reasonable obligation for the insured. Yet in *Thompson,* the court did not even hold the insured to his representation that his brief medical history form was correct and complete.

CONCLUSION

The doctrine of the adhesion contract was adopted by the California Supreme Court to protect the reasonable expectations of the insured.[83] When the court presumes estoppel on the part of the insurer simply to uphold the trial court or to allow recovery for the beneficiary, it defeats the insurer's interest in fair dealing by the insured, and invited fraudulent misrepresentations. When it hides behind fictitous ambiguities to reach the sound result of upholding the insured's reasonable expectations of coverage, it invites unnecessary litigation. In *Thompson,* the majority fails to articulate clearly that they have outlawed premium payment without corresponding coverage, and completely fails to justify their abrogation of the right of fair dealing between parties to an insurance contract.

Martin Wayne Johnson

IV

CRIMINAL LAW AND PROCEDURE

A. *Competence to Stand Trial*

In re Davis.[1] Twenty-four year old Eugene Davis, shoeless and in search of warmth, fell asleep inside an open public laundromat on June 6, 1972. When awakened by a policeman, Davis was unable to tell the officer where he lived or to answer other questions put to him.[2] Charged with disorderly conduct,[3] he was arraigned, and then certified to the superior court for a "sanity," hearing.[4] Two appointed doctors

83. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). *See* note 27, *supra.*

1. 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973) (Burke, J.) (unanimous decision).

2. The facts may be gathered from Davis' petition for habeas corpus, filed with the California Supreme Court, dated August 25, 1972, at 3.

3. CAL. PENAL CODE § 647(i) (West Supp. 1974). Under this section it is a misdemeanor to lodge "in any building . . . , whether public or private, without the permission of the owner. . . ."

4. Penal Code section 1367 provides that "[a] person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." CAL. PENAL CODE § 1367 (West 1970). *See also* Pate v. Robinson, 383 U.S. 375, 378, 385 (1966). In that case, the Supreme Court stated that if a question as to a defendant's ability to proceed to trial is presented, subsequent conviction without a hearing directed to the issue of his competence violates due process and the right to a fair trial.

concluded that Davis was schizophrenic and so mentally disordered as to be incapable of cooperating with appointed counsel. Accordingly, on June 12, 1972 the superior court found Davis "insane" within the meaning of Penal Code section 1368[5] and ordered him committed to Camarillo State Hospital until he regained his "sanity."[6] Meanwhile, trial and judgment were indefinitely suspended.

California's adoption of the common law rule precluding the trial of an incompetent defendant is stated in Penal Code section 1368.

> If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined . . . .

CAL. PENAL CODE § 1368 (West 1970).

5. "Sanity," in the context of Penal Code section 1368, has been construed as having reference to a defendant's capacity to "understand the nature and purpose of the proceedings taken against him and to conduct his own defense in a rational manner." People v. Pennington, 66 Cal. 2d 508, 515, 426 P.2d 942, 947, 58 Cal. Rptr. 374, 379 (1967) (*quoting* People v. Merkouris, 52 Cal. 2d 672, 344 P.2d 1 (1959). This interpretation of section 1368 is thus consistent with the federal statute, 18 U.S.C. § 4244 (1970), which more properly speaks of a defendant's competence to stand trial, under which the test, as articulated by the U.S. Supreme Court, is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

6. Authority for the commitment was derived from Penal Code sections 1370 and 1372. Pursuant to section 1370:

> If the jury finds the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to a state hospital for the care and treatment of the insane, and that upon his becoming sane he be redelivered to the sheriff. In the event of dismissal of the criminal charges before the defendant becomes sane the person shall be subject to the applicable provisions of the Lanterman-Petris-Short Act (Part 1 [(C]ommencing with Section 5000) of Division 5 of the Welfare and Institutions Code).

CAL. PENAL CODE § 1370 (West 1970).

Under section 1372:

> If the defendant is received into the state hospital he must be detained there until he becomes sane. When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county, and the court wherein the defendant's case is pending. The sheriff must thereupon, without delay, bring the defendant from the state hospital, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged.

CAL. PENAL CODE § 1372 (West 1970).

Although these provisions, like Penal Code sections 1367 and 1368, speak in terms of "sanity," the relevant criterion still is whether the defendant can meet the test of competence to stand trial. See note 5 *supra*. This imprecision in terminology has contributed to confusion among judges and psychiatrists in the past, and vestiges of that confusion no doubt remain. One basis for confusion occurs when competence to stand trial, with its requirement that the defendant understand the criminal proceedings against him and be able to assist counsel in his defense, is equated with the M'Naghton test of criminal responsibility, which is premised on the defendant's ability to distinguish between right and wrong and to know the nature of his acts. *E.g.*, S. BRAKEL

On review of the denial of Davis'[7] petition for habeas corpus, the California Supreme Court, relying on a decision by the U. S. Su-

& R. Rock, The Mentally Disabled and the Law 410 (rev. ed. 1971); McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U.L. Rev. 46, 49 (1969).

Another and more pervading problem in the competence to stand trial context has been the not infrequent tendency on the part of examining physicians to judge a defendant's competence against psychiatric standards of mental illness. Consequently, a conclusion that a particular defendant is incompetent to stand trial is often based on a medical determination that he is suffering from psychosis or some other form of mental illness, and no further investigation is made as to his ability to meet the legal standard of competence in spite of such illness. *E.g.*, Lewin, *Incompetency to Stand Trial: Legal and Ethical Aspects of an Abused Doctrine*, 1969 Law & Social Order 233, 239-40, 266 (1969); Slough & Wilson, *Mental Capacity to Stand Trial*, 21 U. Pitt. L. Rev. 593, 598 (1960). Although this latter confusion may stem from the physician's failure to comprehend the legal standard of competence, it more often results from an inability to translate that standard into medical terms that can be usefully applied to the accused. *E.g.*, Vann & Morganroth, *The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial*, 43 U. Det. L.J. 1, 10 (1965); Comment, *Criminal Law—Insane Persons—Competency to Stand Trial*, 59 Mich. L. Rev. 1078, 1082, 1100 n.65 (1961). A determination that the defendant is suffering from a mental disorder need not automatically preclude the possibility that he may still be capable of meeting the legal standard of competence; some forms of mental illness do not detract from, and in some cases may even enhance, a defendant's ability to understand the proceedings against him and to assist counsel in his defense. *See* Slough & Wilson, *supra* at 597-98; *cf.* Vann, *Pretrial Determination and Judicial Decision-making: An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justice*, 43 U. Det. L.J. 13, 29 (1965).

Serious problems are inherent in a procedure that delegates responsibility for what is essentially a legal decision to the medical profession, especially when trial courts consistently accept at face value a conclusion by an examining doctor that a defendant is incompetent to stand trial. McGarry, *supra* at 46; Vann & Morganroth, *supra* at 2-3. Several commentators have urged that the decision concerning the defendant's competence to proceed to trial be left in the hands of the trial court judge or defense counsel, the latter of whom is especially qualified to testify as to his client's actual ability to cooperate with him. Lewin, *supra* at 278 n.132; Slovenko, *The Psychiatric Patient, Liberty, and the Law*, 13 Kans. L. Rev. 59, 70 (1964). Alternatively, it has been suggested that courts require that a doctor set forth the grounds for his opinion so that the court can ensure that the legal test of competence is being applied. McGarry, *supra* at 61.

The difficulties that flow from a partial or complete abrogation to psychiatrists of the judicial responsibility for the initial determination that a defendant is incompetent to proceed to trial reappear when the committed defendant has allegedly regained his competence. Since the competency provisions in many states are worded in terms of restoration to "sanity" rather than restoration to competence, the appropriate criteria which should govern the discharge of a now competent accused—ability to understand the nature and purpose of the proceedings taken against him and to cooperate with counsel—have in the past often been confused with the release standards generally applicable to civilly committed individuals, which normally envision the total cure of the person's mental disorder. *E.g.*, S. Brakel & R. Rock, *supra* at 416-17; Comment, 59 Mich. L. Rev. 1078, *supra* at 1083-86. Consequently, the pre-trial commitment process has been fraught with confusion and misapplication of legal tests from start to finish.

7. The case actually involved a consolidation of three habeas corpus actions; since the petitioners were treated by the court as similarly situated, its holdings were

preme Court in *Jackson v. Indiana*,[8] interpreted the commitment and release procedures of California's competence provisions so as to conform to the constitutional principles outlined in that case.[9] The court's analysis of Davis' equal protection and due process challenges to his pre-trial commitment begins with a comparison of Penal Code section 1367 *et seq.* with California's civil commitment procedures;[10] it ends with the recognition that the disparate standards governing commitment and release of civilly committed persons and incompetent defendants in California subjects Penal Code section 1367 *et seq.* to the same constitutional infirmities which the U.S. Supreme Court had found in the Indiana procedures under attack in *Jackson*.[11] The similarity be-

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equally applicable to each. Petitioner Cowan had been charged with disturbing the peace and assault (Pen. Code §§ 415 and 240), and Petitioner Palma was arrested for misdemeanor battery (Pen. Code § 242).

8. 406 U.S. 715 (1972).

9. 8 Cal. 3d at 801, 505 P.2d at 1021, 106 Cal. Rptr. at 181.

10. *Id.* at 805, 505 P.2d at 1023, 106 Cal. Rptr. at 183. The substantive commitment and release provisions applicable to persons sought to be involuntarily civilly committed in California are contained in the Lanterman-Petris-Short Act, CAL. WELF. & INST'NS CODE § 5000 *et seq.* (West Supp. 1974). The relevant sections are §§ 5008, 5150, 5152, 5250, 5254, 5300, 5303, 5304 and 5305.

11. Like the Indiana statutes, California's involuntary civil commitment provisions encompass two classes of individuals, those who, as a result of mental disorder, are allegedly dangerous and those who, because of their mental disorder, are so gravely disabled as to be unable "to provide for . . . basic personal needs for food, clothing, or shelter." CAL. WELF. & INST'NS. CODE § 5008(h) (West Supp. 1974). Once "reasonable cause" is established, persons in either class may be detained for three days for emergency treatment and evaluation in a county mental health facility. CAL. WELF. & INST'NS CODE § 5150 (West Supp. 1974), § 5152 (West 1972). Thereafter, under certain conditions, the individual may be certified for intensive treatment for an additional 14-day period. CAL. WELF. & INST'NS CODE §§ 5250, 5254 (West 1972). Finally, if the person, because of mental disorder, is considered to remain a physical threat to others by virtue of dangerous acts in the past, he may be retained for postcertification treatment for a period not to exceed 90 days. CAL. WELF. & INST'NS CODE §§ 5300, 5303, 5305 (West 1972), § 5304 (West Supp. 1974). Successive 90-day treatment periods can be added only if the person engaged in dangerous behavior during the previous 90-day term and continues to present "an imminent threat of substantial physical harm to others." CAL. WELF. & INST'NS. CODE § 5304 (West Supp. 1974). Thus, unlike Penal Code section 1367 *et seq.*, which implicitly thrust the burden of proof as to present competence on the defendant if he is to avoid indefinite commitment, in civil commitment proceedings the burden of justifying detention beyond the initial 17-day evaluation and treatment phase rests squarely on the State.

In Davis' case, resort to civil commitment proceedings under the Lanterman-Petris-Short Act would not have sanctioned his detention for more than 17 days without a prior showing of dangerousness stemming from his mental disorder. CAL. WELF. & INST'NS CODE § 5304 (West Supp. 1974). This burden could only have been discharged by pointing to an actual threat, attempt, or infliction of harm on others, either at the time he was taken into custody or during the initial 17-day evaluation and treatment period. *Id.* The court, following the lead of the U.S. Supreme Court in *Jackson*, pointed out that, but for the unproved charges against Davis, it was unlikely that he could have been committed for longer than the 17-day evaluation and treatment period. 8 Cal. 3d at 805, 505 P.2d at 1023, 106 Cal. Rptr. at 183 (1973).

tween the applicable California provisions and the corresponding Indiana statutes dealt with in *Jackson* in the court's views required adoption of the "rule of reasonableness" expounded by the U.S. Supreme Court in *Jackson*.[12]

Under this rule, an accused found incapable of standing trial may constitutionally be committed only for the period of time necessary to assess his chances of regaining competence in the foreseeable future, and, if recovery is found to be possible, for additional time during which progress toward the goal of competence is maintained.[13] Consequently, while it found Davis' original commitment proper, the court held that he would have to be released or recommitted under the applicable civil commitment procedures unless it were shown that he could be expected to regain his competence within such a reasonable time. The Court would not go beyond Davis' due process and equal protection claims, and declined to rule favorably on his additional argument that his pre-trial commitment violated his constitutional right to a speedy trial.[14]

The *Davis* opinion relies heavily on the analysis set forth in *Jackson*. Consequently, this Note commences with the U.S. Supreme Court's position in *Jackson* and then moves on to view *Davis* in its light. The Note concludes by considering the speedy trial claim, which was not raised in *Jackson* and was rejected in *Davis*, insofar as it is a relevant factor in assessing the ultimate impact that *Jackson* and *Davis* are likely to have in the pre-trial commitment context.

I. EQUAL PROTECTION

a. *The position of the U.S. Supreme Court in* Jackson v. Indiana

The facts in *Jackson v. Indiana* demonstrate the extent to which procedures to establish competence to stand trial have been subjected to abuse. Theon Jackson was a 27 year old mentally defective deaf mute whose only means of communication was through rudimentary sign language. He was charged with two robberies involving small

12. 8 Cal. 3d at 805, 505 P.2d at 1023, 106 Cal. Rptr. at 183.

13. 406 U.S. 715, 738 (1972).

14. 8 Cal. 3d at 805-06, 505 P.2d at 1024, 106 Cal. Rptr. at 184. Although the court denied Davis' petition for a writ of habeas corpus, it remanded his case to the superior court for a report by the Camarillo State Hospital superintendent on Davis' progress toward competence and prognosis for the future. *Id.* at 810, 505 P.2d at 1027, 106 Cal. Rptr. at 187. This disposition was deemed more appropriate than an outright dismissal of the pending criminal charge against him. Since Davis had not alleged that the almost eight month delay suffered thus far in bringing him to trial had unduly prejudiced his case, the court felt that the aggravated circumstances which could require immediate release of an incompetent accused and dismissal of any outstanding charges against him were not present in his case. *Id.* at 809, 505 P.2d at 1026-27, 106 Cal. Rptr. at 186-87.

sums of money. At his competence hearing the examining physicians concluded that Jackson's mental retardation and virtual inability to communicate rendered him incapable of understanding the nature of the charges against him or assisting counsel in his defense. More importantly, however, both physicians' testimony revealed that Jackson's chances of ever achieving competence to proceed to trial were minimal, if not nonexistent. Nonetheless, Jackson was committed to the State Department of Mental Health for appropriate disposition.[15] Under an Indiana law[16] similar to California's, before an incompetent defendant could be released from a state psychiatric institution he must have been restored to "sanity," i.e. competence to stand trial. Without a doubt then, through the guise of a procedure ostensibly designed to prepare an incompetent defendant for trial, Jackson, a permanently incompetent defendant, was serving a life sentence in a mental hospital.

The U.S. Supreme Court unanimously overturned Jackson's commitment on equal protection and due process grounds.[17] The Court's equal protection holding was based on a comparison of Indiana's statutes governing commitment and release of defendants found incompetent to stand trial with the procedures applicable to feeble-minded persons and mentally ill persons not accused of crime.[18] An analysis of Indiana's civil commitment statutes had left the Court unconvinced that, on the record presented, Indiana could have civilly committed Jackson as either feeble-minded and in need of custodial care and

15. 406 U.S. at 717-19.

16. IND. ANN. STAT. § 9-1706a (Supp. 1971), now IND. CODE 35-5-3-2 (1971).

17. Justices Powell and Rehnquist took no part in the consideration or decision.

18. Before one could be committed under the Indiana feeble-mindedness statute, it had to be shown that he was unable properly to care for himself and was therefore in need of custodial care and treatment. IND. ANN. STAT. §§ 22-1907, 22-1801 (1964), now IND. CODE 16-15-1-3, 16-15-4-1 (1971). Involuntary civil commitment for mental illness could be achieved only if, in addition to a finding of mental illness, a determination was made that such illness necessitated care, treatment, and detention to protect his or the community's welfare. IND. ANN. STAT. §§ 22-1201(1), 22-1209 (1964), now IND. CODE 16-14-9-1(1), 16-14-9-9 (1972). Indiana, however, could achieve indefinite pre-trial commitment on a showing that the defendant was presently incompetent to stand trial. IND. ANN. STAT. § 9-1706a (Supp. 1971), now IND. CODE 35-5-3-2 (1971).

Not only were the requirements for indefinite incarceration under Indiana's civil commitment laws more stringent than the showing that was necessary under its competence to stand trial statute, but the standards for release of the feeble-minded and noncriminal mentally ill were more lenient than those applicable to an incompetent defendant. One originally committed for feeble-mindedness could be discharged when his condition warranted it. IND. ANN. STAT. § 22-1814 (1964), now IND. CODE 16-15-4-12 (1971). If civilly committed as a dangerous mentally ill person, he would be eligible for release at the discretion of the hospital superintendent or when cured. IND. ANN. STAT. § 22-1223 (1964), now IND. CODE 16-14-9-23 (1971). However, Jackson, as an incompetent defendant, could be released only upon regaining his competence so that he could proceed to trial. IND. ANN. STAT. § 9-1706a (Supp. 1971), now IND. CODE 35-5-3-2 (1971).

treatment or as a dangerous mentally ill person.[19] Moreover, the Court noted, consideration of the evidence relating to Jackson's past employment and home care indicated that the release standards applicable to feeble-minded or dangerous mentally ill persons conceivably could have sanctioned his discharge almost immediately, whether or not his condition improved.[20] The Court held that Jackson was entitled to the same protections against indefinite incarceration that are accorded to all persons civilly committed. The denial of such safeguards to an incompetent defendant, based on the mere fortuity of his encounter with the criminal process, constitutes a violation of equal protection.[21]

b. *The position of the California Supreme Court in In re* Davis

The California Supreme Court in *In re Davis* limited its discussion of the equal protection claim to the assertion that it was bound by the U.S. Supreme Court's decision in *Jackson.* Such brevity is understandable considering the possible impact of such a holding.

Without the due process holdings discussed below, the result of "equalizing" the law of commitment may merely be a shift in emphasis from incompetence to stand trial statutes to civil commitment provisions to accomplish through the latter proceedings that which is now precluded by *Jackson*—the indefinite incarceration of an incompetent defendant pursuant to criminal proceedings. To the extent that the *Jackson* decision will tend to foster such an approach it is regrettable, especially if the relevant criteria for exercising a state's civil commitment powers are relaxed to ensure that none escapes their reach.[22]

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19. 406 U.S. 715, 727 (1972).

20. *Id.* at 729.

21. *Id.* at 730. The Court relied on its earlier decision in Baxstrom v. Herold, 383 U.S. 107 (1966), where it had held that a convicted felon, nearing the expiration of his prison sentence, could not in effect be civilly committed as mentally ill and dangerous in the absence of a jury trial afforded all others sought to be similarly committed. A fortiori, the *Jackson* Court concluded,

> If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.

406 U.S. 715, 724 (1972).

The *Baxstrom* principle has been extended by the Supreme Court to the indeterminate extension of a defective delinquent's prison sentence, McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), and to the indefinite commitment of a sex offender as an alternative to serving his criminal sentence. Humphrey v. Cady, 405 U.S. 504 (1972). In addition, lower courts have followed *Baxstrom* in cases involving commitment after a successful insanity defense. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

22. *See, e.g.,* Gobert, *Competency to Stand Trial: A Pre- and Post-*Jackson *Analysis,* 40 TENN. L. REV. 659, 681 (1973); Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea,* 40 U. CHI. L. REV. 66, 70-71 (1972).

Given the alternatives of outright release of the permanently incompetent defendant or proceeding with his trial notwithstanding his mental disability in contravention of his constitutional rights, the specter of proceeding under civil commitment statutes and the relaxation of standards permitting indeterminate civil commitment in the wake of *Jackson* is not an idle fear.

The impact of such tactics would be minimal in California inasmuch as the Lanterman-Petris-Short Act absolutely prohibits indeterminate confinement, even in the civil commitment context. This is not, however, the typical case since most states have not as yet revamped their civil commitment laws to the extent that California has. Indeed, it is possible that *Jackson*, rather than facilitating further adoption of statutes similar to California's may actually impede or even reverse that trend.[23] In those states in which indefinite civil commitment is possible, an equal protection challenge has less force than in California. Perhaps recognizing this, the *Davis* court appears to have placed less emphasis on *Jackson's* equal protection analysis, implicitly preferring its due process holding.

II. DUE PROCESS

a. *Right to treatment*

1. The position of the U.S. Supreme Court in Jackson v. Indiana. The U.S. Supreme Court's due process holding in *Jackson v. Indiana* was two-fold. First, it concluded that an incompetent defendant could initially be detained only for the limited time necessary to assess his chances of being able to proceed to trial in the foreseeable future.[24] Second, the Court stated that the continued detention of those who appeared after preliminary evaluation to be capable of restoration to competence without undue delay must be justified by progress toward that goal.[25]

In reaching the first part of its holding, the Court recognized and accepted a doctrine which has prevailed in federal courts, but was generally undeveloped in the states, the so-called "rule of reasonableness:"[26] In the absence of a finding of dangerousness, one adjudged

23. *See* Burt & Morris, *supra* note 22, at 71. *Cf.* Note, *Remedies for Individuals Wrongly Detained in State Mental Institutions Because of Their Incompetency to Stand Trial: Implementing Jackson v. Indiana,* 7 VAL. L. REV. 203, 209 n.27 (1973).

24. 406 U.S. 715, 738 (1972).

25. *Id.*

26. 406 U.S. 715, 733-34 (1972). The federal commitment and release statutes involved are 18 U.S.C.A. §§ 4244-46 (1969). Absent a "rule of reasonableness," permanently incompetent defendants would, in effect, receive indefinite commitments. *See* United States v. Curry, 410 F.2d 1372 (4th Cir. 1969); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971).

incompetent to stand trial may be committed only for such reasonable time as is required to ascertain whether he will probably regain his competence in the foreseeable future.[27] This rule, the Court held, is equally applicable to state statutes.[28] Thus, in a case like *Jackson* involving a permanently incompetent defendant, the State must either rely on its civil commitment proceedings authorizing indefinite incarceration, or, if unable to establish a case thereunder, release him.[29]

Secondly, even those who initially could not stand trial, but who showed promise of restoration to competence in the near future, could be retained only as long as continued progress toward that goal justified retention.[30] In essence, by anchoring this due process analysis to a "rule of reasonableness," the Court elevated the newly emergent right to treatment concept to a constitutional level.[31]

The notion that substantive due process will not tolerate the withholding of treatment essential to a mental patient's recovery

> is founded upon a recognition of the concurrency between the state's exercise of sanctioning powers and its assumption of the duties of social responsibility. Its implication is that effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls.[32]

Prior to *Jackson*, several lower courts, while recognizing the validity of the right to treatment argument, had premised that right on a statutory construction of the provisions under which the mentally ill person had originally been committed.[33] In 1971, in *Wyatt v. Stickney*,[34]

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27. 406 U.S. 715, 734 (1972).

28. *Id.* at 737-38. While recognizing that states could, consistent with the due process clause, indefinitely detain mentally ill persons for their welfare or for the protection of society, the Court declared that indeterminate commitment based solely on incapacity to proceed to trial, and in total disregard of the premises underlying civil commitment, would not satisfy the requirements of due process. *Id.* at 736-37. In Jackson's proceedings, the established bases for civil commitment as well as any consideration of the extent to which his incarceration would restore his competence were ignored, and the Court concluded that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 737-38.

29. *Id.* at 738.

30. *Id.*

31. *See* Gobert, *supra* note 22, at 684; Burt & Morris, *supra* note 22, at 72.

32. Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 870 (1969) (footnotes omitted).

33. *E.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); *In re* Anonymous, 247 N.Y.S.2d 323, 20 App. Div. 2d 395 (1964). *See also In re* Gary W., 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971). At the same time, however, it had been ventured that the existence of such a right might have a constitutional basis. *E.g.*, Rouse v. Cameron, 373 F.2d 451, 455 (D.C. Cir. 1966). The overwhelming majority of cases that have held that involuntarily committed mentally ill persons must be afforded treatment while confined have come out of the District of Columbia Circuit. While a number of those cases seized on the dicta in *Rouse* to conclude that the right

however, a court for the first time held that denial of rehabilitative treatment to persons confined in state mental institutions violated due process.[35]

The adoption by the U.S. Supreme Court of the right-to-treatment due process analysis represented the culmination of the movement which had gradually been generating support in the lower courts in the context of civil commitments and mandatory confinements of those successfully sustaining insanity defenses. The assertion by the Court that the concept was equally applicable to incompetent defendants was especially gratifying in light of the abuse to which competence to stand trial statutes had routinely been subjected in the past.[36] The constitutional deprivation that flowed from the application of such provisions is underscored by considering the premises underlying civil commitment (welfare of the patient or protection of society from dangerous mentally ill individuals) and mandatory confinement of those acquitted by reason of insanity[37] (presumption of continued insanity justifying detention to ensure recovery). These premises share a common rationale: certain individuals are considered unable properly to care for themselves or are deemed to be dangerous to themselves or others. Yet this rationale is not shared by competence to stand trial statutes. The underlying basis of the latter provisions is that it is inherently unfair, and after *Pate v. Robinson*[38] unconstitutional as well, to convict and sentence a person who is so disordered as to be unable to understand the nature and purpose of the proceedings against him or to be incapable of assisting in his defense. Long-term incapacity is at the core of the predominantly *parens patriae* rationale of the former provisions. Quite the contrary is true of competence to stand trial statutes, where a showing that incapacity (that is, incompetence) cannot be remedied serves to vitiate the sole purpose of the statute—to ready a defendant for trial. Thus, in *Jackson*, where the defendant was almost

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to treatment had a constitutional underpinning, it must be recognized that the statutes in question in *Rouse* and its successors clearly provided for the extension of treatment to the individuals concerned. Therefore, it cannot be flatly asserted that any of those holdings rested solely on the constitutional argument advanced.

