deficiency judgment and a trustee's sale) and 726 (a deficiency judgment without exhaustion of all the security).

Walker, filling a gap left by the statutes, makes clear that whenever security for a single obligation includes real estate, the creditor who takes a deficiency will lose his interest in unforeclosed real security as against all persons. Such creditors are on notice that, if they desire a deficiency judgment, they should foreclose all security simultaneously in one action. If they desire to foreclose sequentially, they may do so by non-judicial sales, thereby waiving any deficiency judgment.

The court's opinion validates Professor Hetland's theory of the 726 sanction aspect, *i.e.*, even if the debtor fails to raise the 726 affirmative defense, he does not waive the right to assert the sanction to bar later proceedings by the creditor. However, the opinion failed to shed much light on the scope of the 726 sanction.

Paul M. Rose

VII

CRIMINAL PROCEDURE

A. Constitutionality of Airport Searches

People v. Hyde.[1] A unanimous court held that predeparture screening of airline passengers and their carry-on baggage to prevent hijackings is not an unreasonable search in violation of the fourth amendment.[2] The case was decided in the context of judicial conflict over the appropriate constitutional analysis of airport searches and represents the California Supreme Court's first attempt to clarify these issues. The majority opinion, written by Justice Mosk, was based on the "administrative search" vehicle, drawn from a series of recent federal cases.[3] The concurring opinion by Chief Justice Wright[4] found the administrative search doctrine inappropriate to airport searches and reached its conclusion that the search was reasonable by balancing the governmental interest justifying the search against the intrusion on individual rights which results.[5]

The search in question took place when a United States Deputy

1. 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974) (Mosk, J.) (unanimous decision).
2. *Id.* at 169, 524 P.2d at 837, 115 Cal. Rptr. at 365.
3. *Id.* at 165, 524 P.2d at 834, 115 Cal. Rptr. at 362.
4. Justices Tobriner and Sullivan concurred with the Chief Justice.
5. 12 Cal. 3d at 173, 524 P.2d at 840, 115 Cal. Rptr. at 368.

Marshal stopped petitioner Hyde as he attempted to board an airplane at the San Diego International Airport. Hyde allegedly satisfied the Federal Aviation Administration's behavioral profile of a potential hijacker and he activated a magnetometer indicating the presence of metal.[6] Hyde allowed the marshal to search his hand luggage, and, opening a shaving kit, the marshal discovered a clear plastic bag containing what appeared to be marijuana. The marshal placed defendant under arrest and then conducted a "pat-down" search. A further search of defendant's luggage revealed an estimated 100 tablets of what the marshall believed to be LSD.[7] Defendant pleaded guilty to the charge of possessing restricted dangerous drugs, and appealed from the resulting conviction, contending that the evidence against him was the product of an unreasonable search in violation of the fourth amendment.[8]

Section I of this Note discusses the rationales for upholding the constitutionality of airport searches which the court rejected as inappropriate to the search in question. Section II examines the "administrative search" justification adopted by the majority of the court. Section III discusses the "balancing approach" utilized in the concurring opinion. Finally, section IV considers alternative holdings which were available to the court.

II. THE CONTEXT OF *Hyde*: JUSTIFICATIONS FOR THE AIRPORT SEARCH

As the majority in *Hyde* noted, air piracy is a new and unique problem.[9] In a relatively short period of time the courts have been

6. On December 5, 1972, the Federal Aviation Administration ordered that as of January 5, 1973, all carry-on items be searched prior to boarding and all passengers be screened at least through a magnetometer. Dept. of Transportation Release, No. 103-72, 37 Fed. Reg. 25934 (1972). The search in the instant case occurred before the promulgation of any formal regulations by the FAA requiring specified boarding procedures, but subsequent to the President's directive of September 11, 1970, that the Department of Transportation have airlines adopt appropriate surveillance techniques at those airports at which such measures were necessary. PUBLIC PAPERS OF PRESIDENTS OF THE UNITED STATES: Richard Nixon 742-43 (1970). For a complete description of these procedures, see United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971). Although the procedures involved in the search at issue are no longer employed, the court's decision is equally applicable to the procedures currently in use.

7. 12 Cal. 3d at 161-62, 524 P.2d at 831-32, 115 Cal. Rptr. at 359-60.

8. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

9. 12 Cal. 3d at 166, 524 P.2d at 835, 115 Cal. Rptr. at 363.

forced to consider the constitutionality of administrative regulations designed to eliminate the dangerous and costly consequences of armed hijackers.

The procedure in effect at the time Hyde was arrested and those currently employed do not involve a warrant. The Supreme Court has held that searches without a warrant are per se unreasonable except in specifically defined contexts.[10] Thus, the constitutionality of airport searches must rest on some exception to the fourth amendment warrant requirement. Courts which have upheld airport searches have analogized the procedures to exceptions which have already been carved out of fourth amendment territory, the consent theory and the "stop and frisk" rationale.

a. The consent theory

The fourth amendment right to privacy may be waived by consent to be searched, as long as that consent is unambiguous and not the result of fraud or coercion.[11] It has been argued that such consent can be implied from the conduct of an airline passenger who presents himself for boarding after passing conspicuous signs warning that all passengers and baggage are subject to search.[12] Although neither side raised the issue of consent in *Hyde*,[13] the supreme court emphatically rejected the consent theory on the ground that consent can never be voluntary when a person is compelled to choose between exercising fourth amendment rights and the constitutional right to travel.[14]

---

10. Katz v. United States, 389 U.S. 347 (1967).

11. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

12. Federal district courts repeatedly have rejected this "implied consent" argument unless the passenger was given the option of avoiding the search by not boarding. United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971); *see* Note, *Airport Freight and Passenger Searches: Application of Fourth Amendment Standards*, 14 WM. & MARY L. REV. 953, 987-91 (1973) [hereinafter cited as WM. & MARY Note]. *But see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973), in which the United States Supreme Court held that a suspect need not be advised of his right to refuse consent in order to find that the consent was voluntary. The *Schneckloth* decision, however, was concerned only with the voluntariness of consent and did not address the threshold question of whether in fact consent had been given. *See* United States v. Davis, 482 F.2d 893, 914 (9th Cir. 1973).

13. The trial court determined that Hyde had not consented to the search and that factual finding was not challenged. 12 Cal. 3d at 162, 524 P.2d at 832, 115 Cal. Rptr. at 360.

14. 12 Cal. 3d at 162 n.2, 524 P.2d at 832 n.2, 115 Cal. Rptr. at 360 n.2. *See* United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORD. L. REV. 293, 322 (1972) [hereinafter cited as McGinley & Downs]. *But see* Note, *The Constitutionality of Airport Searches*, 72 MICH. L. REV. 128, 152 (1972) [hereinafter cited as MICH Note];

b. The "stop and frisk" rationale

In *Terry v. Ohio*,[15] the Supreme Court authorized a police officer, otherwise entitled to detain a suspicious individual, to conduct a limited "pat-down" for weapons on "reasonable suspicion"— something less than probable cause. Balancing the interests involved, the Court found that the protection of officers and those nearby outweighed the individual's interest in being free from a limited intrusive search. Since the fourth amendment's requirement of reasonableness was satisfied, a warrant was not required.

