Comments

CRUEL OR UNUSUAL PUNISHMENTS IN CALIFORNIA: NEW PROBLEMS IN FITTING PUNISHMENT TO CRIMES

> Let rules be fix'd that may our rage contain,
> And punish faults with a proportion'd pain;
> And do not flay him, who deserves alone
> A whipping for the fault that he has done.
>
> Horace[1]

Cruel or unusual punishments are proscribed by a California Constitution provision which is similar to the Eighth Amendment of the United States Constitution.[2] California's provision first appeared in the "Declaration of Rights," which was part of the 1849 Constitution.[3] The provision was re-incorporated into the Constitution of 1879, and has since remained unchanged.[4]

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1. BOOK OF FAMILIAR QUOTATIONS 179 (Ottenheimer Publishers, Inc. 1970).

2. "Excessive bail shall not be required, nor excessive fines be imposed; nor shall cruel or unusual punishments be inflicted." CAL. CONST. art. I, § 6. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed." U.S. CONST. amend. VIII. The differences between the conjunctive form (U.S.) and the disjunctive form (California) are analyzed in People v. Anderson, 6 Cal. 3d 628, 634-37, 493 P.2d 880, 883-86, 100 Cal. Rptr. 152, 155-58 (1972), and Mosk, *The Eighth Amendment Rediscovered*, 1 LOYOLA (L.A.) L. REV. 4, 17-19 (1968) [hereinafter cited as Mosk].

3. *See generally* People v. Anderson, 6 Cal. 3d 628, 634-35, 493 P.2d 880, 883-84, 100 Cal. Rptr. 152, 155-56 (1972).

4. Article I, section 6 was limited, however, by the passage of Proposition 17, in 1972, which added section 27 to article I of the Constitution. Sec-

California's cruel or unusual punishment prohibition was patterned from the eighth amendment. The eighth amendment was itself modeled after the English Declaration of Rights of 1688.[5] The principle behind the prohibition had developed as early as the eleventh century in the laws of Edward the Confessor. A similar provision can be found in the Magna Carta, and was embodied in the laws of several colonies prior to its adoption in the Bill of Rights.[6]

The eighth amendment was originally interpreted to prohibit only manifestly cruel punishment such as drawing and quartering.[7] *Weems v. United States*[8] was the Supreme Court's first major breakthrough into the concept of excessiveness as a possible standard for the eighth amendment. *Weems* held that the eighth amendment applied to prohibit those punishments which were grossly disproportionate to the crime committed. "[P]unishment for crime," held Justice McKenna, "should be graduated and proportioned to [the] offense."[9] The *Weems* principle of disproportionality has been used in subsequent eighth amendment litigation[10] as well as in many state cruelty cases.[11]

Although a few cases had alluded to such a criterion,[12] *In re Lynch*[13] was the first California case to expressly apply dispropor-

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tion 27 declares that the death penalty may not be held to constitute cruel or unusual punishment under article I, section 6.

5. 1 W. & M. c. 2 at 143; *see In re* Kemmler, 136 U.S. 436, 446 (1890).

6. *See generally* Mosk, *supra* note 2, at 6-7; Furman v. Georgia, 408 U.S. 238, 316-21 (1972) (Marshall, J., concurring).

7. Weems v. United States, 217 U.S. 349, 368-82 (1910); Wilkerson v. Utah, 99 U.S. 130, 136 (1878); *In re* Kemmler, 136 U.S. 436, 446 (1890): "[I]f the punishment . . . [was] burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." (Justice Fuller was speaking of the New York constitutional provision, but applying its meaning to the eighth amendment as well).

8. 217 U.S. 349 (1910).

9. *Id.* at 367.

10. *E.g.*, Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973).

11. *E.g.*, State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952); State v. Pratt, 36 Wis. 2d 312, 153 N.W.2d 18 (1967). For a compilation of other states see Annot., 33 A.L.R.3d 335, 363-64 (1970).

Justice Mosk of the California Supreme Court has called *Weems* "[t]he most significant advance toward elimination of brutality in penal administration . . . ." Mosk, *supra* note 2, at 10.

12. People v. Anderson, 6 Cal. 3d 628, 646, 493 P.2d 880, 892, 100 Cal. Rptr. 152, 164 (1972); People v. Wein, 50 Cal. 2d 383, 423-28, 326 P.2d 457, 481-84 (1958) (dissenting opinion); People v. Oppenheimer, 156 Cal. 733, 737, 106 P. 74, 77 (1909); *In re* Finley, 1 Cal. App. 198, 202, 81 P. 1041, 1042 (1905).

13. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

tionality grounds to a statutory penalty.[14] Recently, two California courts of appeal have attempted to apply the cruelty standards laid down in *Lynch* to the punishment proscribed in a criminal assault statute.[15] *People v. Romo*[16] and *People v. Wingo*[17] came to opposite conclusions as to whether the punishment was cruel or unusual. The conflict will be resolved by the Supreme Court of California when it reviews the two cases.[18] This comment will discuss the status of California's cruel or unusual punishment provision, and will analyze the important problems raised by *Romo* and *Wingo*.

DETERMINING DISPROPORTIONALITY IN CALIFORNIA

The Three-Step Approach

John Lynch was approached by a waitress while he was sitting in his car in a drive-in restaurant. As the waitress neared the window,

> [S]he saw the fly of his pants open, his hand on his erect penis, and a "pin-up" magazine open on the front seat next to him. When petitioner heard her . . . he turned, saw her, and said "Oops."[19]

The waitress left immediately, but later called the police when she observed through Lynch's rearview mirror that he was "still exposed."