34. 325 F. Supp. 781 (M.D. Ala. 1971).

35. In that case the court stated that geriatric patients and mental retardates who were receiving only custodial care "have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition." *Id.* at 784.

36. For a glimpse of the extent to which incompetency proceedings were so often misused prior to Jackson, see Lewin, *supra* note 6.

37. For example, Penal Code sections 1026-26a require that all defendants acquitted by reason of insanity who, in the opinion of the court, have not fully recovered their sanity be committed to a state hospital for not less than ninety days for observation. CAL. PEN. CODE §§ 1026-26a (West 1970).

38. 383 U.S. 375 (1966).

certainly never going to regain his competence,[39] the Court had no difficulty finding the indefinite commitment procedures violative of due process. Right to treatment in such a context, where the treatment goal of restoration to competence is determined to be unattainable, is self-contradictory, and, as noted, a pathway to abuse. For the non-permanently incompetent defendant however, the right to treatment, as opposed to subjection to meaningless and damaging confinement,[40] is at the very heart of his complex of rights and serves to fulfill the very purpose of the statute.

2. *The position of the California Supreme Court in* In re Davis. Consideration of these factors in *In re Davis* left no doubt in the California Supreme Court's thinking as to the efficacy of *Jackson's* "rule of reasonableness." Certainly *Jackson* requires on due process grounds that the states interest in detaining an incompetent defendant pending his restoration to competence be limited by the latter's right to the very means of achieving that competence. The *Jackson* Court refused to impose upon the states any "arbitrary time limits" against which to gauge the performance of hospital authorities pursuant to the "rule of reasonableness."[41] However, the California Supreme Court, confronted with petitioners who were initially properly detained, faced this task in *Davis*. Relying on two analagous sections of the Penal Code[42] the court concluded that 90 days should allow sufficient time for hospital authorities to ascertain whether an incompetent defendant can be restored to competence in the foreseeable future, and if it is determined that he can be, then the probable length of time required.[43] The court also expressed the opinion that as to defendants whose incompetence was considered to be merely temporary, periodic reports on the person's progress toward competence should be forthcoming at least every six months.[44] In laying down this framework, however, the court was only slightly less reluctant than the Supreme Court had been in *Jackson* to prescribe mandatory time limits. It hastened to add that the imposition of 90-day and six-month report requirements and the ultimate determination that adequate progress was being made toward competence so as to justify continued detention would in the final analysis depend on the exercise of sound discretion by the trial

39. 406 U.S. 715, 738-39 (1972).

40. *See* Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 379, 406-07 (1969); McGarry, *supra* note 6, at 56-57.

41. 406 U.S. 715, 738 (1972).

42. CAL. PEN. CODE § 1370.1 (West Supp. 1974) (report required within 90 days as to the likelihood of restoration to competence of mentally retarded defendant) and § 1026a (West 1970) (pre-hearing confinement for 90-day observation period permitted for person acquitted by reason of insanity).

43. 8 Cal. 3d at 806 & n.5, 505 P.2d at 1024 & n.5, 106 Cal. Rptr. at 184 & n.5.

44. *Id.* at 807 & n.7, 505 P.2d at 1025 & n.7, 106 Cal. Rptr. at 185 & n.7.

courts in each case, considering the crime charged, the probable penalty if convicted, and the length of the defendant's confinement to that point.[45]

The California Supreme Court's apparent receptivity to *Jackson's* due process analysis was no doubt assisted by reference to its earlier decision in *In re Gary W.*[46] In that case the court, after holding that a juvenile was entitled to a jury trial in certain wardship proceedings, stated, in dicta, that the Youth Authority was "under an affirmative obligation to provide treatment for the ward's mental . . . abnormality when he is committed pursuant to [sections 1800-1803 of the Welfare and Institutions Code]."[47] This dictum is consistent with lower court cases discussed *supra*[48] basing the right to treatment on statutory construction of commitment provisions. Yet, the California Supreme Court, like the lower federal courts before it, could have based the right to treatment principle in both *Gary W.* and *Davis* on constitutional grounds independently of *Jackson's* specific holding.

The court tackled one further argument in framing its holding—the state's contention that the availability of habeas corpus provided an adequate remedy for the permanently incompetent defendant. The court rejected the contention, reasoning that since habeas corpus proceedings must be initiated by the committed defendant, they require not only legal knowledge of his right to relief, but also the mental faculties necessary to pursue that right, individual attributes obviously inconsistent with the underlying rationale for the initial commitment of an incompetent defendant. Thus, it is clearly inappropriate to thrust the burden of escaping indefinite pre-trial commitment onto the still incompetent defendant, who is least able to bear it.[49] Such a result was a clear reassessment of the court's earlier, favorable position on habeas corpus, enunciated in *Gary W.*, and completed the adoption of the *Jackson* "rule of reasonableness" as the more adequate safeguard for the rights of an incompetent defendant.

b. Least restrictive alternative: The position neither court considered

Closely related to the right to treatment concept is the due process maxim of the least restrictive alternative, a corollary doctrine which both the U.S. Supreme Court in *Jackson* and the California Supreme

45. Id. at 806-07 & nn.5 & 7, 505 P.2d at 1024-25 & nn. 5 & 7, 106 Cal. Rptr. at 184-85 & nn. 5 & 7.

46. 5 Cal. 3d 206, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

47. *Id.* at 303, 486 P.2d at 1206, 96 Cal. Rptr. at 6. Determination of dangerousness as a condition for continued detention was involved.

48. *See* note 33 *supra.*

49. 8 Cal. 3d at 806-07 n.6, 505 P.2d at 1024-25 n.6, 106 Cal. Rptr. at 184-85 n.6.

Court in *Davis* failed to consider. The essence of the maxim is that when a fundamental right is concerned, any legislative act that impinges on that right must be so tailored as to accomplish its objective by the means which least restrict the enjoyment of the affected right.[50] The first judicial application of this rule to mental health treatment was undertaken by the District of Columbia Circuit Court of Appeals, in *Lake v. Cameron*.[51] As in *Rouse v. Cameron*,[52] the primary basis on which the decision in *Lake* rested was the construction of the statute which had originally authorized the commitment. Subsequently, however, two federal district courts have supported the view that mental patients are constitutionally entitled to the least restrictive alternative dispostion of their cases.[53] It is unclear why the courts in *Jackson* and *Davis* passed over the issue since arguably the right to treatment is inseparable from a consideration of the least restrictive alternative in the commitment, detention, and treatment of an incompetent defendant. Release or the commencement of normal civil commitment proceedings, either when treatment will be unavailing in achieving the goal of restoration of competence or when the goal is in fact reached, are both dependent upon receipt of proper treatment. Moreover, progress toward competence is not necessarily dependent upon confinement. The impact of the least restrictive alternative theory should be considered at two separate stages of the commitment process: first when the initial choice of the commitment institution is made and again when the disposition of the individual within that facility is at issue. Regrettably, neither *Jackson* nor *Davis* examined either problem. Instead, it was simply asserted that the requirements of due process were satisfied if a showing that the committed defendant was making satisfactory progress toward restoration of competence were made periodically. In so doing both courts failed to explore the potential inconsistency (of constitutional dimension) involved in not tying a right to treatment to a requirement that its purpose be achieved by the least restrictive means.

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50. Shelton v. Tucker, 364 U.S. 479 (1960).

51. 364 F.2d 657 (D.C. Cir. 1966). In a later case the court held that the least restrictive alternative theory, in addition to being applicable to the initial choice made between two or more mental health treatment facilities, was relevant in selecting the ultimate disposition within the facility to which a mental patient was entitled. Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969).

52. 373 F.2d 451 (D.C. Cir. 1966).

53. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 42 U.S.L.W. 3402 (Jan. 15, 1974); Dixon v. Attorney General, 325 F. Supp. 966, 974 (M.D. Pa. 1971). *Contra*, Burnham v. Dept. of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972); State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969), *appeal dismissed*, 396 U.S. 276 (1969); Fhagen v. Miller, 65 Misc. 2d 163, 317 N.Y.S.2d 128 (Sup. Ct. 1970), *aff'd as modified per curiam*, 36 App. Div. 2d 926, 321 N.Y.S.2d 61 (1971), *aff'd*, 29 N.Y.2d 348, 278 N.E.2d 615, 238 N.Y.S.2d 393 (1972).

To illustrate, if "least restrictive alternative" encompasses a right to release from confinement in the shortest period of time possible, then surely more than minimal treatment is required. A hospital acting otherwise would arguably deprive itself of jurisdiction over the patient. Working at counter purposes, however, are certain common existing provisions, of which California Penal Code section 1370[54] is no exception, which typically provide for automatic pre-trial commitment of an incompetent defendant to a state hospital.[55] The contradiction inherent in this statutory scheme is that historically state mental institutions have been notoriously poor in their extension of treatment, being primarily designed for detention and custodial care of the most severe mental cases.[56] Not only are the facilities often under-equipped, understaffed, and financially unable to provide proper treatment,[57] but the therapeutic milieu conducive to the rapid recovery of the inmate is generally lacking as well.[58] To aver that the receiving authoritics may continue to detain the committed defendant only as long as he progresses toward the goal of eventual competence merely avoids the larger issue and does nothing to promote an ultimate solution. The total failure by the court in *Davis* to come to grips with this issue is all the more inexcusable in view of the fact that alternative settings for treatment of the mentally disordered exist in California in the form of community mental health centers,[59] and their use as treatment facilities

54. CAL. PEN. CODE § 1370 (West 1970), set out at note 5 *supra.*

55. S. BRAKEL & R. ROCK, *supra* note 6, at 415 & Table 11.2.

56. *See* A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 138-39 (1970); Lewin, *supra* note 6, at 233, 267-68 (1969).

57. *See* Lewin, *supra* note 6, at 243; Note, *Remedies for Individuals Wrongly Detained in State Mental Institutions Because of Their Incompetency to Stand Trial: Implementing Jackson v. Indiana,* 7 VAL. L. REV. 203, 233 n.170.

58. This results from two unrelated factors and their interaction. First, the fact that the individual is always subject to trial upon regaining his competence alone may provide a disincentive for recovery. Furthermore, if the defendant was committed over his objection, he may feel that he was unfairly deprived of an adjudication on the merits. This is of course exacerbated if it turns out that he was innocent of the charges. MODEL PENAL CODE § 4.04, Comment (Tent. Draft No. 4, 1953); *see* Lewin, *supra* note 6 at 243. Secondly, when a temporarily incompetent defendant is suddenly incarcerated in a maximum security mental hospital with severely disturbed patients, the possibility arises that his condition, rather than improving, will deteriorate as a result of the depressing surroundings and chronic conditions of his fellow inmates. *See* Note, *Incompetency to Stand Trial,* 81 HARV. L. REV. 454, 462 (1967).

59. Community mental health centers provide a substantial portion of the services now extended to the mentally ill in California. The recent proliferation of these community based facilities has been a result not only of the passage of the Lanterman-Petris-Short Act, with its emphasis on short-term emergency treatment, but has also been significantly aided by the Short-Doyle Act. The latter Act permits community mental health centers to receive at least partial reimbursement for the cost of services extended to the mentally disordered whether it be on an inpatient or an outpatient basis. CAL. WELF. & INST'NS. CODE § 5600 *et seq.* (West 1972) & (Supp. 1974). *See also* 9 CAL. ADM. CODE § 500 *et seq.* (West 1973) (applicable regulations implement-

for incompetent defendants could probably have been required had the court recognized the importance and efficacy of imposing such a duty on committing courts.

III. RIGHT TO A SPEEDY TRIAL

Since *Pate v. Robinson*[60] precludes the conviction of an incompetent defendant, it had been assumed that any pre-trial commitment and consequent delay aimed at restoring his competence was fully justified without further investigation. *Jackson,* of course, put this notion to rest. The question remains, however, whether *Jackson,* and now *Davis,* also put to rest an incompetent defendant's assertion that pretrial commitment denies him his constitutional right to a speedy trial. The answer appears to be an equivocal no.

There is no reason why a consideration of the principles that require a defendant's case to be brought promptly to trial should not at least define the outer limits beyond which no pre-trial commitment of an incompetent defendant could be constitutionally maintained. Two considerations suggest themselves as militating in favor of such a cutoff point. First is the principle enunciated in *Jackson,* that an accused may only be detained for the "reasonable" period of time necessary to assess the probability that he will regain his competence in the foreseeable future. The second stems from one of the premises underlying the speedy trial requirement—the defendant's case should not be prejudiced through undue delay during which vital evidence and witnesses may disappear or otherwise become unavailable. Along this line, in a post-*Jackson* decision,[61] the Supreme Court listed four factors as being relevant in determining whether a denial of the right to a speedy trial has occurred: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of his right to an immediate trial; and (4) resultant prejudice to his case from the delay. While the state certainly has a legitimate interest in delaying trial pending recovery of the defendant's competence, there appears to be no reason why the first and fourth factors should not apply with equal force in this context. Indeed, in light of the defendant's incompetence it appears that the

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ing Short-Doyle Act). Although community mental health centers rendering principally inpatient treatment are no less entitled to financial reimbursement pursuant to the Short-Doyle Act, the thrust of that Act is evident from section 5663 which states in part that "[i]t is the intent of the Legislature that, to the extent feasible, new and extended services requested in the county Short-Doyle plan should provide alternatives to inpatient treatment." CAL. WELF. & INST'NS. CODE § 5663 (West 1972). Thus, utilization of such facilities as short-term inpatient or even outpatient treatment centers for incompetent defendants would not seem to be an unwarranted extension of legislative policy.

60. 383 U.S. 375 (1966).

61. Barker v. Wingo, 407 U.S. 514 (1972).

third factor, the defendant's assertion of his right, should be weighed lightly by the court, or perhaps dispensed with altogether as a limiting factor on the defendant's right to a speedy trial.[62] Moreover, even if the speedy trial concept is regarded as too amorphous and vague to be of assistance in establishing a cutoff point, a rule tying the permissible pre-trial commitment of an incompetent defendant to the maximum penal sentence which could be imposed if he were convicted would certainly accomplish the purpose.[63]

In any event the failure of the California Supreme Court to set any kind of an outer boundary in *Davis* is unfortunate and cannot be rationalized by asserting that the exercise of a committing court's sound discretion in evaluating the progress that a defendant is making toward competence has obviated the necessity for such a limitation. All too often in the past courts have simply deferred to psychiatric opinions to justify commitment.[64] The existence of this abrogation of judicial responsibility in the past suggests that it is not unlikely that it will continue. Thus an incompetent defendant may still be subjected to prolonged pre-trial confinement solely on the strength of two psychiatric predictions: first, that he is capable of restoration to competence in the foreseeable future, and second, that he is progressing satisfactorily toward that goal. The potential difficulties that are inherent in this scheme should be readily apparent. For one, any decision as to what exactly constitutes "in the foreseeable future" can only be made on a purely arbitrary basis. Furthermore, acceptance of a psychiatric determination that the defendant can be expected to regain his competence within a certain period of time assumes that the examining doctors can predict success in restoring a person's competence with a substantial degree of probability. On the contrary, the ability of psychiatrists to diagnose mental illness and dangerousness stemming from mental disorder with reliability and validity has increasingly come un-

62. Support for this proposition may be found in the *Davis* court's treatment of habeas corpus as a sufficient remedy. See note 49 and accompanying text *supra.*

63. *See* N.Y. CODE CRIM. PRO. § 730.50 (McKinney 1971) (requires dismissal of misdemeanor charge against defendant after 90 days if he is still under commitment at that time). Felony charges may not remain outstanding after the defendant has been confined for two-thirds of the maximum sentence allowable if convicted. Were such a provision governing in California, Davis presumably could not have been detained for more than 90 days, since Penal Code section 1367 *et seq.* would no longer control his case after the charges were dismissed and the Lanterman-Petris-Short Act procedures would likewise not permit his continued detention so long as he evinced no dangerous behavior during that 90 day period. The *Davis* court was certainly aware that "the likely penalty or range of punishment for the offense, and the length of time the person has already been confined" are relevant factors. 8 Cal. 3d at 807, 505 P.2d at 1025, 106 Cal. Rptr. at 185.

64. *See, e.g.,* Eizenstat, *supra* note 40, at 392; Note, *Incompetency to Stand Trial,* 81 HARV. L. REV. 454, 460 (1967).

der attack of late.[65] There is no reason why their ability to judge whether a defendant can be soon restored to competence, and if so, how long it will take should be viewed with any less skepticism.

CONCLUSION

The ultimate impact that *Jackson* and *Davis* will have on pretrial commitment of incompetent defendants in California is as yet unknown. The laudatory effect of those two decisions is that one who is incapable of proceeding to trial can no longer be routinely committed indefinitely pursuant to statutes such as Penal Code section 1367 *et seq.* On the other hand, the enlightened approach prohibiting detention for more than 90 days in the absence of a showing of dangerousness to others as set forth in the Lanterman-Petris-Short Act has not in its entirety been extended to the incompetent defendant. Thus, vital distinctions between competence to stand trial provisions and civil commitment laws remain even in the wake of *Jackson* and *Davis.*

The distressing situation that *Jackson* seemingly will tend to foster in some jurisdictions—the shift in emphasis from the former procedures to the latter to accomplish the indeterminate confinement of incompetent defendants—will be of little import in California barring amendment to the Lanterman-Petris-Short Act. However, the very fact that those provisions do not permit indefinite commitment may generate a different sort of problem in California—a shift back to Penal Code section 1367 *et seq.* to justify the detention of one who is presently incapable of proceeding to trial for as long a period as possible. Any state interest in detaining an incompetent defendant prior to trial for more than the initial 90 days permitted under *Davis* must take into account the prohibition of the Lanterman-Petris-Short Act against commitment for more than 90 days absent a showing that the individual presents an imminent physical threat to others. Given this additional factor, it is not at all improbable that an initial determination that the defendant can be restored to competence in the foreseeable future, followed by innumerable "progress" reports, each filled out by psychiatric personnel notoriously incapable of so predicting, will continue to accomplish the very evil the Act was meant to avoid—indeterminate commitment on vague criteria without any finding of dangerousness. *Davis* may be welcomed by those incompetent defendants who will quickly regain their competence, but such a scenario as the above affords little comfort to the long term, non-dangerous incompetent defendant who is deemed "progressing," for years perhaps, toward

65. *See, e.g.,* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* (manuscript to be published in volume 62, no. 3 (May 1974) of the *California Law Review*).

restoration of competence. How many months must the latter languish in a mental hospital, and how many so-called favorable progress reports may issue, before his original commitment must be reassessed in the light of later developments? This is the crucial question which was never meant to be decided by *Jackson* and which regrettably was unsatisfactorily answered by *Davis.*

The need to set outside parameters becomes even clearer when one considers past mistaken impressions on the part of hospital superintendents or others ultimately responsible for the discharge of patients that release was appropriate only if the accused were fully cured, as opposed to merely restored to competence. Moreover, in addition to the historical predisposition for retaining incompetent defendants for longer than *Jackson's* "rule of reasonableness" would now permit, there remains the ultimate question of the extent to which mental hospitals are able to restore committed defendants to competence, even assuming their willingness to do so. In view of the often overcrowded, inadequately staffed, and security-oriented facilities to which all incompetent defendants must be sent, the prognosis for their recovery cannot be particularly optimistic, psychiatric predictions to the contrary notwithstanding. But as long as Penal Code section 1370 mandates confinement in a state mental institution despite all its undesirable aspects, and in total disregard of other possibilities such as community mental health centers which are arguably more therapeutic and therefore more in keeping with the due process notion of the least restrictive alternative, the status of the incompetent defendant in California after *Davis* is not apt to measure up to the expectations which the decision in *Jackson* might have fostered.

Paul Clark

B. *Right of Indigent to Choose Appointed Counsel*

Drumgo v. Superior Court.[1] *Drumgo* concerns the indigent criminal defendant's right to appointed counsel of his choice. The case reaches two important holdings: first, an indigent criminal defendant has no constitutional right to choose his court-appointed attorney even though an attorney of his choice is available and willing to represent him;[2] second, it is no abuse of discretion for a trial court to refuse to appoint the attorney requested by a defendant, as long as the court appoints competent counsel having no conflict of interest with the defendant.[3] Chief Justice Wright wrote the majority opinion;

1. 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973) (Wright, C.J.) (4-2 decision).
2. *Id.* at 934, 506 P.2d at 1009, 106 Cal. Rptr. at 633.
3. *Id.* at 935, 506 P.2d at 1010, 106 Cal. Rptr. at 634.

Justice Mosk dissented in an opinion in which Justice Tobriner concurred.

I. THE DRUMGO FACTS

Fleeta Drumgo was charged with numerous felonies, including five counts of murder, based on an incident that occurred when he was an inmate at San Quentin Prison. Five other indigent inmates were charged with the same murders, creating a potential conflict of interest for defense counsel. The trial court therefore appointed the Marin County Public Defender to represent one of the six defendants, and private counsel to represent the others, including Drumgo.[4]

Prior to arraignment and with court approval, Drumgo consulted two attorneys. Subsequently, on October 29, 1971, the defendant requested the appointment of Richard A. Hodge, an experienced California criminal attorney. Mr. Hodge was present in court and stated that he was ready, willing, and able to accept the appointment.[5] Without stating any reasons, the court rejected the request and instead appointed Richard H. Breiner, who was not present and had not previously been asked by the court to accept the appointment. Breiner, unlike Hodge, had never tried a murder case and subsequently expressed reluctance to undertake a lengthy trial. The defendant stated that he refused to accept the appointment.[6]

On November 18, 1971, the defendant moved to have Mr. Breiner relieved and Mr. Hodge appointed, declaring that he knew and trusted Hodge, but did not know or have confidence in Breiner and would not cooperate with him. The motion was denied on November 24. On December 14, 1971, the court denied a motion for reconsideration on the grounds that the court knew Breiner to be competent, as he had previously served as a court-appointed attorney, and that the defendant's declarations were not a legal basis for terminating Breiner's appointment.[7]

Subsequently, the court of appeal held that although defendant had no right to be represented by a particular attorney, on these facts it was an abuse of judicial discretion to appoint Mr. Breiner. The court then ordered Hodge appointed.[8]

II. THE SUPREME COURT OPINION

The supreme court reversed, upholding the trial court ruling.[9]

4. *Id.* at 932, 506 P.2d at 1008, 106 Cal. Rptr. at 632.
5. *Id.* at 932-33 506 P.2d a t1008, 106 Cal. Rptr. at 632.
6. *Id.* at 933, 936, 506 P.2d at 1008, 1011, 106 Cal. Rptr. at 632, 635.
7. *Id.* at 933, 506 P.2d at 1008-09, 106 Cal. Rptr. at 632-33.
8. Drumgo v. Superior Court, 103 Cal. Rptr. 100, 101 (1st Dist. 1972), *vacated,* 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973).
9. 8 Cal. 3d at 936, 506 P.2d at 1110, 106 Cal. Rptr. at 634.

Citing numerous California and federal authorities,[10] it held that an indigent defendant has no constitutional right to choose his appointed attorney and that the courtroom presence of willing and able requested counsel adds no constitutional compulsion for his appointment.[11] The court equated the absence of the right to choose appointed counsel with an indigent defendant's inability to choose a particular attorney when he is represented by the public defender's office.[12]

Furthermore, the court held that the appointment of Mr. Breiner was not an abuse of the trial court's discretion:

> The appointment of counsel to represent an indigent rests, as always, in the sound discretion of the trial court, and there can be no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense.[13]

The only reason Drumgo gave for rejecting Breiner was that he had no knowledge of or confidence in him. As Drumgo did not assert a conflict of interest or counsel's incompetence, the only grounds upon which to challenge the trial judge's exercise of discretion, the appointment was upheld.[14]

III. CONSTITUTIONAL RIGHT TO CHOICE OF COUNSEL

The *Drumgo* holding that an indigent defendant does not have a constitutional right to the court-appointed attorney of his choice was not compelled by the cases cited by the court.[15] Although those cases contain language which supports the court's holding, they are distinguishable. Each involved special circumstances where the state had

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The court first discussed and approved mandate as the proper remedy when a trial court errs in appointing counsel, citing Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (holding that mandate is an appropriate device for review of a pretrial order which may substantially affect the outcome of the trial, since a post-conviction appeal is not an adequate remedy). 8 Cal. 3d at 933, 506 P.2d at 1009, 106 Cal. Rptr. at 633.

10. See text accompanying notes 15-18 and note 18.

11. 8 Cal. 3d at 934, 506 P.2d at 1009, 106 Cal. Rptr. at 633.

12. *Id.*

13. *Id.* at 935, 506 P.2d at 1010, 106 Cal. Rptr. at 634.

14. *Id.* The opinion does suggest that an appointment could also be challenged if counsel and defendant so disagreed on strategy concerning fundamental rights that the attorney-client relationship broke down and defendant's right to effective assistance of counsel was jeopardized, citing People v. Robles, 2 Cal. 3d 205, 466 P.2d 710, 85 Cal. Rptr. 166 (1970); but there was no indication of such a breakdown here. See text accompanying notes 26-29, *infra.*

15. People v. Aikens, 70 Cal. 2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969); People v. Massie, 66 Cal. 2d 899, 428 P.2d 869, 59 Cal. Rptr. 733 (1967); People v. Hughes, 57 Cal. 2d 89, 367 P.2d 33, 17 Cal. Rptr. 617 (1961); People v. Taylor, 259 Cal. App. 2d 448, 66 Cal. Rptr. 514 (2d Dist. 1968).

a specific interest in rejecting the indigent defendant's choice. None of those special circumstances existed in *Drumgo.*

In three of the four California cases cited,[16] the defendant had requested a private attorney when the public defender was available. In such situations the state's interest in economy and orderly administration is served by rejecting the defendant's choice and appointing the public defender. But in *Drumgo,* the public defender was not available because of a conflict of interest.

