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Comments

IN RE LYNCH* AND BEYOND TO JUDICIAL REVIEW OF SENTENCES

In 1967, John Lynch was convicted of second offense indecent exposure, a felony under California law. The criminal act consisted of subjecting a waitress at a drive-in restaurant to a brief view of his penis in the parking lot at 1:30 in the morning. In the words of the court, this was not a case where an exhibitionist "forced himself on large numbers of the public by cavorting naked on a busy street at high noon."¹ Nevertheless, for his heinous crime he spent over five years in California state prisons, including three and one half years in maximum security at Folsom.²

Had the California Supreme Court not intervened, Lynch possibly could have spent the rest of his life in prison for this common law misdemeanor. Under the California sentencing procedure, the judge may sentence the defendant to imprisonment in a state prison for the term prescribed by law.³ It is then the function of the Adult Authority to determine and redetermine the length of time the person will actually be imprisoned.⁴ For the crime of second offense indecent exposure, a punishment of imprisonment for "not less than one year"⁵ is prescribed. A punishment of imprisonment for not

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

1. *Id.* at 437, 105 Cal. Rptr. at 235, 503 P.2d at 939.

2. *Id.* at 438, 105 Cal. Rptr. at 236, 503 P.2d at 940.

3. CAL. PEN. CODE § 1168 (West 1970).

4. *Id.* § 3020.

5. *Id.* § 314.

less than a specified number of years with no maximum prescribed is imprisonment for life, subject to the determination of the Adult Authority.⁶

In *In re Lynch*⁷ the court deemed the defendant's sentence to be life imprisonment under California Penal Code section 314, and held that the penalty prescribed in the statute violated the prohibition of the California Constitution against cruel or unusual punishment⁸ because it was grossly disproportionate to the offense.⁹ Using *Lynch* as a vehicle, this article will undertake to examine the remedies presently available in California to correct the imposition of an excessive sentence by the trial judge. The function, procedures and discretion of the Adult Authority will also be explored, as will be the feasibility of establishing an abuse of discretion on the part of the Authority for repeatedly refusing to determine a sentence commensurate with the severity of the crime and the character of the defendant.¹⁰

Contrasted with what turns out to be a rather restrictive policy in California toward judicial review of excessive sentences, the attitude of courts in other jurisdictions is beginning to change. The activities of several of these jurisdictions, primarily the United States Court of Appeals for the Sixth Circuit and the state of Alaska, will be summarized as illustrations of workable approaches to the problem of excessive sentences. This article will also touch upon some possible alternatives to the present policy in California and suggest factors to be considered in a re-evaluation of California policy on review of sentences, drawing on the experience of other jurisdictions.

I. THE POLICY OF JUDICIAL ABSTENTION

Aside from the cases where the sentence imposed was based in part on impermissible factors,¹¹ the policy of abstaining from the review of sentences is well established in California. Although a common sense reading of the California Penal Code would compel the conclusion that statutory authority exists for appellate review of sentences,¹² the court, in the first case to construe section 1260

6. *Id.* § 671.

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

8. CAL. CONST., art. I, § 6.

9. *In re Lynch*, 8 Cal. 3d 410, 439, 105 Cal. Rptr. 217, 236, 503 P.2d 921, 940 (1972).

10. *Id.* at 438, 105 Cal. Rptr. at 236, 503 P.2d at 940.

11. *E.g.* *United States v. Tucker*, 404 U.S. 443 (1972) (sentence based in part on unconstitutional prior convictions).

12. CAL. PEN. CODE § 1260 (West Supp. 1972) states in part:

in substantially its present form held that it was authority to reduce the punishment in lieu of ordering a new trial only when there is error relating to the punishment imposed.¹³ Subsequent to *People v. Odle*, the court heard a number of cases involving the imposition of the death penalty by a jury. In all of these cases, the language that "(t)his court . . . has no power to substitute its judgment as to choice of penalty for that of the trier of fact" appeared with monotonous regularity,¹⁴ despite the enactment of Penal Code section 1181(7) after *Odle* was decided.¹⁵

Although the policy of non-review is most often encountered in cases involving the imposition of the death penalty by the jury, it is not safe to assume that California courts will be willing to review the sentence in cases not involving the action of a jury. In *People v. Fusaro*,¹⁶ the defendant alleged that the trial judge abused his discretion in imposing consecutive rather than concurrent sentences upon defendant's conviction of four narcotics offenses. The Court of Appeals for the Third District refused to modify the sentence, observing that:

The Legislature . . . permits appellate modification of sentences only in limited situations. (Citing California Penal Code §§ 1181(7), 1260 and *People v. Odle*.) Aside from these situations, a reviewing court cannot say that a period of imprisonment within the limits fixed by statute exceeds the bounds of reason.¹⁷

The court may reverse, affirm, or modify a judgement or order appealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgement or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances. (emphasis added).

13. *People v. Odle*, 37 Cal. 2d 52, 230 P.2d 345 (1951).

14. For a compilation of cases see *People v. Mabry*, 71 Cal. 2d 430, 455, 78 Cal. Rptr. 655, 670, 455 P.2d 759, 774 (1969) (Peters, J. dissenting).

15. CAL. PEN. CODE § 1181 (West 1970):

When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial in the following cases only:

(7) When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

16. 18 Cal. App. 3d 877, 96 Cal. Rptr. 368 (1971).

17. *Id.* at 894, 96 Cal. Rptr. at 379.