A number of lower federal courts have found anti-hijacking procedures analogous to the *Terry* situation and have relied on the "protective frisk" rationale to uphold airport searches.[16]

The California Supreme Court rejected the *Terry* protective frisk rationale as inappropriate because the airport search fails to meet the *Terry* requirements that the search be limited to a pat-down of the suspect, that the search be based on specific articulable facts warranting each individual intrusion, and that the search be necessary to protect the safety of the investigating officer and others in the immediate vicinity.[17]

The majority pointed out that *Terry* does not authorize a search more intrusive than a superficial pat-down for weapons.[18] The search of a passenger's hand luggage is thus beyond the permissible scope of the *Terry* doctrine.[19] The protective frisk authorized by *Terry* must be predicated upon "specific and articulable facts" warranting a reasonably prudent person to believe he is dealing with an armed and dangerous individual.[20] Arguably, the multilevel screening process used at the time of Hyde's arrest met this requirement. Each element of that system provided some reasonable suspicion to justify each successive step in the procedure.[21] The profile itself was not intrusive enough to be a search, and it theoretically provided rea-

---

WM. & MARY Note at 990.

Although the right to travel is not explicitly guaranteed in the Constitution, the United States Supreme Court has recognized that it is a fundamental right. Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

15. 392 U.S. 1 (1967).

16. *See, e.g.*, United States v. Bell, 464 F.2d 667 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972); United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

17. 392 U.S. at 20-21. *See* McGinley & Downs at 308-09.

18. 12 Cal. 3d at 163, 524 P.2d at 832-33, 115 Cal. Rptr. at 360-61.

19. All of the federal decisions cited in note 16 *supra* do not consider extending the *Terry* authority beyond frisking to justify an unrestricted baggage search.

20. 392 U.S. at 27.

21. *See* MICH. Note at 148.

sonable suspicion to justify the use of the magnetometer, which is a search. The magnetometer, in turn, would justify any frisk deemed necessary.[22]

The court rejected this argument because statistically the profile has little predictive value and is therefore insufficient to provide the "reasonable suspicion" which would justify the use of the magnetometer.[23] Certainly the new procedures,[24] which require the magnetic scanning of every passenger and all carry-on luggage, "are not made pursuant to a particularized cause" of any sort,[25] and consequently cannot meet *Terry*'s demands.

The governmental interest justifying a pat-down search in the *Terry* situation is the protection of investigators performing official duties. The *Hyde* court contended that the interest asserted in airport searches is distinguishable because the grave danger to persons and property justifying such searches occurs after the plane is airborne, "at which time the law enforcement officers remain safely on the ground."[26] Although *Terry* contemplates the protection of others besides the investigating officer,[27] its consideration of the safety of bystanders refers ouly to persons placed in danger as the immediate consequence of the investigator's detention of a suspicious individual.[28] The doctrine cannot justify protecting people from dangerous conduct which is not a product of the affirmative action of police officers.

By rejecting the use of the *Terry* doctrine to justify the airport search, the court evidenced a concern also expressed by the federal court in *United States v. David*:[29] that lowering the level of suspicion required by *Terry* would remove all safeguards against indiscriminately detaining and searching persons wherever and whenever a serious threat of crime exists.[30]

Ironically, however, both majority and concurring opinions require "balancing the need to search against the invasion which the search entails,"[31] the same test that *Terry* adopted from *Camara v.*

22. *United States v. Lopez* first advanced this analysis which, by *Terry* standards, accepts an extremely low level of reasonable suspicion. 328 F. Supp. 1077 (E.D.N.Y. 1971).

23. 12 Cal. 3d at 164, 524 P.2d at 833, 115 Cal. Rptr. at 361.

24. *See* note 6 *supra.*

25. WM. & MARY Note at 985.

26. 12 Cal. 3d at 165, 524 P.2d at 834, 115 Cal. Rptr. at 362.

27. 392 U.S. at 29.

28. 12 Cal. 3d at 165, 524 P.2d at 834, 115 Cal. Rptr. at 362.

29. 482 F.2d 893, 909 n.42 (9th Cir. 1973).

30. 12 Cal. 3d at 164, 524 P.2d at 833, 115 Cal. Rptr. at 361; United States v. Davis, 482 F.2d at 907; McGinley & Downs at 314.

31. 392 U.S. at 21.

Municipal Court[32] to justify a search without a warrant or probable cause. To the extent that both of the *Hyde* opinions balance such interests and allow searches without either warrant or probable cause, they reflect a conceptual, unacknowledged expansion of the *Terry* doctrine. Consequently, the concern that the court expressed over an unlimited extension of *Terry* may be an equally appropriate criticism of their opinions in *Hyde*.

II. THE ADMINISTRATIVE SEARCH RATIONALE

The majority opinion justified the airport search on the authority of a series of federal decisions relating to "administrative" or regulatory searches.[33] Through those cases the *Hyde* majority, like the Ninth Circuit in *United States v. Davis*,[34] found a doctrine broad enough to cover airport searches as well as plant inspections,[35] welfare visits,[36] and investigation of health code violations.[37] Despite the variety of issues involved in these cases, the court simply cited them,[38] failing to demonstrate either their similarity or their applicability to the airport search. Even those distinctions which are noted in the concurring opinion[39] are treated superficially by the majority.

a. Camara and the warrantless search

The foundation of the administrative search doctrine was laid by *Camara v. Municipal Court*[40] and its companion case, *See v. City of Seattle*.[41] In *Camara*, the Supreme Court overruled *Frank v. Maryland*,[42] which had upheld warrantless inspections under regulatory laws, such as building and health codes. The Court held that the plaintiff lessee in *Camara* had the right to refuse to allow an inspection of his apartment without a warrant and found the regulation authorizing

32. 387 U.S. 523, 536 (1967).

33. United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Shafer, 461 F.2d 856 (9th Cir. 1972), *cert. denied*, 409 U.S. 881 (1972); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972).

34. 482 F.2d 893 (9th Cir. 1973).

35. United States v. Shafer, 461 F.2d 856 (9th Cir. 1972), *cert. denied*, 409 U.S. 881 (1972).

36. Wyman v. James, 400 U.S. 309 (1971).

37. Camara v. Municipal Court, 387 U.S. 523 (1967).

38. 12 Cal. 3d at 165, 524 P.2d at 834, 115 Cal. Rptr. at 362.

39. *Id.* at 170, 524 P.2d at 837-38, 115 Cal. Rptr. at 365-66 (Wright, C.J., concurring).

40. 387 U.S. 523 (1967).

41. 387 U.S. 541 (1967).

42. 359 U.S. 360 (1959).

the inspection unconstitutional. The Court found that the city was not excepted from the demands of the fourth amendment warrant requirement since it had not demonstrated that the burden of obtaining a warrant would frustrate the purpose of the search. In *See*, the right of a businessman to refuse a warrantless inspection of his locked warehouse by the fire department was similarly upheld.

The Court in *Camara* and *See* stated that an exception to the fourth amendment warrant requirement can be made only when that requirement "is likely to frustrate the governmental purpose behind the search,"[43] and when a "balancing [of] the need to search against the invasion which the search entails"[44] shows that the governmental interest is compelling and that the intrusion is minimal. Later cases seized upon this exception to justify warrantless searches in a variety of contexts. For the airport search to be analogous to a warrantless administrative search it must meet these requirements.

b. The progeny of Camara and the administrative search doctrine

Camara's progeny include a variety of cases which represent different degrees of governmental interest and official intrusiveness. Their consanguinity is distant, and, indeed, several have not explicitly relied on the administrative search doctrine.[45] While *Colonnade Catering Corp. v. United States*[46] relied on the historical provision that searches and seizures under liquor laws do not fall under the requirements of the fourth amendment, *United States v. Biswell*[47] advanced the notion that licensed gun dealers know that their trade is subject to pervasive regulations and inspections, frequently unannounced. *Wyman v. James*[48] held that home visits by welfare caseworkers were reasonable searches, if they were searches at all, because they were not criminal investigations and because welfare recipients could refuse to consent to them.[49]

Downing v. Kunzig,[50] *United States v. Shafer*,[51] and *United States*

43. 397 U.S. at 533. *See also* United States v. Biswell, 406 U.S. 311, 316 (1972).

44. *Id.* at 557.