In the remaining California case,[17] the defendant's appointed counsel became ill late in the trial, and the court appointed defendant's co-counsel over defendant's objection. The state's interest in avoiding the delay which would result if a new attorney were appointed after the case had already come to trial is served by rejecting the defendant's choice. But in *Drumgo,* defendant's request came very early in the proceedings.

Thus the California cases cited by the court are distinguishable,[18] and the court was free to hold that an indigent defendant has a constitutional right to the attorney of his choice if his request is timely and the public defender is not available. It might be argued that equal protection or due process principles compel such a holding, but as the following discussion indicates, there are serious difficulties with either approach.

Since a defendant who can afford to retain counsel can retain whomever he chooses,[19] it may be a denial of equal protection to deny

16. People v. Massie, 66 Cal. 2d 899, 910, 428 P.2d 869, 877, 59 Cal. Rptr. 733, 741 (1967); People v. Hughes, 57 Cal. 2d 89, 98-99, 367 P.2d 33, 38, 17 Cal. Rptr. 617, 622 (1961); People v. Taylor, 259 Cal. App .2d 448, 450-51,6 6 Cal. Rptr. 514, 516 (2d Dist. 1968).

17. People v. Aikens, 70 Cal. 2d 369, 378, 450 P.2d 258, 264, 74 Cal. Rptr. 882, 888 (1969).

18. The court states that its holding conforms to the rule in the federal courts. But the federal cases cited are also distinguishable from *Drumgo.* In Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970), the court overturned the trial court's refusal to appoint another attorney after a dispute arose between defendant and his first attorney, saying defendant was deprived of his right to effective represeutation by counsel. The court's broad statement that there is no right to choose was dicta. In United States v. Burkeen, 355 F.2d 241 (6th Cir. 1966), the issue was whether the defendant's counsel was disqualified because of a conflict of interest. In Tibbett v. Hand, 294 F.2d 68 (10th Cir. 1961), the court held that the court reporter's failure to prepare a verbatim transcript of pretrial proceedings was not a denial of equal protection. The issue of defendant's right to choose court-appointed counsel was not before the court. In United States *ex rel.* Mitchell v. Thompson, 56 F. Supp. 683 (S.D.N.Y. 1944), the request was made during trial. The requested appointment in Davis v. Stevens, 326 F. Supp. 1182 (S.D.N.Y. 1971), would have upset an established system of rotatiou of appointments.

19. If a defendant does have the funds to retain counsel, his right to hire whomever he chooses is usually protected:

Thus, though it is clear that a defendant has no absolute right to be repre-

an indigent defendant seeking appointed counsel the same right to choose.[20] The argument is illustrated by contrasting *Drumgo* with another case decided the same day, *Magee v. Superior Court.*[21] In *Magee,* the petitioner was an indigent defendant who sought to have Ramsey Clark appointed as co-counsel without compensation. The trial judge refused on the grounds that he did not personally know Clark or his qualifications or have confidence in him. Since Clark was not to receive compensation from the state, the case was analyzed as though the trial court had rejected defendant's choice of *retained* counsel. The supreme court held that the trial judge had committed constitutional error in refusing to permit the association, and that a defendant's right to defend himself in whatever manner he deems best can be infringed only when prejudice to the defendant or disruption of the orderly processes of justice might result. Thus a defendant has a very broad right to the retained counsel of his choice.

In contrast, *Drumgo* holds that the indigent defendant has no right to choose the counsel appointed to represent him in any circumstances. While the wealthy defendant's right to choose is protected, the poor defendant's right is denied. It might be argued that this is discrimination based on wealth and prohibited by the broad dictum in *Griffin v. Illinois*: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[22]

There are two major reasons why the court probably has not accepted the equal protection argument. First, the argument assumes that if an indigent defendant has a right to choose his court-appointed

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> sented by a particular attorney, still the courts should make all reasonable efforts to insure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney.

People v. Crovedi, 65 Cal. 2d 199, 207, 417 P.2d 868, 874, 53 Cal. Rptr. 284, 290 (1966). *Cf.* Chandler v. Fretag, 348 U.S. 3, 9 (1954), a pre-*Gideon* right to counsel decision, in which the Court stated: "Regardless of whether petitioner would have been entitled to the appointment of counsel his right to be heard through his own counsel was unqualified." *See also* Reynolds v. Cochran, 365 U.S. 525 (1960); *In re* Groban's Petition, 352 U.S. 330 (1957). But the question remains whether choice of counsel itself is a right or is only an incident of ability to pay.

20. *See* Griffin v. Illinois, 351 U.S. 12 (1956) (requiring free transcripts on appeal for indigents); Douglas v. California, 372 U.S. 353 (1963) (providing free appellate counsel). The analogue of the right to a transcript or to appellate counsel is the right to trial counsel, not the right to choose particular counsel.

21. 8 Cal. 3d 949, 506 P.2d 1023, 106 Cal. Rptr. 647 (1973).

22. 351 U.S. 12, 19 (1955). A distinction often ignored is that between the existence of a constitutional right and the quality of the exercise of that right. Equal protection guarantees the right to counsel regardless of the wealth of the defendant. The doctrine says nothing about the quality of that counsel beyond minimal competence and effectiveness. Thus if one defendant can buy a better defense because his wealth gives him the choice of counsel denied to an indigent defendant, the latter's lack of choice is not a constitutionally significant discrimination by wealth barred by the equal protection clause.

counsel, the quality of the defense he receives will improve. Some defendants, because of the highly-publicized or political nature of their case, may have access to several highly competent attorneys. Even in ordinary cases, a defendant may have confidence in a particular attorney who can thus provide a better defense.[23] But in refusing to acknowledge the possible improvement in legal defense that choice of counsel might bring about, the court is not rejecting the literal reading of the *Griffin* dictum. Instead, the court is implicitly adopting the view that there is no denial of equal protection where all defendants are assured of some minimal level of legal representation.

Second, if the court held that an indigent defendant has a constitutional right to choose his court-appointed attorney whenever the public defender is not available and the request is timely, it would seem to follow that those who are represented by the public defender's office should have a right to choose among deputy public defenders.[24] Further, once the court accepts the assumption that the quality of the defense improves when a defendant is free to choose his attorney, it may be difficult to justify limiting the exercise of that right to a choice among a small number of deputy public defenders, none of whom might be acceptable to the defendant. And if reasonable lines cannot be drawn to limit the exercise of the right of choice to only a few indigents, then the efficiency of the public defender's office would be undermined, considerable court time could be consumed by continuances to obtain counsel of choice and motions to substitute, and the county would perhaps have to bear the cost of providing additional court-appointed private counsel. By holding that an indigent defendant has no right to the appointment of the attorney of his choice,[25] the court avoids all these problems.

An equal protection analysis is not the only route to a constitutional right of choice of appointed counsel. The right of choice may also be a consequence of the due process right to effective counsel. If a defendant chooses his counsel, it is assumed he will choose someone in whom he has confidence. It can be argued that such confi-

23. Due process considerations protect this interest in the attorney-client relationship by requiring substitute counsel whenever the defense is adversely affcted by a sufficiently serious dispute. See text accompanying notes 26-29, *infra.*

24. *See* People v. Stroble, 36 Cal. 2d 615, 226 P.2d 330 (1951).

25. One proposal to ameliorate discrimination by wealth would provide indigent defendants with attorney fee vouchers, enabling them to choose counsel just as others do. There would, however, be possibilities for abuse. Some attorneys might inflate their rates or refuse to accept set fees, and defendants would have no disincentive to take hopeless cases to trial. The effect on the public defender's office is also uncertain: perhaps the attorneys would be submitted to trial by market along with private attorneys, or perhaps vouchers would be available only when the public defender were not.

dence within the attorney-client relationship, and therefore the right to choose, is necessary for effective representation. This argument is suggested by those cases discussing the right to substitute counsel. The Ninth Circuit, for example, has held that to force a defendant, after he has repeatedly requested substitution of counsel, into trial with an attorney "with whom he has become embroiled in an irreconcilable conflict is to deprive him of effective assistance of any counsel whatsoever."[26]

But the due process right to substitute counsel is limited to situations where a disagreement signals a breakdown in the attorney-client relationship of such magnitude that the defendant's right to effective assistance of counsel is seriously jeopardized.[27] In *People v. Robles*,[28] defendant and client disagreed whether defendant should take the stand, and in *People v. Williams*,[29] the defendant wanted to call certain witnesses his attorney refused to call. Although these were serious disagreements, neither was a sufficient conflict to warrant a finding that the refusal to substitute counsel was a denial of the right to effective counsel.

A simple statement by the defendant that he lacks confidence in his appointed lawyer will not be enough to compel substitution, as *Drumgo* holds.[30] A contrary holding would be essentially equivalent to free choice, with great opportunity for abuse by an unusually belligerent defendant. While a reasonableness standard for lack of confidence might be a compromise between free choice and the limited right under *Robles* and *Williams*, it might also be inadequate because of the peculiarly subjective nature of personal trust. But as the law stands now, even when a serious attorney-client conflict presents a threat to constitutionally sufficient representation, the limited due process right to obtain substitute counsel does not include the far greater right to choose the particular attorney to be appointed.

IV. ABUSE OF DISCRETION

Since an indigent has no constitutional right to choice of counsel, action on a request for particular counsel is a matter of judicial discretion. In *Drumgo*, the court held that "there can be no abuse of that discretion" when competent, disinterested counsel is appointed.[31]

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26. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).
27. People v. Robles, 2 Cal. 3d 205, 215, 466 P.2d 710, 717, 85 Cal. Rptr. 166, 173 (1970).
28. *Id.*
29. 2 Cal. 3d 894, 905-906, 471 P.2d 1008, 1015, 88 Cal. Rptr. 208, 215 (1970).
30. Drumgo v. Superior Court, 8 Cal. 3d 930, 935, 506 P.2d 1007, 1010, 106 Cal. Rptr. 631, 634 (1973).
31. *Id.*

This standard reduces an appellate court's control over a trial judge's discretion to a constitutionally irreducible minimum, since competent, disinterested counsel is necessarily part of the defendant's constitutional right to effective counsel.[32] The trial judge can seemingly reject a defendant's request on the basis of stubbornness, vindictiveness, prejudice, or for no reason at all,[33] and the defendant is without recourse.

The *Drumgo* holding permits the judge much broader discretion in appointing defense counsel for indigents than previously has been allowed. Earlier cases held that when a judge acts arbitrarily and capriciously or exceeds the bounds of reason, he abuses the discretion of his office.[34] In many cases there may be a sound reason to deny the defendant's request for particular counsel, including the availability of the public defender, avoidance of disruption or delay in the administration of justice, or assurance of competent counsel. But in *Drumgo* there is nothing in the record to indicate that any such positive reasons motivated the judge's decision. On the contrary, the equities of the case favored granting the defendant his choice: the public defender was not available, the request was timely, there was no suggestion that Hodge was incompetent, he had previously consulted with the defendant, and he was present and willing to accept the appoint-

32. *See In re* Smith, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970); Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968).

33. Drumgo's request arose and was denied in the following manner:

The Court: . . . [D]o you have your attorney to represent you in the case?

Mr. Drumgo: . . . I would like to have Dick Hodge appointed as my attorney.

The Court: Hodge or Hodges

Mr. Drumgo: H-o-d-g-e.

The Court: Thank you. All right, you do not have an attorney that you have retained yourself or who has agreed to represent you

Mr. Richard Hodge: Excuse me, your Honor. Could I be heard on this point?

The Court: All right, I will hear you.

Mr. Hodge: Just briefly. I think the record should reflect that I have consulted with Mr. Drumgo. . . . I am ready, willing and able to defend Mr. Drumgo in the event that the Court would deem it appropriate to appoint me. . . .

The Court: The Court would appoint, then, —I will deny your request that I appoint Mr. Richard Hodge at this time, Mr. Drumgo, and I will appoint Richard Bremer of San Rafael.

Mr. Drumgo: Would the record show that I refuse who you have appointed?

The Court: Yes. . . . All right, the record may reflect your refusal to accept this.

Reporter's Transcript, October 29, 1971, at 48-52.

34. People v. Marsden, 2 Cal. 3d 118, 123, 465 P.2d 44, 48, 84 Cal. Rptr. 156, 160 (1970) (trial judge abused his discretion in not allowing defendant to relate specific instances of attorney's misconduct in support of a motion for substitution); People v. Russel, 69 Cal. 2d 187, 443 P.2d 794, 70 Cal. Rptr. 210 (1968) (trial judge abused discretion in refusing to admit psychiatric evidence relating to emotional condition of complaining witness—no adequate reason for the refusal appeared on the record).

ment; in contrast, Mr. Breiner was not present, had never met the defendant, had no experience with murder cases, and was not acceptable to the defendant; the county would bear no additional cost by appointing one rather than the other.[35] The judge's unexplained action could certainly be construed as arbitrary or capricious.

When appointment of a particular attorney can promote the confidence and cooperation of a defendant with no cost to the administration of justice or to other legitimate state interests, the requested appointment should be made. In the *Drumgo* court of appeal decision, Judge Bray held that the trial court should consider "[t]he totality of the circumstances applicable to the situation at the time of defendant's request."[36] This implies that the trial judge must balance the interests of the defendant and of the state, denying the defendant's request only when it is outweighed by identifiable state interests,[37] and that the appellate court should itself reweigh the facts and relevant interests in reviewing for abuse of discretion. To reverse a trial judge's discretionary appointment only when counsel is incompetent or there is a clear conflict of interest leaves far too much opportunity for a trial judge to act arbitrarily, as *Drumgo* illustrates. The stricter review suggested by the court of appeal, a review of the totality of the circumstances and all relevant interests, is certainly preferable. Not only does it reduce the chance that appointments will be affected by judges' biases, it also maximizes the chance that a defendant will be represented by an attorney he trusts and with whom he will cooperate, thereby improving the quality of his defense without additional cost to the state.[38] The poor defendant's right to control his defense will be more

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35. The dissenting opinion so concluded:

> In the foregoing factual context, how is the administration of justice served by the dogged insistence that Mr. Breiner and not Mr. Hodge represeut the defendant? Phrasing the question another way: what compelling state interest is served by deuying appointment of the qualified and willing attorney of defendant's choice The obvious answer is: none.

8 Cal. 3d at 936, 506 P.2d at 1011, 106 Cal. Rptr. at 635 (Mosk, J.).

36. Drumgo v. Superior Court, 103 Cal. Rptr. 100, 106 (1st Dist. 1972), *vacated*, Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973).

37. An ABA project has suggested a rotational system of appointments to avoid just such disagreements as in the instant case. In the absence of such a system the report suggests that

> [p]ermitting the defendant to select the lawyer he wishes to represent him is one method for increasing his confidence that he is being provided competeut counsel and of providing as nearly as possible the same conditions for the professional relation that obtain when counsel is retained by a defendant of means.

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 2.3, Comment b at 29-30 (Tent. Draft, 1967).

38. The premium on trusted counsel is particularly great in California, where a defendant can not conduct his own defense and must be represented by counsel—generally counsel appointed by the court. People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489,

like that of the wealthy defendant's. And certainly, other things being equal, an available and willing attorney is preferable to a reluctant one.

The impact of the *Drumgo* decision is that a judge's discretion to deny a defendant's choice of attorney, even in the absence of some contrary state interest, is virtually unchecked.[39] Even though broad judicial discretion is essential to the conduct of trials, it ought not to be so broad as to neglect the protection of the accused. The courts can maximize the defendant's chance of a satisfactory defense and minimize that judicial arbitrariness which so exacerbates cynicism about the quality of justice only by considering "the totality of the circumstances."[40]

Peter Lomhoff

C. *Parolee's Right to Bail*

In re *Law*.[1] In denying a petition for habeas corpus, the California Supreme Court held that a parolee is not entitled to bail pending the final parole revocation hearing required by *Morrissey v. Brewer*.[2] Petitioner Law was convicted of forgery in 1963 and paroled in 1969. On June 9, 1972, he was arrested for automobile grand theft. Although bail was fixed pending trial on this charge, Law evidently did not post the required amount, but remained in custody. On June 29, 1972, his parole officer authorized his continued detention pursuant to a parole hold[3] arising out of his arrest.[4] Law then applied for habeas corpus, claiming that he was entitled to release on bail from this parole hold. Although his subsequent conviction for grand theft

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103 Cal. Rptr. 233 (1972). The Sixth Amendment right to "assistance of counsel" is thus perverted into a denial of the right of the accused to defend himself.

39. If the defendant's choice carries no weight at all, attorneys and clients will be able to circumvent a judge's appointment only by a feigned breakdown of the attorney-client relationship, or by an uncompensated association, perhaps with privately arranged fee-splitting between the appointed and associated attorneys. Since such devices are unethical and produce little or no compensation for the attorney requested by the defendant, it is not likely they will be used on a large scale; but they are nevertheless possible abuses in an occasional "big" case.

40. See text accompanying note 36, *supra*.

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1. 10 Cal. 3d 21, 513 P.2d 621, 109 Cal. Rptr. 573 (1973) (Wright, C.J.) (unanimous decision).

2. 408 U.S. 471, 484-89 (1972).

3. A "parole hold" occurs when a parole agent or other representative of the [Adult] Authority causes a parolee to be restrained in custody independent of any action by the decision-making component of the Authority.

10 Cal. 3d at 24 n.2, 513 P.2d at 623 n.2, 109 Cal. Rptr. 575 n.2.

4. *Id.* at 23-24, 513 P.2d at 622-23, 109 Cal. Rptr. at 574-75. Oddly enough, Law's parole was not revoked following an earlier conviction in federal court for aiding in uttering a forged check. *Id.* at 23, 513 P.2d at 622, 109 Cal. Rptr. at 574.

and the ensuing revocation of his parole mooted his application for habeas corpus, the court nevertheless passed on the merits of his petition[5] under California's public interest exception to the mootness doctrine.[6] Writing for a unanimous court, Chief Justice Wright held that a parolee detained pending a final revocation hearing has no right to bail under either the state or federal constitutions, or under any state statute.[7] These sources for a right to bail will be considered in reverse order.

I. THE COURT'S ARGUMENT

a. Statutory authority

The court's refusal to find a statutory right to bail is the most easily justified of its conclusions. As the court points out,[8] no California statute provides for bail from any detention following a final judgment of conviction.[9] Extrapolation of a right to bail to the Adult Authority's statutory authorization to devise and administer parole revocation procedures remains as the only other way to establish a statutory right to bail. Considerable precedent exists for reading due process protections into statutory sources of administrative authority.[10] But even if the court had been so inclined, the provisions of the Penal Code that authorize revocation of parole without notice[11] render statutory construction of a right to bail all but impossible.

b. Federal constitutional authority

The more interesting issues in this case are whether there exists a federal or state constitutional right to bail, although the court's han-

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5. *Id.* at 23, 513 P.2d at 622, 109 Cal. Rptr. at 574.

6. *In re* William M., 3 Cal. 3d 16, 473 P.2d 739, 89 Cal. Rptr. 33 (1970).

7. *Law* also holds that a preliminary hearing on a felony charge may be "inclusive of or may be made to conform to the procedure mandated in *Morrissey*." 10 Cal. 3d at 27, 513 P.2d at 625, 109 Cal. Rptr. at 577 (citation omitted). The court also notes that the Adult Authority could conduct a separate hearing in such circumstances (*id.*) and that with appropriate modifications as to timing and transcripts, a misdemeanor trial may meet the requirements of *Morrissey* (*id.* at 27-28, 513 P.2d at 625-26, 109 Cal. Rptr. at 577-78).

8. *Id.* at 26, 513 P.2d at 624, 109 Cal. Rptr. at 576.

9. CAL. PENAL CODE §§ 1268-92, 1476 (West 1970), *as amended* (West Supp. 1973).

10. Greene v. McElroy, 360 U.S. 474, 506-08 (1961); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 137-38 (1951) (plurality opinion).

11. CAL. PENAL CODE §§ 3052-53, 3056, 3060-63 (West 1970). In any case, the California Supreme Court's pre-*Morrissey* decisions leave almost no leeway for the statutory construction of a parolee's right to bail, since they uniformly refuse to recognize any procedural requirements, statutory or constitutional, for parole revocation proceedings. *See In re* Tucker, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971); *In re* Marks, 71 Cal. 2d 31, 46, 453 P.2d 441, 451-52, 77 Cal. Rptr. 1, 11-12 (1969) (dictum).

dling of them is far from satisfactory. The court's discussion of a federal constitutional right to bail is confined to three citations to *Morrissey v. Brewer*,[12] for the proposition that the Supreme Court there assumed that a parolee could remain in custody between the probable cause and final hearings required before revocation of parole.[13] Although this conclusion finds support in the wording of the *Morrissey* opinion,[14] it ultimately rests on the tacit assumption that *Morrissey* contains an exhaustive enumeration of the due process rights of parolees.[15] While the court might be excused for reading *Morrissey* as an opinion promulgating a procedural code,[16] its reliance on a negative implication from the list of procedural protections set out in that opinion only compounds the weaknesses of such broad gauge judicial rulemaking. There is no evidence that the Supreme Court in *Morrissey* considered the parolee's right to bail.[17] Nor would a parolee's right to bail be inconsistent with the passages from *Morrissey* that are cited in *Law*. The holding in *Morrissey* that a final revocation of probable cause is sufficient for detention pending a final revocation hearing is not inconsistent with the availability of bail following such a finding.[18] Indeed, in criminal cases, the need for bail is premised on the assumption that a finding of probable cause is sufficient for detention pending trial; without such detention bail would be superfluous.

But whether or not a parolee's right to bail would fall within the letter of *Morrissey*, the court's failure in *Law* was in grounding its federal constitutional ruling on such a mechanical reading of federal prec-

12. 408 U.S. 471 (1972).

13. 10 Cal. 3d at 25, 513 P.2d at 623-24, 109 Cal. Rptr. at 575-76.

14. The California Supreme Court apparently relied on the following statements in *Morrissey*: first, that "it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation" (408 U.S. at 485); second, that this possibility should be taken into account in deciding the requirements of due process (*id.*); and third, that the probable cause determination "would be sufficieut to warrant the parolee's continued detention and return to the state correctioual institution pending the final decision" (*id.* at 487). The court also apparently relied on the contrast between the majority's silence and Justice Douglas's assertion that noncriminal parole violations do not warrant detention before final revocation. *Compare id.* at 485-87 (opinion of the Court) *with id.* at 497, 500 (Douglas, J., dissenting in part).

15. This assumptiou must at least be qualified by *Morrissey*'s explicit reservation of the issue of right to counsel. 408 U.S. at 489.

16. *See id.* at 485-90. *But cf.* People v. Vickers, 8 Cal. 3d 451, 456, 503 P.2d 1313, 1317, 105 Cal. Rptr. 305, 309 (1972) (footnote omitted):

> The court [in *Morrissey*] chose not to prescribe the precise processes which are due a parolee before he may be deprived of his restricted liberty, but it set forth minimum requirements under the Fourteenth Amendment.

17. The right to bail is not mentioned in any of the opinions in *Morrissey*.

18. Although the majority refused to adopt Justice Douglas's position that only criminal parole violators should be detained pending final revocation hearing (see note 14 *supra*), the right to bail, so far from being precluded by such detention, is premised upon it (See text following this note.).

edent, a course it has conspicuously avoided in other cases raising federal constitutional issues.[19] The reasoning adopted by the court is all the more puzzling in view of the readily available alternative of applying the general due process balancing test prescribed in *Morrissey*[20] and the other recent Supreme Court procedural due process decisions.[21]

c. *State constitutional authority*

The court disposed of petitioner's state constitutional claims by relying on the state consititutional provision for bail in criminal cases and on several decisions restricting this provision to criminal defendants awaiting trial.[22] The explicit wording of the constitutional provision, however, does not support this restriction,[23] and none of the dccisions cited by thc court are persuasive authority for denying parolees a right to bail.[24] A plausible analogy might ncvertheless be drawn from the court's previous decisions denying convicted defcndants bail pending appeal.[25] Although these decisions rest on the conclusory argument that convicted defendants have lost their presumption of innocence, this limitation on the constitutional right to bail finds inde-

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19. *See, e.g.*, Rios v. Cozens, 9 Cal. 3d 454, 455, 509 P.2d 696, 697, 107 Cal. Rptr. 784, 785 (1973) (per curiam). *Compare* Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) *and* Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) *with* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

20. 408 U.S. at 481.

21. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

22. 10 Cal. 3d at 25-26, 513 P.2d at 624, 109 Cal. Rptr. at 576.

23. "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." CAL. CONST. art. I, § 6.

24. The decisions cited by the court leave much to be desired. *In re* Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973), refused to allow a public safety exception to article I, section 6; it only implied, and in two footnotes at that, that section 6 guaranteed a right to bail only before trial. *Id.* at 350 nn.6, 7, 508 P.2d at 724 nn.6, 7, 107 Cal. Rptr. at 404 nn.6, 7. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), likewise dealt with the issue in a footnote, and only implicitly, at the end of a long opinion holding the death penalty unconstitutional. *Id.* at 657 n.45, 493 P.2d at 899-900 n.45, 100 Cal. Rptr. at 171-72 n.45. *Ex parte* Voll, 41 Cal. 29 (1871), while holding that a predecessor of section 6 did not grant a right to bail pending appeal, did so on the obviously erroneous ground that convicted defendants pursuing an appeal cannot be distinguished from other convicts. *Id.* at 32-33. Finally, Aguilera v. Dep't of Corrections, 247 Cal. App. 2d 150, 55 Cal. Rptr. 292 (1st Dist. 1966), held that a parole violator's time in county jail must be credited on his sentence, stating only in dicta that cancellation of parole is not bailable. *Id.* at 153, 55 Cal. Rptr. at 295. Other California decisions supporting the court's reasoning are equally weak. *In re* Marks, 71 Cal. 2d 31, 47, 453 P.2d 441, 452, 77 Cal. Rptr. 1, 12 (1969) (requirements of due process for parole and probation revocation are satisfied by the original conviction) (dictum); *In re* Scaggs, 47 Cal. 2d 416, 418, 303 P.2d 1009, 1010 (1956) (no right to bail pending appeal because defendant has lost presumption of innocence).

