage.

It follows that neither the avowed purpose nor the practical use of criminal registration ordinances will be substantially impaired by the decision in the principal case.

Significance Relative To Other Legislation Not Requiring Awareness For Conviction

Mr. Justice Frankfurter in a scathing dissent, in which he was

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[12] Petition for Rehearing for Appellee, p. 2, Lambert v. California, *supra* note 4.

[13] See, *e.g.*, Code of the City of Columbus §34.17 (1952) as amended Dec. 16, 1957, the date of the *Lambert* decision, by Ordiance No. 1587-57 to read as follows: "Any person *knowingly* violating any provision of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not to exceed five hundred dollars and by imprisonment for a period not to exceed ninety days." (Emphasis added.) City Bulletin, Dec. 21, 1957.

[14] *Comprehensive Review, supra* note 2 at 63.

[15] *Id.* at 104.

[16] *Ibid.*

joined by Mr. Justice Harlan and Mr. Justice Whittaker, observed that there are numerous laws under which convictions may properly be obtained without showing that the person convicted was aware of the law or that he was doing wrong, concluding:

> If the generalization that underlies, and alone can justify, this decision were to be given its relevant scope, a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired. . . . I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law.[17]

The purpose of this section will be to identify that "underlying generalization" and to determine its "relevant scope."

It is clear that the majority opinion transfers the due process requirement of notice from its usual application to property interests in civil litigation,[18] applying it here to hold unconstitutional an act taken by the municipality under its delegated police power. The resulting formulation is that a person cannot be constitutionally convicted of violating a criminal registration ordinance without proof of actual knowledge or of the probability of knowledge that he had a duty to register thereunder. In other words, *scienter* is an element necessary for conviction under the ordinance. The dissenters clearly felt this to be in conflict with established authority, the leading case of which, *United States v. Balint*,[19] held that the common law requiring of *scienter* has been modified:

> . . . in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. . . . Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as case of *mala in se*.[20]

The term "public welfare offenses" was subsequently coined "to

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[17] 355 U.S. at 232.

[18] See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), statutory notice of judicial settlement of accounts held incompatible with requirements of Fourteenth Amendment as basis for depriving known persons whose whereabouts are also known of substantial property rights; Covey v. Town of Somers, 351 U.S. 141 (1955), mere compliance with statute did not afford notice to incompetent and subsequent taking of property would be without due process of law; Walker v. City of Hutchinson, 352 U.S. 112 (1956), Due Process requires a hearing for owner of property to be taken for public use and hearing is meaningless without notice.

[19] 258 U.S. 250 (1921).

[20] *Id.* at 251. See also Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1909), trespass on state land to cut lumber after permit had expired. Note that if, as concluded above, *scienter* does not "obstruct" the purpose of the ordinance there is no justification for its elimination. *Cf.* Mackey v. United States, 290 Fed. 18 (6th Cir. 1923).

denote the group of police offenses and criminal nuisances, punishable irrespective of the actor's state of mind, which have been developing in England and America within the past three quarters of a century.[21] Seeking a basis for drawing the line between offenses requiring *mens rea* and those which do not, Sayre considered and rejected statutory form, gravity of the offense, and the *mala in se—mala prohibita* distinction. He concluded that crimes created primarily to punish the individual commonly require *mens rea* whereas "public welfare offenses" commonly do not; but if the penalty "be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind."[22] An examination of Sayre's elaborate classification and exhaustive documentation of "public welfare offenses" further confirms the suspicion that violation of criminal registration statutes does not lie within the ambit of that widely accepted phrase. The offenses are divided into eight groups, the last being "violations of general police regulations, passed for the safety, health or well-being of the community";[23] but a survey of the fifty-odd cases cited thereunder reveals that the violator in every instance was engaged in some business or other activity which was the object of the regulation, in contrast to the total passivity of the defendant in the principal case.

It is clear that the traditional emphasis of the criminal law upon protection of the individual has suffered a substantial alteration to meet the needs of a changing society. But offenses punishable without *mens rea* are, generally, subject to a light monetary fine [24] and "necessitate enforcement against such armies of offenders that require proof of each individual's intent would be virtually to prevent adequate enforcement."[25] As a result "liability is based . . . upon *mere activity*."[26] (Emphasis added.) The *Balint* decision is proof that the Court is willing to go still further and allow a heavier punishment upon proof of mere activity. But the *Lambert* decision shows that the Court refuses to punish *morally innocent passivity*. The majority opinion does not merit the broad significance attributed by the dissent. Although lacking in preciseness, it is marked by repeated references to the fact that the defendant was being punished for conduct that was "wholly passive," "unaccompanied

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[21] Sayre, *Public Welfare Offenses*, 33 COLUM. L .REV. 55, 56 (1933).