45. *E.g.*, Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972), which uses the balancing test but does not even cite *Camara*.

46. 397 U.S. 72 (1970).

47. 406 U.S. 311 (1972).

48. 400 U.S. 309 (1971).

49. In his dissenting opinion Justice Marshall discussed the unreasonableness of having to consent to the home visits as a prerequisite to receiving welfare payments. 400 U.S. at 338.

50. 454 F.2d 1230 (6th Cir. 1972).

51. 461 F.2d 856 (9th Cir. 1972), *cert. denied*, 409 U.S. 881 (1972).

v. Miles[52] were all cases in which a compelling governmental interest justified a minimal intrusion into the privacy of individuals. In *Downing* threats to lives and property created an emergency situation which justified the search of all packages and briefcases prior to entry into a federal building. In *Shafer*, the Ninth Circuit held that no meaningful plant quarantine program could exist in Hawaii without cursory baggage searches at the airport, and in *Miles* the strong public interest in excluding sabotage devices from ammunition dumps justified the search of all commercial vehicles entering a restricted area on a military base.

The majority in *Hyde* found that *Camara* and its progeny established an administrative search doctrine under which airport searches could be justified, but, even if these cases do constitute a coherent doctrine, it is questionable whether that doctrine is applicable to airport searches.

The court in *Hyde* asserted that the critical characteristic of such searches is that they are "conducted as part of a regulatory scheme in furtherance of an administrative purpose rather than as part of a criminal investigation to secure evidence of crime . . . ."[53] It characterized airport searches as part of a comprehensive regulatory scheme, the essential purpose of which is "not to ferret out contraband or to preserve for trial evidence of criminal activity,"[54] but "to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board."[55] But the Supreme Court in *Camara* also stated: "It is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."[56]

The court's analysis glosses over the heavy consequences of a successful anti-hijacking program. As *Davis* points out, many administrative searches include the purpose of discovering violations of regulatory codes which may subject the party searched to criminal sanctions,[57] but those violations do not involve lengthy prison sentences or the "civil death" that follows a felony conviction. In fact, violators

52. 480 F.2d 1217 (9th Cir. 1973), *cert. denied*, 414 U.S. 1008 (1973).

53. 12 Cal. 3d at 165, 524 P.2d at 834, 115 Cal. Rptr. at 362.

54. *Id.* at 166, 524 P.2d at 834, 115 Cal. Rptr. at 362.

55. *Id.* Even the concurring opinion, which rejects the suitability of the administrative search rationale and distinguishes many of these cases, finds that the searches at issue in *Camara* and airport searches are alike in that they both have a primary purpose other than the gathering of evidence to be used in a criminal prosecution. *Id.* at 170 n.2, 524 P.2d at 838 n.2, 115 Cal. Rptr. at 366 n.2.

56. 387 U.S. at 530 (footnote omitted).

57. 482 F.2d at 908-09.

of the regulatory codes often do not go to trial at all. When contraband is discovered in an airport search, on the other hand, the individual is usually criminally prosecuted.

In a broad sense, all law enforcement is aimed at the protection of public safety. But in terms of the governmental interests involved, the court's analogy provides little grounds for distinguishing between procedures necessary to deter health risks, hijackings, or robberies. If the rationale behind airport searches and other regulatory invasions of privacy rests solely on the secondary importance of criminal prosecution, the assertion of public safety will be enough to authorize the kind of wholesale harassment that the court attempted to avoid when it rejected the extension of the *Terry* doctrine.

Arguably, the real similarity between the official action in the cases cited by the court and the airport search procedures is that the intrusions involved are minimal. However, the majority gives only cursory attention to this point in the context of its application of the doctrine.

c. The application of the administrative search rationale

Ignoring the weakness of its analogy, the *Hyde* majority applied the balancing test set forth in *Camara v. Municipal Court* to weigh the government's interest in the search against the invasion of privacy involved.[58] The court concluded that the governmental interest in preventing airline hijackings is substantial because of the danger posed to human life. Furthermore, it found pre-boarding screening of all passengers and their carry-on baggage to be a reasonably necessary means of preventing hijackings. A cursory search of the passenger's hand luggage is justified since, in contrast to the *Terry* situation, the concern is not limited to those weapons which are immediately accessible. Rather, the search must be sufficient in scope to detect any weapons or explosives that would be available after boarding.

It may be argued that the frequency of hijacking has decreased to the point that such intrusions into privacy can no longer be justified.[59] However, unless one concludes that hijacking was only a pass-

58. Administrative searches are subject to fourth amendment protections and must meet that amendment's standard of reasonableness. According to the Supreme Court in *Camara*, the reasonableness of a search can only be established by "balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37. *See generally* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973) [hereinafter cited as Greenberg].

59. For information regarding the frequency and variety of hijacking attempts, *see* Note, *Constitutionality of the 1973 Airport Searches: A Factual Analysis*, 8 U.S.F.L. REV. 172 (1973).

ing fad, there is no reason to believe that such decreases are the result of anything but these universal searches at airport departure points.

Although the court adequately indicated the need for airport search procedures, it gave only cursory attention to the question of the scope of the intrusion into individual privacy.

The court recognized that the "scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible,"[60] and responded that pre-boarding techniques must be no more intrusive than is necessary "to *disclose* the presence of weapons or explosives."[61] The proper limitation, however, is that these procedures be no more intrusive than necessary to *prevent* weapons or explosives from being carried on board the plane. Thus, there is no need to disclose weapons or explosives if a party elects not to board rather than to submit to the search.[62]

The court also found that the absence of a warrant did not render the search unreasonable. The *Camara* decision recognized that the warrant requirement may be omitted when the burden of obtaining a warrant "is likely to frustrate the governmental purpose behind the search."[63] In *Hyde*, the majority concluded that the warrant procedure would totally frustrate the legitimate governmental purpose in airline screening procedures, because, even if it were possible to obtain search warrants for thousands of airline travelers, it would impose inordinate and unacceptable delays in the boarding process.[64] Additionally, the court reasoned that a warrant is not needed since, under the procedures used at the time Hyde was arrested and those currently in use, there is little danger of an unauthorized or improper exercise of discretion by law enforcement officers.[65] Furthermore, as the concurring justices pointed out:

> [S]ince there is no requirement of any level of probable cause for airport searches and since the time, place and scope of these searches are fixed by federal regulation, there is absolutely nothing for a neutral magistrate to pass judgment upon.[66]

The majority also relied on the traditional allowance for prompt in-

60. 12 Cal. 3d at 168, 524 P.2d at 836, 115 Cal. Rptr. at 364.

61. *Id.*, 524 P.2d at 836, 115 Cal. Rptr. at 364 (emphasis added).

62. Although the majority recognized the right of the individual to avoid the search entirely by electing not to board the plane, *id.* at 169, 524 P.2d at 837, 115 Cal. Rptr. at 365, they did not expressly require that the individual be advised of this option. *See* United States v. Davis, 482 F.2d 893, 910-11 (9th Cir. 1973), where the court stated: "[Airport] screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft."

63. 397 U.S. at 533.

64. 12 Cal. 3d at 169, 524 P.2d at 836-37, 115 Cal. Rptr. at 364-65.

65. *Id.*, 524 P.2d at 837, 115 Cal. Rptr. at 365.

