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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. JOEL ALCALA, Defendant and Appellant.	C037000 (Super. Ct. No. SCCRF991730)

APPEAL from a judgment of the Superior Court of Siskiyou County, Robert F. Kaster, Judge. Affirmed.

Law Offices of Sharon L. Rhodes, Sharon L. Rhodes; and Francia M. Welker, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joel Alcala was charged with committing unlawful sex acts with four minor females. A jury convicted him of oral copulation involving one girl (Pen. Code, § 288a, subd. (b)(1)),

acquitted him of the charge of sexual battery against another girl, and was unable to reach verdicts on the charges of oral copulation involving a third girl and sexual battery against the fourth girl. Defendant was granted probation on various conditions, including that he serve 150 days in custody and register as a sex offender pursuant to Penal Code section 290. (Further section references are to the Penal Code unless otherwise specified.)

On appeal, defendant contends the order requiring him to register as a sex offender for committing oral copulation with a minor is unconstitutional because there is no such mandatory registration requirement for what he characterizes as the more harmful offense of unlawful sexual intercourse with a minor. In defendant's view, this disparate treatment deprives him of equal protection of the laws. As we will explain, the contention fails because there is a plausible reason why the Legislature has applied the mandatory sex offender registration requirement to the crime of oral copulation with a minor, but made it optional as to the crime of unlawful sexual intercourse with a minor.[1]

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[1] Although courts do not pass upon the social wisdom of legislation (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 334), from time to time courts suggest that the Legislature reconsider a statute. This seems to us to be such a time. As will become more evident later in this opinion, the statutory scheme would make more sense, would be more just, and would result in fewer costly legal challenges, if the trial court has discretion whether to impose the sex offender registration requirement for oral copulation with a minor, like the trial court has for unlawful sexual intercourse with a minor. (§ 290, subd. (a)(2)(E).)

We also reject defendant's contention that the sex offender registration requirement constitutes cruel or unusual punishment as applied to him. Long ago, the California Supreme Court held that requiring someone to register as a sex offender may, in certain circumstances, constitute cruel or unusual punishment. (*In re Reed* (1983) 33 Cal.3d 914, 920-922.) Later state and federal high court decisions have undermined that holding, but we are bound to follow *In re Reed* until it is explicitly overruled in this regard. Nevertheless, considering the important nonpunitive purpose of the sex offender registration requirement and the minimal, if any, punitive nature of the requirement, we conclude that requiring defendant to register as a sex offender does not shock the conscience or offend fundamental notions of human dignity.

Accordingly, we shall affirm the judgment.

FACTS

We summarize only the facts relating to the charge of which defendant was convicted.

During the summer of 1999, defendant and other fellow Forest Service personnel were frequent customers of the restaurant where a 17-year-old girl (the minor) worked. The minor, who did not have a driver's license, allowed defendant to drive her home from work one night. When he asked her age, she said she was 17. Defendant was 23. Upon arriving at her home, the minor thanked defendant for the ride and declined his request to stay in the car for a few more minutes to talk with him. As she was about to get out of the car, defendant put his hand on her upper thigh and asked, "Am I going to get a thank you?" After she again thanked him for bringing her

home, defendant said, "That is not the kind of thank you that I want." The minor replied, "I know that, but that is the only kind of thank you you are going to get." She then got out of the car and defendant left.

The minor was attracted to defendant and wanted to know him better. Thus, she and her cousin went to the Forest Service barracks to see him. The minor flirted with defendant and allowed him to massage her back. While massaging her, defendant asked her to undo the straps of her overalls, started to kiss and suck on her ear, and said he was going to tell her a secret. According to the minor, she felt "very, very uncomfortable" at this point, but nonetheless invited defendant to visit her later that night at the guest house in which she and her cousin were staying next to her parents' home.