[22] *Id.* at 72.

[23] *Id.* at 84-88. The other groups are: (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of anti-narcotic acts, (5) criminal nuisances, (6) violations of traffic regulations, and (7) violations of motor vehicle laws.

[24] But compare the *Balint* case where a heavier punishment was "justified only on the ground of the extreme popular disapproval of the sale of narcotics." *Id.* at 81.

[25] *Id.* at 72.

[26] *Id.* at 78.

by any activity whatsoever," and so forth. It is this very lack of activity that distinguishes this case from violations of other registration laws.[27]

The dissenters apparently feel that the majority opinion enunciates a new rule that proof of actual awareness of what the law requires, or of a sense of wrongdoing, is requisite to criminal conviction. It is suggested that this conclusion was formed by reading, out of context, the Court's statement that "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with Due Process." But it is clear from study of the opinion as a whole that the holding is meant to apply only to this ordinance and to those which concern a violator in a strictly analogous position. Moreover, the Court affirms the general principle that ignorance of the law will not excuse and recognizes the broad scope of the police power, merely noting that due process necessarily limits its exercise.

The dissent further charges that Lambert represents "a return to Year Book distinctions between feasance and nonfeasance . . . inadmissible as a line between constitutionality and unconstitutionality." Does the decision really draw such a line (admittedly invalid) or does the accused's passivity have a more fundamental significance? The majority does not hold that proof of an affirmative act is prerequisite to the imposition of criminal responsibility. Its concern arises because such responsibility was imposed on a person who was simply living as would an average member of society. Mr. Justice Holmes, insufficiently quoted by both majority and dissent in *Lambert*, reasoned as follows:

> The reference to the prudent man, as a standard, is the only form in which blameworthiness as such is an element of crime, and what would be blameworthy in such a man is an element:—first, as a survival of true moral standards; second, because to punish what would not be blameworthy in an average member of the community would be to enforce a standard which was indefensible theoretically, and which practically was too high for that community.[28]

A survey of Sayre's "public welfare offenses" shows that the violators engaged in some business or activity which was objectively immoral or would have warned the "prudent man" that it might be subject to regulation. In such cases penalties are usually light, proof of the facts is usually sufficient proof of intent, and an occasional injustice is accepted as necessitated by the intolerable burden which would be

[27] See, *e.g.*, State of New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928), where member was prevented from attending meetings or retaining membership in secret organization which had failed to comply with statutory registration requirement; see also United States v. Harriss, 347 U.S. 612 (1953), federal regulation of lobbying; United States v. Kahringer, 345 U.S. 22 (1952), failure to register and pay federal excise tax on wagering.

[28] HOLMES, THE COMMON LAW 76 (1881).

placed upon the judicial process should allegation and proof of intent be required. This proposition that even "public welfare offenses" punish immorality, though of lesser degree, is illustrated by the notion of a continuum, suggesting "a range in morality from the major moral principles to the least of ethical norms."[29]

> The point to be stressed is that the premise underlying such legislation is that intent and negligence *do in fact play essential parts in such offenses.* . . . The key to understanding the petty offenses (and others where *mens rea* has been excluded) is, therefore, that they are designed to catch the wilful and negligent; they are not intended to penalize sheer accident.[30]

Thus the *relevance of passivity* in the *Lambert* case is its *negation of the possibility of immorality*. During the time relevant under the ordinance, the accused engaged in no activity or failure to act which would be "blameworthy in an average member of the community." That of course assumes that the average citizen after conviction and release would not sense that his movements were probably subject to regulation and that he should therefore inquire of the police as to his duties; no other assumption seems justified.

Mr. Justice Frankfurter stated that "there can hardly be a difference as a matter of fairness, of hardship, or of justice," between punishment for unknowing violation of narcotics laws and for similar violation of criminal registration laws. It is the state of "moral passivity" in the latter instance that makes the difference. It seems consonant with "justice" and "fairness" to say that a narcotics handler has a duty to society, and that the average citizen would recognize it were he handling narcotics. The Court indicated as much in the *Balint* case as it examined the basis of the legislation:

> Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless consideration as to the opportunity of the seller to find out the fact . . . contributed to this conclusion.[31]

There is no such opportunity for the violator of a criminal registration ordinance; there is nothing concerning his conduct to warn him that he may have some special duty to society.

Having discounted the dire predictions of the dissent as to the

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[29] Hall, *Prolegomena To a Science of Criminal Law*, 89 U. PA. L. REV. 549, 566 (1943).

[30] *Id.* at 568, 569.

