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Indiscriminate Punishment of Drug Users: California Health and Safety Code Section 11550

MICHAEL LEE PINKERTON*

If a man injures his neighbor, what he hath done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered.

—Leviticus 24:19-20

[O]ur ideas about and intervention in drug taking behavior have only the most tenuous connection with the actual pharmacological properties of "dangerous drugs".

—Thomas S. Szasz, M.D.¹

Punishment is perhaps the most obvious form of coercive state action imaginable. When the government imposes punishment, the convicted citizen is directly confronted with the awesome power of the state. Depending on the circumstances, the state may demand and obtain the offending citizen's property, liberty or even life in retribution for a criminal act. There are, however, definite constitutional limitations on the ability of the state to

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The author has appeared as *amicus curiae* on behalf of the Office of the State Public Defender in several appellate litigations involving California Health and Safety Code Section 11550. The author is indebted to Deputy State Public Defenders Mark E. Cutler and Richard E. Shapiro, who provided guidance through discussions of the issues canvassed in this paper. The assistance of Deputy State Public Defender Richard L. Phillips and Kristin M. Sudhoff, J.D., who each reviewed an earlier draft of the article, is also acknowledged.

1. T. SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS, AND PUSHERS 169 (Anchor ed. 1975).

punish. While most of the restrictions are procedural in nature, substantive limitations do exist.

This article will review California Health and Safety Code Section 11550 in light of the substantive limitation contained in the "cruel and unusual" punishment clause of the United States Constitution and the "cruel or unusual" punishment provision of the California Constitution.² Both proscriptions outlaw, *inter alia*, punishment that is disproportionate to the crime. The precise thesis of the article is that the mandatory minimum sentence³ provision of Section 11550,⁴ which proscribes the use of or being under the influence of a wide variety pharmacological substances,⁵ constitutes cruel or unusual punishment in violation of Article I, Section 17 of the California Constitution.⁶ The chief vice of the statute is that the 90-day mandatory minimum sentence is applicable to an impermissibly wide array of offenders and conduct without regard to the degree of danger the individual criminal act poses to society and without regard to the culpability of the individual offender.

The historic origin and subsequent judicial interpretation of the federal clause will be examined first. This exegesis will reveal that the requirement that punishment be proportionate to the crime is deeply embedded in English common law and is thus an integral part of our legal tradition. The focus of the article will then shift to the California Constitution. The independent nature of the California charter will be touched upon by way of foundation for the presentation of the state constitutional safeguard against disproportionate punishment. The state test to be used when determining whether a

2. U.S. CONST. amend. VIII; CAL. CONST. art. I, §17.

3. For the purposes of this article, the term "mandatory minimum sentence" refers to a sentence by which the defendant must be incarcerated for a given amount of time if he or she is found guilty of the crime charged. Even where probation may be warranted, the granting of probation must be conditioned on the service of the minimum period of incarceration.

4. No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b) or (c) of Section 11054, specified in paragraph (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V excepting when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

CAL. STATS. 1972, c. 1407, §3, at 3031 (emphasis added).

5. See text accompanying notes 69-74 *infra*.

6. "Cruel or unusual punishment may not be inflicted or excessive punishments imposed." CAL. CONST. art. I, §17.

Although other constitutional theories, including equal protection, can be used to attack the statute, they will not be discussed in this article. See *Bosco v. Justice Court*, 77 Cal. App. 3d 179, 143 Cal. Rptr. 468 (1978) (equal protection argument rejected). See also Comment, *California Health and Safety Code Section 11550: Is A Ninety Day Mandatory Minimum Jail Term A Cruel or Unusual Punishment?*, 11 U.S.F. L. REV. 622 (1977).

given punishment is disproportionate to the crime will then be applied to Health and Safety Code Section 11550.

LIMITATIONS ON THE POWER OF THE SOVEREIGN TO PUNISH:
HISTORIC ORIGIN AND ENSUING FEDERAL INTERPRETATION

The principle that punishment should not be *disproportionate* to the crime is of ancient origin and was recognized in the laws of pre-Norman England.⁷ Early English statutes embodied the concept⁸ and it was acknowledged in the Magna Charta.⁹ The most significant codification of this precept in relation to American Constitutional history occurred in the English Bill of Rights. The year 1688 marked the end of the reign of the House of Stuart; King James II was forced to abdicate the throne by William and Mary of Orange. This coup d'etat came to be known as the "Glorious Revolution."¹⁰ Parliament responded by passing a series of measures that comprised the Revolutionary Settlement.¹¹ The Bill of Rights was the principal document of the Settlement.¹² Among the enumerated abuses contained in this document was a claim that "illegal and cruel punishments" had been used.¹³ Accordingly, it was declared that "cruel and unusual punishments" should not be inflicted.¹⁴

The American colonists included this proscription in several state charters

7. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 844 (1969) [hereinafter cited as Granucci].

8. Granucci, *supra* note 7, at 845.

9. 20. A free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence, . . . and the villian shall be fined in the same way . . .

21. Earls and barons shall only be fined by their peers, and only in proportion to their offence.

22. A clergyman shall be fined like those before mentioned, only in proportion to his lay holding, and not according to the extent of his ecclesiastical benefice.

G. ADAMS & H. STEPHENS, SELECT DOCUMENTS IN ENGLISH HISTORY, 45 (1916) [hereinafter cited as G. ADAMS & H. STEPHENS].

10. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 447-48 (1964). It has also been referred to as the "great and glorious revolution." T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 59 (1956).

11. See G. ADAMS & H. STEPHENS, *supra* note 9, at 454-75, in which the documents comprising the Revolutionary Settlement are collected.

12. 1 W&M 2, c.2; see G. ADAMS & H. STEPHENS, *supra* note 9, at 462-69.

[The Bill of Rights] listed most of the faults of which Parliament considered the Stuart monarchs guilty, and settled the crown on William and Mary on the understanding that those misdeeds were not to be repeated.

M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 449 (1964).