Lynch was found guilty of indecent exposure,[20] and because this was his second conviction[21] he was sentenced under California's indeterminate sentencing law to not less than one year in prison.[22]

14. *Id.* at 420, 503 P.2d at 927, 105 Cal. Rptr. at 223; *See generally* Comment, *In re Lynch and Beyond to Judicial Review of Sentences*, 10 SAN DIEGO L. REV. 793 (1973) [hereinafter cited as *Lynch and Beyond*]; Comment, *California's Cruelty Criteria: Evaluating Sentences After In re Lynch*, 25 HAST. L.J. 636 (1974) [hereinafter cited as *Cruelty Criteria*].

15. CAL. PENAL CODE § 245(a) (West 1972): "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for six months to life . . . ."

16. 39 Cal. App. 3d 326, 114 Cal. Rptr. 289 (1st Dist. 1974).

17. 38 Cal. App. 3d 895, 113 Cal. Rptr. 695 (2d Dist. 1974).

18. On August 7, 1974, the California Supreme Court decided to review *Romo* and *Wingo*, and thereby determine the constitutional status of the penalty provision of Penal Code section 245(a).

19. 8 Cal. 3d at 438, 503 P.2d at 940, 105 Cal. Rptr. at 236.

20. CAL. PENAL CODE § 314 (West 1972).

21. Lynch's first conviction was nine years prior to the second.

22. For complete summaries of these facts, and discussions analyzing the opinion, *see Lynch and Beyond* and *Cruelty Criteria, supra* note 14; *see*

His habeas corpus application came after he had served more than five years of his term.

Holding that a sentence of "not less than one year" is a life sentence for purposes of a cruelty examination, the supreme court advanced a three-pronged approach to the cruelty question. The first prong involved an examination of the nature of the offense and the offender, with reference to the degree of danger presented to society. Second, the disputed punishment was compared to punishments in California for more serious crimes. Finally the disputed California punishment was compared to punishments in other states for similar offenses.

Applying these tests to Lynch's life sentence, the supreme court held that the sentence was "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."[23]

The *Lynch* method was also used by the court, in the case of *In re Foss*,[24] to determine if a *minimum* sentence was violative of California's cruelty provision. With a prior conviction fourteen years earlier for possession of heroin, Foss was convicted of selling and furnishing heroin.[25] This prior conviction resulted in the imposition of the sentence of ten years to life, without possibility of parole for ten years. Foss challenged only that part of the sentence which denied him parole. Using the *Lynch* criteria, the supreme court held that the provision of the statute precluding parole for a minimum term was in violation of the cruel or unusual punishment prohibition of the California Constitution.[26]

Underlying Considerations

Foss is currently the only case in which the California Supreme Court has used the three-pronged test developed in *Lynch* to determine whether or not a punishment is unconstitutionally cruel.[27]

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also The Supreme Court of California 1971-1972, 61 CAL. L. REV. 273, 418-26 (1973) [hereinafter cited as *California Supreme Court*].

23. 8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.

24. 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

25. CAL. HEALTH & S. CODE § 11501, Stats. 1959, c. 1112, p. 3193, § 4 (repealed 1972), *now* CAL. HEALTH & S. CODE § 11352 (West Supp. 1974).

26. 10 Cal. 3d at 929, 519 P.2d 1085, 112 Cal. Rptr. at 661.

27. People v. Schueren, 10 Cal. 3d 553, 516 P.2d 833, 111 Cal. Rptr. 129 (1973), involved special circumstances of an "unusual" punishment, but without the use of the *Lynch* method. Schueren was convicted of a lesser included offense, which carried a sentence greater than that of the offense originally charged. The supreme court found that an accused is not normally subject to an increased maximum term as a result of "exercising his constitutional rights *and* successfully defending against the crime charged."

There were two basic concerns underlying the *Lynch* and *Foss* decisions. First, the supreme court was concerned with whether the indeterminate sentencing procedure would fail to work in the circumstances presented. Furthermore, the court was interested in whether there was some legitimate governmental purpose in the punishment.

California's indeterminate sentencing system is founded on the theory that once a person is rehabilitated his sentence should be shortened. In other words,

> [T]he purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is *to mitigate the punishment which would otherwise be imposed upon the offender.* These laws place emphasis upon the reformation of the offender. . . . They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing.[28]

As originally used in Europe, the indeterminate sentencing system was to perform the function of *lengthening* the sentence of a prisoner who was not rehabilitated at the end of his term. This approach was not adopted in the United States. Instead, the system was used to *shorten* sentences "as an incentive to reformation."[29]

Under the American approach, the length of sentence is based on the needs of the individual offender, with reference to the interest of society in the offender's condition.[30] The system is used as a device to "relate the length of confinement to the problem to be solved."[31] California follows this American viewpoint.

The indeterminate sentencing procedure in California commences when the sentencing judge decides to imprison the offender rather than impose a sentence of probation, or suspend the sentence alto-

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10 Cal. 3d at 560, 516 P.2d at 838, 111 Cal. Rptr. at 134 (emphasis by the court). The court held that such a punishment was "unusual," and therefore a violation of the California Constitution. The sentence was modified accordingly.

28. *In re* Lee, 177 Cal. 690, 692, 171 P. 958, 959 (1918), *quoted in part in In re* Lynch, 8 Cal. 3d at 416, 503 P.2d at 924, 105 Cal. Rptr. at 220 (emphasis by the court).