25. See uote 24 *supra*.

pendent support in the statements of its framers.[26] Whether the history of the state constitutional right to bail should prove dispositive with respect to parolees is another matter, especially in light of the analogy between the factfinding prerequisites for both conviction and revocation,[27] and the fact that California did not possess a parole system until 1872,[28] 23 years after adoption of its constitutional right to bail.

But whatever the merits of the argument from the state constitutional provision for bail, the court should not have decided the parolee's right to bail without examining the due process context in which such a right is asserted. In the usual criminal case, bail allows the defendant with sufficient means to postpone any prolonged deprivation of liberty until after his trial.[29] Of the two dimensions of procedural due process—quality of hearing and timing of hearing relative to deprivation of property or liberty—bail allows the defendant to control one. Hence even if the parolee's right to bail is classified as an issue arising under the constitutional provision for bail, it cannot be analyzed except in procedural due process terms.

The irony of In re *Law* is that the court not only refused to undertake this analysis when it was plainly available from *Morrissey*,[30]

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26. The predecessor of article I, section 6, an identical provision in the California Constitution of 1849, was adopted by the constitutional convention on the following argument:

> This section is a part of the common law, and as we have not adopted the common law, and perhaps may not, I think it very necessary that such a section should be introduced, so that in all cases, except capital offences, where the proof is evident or the presumption great, the *party accused* shall be entitled to bail. An *innocent* man may be kept in prison and refused bail, without such a provision as this.

THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849 293 (1850) (emphasis added). *See* CAL. CONST. art. I, § 7 (1849); Foote, *The Coming Constitutional Crisis in Bail* (pt. I), 113 U. PA. L. REV. 959, 975 (1965) [hereinafter cited as Foote]. An earlier version of this provision with an explicit limitation to detention "before conviction" was rejected by the convention's committee of the whole, but for no stated reason. DEBATES, *supra*, at 50.

27. See text accompanying notes 62-63 *infra*. Similarly, bail for parolees and bail pending appeal might be distinguished on the following grounds: first, appeals may be pending for much longer periods than the parolee's final revocation hearing; second, the appealing defendant has already received a full hearing on the merits, whereas the parolee has only received a probable cause hearing. For discussions of bail pending appeal and other instances in which a right to bail has been thought to have been constitutionally denied, see Meltsner, *Pre-Trial Detention, Bail Pending Appeal, and Jail Time Credit: The Constitutional Problems and Some Suggested Remedies*, 3 CRIM. L. BULL. 618 (1967); Comment, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1501-05 (1966) [hereinafter cited as Comment].

28. Act of February 14, 1872, [1872] Cal. Amendments to the Code.

29. Foote (pts. I-II), *supra* note 26, at 964-65, 1135-38; Comment, *supra* note 27, at 1489.

30. See text accompanying note 20 *supra*.

and implicitly required by the California constitutional provision for bail, but went on to simply ignore the due process clause of the California Constitution.[31] Whatever excuse the former authorities might have provided for neglecting a general due process analysis, the latter surely would have required it.[32] While the court's decision might not have been different had it relied on state due process grounds—only a year before *Morrissey* it had denied parolees procedural due process protection[33]—its failure to cite, let alone analyze these grounds immeasurably weakened its decision.

II. GENERAL DUE PROCESS CONSIDERATIONS

The United States Supreme Court has used the same flexible standard for due process analysis for over two decades.[34] *Morrissey* relied on the formulation of this standard in *Cafeteria & Restaurant Workers Union v. McElroy*:[35]

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[36]

The California Supreme Court has also adopted this general standard in interpreting California's due process clause,[37] although, of course,

31. "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ." CAL. CONST. art. I, § 13.

32. The recent procedural due process decisions of the California Supreme Court have relied alternatively on the federal and state due process clauses. *E.g.*, People v. Vickers, 8 Cal. 3d 451, 455, 503 P.2d 1313, 1316-17, 105 Cal. Rptr. 305, 308-09 (1972); Randone v. Appellate Dep't, 5 Cal. 3d 536, 541, 488 P.2d 13, 15, 96 Cal. Rptr. 709, 711 (1971); Blair v. Pitchess, 5 Cal. 3d 258, 276, 486 P.2d 1242, 1255, 96 Cal. Rptr. 42, 55 (1971).

While the court has equated the protection afforded by the two clauses, it has nevertheless utilized the California due process clause as an adequate and independent state ground to insulate its decisions from United States Supreme Court review. Rios v. Cozens, 9 Cal. 3d 454, 455, 509 P.2d 696, 697, 107 Cal. Rptr. 784, 785 (1973) (per curiam); *see* Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965) (per curiam); Falk, *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 275-78 (1973).

33. *In re* Tucker, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971) (denying right to counsel at revocation hearings because parole is a privilege); *accord, In re* Marks, 71 Cal. 2d 31, 47, 453 P.2d 441, 452, 77 Cal. Rptr. 1, 12 (1969) (parolees and probationers are entitled to no due process protection) (dictum). But see note 59 *infra*.

34. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950).

35. 367 U.S. 886 (1961).

36. *Id.* at 895, *quoted in* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

37. *E.g.*, Randone v. Appellate Dep't, 5 Cal. 3d 536, 549-50, 558, 488 P.2d 13, 21, 28, 96 Cal. Rptr. 709, 717, 724 (1971). *See* People v. Vickers, 8 Cal. 3d 451,

the adoption of so general a standard does not require that the scope of the state due process clause mirror that of the federal.[38] This general due process standard not only controls the nature of procedural protections to which a person is constitutionally entitled, but it has also been used to determine the timing of the hearing guaranteed by due process. For instance, in *Sniadach v. Family Finance Corp.*,[39] the Supreme Court found that the temporary loss of wages through prejudgment garnishment was sufficiently serious to require prior notice and hearing except in those unusual cases in which important state interests could only be protected by summary action.[40] Likewise, the fundamental issue in In re *Law* is the extent to which the parolee's loss through temporary incarceration before his final revocation hearing may be overborne by state interests in the administration of the parole system.

Prior decisions, by both the United States and California Supreme Court, provide little specific guidance on this issue. Most of the recent due process decisions of these courts either fail to specify the procedural guarantees in detail,[41] or require only that a deprivation, usually of property interests, be preceded by a probable cause hearing.[42] In re *Law*, on the other hand, concerns the constitutionality of detention *following* such a hearing. The only Supreme Court decision that requires more than a probable cause hearing before any deprivation is *Goldberg v. Kelly*,[43] which held that any termination of welfare benefits must be preceded by a full evidentiary hearing.[44] The timing aspect of this decision, however, has been weakened by *Fuentes v. Shevin*,[45] which requires only a probable cause hearing before prejudgment attachment.[46] While the weight of the individual's interests

455, 503 P.2d 1313, 1316-17, 105 Cal. Rptr. 305, 308-09 (1972) (adopting *Morrissey*'s reasoning in interpreting state due process clause).

38. See note 32 *supra* and accompanying text.

39. 395 U.S. 337 (1969).

40. *Id.* at 339. See note 81 *infra* and accompanying text.

41. *E.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

42. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 97 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring); Rios v. Cozens, 7 Cal. 3d 792, 799, 499 P.2d 979, 984, 103 Cal. Rptr. 299, 304 (1972), *vacated and remanded for clarification*, 410 U.S. 425 (1973) (per curiam), *reinstated*, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973); Randone v. Appellate Dep't, 5 Cal. 3d 536, 563, 488 P.2d 13, 31, 96 Cal. Rptr. 709, 727 (1971); Blair v. Pitchess, 5 Cal. 3d 258, 283, 486 P.2d 1242, 1260, 96 Cal. Rptr. 42, 60 (1971). *Contra*, Specht v. Patterson, 386 U.S. 605, 609-10 (1967) (procedural protections of criminal trial extended to commitment under sex offenders act).

43. 397 U.S. 254 (1970).

44. *Id.* at 267-71.

45. 407 U.S. 67 (1972).

46. *Id.* at 96-97.

in these cases might be compared with one another and with the parolee's interest in conditional liberty,[47] *Fuentes* seems to undercut whatever governing force *Goldberg* might have possessed. At any rate, *Goldberg* cannot be read to undo the traditional doctrine that a criminal defendant—whose interest in unqualified liberty is surely greater than that of the parolee in his conditional liberty—may be arrested and incarcerated before his probable cause hearing, and, if he cannot post bail, until he is acquitted or his case dismissed.[48] For the same reason, the California Supreme Court's dictum in *Randone v. Appellate Department*[49] that certain necessities are entirely exempt from prejudgment attachment is also not dispositive.

Even apart from the unreliability of analogies with procedural solutions designed to reconcile different interests in other contexts, reliance upon such comparisons does not dispose of the specific issue raised in *Law*. At most, such analogies only reveal that the parolee deserves *no more* protection than the criminal defendant, namely a right to bail following arrest.[50] They reveal no procedural minimum short of the probable cause hearing required by *Morrissey*. The only other plausible minimum, the probable cause hearing guaranteed a civil defendant prior to attachment of his possessions, provides more protection than even criminal defendants receive: their probable cause hearings are available only after the deprivation of liberty entailed by an arrest.

a. The parolee's interests

A more fruitful point of departure is an analysis of the interests of the parolee and the state that would be affected by a right to bail. Of these, the parolee's are the more easily identified. Foremost among them, of course, is his interest simply in retaining his conditional liberty during the "reasonable time"[51] between his preliminary and final rev-

47. The installment debtor's possessory interest in the goods attached in *Fuentes* is a more traditional property right than the welfare payments protected by *Goldberg*. On the other hand, pre-hearing termination of welfare payments resembles denial of bail to parolees in that both prevent adequate preparation for a full hearing on the merits. Goldberg v. Kelly, 397 U.S. 254, 264 (1970). See notes 55-63 *infra* and accompanying text.

48. Note, 11 DUQUESNE L. REV. 693, 698-700 (1973). *But see* Note, 86 HARV. L. REV. 95, 103 (1972).

49. 5 Cal. 3d 536, 561-62, 488 P.2d 13, 30-31, 96 Cal. Rptr. 709, 726-27 (1971) (dictum).

50. Arrests, of course, constitutionally can be made even without a warrant, let alone an adversary probable cause hearing. *E.g.*, Adams v. Williams, 407 U.S. 143, 148 (1972). *See also* CAL. PENAL CODE § 836 (West 1970).

51. Morrissey v. Brewer, 408 U.S. 471, 488 (1972).

This interest, as well as the other interests of the parolee, is not to be discounted for those parolees who are ultimately found to be violators. For until a final hearing on the merits, those parolees cannot be identified, and innocent parolees, of course, should not be disadvantaged by the violations of others.

ocation hearings. By the standards of *Morrissey* itself, this period may amount to as much as two months.[52] The effect of denying bail on this interest is likewise clear-cut: it receives no recognition whatsoever. How this interest is to be compared with its most obvious analogue, the criminal defendant's interest in his unconditional liberty,[53] however, is more difficult to determine. The parolee's conditional liberty typically involves substantial restrictions on his activities: for example, prohibitions against the use of liquor and association with "individuals of bad reputation," requirements that he obtain his parole officer's approval for such activities as buying a car or changing jobs, and the usual condition that he report to his parole officer regularly.[54] While this conditional liberty is hardly that of the ordinary citizen, it is nevertheless difficult to assume that it is therefore undeserving of the protection afforded by bail.

A second interest of the parolee is in preparing his defense for the final revocation hearing. Like the criminal defendant who cannot post bail, the detained parolee is severely handicapped in his attempts to locate witnesses, obtain evidence, and raise money for his defense.[55] The significance of a litigant's ability to prepare for subsequent hearings has been recognized in other contexts.[56] It is all the more pressing here given the Supreme Court's recent holding in *Gagnon v. Scarpelli*[57] that a parolee is entitled to assigned counsel only in exceptional cases.[58] Although this decision does not foreclose the parolee's right to counsel under the California Constitution,[59] without counsel most parolees will

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52. *Id.*

53. The other obvious analogue, the conditional liberty of a probationer, has been held to be equivalent to the conditional liberty of a parolee for due process purposes. People v. Vickers, 8 Cal. 3d 451, 458, 503 P.2d 1313, 1318-19, 105 Cal. Rptr. 305, 310-11 (1972). Other deprivations that plausibly might be compared with revocation of parole are induction into the armed services, juvenile court commitment, and involuntary civil commitment. *See, e.g.*, Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 240-44 (1968) (Harlan, J., concurring); *In re* Gault, 387 U.S. 1 (1967); *cf.* Baxstrom v. Herold, 383 U.S. 107, 111-12 (1966). For a comparison of detention pending a final revocation hearing with detention pending appeal, see note 27 *supra*.

54. *See* CAL. PENAL CODE §§ 3053-54 (West 1970); Milligan, *California's Parole Rules*, 15 CRIME & DELINQUENCY 275 (1969).

55. *In re* Tucker, 5 Cal. 3d 171, 202, 486 P.2d 657, 678, 95 Cal. Rptr. 761, 782 (1971) (Tobriner, J., concurring and dissenting); Foote (pt. II), *supra* note 26, at 1137-48; Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 113 (1966); Comment, *supra* note 27, at 1489; Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 969 (1961).

56. Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 398 U.S. 337, 341 (1969); Randone v. Appellate Dep't, 5 Cal. 3d 536, 561-62, 488 P.2d 13, 30-31, 96 Cal. Rptr. 709, 726-27 (1971).

57. 411 U.S. 778 (1973).

58. *Id.* at 790.

59. Despite its pre-*Morrissey* holding that parolees are not entitled to assigned counsel at revocation proceedings (*In re* Tucker, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal.

be forced to rely on whatever assistance might be available from family and friends. But even assuming the availability of counsel, detention pending the final revocation hearing will prevent the parolee from obtaining witnesses, if, as seems likely, he is the only person who can identify them or his appointed counsel lacks investigative assistance.[60] The chances for effective preparation further diminish with the possibility that the parolee may be detained in a prison some distance from his home.[61]

The discretionary elements in a revocation decision do not reduce the significance of the parolee's interest in preparing his defense. Although the determination whether a parolee's violations are sufficiently serious to warrant revocation is inevitably discretionary, a finding that he has in fact committed a violation is still necessary for revocation.[62] Indeed in this respect, denial of bail impinges on the central due process interest in the accuracy of the factfinding process.[63]

A further interest of the parolee is in keeping his job. Detention for periods as long as the two months approved in *Morrissey* will almost surely result in loss of employment, a loss aggravated by the difficulties faced by felons in obtaining jobs in the first place.[64] This loss is all the more significant because it not only injures the parolee by depriving him of the earnings and self-respect he obtains from work, but it also damages the interest he shares with the state in his successful rehabilitation.[65]

b. The state's interests

To be compared with the parolee's interests are those of the state, the most apparent being the need to find and detain the parolee should his parole eventually be revoked. The significance of this interest is undoubted. Given the relatively high rates of violation among parol-

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Rptr. 761 (1971)) the California Supreme Court has recently granted probationers such a right, basing its decision on the non-constitutional ground that a right to counsel is necessary for the efficient administration of justice. People v. Vickers, 8 Cal. 3d 451, 461, 503 P.2d 1313, 1321, 105 Cal. Rptr. 305, 313 (1972). This decision also equates probation and parole for due process purposes. *Id.* at 458, 503 P.2d at 1318-19, 105 Cal. Rptr. at 310-11.

60. Foote (pt. II), *supra* note 26, at 1141-42; Note, *supra* note 55, at 969.

61. *Morrissey* expressly permits removal of the parolee to a state prison prior to his final revocation hearing. 408 U.S. at 485.

62. *Id.* at 483-84, 487-88.

63. *See* Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 814, 828, 833 (1961); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957) [hereinafter cited as *Methodology*].

64. *See* M. FREEDMAN & N. PAPPAS, THE TRAINING AND EMPLOYMENT OF OFFENDERS 2-3 (1967).

65. *See* Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

ees,[66] a parole system could not maintain even minimal compliance with parole regulations without the deterrent provided by a credible threat of detention following revocation. The effect of bail on vindication of this interest is more difficult to ascertain, however. No parole system is administered so strictly that the parolee does not have ample opportunity to flee before he has been arrested for a parole violation.[67] Any added risk of flight following arrest can only be attributed to the parolee's realization that he may well be returned to prison. Imponderable as this incremental risk may be, it seems implausible to conclude that it is significantly greater for parolees than for criminal defendants,[68] given the high rate of conviction for those charged with crime.[69]

More plausible is the argument that recognition of a right to bail will deprive the revocation sanction of its immediacy by allowing the parolee to prolong his freedom until the state is ready to conduct a final revocation hearing. This delay, in turn, could erode the control the parole officer has over his parolees and thus diminish his ability to insure compliance with the conditions of parole by means less drastic

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66. Of those paroled in 1964, within five years 48.8% of the women and 47% of the men had been returned to California prisons following parole revocation. C. SPENCER & J. BERECOCHEA, RECIDIVISM AMONG WOMEN PAROLEES: A LONG TERM STUDY 46-47 (Cal. Dep't of Corrections, Research Div., Report No. 47, 1972). For further statistics supporting the conclusion drawn in the text, see *id.* at 48; D. JAMAN & P. MUELLER, EVALUATION OF PAROLE OUTCOME BY PAROLE DISTRICTS OF RELEASE 3, 5, 17 (Cal. Dep't of Corrections, Research Div., Report No. 21, 1965). *Morrissey* cites an estimate that 35% to 45% of parolees suffer revocation of parole and return to prison. 408 U.S. at 479. Justice Mosk cites the figure, published in 1968, that 63.9% of parolees are found to be violators by the fifth year of their parole. *In re* Tucker, 5 Cal. 3d 171, 181, 486 P.2d 657, 662-63, 95 Cal. Rptr. 761, 766-67 (1971) (Mosk, J., concurring), *citing* CAL. DEP'T OF CORRECTIONS, CALIFORNIA PRISONERS (1968). But see note 67 below.

67. Justice Mosk asserts that 23% of parolees who suffer suspension are reinstated without additional confinement, adding that this most commonly occurs when the parolee's only violation is failure to report. *In re* Tucker, 5 Cal. 3d 171, 182, 486 P.2d 657, 663, 95 Cal. Rptr. 761, 767 (1971) (Mosk, J., concurring), *citing* CAL. DEP'T OF CORRECTIONS, CALIFORNIA PRISONERS (1968).

68. Default rates for bailed criminal defendants appear to be well below three percent. Foote (pt. II), *supra* note 26, at 1162. Furthermore, most defaults appear to be for innocuous reasons rather than because the defendant has fled. *Id.* at 1167 (citing a figure of 96.3%). However, as the bail system is presently administered, bail may be set so high for those criminal defendants believed to be dangerous that they are never released on bail. *Id.* (pt. I) at 994-96; Comment, *supra* note 27, at 1489-92.

69. For instance, in California in 1964, 85.4% of felony defendants prosecuted in superior court were convicted. CAL. DEP'T OF JUSTICE, DIV. OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, CRIME IN CALIFORNIA 122 (1964). However, bailed defendants seem substantially less likely to be convicted than defendants who are detained before trial. Foote (pt. II), *supra* note 26, at 1132 n.192, 1149, cites conviction rates for jailed defendants of 73% to 82%, but for bailed defendants of only 53%.

than revocation.[70] This argument, however, loses much of its force if it is assumed that most parolees, like most criminal defendants, cannot afford bail.[71] But it is anomalous and perhaps hypocritical to argue for a procedural guarantee on the premise that few will be able to enjoy it. A more persuasive counterargument is that the state can, if necessary, decrease the time between the preliminary and final revocation hearings. Given the degree of informality permitted at the final revocation hearing,[72] acceleration should present no serious obstacles to the presentation of the state's case, at least none so serious as detention presently imposes upon the parolee.[73]

Another state interest that could be adversely affected by a parolee's right to bail is that in preventing crime. Available statistics suggest that parolees may represent a greater threat to the safety of the community than criminal defendants released on bail.[74] On the other hand, parolees spend a greater period of time out on parole than criminal defendants spend out on bail, and of course, there is no evidence of the incremental threat posed by parolees on bail between *Morrissey* hearings. Furthermore, as with the state's interest in the immediacy of the revocation sanction, the risk of crime by bailed parolees can be reduced by accelerating the final revocation hearing. A further, albeit somewhat doubtful, measure to this end would be denial of bail to those parolees who appear for some specific reason to be unusually dangerous.[75]

A final state interest to be served by denying bail is that in economical management of the parole system. However, to the extent that this interest encompasses considerations different from the preceding

70. *But see* Note, *Observations on the Administration of Parole*, 79 YALE L.J. 698 (1970) (arguing that parole officers should not be authorized to initiate revocation proceedings).

71. Foote (pt. I), *supra* note 26, at 994-96.

72. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

73. See text accompanying notes 55-61 *supra*. Of course, acceleration of the final hearing will also diminish the time available to the parolee to prepare his case. But a parolee out on bail would seem better able to prepare a defense, with or without accelerated hearings, than a parolee detained in jail or prison.

74. It has been estimated by one corrections official that 80% of parole revocations are in lieu of new criminal prosecutions of the parolee. Comment, *Rights Versus Results: Quo Vadis Due Process for Parolees*, 1 PACIFIC L.J. 321, 341 (1970) (citing an interview with Mr. Joseph Spangler, Administrative Officer to the Adult Authority). *See* Morrissey v. Brewer, 408 U.S. 471, 479 (1972); Milligan, *Parole Revocation Hearings in California and the Federal System*, 4 CAL. WESTERN L. REV. 18, 21 (1968). Given the 45% to 50% of parolees whose parole is revoked within five years (see notes 66-67 *supra*), roughly 35% to 40% of parolees would have been criminally prosecuted within five years if their parole had not been revoked instead. Criminal defendants released on bail, however, seem to have relatively low rearrest figures. *See* Comment, *supra* note 27, at 1497-98.

75. See text accompanying notes 84-85 *infra*.

state interests, it does not appear to be significant. Setting bail at the probable cause hearing would not seem to consume significant administrative resources; and, assuming that a right to bail would not severely undermine the parole system, the expenses incident to arresting parolees who forfeit bail also would not seem great. Furthermore, interests in efficiency have rarely been accorded significant weight in recent due process decisions,[76] although *Gagnon v. Scarpelli*[77] may have given them new life in the parole revocation context.[78]

Not all state interests may be adversely affected by recognizing a parolee's right to bail. In particular, the state interest in rehabilition might be furthered by releasing the parolee on bail instead of subjecting him to a detention that he could well resent if it proved to be unjustified. Similar beneficial consequences were emphasized in *Morrissey*.[79] The extent, however, to which a right to bail would further rehabilitation is at best problematical. A right to bail would probably cause some increase in the number of parole violators who escape revocation, and its rehabilitative effects would be confined to only those few who could afford bail.[80] A right to bail for parolees is more securely founded on its advantages for the individual parolee rather than its uncertain effects on the parole system as a whole.

c. Balancing the interests

One argument that supports the prominence of the state's interests is the recognition in several of the recent due process decisions that summary procedures are justified in certain extraordinary circumstances: specifically, where there is (1) a special need for prompt action (2) to safeguard an important government or public interest and (3) such action can be initiated only by a government officer.[81] Parole revocation satisfies the second and third of these requirements, but whether prompt action is especially necessary in a process so routine as parole revocation seems doubtful.[82] Moreover, *Morrissey* implies that sum-

76. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22, 92 n.29 (1972); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970).

77. 411 U.S. 778 (1973).

78. *Id.* at 787-88.

79. 408 U.S. at 484.

80. See note 71 *supra* and accompanying text.

81. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972). *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.08 (1958, Supp. 1970). The California Supreme Court has interpreted the extraordinary circumstances exception somewhat more narrowly, requiring also that the deprivation does not "vitally touch an individual's life or livelihood." Randone v. Appellate Dep't, 5 Cal. 3d 536, 552-54, 488 P.2d 13, 24-26, 96 Cal. Rptr. 709, 720-22 (1971).

82. *But see* Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (taxpayer has no right to hearing before collection); Fuentes v. Shevin, 407 U.S. 67, 91-92 n.24 (1972) (citing *Phillips* as within extraordinary circumstances exception).

mary procedures apply to the parolee only to the extent that he can be arrested before his probable cause hearing,[83] a procedure no different from that for criminal defendants. But even if the extraordinary circumstances exception can be used to ascertain the pre- or post-detention timing of the final revocation hearing, it does not dispose of the problem of evaluating and reconciling the competing interests of the state and the parolee, but instead only reformulates it.

The most obvious procedural reconciliation of these interests is recognition of a right to bail coupled with acceleration of the final revocation hearing. A prompt final hearing minimizes both the risk of flight by bailed parolees and the threat they pose to the community. It also preserves the psychological immediacy of the revocation sanction. The disadvantages of accelerated final hearings do not appear to be great. To the extent that acceleration decreases the state's ability to prepare its case, it also decreases the parolee's; but so long as the parolee has a reasonable opportunity to locate witnesses, it disadvantages him less than detention.