When defendant arrived at the guest house, he and the minor sat in the bedroom and talked, while her cousin was watching television in the adjacent room. The minor and defendant then began kissing, and he fondled her breasts through her clothing. She had no objection to this and even lifted her shirt at his request. Defendant kept asking her to "have sex" with him. Although the minor said something to the effect, "okay, whatever," she did not mean to convey that she was interested in having sexual intercourse with him. In fact, she did not even think that he was "actually serious about it" because she was only 17 and he was 23. No further sexual activity ensued, and defendant left after 30 to 45 minutes.

Three or four days later, defendant returned to the guest house uninvited. By this time, the minor felt guilty about what had happened during the prior visit "because he was so much older, and [she] realized [she] shouldn't have done it." Even though she felt uncomfortable that he had returned, she talked with defendant while her cousin sat with them. When the cousin left the room to go to bed, the minor allowed defendant to kiss her. Defendant then asked her to unbutton his pants and touch his penis; she declined. He asked why. Without looking at him, she said, "Just because I don't want to." Defendant grabbed her head and turned it toward him. At this point, the minor saw that defendant had unbuttoned his pants and exposed his penis. Forcing her head toward his penis, he asked her to "give him a blow job." She told defendant that she did not want to do so. But he would not take "no" for an answer. Applying pressure to keep her head at his penis, defendant said, "Come on, please." The minor "eventually gave up," stated, "okay, I will," and orally copulated his penis. She stopped before he could ejaculate and told him, "I don't want to do this anymore, and I'm not going to do this anymore." Defendant replied, "Okay," and put his penis back into his pants. Soon thereafter, he departed.

While the minor was at work a few days later, defendant arrived there and offered her another ride home. She declined. When she next saw defendant at an event called "Bigfoot Days," he asked her to go to his barracks with him. Again, she declined. Feeling "violated" and "disgusted with [herself] that [she] had let something like that happen[]," the minor told a teacher that defendant had forced her to orally copulate him.

Defendant testified that the minor unzipped his pants, fondled his penis as he fondled her breasts, and voluntarily performed oral copulation on his penis; he did not force her to do so. According to defendant, he believed that she was an adult because she had her own apartment, worked late at night, and had served him beer at the restaurant.

DISCUSSION

I

As he did in the trial court, defendant contends that the order requiring him to register as a sex offender violates his federal and state rights to equal protection of laws in that section 290 mandates registration as a sex offender for his crime of oral copulation with a minor (§ 288a, subd. (b)(1)) but not for the "substantially" similar crime of unlawful sexual intercourse with a minor (§ 261.5, subd. (c)).[2]

For reasons that follow, we conclude defendant has failed to carry his burden of demonstrating constitutional error.

"The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities,

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[2] Although a conviction for unlawful sexual intercourse with a minor does not require registration as a sex offender, it may be ordered "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (§ 290, subd. (a)(2)(E); *People v. Jones* (2002) 101 Cal.App.4th 220, 227, fn. 6.)

provided the classifications are based upon some legitimate object to be accomplished." (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659 (hereafter *Adams*).)

Whenever "a legislative classification involves a suspect classification or significantly infringes upon a fundamental right" (*Adams, supra,* 8 Cal.4th at p. 659), "'*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.' [Citation.] [Orig. italics.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17 (hereafter *D'Amico*).)

Otherwise, the party who challenges the classification has the burden to demonstrate that it fails the "rational basis test." (*Adams, supra,* 8 Cal.4th at p. 660; *D'Amico, supra,* 11 Cal.3d at p. 17.) To carry this burden, the party must show that the classification bears no "rational relationship to a conceivable, legitimate state purpose." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784.)

In defendant's view, the sex offender registration requirement of section 290 implicates a fundamental right because it affects his "liberty, privacy and travel rights." We address each right in turn.