29. *In re* Lynch, 8 Cal. 3d 410, 416, 503 P.2d 921, 924, 105 Cal. Rptr. 217, 220 (1972).

30. Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. LAW REV. 7, 16 (1972).

31. Conrad, *Punishment to Fit Criminals*, in JUSTICE, PUNISHMENT, TREATMENT 4 (L. Orland ed. 1973).

gether.[32] A judge may not impose a specific term of years.[33] He may simply state the sentence as "the term prescribed by law."[34] After a sentence of imprisonment is imposed by the judge, the Adult Authority is given control over the length of sentence,[35] limited only by the boundaries set in the statute under which the defendant was convicted.[36]

Theoretically, once the offender is within the control of the Adult Authority he is released only when it has been determined that society will not be endangered by his liberation. Indeed, the release of a rehabilitated individual into society is one of the basic purposes of an indeterminate sentencing system.[37]

The bases of the indeterminate sentencing system are rehabilitative treatment of the offender, incentive to reform, and release at the completion of rehabilitation. The supreme court is concerned, in cruel or unusual punishment cases, with the absence of one of these bases, and the failure of the system in the individual case.

Concerned about the failure of the system to work, the court in *Lynch* discussed the possibilities of adequate treatment for a sexual exhibitionist. Noting the intimidation and "concerted peer scorn" to which the exhibitionist is subject, as well as the apparent insufficiency of adequate treatment, the court concluded:

> In any event, if this is the most optimistic treatment offered for exhibitionism in the most psychiatrically oriented institution in the Department of Corrections, the long prison sentence imposed by section 314 can hardly be justified as an act of benevolence towards the offender.[38]

In re Foss also presented circumstances where the goals of the indeterminate sentencing system could not be fulfilled. How can the offender have an incentive to reform himself in circumstances where release is precluded for a period of at least ten years? The bulk of Foss' rehabilitation dealt with his drug addiction. The court concluded that,

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32. *See generally Lynch and Beyond, supra* note 14; Comment, *The Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U.C.D. L. REV. 360 (1972) [hereinafter cited as *Sentencing*].

33. CAL. PENAL CODE § 1168 (West 1972).

34. *Sentencing, supra* note 32, at 363.

35. CAL. PENAL CODE § 3020 (West 1972): "[T]he Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned . . . ."

36. CAL. PENAL CODE § 3023 (West 1972).

37. *See* Frankel, *Lawlessness in Sentencing*, in JUSTICE, PUNISHMENT, TREATMENT 6, at 8 (L. Orland ed. 1973). Another purpose of such a system suggested by the author is the prevention of great differences in sentencing caused by "unregulated vagaries of individual judges." *Id.*

38. 8 Cal. 3d at 434, 503 P.2d at 937, 105 Cal. Rptr. at 233.

> [O]nce he has been able to overcome that addiction or show a real promise of rehabilitation and of being able to remain free of further narcotic usage he may not be tried under parole supervision but must still remain in prison until the expiration of the mandatory ten-year period. This hardly serves as an impetus towards "well-doing" on the part of the prisoner.[39]

Thus, the goal of incentive to reform by strengthening the offender's will and fitting punishment to the criminal were frustrated by the lack of any possibility of parole.[40]

Another concern underlying both the *Lynch* and *Foss* decisions was whether there was a legitimate governmental purpose in the punishments prescribed.[41] If the ideals of the indeterminate sentencing model cannot work for a specific offense, is there some *other* legitimate purpose for the invocation of the lengthy sentence?

Punishment is usually justified on the basis of one or more of four traditional theories. These theories are retribution, deterrence, incapacitation, and rehabilitation.[42] In *Lynch*, the extremely severe penalty of a possible life sentence, imposed because of the petitioner's recidivism, could not be justified under any of these traditional theories. Rehabilitation could not justify a life sentence because of the inadequacy of the treatment for exhibitionists available in prisons.[43] Nor would a deterrence theory justify a life sentence for indecent exposure. First, the offender in *Lynch* had

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39. 10 Cal. 3d at 924, 519 P.2d at 1081, 112 Cal. Rptr. at 657.

40. *Id.* at 923-24, 519 P.2d at 1081-82, 112 Cal. Rptr. at 657-58.

41. It has been contended that such an inquiry does not address cruel or unusual punishment provisions; instead, it addresses substantive due process questions. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). Packer suggests that the issue posed by cruelty provisions is *not* whether there is a rational basis for the legislature's actions, but more correctly, whether the legislature's actions—rationality aside—are "too offensive to stomach." *Id.* at 1076. "Decency" is the issue in eighth amendment-type claims; "rationality" in due process claims. *Id.*

Whether a discussion of legitimate governmental purposes is appropriate in an Eighth Amendment case is a question well beyond the scope of this comment. Suffice it to say that the concept *does* seem broad enough to have a valid role in the rationale for almost any inquiry into the constitutionality of a criminal penalty.

42. *See generally* Packer, *The Justification for Punishment*, in JUSTICE, PUNISHMENT, TREATMENT 183 (L. Orland ed. 1973); THEORIES OF PUNISHMENT (S. Grupp ed. 1971); PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (G. Ezorsky ed. 1972); W. LAFAVE & A. SCOTT JR., HANDBOOK ON CRIMINAL LAW § 5 (1972).