Alternative procedures, other than an outright denial of a right to bail, do not withstand examination. While any right to bail for parolees might be qualified to allow denial of bail to those who appear dangerous or likely to flee, this concession to the state's interests founders on the great difficulties involved in predicting individual behavior.[84] A related problem is the immunity of such a discretionary determination from review. Without appropriate guidelines or a cumbersome mechanism for review, this exception could easily overwhelm the rule.[85]

Nor does a distinction first suggested by Judge Skelly Wright that only parolees charged with crimes should be detained pending the final revocation hearing[86] respond fully to the interests at stake. The state's interest in controlling and rehabilitating parolees extends to noncriminal as well as criminal parole violators. While a legislative judgment arguably validates the proposition that parolees charged with criminal violations are more dangerous to society, there is no empirical evidence to support this conclusion. Finally, using this standard, only about one-fifth of alleged parole violators would have a right to bail following an unfavorable probable cause determination.[87]

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83. *See* 408 U.S. at 485; *cf.* Fuentes v. Shevin, 407 U.S. 67, 93 n.30 (1972).

84. Foote (pt. II), *supra* note 26, at 1167-75; Comment, *supra* note 27, at 1497-98, 1506-07.

85. Foote (pt. II), *supra* note 26, at 1166.

86. Hyser v. Reed, 318 F.2d 225, 262 (D.C. Cir. 1963) (Wright, J., concurring in part and dissenting in part). This distinction has also been adopted by Justices Douglas and Tobriner. Morrissey v. Brewer, 408 U.S. 471, 497 (1972) (Douglas, J., dissenting in part); *In re* Tucker, 5 Cal. 3d 171, 202-03, 486 P.2d 657, 678-79, 95 Cal. Rptr. 761, 782-83 (1971) (Tobriner, J., concurring and dissenting).

87. See note 74 *supra*.

IV. CONCLUSION

Recognition of a right to bail, combined with acceleration of the final hearing at the state's option, remains the only procedural compromise that significantly furthers the parolee's interests.[88] Acceptance of this compromise is premised on, first, a distinction between bail and other procedural rights unavailable to the parolee, and second, a judgment that the parole system can accommodate a right to bail. The first premise is necessary to counter the argument that recognition of a right to bail entails recognition of the parolee's right to all the procedural protections of a criminal trial. The second is needed to establish the feasibility and effectiveness of a right to bail.

The first premise finds support in the need for bail to maintain the accuracy of the factfinding process. The traditionally high value accorded the liberty of criminal defendant's pending trial also argues for its acceptance. While the equally traditional denial of a right to bail pending appeal[89] weakens the analogy to bail pending trial, it appears to be founded on the conclusory assertion that a convicted defendant does not deserve procedural protection because he has lost his presumption of innocence.[90] Even apart from the question-begging logic of this argument, it surely has been discredited by *Morrissey*'s extension of due process safeguards beyond conviction.

The second premise depends upon a more judgmental determination of the capacities of the parole system to accommodate procedural protections. Arguably, procedures that make revocation more difficult will lead the administrators of the parole system to grant parole less frequently. To the contrary, however, is the argument that the frequency of parole release decisions is dictated primarily by the financial pressures created by large prison populations, rather than procedural constraints upon revocation.[91] Also supporting acceptance of this second premise is the apparent feasibility of accelerated final revocation hearings and the consequent reduction in risks posed by bailed parolees.

The conclusiveness of the arguments, for both these premises, may be disputed. Given the lack of empirical evidence, the small likelihood of obtaining impartial opinions from the Adult Authority, and the inevitable intermixture of value with fact in the assessment of un-

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88. An exception to the parolee's right to bail might possibly be allowed where the state presents evidence of an unusually high probability of flight or danger to the community. But see notes 84-85 *supra* and accompanying text.

89. See notes 24-28 *supra* and accompanying text.

90. *See In re* Scaggs, 47 Cal. 2d 416, 418, 303 P.2d 1009, 1010 (1956). See note 24 *supra*.

91. *See* Morrissey v. Brewer, 408 U.S. 471, 483 & n.10 (1972).

certain consequences, acceptance of these premises cannot but depend upon an unarticulated assessment of the due process values at stake.[92] But certainly the arguments in their favor are not so frivolous as to deserve dismissal without discussion. The court in *Law* should not have avoided them.

George Rutherglen

D. *Jury Selection: Vicinage Requirement*

People v. Jones[1] presents a question which, though simple on its face, has significant legal and social overtones: May a criminal defendant in a state trial be tried by a jury selected from a panel from which residents of the judicial district where the crime was committed have been systematically excluded?

Leon Dwight Jones, a black,[2] was convicted by a jury of three counts of selling marijuana.[3] Jones was a resident of the 77th Street police precinct of Los Angeles, and all of the crimes with which he was charged took place in that precinct,[4] the population of which is 73 percent black.[5] Since the 77th Street precinct is located in the Central Superior Court District of Los Angeles County, Jones ordinarily would have been tried in the Central District.[6] Because of a short-

92. *See* People v. Youngs, 23 Cal. App. 3d 180, 184, 99 Cal. Rptr. 901, 903 (4th Dist. 1972):

> While [due process] concepts are rather firmly etched into our judicial process, it is perhaps not too cynical to observe that the outer limits of the application of these concepts depend in some part, at least, upon the current personnel of the highest courts of the nation and states.

Accord, Methodology, supra note 63, at 349.

1. 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973) (Sullivan, J.) (4-3 decision).

2. Although the Supreme Court's opinion does not mention Jones' race, the lower court's opinion makes it clear that he is black, People v. Jones, 103 Cal. Rptr. 475, 476 (2d Dist. 1972), *vacated,* 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

3. 9 Cal. 3d at 547, 510 P.2d at 706, 108 Cal. Rptr. at 346.

4. *Id.* at 548, 510 P.2d at 707, 108 Cal. Rptr. at 347.

5. *Id.*

6. *Id.* Los Angeles is apparently the only California city with internal judicial divisions. People v. Jones, 103 Cal. Rptr. 475, 479 (2d Dist. 1972), *vacated,* 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973). Vicinage problems can arise in other ways, however, such as a change of venue requested by the prosecution, *see, e.g.,* Maryland v. Brown, 295 F. Supp. 63 (D.D.C. 1969), or the application of rules limiting the geographical area from which jurors are drawn to the immediate vicinity of the courthouse, *e.g.,* Alvarado v. State, 486 P.2d 891 (Alas. 1971). Even counties having no formal subdivisions may be subdivided in effect by local practices, such as a rule excusing persons who have served as municipal court jurors during the preceding year from serving on superior court juries. If the municipal court is located at one

age of judges and courtrooms downtown, however, the presiding judge of the Los Angeles Superior Court ordered that cases arising in the 77th Street precinct be tried in the Southwest District until new courtroom facilities, then under construction in downtown Los Angeles, became available.[7] In contrast to the Central District, which is 31 percent black,[8] the Southwest District is only seven percent black.[9]

Since all Southwest District jurors are selected from that district,[10] it quickly became apparent to the defendant that he was to be tried by a jury which excluded residents of the precinct and district where the crime was committed and where he resided. Defendant's initial motion to transfer the trial to the Central District was denied.[11] He then sought to secure a writ of prohibition from the appellate courts,[12] and later moved to challenge the jury panel,[13] urging inclusion of a proportionate number of jurors from the Central District. Both challenges were rejected.[14] He appealed to the Supreme Court, which held that the sixth amendment requires that jurors in criminal cases be selected from a "district" that includes the scene of the crime.[15]

I. THE HOLDING

The sixth amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."[16] *Duncan v. Louisiana*[17] extended the right to jury trial to defendants in state cases which, were they before a federal court, would fall within the sixth amendment's guarantee. *Williams v. Florida*[18] ruled that while not all features of the common-law jury were preserved by the Constitution, those that were essential to trial by jury were preserved. Whether a particular feature is indispensable depends upon the function it performs and its

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end of the county and the superior court at the other, persons living near the municipal court may be more likely to accept jury duty there in order to escape service at the less accessible superior court.

7. 9 Cal. 3d at 548, 510 P.2d at 707, 108 Cal. Rptr. at 347.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 549, 510 P.2d at 707, 108 Cal. Rptr. at 347.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351.
16. U.S. CONST. amend. VI.
17. 391 U.S. 145, 149 (1968).
18. 399 U.S. 78, 99-100 (1970).

relation to the purposes of jury trial. One feature considered essential, and thus required in state proceedings, is the right to "a fair possibility for obtaining [a jury panel reflecting] a representative cross-section of the community."[19] Another feature that the Court suggested was essential was the right to a jury of the vicinage.[20] The precise nature of the vicinage requirement, however, was not spelled out.

In *Jones*, the defendant argued he had been denied his right to a trial by a jury of the vicinage,[21] because while his alleged crimes were committed in the Central District, he had been tried by a jury drawn exclusively from the Southwest District. The state countered that in state trials vicinage means the county in which the crime occurs; therefore, since the jurors in this case had been drawn from within Los Angeles County, the defendant's constitutional rights had not been violated.[22]

Relying on substantial authority, the majority held that the federal Constitution, as interpreted in *Duncan*, *Williams*, and, more recently, in *Peters v. Kiff*,[23] guarantees a criminal defendant in state court the right to a jury comprising a representative cross-section of the district in which the crime occurred.[24] Relying on somewhat less substantial authority,[25] the majority concluded that the "district" may be a county, a Superior Court judicial district, or any other geographic unit selected by the legislature, so long as it does not exclude the scene of the crime.[26] Because Jones had been tried by a jury from which residents of the community where the crime occurred had been excluded, the

19. *Id.* at 100.

20. After a lengthy review of the legislative history of the passage of the sixth amendment, *id.* at 93-96, the Court in *Williams* concluded that although the word "vicinage" was not used, the sixth amendment's language "reflected a compromise between broad and narrow definitions of that term . . ." *Id.* at 96. *See also* Peters v. Kiff, 407 U.S. 493, 500 (1972). The court in *Jones* felt it was "abundantly clear that the vicinage requirement . . . is an essential feature of jury trial preserved, though changed by the Sixth Amendment, and . . . binding on the states . . ." 9 Cal. 3d at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349.

21. 9 Cal. 3d at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349.

22. *Id.*

23. 407 U.S. 493, 500 (1972).

24. 9 Cal. 3d at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349.

25. The majority relied primarily on two cases: Alvarado v. State, 486 P.2d 891 (Alas. 1971), and Maryland v. Brown, 295 F. Supp. 63 (D.D.C. 1969). *Alvarado*'s precedential value is weakened by its focus on the "unique" disparity between primitive rural fishing villages in the Alaskan bush and the modern, urbanized city of Anchorage where the trial took place, and by its emphasis on the vicinage requirement as an aspect of the guarantee of a representative jury. 486 P.2d at 897-904. *Brown* involved a change of venue; its treatment of the vicinage requirement is brief and largely dictum.

26. 9 Cal. 3d at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351. Jones' crimes occurred in only one district, the Central District. Thus, the court did not have to consider the impact of the vicinage requirement on multi-district crimes, such as conspiracy, or "sprees" in which criminal acts are committed in several judicial districts.

conviction was reversed. The dissent, with equally sparse case support,[27] argued that the appropriate geographic unit in California is the county,[28] and since the defendant's jury had been drawn from within Los Angeles County, he had not been deprived of his right to a jury of the vicinage.[29] Nor had he been deprived of a representative jury, since geographic separation alone does not divide a population into classes cognizable for jury selection purposes.[30] "[A]ttitudes . . . [do not] normally differ along lines respecting place of residence within a county."[31]

The sixth amendment requirement of a trial by a jury of the vicinage has been applied to the states only recently,[32] and, as a result, relatively little case law exists as a guide to judicial decision-making.[33] Confronted with an opportunity for creative constitutional interpretation, it is disappointing that both the majority and the dissenting opinions were content to rely on authority that the court itself seems to admit is inconclusive and not squarely on point.[34] The approach taken obscures the underlying policy choices that were at stake in the decision and blurs the relationship between the vicinage requirement and the requirement of a representative jury.

II. THE MEANINGS OF "VICINAGE"

Before turning to a discussion of the policy considerations that were at issue in *People v. Jones*, it will be helpful to set out the different meanings of the term "vicinage," as used by the majority. In the first instance, vicinage is used as a delimiting concept analytically required to shape the notion of a "representative" jury.[35] Juries must

27. For example, one case upon which the dissent relied, was brought on due process and equal protection grounds rather than sixth amendment grounds. State v. Kappos, 189 N.W.2d 563, 564 (Iowa 1971), *appeal dismissed*, 405 U.S. 982 (1972). Only the impartiality of the jury seems to have been challenged, not the vicinage from which it was selected. *Id.* at 563-65. Another case, United States v. Florence, 456 F.2d 46 (4th Cir. 1972), was premised on the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, and involved the selection of jurors from four counties all within the same judicial district, but not from defendant's county of residence. The sixth amendment received only passing attention. *Id.* at 50.

28. 9 Cal. 3d at 559, 510 P.2d at 714, 108 Cal. Rptr. at 354.

29. *Id.*

30. *Id.* at 562, 510 P.2d at 716-17, 108 Cal. Rptr. at 356-57.

31. *Id.* at 562, 510 P.2d at 717, 108 Cal. Rptr. at 357.

32. See notes 17-20 *supra* and accompanying text.

33. Although innumerable opinions deal with the requirement of an impartial jury, relatively few have addressed the question of vicinage. See notes 24-27 *supra* and accompanying text.

34. See notes 25 and 27 *supra* and accompanying text.

35. *See, e.g.*, the following passage from *Alvarado* cited with approval, 9 Cal. 3d at 552, 510 P.2d at 709-10, 108 Cal. Rptr. at 349-50: "The traditional starting point for determining the community from which jurors are to be selected is the scene of

be representative, but what population must they represent? Without predetermined geographical boundaries, "representative" remains an unquantified term, like "free" or "competent." Thus, a representative jury might be understood to be one selected from the area where the defendant resides,[36] where the crime occurred,[37] or where the trial is held.[38] Each of these views has received support in statutory or case law.[39] While the federal Constitution links vicinage with the district in which the crime has occurred,[40] state and lower federal courts have evidently felt that room existed for interpretation of the requirement to accommodate interests of cost and convenience.[41]

While the first meaning sets out the geographical extension of the concept, a second meaning involves a principle of non-exclusion in the selection of jurors. This second meaning stems from the relationship of vicinage to the requirement of an impartial jury.[42] Once the geographic boundaries of the relevant district are drawn, any selection procedure that excludes jurors from one portion of the district may result in a jury from which ascertainable ethnic or other groups are excluded.[43] The vicinage requirement, as interpreted by *Jones*, provides that, whatever region is chosen for purposes of jury selection, jurors may not be selected by any method that results in systematic exclusion of residents of the locality in which the crime was allegedly committed.[44]

III. THE VICINAGE REQUIREMENT AND THE OBJECTIVES OF THE JURY TRIAL: CONSTITUTIONAL INTERFACE

In arriving at its holding concerning these two functions of the vicinage requirement, the court appears to have given scant attention

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the alleged offense . . . . It is the community in which the crime was committed that the jury must represent."

36. *See* Note, *The Case for Black Juries*, 79 YALE L.J. 531, 534 (1970) [hereinafter cited as *Black Juries*]; *cf.* State v. Kappos, 189 N.W.2d 563, 564 (Iowa 1971) (vicinage should be selected to minimize expense to the government and inconvenience to jurors); Graham v. Beverly, 233 S.C. 222, 110 S.E.2d 923, 925 (1959) (vicinage means county in which witnesses reside).

37. See notes 24-26 *supra* and accompanying text.

38. People v. Richardson, 138 Cal. App. 404, 407-08, 32 P.2d 433, 435-36 (1st Dist. 1934). *See also* Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* (1973), which provides for selection of jurors from "the district or division in which the court convenes." *Cf.* State v. Kappos, 189 N.W.2d 563, 564 (Iowa 1971).

39. See notes 36-38 *supra.*

40. U.S. CONST. amend. VI.

41. *See, e.g.*, the dissenting opinion's discussion of the vicinage requirement as only marking the extreme bounds of the area from which the jury can be drawn and its conclusion that within these outer bounds any rational selection scheme is valid. 9 Cal. 3d at 559, 510 P.2d at 714-15, 108 Cal. Rptr. at 354-55.

42. *Id.* at 551, 510 P.2d at 709, 108 Cal. Rptr. at 349.

43. *Id.* at 553-54, 510 P.2d at 710-11, 108 Cal. Rptr. at 350-51.

44. *Id.* at 553, 510 P.2d at 710-11, 108 Cal. Rptr. at 350-51.

to many of the policy factors that undergird the constitutional notion of vicinage. Of the many such factors that have been identified by courts and commentators, the court in *Jones* only mentions one explicitly;[45] others are implicit or in the background,[46] and some are only hinted at or not mentioned at all.[47] The following discussion considers a number of policy considerations that should play a part in determining the proper application of vicinage in state trials.

In early English law, trials were conducted by the defendant's neighbors, who often functioned as witnesses as well as jurors.[48] Thus it was essential that jurors be drawn from the community in which the crime was perpetrated, since these were the persons who could be expected to have knowledge of the victim, the defendant's character, and perhaps the crime itself.[49] In similar fashion, modern courts have also held it desirable that the jury comprise (or at least not exclude) persons who are acquainted with local customs and conditions.[50] Such persons, it is felt, will better understand the significance of certain testimony,[51] and will be more likely to arrive at an accurate intuitive assessment of guilt or innocence. To the extent that this concern is valid today, it would appear to militate in favor of construction of vicinage as necessarily including the scene of the crime.

A second function of the jury system has been to ensure, so far as possible, that an accurate result is reached.[52] A single judge, no matter how fair he attempts to be, may harbor unconscious biases or prejudices that could affect the outcome of the case.[53] A jury comprising men and women from many walks of life should be collectively

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45. *Id.* (assuring an impartial or representative jury).

46. *Id.* at 555, 510 P.2d at 711-12, 108 Cal. Rptr. at 351-52 (preventing racial bias in selection of jurors).

47. *Cf. id.* at 553-55, 510 P.2d at 711-12, 108 Cal. Rptr. at 351-52 (assuring that defendant is tried by a jury of his peers).

48. Thayer, *The Jury and its Development*, 5 HARV. L. REV. 295, 296 *et seq.* (1891).

49. *Id.*

50. United States v. Flaxman, 304 F. Supp. 1301, 1303 (S.D.N.Y. 1969); Graham v. Beverly, 235 S.C. 222, 226, 110 S.E.2d 923, 925 (1959); *cf.* Broeder, *The Impact of the Vicinage Requirement*, 45 NEB. L. REV. 99, 106-08 (1966). This requirement, of course, has its limits. Where a juror is personally acquainted with the parties to the trial, he will not be permitted to serve. And when, because of excessive publicity, no unbiased jury from the vicinage is possible, the jury may be selected from another area. Williams v. Florida, 399 U.S. 78, 94 n.35 (1970).

51. One reason given by defendant Jones for insisting on jurors from the 77th Street precinct was his desire that the panel include persons familiar with the hair and clothing styles worn by young men from that area. People v. Jones, 103 Cal. Rptr. 475, 477 (2d Dist. 1972), *vacated*, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

52. *See* Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. CHI. L. REV. 386, 388 (1954) [hereinafter cited as Broeder]. *See generally* Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419 (1969).

53. Broeder, *supra* note 52, at 420 and sources cited therein.

less subject to prejudice as individual biases will tend to "cancel out."[54] Accordingly, the result obtained by discussion among twelve jurors is likely to be more impartial and accurate than one arrived at by a single person. Is this function better served by a rule requiring inclusion of jurors from the neighborhood in which the crime took place? If diversity among jurors is a virtue, it would seem that excluding *any* geographical group from consideration impairs the representativeness of the resulting jury. Although this policy would argue in favor of including jurors from the scene of the crime, it would also militate in favor of drawing jurors from the broadest possible area, such as an entire county or state. Accordingly, this function is only weakly served by a rule requiring inclusion of jurors from the district in which the crime occurred.

Another function said to be served by jury trials is prevention of oppression by the government.[55] Judges, prosecutors, and even defense attorneys may be perceived by minority groups as representatives of a system antagonistic to their interests.[56] Jurors drawn from the community at large, however, can act as a buffer to protect the defendant from harsh or arbitrary treatment.[57] This function would presumably be served by requiring inclusion of jurors from the neighborhood of the crime, but only in circumstances similar to *Jones*, when the defendant resides in the neighborhood where the alleged crime was committed. Because of the increased mobility of present-day society, many defendants are accused of crimes alleged to have taken place far from their home communities.[58] For example, a black defendant from Watts, accused of using a stolen credit card in Beverly Hills, may well prefer not to be tried by an upper-middle-class suburban jury. Thus, a policy of interposing the jury as a safeguard against class or racial oppression may not always be served by a rule requiring that the jury be selected from among those residing near the place of the crime.

Similarly, the legitimizing effect of jury trials has been put forward as a reason for insisting on the inclusion of jurors from "the community."[59] It is suggested that participation in judicial decisionmaking by representatives of the community increases the likelihood that the resulting decision will be seen as fair and just.[60] Where, as in *Jones*, the

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54. *Cf. Black Juries, supra* note 36, at 532-33.

55. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968); Alvarado v. State, 486 P.2d 891, 903 (Alas. 1971). *See generally* Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419 (1969).

56. *See generally Black Juries, supra* note 36.

57. *Id.*

58. *E.g.*, 1972 ATT'Y GEN. ANN. REP. 160.

59. *E.g.*, Alvarado v. State, 486 P.2d 891, 903-04 (Alas. 1971); *Black Juries, supra* note 36.

60. *Black Juries, supra* note 36.

alleged crimes were committed in the district where the defendant resides, a rule requiring that the jurors be selected from that district makes good sense. But when a resident of Watts is charged with burglary in Beverly Hills the policy becomes ambiguous. The defendant resides in one community; the victim in another. In whose eyes should legitimacy be preserved? Selecting jurors from Watts serves that community's interest in according the defendant fair (perhaps lenient) treatment. Selecting the jury in Beverly Hills, on the other hand, serves the interest of that community in avenging the harm to the victim. Arguably, both interests are equally worthy of protection. To the extent that they coincide—when defendants are accused of crimes committed in their own neighborhoods[61]—a rule requiring selection of jurors from those neighborhoods can maximize the legitimization of the system of justice in the eyes of the community affected. But when defendants are charged with crimes far away from home (as is often the case in a mobile society), such a rule arbitrarily favors one interest group (Beverly Hills residents) and one value (the victim's interests) over another group (residents of Watts) and another value (the defendant's interests).

A related function said to be served by jury trials is the assurance that the defendant will be afforded a fair and impartial judgment by his peers.[62] A verdict rendered by persons like oneself is more likely to be accepted as fair than a verdict rendered by persons from backgrounds and social classes markedly different from one's own.[63] Thus, Jones's reluctance to be tried by an all-white jury from a middle-class district is understandable. Here again, however, considerations militate in favor of a jury from the neighborhood of the crime only when the crime takes place in defendant's neighborhood. When the crime occurs elsewhere the impact is quite different. In these latter cases, a rule requiring that the jury be selected from the area encompassing the scene of the crime might well have the effect of guaranteeing that the defendant will *not* be tried by a jury of his peers, since the characteristics of the residents of this area may differ markedly from those of the residents of the defendant's neighborhood.

A final interest advanced in favor of jury trials is that of accountability.[64] Jurors drawn from the community, it is urged, will feel a

61. *Id.* at 548.

62. *E.g.*, Alvarado v. State, 486 P.2d 891, 904 (Alaska 1971); *Black Juries, supra* note 36, at 531.

63. "When a Negro defendant . . . sees a nearly all White jury selected to try his case, he cannot help but wonder whether his cause will be tried on the merits . . . . If he ever needs a rationalization for his conviction, he has one immediately apparently [*sic*] to him." Appellant's Petition for Hearing at 5, People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

64. *Cf.* Williams v. Florida, 399 U.S. 78, 100 (1970).

greater sense of responsibility for the outcome of the trial, both in terms of protecting the rights of the defendant and assuring the community that criminals will be punished.[65] But, like the interest in being judged by one's peers, this interest is advanced only when the defendant's alleged crime took place in his own neighborhood. When this occurs, jurors drawn from the locality will presumably feel accountable both to the defendant and to the state. Where the crime occurs in another community, however, only one of these interests can be served. As a rule, the defendant will prefer a jury drawn from his own community, while the neighborhood harmed by the crime will demand that its members constitute the jury.

IV. CONCLUSION

The foregoing survey of interests underlying the vicinage requirement discloses that when, as in *Jones*, the crime occurs in the defendant's neighborhood, no valid interest is served by a method of jury selection that excludes residents of this neighborhood. On its narrow facts, then, *Jones* was correctly decided. When the crime occurs at a distance from the residence of the defendant, however, the arguments in favor of requiring that the jury be selected from the scene of the crime are less convincing. Because of society's increased mobility, such cases may be expected to occur with substantial frequency.[66] As a result, the reasons for narrow interpretation of the vicinage requirement are less compelling than they were in the era when the doctrine was formulated. If the vicinage requirement has ceased to be an essential ingredient in furthering the fundamental objectives of criminal trials,[67] states should not be compelled by the rationale of *Williams v. Florida* and *Peters v. Kiff* to observe it. The California Supreme Court's failure in *Jones* to examine the underlying interests and policy considerations favoring retention of the requirement obscures the important choices that are at stake and may have erected a barrier to flexible and sensitive treatment of future cases. Because *Jones* seems to "freeze" the law of vicinage into a blanket rule, the opinion may make it more difficult for courts in California to deal effectively with the troublesome policy issues surrounding the selection of juries that will effectively protect the interests of defendants and society alike.

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65. *Id. See also* Appellant's Petition for Hearing at 4, People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

66. Stolen credit card "sprees" are an increasingly common example.

67. Williams v. Florida, 399 U.S. 78 (1970), held that only essential features of trials are preserved by the sixth amendment. Courts determine which features are essential by considering the function a particular feature performs and its relation to the objectives of the jury system. *Id.* at 99-100.