Defendant tenders no argument or legal authority to support his claim that the sex offender registration requirement infringes upon his liberty interest. "Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno*

(1984) 151 Cal.App.3d 635, 647.) In any event, as the California Supreme Court has recognized, the requirement does not constitute punishment (at least for ex post facto analysis) because it serves an important and proper remedial purpose and it is not punitive in either purpose or effect. (*People v. Castellanos* (1999) 21 Cal.4th 785, 795-796 (lead opn. of George, C.J.) and pp. 803-804 (conc. & dis. opn. of Kennard, J.).) As noted in *Russell v. Gregoire* (9th Cir. 1997) 124 F.3d 1079, sex offender registration is "a regulatory measure; it does not have a retributive purpose but does have legitimate nonpunitive purposes." (*Id.* at p. 1089.) Because the sex offender registration requirement generally is not regarded as punishment, it "does not violate a liberty . . . interest." (*Id.* at p. 1094.)

According to defendant, the registration requirement causes him to "suffer the shame and ignominy of being publicized as a sex offender." We construe this to be an argument that there is a fundamental right to privacy that precludes the collection of sex offender information through registration. Again, defendant cites no authority for such a proposition, and we are aware of none. To the contrary, the damage to defendant's reputation caused by requiring him to register as a sex offender, and by making it public, "does not violate any protected privacy interest . . . ." (*Russell v. Gregoire, supra,* 124 F.3d at p. 1094.)

Defendant also claims that the requirement "severely limit[s]" his freedom of movement and places him "continuously under police surveillance." However, the only authority to which he cites, *Kelly v. Municipal Court* (1958) 160 Cal.App.2d 38, did not consider

an equal protection claim or suggest that strict judicial scrutiny is required. As noted in *Russell v. Gregoire, supra,* 124 F.3d 1079, a sex offender registration requirement "does no more than apprise law enforcement officials of certain basic information about an offender living in the area. It places no restraint on the offender's movements . . . ." (*Id.* at p. 1087.)

Because the sex offender registration requirement does not implicate a fundamental right of the convicted offender, "courts have consistently applied the rational basis standard of review" to statutes such as section 290. (*People v. Jones, supra,* 101 Cal.App.4th at p. 230.) We do so as well.

Defendant argues there "is absolutely no rational [basis] for requiring a person to register as a sex offender for the rest of [his] life for engaging in oral copulation with a person not yet 18 years old and not requiring a person to register as a sex offender at all for committing the much more harmful offense of having sexual intercourse with a person not yet 18 years old. Sexual intercourse is a much grater [*sic*] violation of personal space and personal integrity and can, of course, result in pregnancy, changing the course of the young woman's life forever whether or not she carries the pregnancy to term. There is not only no *rational* relationship in such a scheme; it is completely *irrational*." (Orig. italics.)

While it may not seem wise to some to treat the two crimes differently, "[i]t is for the Legislature, not the courts, to pass upon the social wisdom of such an enactment." (*Neighbours v. Buzz Oates Enterprises, supra,* 217 Cal.App.3d at p. 334.) Rather,

courts simply must determine whether defendant has carried his burden (*D'Amico, supra,* 11 Cal.3d at p. 17) of showing that the difference in treatment bears no "rational relationship to a conceivable legitimate state purpose." (*Westbrook v. Mihaly, supra,* 2 Cal.3d at p. 784.) "[U]nder the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. [Citations.]" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644.) "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." (*Williamson v. Lee Optical of Okla.* (1955) 348 U.S. 483, 489 [99 L.Ed. 563, 573.)

Accordingly, where there is any "'"plausible reason[]"'" for the classification, the court's "'"inquiry is at an end."' [Citations.]" (*Warden v. State Bar, supra,* 21 Cal.4th at p. 644; see also *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 482.)

We perceive some plausible reasons why the Legislature, when in 1985 it repealed section 290, effective January 1, 1988, and reenacted section 290, chose to continue to apply the mandatory sex offender registration requirement to a conviction for committing oral copulation with a minor (§ 288a) but not to apply it

automatically to a conviction for unlawful sexual intercourse with a minor (§ 261.5). (Stats. 1985, ch. 1474, § 1, pp. 5403-5410.)[3]

The purpose of the sex offender registration requirement of section 290 is to promote the state's interest in preventing recidivism by sex offenders. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) The requirement assures that persons convicted of specified sex crimes are "readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 825-826; accord, *Wright v. Superior Court, supra,* 15 Cal.4th at p. 527.)