[31] 258 U.S. at 254. In United States v. Dotterweich, 320 U.S. 277, 285 (1943), Mr. Justice Frankfurter writing for the majority in an impure food case, observed that Congress preferred to place the hardship "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce."

effect of the Lambert decision upon the body of law represented by the term "public welfare offenses," there remains the question of its effect, if any, upon other statutes not requiring *mens rea* for conviction.

The Alien Registration Act,[32] although requiring wilfulness for violation of its registration provision, does permit punishment for unintentional failure to comply with a notice requirement of the Act.[33] But it should be noted that this Act is widely publicized by the government and that Congress has long exercised special power with respect to aliens under its power "To establish an Uniform Rule of Naturalization."[34] It must also be admitted that an alien, by the very nature of his status, is or should be aware that there are special duties placed upon him.

The Subversive Activities Control Act requiring Communist registration provides that:

> . . . each individual having a duty . . . to register or to file any registration statement . . . shall, upon conviction of failure to so register . . . be punished for each offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both.[35]

Thus, failure to register is in itself a violation subject to serious penalty. But this enactment was found necessary because "the world Communist movement [presents] a clear and present danger to the security of the United States,"[36] and applies to persons whose conduct would surely warn the average citizen participating therein of the possibility that it was regulated. This, combined with the wide publicity attending any regulation of political activity in the United States, negatives any notion that the Lambert formula has application here.

Modern social and economic developments have resulted in the reduction or elimination of the requirement of *mens rea* in the field of financial transactions between the buying public and business interests, which now seems to be looked upon as quasi-fiduciary relation. Convictions for using the mails to defraud in violation of federal statute furnish good examples of this. It has been held that substantial fraud depended upon the divergence between the promised performance and the promisor's belief that he could perform, it being enough to prove that the promisor had "no intention at all on the matter."[37] This concept of individual duty in the public interest is of course one justifica-

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[32] 66 STAT. 224 (1952), 8 U.S.C. §1302 (1952).

[33] 66 STAT. 225 (1952), 8 U.S.C. §1306 (1952). Note here that the Universal Military Training Act punishes only those who "knowingly fail or neglect or refuse to perform." 62 STAT. 622 (1948), 50 U.S.C. APP. §462(a) (1952).

[34] U.S. CONST. art. I, §8, cl. 4. See Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1951).

[35] 64 STAT. 1002 (1950), 50 U.S.C. §794(2) (1952).

[36] 64 STAT. 989 (1950), 50 U.S.C. §781(15) (1952).

[37] Knickerbocker Merchandising Co., Inc. v. United States, 13 F.2d 544, 545 (2d Cir. 1926).

tion for our ever-expanding securities regulations.[38] It must be admitted that the average citizen undertaking such enterprises would appreciate his special relationship vis-a-vis the investing public, and this admission precludes application of the *Lambert* doctrine.

The foregoing analysis exposes the fears of the dissenters as unfounded. The generalization that justifies the decision is simply that a state of "moral passivity" cannot be punished consistently with due process. Its relevant scope appears to be narrow enough to calm the faintest heart. Far from being "a derelict on the waters of the law," the *Lambert* decision draws a just and sensible line beyond which legislative bodies may not constitutionally venture when sacrificing individual rights for the common good.

Some Unresolved Questions of Validity

The *Lambert* case dealt with only one of a number of issues which are raised by the enforcement of criminal registration ordinances. Now that the ordinances have been subject to attack in the courts, and if it is correct to conclude that the decision will not perceptibly hinder their use, it seems highly probable that we will soon witness litigation of one or more of these unresolved issues.

Although there is no "typical" criminal registration ordinance, one which is fairly representative applies to:

> . . . every person who comes into the city from any point outside of the city, whether in transit through the city or otherwise, who within the period of ten years prior thereto has been convicted two or more times [of a felony] . . .[39]

Every such person must report to the police within twenty four hours after arrival, furnish a description of himself, information concerning his past convictions, where he is staying and for how long, and must submit to photographing and fingerprinting; in addition, he must notify the police by written statement within twenty-four hours after change of address.[40]

Compliance with such provisions, the resultant availability for police "line-ups" and the very real possibility of damage to a person's name and thus to his employment opportunities constitute undeniable inroads upon constitutional rights and privileges. In *Edwards v. California*[41] the four concurring Justices felt that:

> . . . it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship

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38 Federal Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. §77 (1952); Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. §78 (1952).

39 Code of the City of Columbus §34.8 (1952).

40 Code of the City of Columbus §§34.9-34.11, 34.13 (1952).

41 314 U.S. 160 (1941).

> thereof. If national citizenship means less than this, it means nothing.[42]

The *Edwards* case concerned exclusion of "paupers" but it seems only simple logic to apply the reasoning to enactments the unarticulated purpose of which is to exclude the presence of ex-felons, and which at best burdens the exercise of the "right of free transit."[43] Further, the ordinances limit the "right to liberty," protected by the Fifth and Fourteenth Amendments, which "extends to the full range of conduct which the individual is free to pursue."[44] It would be pointless to survey here the other individual rights and privileges, such as the "right of privacy," which may be limited by criminal registration ordinances.