Lorenzana v. Superior Court.[1] The court issued peremptory writs of mandate setting aside a trial court's refusal to suppress evidence uncovered in a police search. It held that the police searched unreasonably where an officer looked into petitioner's home through a two-inch gap between the windowsill and the drawn shade from a vantage point which the public had not been expressly or implicitly invited to traverse or stand upon.[2]

Acting on a tip concerning heroin sales,[3] several Los Angeles police officers went to the home of petitioner Lorenzana; on arrival, one officer crossed from an adjacent driveway to a six-foot strip of land bordering the rear of the house. He then positioned his face within an inch of the window and overheard a telephone conversation that indicated a heroin sale would soon take place. Shortly thereafter, petitioner Lorenzana left the dwelling, and, with the police following him, went to an apartment where he spoke to petitioner Salas; the police did not see any items transferred but surmised that something might have been exchanged.[4] On Lorenzana's return home, the police resumed observing him through the window; when he emptied the powdery contents of a rubber balloon onto a newspaper, they entered the home and arrested him.[5] Salas was later arrested at his apartment.

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1. 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973) (Tobriner, J.) (4-2 decision).

2. 9 Cal. 3d at 629, 511 P.2d at 35, 108 Cal. Rptr. at 587.

3. The tip, from what the police called a "confidential reliable informant," apparently met the test of Aguilar v. Texas, 378 U.S. 108 (1964), for establishing sufficient probable cause to obtain a search warrant. The informant had in the past given tips leading to five narcotics arrests, and his information in this case was based on personal observation. 9 Cal. 3d at 629-30 n.1, 511 P.2d at 35-36 n.1, 108 Cal. Rptr. at 587-88 n.1. The opinion does not explain why the police did not attempt to procure a search or arrest warrant.

4. 9 Cal. 3d at 631, 511 P.2d at 36, 108 Cal. Rptr. at 588.

5. Searching or arresting officers may enter a dwelling forcibly if, after notice to the occupants of the officers' authority and purpose, the officers are refused admittance. Penal Code section 1531 governs searches; section 844 governs arrests. In some circumstances, compliance with the notice requirement is excused, as, for example, if the officer, before entry, knows specific facts giving rise to a good faith belief that an announcement will increase the officer's peril, frustrate the arrest, or allow destruction of evidence. *See generally* People v. Tribble, 4 Cal. 3d 826, 484 P.2d 589, 94 Cal. Rptr. 613 (1971); People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956). Compliance with the section 1531 announcement requirement may also be excused where police officers, on the basis of previously obtained information, supported by facts occurring on the scene, are aware at the time they approach particnlar premises to effect entry that they are faced with an emergency situation. People v. Dumas, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973). However, if the officers obtain a warrant excusing in advance compliance with section 1531, then the entry and resulting search will be unconstitutional. Parsley v. Superior Court, 9 Cal. 3d 934, 513 P.2d 611, 109 Cal. Rptr. 563 (1973). The arresting officers in *Lorenzana* announced their authority and purpose; upon hearing the sound of running footsteps, they concluded they were being denied

Both arrests resulted in the recovery of heroin. At trial, the petitioners contended that the observations at Lorenzana's house were an unconstitutional search and that all the evidence seized was the fruit of that unlawful search. The trial court disagreed, but the supreme court found a violation of the fourth amendment and ordered the evidence suppressed.[6]

I. THE HOLDING

Writing for the majority, Justice Tobriner extracted from a variety of California cases the rule that observations made by a police officer, from a place where he "has a right to be," are not a search in the constitutional sense.[7] In *Lorenzana* the court expressed the test of where an officer "has a right to be" as whether the observations "are made from a position to which the officer has not been expressly or implicitly invited . . . ."[8] Thus, in *Lorenzana,* where there was no express invitation, the legality of the search depended upon whether the characteristics of the house and neighboring residences constituted an implied invitation to stand at the point from which the observations were made. The trial court found such an implied invitation, but the California Supreme Court reversed on the ground that no substantial evidence existed to support that conclusion.[9]

a. *Plain view*

The rule enunciated by the supreme court resembles the traditional plain view exception to the fourth amendment's warrant requirement, long recognized in both federal and state courts.[10] In *Lorenzana,* the court sought to place an added gloss on the exception by claiming to follow the United States Supreme Court decision in *United States v. Katz.*[11] Nonetheless, the court did not fully respect the *Katz* principle that "the Fourth Amendment protects people, not places,"[12]

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admission and that a danger existed that evidence might be destroyed. 9 Cal. 3d at 631, 511 P.2d at 36-37, 108 Cal. Rptr. at 588-89.

6. 9 Cal. 3d at 640-41, 511 P.2d at 43-44, 108 Cal. Rptr. at 595-96.

7. 9 Cal. 3d at 634, 511 P.2d at 39, 108 Cal. Rptr. at 591.

8. *Id.*

9. *Id.*

10. Harris v. United States, 390 U.S. 234 (1968): "[I]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Id.* at 236. The plain view exception usually applies to cases in which the police, during a lawful search pursuant to a warrant, see incriminating material not specified in the warrant. See the discussion in Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion).

11. 389 U.S. 347 (1967).

12. *Id.* at 351.

for it effectively circumvented the *Katz* mandate extending the amendment's protection to the individual's justifiable expectation of privacy.[13] Justice Tobriner analyzed the reasonableness of the individual's reliance on privacy in his home primarily in terms of physical areas shifting the focus from the individual's expectations to the location of the police[14]—in effect moving a step backwards towards the older, mechanical rule of *Olmstead v. United States*.[15] The court's test in *Lorenzana* vindicated the privacy of the individual appellant, but the test does not provide protection for individuals' privacy in cases where that privacy equally deserves protection, but where the officer chooses a more "public" place to stand.[16]

b. Lorenzana *and the* Katz *doctrine*

The principle underlying the decision in *Katz v. United States* is that the fourth amendment protects from governmental intrusion an individual's reasonable expectation of privacy.[17] Conversely, whatever is knowingly exposed to public view is unprotected.[18] It follows then, that the fourth amendment permits an individual to rely upon the privacy of the phone booth or bedroom, provided, of course, that such reliance is justifiable.[19] In *Lorenzana*, the court held that the

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13. *Id.* at 353. See note 19 *infra.*

14. The court revealed this distortion of *Katz* when it stated that:

> Taking into account the nature of the area surrounding a private residence, *we ask whether that area has been opened to public use*; if so, the occupant cannot claim he expected privacy from all observations of the officer who stands upon that ground; if not, the occupant does deserve that privacy.

9 Cal. 3d at 638, 511 P.2d at 42, 108 Cal. Rptr. at 594 (emphasis added).

15. 277 U.S. 438 (1928).

16. The *Lorenzana* rule lends continued vitality to cases such as People v. King, 234 Cal. App. 2d 423, 44 Cal. Rptr. 500 (2d Dist. 1965), *cert. denied*, 384 U.S. 1026 (1966). See note 26 *infra.*

17. 389 U.S. at 352-53. See note 19 *infra.*

18. 389 U.S. at 351.

19. The *Katz* decision spoke of the individual's "justifiable" reliance on the privacy of his acts, without defining the meaning of "justifiable". Subsequent decisions in other courts have often spoken of a "reasonable" expectation of privacy, but have not defined that term. This lack of definition causes difficulty in interpreting the decisions. The term can be used in a normative sense, *i.e.*, a "reasonable" expectation is one that society ought to respect. It can also be used in a predictive sense, *i.e.*, a reasonable" expectation is one that society is actually likely to respect, whether it ought to or not. *See* People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969), where the court suggested a test employing both concepts: Its standard was "whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion." *Id.* at 1100, 458 P.2d at 715, 80 Cal. Rptr. at 635. The *Lorenzana* court did not address this issue. It used language consistent with both predictive and normative reasonability. It indicated that Lorenzana's expectation of privacy was reasonable because the public had not been expressly or implicitly invited to the point from which the police observed him, thus suggesting that his expectations, though mistaken, were predic-

"*Katz* rule permits the resident of a house to rely justifiably upon the privacy of the surrounding areas" as protected from police intrusion.[20] However, the court qualified this rule with the dictum that if the public is expressly or impliedly invited to these surrounding areas, the resident is not justified in expecting privacy from the observations of police who stand upon such ground.[21] The notion of express or implied invitation is arguably consistent with *Katz*: activities exposed to public-use areas cannot generally be expected to be kept private. But it does not follow that simply because an area is open to public use, any expectations of privacy are unreasonable.

Alternatively stated, the *Lorenzana* court held that a resident cannot reasonably expect privacy from the observations of a police officer standing upon public-use ground. The majority's reasoning depends entirely on the assumption that commonly used areas on private property, such as footpaths from a public sidewalk to the door of the house, extend an implied invitation to the public to use those areas. It is this implied invitation that justifies an officer's presence in such areas and legitimizes any observation he makes. However, the court offers no authority for this position. The assumption itself is not irrational, but neither is it self-evident. At any rate, the assumption is one that should be carefully scrutinized, for on that one premise rests the court's whole distinction between permissible and impermissible viewing areas—a distinction that, under *Lorenzana*, will be of decisive importance in similar cases of police surveillance.

The assumption that the existence of common-use areas constitutes an invitation to use such areas is faulty for at least two reasons. In the first place, the case law of trespass[22] furnishes no basis for the implied invitation theory. Presence without express permission creates at least a technical trespass, yet trespass cases have not suggested that footpaths provide an implied invitation to use the property.[23]

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tively reasonable. But it concluded that the "questioned police procedure too closely resembles the process of the police state," indicating a normative sense of reasonable. 9 Cal. 3d at 629, 511 P.2d at 35, 108 Cal. Rptr. at 587.

20. 9 Cal. 3d at 638, 511 P.2d at 42, 108 Cal. Rptr. at 594.

21. *Id.*

22. The existence of a technical trespass, however, does not determine whether or not a fourth amendment violation has occurred. *See* Katz v. United States, 389 U.S. at 353. For a commentary on earlier California cases, see Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CALIF. L. REV. 421, 434 (1962).

23. *See, e.g.*, Bauman v. Beaujean, 244 Cal. App. 2d 384, 389, 53 Cal. Rptr. 55, 58 (5th Dist., 1966): "'Every unauthorized entry on another's property is a trespass, and any person who makes such an entry is a trespasser.'" *See also* MacLeod v. Fox West Coast Threatres Corp., 10 Cal. 2d 383, 74 P.2d 276 (1937). More importantly, the cases relied on by the court in formulating its rule do not speak of implied invitations; rather, they speak generally of expectations of privacy in the particular area, or of the officer's "right" to be there, without indicating the origin of that right.

Secondly, even if it were conceded that the owner of a house opens for public use areas such as his footpaths and porches, it does not follow that this invitation extends to all persons for all conceivable purposes. If a path to the door is an implied invitation, it seems more reasonable to assume that the scope of the invitation, and a fortiori the scope of the right to be there, includes only the purpose of the invitation, *i.e.*, access to the door for those having business with the residents. The invitation hardly includes permission to the public to loiter or to use the path to spy more effectively on the house and its occupants. Under the court's reasoning, however, the effect is exactly that: If the police can only find some area "opened to the public" they may, once there, apparently engage in any activity that affords them a favorable position to spy into the house, subject to the sole condition that their feet remain planted on the proper patch of ground.

II. AN ALTERNATIVE: THE NORMAL-USE RULE

The distinction in *Lorenzana* between public- and private-use areas establishes a questionable dividing line between an individual's reasonable and unreasonable expectations of privacy. If it smacks of the police state to allow police officers to creep up to the windows of residential buildings to peer inside,[24] then it ought not to matter which windows the officers choose. The court should instead adopt a rule genuinely employing the rationale underlying the *Katz* principle and the "plain view" rule: Police observation of the interior of a residence is not a search only if it involves no closer scrutiny than that which the public normally would give the house. Put another way, the police engage in a search when they subject the house to a more prolonged or intensive gaze than that of an average passerby.

This rule would restrict such police observation to that which is truly in the plain view of the public: the wide-open window or the object left openly on the ground.[25] It would prevent the police from

24. 9 Cal. 3d at 629, 511 P.2d at 35, 108 Cal. Rptr. at 587.

25. One recent example of the type of situation properly included in the plain view exception is Marshall v. United States, 422 F.2d 185 (5th Cir. 1970), which found that no search occurred where a police officer glanced into an automobile at night in a public parking lot with the aid of a flashlight. The court noted that the officer did not suspect any crime and that he had been asked by a bystander to see if the occupant of the car needed assistance. The court further noted that the result might be different if the officer's original intent was to search for evidence of crime: "A probing, exploratory quest for evidence of crime is a search governed by Fourth Amendment standards whether a flashlight is used or not. . . . [T]he plain view rule must be upheld where the officer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory." 422 F.2d at 189. The proposed normal-use test would not require inadvertent discovery, as *Marshall* seems to require; instead, it requires only that the police scrutiny, though it may be done investigatively, be no more intrusive than the scrutiny normally to be expected from a non-investigative

engaging in the type of activity criticized in *Lorenzana*—the surreptitious crouching beneath the window, the face pressing up against the windowpane, the peering through the tiny aperture inadvertently left in the drawn curtains. Such behavior would properly be condemned as an unlawful search. Unlike the *Lorenzana* test, however, the proposed test would eliminate all such activity unless the police obtain a warrant or one of the exceptions to the warrant requirement applies.

The normal-use test would focus on the purposes of the implied invitation to the public and the time of the day when the invitation ordinarily remains open.[26] It would eliminate the kind of clandestine window-peeking employed in *Lorenzana*, even if it were done by an officer standing in a driveway or on a commonly used walkway. Such close, prolonged scrutiny[27] would run afoul of the requirement that the nature of the observation be consistent with the purpose and scope of the invitation to the public.

The proposed test lacks the certainty which appears to commend *Lorenzana*. *Lorenzana* asks only where the policeman was standing. Police, in their activities, can be relatively certain that their observation will be permissible if they are in a common-use area. Under the proposed test, which considers all the circumstances of public use, the police may sometimes have to guess whether they can make a permissible observation from a given spot.[28] Further, evidentiary problems may be greater with the normal-use test as it requires a more careful examination of the nature of the public's use of the area. By striving for certainty, however, the *Lorenzana* test results in some ar-

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public. Thus, it would not disturb the admissibility of such observations as the one discussed in People v. Terry, 70 Cal. 2d 410, 454 P.2d 36, 77 Cal. Rptr. 460 (1969), where the police observed marijuana on the dashboard of a car parked in the garage of an apartment building, the garage being in common use by the tenants of the building.

26. *Lorenzana* looks only to the location of the officers, not to the time of day, though the latter affects the likelihood of privacy as much as the former. Presumably, one runs less risk of being observed by the public late at night than in the middle of the day. *Lorenzana* makes no provision for the time factor. In practice, the rule can lead to results such as that in People v. King, 234 Cal. App. 2d 423, 44 Cal. Rptr. 500 (2d Dist. 1965), *cert. denied*, 384 U.S. 1026 (1966). There, the police officers entered defendant's fenced yard late at night in order to stand on the porch and peer into a window through a gap in drawn blinds. The court found no unconstitutional search, although the officer testified his eye level during the observation was less than four feet from the floor of the porch, and he could not have seen inside from any other position. *Id.* at 426-27, 44 Cal. Rptr. at 502.

27. The observation in *Lorenzana* lasted over fifteen minutes, including two separate periods of observation. 9 Cal. 3d at 630, 511 P.2d at 36, 108 Cal. Rptr. at 588.

28. Even *Lorenzana* does not assure complete certainty. The extensive factual discussion in both the majority opinion and the dissent as to whether the six-foot grass strip in question was actually open to public use belies the certainty of the test. 9 Cal. 3d at 635-36, 644-45, 511 P.2d at 39-40, 46-47, 108 Cal. Rptr. at 591-92, 598-99.

bitrariness. Since the test stresses the physical location of the observing officer it will inevitably lead to situations where a search from one spot is not constitutional, while the same observation made from two feet away is entirely valid, even though such minute geographical differences may be utterly unrelated to anyone's expectations of privacy, reasonable or otherwise.

The proposed test would go beyond *Lorenzana* in its effect on existing law. It would encompass *Lorenzana* situations, but would also include sueh cases as *People v. Berutko*,[29] where the supreme court refused to suppress evidence obtained after a similar observation through a narrow gap in drawn drapes. The court there noted that the observing officer was in a common-use area of an apartment building and thus had a right to be on the spot from which he made his observations.[30] The proposed test, emphasizing the normal public use of the area, would prohibit such observations without warrants.

The normal-use test would also be in greater accord with the *Katz* rationale that "[w]hat a person exposes knowingly to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[31] The *Berutko* court quoted this point from *Katz*, and then immediately proceeded to say that when a person by his own action *or neglect* allows visual access to his residence, he may not complain of a police officer's observation through the aperture.[32] That rule, however, transforms the *Katz* test of knowing exposure into a much broader test, including accidental or unintended exposure, even where, as in *Berutko* and *Lorenzana*, the observed person has taken precautions to insure his privacy. *Lorenzana* reaffirms this departure from *Katz*; the proposed test would correct it.

Under *Berutko* and *Lorenzana*, people living in apartments with windows facing on common-use areas are constantly subject to police observation through even the smallest openings in curtains or drapes. Those living in private homes have much greater protection, since not all of their windows are subject to scrutiny. It would seem, however, that the reasonableness[33] of privacy expectations are similar in both cases. Where the windows are wide open, neither group of residents has a reasonable hope of privacy, but where public view is almost entirely screened, then the public is likely to respect both groups' expectations of privacy. And if, as the United States Supreme Court has indicated, the underlying principle is the protection of privacy,

29. 71 Cal. 2d 84, 453 P.2d 721, 77 Cal. Rptr. 217 (1969).
30. *Id.* at 91-94, 453 P.2d at 724-25, 77 Cal. Rptr. at 220-22.
31. 389 U.S. at 351-52.
32. 71 Cal. 2d at 93-94, 453 P.2d at 726, 77 Cal. Rptr. at 222.
33. See note 19 *supra*.

rather than property,[34] the proximity of screened windows to a porch or footpath should be of no legal significance.

CONCLUSION

The supreme court has struck down a particularly intrusive type of police surveillance in *Lorenzana.* In doing so, however, it has announced a general rule that fails to prohibit equally intrusive types of searches. In deciding when police observations from publicly used property constitute a search, the court should look to the extent of privacy that can normally be expected, according to the purpose and scope of normal public use of an area by citizens not investigating criminal activity.

Patrick W. Walsh

F. *Harsher Sentence or Retrial Following Erroneous Modification of a Jury Verdict*

People v. Serrato.[1] A jury found the defendants, Joe and Gloria Serrato, guilty of possessing a fire bomb, in violation of section 452 of the California Penal Code.[2] The trial court responded to defendants' motion for a new trial by modifying the verdict, imposing an alternative conviction for disturbing the peace[3] pursuant to section 1181(6) of the Penal Code.[4] The court placed each defendant on two years probation, upon condition that each pay a $125 fine.[5] On appeal

34. Warden v. Hayden, 387 U.S. 294, 304 (1967).

1. 9 Cal. 3d 753, 512 P.2d 289, 109 Cal. Rptr. 65 (1973) (Files, J., assigned by the Chairman of the Judicial Council.) (5-2 decision).

2. "Every person who possesses, manufactures or disposes of a fire bomb is guilty of a felony." CAL. PENAL CODE § 452(b) (West 1972). *See also* CAL. PENAL CODE § 18 (West 1972) (unless otherwise specified, a felony is punishable by imprisonment in the state prison for a period not exceeding five years).

3. 9 Cal. 3d at 757, 512 P.2d at 292, 109 Cal. Rptr. at 68. "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person . . . is guilty of a misdemeanor . . . ." CAL. PENAL CODE § 415 (West 1972).

4. 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:

> . . . .
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> 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed . . . .

CAL. PENAL CODE § 1181 (West 1972).

5. 9 Cal. 3d at 757, 512 P.2d at 292, 109 Cal. Rptr. at 68.

from the order granting probation,[6] the California Supreme Court reversed. It held that, since disturbing the peace is not a lesser included offense of the firebomb charge, the trial court's modification of the jury verdict exceeded the authority granted by section 1181. Moreover, because the firebomb charge provided the Serratos no notice of the possibility of being convicted for disturbing the peace, the court held that the modification violated due process requirements. Had there been no other error, the court would have remanded the case to superior court for a rehearing on the motion for a new trial;[7] an erroneous jury instruction, however, necessitated reversal.[8]

Although defendants succeeded in obtaining reversal, their victory may have cost them dearly, since the divided court also held that the erroneously modified verdict did not imply acquittal of the original felony offense. Because there was no implied acquittal, double jeopardy prohibitions[9] would not bar further prosecution of the defendants on the original firebomb charge.[10] More significantly the court asserted that if the defendants were found guilty on retrial, they could be sentenced to a greater punishment than the unauthorized sentence imposed by the trial court after its attempt to modify the verdict.[11]

While reversal turned on a simple error in instructing the jury, the *Serrato* decision has important implications for double jeopardy guarantees and the right of appeal. Future defendants who, like the Serratos, are erroneously convicted and sentenced, might well decide to forego appeal rather than expose themselves to the risk of greater punishment on retrial.

I. RETRIAL ON THE FIREBOMB CHARGE

a. *Implied acquittal*

Typically an implied acquittal is found when the defendant is convicted of a lesser included offense of the one charged.[12] In *Serrato,* however, the jury verdict was modified by the trial court and the de-

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6. Such an order is a judgment for the purpose of appeal. CAL. PENAL CODE § 1237(1) (West 1972).

7. 9 Cal. 3d at 765, 512 P.2d at 298, 109 Cal. Rptr. at 74.

8. *Id.* at 767, 512 P.2d at 299, 109 Cal. Rptr. at 75.

9. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

"No person shall be twice put in jeopardy for the same offense . . . ." CAL. CONST. art. 1, § 13.

10. 9 Cal. 3d at 760, 512 P.2d at 294, 109 Cal. Rptr. at 70.

11. *Id.* at 765, 512 P.2d at 298, 109 Cal. Rptr. at 74.

12. *See* Price v. Georgia, 398 U.S. 323 (1970); Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958). Implied acquittal also obtains when the trier of fact returns a verdict finding the defendant guilty of an unchanged and nonincluded offense. *See* note 13 *infra.*

fendants convicted of a lesser nonincluded offense. Despite this difference, the defendants argued that retrial on the more serious charge—possession of a firebomb—should still be barred.[13] They contended that an erroneous modification to a lesser nonincluded offense implies acquittal of the original, greater charge; the trial court's initial determination that there was insufficient evidence for conviction of the crime charged should remain valid, even if its subsequent step of imposing the modified verdict is found improper.[14] Emphasizing that a trial court reviewing the evidence prior to a modification is charged with the same responsibility conferred upon the triers of fact, the defendants noted that the trial judge has been termed "a thirteenth juror"[15] who, like the jury, is required to "judge the credibility of witnesses, determine the probative force of testimony, and weigh the evidence."[16]

The majority of the court in *Serrato* rejected the defendants' acquittal arguments after reviewing the history of a trial court's powers when confronted with a defendant's claim that his or her conviction is unsupported by the evidence.[17] At common law the authority of a trial court reviewing a verdict was limited solely to granting a new trial, and only the trier of fact had full power to acquit.[18] Section 1181(6) of the Penal Code amended the common law rule to obviate the need for a new trial when the trial court found that the evidence was sufficient to convict the defendant of a lesser included crime but not the greater.[19] The statute specifically allows departure from the common law rule only when guilt of a lesser included or lesser degree

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13. 9 Cal. 3d at 759, 512 P.2d at 293-94, 109 Cal. Rptr. at 69-70.

14. The defendants relied on *In re* Hess, 45 Cal. 2d 171, 288 P.2d 5 (1955), and People v. Schumacher, 194 Cal. App. 2d 335, 14 Cal. Rptr. 924 (2d Dist. 1961), to support their position that the trial judge's erroneous modification amounted to an implied acquittal of the firebomb charge and thus created a double jeopardy bar to retrial. In *Hess*, a man charged with rape received a jury verdict of contributing to the delinquency of a minor, a lesser nonincluded offense. The supreme court held that double jeopardy barred retrial on the original charge. The same result obtained in *Schumacher*, where a conviction by a trial court of a lesser-nonincluded crime was held to bar retrial on the original offense. But the defendants disregarded the facts which distinguish these cases from *Serrato*. In *Hess*, as in *Schumacher*, the trier of fact did not convict the accused on the original charge; instead, it attempted to convict on a lesser nonincluded offense. In *Serrato*, however, the jury convicted the defendants of the original charge; thus there was no basis for inferring the existence of an implied acquittal.

15. People v. Megladdery, 40 Cal. App. 2d 748, 785, 106 P.2d 84, 103 (1st Dist. 1940).

16. People v. Sheran, 49 Cal. 2d 101, 109, 315 P.2d 5, 10 (1957).

17. 9 Cal. 3d at 760-61, 512 P.2d at 294, 109 Cal. Rptr. at 70. *See also* Estate of Bainbridge, 169 Cal. 166, 146 P. 427 (1915).

18. *See* People v. Amer, 151 Cal. 303, 305, 90 P. 698, 699 (1907).

19. *See* People v. Kelley, 208 Cal. 387, 391-92, 281 P. 609, 610 (1929).

crime has been established.[20] In *Serrato*, since neither the court nor the triers of fact found the defendants guilty of a lesser included offense, the conditions of section 1181(6) were not met.

As the court pointed out, however, even a proper modification pursuant to section 1181(6) would not necessarily have to be characterized as an implied acquittal of the greater charge.[21] Rather, if the modified verdict ripened into a final judgment of conviction, the conviction itself would bar prosecution for the greater offense, not because of an implied acquittal but because of the rule that a conviction of a lesser offense bars prosecution of another offense of which the lesser is a part.[22] The court thus attempted to distinguish the function of the trier of fact from the reviewing function, which can be performed either by an appellate court or by the trial court in considering a motion for a new trial. In attempting to modify the verdict under the authority granted by section 1181(6), the trial court was performing a reviewing function and not acting as the trier of fact. While "there may be an implied finding that the evidence does not support the conviction of the offense charged,"[23] such a finding by a reviewing court could only result in an order for a new trial[24] since only the trier of fact can acquit.