This restrictive view of the power of appellate courts to redetermine sentences has not gone unopposed. In *In re Anderson*,¹⁸ the dissent objected to the vesting of absolute discretion to fix the penalty with the trier of fact, which discretion was not even subject to review for abuse. A subsequent case involving an appeal from the imposition of the death penalty by a jury drew two dissents.¹⁹ In the first, Justice Mosk contended that reduction of a sentence is clearly a judicial function, and that to hold otherwise is error.²⁰ Justice Peters was more cautious, contending that Penal Code section 1181(7) lent itself to the reasonable construction that the appellate courts have a limited power to impose life imprisonment rather than the death penalty in cases where the trier of fact has abused its discretion.²¹

One final case that raised the issue of whether appellate courts have the power to order a reconsideration of the sentence imposed, did so in an interesting manner. In *People v. Colbert*,²² sections of the Penal Code were amended following defendant's conviction, making two of the offenses involved felony-misdemeanors rather than felonies, thus necessitating remand of the case for resentencing on two counts. The defendant contended that the remaining count should also be remanded for reconsideration of the denial of probation. The court refused, not deciding whether it had the power to do so, despite the Attorney General's suggestion that Penal Code section 1260 gave the court authority to remand the case for reconsideration of the sentence.²³

In the federal courts we also start with the proposition that "an appellate court has no power to modify a sentence. If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by statute."²⁴ However, unlike the California cases, in the federal courts there has been some recent hedging on this heretofore firmly established policy. In *United States v. Daniels*,²⁵ a young Jehovah's Witness was convicted of willfully dis-

18. 69 Cal.2d 613, 643, 73 Cal. Rptr. 21, 41, 447 P.2d 117, 137 (1968) (Tobriner, J. concurring).

19. *People v. Mabry*, 71 Cal.2d 430, 78 Cal. Rptr. 655, 455 P.2d 759 (1969).

20. *Id.* at 449, 78 Cal. Rptr. at 666, 455 P.2d at 770 (Mosk, J. dissenting).

21. *Id.* at 457, 78 Cal. Rptr. at 671-72, 455 P.2d at 775 (Peters, J. dissenting).

22. 6 Cal. App. 3d 79, 85 Cal. Rptr. 617 (1971).

23. *Id.* at 85, 85 Cal. Rptr. at 621.

24. *United States v. Rosenberg*, 195 F.2d 583, 604 (2d Cir. 1952) cert. denied 344 U.S. 838 (1952).

25. 429 F.2d 1273 (6th Cir. 1970).

obeying an order of his local draft board to report for instructions to proceed to a state hospital for employment as a conscientious objector, and was sentenced to five years imprisonment. The Court of Appeals affirmed the conviction, but taking judicial notice of the fact that Jehovah's Witnesses will respond to a court order to perform conscientious objector work but not to an order of the Selective Service Board, it remanded the case for reconsideration of suspending the five year sentence and granting probation on condition that defendant perform the conscientious objector work.

Upon remand, the District Court refused to reduce or suspend the sentence and the case made its way back up to the Court of Appeals.²⁶ Observing that generally the severity or duration of punishment imposed by a trial court is not subject to modification where the sentence imposed is within the statutory limits, the court held that such a sentence is not wholly immune from judicial review.²⁷ Thus remand for resentencing is proper when, *inter alia*, a trial judge has "grossly abused his discretion by failing to evaluate the relevant information before him"²⁸ Here, the relevant information disregarded was the fact that a Jehovah's Witness may not recognize an order by the Selective Service Board but may obey an order by the court, and defendant's exemplary past conduct and good character. The court also expressed concern with the District Court's inflexible and mechanical sentencing procedure whereby all defendants who refused to obey an order of a local draft board were given five year sentences.²⁹ In view of its prior experience with this District Court, the Court of Appeals did not remand for resentencing, but rather vacated the sentence and remanded the case, instructing the District Court to impose a suspended sentence and place defendant on probation provided he perform the conscientious objector work.

The conclusion that *United States v. Daniels* marks the beginning of an expanded federal review of sentences is seductive,³⁰ but too broad a view of this small beginning is not supported by a careful

26. *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971).

27. *Id.* at 969.

28. *Id.* at 971.

29. *Id.* at 969.

30. See, e.g., Note, *Daniels v. United States: Appellate Review of Criminal Sentencing—Limiting the Scope of the Non-Review Doctrine*, 33 U. PITT. L. REV. 917 (1972).

reading of the case. An important factor in the decision was the district judge's observation that in 30 years on the federal bench he had, almost without exception, given a five year sentence in cases of refusal to obey an order of a local draft board.³¹ Thus it is possible to read the case as one in which the sentence was modified because the trial judge exercised *no* discretion in imposing sentence at all.

Indeed, this is the meaning the Fourth Circuit *said* it attributed to *Daniels* when it heard a request for the review of a sentence. In *United States v. Wilson*,³² the court was faced with a 23 year old defendant who was sentenced to three years imprisonment for forging an endorsement on a \$90 United States Treasurer's check. Baffled by the severity of the sentence in light of defendant's good reputation and lack of a prior criminal record, the court remanded the case for reconsideration of sentence on the possibility that the trial judge had inadvertently overlooked the applicability of the Youth Corrections Act³³ to defendant's case.³⁴ This was the articulated reason for remanding the case, despite the fact that earlier in the proceedings the trial judge had commented on the fact that defendant was eligible for sentencing under the Act.

The next application of *Daniels* once again involved a Jehovah's Witness sentenced to five years imprisonment by the District Court for the Eastern District of Kentucky. In *United States v. Charles*,³⁵ the District Court had distinguished *Daniels* because here the young man had only recently converted to the Jehovah's Witness faith. The Court of Appeals was not convinced, however, and expressed the opinion that by continuing to apply an inflexible standard of sentencing in draft cases, the District Court had abused its discretion.³⁶ Observing that the defendant's recent marriage to a Jehovah's Witness probably had more to do with his recent conversion than did a desire to avoid the draft, the Court nevertheless felt that this was enough of a difference to call for a remand for reconsideration of the sentence rather than an instruction as to what the new sentence was to be.³⁷

The latest installment in the drama unfolding in the Sixth Circuit once again originated in the Eastern District of Kentucky and

31. *United States v. Daniels*, 446 F.2d 967, 969 (6th Cir. 1971).