It is plausible the Legislature felt that oral copulation with a minor is more likely to occur *and to reoccur* than is sexual intercourse with a minor because:

(1) oral copulation does not pose the same risks as sexual intercourse, e.g., pregnancy;

(2) oral copulation is easier to commit than sexual intercourse since (a) oral copulation can be accomplished more surreptitiously, and (b) victims are less likely to resist oral copulation than sexual intercourse because oral copulation is not as physically

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[3] As we have noted (see fn. 2, *ante*), a court has *discretion* to require sex offender registration for a defendant convicted of unlawful sexual intercourse with a minor if the court finds the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification--a finding, we think, that would apply to almost every act of unlawful sexually intercourse with a minor.

painful to a minor and it was more widely acceptable among youth in the culture of the 1980's;

(3) because oral copulation does not carry the same risks as sexual intercourse, is less physically painful to a minor, and is more widely acceptable among youth in our culture, the minor victim is less likely to report an act of oral copulation than to report an act of sexual intercourse;

(4) absent a complaint by the victim, oral copulation is more difficult to detect by a third person than is sexual intercourse because oral copulation never results in pregnancy and ordinarily does not result in physical trauma;

(5) more minors are at risk of being the victims of oral copulation than of sexual intercourse because an adult male can commit oral copulation with boys as well as girls;

(6) for all of these reasons, there is a wider "victim base" for oral copulation with a minor than for sexual intercourse with a minor; and

(7) there is particular need for the state to prevent recurring oral copulation with minors because it often is used to "groom" the victims for other sex acts by making them less likely to resist those acts than if they had never been subjected to acts of oral copulation; thus, it creates a wider victim base for other sexual acts with minors.

Therefore, "[a]pplying the rational basis standard, we conclude that defendant 'does not carry his burden' [citation] and that section 290 does not violate defendant's right to equal protection of the law." (*People v. Jones, supra,* 101 Cal.App.4th at p. 230.)

II

In another attack on the order requiring him to register as a sex offender, defendant contends as he did in the trial court that it violates the cruel and/or unusual punishment clauses of the Eighth Amendment of the United States Constitution and article I, section 17 of California's Constitution.

Twenty years ago, five justices of the California Supreme Court held that the requirement to register as a sex offender is punitive, and thus a form of punishment, such that it can be challenged on the ground it constitutes cruel or unusual punishment as applied. (*In re Reed, supra,* 33 Cal.3d at pp. 920-922, opn. of Mosk, J., Bird, C.J., Broussard, Reynoso, and Grodin, JJ., concurring (hereafter *Reed*).) Subsequent state and federal jurisprudence has called into question the correctness of *Reed*. (*People v. Castellanos, supra,* 21 Cal.4th at pp. 797-798.) As noted by the Supreme Court in *People v. McVickers* (1992) 4 Cal.4th 81, "registration as a sex offender . . . has a legitimate nonpunitive purpose" (*id.* at p. 89) that courts have recognized is "unrelated to punishment. [Citation.]" (*Id.* at p. 87.)

"Upon reexamination of the decision in *Reed* in light of these more recent cases, [six California Supreme Court justices have] conclude[d] that *Reed* should be disapproved to the extent that decision can be interpreted as suggesting that sex offender registration constitutes punishment for purposes of ex post facto analysis." (*People v. Castellanos, supra,* 21 Cal.4th at p. 798 (lead opn. of George, C.J.) and pp. 800-805 (conc. & dis. opn. of Kennard, J.).)

However, the current California Supreme Court has not yet disapproved *Reed* to the extent it holds sex offender registration is punishment for the purpose of a claim that it constitutes cruel and/or unusual punishment as applied. (See *People v. Castellanos, supra,* 21 Cal.4th at p. 805 (conc. & dis. opn. of Kennard, J.).) Because we are bound by this holding in *Reed* until the Supreme Court explicitly overrules it (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we now proceed to address defendant's challenge to the sex offender registration requirement as applied to him.