13. Whereas the late king James the Second by the assistance of divers evil counselors, judges and ministers employed by him did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of our kingdom. . . . And excessive fines have been imposed. And illegal and cruel punishments have been inflicted.

G. ADAMS & H. STEPHENS, *supra* note 9, at 463.

14. And thereupon the said lords spiritual and temporal and commons pursuant to their respective letters and elections being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like cases have usually done) for the vindicating and asserting their ancient rights and liberties, declare: . . . That excessive bail might not be required nor excessive fines imposed nor cruel or unusual punishments . . . inflicted.

Id. at 464-65.

that were enacted before the United States Constitution.¹⁵ Virginia was the first, and eight other states followed suit.¹⁶ It was also a part of the Northwest Ordinance, and was included in the eighth amendment to the United States Constitution in 1791.¹⁷ Early American judicial interpretations of this constitutional prohibition shifted away from the English concept of disproportionality, concentrating instead on the *mode* of punishment inflicted.¹⁸ Thus, one writer maintained:

Following adoption, state and federal jurists accepted the view that the clause prohibited certain methods of punishments. Since barbarities of Stuart England were not often used in America, the clause was rarely invoked in the courts. Attempts to extend the meaning of the clause to cover any punishment disproportionate to the crime were rebuffed throughout the nineteenth century and commentators believed the clause to be obsolete.¹⁹

In 1910 a safeguard against disproportionate punishment was read into the eighth amendment by the United States Supreme Court in *Weems v. United States*.²⁰ In that case the Supreme Court invalidated a Philippine statute that punished a white-collar crime with a fine, a minimum of twelve years at hard labor, and serious perpetual civil collateral consequences which for practical purposes amounted to civil death.²¹ This punishment was found to be impermissibly disproportionate because more serious crimes were less severely punished under the United States and Phillipine Codes.²² Also mentioned was a similar federal crime that was less severely punished.²³

The *Weems* decision was supported by two lines of reasoning. The majority reasoned that although the Framers may have been primarily concerned with banning the barbaric forms of punishment that existed in seventeenth century England, they must also have intended to prohibit other sorts of punishment.²⁴ Thus if a punishment violates society's evolved sense of decency, it would be unconstitutional even though it may not be an inherently barbaric or cruel mode of punishment. The majority also declared that the Constitution is not a document of fixed meaning:

Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief that gave it birth. This is peculiarly true of constitutions.²⁵

15. Granucci, *supra* note 7, at 840. See also *Weems v. United States*, 217 U.S. 349, 393-94 (1910) (dissenting opinion).

16. Granucci, *supra* note 7, at 839-40.

17. Granucci, *supra* note 7, at 840.

18. Granucci, *supra* note 7, at 839-42.

19. Granucci, *supra* note 7, at 842.

20. 217 U.S. 349 (1910).

21. *Id.* at 381-82.

22. *Id.* at 380-81.

23. *Id.* at 380.

24. *Id.* at 372-75.

25. *Id.* at 373.

Thus it was deemed necessary and proper to evaluate the proportionality aspect of the cruel and unusual punishment clause in terms of contemporary social mores.²⁶ Although thus firmly established, the concept of proportionality was not vigorously applied by the courts. For some time legislative judgments regarding the appropriateness of a penalty were left largely undisturbed.²⁷ In the past twenty years, however, the Supreme Court has exhibited renewed interest in the proportionality test. In *Coker v. Georgia*²⁸ the Court revitalized and refined the proportionality requirement.

In *Coker*, the defendant had escaped from a Georgia state prison where he was serving sentences for murder, rape, kidnapping and aggravated assault. His activities during the time he was at liberty resulted in convictions for escape, motor vehicle theft, kidnapping and rape. In the sentencing phase of his subsequent trial the jury applied an aggravation statute and fixed the penalty on the rape conviction at death. The Court was thus presented with an issue that was not before it in the recent capital cases of *Furman v. Georgia*²⁹ or *Gregg v. Georgia*³⁰—namely: Can the death penalty be imposed on a person who has not been convicted of murder? The scope of the decision was stated early in the opinion: The death penalty is not cruel and unusual punishment *per se* because it is not “inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed.”³¹ According to Mr. Justice White, writing for the majority and joined by Justices Stewart, Blackmun and Stevens, a penalty is cruel and unusual if it does not measurably contribute to a valid penological goal.³² Such punishment would amount to nothing more than the gratuitous infliction of pain and suffering.

A second method acknowledged by the majority for testing constitutionality in this context is an inquiry into whether the punishment “is grossly out of proportion to the severity of the crime.”³³ The Court then engaged in an historical and comparative approach in applying this criterion of proportionality. The laws of the other states were consulted to determine how many, both presently and within the past 50 years, prescribed death for rape of an adult woman. This survey revealed that within the last half century, the states making rape a capital crime were in a distinct minority.³⁴ Contemporary mores, expressed through present punishment provisions pointed even more convincingly toward the unconstitutionality of the Georgia statute. Georgia was found to be “the sole jurisdiction in the United States at

26. *Id.* at 373-75.

27. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 848 (1961).

28. 433 U.S. 584 (1977).

29. 408 U.S. 238 (1972).

30. 428 U.S. 153 (1976).

31. *Coker v. Georgia*, 433 U.S. 584, 591 (1977).

32. *Id.* at 592.

33. *Id.*

34. *Id.* at 593.

the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child."³⁵

The indisputably serious nature of the crime of rape was considered next. The Court conceded that:

[Rape] is highly reprehensible in both a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide it is the "ultimate violation of self."

