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Constitutional Law-Cruel or Unusual Punishment-Indeterminate Sentence with No Maximum Term for a Second Offense of Indecent Exposure is so Disproportionate to the Crime as to Violate the Cruel or Unusual Punishment Provision of the California Constitution

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CONSTITUTIONAL LAW—CRUEL OR UNUSUAL PUNISHMENT—INDETERMINATE SENTENCE WITH NO MAXIMUM TERM FOR A SECOND OFFENSE OF INDECENT EXPOSURE IS SO DISPROPORTIONATE TO THE CRIME AS TO VIOLATE THE CRUEL OR UNUSUAL PUNISHMENT PROVISION OF THE CALIFORNIA CONSTITUTION—*In re Lynch,* 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

In 1958, petitioner John Lynch was convicted of misdemeanor indecent exposure in violation of former California Penal Code section 311, now Penal Code section 314,[1] and was placed on two-years probation.[2] In 1967, while being served at a drive-in restaurant, Lynch was observed through his car window by a carhop, who noticed that Lynch had his pants unzipped, his hand on his penis, and a "pin-up" magazine open on the front seat next to him. Having been momentarily distracted by the sound of a siren, Lynch suddenly became aware of her presence and uttered a surprised "oops." She left immediately. Fifteen minutes later, the waitress allegedly observed through Lynch's rearview mirror that he was still exposed and reported the incident to the police. Lynch was thereupon arrested and subsequently convicted of his second offense of indecent exposure. He was sentenced pursuant to Penal Code section 314 to an indeterminate term of not less than one year.[3] He appealed to the court of appeal, but his conviction was affirmed.[4]

Lynch spent more than five years in state prison, including three and one-half years in the maximum security confines of Folsom Prison. He was denied release on parole four times by the Adult Authority.[5] He ultimately filed two applications for habeas corpus with the California Supreme Court. The first included the assertion that his sentence

1. CAL. PEN. CODE § 314 (West 1972).

2. Lynch could have been sentenced to a maximum 6 months in county jail or a fine of $500 or both. CAL. PEN. CODE § 19 (West 1972).

3. Penal Code section 314 provides in relevant part:

Every person who wilfully and lewdly . . .

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby;

. . . is guilty of a misdemeanor.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code [lewd or lascivious acts upon a child], *every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year.* (Emphasis added.)

4. In re Lynch, 8 Cal. 3d 410, 414, 503 P.2d 921, 923, 105 Cal. Rptr. 217, 219 (1972).

5. *Id.* at 438, 503 P.2d at 840, 105 Cal. Rptr. at 236.

for the 1967 conviction constituted cruel and unusual punishment.[6] The second attacked the validity of his 1958 conviction.[7] The applications were consolidated for hearing by the supreme court. Justice Stanley Mosk, writing for the majority, determined that the aggravated penalty for second-offense indecent exposure, punishment of imprisonment in state prison for "not less than 1 year," was in effect life imprisonment.[8] It was this maximum term of imprisonment permitted by Penal Code section 314 which had to be tested against the California constitutional limitation of cruel or unusual punishment.[9] The court concluded that Lynch's sentence violated article I, section 6 of the California Constitution[10] because, while not cruel or unusual in its method, it was so disproportionate to the crime involved "that it shock[ed] the conscience and offend[ed] fundamental notions of human dignity."[11]

Prior to *Lynch,* no California court had adjudged a statutory penalty unconstitutional on the ground that it was disproportionate to the crime

6. *Id.* at 414, 503 P.2d at 923, 105 Cal. Rptr. at 219.

7. In Crim. No. 16237, Lynch contended his conviction was invalid because he assertedly was denied various constitutional rights at the proceedings. This point had been raised in several prior applications for habeas corpus which had been denied by the court; it therefore refused to reconsider the issue. 8 Cal. 3d at 439 n.26, 503 P.2d at 940 n.26, 105 Cal. Rptr. at 236 n.26.

8. 8 Cal. 3d at 419, 503 P.2d at 927, 105 Cal. Rptr. at 223. The court based this conclusion on three considerations: (1) the purpose of the indeterminate sentence law is to encourage rehabilitation by allowing for mitigation of a punishment which would otherwise be imposed, and the validity of such an incentive system depends on the legislature's power to prescribe the described maximum term; (2) the actual operation of the indeterminate sentence program provides that the Adult Authority can extend a previously fixed lesser term to a new term to and including the statutory maximum at any time prior to the prisoner's final discharge; and (3) the law has been upheld against various constitutional challenges, including ones based on the separation of powers and due process clauses, on the ground that the indeterminate sentence is in legal effect a sentence for the maximum term. *Id.* at 416-17, 503 P.2d at 925, 105 Cal. Rptr. at 221. Thus, section 671 of the Penal Code provides:

> Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, punishment of such offender shall be imprisonment during his natural life . . . . CAL. PEN. CODE § 671 (West 1972).