66. *Id.* at 178, 524 P.2d at 844, 115 Cal. Rptr. at 372.

spections, even without warrant, in emergency situations. The cases cited for support, however, all involve a single occurrence or a limited period of time.[67] As the concurring opinion observes, "ongoing emergency" is a fiction, which strains the *Camara* analogy.[68]

The administrative search rationale in *Camara* also requires a prior showing of some functional equivalent to probable cause. Thus, while specific knowledge of the condition of a particular dwelling is not required in *Camara* before an inspection for housing code violations is made, there must be some showing, based upon reasonable standards, that an inspection of the area in which the dwelling is situated is justified.[69] The majority in *Hyde* contended that conducting the searches in a particular area—airport departure facilities—satisfies the "area inspection" concept of *Camara.*[70] Yet, it is questionable that this response actually meets that "area-specific" standard.[71] While there may be concrete reasons to inspect homes in a certain neighborhood, the screening of all individuals before they board their plane is indiscriminate and takes place in the airport departure area mainly because of convenience and the lack of an effective alternate hijacking procedure.

The absence of a functional equivalent to probable cause is not critical in all situations. Cases subsequent to *Camara* have upheld regulatory searches either without any showing of such equivalent[72] or by concluding that a valid public interest justifying the intrusion itself constitutes "probable cause."[73] Those cases and airport searches, however, do not clearly fit under the *Camara* exception for administrative searches.[74]

III. THE BALANCING APPROACH

After distinguishing the *Camara* and *See* types of inspections from

67. *Id.* at 168, 524 P.2d at 836, 115 Cal. Rptr. at 364.

68. *Id.* at 171, 524 P.2d at 838, 115 Cal. Rptr. at 366.

69. 392 U.S. 523, 538 (1967).

70. 12 Cal. 3d at 167, 524 P.2d at 836, 115 Cal. Rptr. at 364.

71. Perhaps the use of the profile as an indication that violations of the law might exist within a certain "area" or "group" of passengers better satisfies the *Camara* standard. MICH. Note at 143. However, the court stated that the applicability of the profile was not a critical factor in sustaining the search under the administrative search rationale. 12 Cal. 3d at 168, 524 P.2d at 836, 115 Cal. Rptr. at 364. And under current procedures, there is no specific group selected for special attention upon the basis of any particular standard.

72. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

73. *See, e.g.*, United States v. Miles, 480 F.2d 1217 (9th Cir. 1973), *cert. denied*, 414 U.S. 1008 (1973); United States v. Shafer, 461 F.2d 856 (9th Cir. 1972), *cert. denied*, 409 U.S. 881 (1972); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972).

74. *See* text accompanying notes 45-57, *supra.*

airport searches,[75] the concurring justices concluded that it is inappropriate "to compress airport searches within the confines of *Camara*—and rely on fictions . . . to do so . . . ."[76] At the heart of their opinion lies a rejection of crude judicial labeling and an attempt to outline a more flexible and more forthright approach to fourth amendment issues. Despite its conceptual purity, however, the concurring opinion is also ultimately unsatisfactory. The flexibility of the test is open to abuse and might be used by a less sensitive court to substantially erode basic fourth amendment protections.

The concurring justices argued that there is no fixed standard of fourth amendment reasonableness applicable to all types of governmental action. They asserted that a balancing approach, similar to that used by the majority, should be used to determine the reasonableness of an intrusion whenever the official conduct under review

> (1) has objectives qualitatively different from those of a search and seizure in the criminal context and (2) cannot feasibly be subjected to regulation through the traditional probable cause standard of justification . . . .[77]

These criteria are allegedly satisfied in airport searches because (1) although they include the general objective of detecting criminal activity, "the overriding more immediate interest is to prevent hijackings and thereby to save human lives and private property,"[78] and (2) if probable cause were required, "few if any passengers could lawfully be searched."[79]

The concurring justices cited three factors relevant to their determination that the search was reasonable despite the absence of probable cause or its functional equivalent: (1) the compelling nature of the governmental interest, (2) the lack of an effective means of limiting the search to those reasonably likely to hijack an airplane, and (3) the relatively minor intrusion upon the privacy of airline passengers.[80]

The concurring opinion analyzed the government's interest in substantially the same terms as the majority opinion. The view is essen-

---

75. Chief Justice Wright cites the lack of any functional equivalent to probable cause, the advance notice, and the option to avoid the search as factors which make airport searches significantly different from health or fire inspections. 12 Cal. 3d at 170, 524 P.2d at 838, 115 Cal. Rptr. at 366.

76. *Id.* at 171, 524 P.2d at 838, 115 Cal. Rptr. at 366.

77. 12 Cal. 3d at 173, 524 P.2d at 840, 115 Cal. Rptr. at 368.

78. *Id.* at 173 n.7, 524 P.2d at 840 n.7, 115 Cal. Rptr. at 368 n.7. *See* text accompanying note 57 *supra.*

79. *Id.* at 173 n.8, 524 P.2d at 840 n.8, 115 Cal. Rptr. at 368 n.8.

80. *Id.* at 177, 524 P.2d at 843, 115 Cal. Rptr. at 371

tially that of Judge Friendly is his concurring opinion in *United States v. Bell*:[81]

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking.[82]

This approach prompted Judge Mansfield to concur separately for the express purpose of criticizing Friendly's opinion.[83] Judge Mansfield felt that such an approach would erode fourth amendment protections to the point that "the sharp increase in the rate of serious crime in major cities could be used to justify similar searches of persons or homes in high crime areas."[84]

This problem with a balancing approach—that the public interest might be held to justify widespread invasions of privacy—is also present in the administrative search approach. The problem is more acute, however, when the balancing approach is used. Although the judicial practice of "labeling" conduct is usually less desirable than a functional analysis of it, when exceptions are being carved out of fourth amendment protections, it is useful in attempting to assure that these exceptions are construed as narrowly as possible to characterize such exceptions by a specific label such as "administrative searches." The more general balancing approach too easily lends itself to justifying invasions of privacy when any public interest, including one primarily directed toward crime detection, is deemed compelling.

The second factor which the concurring justices felt justified the airport search is the inability to detect potential hijackers and therefore to limit screening to those passengers. The lack of any method to determine which particular individuals are reasonably likely to be carrying explosives or weapons means that only a search of all passengers can effectively prevent hijackings.

Lastly the concurring justices considered the intrusion upon the privacy of airline passengers which an airport search entails and concluded that the intrusion is "clearly minimal." The search occurs in a quasi-public place rather than a home. It does not involve the indignity of being stopped on the street and frisked for weapons, nor is any

---

81. 464 F.2d 667 (2d Cir. 1972), *cert. denied,* 409 U.S. 991 (1972), (justifying airport search on the *Terry* rationale).

82. *Id.* at 675 (emphasis in original).

83. *See* MICH. Note at 147.

84. 464 F.2d at 676. *Compare with* the majority opinion in *Hyde* which rejected the *Terry* rationale for similar reasons. 12 Cal. 3d at 164, 524 P.2d at 833, 115 Cal. Rptr. at 361; *see* text accompanying note 30 *supra.*

one passenger treated differently from any other.[85] Further, the magnetometer reveals nothing other than the presence of metal objects, and the baggage inspection is strictly limited to a scope reasonably necessary to detect weapons and explosives.[86]

The Wright opinion also asserted that the intrusiveness of the search is ameliorated by several other considerations. First, the advance notice that passengers will be subjected to pre-entry screening enables individuals to avoid the embarrassment and psychological dislocation of a surprise search.[87] A passenger may place any personal effects which would cause him embarrassment or subject him to criminal prosecution in his non-carry-on baggage or he may simply check all of his baggage.[88] The concurring opinion does not specifically consider the effect which the search may have upon the right to travel, but it is likely that the ability to avoid the inspection by checking one's luggage effectively disposes of any argument that the searches unreasonably burden the right to travel.

The contention that individuals may avoid the screening search entirely by electing to forego air travel or may avoid the most intrusive facet of the procedure by checking all luggage requires critical examination.[89] This election is only available to those who actually have advance notice of the impending search and who comprehend the nature of the screening procedures *before* reaching the departure area. There is no evidence, however, that such an election is still realistically available once a potential passenger reaches the screening area, although that is the only point at which his actual comprehension of the nature of the search can indisputably be established.