Rape is without doubt deserving of serious punishment; but . . . it does not compare with murder, which does involve the unjustified taking of human life.³⁶

Mr. Justice White then concluded that "the death penalty, which 'is unique in its severity and [irrevocability],'. . . is an excessive penalty for the rapist who, as such, does not take human life."³⁷ As a final note the Court pointed out that according to Georgia law, the more serious crime of murder is not punishable by death unless specific aggravating factors are found. This meant that in certain circumstances a rapist would be more severely punished than a murderer. This anomaly was "difficult" for the Court to accept.³⁸

The foregoing analysis demonstrates that although the proportionality requirement has been received and applied unevenly by the Supreme Court over the years, it is again becoming an important and viable constitutional safeguard. It should also be noted that the English principle of proportionality was broad and not originally intended to limit the mode of punishment inflicted, but to insure that the punishment imposed was not excessive. This made even the judicial review of fines possible.³⁹

The United States Supreme Court has never declared that a punishment violates the eighth amendment solely because of the length of the assigned period of incarceration. The California courts, however, have invalidated excessively long sentences on the basis of the "cruel or unusual punishment" provision of the California Constitution. In a series of cases beginning in 1972 with *In re Lynch*,⁴⁰ the California Supreme Court developed a multifaceted test that limits the period of incarceration to a length that is

35. *Id.* at 595-96. A further indication of contemporary societies' ethical view that death is an inappropriate sanction for rape was found in the fact that in over 90 percent of the cases in which Georgia juries had the opportunity to impose the death penalty, they refused to do so. *Id.* at 597.

36. *Id.* at 597-98.

37. *Id.* at 598. The Court was unimpressed by the fact that under the statute the death penalty could only be imposed if specific aggravating factors were found because none of the factors involved the death of the victim. *Id.* at 598-99.

38. *Id.* at 600.

39. The writ *de moderata misercordia* developed as a mechanism to enforce the Magna Charta's prohibition against excessive fines. Granucci, *supra* note 7, at 846.

40. 8 Cal. 3d 410, 503 P.2d 921, 10 Cal. Rptr. 217 (1972).

proportionate to the crime.⁴¹ Because the standard applied by the California courts will reach sentences that are beyond the purview of the federal criterion, it is necessarily based on the California rather than the United States Constitution.⁴² Although the state criterion is more exacting than its federal counterpart, it is fully consonant with its English antecedent and thus possesses considerable historical integrity. After a brief discussion of the independent nature of the state charter, this state test for determining when a sentence is disproportionate will then be developed and applied to California Health and Safety Code Section 11550. A recent intermediate appellate court case which considered this issue will also be critically reviewed.

THE THEORETICAL BASIS OF THE CALIFORNIA STANDARD: INDEPENDENT STATE GROUNDS

The notion that the rights embodied in the California Constitution are independent of those contained in the federal charter has both historic and analytic underpinnings. In 1849, when the Constitution of California was adopted, the federal Bill of Rights did not apply to the states.⁴³ Therefore, out of practical necessity, the rights enumerated in the Declaration of Rights in California could not have been intended to be dependent upon the guarantees in the United States Constitution. Additionally, the available historic data suggests that the authors of the Declaration of Rights were heavily influenced by the charters of other states.⁴⁴

Considerations of federalism provide the analytic basis for the independence of state constitutions. Although the United States Supreme Court has appellate jurisdiction over state court decisions,⁴⁵ that jurisdiction "rests entirely on the existence of what is always referred to as a 'federal question' in the case."⁴⁶ This of course means that state judiciaries are free to interpret state laws protecting individual rights more liberally than analogous federal provisions have been interpreted.⁴⁷ This principle is explicitly recognized in

41. *Id.* at 424, 503 P.2d at 930, 10 Cal. Rptr. at 226.

42. *Id.*

43. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833).

44. R. HUNT, *THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION* 55-60 (1895); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 283 (1973) citing C. BROWNE, *REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER 1849*, at 24, 31, 221 (1850).

45. *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

46. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 482 (1970). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 n.80 (1977):

The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

47. As Mr. Justice Brennan has observed:

[T]he decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state

the state constitution itself,⁴⁸ and in provisions of California statutes.⁴⁹

The California Supreme Court, along with the highest court of several other states,⁵⁰ has taken an active role in promoting this brand of federalism. On many notable occasions the California High Court has rejected and expanded upon the prevailing federal interpretation of a constitutional safeguard, resting its holding on the state constitution.⁵¹ In *People v. Disbrow*,⁵² a case involving the right against self-incrimination, the California Supreme Court explicitly relied upon the state charter in the face of contrary federal authority.⁵³ In so doing, the court articulated the independence of the California Constitution:

We declare that [the contrary holding of the United States Supreme Court] is not persuasive authority in any state prosecution in California We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."⁵⁴

The independent state grounds doctrine has been relied upon by the California Supreme Court in its interpretation of the "cruel or unusual punishment" clause of Article I, Section 17.⁵⁵ In one line of cases, the court has developed a test that restricts the permissible period of incarceration to a length of time that is proportionate to the crime. This body of case law will now be analyzed and applied to Health and Safety Code Section 11550.

law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and members of the bar seriously err if they so treat them. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

48. CAL. CONST. art. I, §24 reads in part: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."

49. See CAL. EVID. CODE §1204:

A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California (emphasis added).

50. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); *Project Report, Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

51. See, e.g., *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); *Cardenas v. Superior Court*, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961). See generally Falk, *supra* note 44, at 278-79 n.18.

52. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

53. *Harris v. New York*, 401 U.S. 222 (1970).

54. 16 Cal. 3d at 113-15, 345 P.2d at 280, 127 Cal. Rptr. at 368-69.

55. See *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (outlawed capital punishment on state constitutional grounds), superseded by CAL. CONST. art. I, §27.