9. *See In re* Schoengarth, 66 Cal. 2d 295, 302, 425 P.2d 200, 204-05, 57 Cal. Rptr. 600, 604-05 (1967); *In re* Cowen, 27 Cal. 2d 637, 641, 166 P.2d 279, 281 (1946); *In re* Lee, 177 Cal. 690, 692-93, 171 P. 958, 959 (1918).

10. CAL. CONST. art. 1, § 6, provides: "[N]or shall cruel or unusual punishments be inflicted . . . ."

11. 8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226. The court disapproved dictum in *In re* Garner, 179 Cal. 409, 414-15, 177 P. 162, 165 (1918), which arguably suggests the contrary. 8 Cal. 3d at 424 n.15, 503 P.2d at 930 n.15, 105 Cal. Rptr. at 226 n.15.

committed. However, the principle, derived from Justice Field's dissent in the United States Supreme Court decision of *O'Neil v. Vermont*,[12] had been continually recognized in California cases testing the constitutionality of the death penalty against the prohibition of cruel or unusual punishment.[13] It had also been well-established in the federal courts,[14] and had been invoked repeatedly in the highest courts of California's sister states.[15] Several months prior to *Lynch*, in *People v. Anderson*,[16] the California Supreme Court recognized that "punishments of excessive severity for ordinary offenses" *may* be both cruel and unusual.[17] In *Lynch*, the court declined to call a life sentence per se "cruel or unusual" as a method of imposing punishment.[18] Rather, the court held that the life sentence was cruel or unusual because it was grossly disproportionate to the crime committed.[19] This interpretation recognizes a distinction between the method of punishment, such as torture or death, which has traditionally been thought to invoke the prohibitions of the cruel or unusual punishment clause, and the length of sentence, which heretofore has not been considered by the California court in the context of cruel or unusual punishment.[20] The *Lynch*

12. 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). In *O'Neil*, a New York liquor dealer sent individual jugs of liquor by common carrier to persons in Vermont, a "dry" state, who had ordered them in New York where such sale was legal. The United States Supreme Court refused to consider whether a sentence of a fine of over $6000 or 54 years at hard labor constituted cruel and unusual punishment. Justice Field dissented, suggesting that the sentence was excessively severe and was therefore cruel and unusual. He recognized that what might be considered cruel and unusual punishment was not confined to rack and screw methods of punishment, but logically extended to sentences severely disproportionate to the crime charged. *Id.*

13. People v. Anderson, 6 Cal. 3d 628, 643-44, 493 P.2d 880, 890, 100 Cal. Rptr. 152, 162 (1972); People v. Oppenheimer, 156 Cal. 733, 737-38, 106 P. 74, 77 (1909); *In re* Finley, 1 Cal. App. 198, 201-02, 81 P. 1041, 1042-43 (1905).

14. Furman v. Georgia, 408 U.S. 238, 280 (1972) (Brennan, J., concurring); Trop v. Dulles, 356 U.S. 86, 99 (1958); Weems v. United States, 217 U.S. 349, 353 (1910); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting); Ralph v. Warden, 438 F.2d 786, 789 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

15. State v. Evans, 245 P.2d 788, 792 (Idaho 1952); Dembowski v. State, 240 N.E.2d 815, 817-18 (Ind. 1968); Workman v. Commonwealth, 429 S.W.2d 374, 377-78 (Ky. 1968); People v. Lorentzen, 194 N.W.2d 827, 829-31 (Mich. 1972); Cannon v. Gladden, 281 P.2d 233, 234-35 (Ore. 1955); State v. Kimbrough, 46 S.E.2d 273, 275 (S.C. 1948).

16. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

17. *Id.*. at 654, 493 P.2d at 897, 100 Cal. Rptr. at 169.

18. 8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226. In *In re* Rosencrantz, 205 Cal. 534, 537, 271 P. 902, 904 (1928), the court determined that a life sentence by itself was not cruel or unusual punishment.

19. 8 Cal. 3d at 437, 503 P.2d at 939, 105 Cal. Rptr. at 235.