32. 450 F.2d 495 (4th Cir. 1971).

33. 18 U.S.C. §§ 5005-5026.

34. *United States v. Wilson*, 450 F.2d 495, 498 (4th Cir. 1971).

35. 460 F.2d 1093 (6th Cir. 1972).

36. *Id.* at 1095.

37. *Id.*

involved a series of three cases. In *United States v. McKinney*,³⁸ the young defendant was convicted of knowingly refusing to submit to induction into the armed forces and received a sentence of five years imprisonment. Finding that there was sufficient evidence to support the conviction, the Sixth Circuit nevertheless was of the opinion that the 5 year sentence was excessive and out of proportion to the offense in view of defendant's willingness to serve his country in a noncombatant capacity and his lack of a prior criminal record. Therefore, the conviction was affirmed but the case remanded for reconsideration of the sentence, the Circuit Court retaining jurisdiction to consider the sentence finally imposed.

Upon remand, the District Court for the Eastern District of Kentucky once again imposed the maximum five year sentence and the Sixth Circuit got the case once more. In the meantime, *Daniels* had been decided and *McKinney* was simply remanded for reconsideration in light of that case.³⁹

This time the District Court not only refused to reduce the sentence, but delivered a commentary on the absolute discretion of the trial court to impose any sentence he saw fit so long as it did not exceed the statutory limit, and the lack of jurisdiction of the appellate court to do anything about it.⁴⁰ Observing that disparity in sentencing causes considerable resentment among prison inmates, the Court of Appeals ruled that the maximum sentence imposed in this case constituted a gross abuse of discretion in light of defendant's good reputation in the community, his lack of a criminal record and the fact that he was married with a small child. The Court then did do something about it by ordering that the five year sentence be reduced to one year with credit for time served and statutory allowances. It also chastised the District Court for refusing to follow an individual sentencing approach and for violating an appellate mandate.⁴¹

What this recent shifting in the attitude of the federal courts means to the future of appellate review of sentences is not exactly clear. At the least it indicates a growing fruition of the dissatisfaction of federal judges with the policy of abstaining from the re-

38. 427 F.2d 449 (6th Cir. 1970).

39. *United States v. McKinney*, 466 F.2d 1403 (6th Cir. 1971).

40. *United States v. McKinney*, 466 F.2d 1403, 1404 (6th Cir. 1972).

41. *Id.*

view of sentences.⁴² It would also seem clear that there has been an advance beyond the prior limit of review represented by *United States v. Wiley*,⁴³ a case where the Seventh Circuit remanded for resentencing because of the trial judge's announced policy that probation would not be considered for defendants demanding trial. One is struck by the emphasis placed on the presence of mitigating factors in the above cases, and particularly in the *McKinney* cases. This emphasis lends itself readily to the conclusion that it is an abuse of discretion for the trial judge to fail to consider mitigating circumstances when imposing sentence. In any event, it is unquestionable that the proposition that an "appellate court has no control over a sentence which is within the limits allowed by statute"⁴⁴ is no longer viable in the federal courts.

II. APPEAL FROM THE DETERMINATION OF SENTENCE BY THE ADULT AUTHORITY

When a person is convicted of an offense in California for which imprisonment in a state prison is prescribed, the sentencing judge may place the person on probation, grant a new trial, suspend imposition of sentence or sentence the individual to the term prescribed by law.⁴⁵ If the latter alternative is chosen, it is then the function of the Adult Authority to determine the duration of the individual's imprisonment.⁴⁶ The Adult Authority may not, of course, determine a sentence in excess of the statutory maximum,⁴⁷ but short of this limitation, its discretion is virtually unassailable. The courts have found that once sentenced, a prisoner has no "vested right to serve less than the maximum term for which he was sentenced" and no right to have his case determined in a particular way.⁴⁸ Thus the discretion lodged in the authority is so broad that "it is seldom that a case can be made out that would show an abuse of that discretion."⁴⁹

42. See, e.g., Frankel, *Lawlessness In Sentencing*, 41 U. CIN. L. REV. 1 (1972).

43. 278 F.2d 500 (7th Cir. 1960). This case was relied upon heavily by the *Daniels* court, possibly because it was the only precedent it had, and possibly because it too involved an inflexible sentencing policy.

44. *United States v. Rosenberg*, 195 F.2d 583, 604 (2d Cir. 1952) cert. denied 344 U.S. 838 (1952).

45. Note, *The California Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U.C.D.L. REV. 360 (1972).

46. CAL. PEN. CODE § 3020 (West 1970).

47. *Id.* § 3023.

48. *Azeria v. Cal. Adult Authority*, 193 Cal. App. 2d 1, 4-5, 13 Cal. Rptr. 839, 841-42 (1961).