The court saw an additional problem if it were to hold that trial courts performed a function comparable to that of the trier of fact, with equal power to acquit, in the context of verdict modification. By the same logic, it said, when insufficient evidence required the trial court to set aside a jury verdict and order a new trial, that ruling would also be tantamount to an implied acquittal barring further prosecution.[25] While a trial court may be called a "thirteenth juror," that does not mean it is entitled to cast a vote for acquittal.

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20. CAL PENAL CODE § 1181(6) (West 1972). See note 4 *supra*.

21. 9 Cal. 3d at 762, 512 P.2d at 295, 109 Cal. Rptr. at 71. Whether a proper modification would be so characterized is "open to question." *Id.* Later in its opinion, however, the majority flatly stated that "[a] court reviewing the verdict under section 1181 has no authority to acquit the defendant expressly, impliedly or inadvertently." *Id.* at 762, 512 P.2d at 296, 107 Cal. Rptr. at 72.

22. *Id.* at 761-62, 512 P.2d at 295, 109 Cal. Rptr. at 71. *See* People v. Greer, 30 Cal. 2d 589, 184 P.2d 512 (1947).

23. 9 Cal. 3d at 762, 512 P.2d at 295, 109 Cal. Rptr. at 71.

24. *Id.* Moreover, the court found it impossible to determine precisely what the trial judge had concluded regarding the firebomb charge, since

> [L]ogic does not reveal any fact-finding which would support a modification to an offense neither charged nor proved. What appears is that the trial court desired to exercise an unauthorized leniency. The fact that the court imposed probation and a fine implies the court found that the defendants were guilty of some offense. But if they are not being punished for the offense found by the jury, we have no clue to any other basis of punishment.

Id. at 762-63, 512 P.2d at 296, 109 Cal. Rptr. at 72.

25. *Id.* at 760, 512 P.2d at 294, 109 Cal. Rptr. at 70.

The minority opinion in *Serrato* took issue with the majority's rejection of the implied acquittal argument.[26] It argued that the trial court must have decided the defendants were innocent of the firebomb charge before it proceeded to find them guilty of the misdemeanor charge. The trial court picked the "wrong misdemeanor,"[27] but the first step of its analysis remained intact. The minority chose to overlook the majority's conclusion that even if the trial court in its reviewing function found the evidence would not support the firebomb charge, all it could do was order a new trial or modify the verdict pursuant to the limited mandate of section 1181(6). Rather than comment on the fine line the majority drew between the trial court's reviewing and fact-finding functions, the minority asserted that an implied acquittal should not depend on the "razor-sharp" distinction between lesser-included and lesser-nonincluded offenses.[28]

While it is true that in some contexts the line between lesser included and lesser nonincluded offenses may seem tenuous, the dissent failed to acknowledge the compelling justification, demonstrated in *Serrato* itself, for establishing a statutory distinction between the two classes of crimes. When a defendant is convicted of a lesser nonincluded offense, due process is violated, for the defendant did not receive notice that he or she could have been convicted of that crime.[29] When a defendant does not receive notice, he or she is ill-equipped to assess alternatives, rebut evidence, or establish a defense strategy. In the case of lesser included offenses and lesser degree crimes, however, that essential due process requirement is satisfied because notice of the greater charge automatically furnishes notice of the lesser. Section 1181(6) satisfies this due process requirement by denying authority to modify except where guilt of a lesser included offense has been proved.[30] However, since the minority opinion concurred in holding

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26. Justice Mosk, whose opinion Justice Tobriner joined, concurred in part and dissented in part. He agreed that the verdict modification was improper and the jury instruction erroneous, but he departed from the majority opinion on the issues of implied acquittal and punishment on retrial. 9 Cal. 3d at 767, 512 P.2d at 299, 109 Cal. Rptr. at 75.

27. *Id.* at 771, 512 P.2d at 301, 109 Cal. Rptr. at 77.

28. *Id.* at 769, 512 P.2d at 300, 109 Cal. Rptr. at 77. The distinction between lesser included offenses and lesser degree crimes was abandoned by the supreme court in Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958). The court held that a defendant could not be convicted of a higher degree of a crime after his lower-degree conviction had been reversed. Prior to this decision, although a conviction of a lesser included offense was considered an acquittal of the greater offense, a conviction of a lesser degree crime did not imply acquittal of the greater degree crime.

29. *See In re* Hess, 45 Cal. 2d 171, 175, 288 P.2d 5, 7 (1955). The court held that due process had been violated since the defendant had received no notice that he could be convicted of a lesser non-included offense.

30. CAL. PENAL CODE § 1181(6) (West 1972). See note 4 *supra*.

that the trial court exceeded its jurisdiction in attempting to modify the verdict, Justices Mosk and Tobriner would presumably recognize the distinction when ignoring it would violate due process, but discard it when an implied acquittal could be found.

b. Other double jeopardy issues

As indicated earlier, *Serrato* involved a conviction on the original charge.[31] Following that determination, the trial court impermissibly modified the verdict. While the modification was properly voided as being jurisdictionally unsound, the jury verdict remained intact, since it was unaffected by the subsequent impropriety of the purported modification and since the court rejected the implied acquittal argument. Had there been no other error, the supreme court would have remanded the case to superior court for rehearing of the defendants' motion for new trial.[32] There was, however, another error which the court found to have tainted the jury verdict.[33] In his instructions to the jury, the trial judge made informal remarks which could have been interpreted as reversing the burden of proof on the only contested factual issue in the case.[34] This error, which the court could not find harmless,[35] necessitated reversal. As the minority opinion pointed out, had defendants accepted the erroneous judgment, or had they appealed and lost, they would have remained "simple misdemeanants, enjoying probation upon payment of a modest fine."[36] Their victory, however, subjected them to the possibility of a second trial on the felony charge. This situation raised interesting double jeopardy issues which neither opinion satisfactorily resolved.

The majority discussed double jeopardy only in a passing reference to the role of waiver when a defendant appeals a judgment. It noted that "a defendant who has succeeded in having his conviction set aside impliedly waives any objection to being retried on the charge of which he was convicted."[37] The minority relied on this principle to argue that the defendants had not impliedly waived their defense of former jeopardy to the firebomb charge. The Serratos did not appeal from a conviction on the original firebomb offense; rather, they sought reversal of the disturbing the peace conviction.[38] Consequently, the dissent asserted that the only waiver which could be logically implied would remove the bar against retrial for disturbing the peace; the

31. 9 Cal. 3d at 757, 512 P.2d at 292, 109 Cal. Rptr. at 68.
32. *Id.* at 765, 512 P.2d at 298, 109 Cal. Rptr. at 74.
33. *Id.* at 767, 512 P.2d at 299, 109 Cal. Rptr. at 75.
34. *Id.* at 766, 512 P.2d at 298, 109 Cal. Rptr. at 74.
35. *Id.* at 767, 512 P.2d at 299, 109 Cal. Rptr. at 75.
36. *Id.*
37. *Id.* at 759, 512 P.2d at 294, 109 Cal. Rptr. at 70.
38. *Id.* at 768, 512 P.2d at 300, 109 Cal. Rptr. at 76.

defendants had relinquished no rights pertaining to the firebomb offense.[39] As jeopardy attached when the jury was first impaneled,[40] the minority concluded that retrial on the latter charge would violate double jeopardy prohibitions.[41]

But in relying on the waiver doctrine, both the majority and minority opinions reflect a superficial analysis of double jeopardy protections. First, as Justice Mosk pointed out,[42] the "well-accepted" waiver theory was expressly discredited by the United States Supreme Court in *Green v. United States.*[43] Second, the court failed to examine other theories that might justify retrial on the original charge. For example, it might have reasoned that the initial instance of jeopardy continued since the conviction was not final and the defendants had not been acquitted.[44]

More to the point, however, the court could have held forthrightly—after it rejected implied acquittal—that double jeopardy does not bar retrial when a conviction is erroneously modified. The double jeopardy doctrine was established to protect defendants from repeated attempts to convict for an alleged offense.[45] In *Serrato,* the prosecutor was successful in his initial effort; the jury found defendants *guilty* of the firebomb felony charge. Subsequent retrial thus would not improperly disadvantage the defendants, so long as they were not tried on a more serious charge than the firebomb offense of which they had been originally convicted.[46]

Without further clarification, however, the court's conclusion that the Serratos could be retried on the firebomb charge would give the state inordinate prosecutorial discretion. Because jurisdictional errors are subject to correction whenever they are discovered,[47] the prosecutor

39. The defendants, however, did appeal the jury instructions given in the firebomb trial, and the court could have concluded that by appealing this aspect of their conviction the Serratos impliedly waived the defense of former jeopardy.

40. Downum v. United States, 372 U.S. 734 (1963). *See also* United States v. Sisson, 399 U.S. 267 (1970).

41. 9 Cal. 3d at 772, 512 P.2d at 302, 109 Cal. Rptr. at 78.

42. *Id.* at 768, 512 P.2d at 300, 109 Cal. Rptr. at 76.

43. 355 U.S. 184 (1957). The court held that when a defendant successfully appealed his second degree murder conviction, he had not waived his double jeopardy guarantee against being retried for first degree murder. The court observed that waiver "connotes some kind of voluntary knowing relinquishment of a right," and that when a defendant must give up a valid defense to one offense in order to challenge a conviction for another, the element of voluntariness ceases to exist. *Id.* at 191-92.

44. *See id.* at 189.

45. *Id.* at 187.

46. While retrial may result in a greater sentence than that imposed for the modified conviction, this inequity is better remedied by limiting punishment on retrial than by precluding retrial altogether. See section II *infra.*

47. 9 Cal. 3d at 763, 512 P.2d at 296, 109 Cal. Rptr. at 72. *See also In re* Sandel, 64 Cal. 2d 412, 412 P.2d 806, 50 Cal. Rptr. 462 (1966).

could wait until some propitious moment and then challenge the erroneous modification in order to obtain a new trial on the original charge. Thus, even if defendants did not appeal, they could be forced again to endure the humiliation and hardship of another trial. It is unfortunate that the court failed to address this disturbing implication of the *Serrato* holding. In the future, courts should not rely on *Serrato* in permitting prosecutors to initiate new proceedings if the state has failed to file timely appeal of an erroneous modification. Statutory limitation would be an appropriate means of restricting prosecutorial discretion following misapplications of section 1181(6).[48]

II. THE IMPOSITION OF HARSHER PUNISHMENT ON RETRIAL

Having held that the Serratos could be retried on the firebomb charge, the court considered in dictum what sentence could properly be imposed following the second prosecution. Defendants had argued in the alternative that the rule of *People v. Henderson*[49] would protect them on retrial against punishment more severe than the trial court's imposition of a fine and probation.[50] Before that decision, substantial disagreement existed as to whether a defendant who successfully appealed could be subjected on retrial to a greater punishment than that originally imposed. In *Henderson,* the supreme court held that a defendant's right of appeal was unreasonably impaired when a court required him to choose between allowing "an erroneous conviction to stand unchallenged and appealing therefrom at the cost of forfeiting a valid defense to the greater offense."[51] Under this rationale, the *Henderson* court refused to allow a defendant, who had successfully appealed a second degree murder conviction, to be sentenced for first degree murder after retrial. In re *Ferguson*[52] followed the *Henderson* precedent by invalidating a defendant's prison sentence, since his first conviction had resulted in a shorter term in the county jail.[53] *Ferguson* reiterated that double jeopardy guarantees prohibit a court from forcing a defendant to expose himself to a long prison sentence in order

48. Perhaps the best solution would be a statutory provision specifying that a prosecutor cannot object to an erroneous modification subsequent to the expiration of the normal period allowed for appeal.

49. 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

50. 9 Cal. 3d at 763, 512 P.2d at 296, 109 Cal. Rptr. at 72.

51. 60 Cal. 2d at 496, 386 P.2d at 685, 35 Cal. Rptr. at 85. The court held that the double jeopardy clause prohibited a more severe sentence on retrial. The federal double jeopardy clause is now applicable to the states, but it does not necessarily prohibit the imposition of a harsher sentence on retrial. The defendant, however, is entitled to credit any time served to the new sentence. *See* North Carolina v. Pearce, 395 U.S. 711 (1969). *Pearce* was not in effect when *Henderson* was decided.

52. 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (2d Dist. 1965).

53. *Id.* at 82, 43 Cal. Rptr. at 327.

to appeal an erroneous conviction.[54]

Despite the *Henderson* rule barring harsher sentences on retrial, *Serrato* implied that if the defendants were retried and convicted on the firebomb charge, they could receive a more severe sentence than had been previously imposed. The court relied on several cases that permitted the imposition of harsher punishment when the original sentence was not authorized under the controlling statute.[55] In *People v. Massengale*,[56] for example, a court of appeal held that *Henderson* did not apply when a trial court exceeded its jurisdiction by imposing an unauthorized sentence. The court reasoned that since jurisdictional errors are subject to correction whenever discovered, regardless of whether an appeal has been taken, judicial repair of such mistakes cannot be considered a penalty for exercising the right of appeal.[57]

In light of the distinction drawn in *Massengale* and its predecessors[58] between lawful sentences and those imposed in excess of a court's jurisdiction, the *Serrato* decision cannot be considered devoid of precedential support. As a matter of simple justice, however, there is reason to be dissatisfied with the result of this line of cases.

Clearly the defendants would have avoided the more serious punishment had they not exercised their right of appeal. The prosecution had evidenced no desire to appeal the modification; indeed, it could be argued that the Deputy District Attorney consented to the misdemeanor conviction.[59] Moreover, the prosecutor, unlike the defense attorney, usually would not have the time or incentive to review a case in which a conviction had been obtained. It is apparent that, as a practical matter, the defendants' exertion of their right of appeal was the prime cause of their being re-exposed to the more serious firebomb charge. To obviate this restraint of the right of appeal, the court should have held that the sentence imposed for the disturbing the peace conviction created a maximum limit to the sentence prescribable on retrial for the firebomb charge. In its failure to so specify, the *Serrato* decision reflects gross insensitivity to the realities of the criminal process.

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54. *Id.*

55. *See In re* Sandel, 64 Cal. 2d 412, 412 P.2d 806, 50 Cal. Rptr. 462 (1966) (where Adult Authority exceeded its jurisdiction by imposing sentences that ran consecutively rather than concurrently, the court held that a sentence correction could be made when the error was discovered notwithstanding the double jeopardy clause); People v. Massengale, 10 Cal. App. 3d 689, 89 Cal. Rptr. 237 (2d Dist. 1970) (discussed in text accompanying note 50 *infra*); People v. Orrante, 201 Cal. App. 2d 553, 20 Cal. Rptr. 480 (1st Dist. 1962) (trial court exceeded its jurisdiction by granting probation).

56. 10 Cal. App. 3d 689, 89 Cal. Rptr. 237 (2d Dist. 1970).

57. *Id.* at 693, 89 Cal. Rptr. at 239.

58. *See* cases cited in note 49 *supra.*

59. 9 Cal. 3d at 758, 512 P.2d at 293, 109 Cal. Rptr. at 69.

CONCLUSION

Of primary significance in *Serrato* was the court's treatment of the implied acquittal and sentencing issues created as the result of an unauthorized modification under section 1181(6) of the Penal Code. In its handling of the implied acquittal question, the supreme court properly recognized that when a trial court departs from the statutory mandate, it can impose a new trial but it has no power to acquit. In the area of verdict modifications, section 1181(6) defines the scope of the trial court's jurisdiction; when that jurisdiction is exceeded, the purported judgment is void.[60]

While its disposition of the implied acquittal issue may have been correct, the court did not adequately resolve the problem of proper sentencing on retrial. By concluding that an unauthorized verdict suspended operation of the *Henderson* rule barring harsher sentences on retrial, the court failed to acknowledge in *Serrato* the practical implications of the decision on the right of appeal. Given the law as it now stands, there can be little doubt that if the Serratos were again faced with the decision to appeal, they would eschew their right, confident at least that they would never have to face the firebomb charge again.

Scott W. Sonne

G. *Public Safety Exception to Right to Bail*

In *re Underwood*.[1] Article I, section 6 of the California Constitution provides in part that "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great."[2] In *Underwood*, the court held that this language and the statutory provisions implementing it do not contemplate a "public safety" exception to the right to bail in noncapital cases.[3]

Underwood, a student at the University of California at Santa Barbara, was first arrested for possession of two sawed-off shotguns and two live shotgun shells. Bail was set at $500 and petitioner was released after posting that amount. One or two days later, a package containing a pipe bomb was sent to the police station at which peti-

60. People v. Orrante, 201 Cal. App. 2d 553, 558-59, 20 Cal. Rptr. 480, 483-484 (1st Dist. 1962). *See* cases cited in note 49 *supra*.

1. 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973) (Wright, C.J.) (6-1 decision).
2. CAL. CONST. art. 1, § 6.
3. 9 Cal. 3d at 350, 508 P.2d at 724, 107 Cal. Rptr. at 404.

tioner had been booked. A subsequent search of petitioner's residence and automobile revealed numerous articles of the type used in the construction of such bombs. Petitioner was again arrested but this time the court refused to set bail.[4] In so doing, the lower court relied essentially on the "public safety exception," a judicial qualification of the right to bail which would permit the denial of bail in cases where such a denial would serve to protect society or the defendant himself.[5] Petitioner attacked the denial by writ of habeas corpus, arguing that the public safety exception accorded with neither the constitutional nor statutory mandates which govern the right to bail in noncapital cases.[6] In sustaining these contentions, the California Supreme Court substantially clarified the purpose of the criminal bail system in California. The extent to which the court will be willing to accept the ramifications of the position it has taken in *Underwood* remains, however, an important and unsettled question.

The court premised its result on the language and history of article I, section 6 of the California Constitution. The court first acknowledged that the United States Supreme Court had held that the eighth amendment proscription of excessive bail does not prohibit the denial of bail under certain circumstances in noncapital cases.[7] While the California constitutional provision derives from the eighth amendment, the court found that the conscious addition of the sentence beginning "all persons shall be bailable" evidenced an intent to preclude such a qualification of the right to bail in noncapital cases.[8] In arriving at this interpretation of the state constitution, the court firmly established that the only purpose of the California criminal bail system is to ensure the presence of a defendant when his presence is required.[9]

Justice Burke vehemently dissented on two grounds. First, he argued that however absolute the right to bail initially, the grant thereof carried with it a condition of good behavior which, if violated, justified the revocation of the right.[10] Second, he asserted that the language of the state constitution was reasonably susceptible to an interpretation permitting an exception to the otherwise absolute right to bail in cases where necessary to promote public safety. In support of this

4. *Id.* at 346-47, 508 P.2d at 721-22, 107 Cal. Rptr. at 401-02.

5. *Id.* at 347, 508 P.2d at 722, 107 Cal. Rptr. at 402.

6. *Id.* at 346, 508 P.2d at 721, 107 Cal. Rptr. at 401.

7. *Id.* at 349, 508 P.2d at 723, 107 Cal. Rptr. at 403. The eighth amendment to the United States Constitution provides: "Excessive bail shall not be required, nor cruel and unusual punishment inflicted." The United States Supreme Court has held that this language permits the denial of bail in certain circumstances. Carlson v. Landon, 342 U.S. 524 (1952).

8. 9 Cal. 3d at 349-50, 508 P.2d at 724, 107 Cal. Rptr. at 404.

9. *Id.* at 348, 508 P.2d at 723, 107 Cal. Rptr. at 403.

10. *Id.* at 352, 508 P.2d at 726, 107 Cal. Rptr. at 406.

interpretation he adduced constructions of similarly worded provisions in other state constitutions.

Part I of this Note assesses the position of the majority and that of the dissent in terms of prior California decisions and the historical characteristics of bail. Part II probes the potential significance of the *Underwood* opinion for the future of the criminal bail system and the concept of preventive detention in California.

I. THE LEGAL AND HISTORICAL BACKGROUND OF UNDERWOOD

A survey of the legal and historical development of bail in California indicates that the *Underwood* result was by no means a foregone conclusion; rather, the opinion represents a conscious policy decision on an issue of constitutional interpretation on both sides of which there is adequate support.

a. The majority position

Several aspects of the history of bail in California support the conclusion reached by the majority. First, the scant constitutional history which exists suggests that the language, "all persons shall be bailable . . . unless for capital offenses," was inserted explicitly to consitutionalize the common law of bail.[11] At common law bail was available as a matter of right in all noncapital cases and its only purpose was to ensure the defendant's presence at trial.[12] The common law rationale for the exception to bail in capital cases reflects this purpose. As Blackstone expressed it, ". . . what is there that a man may not be induced to forfeit, to save his own life . . . . Such persons have no other sureties but the four walls of the prison."[13]

Second, with one major exception,[14] the statutory provisions implementing article I, section 6 of the constitution corroborate the contention that preconviction bail was intended to be a matter of right and that the sole purpose of bail is to ensure a defendant's presence when required. Section 1271 of the Penal Code, the basic implementing provision for noncapital cases, reiterates the constitutional mandate in somewhat stronger language: "[I]f the charge is for any other [than capital] offense, he may be admitted to bail before conviction, as a matter of right."[15] Further, the conditions which may be attached to

11. REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 293 (1849).

12. 4 W. BLACKSTONE, COMMENTARIES *296.

13. *Id.* at *297-98.

14. *See* CAL. PEN. CODE § 1275 (West 1972) (relating to the amount of bail). Section 1275 of the code is considered at length in Parts I.b. and II.b. *infra*.

15. CAL. PEN. CODE § 1271 (West 1972).

bail delineated in section 1273[16] relate only to ensuring the defendant's presence at requisite times.[17]

Additionally, the lower court cases relied upon by the trial court and disapproved by the majority provide less support for a public safety exception to bail than their language might suggest. In each case, the defendant was admitted to bail even though his behavior arguably justified detention for the protection of the public.[18] Thus, despite their doctrinal development of a public safety exception to bail, the lower California courts have been loath to use it to deprive even allegedly dangerous individuals of their pre-trial liberty.[19]

b. The position of the dissent

Despite the strength of the majority position when measured against the origins of bail at common law and in California, public

16. CAL. PEN. CODE § 1273 (West 1972).

17. In addition, two prior California Supreme Court cases have held explicitly that the purpose of bail is to ensure the defendant's presence in court when required. People v. United Bonding Ins. Co., 5 Cal. 3d 898, 489 P.2d 1385, 98 Cal. Rptr. 57 (1971); *In re* Newbern, 55 Cal. 2d 500, 360 P.2d 43, 11 Cal. Rptr. 547 (1961).

18. Bean v. County of Los Angeles, 252 Cal. App. 2d 754, 60 Cal. Rptr. 804 (2d Dist. 1967), involved an action against a surety company which had posted bail for a defendant who failed to appear for sentencing. The defendant allegedly suffered from a mental illness and the principal issue in the case was the effect of such an illness on the surety's obligation to ensure defendant's presence at a requisite time. The language of "public safety" was wholly extraneous to the resolution of this issue.

In re Gentry, 206 Cal. App. 2d 723, 234 Cal. Rptr. 208 (2d Dist. 1972), presented the issue whether a defendant loses his right to bail merely by virtue of entering a plea of not guilty by reason of insanity. The court answered this question in the negative and ordered the defendant to be returned to freedom pending trial. The court did, however, note that in certain cases the denial of bail might be proper for the protection of the public.

In *In re* Henley, 18 Cal. App. 1, 121 P. 933 (3d Dist. 1912), the defendant was addicted to narcotics and had been denied bail by the magistrate, evidently for this reason. Despite its recognition of the availability of the public safety exception in certain circumstances, the court voided the action of the magistrate and ordered that the defendant be admitted to bail.

Of the four cases cited by the court, only Evans v. Municipal Court, 207 Cal. App. 2d 633, 24 Cal. Rptr. 633 (2d Dist. 1962) involves even a colorable "public safety" denial of bail. In that case defendant was arrested for driving while intoxicated and was detained for four hours in order to allow him to sober up. The court sustained the propriety of his detention on the ground that the right to bail does not comprehend the right to instant release in a case where such a release would endanger the public.

19. Perhaps the most striking example of this reluctance to use the public safety exception is a case not discussed in *Underwood, In re* Westcott, 93 Cal. App. 575, 270 P. 247 (2d Dist. 1928). In that case defendant was charged with murder and his sanity was in doubt. Further, he had been tried and found guilty twice before, in the first case the conviction having been overturned on appeal and in the second case, the verdict having been set aside on motion for a new trial. Despite the strong showing of dangerousness, the court refused to utilize either the capital offense exception or the public safety exception to deny defendant bail.

safety considerations have had an often unstated but persistent influence on the jurisprudence of bail in this state and elsewhere. This influence has manifested itself in a variety of ways. First, the statutory implementation of the constitutional right to bail, section 1275 of the Penal Code, authorizes the court to consider the seriousness of the offense, the criminal record of the defendant, and the probability that he will appear when required.[20] Although the implications of *Underwood* for the future of section 1275 will be considered in detail later, it is worth noting at this point that the authorization in that section suggests the legislature may not have seen the sole purpose of bail to be ensuring the presence of defendant at appropriate times.[21]

Second, the California courts have at times indicated that the bail system comprehended both the purpose of ensuring defendant's presence and the purpose of protecting the public. In addition to the lower court cases discussed earlier,[22] the recent supreme court case, *People v. Anderson*,[23] furnishes a striking example of the vitality of the public safety aspect of bail. In that case the court held the death penalty to be unconstitutional but determined that the decision would not affect the right to bail in cases involving offenses for which the death penalty was previously authorized.[24] The court justified this result on the ground that "the underlying gravity of those offenses endures and the determination of their gravity for the purpose of bail continues unaffected by this decision."[25] The view of bail announced in *Underwood* vitiates the rationale of this position: If the sole purpose of bail is to ensure defendant's presence when required, it follows that the distinguishing feature of capital offenses for bail purposes inheres in the nature of the punishment and its likely effect on the defendant's urge to flee.[26] Concern for the "gravity" of formerly capital offenses, after

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20. CAL. PEN. CODE § 1275 (West 1972). It is, of course, possible that the first and second of these factors are relevant only to the extent they bear on the third. This, indeed, would seem to be the only permissible construction of the section. See Part II.b *infra*. If such a construction were the desire of the legislature, however, section 1275 represents a misleading way to express it.