43. 8 Cal. 3d at 433-34, 503 P.2d at 937, 105 Cal. Rptr. at 233.

psychological problems which significantly contributed to causing his offense. He was not likely to ever contemplate the possible criminal results of his acts. Furthermore, even if exhibitionism could be deterred, the sentence needed to accomplish the deterrence must surely be less than life imprisonment. A life sentence would be well beyond the needs of a deterrent purpose of punishment.

Similarly, a life sentence was unnecessary to incapacitate the offender who exposed himself in public only once every nine years. Since the exhibitionist does not commonly progress to more serious crimes,[44] to incapacitate him for life for being a two-time offender is cruelly excessive. Finally, even if retribution is a valid rationale for punishment under modern considerations,[45] the gravity of the offense in the case of an exhibitionist could not rationally justify a life sentence.[46] Consequently, although the supreme court did not specifically hold in *Lynch* that the lack of any legitimate governmental purpose was a contributing factor in its decison, this factor was of at least an underlying concern to the court.[47]

The court which decided *In re Foss* was similarly concerned with the lack of a penological purpose to punishment.[48] Rehabilitation fails in a mandatory ten-year term for possession of a limited amount of drugs because of the removal of any incentive for rehabilitation.[49] Isolation from society is not a legitimate reason for denying the possibility of parole for a fixed term since society's safety is already protected by the power of the Adult Authority to deny parole if the offender has not been rehabilitated. Therefore, the minimum term could not "afford any *extra* protection from a dangerous offender to society than is otherwise available . . . ."[50]

Nor was deterrence of sufficient importance to justify the preclusion-of-parole provision in *Foss*. Because Foss sold heroin only to support his addiction, his crimes of possession and sale of the drug were closely related to physiological and psychological com-

44. *See Id.* at 433, 503 P.2d at 936, 105 Cal. Rptr. at 232.

45. Retribution may not be the *sole* purpose of punishment according to People v. Anderson, 6 Cal. 3d 628, 651, 493 P.2d 880, 896, 100 Cal. Rptr. 152, 168 (1972).

46. *In re* Lynch, 8 Cal. 3d 410, 429, 503 P.2d 921, 933, 105 Cal. Rptr. 217, 229 (1972).

47. This position is supported by language in a subsequent case: "Although not mentioned in *Lynch*, also relevant [to an examination of the nature of the offense and the offender] is a consideration of the penological purposes of the prescribed punishment." *In re* Foss, 10 Cal. 3d 910, 919-20, 519 P.2d 1073, 1078, 112 Cal. Rptr. 649, 654 (1974).

48. *Id.* at 923-25, 519 P.2d at 1081-82, 112 Cal. Rptr. at 657-58.

49. *See* text accompanying notes 36-37, *supra*.

50. 10 Cal. 3d at 925, 519 P.2d 1082, 112 Cal. Rptr. at 658 (emphasis added).

pulsions. The possibility of the minimum sentence having a deterrent effect in the case was slight.[51]

Therefore, future challenges based on California's cruelty provision must go beyond *Lynch*'s three-step approach to the issue of disproportionality. They must resolve the issue of whether the indeterminate sentencing method will succeed, and if it will not, they must determine whether there is some other legitimate penological purpose to the punishment. These determinations are factors in analyzing the nature of the offense and the offender—the first step in a *Lynch* examination.

THE *Wingo* AND *Romo* CASES

Wingo

Two recent California Court of Appeal cases, which are currently before the supreme court, present the court with the opportunity to elucidate the *Lynch-Foss* cruelty standard.

In April of 1974, *People v. Wingo*[52] was decided by the Second District Court of Appeal. The defendant had been charged with murder[53] and assault by means of a force likely to produce great bodily injury.[54] Although acquitted on the murder count, the defendant was convicted on the assault charge and was sentenced to prison for six months to life.

Charges in the case stemmed from the brutal beating and death[55] of a seventy-two year old man. The defendant had knocked the victim down, and kicked him in the upper body and head. The

51. *Foss* was followed by a divided court of appeal in People v. Malloy, — Cal. App. 3d —, 116 Cal. Rptr. 592 (4th Dist. 1974), where the defendant was convicted for selling LSD, and was precluded from parole consideration for a five year minimum period. Deterence *could* have been achieved in this case since the defendant was a commercial dealer. He was not an addict, and was not under a physiological compulsion. Since there was a valid penological purpose to the punishment, the court's holding of unconstitutionality appears wrong unless the preclusion-of-parole provision is excessive *per se* for deterent purposes in drug offenses.

52. 38 Cal. App. 3d 895, 113 Cal. Rptr. 695 (2d Dist. 1974).

53. CAL. PENAL CODE § 187 (West 1972).

54. *Id.* § 245(a) (quoted at note 15).

55. Death was caused by a heart attack. An acquittal on the murder charge occurred in large part because witnesses for the prosecution could not say whether the heart attack would have occurred regardless of the injuries sustained in the beating.

beating occured during daylight when the victim had been walking through a public park. On appeal, the defendant's theory was that the sentence, with its life maximum, was unconstitutionally disproportionate to the crime of assault with force likely to produce great bodily injury.

The first *Lynch* test was resolved in favor of the long sentence. The court of appeal examined the nature of the offense and the offender with reference to the degree of danger presented to society. The court found that the crime charged and the offender himself presented a "serious challenge to public order."[56] Not only was the attack unprovoked, but there were no mitigating circumstances. Therefore, there was a high degree of danger to society.