49. *Id.* at 5, 13 Cal. Rptr. at 842. By using the word "seldom" the court understated the situation, as a careful search of the cases has failed to turn

Nor is the procedure followed by the Adult Authority more vulnerable to attack in the courts. It has been held that there is no right to counsel at Adult Authority proceedings to fix or redetermine the sentence.⁵⁰ Other procedural niceties, such as access to the information relied upon by the Authority in fixing the sentence and a written record of the proceedings, are also not required at Adult Authority hearings.⁵¹ As late as 1971, when the California Supreme Court refused to apply *Mempa v. Rhay* to parole revocation hearings, the court stated that "due process only requires that the Adult Authority discharge its responsibilities in good faith, neither arbitrarily nor capriciously . . ." ⁵² and also refused to rule on the validity of the factors considered by the Adult Authority. However, even arbitrary or capricious action on the part of the authority would be extremely difficult to demonstrate. There are no formal criteria for the determination of sentences, only the briefest of notes make up the "record" and the determinations are unilateral affairs, usually the decision of one member of a panel.⁵³

One recent development in this area of the law has been the overruling of *In re Tucker* by the United States Supreme Court in *Morrissey v. Brewer*,⁵⁴ which held that parole revocation hearings put at stake a person's liberty and therefore a little bit of due process was required at two stages of the proceeding. After the arrest of the parolee, a reasonably prompt informal inquiry must be made by an impartial officer to determine whether probable cause exists to believe that the person has violated his parole. The parolee must be given prior notice of the alleged violations and be permitted to produce information and question adverse witnesses. At the revocation hearing itself, the parolee must be given written notice of the violations, the evidence against him must be disclosed, he must be given an opportunity to be heard and to present witnesses in his behalf, he must be given the right to confront and cross-examine adverse witnesses, the hearing must be before a neu-

up a single instance where an abuse of discretion by the authority has been found.

50. *People v. St. Martin*, 1 Cal. 3d 524, 83 Cal. Rptr. 166, 463 P.2d 390 (1970).

51. *Dorado v. Kerr*, 454 F.2d 892 (9th Cir. 1972).

52. *In re Tucker*, 5 Cal. 3d 171, 95 Cal. Rptr. 761, 486 P.2d 657 (1971).

53. Note, *supra* note 45, at 372-75.

54. 408 U.S. 471 (1972).

tral and detached hearing body, and a written statement must be prepared detailing the evidence relied upon and the reasons for revoking parole.⁵⁵ The right to counsel at parole revocation hearings was not reached by the Court.

It is again tempting to conclude from *Morrissey v. Brewer* that the due process procedural requirements set out in that case will now be applicable to sentence determination and redetermination hearings conducted by the Authority. However, it is submitted that such a broad application of *Morrissey* would not be compelled by the opinion of the Court. The parolee's release gave him a sufficient stake in his liberty that its *termination* required that he be given due process.⁵⁶ Thus it will not necessarily be extended to cover situations in which the prisoner "has no vested right to serve less than the maximum term for which he was sentenced."⁵⁷

There is a good argument, however, that the *Morrissey* due process requirements might extend to hearings conducted to redetermine the sentence of a prisoner. Indeed, the United States District Court for the Central District of California seemed to be heading in this direction in *Hester v. Craven*,⁵⁸ where it held that the Authority had violated the defendant's right to due process when it redetermined his sentence on the basis of factual events which occurred outside of prison while he was on parole, without giving him the opportunity to confront the witnesses against him.⁵⁹ The holding was based on the rationale that once the prisoner's sentence was determined, he had a right to have it terminate on that date, and if the Authority was to redetermine the sentence, the prisoner's right was sufficient that he must be given due process before he could be deprived of it.

III. APPEAL OF SENTENCE—CRUEL OR UNUSUAL PUNISHMENT

Thus it appears that in contending that his sentence for not less than one year was cruel or unusual punishment, John Lynch was using the only avenue available in California to contest the excessiveness of his sentence. However, even in this area a survey of the cases does not leave one with a feeling of optimism about the future treatment of excessive sentences. Here too the analysis be-

55. *Id.* at 485-89.

56. *Id.* at 482.

57. *Azeria v. Cal. Adult Authority*, 193 Cal. App. 2d 1, 4-5, 13 Cal. Rptr. 839, 841-42 (1961).

58. 322 F. Supp. 1256 (C.D. Cal. 1971).

59. *Id.* at 1265.

gins with a presumption that a sentence within the limits of a valid statute is not generally cruel or unusual.⁶⁰ There is also a reluctance to interfere with the legislative determination of what constitutes a proper punishment, and the courts will uphold a statute unless its "unconstitutionality clearly, positively and unmistakably appears."⁶¹ Nor is there any doubt as to the constitutionality of the indeterminate sentence law.⁶²

*In re Lynch*⁶³ was the first case in which a California court has held that a punishment was unconstitutional because it was disproportionate to the offense.⁶⁴ Relying on numerous decisions in the federal courts and other states,⁶⁵ the court enumerated three techniques used to determine if a punishment is so disproportionate to the crime that it constitutes cruel or unusual punishment. First, the nature of the offense and the offender is examined to determine the degree of danger which both present to society. Thus if the offense is minor, or nonviolent, or is committed in the absence of aggravating circumstances, a less severe punishment is called for. Second, if the punishment imposed for the offense in question is more severe than that imposed for similar or more severe crimes in the same jurisdiction, then it becomes suspect. The third method of analysis is to compare the punishment prescribed with that imposed by other jurisdictions for the same offense.⁶⁶ The court then measured the facts in *Lynch* against these three analytical tech-

60. *People v. Keller*, 245 Cal. App. 2d 711, 54 Cal. Rptr. 154 (1966) (life sentence for selling marijuana not cruel or unusual).

61. *In re Dennis*, 70 Cal. 2d 444, 453, 75 Cal. Rptr. 1, 6, 450 P.2d 296, 301 (1969).

62. *People v. Wade*, 266 Cal. App. 2d 927, 72 Cal. Rptr. 538 (1968).

63. 8 Cal. 3d 410, 105 Cal. Rptr. 217, 503 P.2d 921 (1972).