"The California Constitution prohibits 'cruel *or* unusual punishment.' [Citation.] We construe this provision separately from its counterpart in the federal Constitution. [Citation.] [¶] A punishment may violate the California Constitution although not 'cruel or unusual' in its method, if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (hereafter *Lynch*).)" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135-1136.)

Lynch, supra, 8 Cal.3d 410, identified three techniques that courts used to administer this rule: examination of the nature of the offense and the offender (*id.* at p. 425); comparison of the punishment with the penalty for more serious crimes in the same jurisdiction (*id.* at p. 426); and comparison of the punishment to the penalty for the same offense in different jurisdictions (*id.* at p. 427; see also *People v. Cartwright, supra,* 39 Cal.App.4th at pp. 1135-1136).

A

As to the offense, defendant claims that his actions "were only criminal due to the victim's age," and that "if the act had occurred two months later, it would not have been criminal."

However, defendant obtained the minor's consent using methods that may have proved less successful with an adult. The minor testified defendant surreptitiously exposed his penis, grabbed her head, turned it and forced it toward his penis, applied pressure to her head to keep it in position, and then kept urging her to orally copulate him until she relented and did so.

Moreover, there was evidence that this was not an isolated incident with one soon-to-be adult victim. Six other minor females accused defendant of making sexual overtures to them, touching them sexually, or trying to pressure them into orally copulating him. These events occurred when one of the girls was only 14 years old, three were 15, one was 16 and one was 17.

One girl testified to an incident when she was 15 years old. Defendant first met her while she was walking down the street. When he asked for her telephone number, she told him she was 15 and gave her number to him. Some time later, he called and they planned to meet a group of her friends by a creek. Defendant picked her up. After they had some beer and talked with others who were at the creek, defendant drove her home. Rather than drop her off at the house, he drove past it and stopped. Telling her that she "needed somebody in [her] life [who] treated [her] well instead of somebody [who] was [her] age and didn't treat [her] well," defendant unbuttoned his pants and exposed his penis to her. He

then grabbed her head and pulled her mouth towards his penis. His penis entered her mouth, but she opened the car door and got out before he ejaculated.[4]

Another girl testified that when she was 15 years old, defendant paid her to wash his car at his barracks. When she was done, he "slapped [her] on the butt" more than once, even though she asked him to stop, and then tried to kiss her. When she resisted, he pulled her by the arm toward his bed, had a hold of her hair, and started kissing her. When she tried to push him away, he "grabbed her hair harder" and "stuck his hand up [her] shirt and started feeling [her] up." He then tried to put his hand in her pants, attempted to put her hand between his legs, and asked the 15-year-old to orally copulate him. When she continued to resist, he stuck some money down the front of her pants, slapped her on the buttocks, and left.[5]

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[4] Defendant testified that when he arranged to meet with this girl after their first encounter, he believed she was 17 or 18 years of age. She did not tell him her age until they left from their outing at the creek. He tricked her into admitting she was age 16. In fact, she was 15. It was her idea that defendant should park and talk with her. He did not ask her to orally copulate him, and she did not do so. He did not do or see anything that she could have mistaken for his penis protruding from his pants. Defendant's counsel argued that the girl, who "couldn't testify without giggling," was "definitely very young [and] very immature." In closing argument, defense counsel argued that the girl was "clearly lying" and that the claimed incident in the car "never happened."

[5] Defendant testified that he made no advances upon this girl when she was in his room at the barracks. He never flirted with her, even though she flirted with him. Defendant was aware the

A third girl testified that when she was 17 years old, she encountered defendant while he was talking to her best friend at the Bigfoot Days event. She walked up to them and introduced herself to defendant. He reached out to say goodbye to the friend and then brought his hand down so that it brushed the 17-year-old's breasts. He then touched her buttocks with his hand. Surprised at what defendant had done, she turned around to say something to him, but defendant had already walked away. Her friend became very upset. Later, defendant began following them until she told him in "not nice words" to "get away, that he [did not] need to bother [them] anymore, he[had] done enough."[6]

Another girl testified that when she was 14 years old, defendant stepped in front of her while she and a friend were walking through the Forest Service compound on their way home from school. He introduced himself, asked where she lived, and began talking about his work. Every time she tried to move around him, defendant would step in front of her. When she told him she needed to go, defendant shook her hand and she left. The next weekend, defendant saw her at the park and told her she "should come over and dance with him later[.]" He then softly "punched" her on the shoulder. She was scared because of "the way he stared and the way

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girl was "very young." In closing argument, defense counsel argued that the touchings did not occur.