The court came to the same result when it compared the sentence for assault with the punishments for more serious crimes in California. There are many crimes which are arguably more serious than the assault charged in *Wingo*, and some of these offenses involve a less severe punishment. But the court found that there was no "gross and indefensible miscalculation"[57] in the legislature's assignment of penalties. Forcible assault likely to produce great bodily injury was found to be a crime warranting major punishment. The differences between this and other crimes of a similar nature were found to be insignificant.

A comparison of California's punishment with those in other states for similar offenses, the third *Lynch* test, revealed that there were several jurisdictions which had less severe punishments. Those differences were not sufficiently significant, however, to support a finding that California's punishment is so inconsistent with general American standards that it is cruel or unusual. In fact, the court of appeal found that the assault charge in *Wingo* is "considered nationally a most serious crime,"[58] thereby rendering California's punishment compatible with those of other jurisdictions.

The court concluded, based on its application of the *Lynch* criteria, that a life sentence for an assault likely to produce great bodily injury does not violate the cruel or unusual punishment provision of the California Constitution.

Romo

Two months after the *Wingo* decision, the First District Court of Appeal, in *People v. Romo*,[59] held that the same penalty provision

56. 38 Cal. App. 3d at 898, 113 Cal. Rptr. at 697.
57. *Id.* at 898-99, 113 Cal. Rptr. at 697.
58. *Id.* at 899-900, 113 Cal. Rptr. at 698.
59. 39 Cal. App. 3d 326, 114 Cal. Rptr. 289 (1st Dist. 1974). This decision

is cruel and unusual under the *Lynch* approach.

Billy Romo and three friends had been drinking heavily when a fight broke out between Romo and Rodriguez. Rodriguez, who was stabbed in the leg and back, testified at trial that he saw a knife in Romo's hand. Romo testified that Rodriguez had the knife and had tried to "stick" Romo, when they both fell to the ground. Although he testified that he grabbed at the knife, Romo testified further that he had not intentionally stabbed Rodriguez.[60] Romo was convicted of assault with a deadly weapon.[61]

The defendant challenged the maximum penalty of life imprisonment as cruel or unusual. Like its resolution in *Wingo*, the first *Lynch* test was resolved in favor of the long sentence. The court stated,

> There can be little doubt that the crime of assault with a deadly weapon is a serious offense and that by reason of the violence of the conduct inherent in the crime the offense and the offender present a danger to society. Accordingly, *from this viewpoint* it may not be said that there is an unconstitutional disproportionality between the offense and the penalty prescribed therefor by subdivision (a) of section 245.[62]

Comparing the punishment with those of more serious crimes, the court observed that there were fifteen Penal Code sections and one Vehicle Code section, all of which established crimes "which [were] undeniably of far greater seriousness than the crime of assault with a deadly weapon,"[63] but which provide for penalties much less than life. Among the crimes listed were manslaughter,[64] kidnapping,[65] shooting at an inhabited dwelling or occupied building,[66] and statutory rape.[67]

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was upon a rehearing by the court of appeal. At the first hearing on the matter the court of appeal held that there was *no* violation of the California Constitution. Although *Lynch* was cited in the first opinion, a three-step approach was not used, nor was there any in-depth analysis of Romo's challenge.

60. The circumstances surrounding the offense were mentioned in the first opinion, but not at all in the second.

61. CAL. PENAL CODE § 245(a) (West 1972) (quoted at note 15).

62. 39 Cal. App. 3d at 337, 114 Cal. Rptr. at 297 (emphasis added).

63. *Id.*

64. CAL. PENAL CODE § 193 (West 1972) (up to fifteen years).

65. *Id.* § 208 (one to twenty-five years).

66. *Id.* § 246 (one to five years in prison or up to one year in county jail).

67. *Id.* § 264 (up to fifty years in prison or up to one year in county jail).

Finally, turning to the comparison of California's punishment with those in other jurisdictions, the court of appeal noted that except for one state, no other American jurisdiction "approaches the life maximum decreed in California."[68]

Having found that the punishment for assault with a deadly weapon was at "total disparity" with other more serious crimes, and that the California punishment was not consistent with other jurisdictions, the court of appeal concluded that the punishment was a violation of California's constitutional cruelty provision.

Issues Presented to the Supreme Court

The California Supreme Court has been presented with a serious conflict between two court of appeal decisions. This conflict stems from uncertainties in, or perhaps misapplications of, the *Lynch* approach to the question of cruel or unusual punishment. In both *Wingo* and *Romo*, the supreme court will have to deal with problems in the *Lynch* approach which these cases have raised.[69] It

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68. 39 Cal. App. 3d at 338, 114 Cal. Rptr. at 298.

69. One problem, not dealt with at length here, is whether or not a court has the power to declare a statutory punishment provision cruel or unusual as applied only in the particular case. There is a split of authority on the issue, with the majority of jurisdictions adhering to the position that the statute itself must be attacked, rather than its application to a single offender. *E.g.*, McDougle v. Maxwell, 1 Ohio St. 2d 68, 203 N.E.2d 334 (1964); Chasse v. People, 119 Colo. 160, 201 P.2d 378 (1948); for a compilation of cases following this view, *see* Annot., 33 A.L.R.3d 335, 359-63 (1970). California's position in the conflict is uncertain, although cases appear to favor the majority rule. *See generally Cruelty Criteria, supra* note 14, at 645-48.