THE 90-DAY MANDATORY MINIMUM SENTENCE PROVISION OF CALIFORNIA
HEALTH AND SAFETY CODE SECTION 11550 AND THE STATE PROHIBITION
AGAINST CRUEL OR UNUSUAL PUNISHMENT

A. *The Basic Constitutional Limitation: In re Lynch*

In *In re Lynch*⁵⁶ the Supreme Court of California announced the test for determining whether a punishment is so disproportionate to the crime that it constitutes cruel or unusual punishment in violation of Article I, Section 17 of the state constitution.⁵⁷ Mr. Justice Mosk, writing for five other members of the court, first acknowledged the doctrine of separation of powers and reaffirmed the well-established precept that "in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments, and that such questions are in the *first instance* for the judgment of the Legislature alone."⁵⁸ The complementary role of the judiciary in this system of checks and balances is to subject legislative judgments to the litmus of the constitution. Thus, although "[t]he Legislature is . . . accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime, . . . the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function."⁵⁹ To strike the proper balance in this constitutional division of labor "[s]tatutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears."⁶⁰

After the decision was thus placed into proper context, the standard for determining whether a punishment is disproportionate was announced.⁶¹ First, the nature of the offense and the offender should be examined. The primary focus of this investigation should be the degree of danger the offense and offender present to society. The later case of *In re Foss*⁶² stated for the first time that the penological purposes of the punishment should also be taken into consideration in this regard. Second, after this assessment is made, a comparison should be made between the challenged punishment and punishments levied in the same jurisdiction for more serious crimes.

56. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

57. For detailed commentary on *Lynch* and those cases following, see Comment, *California's Cruelty Criteria: Evaluating Sentences After In re Lynch*, 25 HASTINGS L.J. 636 (1974); Comment, *Prohibiting Cruel or Unusual Punishment: California's Requirement of Proportionate Sentencing After Wingo and Rodriguez*, 10 U.S.F. L. REV. 524 (1976).

58. *In re Lynch*, 8 Cal. 3d 410, 414, 503 P.2d 921, 923, 105 Cal. Rptr. 217, 219 (1972) (emphasis added), citing *People v. Bauer*, 1 Cal. 3d 368, 375, 461 P.2d 637, 641, 82 Cal. Rptr. 357, 361 (1968); *People v. Knowles*, 35 Cal. 2d 175, 181, 217 P.2d 1, 4 (1950); *People v. Tanner*, 3 Cal. 2d 279, 298, 44 P.2d 324, 332 (1935).

59. 8 Cal. 3d at 414, 503 P.2d at 923, 105 Cal. Rptr. at 219 (emphasis added), quoting *People v. Anderson*, 6 Cal. 3d 628, 640, 493 P.2d 880, 888, 100 Cal. Rptr. 152, 160 (1972).

60. 8 Cal. 3d at 415, 503 P.2d at 923, 105 Cal. Rptr. at 219, quoting *In re Dennis M.*, 70 Cal. 2d 444, 453, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 6 (1969).

61. The *Lynch* test is by no means novel. The supreme court relied heavily upon authority from foreign jurisdictions when it devised the basic framework that is used to determine constitutionality *vel non* in this context.

62. 10 Cal. 3d 410, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

Finally, the challenged penalty should be compared with that imposed in other states for committing the same or similar crime.⁶³

This multi-faceted test appears to be a well-balanced approach to a delicate judicial function. Even though the first prong might be subject to attack as inviting an individual judge to read his or her subjective views on the wisdom of the challenged penalty into the constitution, the latter two components insure a degree of objectivity by utilizing a comparative analysis. One of the most outstanding virtues of the *Lynch* criteria is its versatility. Subsequent cases have applied the comparative proportionality test to minimum⁶⁴ as well as maximum sentences.⁶⁵ The mandatory minimum sentence provision of California Health and Safety Code Section 11550 will now be examined in light of *Lynch* and its progeny.

B. The Nature of the Offense and the Offender

1. The Nature of the Offense

The most salient feature of Health and Safety Code Section 11550 is the fact that a great variety of conduct comes within its ambit.⁶⁶ This is a critical factor in determining the constitutionality of an assigned penalty. The broader the scope of a statute that prescribes a mandatory minimum period of incarceration the more constitutionally suspect it becomes because it eschews consideration of the particular criminal act or of individual culpability.⁶⁷ As the California Supreme Court has noted when discussing the suspect nature of other provisions of the Health and Safety Code dealing with controlled substances:

[T]here is one pertinent characteristic shared by each of the narcotics recidivist provisions of the Health and Safety Code: each such provision proscribes a broad range of conduct More significant for purposes of our analysis, the mandatory prison terms prior to parole eligibility prescribed for each offense are automatically enhanced by the findings of one or more prior convictions of specified narcotics offenses which cover an even broader spectrum of conduct⁶⁸

The statute under consideration contains a defect similar to these recidivist provisions. Section 11550 incorporates several other sections of the Health and Safety Code.⁶⁹ These incorporated sections list pharmacological

63. 8 Cal. 3d at 427, 503 P.2d at 932, 105 Cal. Rptr. at 228.

64. See, e.g., *In re Grant*, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976); *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re Williams*, 69 Cal. App. 3d 840, 138 Cal. Rptr. 384 (1977).

65. See *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

66. See text accompanying notes 68-75 *infra*.

67. See generally *In re Grant*, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976); *People v. Wingo*, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

68. *In re Grant*, 18 Cal. 3d at 9-10, 553 P.2d at 596, 132 Cal. Rptr. at 436.

69. Although it is clear that other sections of the Health and Safety Code are incorporated

substances as diverse as heroin,⁷⁰ tetrahydrocannabinol (the active ingredient in marijuana),⁷¹ codeine (a pain reliever),⁷² and mescaline (an hallucinogen).⁷³ A more diverse group of drugs is hard to imagine.⁷⁴ Yet the statute treats them all the same. These drugs have a wide range of effect upon the human body; the only quality they share is legislative regulation of their usage under Section 11550.

Also material is the fact that the section does not require that there be any measurable or perceptible intoxicating effect upon the user.⁷⁵ This law does not distinguish between one who is rendered incapacitated by ingesting a controlled substance and one who has taken a pharmacologically insignificant dosage and remains unaffected. These two cases are polar opposites that demand different treatment since enormously different threats to society are presented, yet no such distinctions are made in the mandatory minimum sentence provision of Health and Safety Code Section 11550.