In *United States v. Meulener*[90] the federal court invalidated an airport search because the defendant was not told at the time the search was initiated that he was entitled to avoid the search by not boarding the airplane. By requiring that the individual be advised at the time of the search of his option to avoid it, the *Meulener* court eliminated the risk of an unknowing waiver of the right to avoid the search.

Neither the majority nor the concurring opinion properly empha-

85. Although this conclusion is questionable with regard to the procedures under which Hyde was searched, it is certainly accurate regarding current practices.

86. Arguably, luggage contains some items which cannot contain dangerous substances. However, the court disposes of this problem by noting that the tools of the hijacker come in many unexpected forms. 12 Cal. 3d at 174-75, 524 P.2d at 841, 115 Cal. Rptr. at 369.

87. 12 Cal. 3d at 175-76, 524 P.2d at 841-42, 115 Cal. Rptr. at 369-70.

88. *Id.* at 176, 524 P.2d at 842, 115 Cal. Rptr. at 370.

89. *Id.*

90. 351 F. Supp. 1284, 1286 (C.D. Cal. 1972).

sizes that the availability of such an election is required if the intrusiveness of the search is to be no greater than that which is justified by the governmental interest sought to be protected.

Had the court more carefully examined the record of the search under review, it might have concluded that there was no evidence that Hyde was advised of his option to avoid the search by electing not to board, or that he was ever free to exercise such an option had he attempted to do so. Such careful consideration of each airport search is essential to assure that the search is no more intrusive than is necessary to protect the governmental interest which justifies the search at its inception.

IV. ALTERNATIVE HOLDINGS

By ruling that airport searches are constitutional, the California Supreme Court did not need to consider using the exclusionary rule. However, rather than trying to fit the search under the existing exception for administrative searches or employing a balancing test, the court could have chosen to rule inadmissible any evidence other than weapons or explosives obtained as the result of an airport search. It is arguable that to the extent drugs instead of weapons are found, the search has exceeded its limited constitutional scope and the defendant should not have to suffer for that unreasonable intrusion into his privacy.[91] Additionally, the rule could be administered easily and would substantiate the public policy argument that the airport search is only for the prevention of hijacking.

However, such an approach would do violence to the exclusionary rule, since the fourth amendment protects the guilty only to the extent that it is necessary to protect the innocent. Generally, persons with contraband should be prosecuted for the crime they have committed. Further, the extension of the exclusionary rule would be contrary to settled case law[92] holding that if the search is lawful, seizing any contraband in plain view is also legal. There is no notion of protecting the integrity of the courts, because no "lawless invasion" of the rights of citizens is involved if the airport search is constitutional.

Finally, extending the exclusionary rule is a more appropriate role for the legislature than the court. However, if the court felt this was a desirable alternative, it could have pointed to the Illinois stat-

91. *See* United States v. Skipwith, 482 F.2d 1272, 1281 (5th Cir. 1973) (Aldrich, C.J., dissenting); Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 185-86 (1968).

92. Harris v. United States, 390 U.S. 234, 236 (1968), *see* McGinley & Downs at 323-24; MICH. Note at 156-57.

ute,[93] which excludes evidence of any criminal activity, other than carrying a firearm, explosive, or lethal weapon if the evidence was obtained in an airport search. Then the court might at least have come to its conclusion somewhat more reluctantly and urged legislative action.

The court could also have created a new exception to the fourth amendment for airport searches.[94] This would have several advantages. First a specific exception would be less open to abuse than the balancing test.[95] It would also avoid over-extending the initial justification for the administrative search rationale and other exceptions just to cover new fact situations. Furthermore, an exception for airport screening searches[96] would enable courts to deal with the unique problems of that search instead of struggling to fit it under clearly distinguishable situations.

The court may have hesitated to create any further exceptions to fourth amendment safeguards. Its concern may have been that another exception could undercut constitutional rights and relax the strict standard which views all warrantless searches as per se unreasonable. However, if the exception is specific and well-delineated, the compelling government interest in preventing hijacking, the lack of any effective alternative enforcement procedure, and the minimal intrusion into individual rights will sustain the reasonableness of the airport search, even if there is no warrant or probable cause.

CONCLUSION

In *People v. Hyde*, the California Supreme Court unanimously upheld airport searches but provided two rationales for finding the searches constitutional. The majority relied on fictions to analogize the airport search to administrative search cases which are clearly distinguishable. The concurring opinion's balancing approach, on the other hand, was an attempt at intellectual honesty but gave more attention to the intrusiveness of the search than the majority. Both rationales, however, applied a balancing test which is open to abuse and an erosion of fourth amendment protections against unreasonable searches and seizures.

In its decision, the court ignored the issue of whether the defend-

93. ILL. ANN. STAT. ch. 38 § 84-1 to -7, *as amended*, (Supp. 1974).

94. *See* MICH. Note at 152-54.

95. *See* text following note 84 *supra*.

96. The exception would cover other "public facilities screening searches," such as the searches in the federal building (*Downing v. Kunzig*) and the plant quarantine searches (*United States v. Shafer*), which are more like airport searches than the *Camara* and *See* health and fire inspections.

ant actually had the option to avoid the search by choosing not to fly. It also failed to consider extending the exclusionary rule or creating a new exception to the fourth amendment requirements for airport searches.

Arthur Larry Passar
Lani Liu Ewart

B. Discovery of Complaints Alleging Police Brutality

Pitchess v. Superior Court.[1] In the first reported California decision to confront the issue squarely, the supreme court granted discovery of citizen complaints made to a law enforcement agency concerning the use of excessive force by a peace officer. In so holding, the court clarified judicially developed standards governing the criminal defendant's right to discovery. At the same time, however, *Pitchess* raised new questions about the operation of the conditional governmental privilege for official information.

In March, 1972, Caesar Escheveria was charged with committing battery against four Los Angeles County deputy sheriffs. Asserting that he had acted in self-defense in response to the deputies' use of excessive force, the defendant moved to discover records of citizen complaints alleging similar misconduct by the same deputies.[2] The trial court granted the motion and ordered the prosecution to obtain the records from the administrative services bureau of the sheriff's department. Upon the sheriff's refusal to comply, the defense obtained a subpoena duces tecum directing production of the records. The sheriff then moved unsuccessfully to quash the subpoena and subsequently petitioned the supreme court for a writ of mandate to compel the trial court to quash.

In denying the extraordinary relief sought by the sheriff, the supreme court held that the defendant had demonstrated good cause sufficient to justify discovery. More specifically, it declared that principles developed by California case law, rather than the provisions of the

1. 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974) (Mosk, J.) (unanimous decision) (Clark, J., concurring in a separate opinion).

2. Such records would be admissible to prove that the deputies used excessive force against the defendant under section 1103 of the Evidence Code, which provides in part as follows:

> In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 [generally excluding evidence of character to prove conduct] if such evidence is: (a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

CAL. EVID. CODE § 1103 (West 1966).

Code of Civil Procedure relating to civil discovery, govern the showing of good cause required for criminal discovery. The court also rejected the sheriff's contention that the complaint records were protected under a common law privilege to prevent the disclosure of governmental information when the public interest so requires. It held instead that Evidence Code section 1040[3] provides the exclusive means of claiming this privilege. The sheriff had chosen to rely upon the common law privilege in an attempt to avoid the statutory sanction under Evidence Code section 1042(a)[4] of an adverse ruling on issues to which the privileged information is material. The court's holding made clear that the sheriff could not in this manner obtain the benefits of the statutory scheme without also suffering its attendant disadvantages.[5] Finally, the precise nature of the sanction required by section 1042(a) was held to be a matter within the discretion of the trial court.