21. No argument is made here that in *Underwood* the court should have felt itself bouud by the legislature's view of bail evinced in section 1275. Rather that view is relevant only as an iudication of the ambiguity which historically has characterized the purpose of bail in California. See Section I.c. *infra*.

22. See note 18 *supra* and accompanying text.

23. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

24. *Id.* at 657 n.45, 493 P.2d at 899-900 n.45, 100 Cal. Rptr. at 171-72 n.45.

25. *Id.*

26. It could be argued that the capital offense exception responds both to the need to prevent pretrial flight and the need to protect society. Such an argument, however, is inconsistent both with the common law rationale for the capital exception (see note 13 *supra* and accompanying text) and with the *Underwood* assertion that the sole purpose of bail is to ensure a defendant's presence when required. See text accompanying note 9 *supra*.

these offenses have been stripped of the characteristic which set them apart from other crimes, can only represent a recognition of the public safety implications of those offenses.[27] *Anderson*, then, indicates a "public safety" undercurrent to the supreme court's view of bail existed as recently as two years prior to *Underwood*.

Finally, other states have construed similarly worded constitutional provisions to permit the use of the bail system to protect the public.[28] Although the cases which the dissent cites on this point involve not the denial of bail but rather conditions on the grant of bail, arguably the conditions in issue all related to public safety.[29] By way of buttressing the argument for a like interpretation of article I, section 6, Justice Burke points to article I, section 1 of the constitution, which guarantees the right to obtain safety and happiness.[30] His contention on this score seems to be that a constitution cannot rationally provide that its adherents shall "obtain" safety unless it also provides them with

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27. It is interesting to note that two other state supreme courts, when confronted with the question of bail for an offense for which the death penalty had been removed by legislative or court action, reached a result contrary to the position announced in *Anderson*. *See* State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972). In *Johnson*, the court specifically noted and criticized the California resolution of this question. 61 N.J. at 359 n.3, 294 A.2d at 249-50 n.3.

28. *See, e.g.*, Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970); State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972).

29. Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), concerned constitutionality of an Arizona statute which authorized the revocation of bail upon a showing of probable cause that the accused had committed a felony while free. The Arizona Constitution contains a provision for bail identical to the first sentence of article I, section 6 of the California Constitution (see text accompanying note 2, *supra*). The court held that the statute in question did not offend the Arizona Constitution, relying primarily on the tortured argument that a second arrest would increase the defendant's urge to flee so dramatically that there might be no "sufficient sureties" short of detention. 106 Ariz. at 237-38, 474 P.2d at 828-29. More realistically, the court admitted that "[i]n deciding as we do, we are mindful of the principle that a free society and the victims of crime are entitled to the same measure of justice as the accused." *Id.* at 238, 474 P.2d at 829.

In State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972), the court also confronted a constitutional provision substantially identical to the first sentence of article I, section 6 of the California Constitution. The court authorized the imposition of certain conditions on bail "to preserve domestic tranquility and the general welfare of the people." 61 N.J. at 363-64, 294 A.2d at 252. The court specifically mentioned the conditions proposed by the ABA Project on Standards Relating to Pretrial Release. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO PRETRIAL RELEASE (1968). These conditions are substantially the same as those authorized by the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146(a) (1969), and are discussed at length in Section II.c. See text accompanying notes 64-69 *infra*.

30. 9 Cal. 3d at 353, 508 P.2d at 726-27, 107 Cal. Rptr. at 406-07. "All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, sec. 1.

a right to bail which can be denied to an "unsafe" defendant. This is hardly a convincing resolution of the constitutional issue. Despite these shortcomings, there is merit in the dissent's contention that article I, section 6 does not by its language alone, exclude the possibility of a public safety exception to bail.[31]

c. Preventive detention and the resolution of the Underwood problem

The evolution of bail beyond its original function largely explains the conflicting views of bail upon which the majority and dissenting positions are predicated. The bail system now operates in a society where flight of a defendant has become a much less significant problem,[32] and in which the number of bailable, that is, noncapital offenses with public safety implications has become much greater than at the time of the system's common law origins.[33] With reduced need to ensure the defendant's presence at trial, a second function has infused the bail system—the protection of the public. Whether to reject or give explicit recognition to this new purpose was the essential question before the *Underwood* court. In answering this question the history of bail in California provided little guidance, reflecting as it does the ambiguity which has surrounded the purpose and function of bail for quite some time. The issue then resolved itself primarily into one of policy, at the center of which was the concept of preventive detention.

Although a full discussion of the continuing controversy over preventive detention is beyond the scope of this Note,[34] the debate over engrafting a public safety exception to the right to bail in noncapital cases necessarily involves that controversy: Refusing bail in the interest

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31. After all, a mere two years prior to *Underwood*, the court announced that "[w]e are mindful, too, that art. I, sec. 6, like the Eighth Amendment, is not a static document." *In re* Anderson, 6 Cal. 3d 628, 647, 493 P.2d 880, 893, 100 Cal. Rptr. 152, 165 (1972). The *Underwood* majority's rigid adherence to the view of bail at the time the California Constitution was drafted seems inconsistent with this willingness to question and modify the constitution. *See* 5 UNIV. W. LOS ANG. L. REV. 68, 70-71 (1973).

32. *See* Hickey, *Preventive Detention and The Game of Being Dangerous*, 58 GEO. L.J. 287, 288-89 (1969).

33. This is at least largely because so many more crimes are now noncapital crimes and therefore bailable. At common law, all felonies were capital crimes. *See* 4 W. BLACKSTONE, COMMENTARIES *296-297. As a result very few, if any, crimes with public safety implications carried with them an absolute right to bail. At present, of course, precisely the opposite is true; very few felonies are potentially capital. *See, e.g.*, CAL. PENAL CODE § 37 (West 1972); CAL. PENAL CODE § 190.2 (West Supp. 1974).

34. For discussions of this issue, see Foote, *The Coming Constitutional Crisis on Bail*, 113 U. PA. L. REV. 959 and 1125 (1965); Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 GEO. L.J. 287 (1969); Portman, *"To Detain or Not to Detain?" A Review of the Background, Current Proposals, and Debate on Preventive Detention*, 10 SANTA CLARA LAW. 224 (1970); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

of public safety—and thus keeping the accused in jail—is the essence of preventive detention. The majority indicates its disenchantment with preventive detention and points out its two major pitfalls, the necessity of relying on predictions which cannot be made accurately, and the tendency toward treating arrest and detention as a factual determination of guilt.[35] This disenchantment, coupled with the court's willingness to impute to the framers of the California Constitution a desire that the bail system never be used for such a purpose, explains the result in *Underwood.*

By the same token the dissent clearly harbors more positive feelings toward preventive detention. Although the opinion does not confront the issue directly, the author's sentiments may be inferred. On a general level, the conclusion, couched in language taken from Justice Douglas' often quoted opinion in *Carlo v. United States,*[36] indicates that pre-trial detention of some individuals is a moral imperative.[37] More specifically, the dissent's public safety exception does not respond to the criticisms of preventive detention which underlie the majority position. For Justice Burke, denial of bail would depend on three findings by the trial court judge: that a substantial risk of harm exists, that no reasonable alternative to denying bail would adequately protect the public, and that there is a substantial likelihood that defendant committed the crime of which he is accused.[38] The first and third findings involve the precise pitfalls which the majority emphasizes in its criticism of preventive detention. Perhaps the dissent does not consider these problems to be very serious; at the very least the proposal reflects a belief that the protection which the public safety exception would afford outweighs the dangers endemic to preventive detention. This belief contrasts sharply with that of the majority and illustrates the underlying importance of the preventive detention issue to the resolution of the problem presented by the *Underwood* case.

In sum, *Underwood* clarifies the purpose and function of bail against a background of constitutional language broad enough to support varying interpretations, and a pattern of historical development in which bail began to serve a purpose apart from that for which it was developed. Ultimately, the decision to restrict bail in California to its original common law function seems influenced largely by the court's disaffection with the concept of preventive detention.

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35. 9 Cal. 3d at 349 n.5, 508 P.2d at 723-24 n.5, 107 Cal. Rptr. 403-04 n.5.

36. 82 S. Ct. 662 (Douglas, Circuit Justice 1962). In that case Justice Douglas observed: "If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail." *Id.* at 666. It should be noted, however, that Justice Douglas was discussing the right to bail pending appeal. The context of the quote therefore mitigates its forcefulness and applicability to *Underwood.*

37. 9 Cal. 3d at 354-55, 508 P.2d at 727, 107 Cal. Rptr. at 407.

38. *Id.* at 354, 508 P.2d at 727, 107 Cal. Rptr. at 407.

II. UNDERWOOD AND THE FUTURE OF BAIL AND PREVENTIVE DETENTION IN CALIFORNIA

Despite its disapproval of preventive detention and the consequent rejection of a public safety exception, the California Supreme Court acknowledged the legitimacy of concern for public safety in certain criminal cases. It purported to relegate this concern to other areas of the law, however, primarily the area of civil commitment of mentally disordered individuals. Part II of this Note evaluates this attempt to accommodate all competing interests in a situation where the pretrial liberty of an arguably dangerous individual is at stake. The first section considers the question whether the civil commitment alternative adequately responds to the criticisms of preventive detention outlined by the court. Part *b* examines two aspects of the bail system which were not considered by the court in *Underwood* but which, as a practical matter, will determine the future of preventive detention in the criminal bail context.

a. Civil commitment and preventive detention

Whether civil commitment adequately can protect the interest vindicated by a public safety exception to bail turns on the scope accorded that interest. If, as the court implies, the public safety exception purports merely to protect against dangerousness in an individual which stems from an acknowledged mental disorder, civil commitment offers a preferable solution.

Although the factual determinations which must be made in the final stage of civil commitment are quite similar to those proposed by the dissent for use in applying the public safety exception,[39] there are some important differences in the two approaches. First, while the bail process provides only one opportunity for a hearing, the civil commitment procedure provides three distinct stages in the commitment process, each based on evaluations made in the prior stage, and each affording ample opportunity for judicial review.[40] Second, the com-

39. The finder of fact must determine that a person "had attempted or inflicted physical harm upon the person of another, that act having resulted in his being taken into custody and who, as a result of mental disorder, presents an imminent threat of substantial physical harm to others . . . ." CAL. WELF. & INST'NS CODE § 5304(b) (West 1972). The dissent's public safety exception would require, among other findings, that 1) the defendant presents a substantial risk of harm and 2) there is a substantial likelihood that the defendant committed the crime of which he is accused. See note 34 *supra*. In a criminal case, it is submitted that these standards involve virtually the same determinations.

40. Upon a showing of reasonable cause, any person who as a result of a mental disorder is a danger to himself or others, may be taken into custody for a period of 72 hours for treatment and evaluation. CAL. WELF. & INST'NS CODE § 5150 (West 1972). If further treatment is required, an individual may be certified for involuntary

mitment procedures envisage systematic input from, and evaluation by, mental health professionals before the ultimate judicial determination is made.[41] In contrast, a judge sitting in a bail proceeding could ask for input from such professionals,[42] but it seems unlikely that he would find it convenient to do so in every case; even when he did find it convenient, the input probably would not be based on day-to-day observation over an extended period. Finally, civil commitment provides for a right to jury trial to determine the factual issues necessary for ninety-day detention;[43] the public safety denial of bail would involve a determination by the judge, subject to appellate review for abuse of discretion.[44] If, then, dangerousness stemming from mental disorder represents the threat at which the public safety exception is directed, the civil commitment procedures strike a fairer and more rational balance between society's need for protection and the individual's preconviction right to liberty.

The public safety exception, however, probably aims at a broader threat than the mentally disordered criminal defendant. For the dissent, the sane but cold-blooded professional criminal represents the archetype of this threat.[45] For most proponents of preventive detention, a more mundane figure typifies their concerns: the ordinary criminal who commits another crime while free on bail.[46] The majority position in *Underwood* may represent a proscription of any form of detention as a response to these broader aims of the public safety exception. On the other hand, the case may represent an invitation to develop the civil commitment procedures in a way which would accommodate these aims.[47]

Adapting the civil commitment procedures to provide for the de-

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intensive treatment for a period not to exceed 14 days. *Id.* § 5250. After the expiration of the 14-day period, an individual may be held over for post-certification treatment, not to exceed 90 days, if the findings delineated in note 35 *supra* are made. *Id.* § 5300(b).

41. CAL. WELF. & INST'NS CODE §§ 5151, 5152, 5250, 5301, 5303, 5303.1 (West 1972).

42. Perhaps the use of such input even could be made mandatory. The dissent's proposal does not, however, seem to envisage such a requirement. *See* 9 Cal. 3d at 354, 508 P.2d at 727, 107 Cal. Rptr. at 407.

43. CAL. WELF. & INST'NS CODE § 5303 (West 1972). Review on a habeas corpus petition is available if grounds for detention are found. *Id.* § 5303. Similar relief is available in the bail context. CAL. PEN. CODE § 1473 (West 1972).

44. 9 Cal. 3d at 354, 508 P.2d at 727, 107 Cal. Rptr. at 407.

45. *Id.* at 352 n.1, 508 P.2d at 726 n.1, 107 Cal. Rptr. at 406 n.1.

46. *See* commentators cited in note 34 *supra*.

47. The statement which might indicate such an invitation appears in the majority's conclusion: that "if it becomes necessary to detain such [dangerous] persons, authorization therefor must be found elsewhere, either in existing or *future* provisions of the law." 9 Cal. 3d at 350, 508 P.2d at 724, 107 Cal. Rptr. at 404 (emphasis added).

tention of criminal defendants who are likely to commit further crimes before trial presents serious problems. First, the civil commitment procedure with its three stages and its extensive use of psychiatric evaluation and treatment is cumbersome and irrational if the only issue to be determined is whether the individual is likely to commit another crime before trial.[48] Further, the method for making the judicial determination required for civil commitment, if anything, exacerbates the two evils which the *Underwood* majority scores in its discussion of preventive detention. Placing the determination of the defendant's propensity for further criminal activity before trial with a jury rather than a judge can hardly mitigate the predictive difficulties inherent in such a determination. Since the factual findings required for civil commitment involve a determination of substantially the same issue as that to be presented at the criminal trial,[49] such a procedure will approach a plenary trial on the merits and will thus enhance the tendency to equate detention with guilt. It follows that a reading of *Underwood* which would authorize the development of a broad civil system of preventive detention should be rejected; rather, the thrust of *Underwood* argues for the use of civil commitment only in cases where a defendant suffers from those mental or physical disorders which have traditionally formed the basis for such commitment.[50]

b. Bail and preventive detention

The function and structure of the civil commitment procedure make it an unlikely substitute for the public safety exception as a means of accomplishing the objectives of preventive detention. In all prob-

48. The interplay between the civil and criminal commitment processes might also prove troublesome. For instance, if an individual with an alleged potential for further criminal activity were committed civilly for ninety days at the pretrial stage, a verdict of acquittal at the criminal trial would not necessarily effect his release. *See* CAL. WELF. & INST'NS CODE §§ 5304, 5305 (West 1972) (termination of ninety day commitment). Further, a verdict of acquittal at the criminal trial would not seem to bar an attempt by the state to impose additional ninety day periods of commitment despite the fact that one of the required findings for civil commitment involves essentially the issue of a defendant's guilt. See note 49 *infra* and accompanying text. Presumably, this would follow because the civil commitment findings do not require proof beyond a reasonable doubt. *See* CAL. WELF. & INST'NS CODE §§ 5304, 5305 (West 1972). Such a result, of course, would be manifestly unfair to a defendant whose only "mental disorder" was a possible propensity for criminal activity before trial.

49. For 90-day detention the civil commitment procedures require a finding that the individual "had attempted or inflicted physical harm upon the person of another, that act having resulted in his being taken into custody. . . ." CAL. WELF. & INST'NS CODE § 5304 (West 1972). In a criminal context, of course, this will involve the determination of whether the accused has committed the crime for which he was charged.

50. For purpose of implementing the civil commitment procedures, "mental disorder" is defined as any disorder "set forth in the Diagnostic and Statistical Manual of Mental Disorders (Current Edition) of the American Psychiatric Association." CAL. ADMIN. CODE tit. 9 § 813 (1948).

ability, then, the future of preventive detention in California remains within the criminal bail system. Although *Underwood* broadly proscribes the use of bail for such a purpose, preventive detention will still be possible within the bail system unless the court extends the rationale of *Underwood* to two aspects of bail which were not considered in that case: the amount of bail and permissable conditions on bail.

1. *Excessive bail and preventive detention*

As the dissent correctly pointed out, the result which the trial judge sought in *Underwood* easily (although indirectly) could have been achieved by setting bail at an amount beyond the financial capabilities of the defendant.[51] The viability of such a technique after *Underwood* presents perhaps the most critical issue for the future of preventive detention within California's criminal bail system.

As noted earlier,[52] section 1275 of the Penal Code sets forth three factors which a judge may consider in setting the amount of bail: the seriousness of the crime of which the accused is charged, the criminal record of the accused, and the probability that he will appear when required.[53] At a minimum *Underwood* indicates that the first and second factors may only be considered in light of their bearing on the third. If, then, the probability of the accused's appearance represents the overriding consideration in setting the amount of bail, the question becomes whether securing this end by setting bail at an amount above defendant's resources offends article I, section 6 of the California Constitution.

In an early case, In re *Duncan*,[54] the California Supreme Court answered this question in the negative, noting that a contrary holding would oblige the judge to release impecunious defendants on their own recognizance.[55] Despite the precedential significance of *Duncan* and its premise, shared by the *Underwood* majority, that the sole purpose of bail is to ensure defendant's appearance at appropriate times,[56] the thrust of *Underwood* contravenes the *Duncan* result. Given the *Underwood* and *Duncan* view of the purpose of bail in the context of the California Constitution, it follows that the first sentence of article I, section 6[57] represents a judgment by the framers of that instrument

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51. 9 Cal. 3d at 354, 508 P.2d at 727, 107 Cal. Rptr. at 107.
52. See note 20 *supra* and accompanying text.
53. CAL. PEN. CODE § 1275 (West 1972).
54. 54 Cal. 75 (1879).
55. *Id.* at 78.
56. *Id.* at 77.
57. Article I, section 6 of the California Constitution provides, in pertinent part: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishment be inflicted."

that only one type of case presents a probability of flight sufficient to justify denying a defendant his pretrial liberty: a case involving a capital offense where the proof is evident or the presumption great. Any construction of the term "excessive bail" in the second sentence of article I, section 6 which would countenance an amount of bail sufficient, as a practical matter, to deny defendant his pretrial liberty in a noncapital case seems inconsistent with this judgment.[58]

Moreover, any such construction would authorize the use of bail for the very purposes proscribed in *Underwood.* Any judge confronted with an individual who manifests dangerousness could set bail at an amount known to be beyond the individual's resources. He could justify the high figure by pointing to the defendant's record and/or the seriousness of his alleged crime, both of which are, by statute,[59] made relevant to the probability of his appearance, and could justify the de facto denial of bail by citing *Duncan.*

If, then, the California Supreme Court is seriously committed to the position adopted in *Underwood, Duncan* should be overruled to the extent it authorizes de facto denial of bail in noncapital cases. As to each defendant, the amount of bail would still depend on the variables delineated in section 1275, but the defendant's resources would circumscribe the range within which that amount could be determined. To the argument, made by the court in *Duncan,* that this would result in numerous instances of release on the defendant's own recognizance, the court might respond, as it did to a similar argument in *Underwood,* with the observation: "[I]f the constitutional guaranties are wrong, let the people change them . . . ."[60]

2. *Conditions on bail and preventive detention*

The dissent also argued that regardless of the existence or nonexistence of a public safety exception to bail, there is implicit in the grant of bail a condition of good behavior, which justifies the revocation of bail if violated by an arrest before trial.[61] Although the majority does not deal directly with this point, the opinion clearly rejects

58. It might be argued, however, that the "right to bail" is not a right to pretrial liberty but merely a right to have an amount fixed, and thus "excessive" bail need not be determined in relation to a defendant's resources. The concern of the *Underwood* court with the shortcomings of preventive detention strongly militates against such a restrictive interpretation of the right to bail. If the right to have an amount fixed is all that is at stake, *Underwood* seems an opinion hardly worth writing. The use of such an argument, then, to sustain the *Duncan* position, could only represent an ill-disguised evasion of the ramifications of *Underwood.*

59. See CAL. PEN. CODE § 1275 (West 1972) and the post-*Underwood* interpretation thereof suggested in the text accompanying notes 52-54 *supra.*

60. 9 Cal. 3d at 350, 508 P.2d at 724, 107 Cal. Rptr. at 404.

61. *Id.* at 352, 508 P.2d at 726, 107 Cal. Rptr. at 406.

this argument. The existence of such an implicit condition would raise two problems. First, the defendant might complain that he lacked notice, especially since all of the statutory conditions relate solely to his appearance when required.[62] Second, and more importantly, regarding an arrest while free on bail as a violation of that condition involves one of the major evils of preventive detention: treating the second arrest and thus the revocation and detention as a factual determination that the individual committed the second alleged crime.[63] The majority view of bail and the public safety exception, based as it is on a dissatisfaction with preventive detention, precludes the possibility of an implied condition of good behavior.

The question of the legislature's authority explicitly to condition the grant of bail in other respects, however, remains open. It is worth noting that both the Federal Bail Reform Act of 1966[64] and the ABA Project on Standards Relating to pretrial Release,[65] while rejecting the concept of preventive detention, authorize the imposition of various conditions on bail. The Federal Act is illustrative in this respect. The permissible conditions include placing the defendant in the custody of a designated person or organization agreeing to supervise him; imposing restrictions on the travel, association, or place of abode of the defendant during the period of release; and requiring the defendant to return to custody after specified hours.[66]

Any attempt to institute a similar scheme in California would have to overcome the obstacle of the *Underwood* interpretation of article I, section 6. On the one hand, the court could adopt the view that such conditions do not relate to ensuring public safety but only to guaranteeing the defendant's presence at trial. Indeed, the Federal Act expressly adopts this rationale for the conditions it authorizes.[67] Further, the Arizona Supreme Court's herculean effort to justify the Arizona statutory condition of good behavior on this basis illustrates the potential appeal of this approach to a court sympathetic to the condition or conditions in question.[68] The California Supreme Court could easily react sympathetically to conditions such as those prescribed in the Federal Act because they appear to represent a fair balance be-

62. CAL. PEN. CODE § 1273 (West 1972).

63. This is the second evil emphasized by the *Underwood* majority in its criticism of preventive detention. 9 Cal. 3d at 349 n.5, 508 P.2d at 723-24 n.5, 107 Cal. Rptr. at 403-04 n.5.

64. 18 U.S.C. § 3146(a) (1969).

65. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO PRETRIAL RELEASE § 5.2 (1968).

66. 18 U.S.C. § 3146(a) (1969).

67. *Id.*

68. Kendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), discussed in note 29 *supra*.

tween the individual's right to liberty before conviction and society's interest in protecting itself.

On the other hand, the very fact that the conditions might be viewed as such a balance suggests the constitutional problem under article I, section 6. Intellectual honesty requires the recognition that conditions such as those contemplated by the Federal Act respond as much, if not more, to considerations of public safety as to the probability of the defendant's appearance.[69] Since *Underwood* establishes that the purpose of bail under the California Constitution does not comprehend the protection of the public, any condition on bail, however reasonable on its face, which serves such an end might be held unconstitutional. A cogent argument could be made for distinguishing the imposition of "public safety" conditions on bail from an outright or de facto "public safety" denial of bail; nonetheless, the letter of *Underwood* would appear to prohibit such a distinction.

In sum, after *Underwood* the California Supreme Court could sustain "public safety" conditions such as those set forth in the Federal Act only by accepting the appearance-at-trial rationale at face value; if the court should decide that such conditions were impermissible, a nonbail scheme embodying such conditions might represent the most defensible response to the invitation in *Underwood* to develop new laws, outside the criminal bail system, to guarantee public safety.[70]

CONCLUSION

In *Underwood* the court confronted a bail system which seemed to serve an additional purpose quite apart from the purpose which characterized its origins. Not only was the system used to ensure the defendant's presence at trial, but also to provide for the preventive detention of dangerous persons. *Underwood* represents the first step toward limiting bail to the function for which it was historically designed. By repudiating preventive detention in the form of a public safety exception, however, the court has by no means succeeded in divorcing the operation of the bail system from the protection of public welfare. The practical effect of excessive or conditional bail and civil commit-

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69. In State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972), discussed in note 29 *supra*, the court explicitly acknowledged this. 61 N.J. at 363, 294 A.2d at 252.

70. Presumably a statutory scheme which regulated the pretrial freedom of a defendant but which did not provide for the depositing of monetary "bail" might qualify as a "non-bail" scheme. It is also, of course, possible that any "new law" regulating the pretrial conduct of a defendant would be considered a "bail" law. If so, the court would be forced to face directly the issue of whether public safety conditions on bail offend the constitutional mandate of article I, section 6. If this latter view of what constitutes a "bail" scheme is adopted, however, the invitation in *Underwood* to develop "future" laws, outside the criminal bail system, to protect the public from arguably dangerous arrestees makes little sense.