[6] Defendant testified that he did not touch this girl at all. He did not run his arm or hand across her breasts or buttocks. In closing argument, defense counsel argued that, if defendant did touch the girl, it was not with the intent required for the offense.

he had to be close when he talked. He had to have some kind of bodily contact when talking." Every time the 14-year-old girl saw him thereafter, he waved at her.[7]

Yet another girl testified that when she was 15 years old, defendant tried to kiss her and called her a "tease." He knew she was 15 years old at the time because she had told him her age.[8]

A sixth girl testified that when she was 16 years old, defendant told her that she was "a wild one," said something about "jail bait," and later asked her to give him a massage at his barracks.[9]

Defendant was not convicted of any offenses involving these six girls (he was not charged with any acts involving three of the girls; the jury was unable to reach verdicts regarding his alleged acts with two of them; and the jury acquitted him with respect to one alleged victim). Nevertheless, if supported by a preponderance of the evidence (*People v. Levitt* (1984) 156

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[7] Defendant testified that he confronted this girl and her friend because he did not know what they were doing on the compound and because strangers had stolen and vandalized property on the compound in the past. According to defendant his only intent was to find out why they were there and where they were going. Nothing else occurred.

[8] Defendant denied that he tried to kiss this girl. In closing argument, defense counsel suggested the girl accused defendant of wrongdoing in order to support her friends who had testified against him.

[9] Defendant acknowledged meeting this girl at the fair, but testified that he never touched her, never flirted with her, never made any crude comments to her, and never asked her to come to his barracks.

Cal.App.3d 500, 515; see Cal. Rules of Court, rule 4.420(b)) and reasonably related to the sentencing decision (*People v. Taylor* (1979) 92 Cal.App.3d 831, 833), defendant's conduct with those seven girls can be considered. (See *In re Coughlin* (1976) 16 Cal.3d 52, 59-60 [criminal conduct for which a defendant was acquitted can be considered by the court in deciding whether to revoke probation]; *In re Dunham* (1976) 16 Cal.3d 63, 69 [conduct resulting in an acquittal can be considered in deciding whether to revoke parole]; *People v. Lent* (1975) 15 Cal.3d 481, 486-487 [conduct resulting in an acquittal can be considered for an order of restitution that serves the purposes of probation]; *People v. Richards* (1976) 17 Cal.3d 614, 623-624; *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [uncharged conduct can be considered "as an aggravating factor or as a factor in other sentencing decisions"]; *People v. Fulton* (1979) 92 Cal.App.3d 972, 976 [same]; *People v. Taylor, supra,* 92 Cal.App.3d at p. 833 [conduct for which a defendant was arrested can be considered for a reasonably related sentencing decision]; but see *People v. Takencareof* (1981) 119 Cal.App.3d 492, 498.)

Obviously, evidence of a pattern of misconduct that would demonstrate a likelihood of future, similar misconduct is relevant to the sex offender registration requirement. And such a pattern of conduct is relevant to the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society," for purpose of a cruel or unusual punishment assessment. (*In re Lynch, supra,* 8 Cal.3d at p. 425). Thus, all of defendant's conduct that is factually supported in the record should

be considered in determining whether requiring him to register as a sex offender registration constitutes cruel and unusual punishment.

Considered separately, or in conjunction with the other allegations against defendant, by no stretch of the imagination can it be said that his offense against the minor was insignificant.