I. THE SHOWING OF GOOD CAUSE

Since *People v. Riser*[6] and *Powell v. Superior Court*,[7] California courts have pursued a relatively liberal course in developing the criminal defendant's right to discovery. The primary impetus underlying this development has been a desire to ensure the accused a fair trial.[8] The right to discovery is not unlimited, however, but is instead contingent upon a prior showing of good cause.[9]

Three elements appear necessary to an adequate showing of good cause under the cases which have developed the law of criminal discovery. First, the defendant must offer "plausible justification" for in-

3. CAL. EVID. CODE § 1040 (West 1966).

4. CAL. EVID. CODE § 1042(a) (West Supp. 1974).

5. The court observed that the sheriff could not have avoided the potentially adverse consequences of § 1042(a) even if the Evidence Code provisions relating to the governmental privilege for official information had not supplanted the pre-existing common law rules. 11 Cal. 3d at 539 n.5, 522 P.2d at 311 n.5, 113 Cal. Rptr. at 903 n.5. This is because § 1042(a) is itself a codification of common law principles which would be operative in its absence. *See* United States v. Reynolds, 345 U.S. 1, 12 (1953); People v. McShann, 50 Cal. 2d 802, 806-11, 330 P.2d 33, 35-38 (1958); People v. Superior Court (Biggs), 19 Cal. App. 3d 522, 529, 97 Cal. Rptr. 118, 123 (3d Dist. 1971).

6. 47 Cal. 2d 566, 305 P.2d 1 (1956), *appeal dismissed*, 358 U.S. 646 (1959), *overruled on other grounds*, People v. Morse, 60 Cal. 2d 631, 338 P.2d 331, 36 Cal. Rptr. 201 (1964). Although technically concerned only with the defendant's right to discovery at trial, *Riser* is nonetheless significant for pretrial discovery as well. This may be inferred from Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959), in which the court observed, "[T]here is no sound basis for applying a different rule merely because production is requested prior to, rather than during, trial." *Id.* at 424, 340 P.2d at 594.

7. 48 Cal. 2d 704, 312 P.2d 698 (1957) (pretrial discovery).

8. *Id.* at 707, 312 P.2d at 699-700; Cash v. Superior Court, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

9. Hill v. Superior Court, 10 Cal. 3d 812, 817, 518 P.2d 1353, 1356, 112 Cal. Rptr. 257, 260 (1974).

spection.[10] Although this does not require a showing that the requested information would be admissible at trial,[11] it must reasonably appear that such information will assist in the preparation of the defense.[12] Second, the information must be requested "with at least some degree of specificity."[13] Finally, the defendant must show that he cannot readily obtain the information through his own efforts.[14]

a. Discovery by subpoena duces tecum

As long as the information sought by the defense is available to the prosecution, it is clear that these common law principles are controlling. Occasionally, however, the defense may desire information which is not readily obtainable by the prosecution, as was the case in *Pitchess*.[15] Under these circumstances, the appropriate method of securing the information is by subpoena duces tecum rather than by discovery motion.

Although the Penal Code expressly provides for subpoenas duces tecum in criminal proceedings,[16] the defendant in *Pitchess* obtained a subpoena duces tecum issued pursuant to Code of Civil Procedure section 1985.[17] Section 1985 requires a supporting affidavit showing good cause in approximately the same manner as would be expected under the common law principles applicable to criminal discovery motions.[18]

---

10. Ballard v. Superior Court, 64 Cal. 2d 159, 167, 410 P.2d 838, 843, 49 Cal. Rptr. 302, 307 (1966).

11. Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (3d Dist. 1957); People v. Cooper, 53 Cal. 2d 755, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960).

12. Hill v. Superior Court, 10 Cal. 3d 812, 817, 518 P.2d 1353, 1356, 112 Cal. Rptr. 257, 260 (1974).

13. Ballard v. Superior Court, 64 Cal. 2d 159, 167, 410 P.2d 838, 843, 49 Cal. Rptr. 302, 307 (1966).

14. Joe Z. v. Superior Court, 3 Cal. 3d 797, 806, 478 P.2d 26, 32, 91 Cal. Rptr. 594, 600 (1970).

15. The records were "unavailable" in this case due to the sheriff's refusal to furnish them to the prosecution in compliance with the trial court's initial ruling. Such refusals by law euforcement personnel to cooperate should not provide the prosecution with an excuse for failing to disclose evidence sought by the defense. "When the prosecutor consciously uses police officers as part of the prosecutorial team, those officers may not conceal evidence that the prosecutor himself would have a duty to disclose. It would be uncouscionable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that he bear the responsibility of producing all known and relevant evidence tending to show innocence." Moore v. Illinois, 408 U.S. 786, 810 (1972) (Marshall, J., concurring and dissenting).

16. CAL. PENAL CODE §§ 1326, 1327 (West Supp. 1974).

17. CAL. CODE CIV. PRO. § 1985 (West Supp. 1974).

18. CAL. CODE CIV. PRO. § 1985 (West Supp. 1974) provides in part as follows:

> A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in such subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues in-

Code of Civil Procedure section 2036, however, explicitly requires that the showing of good cause under section 1985 additionally include "specific facts justifying discovery."[19] This requirement, which could force a criminal defendant to compromise fifth amendment rights in order to obtain discovery by subpoena duces tecum,[20] has never been imposed where discovery is sought by motion rather than subpoena.

The court in *Pitchess* resolved this difference in the respective requirements for discovery by motion and subpoena duces tecum by refusing to give effect to the language of section 2036, stating that "civil discovery procedure has no relevance to criminal prosecutions."[21] Instead, the judicially developed principles governing criminal discovery are controlling, regardless of the discovery device employed.

---

volved in the case, and stating that the witness has the desired matters or things in his possession or under his control.

The only element of the showing of good cause required under common law principles which is not expressly mentioned in § 1985 is that the information sought not be readily available to the defendant through means other than discovery.

Penal Code sections 1326 and 1327, the counterpart in criminal proceedings to section 1985, do not expressly require a supporting affidavit or otherwise furnish criteria for determining whether good cause has been demonstrated for the issuance of a subpoena duces tecum. In People v. Climesmith, 175 Cal. App. 2d Supp. 911, 346 P.2d 923 (App. Dept., Los Angeles County Superior Court 1959), however, the court held the affidavit requirement of section 1985 applicable to subpoenas duces tecum issued under the Penal Code as well.

19. CAL. CODE CIV. PRO. § 2036 (West Supp. 1974).

20. *Pitchess* is itself illustrative of the fifth amendment problems which may arise by enforcing the requirement in section 2036 of stating "specific facts justifying discovery." The declaration in support of the defendant's subpoena stated:

> One of the defenses in this case will be that of self-defense, that if the defendants used any force against the victim deputies it was only reasonable force necessary for their protection against great bodily injury. The statements of past complainants against victim officers, where the complaint filed involved the alleged excessive use of force by the victim deputies, are material on the issue of the propensity of the victim officers to use excessive force against private citizens and more specifically to enhance the credibility of the defendants in their testimony that excessive force was used by the victim deputies against the defendants in this case.

Pitchess v. Superior Court, 109 Cal. Rptr. 596, 599 (2d Dist. 1973), *hearing granted*, Cal. Sup. Ct. (Nov. 28, 1973). In holding this declaration insufficiently specific, the court of appeal remarked, "If, for example, defendant had filed a personal declaration asserting that he had been pistol-whipped at a particular time and place by a particular deputy, that to protect himself from the whipping he had used his fists against the deputy, . . . the declaration would satisfy the statutory requirements of 'specific facts' and 'full detail' for issuance of a subpoena duces tecum. Instead, defendant merely filed a declaration of counsel setting forth hypothetical facts in a conclusory manner." *Id.* at 600.