64. *Id.* at 420, 105 Cal. Rptr. at 223, 503 P.2d at 927. See also Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 853-54 (1972) for the proposition that proportionality is the principle underlying the 8th Amendment, and that it has been so since the inception of the amendment.

65. See, e.g., *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972) (mandatory minimum sentence of 20 years for selling marijuana so severe as to be cruel or unusual punishment); *Weems v. United States*, 217 U.S. 349, 377 (1910) (sentence of 12 years at hard and painful labor, together with loss of civil rights and official surveillance for life, for the crime of making two false entries in a government cash book was cruel in its excess and unusual in its character).

66. *In re Lynch*, 8 Cal. 3d 410, 425-29, 105 Cal. Rptr. 217, 226-29, 503 P.2d 921, 930-33 (1972).

niques, and found that the punishment was disproportionate to the offense for all three reasons.

Turning first to the nature of the offense, it was noted that indecent exposure at common law was merely a public nuisance, punishable as a misdemeanor. Correspondingly, the offense was a misdemeanor in California for 80 years, until the enactment of the present penalty in 1952. The court also observed that the offense never entails physical aggression or contact with the "victim", and in fact the exhibitionist fears such contact. In short, the act of exposure would seem to be the product of insecurity and low self-esteem, triggered frequently by frustrations of daily life rather than by aggressive intent. Finally, the court pointed to the fact that, although the crime is not exactly a victimless one, the harm caused is minimal embarrassment or annoyance.⁶⁷

The penalty involved fared no better when subjected to the second technique of analysis. When compared with the punishments prescribed for other crimes in California of far greater seriousness, the life sentence imposed on *Lynch* for second offense indecent exposure stands out as an anomaly. Among the more striking examples used by the court are: manslaughter (up to 15 years); assault with intent to commit murder (1-14 years); assault on a peace officer in the performance of his duties (up to 2 years); assault with intent to commit rape (1-20 years); inflicting on a child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition (up to 10 years).⁶⁸ Likewise, when the statutes prescribing enhanced punishment for recidivism were examined it was discovered that:

(A) man may repeatedly commit manslaughter or mayhem, assault with intent to commit rape or sodomy, child-beating or felony drunk driving, and still be subject each time to a lighter penalty than one who twice exposes his private parts.⁶⁹

Turning to the last technique, the court found that 34 states and the District of Columbia do not increase the punishment for repeated offenses, but treat each offense as a misdemeanor. Of those states which do enhance the punishment for second or subsequent offenses of indecent exposure, only two approach the life maximum imposed in California, with most of the remainder prescribing a short jail sentence or a small fine.⁷⁰

67. *Id.* at 429-31, 105 Cal. Rptr. at 229-31, 503 P.2d at 933-35.

68. *Id.* at 431-32, 105 Cal. Rptr. at 231-32, 503 P.2d at 935-36.

69. *Id.* at 434, 105 Cal. Rptr. at 233, 503 P.2d at 937.

70. *Id.* at 436-37, 105 Cal. Rptr. at 234-35, 503 P.2d at 938-39.

IV. STATUTORY REVIEW OF SENTENCES: THE EXPERIENCE
IN OTHER JURISDICTIONS

Presently at least sixteen jurisdictions have statutes which allow appellate review of sentences.⁷¹ Of these states, Alaska, Illinois and Oklahoma have been extremely active in reviewing sentences alleged to be excessive. The Alaska review statute and the cases decided thereunder will be examined herein as an example of a modern approach to the review of sentences.

Effective January 1, 1970, the state of Alaska provided for appellate review of sentences as follows:

(a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence is excessive. By appealing a sentence under this section, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense.

(b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion. . . .⁷²

In the first case to arise under the new statute,⁷³ the court acknowledged a "duty to examine the proceedings below to review for excessiveness or leniency the sentence imposed by the trial court, in light of the nature of the crime, the defendant's character, and the need for protecting the public."⁷⁴ It also recognized that the statute relied on the objectives of sentence review expressed in the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences:

(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;

(ii) to facilitate the rehabilitation of the offender by affording

71. The statutes are gathered in the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Appendix A. (Approved Draft, 1968) (hereinafter cited as ABA Standards).

72. ALASKA STAT. § 12.55.120 (1969).

73. *State v. Chaney*, 477 P.2d 441 (Alaska 1970).

74. *Id.* at 443.

him an opportunity to assert grievances he may have regarding his sentence;

(iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and

(iv) to promote the development and application of criteria for sentencing which are both rational and just.⁷⁵

Somewhat repetitiously, other goals within the standards were found to be rehabilitation, isolation of the offender, deterrence of the offender and others from future crimes of a like nature, and maintaining respect for societal norms.⁷⁶

In applying these standards to the case in question, an appeal by the state on the ground that the imposition of three concurrent terms of one year for convictions on two counts of forcible rape and one count of robbery was too lenient, the Court expressed its opinion that a substantially longer period of incarceration on each count would have served to emphasize society's condemnation of forcible rape, brought home to the defendant the seriousness of his crime, and given the Division of Corrections better opportunity to determine whether defendant required any special treatment. The minimal sentence in this case also contributed to the problem of disparity in sentences throughout the state.