2. The Nature of the Offender

The notion of a typical offender of Health and Safety Code Section 11550 is as mercurial a concept as the "typical offense." Due to the panoramic scope of the substances regulated by the statute a violator may be one who takes one pain pill that was prescribed to another or the violator may be a morphine addict who injects the substance several times daily. Although it cannot be seriously argued that these two offenders are equally deserving of punishment, the statute absurdly lumps the addict and nonaddict together and treats them in a singular fashion. Such a practice is impermissible, and the inability of Section 11550 to make such a critical distinction is strong evidence of its unconstitutional nature.⁷⁶ The constitutional vice of such a

by Section 11550, deciding exactly which pharmacological agents listed in the incorporated sections are actually regulated by Section 11550 is another matter. *See* *Bosco v. Justice Court*, 77 Cal. App. 3d 179, 184 n.6, 143 Cal. Rptr. 468, 472-73 n.6 (1978).

70. CAL. HEALTH & SAFETY CODE §11054(c)(10).

71. CAL. HEALTH & SAFETY CODE §11054(d)(17).

72. CAL. HEALTH & SAFETY CODE §11056(d).

73. CAL. HEALTH & SAFETY CODE §11054(d)(11).

74. What are commonly referred to as "narcotic drugs" consist of a great variety of substances, with different properties and with varying degrees of habit-forming characteristics. Narcotics are defined in the dictionary as substances that induce sleep, dull the senses, and relieve pain. In law, the president's crime commission recently noted, the term "has been given artificial meaning." It does not refer, as might be expected, to one class of drugs encompassing substances with similar chemical properties or pharmacological effects. It is applied, rather, to a number of different classes of drugs that have been grouped together for convenience and for purposes of legal control. These typically include the opiates, cocaine, and marijuana.

N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 217-18 (1971) [hereinafter cited as N. KITTRIE].

75. Section 11550 of the Health and Safety Code prohibits the mere use of the incorporated controlled substances. Contrast this to other legislative provisions that require an ascertainable level of intoxication. *See, e.g.*, CAL. PENAL CODE §647(f) (drunk in public); CAL. VEH. CODE §23101 (felony drunk driving); CAL. VEH. CODE §23102(a) (misdemeanor drunk driving); CAL. VEH. CODE §23105 (misdemeanor driving under the influence of drugs); CAL. VEH. CODE §23106 (felony driving under the influence of drugs).

76. *Cf. In re Rodriguez*, 14 Cal. 3d 639, 653, 537 P.2d 384, 394, 122 Cal. Rptr. 552, 562 (1975) (failure of the Adult Authority to distinguish between its term-fixing responsibility and its parole-granting function is unconstitutional).

legislative arrangement is further highlighted when the penological purposes of punishment are considered.

3. *The Penological Purposes of the Prescribed Punishment*

Jurisprudential discussions of the purpose and function of penal sanctions generally focus on four general theories; rehabilitation, isolation, deterrence, and retribution.⁷⁷ All theories have one thing in common: each contains definite limits on the extent to which punishment can legitimately be imposed.

The positivist school of penology maintains that punishment should be utilized to reform the offender and to isolate him or her from society during the reformation process.⁷⁸ From this perspective punishment is permissible only until the offender is reformed or is no longer a danger to society. Because of the problems inherent in predicting dangerousness,⁷⁹ and the lack of actual ability to reform offenders, the nature of the offense is a major factor to consider when setting the limits of permissible punishment.⁸⁰ The deterrence theory of punishment is based on utilitarian assumptions. If the punishment inflicted is "painful" enough to outweigh the "pleasure" derived from the commission of the unlawful act, then crime will be prevented by deterring members of society (general deterrence) and the particular offender (special deterrence).⁸¹ In all instances, the punishment should be great enough to bring about deterrence, but no greater.⁸² Classical retribution theory holds that punishment is imposed for purposes of revenge or expiation.⁸³ Strict limitations on punishment obtain from this theoretical

77. See generally H. L. A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

The social sciences provide alternative perspectives from which the phenomenon of punishment can be fruitfully studied. Professor Hermann's review of this literature contains a concise summary of the major theoretical positions. Hermann, *The Evil Christ Crucified: The Ritual Function of Punishment*, 19 WAYNE L. REV. 1909 (1973).

Thomas S. Szasz, M.D. has incisively analyzed the political, moral and sociological implications of the legal regulation of drug related activity from a libertarian perspective. T. SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS AND PUSHERS (Anchor ed. 1975).

78. N. KITTRIE, *supra* note 74, at 24-39.

79. See Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 440 (1974) in which Dr. Diamond states:

Can psychiatrists predict danger with reasonable accuracy? Are there well established clinical symptoms which, if present, can be relied upon to indicate potential danger? Can one be reasonably sure that persons who are not dangerous will not be labeled as such and unnecessarily confined? I believe the answer to all these questions is an emphatic "no."

80. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 54 (1968).

81. Hermann, *The Evil Christ Crucified: The Ritual Function of Punishment*, 19 WAYNE L. REV. 1409, 1420-21 (1973).

82. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 182 (Hafner edition 1948):

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.* (emphasis in original).

83. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 33-39 (1968).

The appropriateness of considering the penological purposes of punishment in conjunction with this aspect of the *Lynch* test was first suggested in *In re Foss*, 10 Cal. 3d 910, 919-20, 519 P.2d 1073, 1078, 112 Cal. Rptr. 649, 654 (1974). At that time the court did not discuss

stance. It "should be proportionate to the crime committed and must not become excessive."⁸⁴

Proper application of all of the above penological theories require that punishment be tailored with reference to the individual criminal act. It is precisely in this regard that the punishment provision of Health and Safety Code Section 11550 fails. It seems obvious that the mélange of offenders and behavior that falls within the purview of this code section does not present a uniform degree of danger to society, nor are they singularly culpable and deserving of punishment. To lump such a mixed bag of persons and activities together can not serve a valid penological purpose, but can only "shock the conscience" of a fair-minded person.⁸⁵