By thus committing himself to such a detailed factual version of the incident in order to obtain discovery, the defendant would effectively relieve the prosecution of its burden of proving that he used force against the deputies. The defendant would in effect be gambling that the fruits of discovery would permit him to establish his claim of self-defense, for that would be the only defense left open to him after making such a declaration.

21. 11 Cal. 3d at 536, 522 P.2d at 308, 113 Cal. Rptr. at 900.

Aside from eliminating a potential fifth amendment dilemma for defendants seeking discovery by subpoena duces tecum, the court's ruling on section 2036 is important for another reason. The showing of good cause for a subpoena under section 1985 is made in an affidavit which, according to section 2036, must state specific facts justifying discovery. To the extent that this requirement renders affidavits containing statements made only on information and belief insufficient, a defendant would perhaps be precluded by section 2036 from discovering complaints of an officer's use of excessive force merely because he could not specify facts showing personal knowledge that such complaints had been made.[22] Since most defendants will have no personal knowledge of whether complaints have actually been made against a particular officer, this would frustrate discovery by subpoena duces tecum in all but a few instances. In holding section 2036 inapplicable to criminal discovery, *Pitchess* impliedly authorizes showing good cause by alleging on information and belief alone the existence of complaints. In view of the unfairness of requiring a defendant to state the very information sought to be discovered as a precondition to discovery, this result seems sound.[23]

---

22. *See* Johnson v. Superior Court, 258 Cal. App. 2d 829, 836-37, 66 Cal. Rptr. 134, 139 (2d Dist. 1968).

23. The paradox inherent in this situation was recognized iu Kenney v. Superior Court, 255 Cal. App. 2d 106, 63 Cal. Rptr. 84 (3d Dist. 1967), a medical malpractice action in which the plaintiff was granted discovery, *inter alia*, of hospital records alleged on information and belief to contain matter pertaining to prior instances of the defendant doctor's unprofessional conduct. The court observed, "[A]s a practical matter, how is a plaintiff ever to learn of the existence of these perhaps important sources of evidence vital to his cause except through information and belief?" *Id.* at 110, 63 Cal. Rptr. at 88.

The California Supreme Court has expressed similar views in connection with criminal discovery. In People v. Chapman, 52 Cal. 2d 95, 338 P.2d 428 (1959), the prosecuting witness had signed a statement which the defendant desired for impeachment purposes. Without having first viewed the statement, however, the defendant could not meet a requirement of demonstrating inconsistency between the statement and the testimony of the witness. In dispensing with this requirement, the court stated, "Ordinarily a defendant cannot show that a statement contains contradictory matters until he has seen it, and, if such a showing were a condition precedent to production, his rights would be dependent upon the highly fortuitous circumstance of his detailed knowledge as to the contents of the statement." *Id.* at 98, 338 P.2d at 430. In the more recent case of Hill v. Superior Court, 10 Cal. 3d 812, 518 P.2d 1353, 112 Cal. Rptr. 257 (1974), the prosecution's case rested heavily on the testimony of an eyewitness. In order to impeach this witness, the defendant sought production of his felony conviction record. The declaration in support of the discovery motion, however, alleged only on information and belief that such record was in the possession of either the police or the prosecutor, so the lower court denied discovery on the basis that there was insufficient showing of the record's existence. The supreme court rejected this reasoning, holding that "proof of the existence of the item sought is not required. . . . A requirement of such proof would, in many cases, deny the accused the benefit of relevant and material evidence." *Id.* at 817, 518 P.2d at 1356, 112 Cal. Rptr. at 260.

b. Discovery in the absence of prior knowledge of actual complaints

The defendant in *Pitchess* did not need to allege the existence of complaints on information and belief; he knew in advance the names of four persons who had previously complained to the sheriff's department of abusive treatment by the same deputies. Since two of the complainants were no longer available, the defendant sought production of their complaints to prepare for cross-examination of the deputies. The other two complainants, though available to testify, had forgotten the details of their encounters with the deputies and therefore needed to refresh their recollections by referring to their own complaints. Under these circumstances, the court found that there was "plausible justification" for discovery. It did not, however, rest its holding on these rather atypical facts, but declared instead that evidence of the complaints was "unquestionably relevant and admissible under Evidence Code section 1103" to prove the deputies' violent propensities in support of the defendant's self-defense theory.[24] The implication is that a defendant ac-

24. 11 Cal. 3d at 537, 522 P.2d at 309, 113 Cal. Rptr. at 901. It should be noted, however, that the court did not suggest any rationale for discovery other than that embodied in section 1103. Although discovery was ostensibly needed to prepare cross-examination and refresh witness recollection, these purposes could be directed only to proving the deputies' use of excessive force on prior occasions, which would not be relevant (at least under any theory discussed by the court) in the absence of section 1103.

There are, however, two other arguments for allowing discovery of complaint records which do not depend upon section 1103. The first of these is made under Evidence Code section 1101(b), which renders such records admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than the disposition to commit such acts." CAL. EVID. CODE § 1101(b) (West 1966). It can be argued that the officer, having himself perpetrated the battery, followed a "plan" of charging the defendant with the crime in order to conceal his own criminal conduct. This is illustrated by People v. Mascarenas, 21 Cal. App. 3d 660, 98 Cal. Rptr. 728 (2d Dist. 1971), in which the defendant was charged with furnishing narcotics to a minor. The minor was in fact an undercover agent who had, on one occasion in the past, stolen some wine in order to ingratiate himself with a suspect. The defendant denied having furnished narcotics to the agent and asserted that the agent had instead stolen the narcotics from him. In support of this defense, he sought to have evidence of the agent's prior theft admitted. The court held the evidence properly admissible under section 1101(b) as relevant to a plan of the agent to steal in order to secure convictions.

Under a second theory, complaints of the officer's previous use of excessive force are admissible either to attack the officer's credibility or to support the defendant's. This evidence is arguably relevant under Evidence Code section 780(f) to show the existence or nonexistence of bias, interest or motive, and section 780(i) to show the existence or nonexistence of any fact testified to by a witness. CAL. EVID. CODE §§ 780 (f), 780(i) (West 1966). People v. Rowland, 262 Cal. App. 2d 790, 69 Cal. Rptr. 269 (2d Dist. 1968), involving a prosecution for assault with a deadly weapon, is illustrative. The defendant in that case asserted that he had shot the victim in attempting to ward off a homosexual advance by the latter. The court held that the victim's "character" as an aggressive homosexual could be proved by evidence of specific instances of his past homosexual conduct in order to impeach his testimony under § 780(f). In language strikingly appropriate to the situation in which a peace officer has assaulted the

cused of committing a violent crime against a peace officer may establish "plausible justification" for discovering complaints of the latter's use of excessive force simply by claiming self-defense, whether or not he has personal knowledge of any complaints previously made.

It could be argued, however, that the lack of such knowledge would prevent a defendant from requesting discovery with sufficient specificity to satisfy the second requirement for showing good cause. For example, a blanket request for complaints relating to an officer's assaultive conduct might be denied for lack of specificity.[25] Requiring the discovery request to distinguish between different types of assaultive conduct, however, is pointless since all assaultive conduct is indicative of a general propensity for violent behavior.[26] Since a primary rea-

---

defendant and charged him with the offense, the court observed, "Whether or not Fricke [the victim] was a homosexual, particularly an aggressive one, bears not only on establishing defendant's claim of self-defense but also on his credibility. . . . If Fricke was a homosexual and if he was trying to pickup a male partner, there would be a strong motive or interest to camouflage his deviate personality disorder and possibly a criminal act . . . by giving testimony which would remove a possible complaining witness by causing the witness to be first convicted and incarcerated." *Id.* at 796, 69 Cal. Rptr. at 273. The court noted further that "the evidence of character was sought to establish that Fricke was of an aggressive homosexual character and from that fact to infer that he was making an aggressive homosexual advance towards defendant, which defendant had to ward off. Establishment of this fact is also interrelated with proving the credibility of *defendant* as a witness. (Evid. Code, § 780, subd. (i).)" *Id.* at 797-98, 69 Cal. Rptr. at 274 (emphasis added). But compare the later remarks of the same court of appeal in Pitchess v. Superior Court, 109 Cal. Rptr. 596, 599 n.2 (2d Dist. 1973), *hearing granted*, Cal. Sup. Ct. (Nov. 28, 1973): "[E]vidence of the character of the victim is not relevant to the credibility of defendant. Obviously, the credibility of defendant is established by his own character and not by someone else's."