20. Federal court recognition of length of sentence as a relevant factor began with Justice Field's dissenting view in O'Neil v. Vermont, 144 U.S. 323 (1892), which later

court reasoned, as did the United States Supreme Court in *Weems v. United States*,[21] that the length of sentence can constitute cruel or unusual punishment, thereby enlarging the scope of article I, section 6 of the California Constitution.[22] However, proof that a sentence was *merely* disproportionate to the crime committed is not a sufficient showing to hold a statutory penalty unconstitutional. The *Lynch* court was careful not to encroach upon the role of the legislature in enacting penal statutes and in specifying punishment for crimes.[23] Accordingly, it determined that it should not interfere with the legislative function unless the statute prescribed a penalty so severe in relation to the offense that it "shocks the conscience and offends the fundamental notions of human dignity."[24]

Finding insufficient guidelines in California case law to determine what constitutes gross disproportion, the court inquired into the tests employed in other jurisdictions. Under those tests, a defendant is required to show: (1) that there was a gross disparity between the penalty and "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society";[25] or (2) that the penalty, when compared with punishments for more serious offenses in the same jurisdiction, ought to be deemed excessive;[26] or

became the law in Weems v. United States, 217 U.S. 349 (1910). 8 Cal. 3d at 420-21, 503 P.2d at 927-28, 105 Cal. Rptr. at 223-24.

21. 217 U.S. 349 (1910). In *Weems*, a disbursing officer employed in a Philippine government bureau was convicted of making two false entries in his cash books. The Philippine statute he was convicted under prescribed a minimum sentence of 12 years imprisonment in chains and hard and painful labor, with concomitant penalties of fines, loss of certain civil rights, and perpetual surveillance. The Court held this to be cruel and unusual punishment both as to its method and its sentence which was severely disproportionate to the offense. *Id.* at 377.

22. 8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.

23. *Id.* at 414, 423-24, 503 P.2d at 923, 930, 105 Cal. Rptr. at 219, 226.

24. *Id.* at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.

25. *Id.* at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226; *see* Weems v. United States, 217 U.S. 349, 365-66 (1910) (12 years imprisonment at hard labor and in chains for two false entries in government cash books); O'Neil v. Vermont, 144 U.S. 323, 337-41 (1892) (Field, J., dissenting) ($6000 or 54 years at hard labor for unauthorized sale of liquor); Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972) (death sentence for rape); Faulkner v. State, 445 P.2d 815, 818-19 (Alaska 1968) (36 year sentence on 8 bad check counts); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (life sentence without possibility of parole for rape committed by juvenile defendants); People v. Lorentzen, 194 N.W.2d 827, 828 (Mich. 1972) (mandatory minimum 20 year sentence for sale of marijuana); State v. Ward, 270 A.2d 1, 4-5 (N.J. 1970) (two to three years imprisonment for youthful offenders for possession of marijuana).

26. 8 Cal. 3d at 426, 503 P.2d at 931, 105 Cal. Rptr. at 227; *see* Weems v. United States, 217 U.S. 349, 380 (1910) (12 years imprisonment at hard labor in chains for

(3) that there is a gross disparity between the challenged penalty and "the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision."[27]

The court used all three tests to strike down the contested sentencing provision of section 314 of the Penal Code. Applying the first test, the court determined that Penal Code section 314 defined the crime of indecent exposure as a mere "annoyance," which is not such a grave danger to society as to warrant a prospective punishment of life imprisonment.[28] Indeed, both at common law[29] and under 80 years of California statutory law,[30] until the enactment of the present penalty in 1952, indecent exposure was considered to be no more than a nuisance, and was punished as a misdemeanor. Modern clinical studies in psychiatry also corroborate the generally low-key approach taken by legislatures in formulating an appropriate punishment for this crime, typically characterizing indecent exposure "as a social nuisance"[31] rather than as conduct resulting in violence[32] or involving a true victim.[33]

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two false entries in government cash books); O'Neil v. Vermont, 144 U.S. 323, 339 (1892) ($6000 or 54 years at hard labor for unauthorized sale of liquor); State v. Evans, 245 P.2d 788, 793 (Idaho 1952) (life imprisonment for lewd and lascivious acts upon a child); Dembowski v. State, 240 N.E.2d 815, 816-18 (Ind. 1968) (25 years maximum sentence for robbery); People v. Lorentzen, 194 N.W.2d 827, 831-32 (Mich. 1972) (mandatory minimum 20 year sentence for sale of marijuana); State v. Driver, 78 N.C. 423, 426 (1878) (5 years in county jail for wife beating); Cannon v. Gladden, 281 P.2d 233, 235 (Ore. 1955) (life imprisonment for assault with intent to commit rape).