C. *The Mandatory Minimum Sentence Provision of Health and Safety Code Section 11550 Compared to the Minimum Penalty Imposed for More Serious Crimes in California*

The second prong of the *Lynch* analysis, which requires comparison with punishment for more serious crimes, was elucidated by the *Foss* court in the following manner:

The second technique . . . involves a comparison of the questioned punishment with punishments imposed within the same jurisdiction for offenders which may be deemed more serious than that for which the questioned punishment is imposed . . . [T]he vast majority of punishments . . . may . . . be deemed illustrative of constitutionally permissible degrees of severity; and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect.⁸⁶

One of the most striking features of the punishments prescribed in the California codes is the almost total lack of provisions for mandatory incarceration. The possibility of straight probation with no time served stands as the rule almost without exception.⁸⁷ The exceptional circumstances in which a minimum sentence must be served constitute a narrow course of conduct that is inherently dangerous to others.⁸⁸ This stands in contrast to the panoply of victimless conduct embraced by California Health and Safety Code Section 11550. A brief canvas of the codes will reveal that the 90-day

retribution. The California Legislature, however, has recently emphasized this factor in its new determinate sentencing scheme. CAL. PENAL CODE §1170(a)(1) which provides in part: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." In this context the term "punishment" should be read as "retribution." See generally Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 1 (1978); Smith & Newcomb, *California's Determinate Sentence Law: The "Final" Version*, 4 ORANGE C.B.J. 280 (1977).

84. N. KITTRIE, *supra* note 74, at 21.

85. See 8 Cal. 3d at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226.

86. *In re Foss*, 10 Cal. 3d 910, 920, 519 P.2d 1073, 1078, 112 Cal. Rptr. 649, 654 (1974).

87. See text accompanying notes 88-91 and 93-96 *infra*.

88. See text accompanying notes 92 & 97 *infra*.

minimum sentence provision under discussion is an isolated excessive penalty and thus constitutionally suspect.

1. *Nondrug Related Felonies*

The most serious nondrug related felonies are, of course, those designated as "violent felonies." These violent felonies are: murder or voluntary manslaughter; mahem; forcible rape as defined in subdivisions (2), (3) and (4) of Penal Code Section 261; sodomy by force, violence, duress, menace or threat of great bodily harm; kidnapping as defined in Penal Code Section 209; lewd acts on a child under 14 as defined in Penal Code Section 288; and any other felony in which the defendant inflicts great bodily injury on persons other than accomplices.⁸⁹ Despite the fact that the legislature has singled out these crimes to receive enhanced punishment "to display society's condemnation for such extraordinary crimes of violence against the person,"⁹⁰ the perpetrator of any of these crimes is still eligible for straight probation.⁹¹ The same is true of other serious felonies such as robbery or burglary.⁹² This of course does not mean that the perpetrator will be granted straight probation; it does mean, however, that the offender has the right to be *considered* for probation. In so considering, the sentencing judge will then take into account factors of the individual offense—something that is not allowed by Health and Safety Code Section 11550.

Contrast the above to the situation in which one uses a firearm during the commission of certain specified felonies. When this occurs the defendant is not eligible for probation.⁹³ A mandatory sentence is thus reserved for

89. CAL. PENAL CODE §667.5(c).

90. CAL. PENAL CODE §667.5(c).

91. CAL. PENAL CODE §1203. A group of criminal acts are singled out in subdivision(d) of Section 1203 of the Penal Code. Those who perpetrate the acts enumerated in that subsection are still eligible for probation, but the sentencing judge must find that justice would best be served by such a disposition. When probation is granted under these circumstances, the court must specify the reasons for the finding. CAL. PENAL CODE §1203(e). Thus, even those defendants falling within the scope of subdivision (d) receive the benefit of being *considered* for probation. *But see* CAL. PENAL CODE §§ 1203.08 (recidivist provision); 1203.09 (violent crimes against aged or disabled persons).

92. CAL. PENAL CODE §1203.

93. CAL. PENAL CODE §1203.06 provides:

Notwithstanding the provisions of Section 1203:

(a) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:

(1) Any person who used a firearm during the commission or attempted commission of any of the following crimes:

- (i) Murder.
- (ii) Assault with intent to commit murder in violation of Section 217.
- (iii) Robbery, in violation of Section 211.
- (iv) Kidnapping, in violation of Section 207.
- (v) Kidnapping for ransom, extortion, or robbery, in violation of Section 209.
- (vi) Burglary of the first degree, as defined in Section 460.
- (vii) Rape by force or violence, in violation of subdivision (2) of Section 261.
- (viii) Rape by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261.
- (ix) Assault with intent to commit rape, the infamous crime against nature, or robbery, in violation of Section 220.
- (x) Escape, in violation of Section 4530, or Section 4532.

extraordinary crimes where, due to the use of a firearm, the offense was perpetrated in a particularly life-endangering fashion.

2. Drug related felonies

The same type of sentencing structure that was described above for nondrug related felonies also holds true in the case of drug-related felonies. This is perhaps best illustrated by examining the felony provisions relating to the same substances controlled by Health and Safety Code Section 11550. One may feloniously possess,⁹⁴ feloniously possess for sale,⁹⁵ or feloniously sell,⁹⁶ agents covered by Section 11550. These crimes are certainly more serious than the misdemeanor violation of Section 11550, and yet commission of these crimes still does not subject the offender to a mandatory minimum period of incarceration.⁹⁷

As in the case of nondrug related felonies, the legislature has carved out a narrow exception to the general precept of probation eligibility. The exception deals with possession for sale, or sale of one-half ounce or more of heroin, or for offenders who have been convicted more than once of possession for sale of heroin. These persons cannot be considered for probation.⁹⁸

(2) Any person previously convicted of a felony specified in subparagraphs (i) through (x) of paragraph (1), who is convicted of a subsequent felony and who was armed with a firearm at the time of his arrest for the subsequent felony.

(b)(1) The existence of any fact which would make a person ineligible for probation under subdivision (a) shall be alleged in the information or indictment, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(2) This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(3) As used in subdivision (a) "used a firearm" means to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it.