In re Lynch has been criticized because it evaluated the recidivist portion of the indecent exposure statute in terms of the *least* offensive behavior covered by that law. *E.g., California Supreme Court, supra* note 22, at 422. Since the defendant's behavior in that case was found to warrant a less severe punishment than that provided in the statute, the entire recidivist punishment provision was declared unconstitutional. 8 Cal. 3d at 439, 503 P.2d at 940, 105 Cal. Rptr. at 236.

The legislature, on the other hand, fixes punishment limits thinking of "the worst cases in the class that it is dealing with." Wechsler, *Sentencing Innovotions, Sentencing Institute: Violence Today—A Judicial Concern*, 46 F.R.D. 497, 519 (1968). *In re Lynch* invalidated the punishment provision not only as applied to the individual in that case, but also as applied to offenders who cannot be reformed and who would have served the maximum sentence. This result was not necessary, because the court could have held that under the circumstances presented in *Lynch*, and only in that case, the punishment was unconstitutional.

A ruling by the supreme court that the judiciary has the power to declare individual applications of a punishment cruel or unusual would make the *Lynch* result more acceptable. *Romo* and *Wingo*, however, do not present the court with a clear opportunity to rule on the issue. The assaults charged in those cases were punishable by imprisonment in the county jail,

can be assumed that the court will retain at least the basic framework of its three-step approach to cruelty. In order to make that approach more workable at lower appellate levels, however, the court should hand down specific guidelines.

What is a "More Serious" Crime?

One problem the supreme court must deal with in its upcoming *Romo-Wingo* decisions concerns the second *Lynch* technique, that of comparing the challenged penalty with punishments prescribed for more serious offenses in California. The rationale in *Lynch* for this test was that occasionally the legislature acts in response to a temporary public outcry. The reaction of the legislature on that occasion would result in an excessive penalty. Since a majority of punishments are acted upon with "due and deliberate regard for constitutional restraints,"[70] those punishments are used as guides to the parameters of "permissible degrees of severity."[71]

The difficulty in comparing penalties is in determining whether one offense is more "serious" than another. As a general rule it could be said that those offenses with greater penalties are more serious than those with lighter penalties. But in examining a penalty as excessive or disproportionate, the use of such an argument would be resorting to circular reasoning. The greater penalty *is* important, however, because it gives an indication of how serious the legislature thinks the offense is.[72]

The supreme court has required that the crimes chosen for com-

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or by a fine, as well as by incarceration in a state prison. If the particular cases warranted less than a state prison term, the remedy should be a finding of abuse of discretion at the trial level, rather than a finding of cruel or unusual punishment. In these cases, a less severe punishment *could* have been applied by the trial judge. For a discussion of judicial review of trial judges' sentence impositions, *see Lynch and Beyond, supra* note 14, at 794-800.

70. 8 Cal. 3d at 426, 503 P.2d at 932, 105 Cal. Rptr. at 228.

71. *Id.* The comparative approach was substantially rejected in Howard v. Fleming, 191 U.S. 126 (1903). *See generally Cruelty Criteria, supra* note 14, at 640 and 643-44.

72. "The legislature is . . . accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime . . . ." *In re* Lynch, 8 Cal. 3d 410, 414, 503 P.2d 921, 923, 105 Cal. Rptr. 217, 219 (1972), *quoting from* People v. Anderson, 6 Cal. 3d 628, 640, 493 P.2d 880, 888, 100 Cal. Rptr. 152, 160 (1972).

parison be "undeniably of far greater seriousness"[73] than the challenged offense. Unless there is a considerable difference, the judiciary does not have sufficient means to distinguish and contrast the seriousness of the various offenses.[74]

One way to differentiate between the gravity of offenses is to categorize them as violent or nonviolent. Violence has been defined in several ways, with most definitions emphasizing an unwarranted or abusive degree of force.[75]

Although the former is usually equated with the latter, there is a distinction between the violent offender and the dangerous offender.[76] Most violent crimes against people involve an offender and a victim who knew each other, and the crime itself is usually spontaneous.[77] Thus, "many, if in fact the majority [of violent offenders], may well not be of a *continuing* danger [to society]."[78] Simply stated, a person can commit a violent crime without necessarily being dangerous in the future.

The courts should recognize that when the legislature determines the penalty for certain conduct it is concerned not only with violence, but with dangerousness to society—a reflection of "society's right and power to protect itself."[79] Dangerousness is a *potential* to commit violent crimes, rather than a *history* of crime commission.[80] It is caused by psychological characteristics which can now be recognized, diagnosed, and often very effectively treated.[81] High maximum sentence provisions are reflections of legislative concern over the dangerousness of the offender.[82] Therefore, when a court determines the seriousness of a crime, for purposes of an examination into the constitutionality of punishment, the focus should be on whether or not the commission of the crime discloses a potential

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73. *In re* Lynch, 8 Cal. 3d 410, 431, 503 P.2d 921, 935, 105 Cal. Rptr. 217, 231 (1972).

74. *California Supreme Court, supra* note 22, at 423.

75. *E.g.*, BLACK'S LAW DICTIONARY 1742 (revised 4th ed. 1968); Couzens, *Reflections on the Study of Violence*, 5 LAW AND SOCIETY REV. 583, 586 (1971).

76. Sheppard, *The Violent Offender: Let's Examine the Taboo*, 35 FED. PROBATION 12, 15 (Dec. 1971).

77. *Id.* at 13-14.

78. *Id.* at 15 (emphasis added). *But see* Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME AND DELINQUENCY 393, 394 (1972).

79. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME AND DELINQUENCY 371, 374 (1972).