27. 8 Cal. 3d at 427, 503 P.2d at 932, 105 Cal. Rptr. at 288; *see* Trop v. Dulles, 356 U.S. 86, 102-03 (1958); Weems v. United States, 217 U.S. 349, 377 (1910); Ralph v. Warden, 438 F.2d 786, 791-92 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972;) State v. Evans, 245 P.2d 788, 792-93 & n.1 (Idaho 1952); People v. Lorentzen, 194 N.W.2d 827, 832 (Mich. 1972).

28. 8 Cal. 3d at 431, 503 P.2d at 935, 105 Cal. Rptr. at 231.

29. *See* ARCHBOLD, CRIMINAL PLEADINGS, EVIDENCE AND PRACTICE 1241-42 (37th ed. 1969); 2 WHARTON'S CRIMINAL LAW 2048-51 (12 ed. 1932); Annot., 93 A.L.R. 996, 997-1001 (1934). In England, indecent exposure is still regulated under the Vagrancy Act of 1824, 5 Geo. 4, c. 83, and Town Police Causes Act of 1847, 10 & 11 Vict., c. 89, § 28.

30. 8 Cal. 3d at 437, 503 P.2d at 939, 105 Cal. Rptr. at 235. The California Legislative Revision Committee has introduced to the California Legislature a proposed Criminal Code to replace a large part of the current Penal Code. Section 9312 of the new code, if adopted, would return indecent exposure to its pre-1952 posture with no enhanced penalty for second or subsequent offenses. S. 1506, Cal. Legis., Reg. Sess. (1972).

31. Gigeroff, Mohr & Turner, *Sex Offenders on Probation: The Exhibitionist*, 32 FED. PROB. 17, 21 (1968).

32. *See* REPORT OF KARL M. BOWMAN, MEDICAL SUPERINTENDENT OF THE LANGLEY PORTER CLINIC, 2 CAL. ASSEM. J., Reg. Sess. 2844, 2847 (1951) [hereinafter cited as Bowman].

33. *See* MOHR, TURNER & JERRY, PEDOPHILIA AND EXHIBITIONISM 121 (1964). This

Turning to the second test, the court observed that the penalty for second-offense indecent exposure is much greater than the punishments prescribed for many crimes in California which are far more serious.[34] The aggravated penalty is far greater than that imposed for violent crimes against the person,[35] crimes indirectly yet extremely dangerous to life and limb,[36] crimes involving antisocial conduct in the realm of sexual activities,[37] and crimes against children.[38] All but three of the crimes in these categories do not involve an increased penalty for repeated commission of the crime.[39] The statutes which enhance the penalty for a second offense have, with two exceptions, retained a reasonable relationship between the penalties imposed for the first and subsequent offenses.[40] Only Penal Code sections 314 and 647a make the first

book indicates that the harm suffered by an individual exposed to exhibitionism in the form of indecent exposure is likely to be minimal at best. Thus, it is suggested that indecent exposure is more aptly described as a "victimless" crime. *Cf.* Guttmacher & Weihofen, *Sex Offenses,* 43 J. CRIM. L.C. & P.S. 153, 154 (1952), wherein the authors suggest that in reality sex offenders do not "progress from minor offenses like exhibitionism to major offenses like forcible rape."

34. 8 Cal. 3d at 431, 503 P.2d at 935, 105 Cal. Rptr. at 231.

35. *Cf.* CAL. PEN. CODE § 193 (West 1972) (up to 15 years for manslaughter); *id.* § 217 (1-14 years for assault with intent to commit murder); *id.* § 208 (1-25 years for kidnapping); *id.* § 204 (up to 14 years for mayhem); *id.* § 220 (1-20 years for assault with intent to commit mayhem or robbery); *id.* § 244 (1-14 years for assault with caustic chemicals with intent to injure or disfigure); *id.* § 241 (up to 2 years for assault on a peace officer or fireman engaged in the performance of his duties).

36. *Cf.* CAL. PEN. CODE § 447a (West 1972) (2-20 years for arson); *id.* § 464 (10-40 years for burglary by torch or explosives); *id.* § 219.1 (1-14 years for wrecking a vehicle of a common carrier causing bodily harm); *id.* § 246 (1-5 years for shooting at an inhabited dwelling); *id.* § 347 (1-10 years for poisoning food or drink with the intent to injure a human being); CAL. VEH. CODE ANN. § 23101 (West 1971) (up to 5 years for drunk driving causing bodily injury).