In subsequent cases, and they are numerous, the standards set out in *Chaney* have begun to emerge with admirable clarity and consistency. One of the first principles to be followed is that the statutory maximum for a particular crime is the expression of a legislative judgment about how the worst offenders within the class should be treated.⁷⁷ In line with this principle, drug offenses are put into four classes of descending seriousness: smuggling or sale of large amounts of narcotics; smuggling or sale of small amounts of narcotics; possession; and marijuana offenses.⁷⁸

However, this standard is not inflexible and the Court has been reluctant to modify the imposition of the statutory maximum on persons other than the worst type of offender within the prescribed class, if aggravating factors are present. Likewise, if the trial court has not strictly complied with the four classifications of drug offenses when imposing sentence, the sentence will not be modified if it was based on other proper considerations. Thus if

75. ABA Standards, *supra* note 71, Standard 1.2.

76. *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

77. *Waters v. State*, 483 P.2d 199 (Alaska 1971); *Galaktionoff v. State*, 486 P.2d 919 (Alaska, 1971); *Tarnef v. State*, 492 P.2d 109 (Alaska, 1971).

78. *Waters v. State*, 483 P.2d 199 (Alaska, 1971); *Meyers v. State*, 488 P.2d 713 (Alaska, 1971); *Tarnef v. State*, 492 P.2d 109 (Alaska, 1971); *Wright v. State*, 501 P.2d 1360 (Alaska, 1972).

the defendant has demonstrated a propensity for criminal activity,⁷⁹ or a sporadic employment record,⁸⁰ or a lack of interest in rehabilitation,⁸¹ or if a psychiatric report has indicated that he is likely to engage in further anti-social behavior,⁸² then a more severe sentence will not be modified. Along these same lines, the Court has tended to affirm severe sentences if the criminal behavior in question involved death or great danger to the personal safety of others,⁸³ or if the legislature has decided that a class of offenses is particularly serious.⁸⁴

Of particular interest to the present inquiry are the standards that the Court established in those cases where the sentence was found to be excessive. Of primary importance is the theory of proportionality that is inherent in the concept of reserving the statutory maximum for the worst type of offenders. This was the standard applied in *Galaktionoff v. State*⁸⁵ where the Court modified a maximum sentence of one year and reduced it to six months in the case of a defendant convicted of petty larceny for stealing a half gallon of sherbet and two packages of cigarettes. Of equal significance was the Court's recognition that the maxim that the trial judge is in the best position to evaluate the crime and the defendant is of lit-

79. *Waters v. State*, 483 P.2d 199 (Alaska, 1971) (prior sale of heroin while on probation, robbery while awaiting trial, prior record); *Peterson v. State*, 487 P.2d 682 (Alaska, 1971) (Prior record); *Johnston v. State*, 489 P.2d 134 (Alaska, 1971) (same); *Griggs v. State*, 494 P.2d 795 (Alaska, 1972) (7 prior convictions); *Gullard v. State*, 497 P.2d 93 (Alaska, 1972) (2 subsequent convictions for similar offense); *Hawthorne v. State*, 501 P.2d 155 (Alaska, 1972) (a "considerable" criminal record); *Gordon v. State*, 501 P.2d 772 (Alaska, 1972) (2 prior convictions).

80. *Peterson v. State*, 487 P.2d 682 (Alaska, 1971) (erratic job record); *Meyers v. State*, 488 P.2d 713 (Alaska, 1971) (same); *Tarnef v. State*, 492 P.2d 109 (Alaska, 1971) (poor service record and history of unemployment).

81. *Meyers v. State*, 488 P.2d 713 (Alaska, 1971); *Gregory v. State*, 492 P.2d 108 (Alaska, 1971); *Tarnef v. State*, 492 P.2d 109 (Alaska, 1971); *Gordon v. State*, 501 P.2d 772 (Alaska, 1972).

82. *Condon v. State*, 498 P.2d 276 (Alaska, 1972).

83. *Gray v. State*, 487 P.2d 680 (Alaska, 1971) (life sentence for felony-murder); *Johnston v. State*, 489 P.2d 134 (Alaska, 1971) (8 years, with 3 suspended for beating and robbing a cab driver); *Gregory v. State*, 492 P.2d 108 (Alaska, 1971) (7 years with 3 suspended for manslaughter by stabbing); *Condon v. State*, 498 P.2d 276 (Alaska, 1972) (20 years for 2d degree murder).

84. *Wright v. State*, 501 P.2d 1360 (Alaska, 1972) (6 years for selling LSD not excessive in view of 25 year and/or \$20,000 maximum).

85. 486 P.2d 919 (Alaska, 1971).

tle real significance where a guilty plea has been entered without a trial.

The articulated goal in sentencing of the rehabilitation of the offender was highlighted in another case. In *Mattern v. State*⁸⁶ a twenty six year old man was convicted of burglary for entering an unoccupied apartment and taking some items of woman's under clothing, ignoring the valuables that were present. In deciding that the eighteen month sentence imposed was too severe, the court said that in view of defendant's age, his good reputation in the community, his excellent job record, and particularly the presentence report which indicated that he could benefit from treatment if placed on probation, the twin goals of rehabilitation of the offender and the protection of the public could best be served if defendant were placed on probation and underwent a regular program of treatment.

The goal of rehabilitation has cropped up in other contexts as well. In *Gullard v. State*⁸⁷ the Court affirmed a ten year sentence imposed for vehicular manslaughter but vacated that part of the sentence calling for service of one-third of the sentence without possibility of parole. It felt that because defendant was nineteen years old and the maximum sentence was a long one, the parole board could best determine defendant's eligibility for parole. However, the Court has also upheld a ten year sentence, one third without the possibility of parole, when the trial court has made a reasoned decision that rehabilitation is unlikely at best.⁸⁸

As indicated earlier in this discussion of the Alaska experiment, the State was also given the option to appeal a sentence on the ground that it is too lenient. This power is, of course, consistent with the goal of ". . . promot(ing) the development and application of criteria for sentencing which are both rational and Just."⁸⁹ The idea was to achieve a more balanced picture of the evolving sentencing standards in the state. To date, the State has appealed three cases on the ground that the sentence was too lenient, and "won"⁹⁰ two. The first, *State v. Chaney*,⁹¹ has already been discussed in relation to the articulated goals of sentence review. In that case, the wisdom of providing the state with the power to ap-

86. 500 P.2d 228 (Alaska, 1972).