(4) As used in subdivision (a) "armed with a firearm" means to knowingly carry a firearm as a means of offense or defense."

94. CAL. HEALTH & SAFETY CODE §11350.

95. CAL. HEALTH & SAFETY CODE §11351.

96. CAL. HEALTH & SAFETY CODE §11352.

97. CAL. PENAL CODE §1203.

98. CAL. PENAL CODE §1203.07 provides:

(a) Notwithstanding the provisions of Section 1203, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:

(1) Any person who is convicted of violating Section 11351 of the Health and Safety Code by possessing for sale one-half ounce or more of a substance containing heroin.

(2) Any person who is convicted of violating Section 11352 of the Health and Safety Code by selling or offering to sell one-half ounce or more of a substance containing heroin.

(3) Any person convicted of violating Section 11351 of the Health and Safety Code by possessing heroin for sale or convicted of violating Section 11352 of the Health and Safety Code by selling or offering to sell heroin, and who has one or more prior convictions for violating Section 11351 or Section 11352 of the Health and Safety Code.

(b) The existence of any fact which would make a person ineligible for probation of subdivision (a) shall be alleged in the information or indictment, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt

3. Analysis

Both the general rule of probation availability and the exceptions to the rule highlight the unreasonable nature of the sentencing provision of Health and Safety Code Section 11550. The vast majority of offenders, even those convicted of violent crimes, are entitled to have the individual factors of the particular criminal act considered by the sentencing judge. This is impossible under Health and Safety Code Section 11550 because, although probation may be granted to an offender, it must be conditioned on service of a 90-day jail sentence.

The few provisions of the codes that preclude parole consideration also confirm the suspect nature of Health and Safety Code Section 11550. In both the exceptions cited above,⁹⁹ a very specific type of criminal conduct is singled out for special treatment. In contrast, Health and Safety Code Section 11550 encompasses an enormously wide variety of conduct that does not present a uniform degree of danger to society. The inequity resulting from this incongruous sentencing structure is apparent. The perpetrator of the most serious, violent crimes in California has the right to be judged as an individual offender and considered for straight probation while the nonviolent offender of Health and Safety Code Section 11550 faces a mandatory period of incarceration without consideration of the individual criminal act. Disparity of this order is intolerable in a civilized system of criminal justice.

D. *The Mandatory Minimum Sentence Provision of Health and Safety Code Section 11550 Compared to the Minimum Sentence Imposed in Other Jurisdictions for Similar Crimes*

Like the preceding two parts of the *Lynch* test, the third *Lynch* prong points unwaveringly toward the unconstitutionality of the minimum sentence under consideration. Only *twelve* states in the Union other than California make it a crime to use or be under the influence of a controlled substance.¹⁰⁰ Of these, only Arizona has a mandatory minimum sentence provision.¹⁰¹ "Thus it is the virtually unanimous judgment of our sister states that [drug use] . . . can be adequately controlled [without a mandatory minimum sentence]. In this setting the California penalty . . . strikes a

or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

99. CAL. PENAL CODE §§1203.06, 1203.07.

100. ALASKA STAT. tit. 17, §12.110(d) (Supp. 1977); ARIZ. REV. STAT. §36-1062 (1974); CONN. GEN. STAT. §53a-184 (Supp. 1978); DEL. CODE tit. 16, §4753 (Supp. 1977); MICH. COMP. LAWS §335.341(5) (1975); NEV. REV. STAT. tit. 40, §453.441 (19—); N.J. STAT. ANN. §24:21-20(b), (c) (West Supp. 1977); OHIO REV. CODE ANN. §2925.11 (Page Supp. 1978); OKLA. STAT. tit. 63, §2-405 (1973); OR. REV. STAT. §167.217 (1977); UTAH CODE ANN. tit. 58, §37-8(2)(a)(i) (Supp. 1977); WYO. STAT. tit. 35, §7-1039 (1977).

101. ARIZ. REV. STAT. §36-1062 (1974). Even in Arizona, however, the trial court may suspend the sentence if the defendant is a first-time offender and undergoes treatment. ARIZ. REV. STAT. §36-1062.02E (1974).

discordant note indeed."¹⁰² Health and Safety Code Section 11550 is thus revealed as an isolated example of disproportionate punishment when viewed on a national level.

A recent intermediate appellate court decision dealing with the constitutionality of Section 11550 will be considered next. An analysis of that opinion reveals that the court did not examine most of the issues presented above in any depth. The approach used by the court was to characterize the statute so it did not seem to embrace such a wide variety of conduct and pharmacological substances. After this shallow examination Section 11550 was found to be constitutional.

E. Bosco v. Justice Court: A Misapplication of Lynch

The California Court of Appeal for the Fifth District recently considered the constitutionality of the 90-day mandatory sentence provision of Section 11550. In *Bosco v. Justice Court*¹⁰³ Mr. Justice Hopper applied what he characterized as a *Lynch* analysis and concluded that the mandatory minimum sentence was constitutional. Although the court summarily conceded that the second and third prongs of the *Lynch* test indicated that the statute was constitutionally suspect, it nevertheless upheld the blanket penalty based on its construction of the first *Lynch* prong.

The main thrust of the court's treatment of the first *Lynch* factor was that any person who should not be subjected to the mandatory minimum penalty would be saved by the manner in which the statute is administered. The court reasoned that when an unsuitable case is presented it would either not be prosecuted, or the trial court would dismiss the complaint if filed.¹⁰⁴ In lieu of this, the court asserted that statutory diversion¹⁰⁵ or a California Rehabilitation Center commitment¹⁰⁶ would factor out those who should not receive the 90-day sentence, even though they literally fall within the reach of the statute.¹⁰⁷

When the penological purposes of the mandatory minimum sentence were considered, the court spoke as if Section 11550 dealt exclusively with addicting substances.¹⁰⁸ According to the *Bosco* court, it could not be said that the goals of deterrence and rehabilitation were not served by the mandatory sentence.¹⁰⁹ Thus, on the basis of an indication of constitutionality on the first prong of the *Lynch* test and unconstitutionality on the second and third aspects of the test, the court found the statute to be valid.