37. *Cf.* CAL. PEN. CODE § 220 (West 1972) (1-20 years for assault with intent to commit rape or sodomy); *id.* § 265 (2-14 years for forcible abduction for purposes of defilement); *id.* § 266a (up to 5 years for abduction for prostitution); *id.* §§ 266e, 266f (up to 5 years for purchasing or selling a woman for prostitution); *id.* § 264 (up to 50 years for statutory rape).

38. *Cf.* CAL. PEN. CODE §§ 273a, 273d (West 1972) (up to 10 years for willful infliction of unjustifiable pain on a child likely to produce great bodily harm, trauma or death).

39. 8 Cal. 3d at 434, 503 P.2d at 937, 105 Cal. Rptr. at 233. Kidnapping, arson and assault with intent to commit murder do involve an increased penalty, but only after the third separate conviction. CAL. PEN. CODE § 644 (West 1972).

40. *Cf.* CAL. PEN. CODE § 415.5 (West 1972) (distrubing peace on college campus: first offense—$200 and/or up to 90 days, second offense—$500 and/or up to 180 days); *id.* § 12022 (commission of a felony armed with a deadly weapon: first offense —5 to 10 years, second offense—10 to 15 years, third offense—15 to 25 years); *id.* § 71 (threatening public officials with bodily injury: first offense—fine and/or up to 5 years, second offense—up to 5 years).

offense a misdemeanor and the second offense a prospective life sentence.[41]

Finally, Justice Mosk pointed out that indecent exposure statutes in virtually every other state and in the District of Columbia have treated initial and subsequent offenses of indecent exposure as adequately and appropriately controlled by a short jail sentence and/or a small fine.[42]

One question which might be asked concerning *Lynch* is whether the court has seriously interfered with the broad discretion accorded the legislature in California's tripartite system of government in enacting penal statutes and specifying punishment. The court impliedly indicates it will act as a check on the legislature when that body seemingly overreacts to the emotional outcry of its constituency by enacting stricter penalties into California's sex offense statutes.[43] The legislature finds its justification for such reaction in cases like *People v. Stroble.*[44] There, the sexual abuse and murder of a child engendered community fears resulting in a public demand for extreme regulatory provisions.[45] Less than one month after the *Stroble* incident occurred, Governor Earl Warren proclaimed the First Extraordinary Session of 1949, the stated purpose of which was in part to consider and enact stricter legislation to curb sex offenders.[46] The result was an increased penalty for viola-

41. CAL. PEN. CODE § 647a (West 1972) provides:

> Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine not exceeding five hundred dollars . . . or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison for not less than one year.

42. 8 Cal. 3d at 436, 503 P.2d at 938-39, 105 Cal. Rptr. at 234-35. Only Michigan permits a life sentence for second offenders. MICH. STAT. ANN., CRIMES § 28.567(1) (1972). The *Lynch* opinion incorrectly states that Oklahoma, which actually prescribes a maximum penalty of 10 years imprisonment, also allows a life sentence. OKLA. STAT. ANN., CRIMES & PUNISHMENTS § 1021 (West Supp. 1972).

43. *Cf.* Guttmacher & Weihofen, *Sex Offenses,* 43 J. CRIM. L.C. & P.S. 153 (1952).

44. 36 Cal. 2d 615, 226 P.2d 330 (1951).

45. Nevertheless, the *Stroble* court denied the defendant's contention that the jury had been improperly influenced adversely to him because of the atmosphere of public pressure and sensational publicity throughout the trial. *Id.* at 620-21, 226 P.2d at 333-34.

46. *See* ch. 12, § 2, [1949] Cal. Stat. 1st Extr. Sess. 26-27; ch. 13, § 2, [1949] Cal. Stat. 1st Extr. Sess. 28; ch. 14, § 2, [1949] Cal. Stat. 1st Extr. Sess. 29; ch. 16, § 2, [1949] Cal. Stat. 1st Extr. Sess. 30. The legislative rationale underlying the immediate adoption of these urgency measures was the following:

> The number and nature of sexual crimes has increased within recent months to such an extent as to pose a threat to the health, welfare and safety of the citizenry of this State. The extent and seriousness of this situation is evidenced by the fact that the Governor of the State has called an extraordinary session of the Legislature to consider and act upon legislation relating to sex offenses. To afford immediate protection to the citizens, it is necessary that this act shall take effect immediately. Ch. 13, § 2, [1949] Cal. Stat. 1st Extr. Sess. 28.