87. 497 P.2d 93 (Alaska, 1972).

88. *Gordon v. State*, 501 P.2d 772 (Alaska, 1972).

89. ABA Standards, *supra* note 71, Standard 1.2(iv).

90. Of course the sentence cannot be increased unless the defendant has also appealed on the ground that the sentence is excessive. ALASKA STAT. §12.55.120(b).

91. 477 P.2d 441 (Alaska, 1971). See text at note 73, *supra*.

peal lenient sentences appears, because it is in appeals by the state that the goals of maintaining respect for society's norms (punishment?) and deterring the offender and others from future criminal conduct stand out. For example, in the next case appealed by the State,⁹² the Court found that a sentence of three years probation imposed on a defendant who assaulted his victim with a tire iron and left him for dead in an isolated area was too lenient because a stretch in jail would have brought home to the defendant the seriousness of his crime. In the third such case, however, the Court held that a three year suspended sentence and probation was not too lenient a sentence for the crime of manslaughter in view of the "extraordinary circumstances" surrounding the crime,⁹³ once again demonstrating the admirable flexibility of its sentencing standards.

Two final observations are in order as to appellate review of sentences in Alaska. The first is that it is improper to base the sentence, even in part, on purported "contacts" with the police not resulting in conviction. This situation first presented itself in *Peterson v. State*⁹⁴ and the Court cautioned against relying on such "contacts" as a basis for sentence. Subsequently, the Court warned that undue emphasis in a proper case upon such "contacts" could call for remand for resentencing, although in the case before it the defendant's seven prior convictions were sufficient police contacts that the D.A.'s reference to thirty-eight arrests was not prejudicial.⁹⁵ And likewise the fact that the record discloses that the defendant might have been charged with a more serious offense is not a proper basis for a more severe sentence.⁹⁶

The final observation is one that is so obvious that it was nearly overlooked. In order for the review of the sentence to be meaningful in any real sense, it is necessary that the appellate court have before it the presentence report and the trial judge's reasons for the imposition of the sentence chosen.⁹⁷ Thus, predictably, the Supreme Court Rules require that the trial judge articulate his reasons for the imposition of sentence.⁹⁸

92. *State v. Armantrout*, 483 P.2d 696 (Alaska, 1971).

93. *State v. Howey*, 495 P.2d 1270 (Alaska, 1972). We are not told what the "extraordinary circumstances" are, however.

94. 487 P.2d 682 (Alaska, 1971).

95. *Griggs v. State*, 494 P.2d 795 (Alaska, 1972).

96. *Galaktionoff v. State*, 486 P.2d 919 (Alaska, 1971).

97. ABA Standards, *supra* note 71, Standard 2.3.

98. ALASKA SUP. CT. R. 21 (f).

In summary it would appear that we have in the Alaska experiment a rather innovative and apparently successful workshop in the principles of modern appellate review of sentences. The ABA Standards Relating to Appellate Review of Sentences are manifestly relied upon in applying sentencing standards, with the deviations becoming insignificant in the overall context. Thus Alaska would seem to offer a wealth of experience from which to draw when considering a workable review procedure for California. With the possible exception of Illinois, which relies on a threefold objective of sentencing as being: to provide adequate punishment for the offense, to safeguard society, and to rehabilitate the offender, and also considers similar factors as Alaska when imposing individual sentences,⁹⁹ Alaska appears to be the only state where coherent standards for sentencing are being imposed statewide. It has the added advantage of having decided a manageable number of cases for purposes of analysis.

V. JUDICIAL REVIEW OF SENTENCES IN CALIFORNIA

In reading the disclaimers by the California appellate courts of any "power to substitute its judgment as to choice of penalty for that of the trier of fact,"¹⁰⁰ one wonders if the justices are not being too modest. The federal courts, after all, have begun to rebel against this narrow policy, and the Oklahoma Court of Criminal Appeals has reviewed sentences on the ground of excessiveness in a prolific number of cases, on no more authority than a general review statute worded in much the same manner as California Penal Code section 1260.¹⁰¹ Admittedly though, the Oklahoma justices are modest also, having power to modify a sentence only if it is "so excessive as to shock the conscience of the court,"¹⁰² seemingly language indicating cruel or unusual punishment. However, a survey of the digests reveals that the conscience of the court has been shocked what appears to be hundreds of times.

Somehow, one is reminded of the time Tom Sawyer and Huck Finn set out to release Jim from the cabin where he was being held captive. Tom had read the authorities and knew that the only proper way to dig out of prison was to use a case knife. Consequently, he would have nothing to do with Huck's suggestion that picks would be the more appropriate tools. After a long session

99. See, e.g., *People v. Odom*, 8 Ill. App. 3d 227, 289 N.E.2d 663 (1972).

100. See note 14, *supra*.

101. OKLA. STAT. ANN., tit. 22, § 1066: "The appellate court may reverse, affirm or modify the judgement appealed from . . ."

102. *Stidham v. State*, 503 P.2d 905, 909 (Okla. Crim. App. 1972).

with the knives, it became apparent that they were not equal to the task. After studying on it, Tom came up with a solution that would get the job done without offending the authorities. "Gimme a case knife," he said. As Huck tells it:

He had his own by him, but I handed him mine. He flung it down, and says:

'Gimme a *case knife*.'

I didn't know just what to do—but then I thought. I scratched around amongst the old tools, and got a pickax and give it to him, and he took it and went to work, and never said a word.