80. *Id.* at 372.

81. *Id.* at 392.

82. *See generally* Ginsberg & Klockers, *The "Dangerous Offender" and Legislative Reform*, 10 WILLAMETTE L.J. 167 (1974); *Sentencing Institute: Violence Today—A Judicial Concern*, 49 F.R.D. 497 (1968).

for dangerousness. The importance of violence in a cruelty examination should be limited.

Judicial determinations of seriousness are further confused when the target crime itself is violent, or poses a threat of dangerousness. These crimes must be compared to other violent crimes, but the other crimes must be of undeniably greater seriousness. It is difficult, for example, to determine whether kidnapping is more serious than arson. The difficulty stems from the fact that both offenses are violent, and both crimes evidence the offender's potential for dangerousness.

It has been asserted that the more serious crimes "touch the very foundations of social order."[83] Traditionally, these crimes were burglary, arson, rape, robbery, mayhem, and murder. Theft would be considered less serious because it is not an offense which "threatens the underpinnings of the social order."[84] Of least seriousness are such offenses as assault resulting in no injury, and minor batteries. This type of categorization of seriousness had been proposed by several writers.[85]

Most categorization of crimes has been aimed at the legislative level. At the judicial level a more common-sense approach must be used because,

> Courts are without adequate facilities for the re-examination of the complex social and economic phenomena of which the legislature is supposed to have taken cognizance, and it is not likely that they will be furnished with [these facilities] . . . .[86]

A common-sense approach is feasible since it is made up of broad, general judgments of "relative moral iniquity and harmfulness."[87] These categories, however, "cannot cope with any *precise* assessment of an individual's wickedness."[88]

Another problem with the categorization of crimes is the placement of offenses arising from civil disobedience. Burning draft records, for example, is not only a challenge to the law and an ex-

83. E. FREUND, STANDARDS OF AMERICAN LEGISLATION 57 (1965).
84. Wechsler, *supra* note 69, at 524-25.
85. *E.g.*, Wechsler, *supra* note 69, at 524; MODEL SENTENCING ACT, art. III (2d ed. 1972).
86. E. FREUND, *supra* note 83, at 96.
87. Hart, *Prolegomenon to the Principles of Punishment*, in THEORIES OF PUNISHMENT 354, 375 (Grupp. ed. 1971).
88. *Id.* (emphasis added).

pressive crime, but it is also, arguably, a threat to public order. But is it a "serious" offense? This type of problem will continue to plague the courts so long as they must categorize the "seriousness" of crimes.

The lack of any clear definitions or categorizations of seriousness gives rise to the need for undeniable differences in "seriousness" between the challenged offense and the crime used for comparison.

The necessity for supreme court guidance in the area of comparing offenses is clear. *People v. Romo*,[89] for example, compared assault with a deadly weapon to crimes which, by the court's standards, were "undeniably of far greater seriousness."[90] One of these crimes was statutory rape. But is an eighteen-year-old boy who has sexual intercourse with his seventeen-year-old girlfriend undeniably more dangerous to society than someone who assaults another with a deadly weapon?[91] In short, the use of "more serious" crimes for comparison purposes was inconsistent with the *Romo* court's stated standard of comparison.

An interesting approach to the determination of seriousness of offenses was used in *People v. Wingo*.[92] *Wingo* also involved the charge of assault, but in searching for more serious crimes the court conceded that "reasonable men may and do differ sharply on the relative degrees of evil and social danger attached to particular crimes."[93] Judicial interference in the assignment of degrees of danger should come only in cases of "gross and indefensible miscalculation."[94] The *Wingo* court simply observed that forcible assault is a major crime, and that a major punishment is approriate.

Wingo may have touched on a viable alternative to the *Lynch* technique of comparing punishments in terms of seriousness. It

89. 39 Cal. App. 3d 326, 114 Cal. Rptr. 289 (1st Dist. 1974).

90. *Id.* at 337, 114 Cal. Rptr. at 297. The crimes were: manslaughter; assault with intent to commit murder; kidnapping; mayhem; assault with intent to commit rape, sodomy, mayhem, robbery or grand larceny; assault with caustic chemicals with intent to injure or disfigure; assault on a peace officer or fireman engaged in the performance of his duties; arson; burglary by torch or explosives; wrecking a vehicle of a common carrier causing bodily harm; shooting at an inhabited dwelling or occupied building; poisoning food or drink with the intent to injure a human being; drunk driving causing bodily injury; forcible abduction for purposes of prostitution; and statutory rape. *Id.* at 337-38, 114 Cal. Rptr. at 297.

91. Another example of the court's inconsistency was its use of drunk driving causing injury as an offense of greater seriousness than the assault charged. It cannot be rationally asserted that an injury caused by an intoxicated driver is "undeniably of far greater seriousness" than an injury caused by an assault with a deadly weapon.

92. 38 Cal. App. 3d 895, 113 Cal. Rptr. 695 (2d Dist. 1974).

93. *Id.* at 898, 113 Cal. Rptr. at 697.

94. *Id.* at 899, 113 Cal. Rptr. at 697.

is a combination of the categorization and common-sense approaches. For major crimes, a severe punishment is appropriate. For minor offenses, a less severe punishment is sufficient. If the offense is minor as a matter of logic, experience, and common sense, yet the punishment is severe, then there is a strong indication of disproportionality. Under the same criteria, if the offense is major and the punishment is severe, then the courts would not need to distinguish between minute categories of seriousness. Two all-encompassing categories would be sufficient for judicial purposes.