tion of Penal Code section 647a[47] and the amendment of Penal Code section 290 to provide stringent requirements for registration of sex offenders.[48] Similarly, the case of *People v. McCracken,*[49] involving a similar set of facts, precipitated widespread indignation by Orange County residents which persisted from the time of the incident in May, 1951, until the case was finally disposed of in June, 1952. *McCracken* was in large part responsible for the convening of the First Extraordinary Session of 1952 (March) by Governor Warren, which resulted in the enactment of penalties in Penal Code sections 311[50] (now section 314) and 647a.[51] The California Legislature persists in maintaining the present penalties in the face of modern clinical studies which characterize the proclivities of the indecent exposer as something decidedly less than dangerous.[52] The legislature rejected the recommendations of the 1967 Joint Legislative Committee for Revision of the Penal Code, which would have mitigated the present punishment for the first and subsequent offenses of indecent exposure by relegating them to misdemeanor status.[53] It is questionable whether the *Lynch* court should have entered the legislative province with the knowledge that the legislature was presently considering the 1972 legislative studies on the Criminal Code, which would return Penal Code section 314 to its pre-1952 posture.[54] More appropriately, the court should have deferred

47. Ch. 14, § 1, [1949] Cal. Stat. 1st Extr. Sess. 28-29 (codified at CAL. PEN. CODE § 647a (West 1972)).

48. Ch. 13, § 1, [1949] Cal. Stat. 1st Extr. Sess. 27-28 (codified at CAL. PEN. CODE § 290 (West 1972)).

49. 39 Cal. 2d 336, 246 P.2d 913 (1952).

50. Ch. 23, § 4, [1952] Cal. Stat. 1st Extr. Sess. 381-82 (codified at CAL. PEN. CODE § 314 (1972)).

51. Ch. 23, § 5, [1952] Cal. Stat. 1st Extr. Sess. 382 (codified at CAL. PEN. CODE § 647a (West 1972)).

52. *See* Bowman, *supra* note 32, at 2847; Gigeroff, Mohr & Turner, *Sex Offenders on Probation: The Exhibitionist,* 32 FED. PROB. 17, 19-21 (1968); Guttmacher & Weihofen, *Sex Offenses,* 43 J. CRIM. L.C. & P.S. 153, 153-54 (1952).

53. The committee recommended:

> A person commits a misdemeanor if, for the purpose of arousing or gratifying the sexual desire of any person, including the actor, he exposes his genitals or performs any other lewd act under circumstances in which his conduct is likely to be observed by any person who would be offended or alarmed. Penal Code Revision Project § 1609 (Tent. Draft No. 1, 1967).

54. *See* note 30 *supra* and accompanying text. Proposed section 9313 provides:

> (a) A person is guilty of indecent exposure when, for the purpose of arousing or gratifying the sexual desire of any person exposes his private parts in any public place or in any place open to public view.
> (b) This section shall not apply to a presentation in place where children are excluded.
> (c) Indecent exposure is a misdemeanor of the second degree. S. 1506, Cal. Legis., Reg. Sess. (1972).

deciding the case on constitutional grounds and utilized the alternative methods, discussed below, for resolving the case in Lynch's favor.

Application of the judicial doctrine of "last resort" suggests that, whenever possible, it is preferable to resolve an issue by non-constitutional means.[55] It is arguable that the *Lynch* court should have applied this concept by utilizing appropriate alternative means of dealing with the petitioner's claim.[56] In effect, preservation of the penalty portion of the statute would have resulted in the correct judicial approach in light of the "last resort" doctrine, which acknowledges a role of the legislature which is consistent with separation of powers.[57] In addition, it would have maintained a viable means for dealing with those offenders who, unlike Lynch, are not innocuous.[58]

There are two approaches, not mentioned in the opinion, which the court could have utilized: (1) a writ of habeas corpus to command the California Adult Authority to grant the petitioner parole or (2) a writ of administrative mandamus to effect the same result. Either approach would focus on a judicial examination of the scope of the discretion exercised in the decisions of the Adult Authority. The Adult Authority is an administrative agency within the Department of Corrections[59] and, as such, it is governed by the principles which are common to all other administrative agencies within California. Unlike those other agencies, its acknowledged broad discretion in determining the length of a convicted defendant's sentence has been relatively impervious to challenge.[60] Very recently, the California Supreme Court

55. Bell v. Superior Court, 150 Cal. 31, 35, 87 P. 1031, 1033 (1906); Estate of Damon, 10 Cal. App. 542, 544, 102 P. 684, 685 (1909).