He was always just that particular. Full of principle.¹⁰³

What is being suggested is simple. In holding that the punishment imposed upon Lynch was cruel or unusual, the California Supreme Court relied upon the concept of proportionality upon which the Alaska review statute is based. There is also more than a passing similarity between the factors examined by the court in *Lynch* and those which were deciding in the Sixth Circuit draft cases and in the cases decided under the Alaska statute. Indeed, there is little doubt as what the result in *Lynch* would have been had the Alaska Supreme Court heard the case. The court would have taken notice of the nonviolent nature of the offense, the complete lack of aggravating factors in this particular offense, the pleasant personality and the great potential of the defendant,¹⁰⁴ the likelihood that defendant could benefit from treatment away from penal environs, and the fact that such an excessive sentence contributes to the disparity in sentences throughout the state, and then would have found the sentence excessive. Of course, these were precisely the factors relied upon by the California court, along with its comparison with the penalties imposed in other states, for its decision that Lynch's punishment was cruel or unusual. Is it possible that the California Supreme Court took a lesson from *The Adventures of Huckleberry Finn*, and struck down a sentence that was merely excessive, calling it "cruel or unusual punishment" only because the authorities (here, the court itself) have held that excessiveness is not sufficient grounds to review a sentence?

It is recognized that this suggestion is not entirely fair. It was

103. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN*, 239-240 (New American Library, 1959).

104. The California Supreme Court also took notice of the fact that the punishment did not fit the offender, *In re Lynch*, 8 Cal. 3d 410, 437, 105 Cal. Rptr. 217, 235, 503 P.2d 921, 939 (1972).

not the sentence imposed by the trial judge which was examined at all, but rather the statutory penalty. Furthermore, it was the action of the Adult Authority in four times refusing to fix Lynch's sentence at less than life¹⁰⁵ that resulted in his excessive incarceration. However, in a very real sense it *was* the action of the Adult Authority which was reviewed because the cruel or unusual punishment issue would never have arisen but for its inaction. This fact did not escape the notice of the court, for it commented on "the vast disproportion between the conduct of which petitioner was convicted and the punishment *he has suffered*," although it found it unnecessary to reach petitioner's claim that the Authority deprived him of due process by repeatedly denying him parole.¹⁰⁶

The problem with the holding in *In re Lynch* is that a decision that life imprisonment for second offense indecent exposure is cruel or unusual punishment does not promise to be of much utility to others who have been unreasonably denied release by the Adult Authority. It is recognized that until the scope of the problem of excessive prison terms is determined in California, any suggested solutions would be premature. Therefore, it is submitted that a legislative investigation is in order to take inventory of those persons warehoused in California penal institutions for unreasonable periods of time. Depending, then, on the results of the inventory, the following recommendations merit consideration.

It has been suggested that in a very real sense, the determination of sentence by the Adult Authority is the sentencing process.¹⁰⁷ If one accepts this observation as sound, then all the reasons for extending due process and the right to counsel to the imposition of sentence under *Mempa v. Rhay*¹⁰⁸ and the revocation of parole under *Morrissey v. Brewer*¹⁰⁹ pertain with equal force to sentence determination hearings. Thus it has been recommended that prisoners be given access to the information relied upon by the Authority in determining sentence, that a detailed record of the proceedings be required listing the reason for the decision and the factors considered, and that the right to counsel be extended to sentence determination hearings.¹¹⁰

105. 8 Cal. 3d 410, 438, 105 Cal. Rptr. 217, 236, 503 P.2d 921, 940 (1972).

106. *Id.* (emphasis added).

107. *Sturm v. Cal. Adult Authority*, 395 F.2d 446 (9th Cir. 1968) (Brown-
ing, J. concurring).

108. 389 U.S. 128 (1967).

109. 408 U.S. 471 (1972).

110. Note, *The California Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U.C.D.L. REV. 360, 377-81 (1972).

Judge Frankel has advanced the suggestion that precise factors in mitigation and aggravation of sentence be defined and codified to govern the sentencing process.¹¹¹ This suggestion could easily be applied to the proceedings of the Adult Authority, and the factors themselves might be taken from the cases decided by the Sixth Circuit and the Supreme Court of Alaska. This development would not only serve to guide the Adult Authority in its exercise of discretion, but would in turn provide criteria for judicial review of its determinations. This extended judicial review, in turn, would not seem to be a radical development, as the courts already review sentences based in part on impermissible factors.¹¹²

Finally, if the suggested inventory of California penal institutions reveals widespread abuse, it is suggested that the indeterminate sentencing concept itself be reconsidered. The theory of the indeterminate sentence law is that it permits the shortening of the defendant's sentence if he has been rehabilitated.¹¹³ However, Judge Frankel has pointed out some basic fallacies in the theory which have resulted in cruelty and injustice rather than rehabilitation.¹¹⁴ First, many offenders neither need nor respond to any form of rehabilitation and thus their sentences can logically be based only upon the objectives of deterrence and societal condemnation-objectives which do not call for consideration at a time later than trial. Second, with the possible exceptions of the drug offenders, the juveniles and the mentally ill, the goal of rehabilitation is a forlorn hope at best. And third, the resentment generated among prisoners by the indeterminate sentences very likely outweighs any benefits.¹¹⁵ Thus it is suggested that the indeterminate sentence be reserved only for those types of offenders which we have some hope of rehabilitating.

STEVE SCHROEDER

111. Frankel, *Lawlessness In Sentencing*, 41 U. CIN. L. REV. 1, 45-46 (1972).

112. *United States v. Tucker*, 404 U.S. 443 (1972).

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

114. Frankel, *supra* note 110, at 31.

115. *Id.* at 31-39.