Balancing the Three Tests

Another problem which the supreme court must deal with is whether or not any one of the three *Lynch* tests outweighs the other two. Succinctly stated, how should the three tests be balanced to reach a final conclusion in a cruelty examination? It must be remembered that the criterion for California's cruelty prohibition is whether the disproportionality is so great that it "shocks the conscience and offends fundamental standards of human dignity."[95] The three-step *Lynch* approach is an aid to the application of this standard.

Since the three *Lynch* steps are merely means to an end, any strict mathematical formula should be avoided in balancing the tests. The inquiry should focus on a combination of *all three* tests, with a reasonable degree of flexibility.

In *Romo*, two tests favored disproportionality, while only one favored a finding of constitutionality. According to the First District Court of Appeal, the danger to society was clear. The punishment was declared unconstitutionally disproportionate, however, solely on the basis of the two comparative tests. This application of the *Lynch* criteria was erroneous.

The degree of danger which the offense and the offender present to society, the first *Lynch* test, should be given the most consideration in any cruelty challenge. Most cases in which disproportionality has been found to exist have involved nonviolent or relatively nondangerous offenders.[96] When the offense is one in which the

95. *In re* Lynch, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972); *In re* Foss, 10 Cal. 3d 910, 919, 519 P.2d 1073, 1078, 112 Cal. Rptr. 649, 654 (1974).

96. *E.g.*, Weems v. United States, 217 U.S. 349 (1910) (falsifying public

safety of society is threatened, comparative techniques should only be allowed to outweigh that threat if there are irrational or irreconcilable differences between the punishments. *Lynch* itself used the comparison tests only to bolster a tentative finding of disproportionality.[97] *People v. Anderson*,[98] which struck down capital punishment in California, used a comparative approach after having already found capital punishment to be a violation of the constitutional cruelty prohibition.[99] *Foss*, like *Lynch*, used the comparative approach simply to strengthen its prior finding of excessiveness.[100]

Romo is one of only two California cases finding disproportionality solely on the basis of the comparative techniques.[101] These results are unacceptable because the weight to be given the comparative factors in the balancing of the tests should be severely limited when the offender's dangerousness to society is clear.

The fault lies in a complete lack of any supreme court guidelines for balancing the tests. In *Lynch*, all three tests pointed to disproportionality. This is the best approach, since a requirement of agreement of all three tests would be consistent with the acknowledged limitation that a court will invalidate a punishment only when it is "plainly and palpably" in conflict with the constitution.[102] The supreme court should require that a finding of unconstitutional disproportionality must be supported by *all three* of the *Lynch* criteria.

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document); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (perjury); Faulkner v. State, 445 P.2d 815 (Alaska 1968) (passing bad checks); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (indecent exposure); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (sale of drugs); People v. Lorentzen, 187 Mich. 167, 194 N.W.2d 827 (1972) (sale of marijuana); *accord*, O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (dissenting opinion) (punishment for sale of liquor in dry state urged as disproportionate); *In re* Jones, 35 Cal. App. 3d 531, 542, 110 Cal. Rptr. 765, 772 (1973) (dissenting opinion) (punishment for sale of marijuana urged as disproportionate).

97. 8 Cal. 3d at 431, 503 P.2d at 935, 105 Cal. Rptr. at 231.

98. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

99. *Id.* at 651 and 654-56, 493 P.2d at 895 and 898-99, 100 Cal. Rptr. at 167 and 170-71.

100. 10 Cal. 3d at 923 and 925-29, 519 P.2d at 1081 and 1082-85, 112 Cal. Rptr. at 657 and 658-61.

101. The other case is People v. Thomas, — Cal. App. 3d —, 116 Cal. Rptr. 393 (4th Dist. 1974), which also dealt with assault with a deadly weapon, and came to the same conclusion as *Romo*, that the punishment was cruel and unusual.

102. *In re* Finley, 1 Cal. App. 198, 200, 81 P. 1041, 1042 (1905); *accord*, *In re* Dennis M., 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969) (unconstitutionality must appear clearly, positively, and unmistakenly).

CONCLUSION

When the California Supreme Court decides the *Romo* and *Wingo* cases, it will have to deal either explicitly or implicitly with two serious problems: (1) the criteria for determining "seriousness" of crimes, and (2) the weight to give each of the factors in the three-pronged *Lynch* approach.

Underlying the *Romo* and *Wingo* cases—and therefore underlying the determination of the two problems presented—will be a concern with whether the indeterminate sentencing procedure will be successful in those specific cases, and whether the punishment serves a legitimate penal purpose.

The question of what constitutes seriousness is best resolved by either classifying all crimes into major and minor crimes, or by altogether abandoning the use of comparisons between different types of crimes. Court of appeal applications of the *Lynch* comparison approach have clearly demonstrated the confusion stemming from the current lack of any workable standard.

The "balancing" problem should be resolved by a holding that before a punishment will be declared unconstitutionally disproportionate, all three prongs of the *Lynch* method must be resolved against the punishment. This result would be consistent with the judiciary's valid reluctance to declare a law unconstitutional.

The *Lynch* approach to cruelty examinations is an acceptable exercise of the judiciary's powers of constitutional review. But the need for clarification in that approach is clear. Cases like *Romo* and *Wingo* should be used by the supreme court to explain the criteria for detrmining the constitutionality of punishments, thereby avoiding future problems on the lower appellate levels.

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