56. Justice Mosk's statement that it is not proper to judicially interfere with the legislative function "unless a statute prescribes a penalty 'out of all proportion to the offense'" (8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226, *quoting* Robinson v. California, 370 U.S. 660 (1962) (Douglas, J., concurring)) should be additionally qualified to prohibit unwarranted intrusion by the judiciary where other forms of resolving the issue exist. See text accompanying notes 59-72 *infra.*

57. CAL. CONST. art 3, § 1, states:

> The powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

58. Dr. Alfred Kinsey has estimated that only 5% of convicted sex offenders are so dangerous as to exercise force or injury upon a victim. *See* Tappan, *Some Myths About the Sex Offender,* 19 FED. PROB. 7 (1955). Query whether 5% isn't a significant number?

59. 8 Cal. 3d at 415, 503 P.2d at 924, 105 Cal. Rptr. at 220; *see* CAL. PEN. CODE §§ 5001, 5075-82 (West 1972).

60. *See In re* Schoengarth, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967) (denial of writ of habeas corpus which challenged power of Adult Authority to condition its offer of parole on prisoner's agreeing to be released to custody of representa-

affirmed the principle that the Adult Authority can be compelled to review a petitioner's application for parole when it has abused its discretion by refusing to do so.[61] Because statutory authorization gives the Adult Authority exclusive jurisdiction to fix a prisoner's sentence,[62] no case has expanded this rule prohibiting abuse of discretion to require that a petitioner be granted parole outright. However, this does not preclude the court from declaring on remand to the Adult Authority what properly would not be an abuse of discretion. This, in effect, would be tantamount to an instruction that parole be granted.

Such an argument would parallel the one made unsuccessfully before the California court of appeal in *In re Wilkerson*.[63] Wilkerson challenged alleged "arbitrary and capricious" conduct on the part of the Adult Authority by way of writ of habeas corpus to command the Adult Authority to grant him parole.[64] In exercising its discretion, the Adult Authority purported to consider his conduct while incarcerated, the nature of his offense, his age, his prior associations, his habits, inclinations and traits of character, the probability of his reformation and the interests of public security.[65] Dicta in *Wilkerson* indicated that it would be a misuse of power by the courts to interfere when the Adult Authority had exercised its discretionary judgment based on these factors, unless there was an abuse of such discretion.[66] The *Wilkerson* court denied the petitioner's writ because the Adult Authority had properly considered his past social history of felony convictions for armed robbery and breaking and entering with intent to commit larceny.[67]

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tive of a sister state for trial on charges pending against him in that state); *In re* Streeter, 66 Cal. 2d 47, 423 P.2d 976, 56 Cal. Rptr. 824 (1967) (denial of writ of habeas corpus which sought to have prior convictions withdrawn from the consideration of the Adult Authority in its administration of petitioner's sentence); *In re* Wilkerson, 271 Cal. App. 2d 798, 77 Cal. Rptr. 340 (1969) (writ of habeas corpus to compel Adult Authority to grant petitioner parole denied where petitioner charged abuse of discretion by the agency); *cf. In re* Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (writ of habeas corpus issued to compel Adult Authority to consider petitioner's application for parole where Adult Authority abused its discretion by fixing his sentence at maximum, denying him parole, and declaring that future applications would not be considered); Roberts v. Duffy, 167 Cal. 629, 140 P. 260 (1914) (writ of mandate ordered to compel state board of prison directors to receive and file applications of petitioner for release on parole).

61. *In re* Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972).
62. CAL. PEN. CODE §§ 5077, 3020 (West 1972).
63. 271 Cal. App. 2d 798, 77 Cal. Rptr. 340 (1969).
64. *Id.* at 803, 77 Cal. Rptr. at 343.
65. *Id.* at 804, 77 Cal. Rptr. at 343-44.
66. *Id.* at 804, 77 Cal. Rptr. at 344.
67. *Id.*

If the issue in *Lynch* had been whether the Adult Authority abused its discretion, it is arguable on the facts that the result would have been different from *Wilkerson.* Lynch was notably an innocuous perpetrator of a non-violent "victimless" crime. Particularly apropos are the remarks of the trial judge at the conclusion of the trial:

> "Mr. Lynch . . . you are a man of great potential. You are a person of unusual appearance, you make a very pleasant appearance, obviously have the capacity to get along well with people, you are obviously a person of superior intellect."[68]

Justice Mosk observed:

> The circumstances of the offense do not undermine [the trial judge's] appraisal. This is not a case, for example, in which an exhibitionist forced himself on large numbers of the public by cavorting naked on a busy street at high noon. Indeed, a very different picture emerges.
>
> . . . .
>
> For this single act petitioner has now spent more than five years in state prison—three and a half of those years in the maximum security confines of Folsom. The Adult Authority has four times denied him release on parole, and has never fixed his sentence at any term less than the life maximum prescribed by section 314.
>
> We recite these facts simply to illustrate the vast disproportion between the conduct of which petitioner was convicted and the punishment he has suffered—and still faces.[69]

This appraisal suggests that it would arguably not have been a misuse of the court's power to compel the Adult Authority, by writ of habeas corpus, to release Lynch on parole unless the Authority could present reasonable grounds for his continued incarceration.[70] *In re Lynch* would have been an ideal setting for such an extension of judicial doctrine.