102. 8 Cal. 3d at 436, 503 P.2d at 938-39, 105 Cal. Rptr. at 234-35.

103. 77 Cal. App. 3d 179, 143 Cal. Rptr. 468 (1978).

104. *Id.* at 184, 143 Cal. Rptr. at 473.

105. See CAL. PENAL CODE §§1000-1000.5.

106. See CAL. WELF. & INST. CODE §§3050-3054.

107. 77 Cal. App. 3d at 184-85, 143 Cal. Rptr. at 473.

108. *Id.* at 186-87, 143 Cal. Rptr. at 474-75.

109. *Id.* at 187, 143 Cal. Rptr. at 475.

The approach used by the court of appeal is objectionable for several reasons. First, the court's analysis of the first *Lynch* prong is unprecedented. Rather than analyzing the variety of conduct and drugs that fall within the ambit of Section 11550, the court performed a constitutional sidestep by fabricating a process by which many offenders would be filtered away from the mandatory minimum sentence. This was an attempt to remedy the overbreadth and singular treatment contained in the statute. The statute thus viewed from a pragmatic stance was then seen as an appropriate means for dealing with the much narrower issue of narcotics addiction. Nowhere has the California Supreme Court endorsed such an analysis. Indeed, in *People v. Wingo*,¹¹⁰ the supreme court highlighted the necessity of considering *all* the conduct coming within the reach of a statute. In *Wingo*, subdivision (a) of Penal Code Section 245¹¹¹ was found to be constitutional even though it outlawed a wide variety of conduct because "an equally wide range of penalties"¹¹² were prescribed. Such is not the case with Section 11550 which treats all offenders in a singular fashion.

This fundamental misconstruction also flawed the court's discussion of the penological purpose of the mandatory punishment. The court did not even attempt to deal with the myriad of drugs and wide array of conduct reached by this statute. Due to the hypothetical filtering process the court constructed earlier in the opinion, it only discussed a relatively narrow spectrum of conduct and pharmacological agents. This assertion is manifestly ill-conceived.¹¹³ The hard cases that demonstrate the constitutional infirmity of the statute were simply not addressed.¹¹⁴

Another objection that can be registered against the *Bosco* opinion, albeit not as basic as the others, is the manner in which the court dealt with the second prong of the *Lynch* test. The court merely stated that this factor indicated that Section 11550 is constitutionally suspect. It did not examine the issue in any depth. When the penalty provisions of other statutes in California are considered, Section 11550 truly stands out as an isolated instance of excessive punishment.¹¹⁵ The summary treatment of this issue by the court of appeal eviscerated a great deal of the impact of this factor.

Although not mentioned in conjunction with its application of *Lynch*, the court ended its discussion of the cruel or unusual punishment argument by expressing a reluctance to declare a 90-day penalty unconstitutional:

No case has been called to our attention holding a one-year minimum to be cruel or unusual punishment

110. 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975).

111. Assault with a deadly weapon or with force likely to produce great bodily injury.

112. 14 Cal. 3d at 174, 534 P.2d at 1005-06, 121 Cal. Rptr. at 101-02.

113. See text accompanying notes 68-74, *supra*.

114. The court's approach to the first *Lynch* test appears to have stood the doctrine of "unconstitutionality as applied" on its head. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

115. See text accompanying notes 86-99, *supra*.

In our opinion the 90-day mandatory minimum is simply not so excessive or grossly disproportionate or for such a substantial period of time as to shock the moral sense of the people. Even though we may philosophically or personally oppose mandatory punishments, we cannot say that 90 days does not meet generally accepted standards of decency. We are not authorized to simply convert our own views of what is wise policy into constitutional law.¹¹⁶

This reservation, although containing some surface appeal in its reliance on judicial restraint, is ultimately unavailing. The notion that the legislature may escape constitutional scrutiny by limiting an assigned penalty to one year does not comport with history or constitutional theory. As was shown above, the English antecedent of the limitation on punishment was extremely sensitive, reaching even fines.¹¹⁷ Furthermore, the trend of modern American constitutional law, although at first halting, is again in this direction.¹¹⁸

This reluctance may be a possible explanation for the manner in which the *Bosco* court applied the *Lynch* criteria. Since a straightforward application of *Lynch* would have dictated what the court considered to be an unwarranted invalidation of a "short" sentence, perhaps the test was modified to save the statute. Whatever the reason for the approach adopted by the court, it is submitted that it is unsound both from a historical and theoretical viewpoint.

CONCLUSION

Although the legislature generally acts with a great deal of circumspection when it considers sentencing issues, in a few instances it has exercised its power in an arbitrary fashion. The mandatory minimum sentence provision of California Health and Safety Code Section 11550 is an example of the latter type of legislative behavior. The legislature has recently devoted considerable attention to sentencing issues. While these elected representatives are involved in this area, they should reexamine both the wisdom and constitutionality of the mandatory nature of the minimum sentence contained in Section 11550. If the statute were redrafted to allow the sentencing judge to consider whether the minimum sentence is warranted in a particular case a major defect of the statute would be remedied.

In lieu of corrective legislative action, the judiciary, as custodian of the state charter should act to strike down the mandatory aspect of the sentence. The California Supreme Court has fashioned a set of criteria to be used to determine whether a sentence is grossly disproportionate to the crime, and

116. 77 Cal. App. 3d at 189-90, 143 Cal. Rptr. at 476-77.

117. See text accompanying notes 7-17, *supra*.

118. See text accompanying notes 18-39, *supra*.

thus unconstitutional. Although the court of appeal was recently called upon to apply these standards to Section 11550, it failed accurately to analyze the issue using the supreme court guidelines. The reasoning of the court in *Bosco v. Justice Court* is thus unpersuasive and this issue should be reconsidered by another appellate court.