What then justifies such interference with individual interests? It can only be the assumption that convicted persons, because of recidivistic tendencies, pose such a threat to society that they must be kept under close surveillance even at the expense of certain of these interests. This problem of recidivism raises a fundamental dilemma of criminology which it would be futile to attempt to reconcile here, although a few pertinent observations should be made.

It has been stated that "The assurance with which criminologists have advanced opinions regarding the causes of crime is in striking contrast to the worthlessness of the data upon which those opinions are based."[45] If this is the state of criminology, the legislative and judicial branches are met by an insuperable problem in attempting to weigh conflicting interests, since they simply do not know the extent of the public interest at stake. So unsettled is the situation that opponents of the ordinances may make thorough analysis of chosen studies and conclude that "it is apparent that the crime rate for the general population is not significantly less (and may be even greater) than that reported for first offenders. . . ."[46]

Only strict social defense theory can explain the rash of criminal registration ordinances which have limited clearly defined individual rights in favor of a supposed public interest which appears to be only a shadow without substance. In fact, the ordinances defeat social defense objectives insofar as well-meaning convicted persons are embittered by this added burden upon their already difficult attempts at rehabilitation.[47] It is significant to note here that many of the ordinances have a long time limit (or none at all) upon their application, so that a record of

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[42] *Id.* at 183.

[43] See Crandall v. Nevada, 6 Wall. 35 (1867).

[44] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[45] MICHAEL & ADLER, CRIME, LAW AND SOCIAL SCIENCE 169 (1933).

[46] Brief of Amicus Curiae for Appellant, p. 40, *supra* note 7.

[47] "The problem of recidivism is a serious one. Drastic legislation is not the answer since it is passed in an atmosphere of hatred for the criminal rather than one of helpfulness to society." BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 73 (1951).

extended lawful conduct is no excuse for failing to register. Further, the "honest" ex-convicts will be most burdened by the ordinances since they will hasten to comply with the law, whereas the "hardened" criminal will surely not voluntarily alert the police to his presence.

The legislation under consideration is purportedly aimed at controlling "professionalism in crime," "habitual criminals" and the like. It has been held that to limit individual liberties protected by the Fourteenth Amendment a statute must be "reasonably restricted to the evil with which it is said to deal."[48] It is highly probable that the broad scope of some criminal registration legislation violates this rule and is therefore unconstitutional. An ordinance limited to enumerated violent felonies, to "habitual" criminals (*e.g.*, those convicted at least twice of enumerated felonies), and to convictions within a reasonable period of time would seem to answer the major objections, if punishable by a reasonable standard. An elementary, yet fundamental, precept is that positive law must be responsive to morals.

> The moral obloquy and the social disgrace incident to criminal conviction are whips which lend effective power to the administration of criminal law. When the law begins to permit convictions for serious offenses of men who are morally innocent . . . its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped.[49]

A further question of import is raised by the practical use of criminal registration ordinances, considered *supra*, as a facade for police harassment of convicted persons. Even though a law is not discriminatory on its face, equal protection is violated if its application is discriminatory.[50]

The foregoing discussion reveals the constitutional quicksand upon which stand many criminal registration ordinances. Much of this vulnerability would be outweighed if there were a more definitive public interest at stake, but twenty years after the origin of the laws, the only thorough survey of their operation reports:

> It is questionable whether the registration of these persons, even where a substantial number have registered, materially aids the police in preventing criminality or apprehending criminals.[51]

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[48] Butler v. Michigan, 352 U.S. 380, 383 (1956).

[49] Sayre, *supra* note 21 at 79, 80.

[50] Yick Wo v. Hopkins, 118 U.S. 356, 362 (1886). See also Norris v. Alabama, 294 U.S. 587 (1935); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

[51] *Comprehensive Review, supra* note 2 at 103.

Conclusion

The general rule that criminal conviction must be conditioned upon proof of *mens rea* remains a necessary safeguard to individual rights and should not be unduly diluted by modern social and economic pressures. The *Lambert* decision is valuable in that context, reflecting the basic tenet that law must be responsive to morals by placing the status of "moral passivity" beyond the scope of police power punishment. If properly confined within its narrow scope, the decision will serve as a valuable precedent, entirely consonant with prior authority.

It would seem probable that the brevity of the Court's opinion mirrors judicial disapproval of the general tenor of the legislation. Be that as it may, the questionable validity of these ordinances promises an interesting future for them in the judicial process.

Wayman C. Lawrence III