B

As to the nature of the offender, defendant notes that, prior to sentencing, he was evaluated by a clinical psychologist who felt that defendant was unlikely to be a sexual predator. However, when asked about the evidence that defendant had sexual encounters with other minor females during the general time frame of the present offense, the psychologist conceded this evidence showed a person who is "a danger to under aged girls" if such aggressive sexual behavior continues.

Defendant notes he had no criminal record and was employed as a firefighter at the time of the incident. But these factors did not preclude him from committing the offense against the minor, and they do not suggest that he would not commit similar offenses in the future.

C

Regarding the punishment for more serious crimes, defendant argues that sexual intercourse with a minor under age 16 is more serious than oral copulation with a minor who is almost age 18, yet sex offender registration for unlawful sexual intercourse is not mandatory. However, as we have noted, the trial court has discretion to order sex offender registration where, as usually is the case, the unlawful sexual intercourse with a minor is

motivated by sexual gratification. (§290, subd. (a)(2)(E); fn. 2, *ante*.)

Defendant's reliance on the fact sex offender registration is not required for serious crimes such as robbery, burglary, and arson "not related to sex" is of no help to him because, if a court finds that such crimes are committed "as a result of sexual compulsion or for purposes of sexual gratification," the perpetrator may be ordered to register as a sex offender. (§ 290, subd. (a)(2)(E).)

That all states have sex offender registration requirements but most do not apply them to crimes like defendant's also is of no help to defendant. "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516; see *People v. Romero* (2002) 99 Cal.App.4th 1418, 1433.)

D

In sum, considering the important nonpunitive purpose of the sex offender registration requirement, and the minimal if any punitive nature of the requirement, we conclude that requiring defendant to register does not "shock[] the conscience" or

"offend[]s fundamental notions of human dignity." (*Lynch*, *supra*, 8 Cal.3d at p. 424.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

I concur:

NICHOLSON, J.

Morrison, J.

I concur.

Unlike unlawful sexual intercourse with a minor, a person convicted of oral copulation with a minor must register as a sex offender and wear this "ignominious badge" for the rest of his or her life. (§ 290; see *In re Birch* (1973) 10 Cal.3d 314, 321-322.)

For some purposes sex offender registration is not deemed to be punishment. (See, e.g., *Smith v. Doe* (2003) ___ U.S. ___ [155 L.Ed.2d 164 [ex post facto purposes]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061-1065 [due process purposes].) But becoming a registrant is a most unwelcome event, requiring various notifications to the authorities, on pain of imprisonment, such as for moving or having a birthday. (See, e.g., § 290, subds. (a)(1)(A), (D).) Indeed, the California Supreme Court has held that in some cases such registration can be punishment for purposes of cruel or unusual punishment analysis under the California Constitution. (*In re Reed* (1983) 33 Cal.3d 914; see also 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 187, p. 260.)

Whether or not that view is still correct as a matter of law, as a matter of fact, registrants are burdened. As held by the majority and by *People v. Jones* (2002) 101 Cal.App.4th 220, whether a particular crime and not others may be subject to registration is reviewed under the

rational basis standard. The justification for treating these two crimes differently that the majority has come up with passes this standard, although I doubt it was the rationale which actually motivated this legislative result.

Forcing a defendant who commits oral copulation on a child to register while no such requirement exists for a defendant who has intercourse with a child seems a vestige of the legal view that oral copulation is unnatural under any circumstance. That time has passed. Except where force is used or a participant is a prisoner, the Legislature decriminalized adult oral copulation in 1975. (See *People v. Collins* (1978) 21 Cal.3d 208, 211.)

In my view unlawful sexual intercourse with a minor is far more dangerous and has more serious consequences than oral copulation with a minor. I urge the Legislature to address the disparate treatment of these two crimes. If not persuaded by the rationale posited in this opinion, the Legislature ought to consider repealing the registration requirement for oral copulation with a minor or consider extending the mandatory registration requirement to the more serious crime of unlawful sexual intercourse. Either option would be more logical than the current scheme.

MORRISON, J.