Similarly, a writ of administrative mandamus to compel the Adult

68. 8 Cal. 3d at 437, 503 P.2d at 939, 105 Cal. Rptr. at 235.

69. *Id.* at 437-38, 503 P.2d at 939-40, 105 Cal. Rptr. at 235-36.

70. Lynch asserted in one of his petitions that the Adult Authority had based its repeated denials of parole on (1) alleged additional acts of indecent exposure which he had not been given an opportunity to rebut and (2) his steadfast refusal to confess to committing those acts. *Id.* at 439 n.26, 503 P.2d at 940 n.26, 105 Cal. Rptr. at 236 n.26. He maintained that, as such, the denials deprive him of due process and equal protection of the law. *Id.; cf.* Note, *An Endorsement of Due Process Reform in Parole Revocation: Morrissey v. Brewer,* 6 LOY. L.A.L. REV. 157 (1973). The *Lynch* court expressly refused to meet this constitutional issue. Perhaps the court would not have been so reluctant to reach the underlying problem if it had been reformulated as a non-constitutional question of administrative law.

Authority to grant the petitioner parole is an appropriate remedy for any abuse of discretion by an administrative agency.[71] Although the Adult Authority has been insulated from its use in the past, the principles exist and have been invoked successfully whenever an agency exercises its power in a reputedly arbitrary or capricious fashion.[72]

The court has shied away from an abuse of discretion approach, thereby lending uncertainty to its prospective application, in favor of a constitutional approach which sets the stage for broad application of a constitutional rule. Arguably, the *Lynch* rationale may be applied to violators of Penal Code section 647a who, like Lynch, have received a prospective punishment of life imprisonment.[73] In addition, the implications of *Lynch* extend beyond mere sex offenses. Dicta in the recent case of *People v. Draper*[74] suggests that there may be circumstances in which the *Lynch* holding would be applied to lesser included offenses which carry a maximum sentence greater than that of the principal offense. It would also be a logical extension to apply the same reasoning to victimless crimes and other misdemeanor offenses subject to judicial sentencing, when those sentences are grossly disproportionate to the crime committed. In light of the potential impact of

71. CAL. CODE OF CIV. PROC. § 1094.5 (West 1967) provides in pertinent part:

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given . . . .

(b) Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence . . . .

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

See W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS 41 (C.E.B. 1966); CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE 253 (C.E.B. 1970); K. DAVIS, ADMINISTRATIVE LAW TEXT 460 (3rd ed. 1972).

72. Harris v. Alcholic Beverage Control Appeals Bd., 62 Cal. 2d 589, 400 P.2d 745, 43 Cal. Rptr. 633 (1965) (revocation of liquor license set aside as clear abuse of discretion); Magit v. Board of Medical Examiners, 57 Cal. 2d 74, 366 P.2d 816, 17 Cal. Rptr. 488 (1961) (revocation of physician's license too severe in view of mitigating circumstances).

73. Dicta in *Lynch* indicates that the same problem exists with Penal Code section 647a as did with Penal Code section 314. However, the court declined to advance an opinion as to its future status. 8 Cal. 3d at 434, 503 P.2d at 937, 105 Cal. Rptr. at 233. See note 41 *supra* for the text of section 647a.

74. 29 Cal. App. 3d 465, 475, 105 Cal. Rptr. 653, 666 (1972) (Adult Authority advised that if maximum penalty on included offense conviction were not limited to less than the maximum for the principal offense, it would result in an unconstitutional sentence).

In re Lynch, the legislature could profitably reconsider the present system of incongruous penalties.[75]

Steven H. Kaufmann

75. *Id.* at 476-77, 105 Cal. Rptr. at 661. *Compare* CAL. PEN. CODE § 217 (West 1972) (14 years for assault with intent to commit murder) *with id.* § 221 (15 years for assault with intent to commit any felony other than murder); *id.* § 220 (20 years for assault with intent to commit rape, sodomy, mayhem, robbery or grand larceny); *id.* § 245 (life for assault with deadly weapon or by means likely to produce bodily harm).