At first glance, this second argument appears to run afoul of Evidence Code section 787, which provides that "evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." CAL. EVID. CODE § 787 (West 1966). There is authority, however, for concluding that section 787 does not bar evidence of an officer's prior assaultive conduct if such conduct bears on the ultimate issue of whether the defendant in fact committed the crime charged. This is known as the "basic fact in issue" exception to the rule embodied in section 787. *See* People v. Clark, 63 Cal. 2d 503, 505, 407 P.2d 294, 295, 47 Cal. Rptr. 382, 383 (1965); People v. Hurlburt, 166 Cal. App. 2d 334, 339, 333 P.2d 82, 85 (1st Dist. 1958); People v. Mascarenas, 21 Cal. App. 3d 660, 669, 98 Cal. Rptr. 728, 733 (2d Dist. 1971); *but see* Engstrom v. Superior Court, 20 Cal. App. 3d 240, 245, 97 Cal. Rptr. 484, 487 (1st Dist. 1971), *overruled on other grounds*, Hill v. Superior Court, 10 Cal. 3d 812, 820, 518 P.2d 1353, 1358-59, 112 Cal. Rptr. 257, 262-63 (1974).

25. A discovery request phrased in similar terms was thought to lack adequate specificity in Engstrom v. Superior Court, 20 Cal. App. 3d 240, 245, 97 Cal. Rptr. 484 (1st Dist. 1971).

26. Although this seems self-evident, the court of appeal in *Pitchess* was prepared to require the defendant to specify whether the deputies had administered excessive force with fists, feet, clubs or firearms. 109 Cal. Rptr. 596, 600 (2d Dist. 1973), *hearing granted*, Cal. Sup. Ct. (Nov. 28, 1973). "If, for example, defendant had filed a personal declaration asserting that he had been pistol-whipped at a particular time and place by a particular deputy, . . . and that other substantiated complaints of pistol-whip-

son for the specificity requirement is to facilitate production of the desired information by adequately apprising the custodian of its nature,[27] a request for complaints of assaultive conduct seems sufficiently specific to fulfill this purpose.

As to the third element of showing good cause, unavailability of the information through one's own efforts, a defendant having no prior knowledge of actual complaints is in an even stronger position to compel discovery than was the defendant in *Pitchess*. Indeed, where the identities of complainants are known in advance, discovery is unnecessary unless, as in *Pitchess*, the complainants have forgotten the facts which gave rise to their complaints or are unavailable. On the other hand, the defendant without prior knowledge can obtain the information only from the officer himself or from the appropriate law enforcement agency. It is unrealistic to expect that any cooperation would be forthcoming from either of these sources.[28]

The various requirements for showing good cause, it appears, permit a defendant who has no knowledge of actual complaints lodged against a particular peace officer to obtain discovery of such complaints simply by alleging that he acted in self-defense in response to the officer's use of excessive force.[29] Such a rule would probably encourage many defendants accused of violent crimes against peace officers to claim self-defense and thereby obtain the tactical advantage of compelling the agency holding the complaints either to disclose them or assert the privilege for official information (with its attendant sanction of an adverse ruling on issues to which the complaints are material). This

---

ping had been made against that same deputy, the declaration would satisfy the statutory requirements of 'specific facts' and 'full detail' for issuance of a subpoena duces tecum." *Id.* Query whether the court would classify pistol-whipping as the use of a club (thereby precluding discovery of complaints alleging the use of firearms) or a firearm (precluding clubs).

27. Pacific Automobile Ins. Co. v. Superior Court, 273 Cal. App. 2d 61, 68, 77 Cal. Rptr. 836, 841 (2d Dist. 1969); Grannis v. Board of Medical Examiners, 19 Cal. App. 3d 551, 565, 96 Cal. Rptr. 863, 873 (1st Dist. 1971). Although these cases involve civil discovery, there is no reason to suppose that a different rationale underlies the requirement for specificity when requesting criminal discovery.

28. The officer himself would naturally be reluctant to divulge information relating to his own previous misconduct. As to disclosure by the agency having custody of the complaint records, the statement of the commander of the administrative services bureau of the Los Angeles County Sheriff's department, made in counection with the request for discovery in *Pitchess*, is probably representative: "[N]one of the information whatsoever obtained as the result of an internal investigation will be given, or in any way made available, to any prosecuting authority. In addition, no information is given to departmental personnel who may be investigating the same incident . . . in connection with a criminal prosecution." Pitchess v. Superior Court, 109 Cal. Rptr. at 599 n.1 (2d Dist. 1973), *hearing granted*, Cal. Sup. Ct. (Nov. 28, 1973).

29. The discovery request would probably stand a greater chance of success if limited to complaints made within a specified period of time. *See* Engstrom v. Superior Court, 20 Cal. App. 3d 240, 245, 97 Cal. Rptr. 484, 487 (1st Dist. 1971).

result is justified, however, since evidence of the complaints may play a potentially crucial role in the defense, as will be discussed more fully below.

II. THE PRIVILEGE FOR OFFICIAL INFORMATION

Even if a defendant successfully demonstrates good cause for the discovery of complaint records, his efforts to obtain disclosure may still be frustrated if the records can be brought within the governmental privilege for official information, codified in Evidence Code section 1040.[30] This section provides a balancing test under which the privilege will be sustained only if the public interest in confidentiality outweighs the necessity for disclosure in the interest of justice. Although the privilege belongs to the public entity having possession of the desired records, it may not be invoked, much less sustained, unless the information contained in the records was acquired in confidence.[31] Thus, the privilege is designed primarily to further the government's interest in receiving information from the public which presumably could not be obtained without a guarantee of confidentiality.[32]

The court in *Pitchess* stated that the requested complaint records were encompassed by the privilege under section 1040.[33] This conclusion is sound, however, only to the extent that the complaints were actually "acquired in confidence." Although the sheriff's department as-

---

30. CAL. EVID. CODE § 1040 (West 1966) provides:

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

The California Public Records Act, CAL. GOV'T CODE §§ 6250-60 (West Supp. 1974), may not be invoked to support a claim that complaint records are not subject to criminal discovery. CAL. GOV'T CODE § 6260; Andujo v. Municipal Court, No. C 29427, App. Dept., Los Angeles County Superior Court (1972).

31. CAL. EVID. CODE § 1040 (West 1966); 55 CAL. OP. ATT'Y GEN. 369, 370 (1972).

32. 53 CAL. OP. ATT'Y GEN. 136, 149 (1970); City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 785, 109 Cal. Rptr. 365, 369 (2d Dist. 1973).

33. 11 Cal. 3d at 539, 522 P.2d at 310, 113 Cal. Rptr. at 902.

sured all complainants that their statements would be treated as confidential,[34] many complainants may not have desired confidentiality. Having themselves been victims of police brutality, such persons could reasonably be expected to welcome disclosure; withholding discovery of their complaints from a subsequent victim of the same officer's violent propensities would likely frustrate their desire to expose the officer's misconduct.[35] Thus, permitting a law enforcement agency unilaterally to label all complaints confidential might actually discourage some complainants from coming forward, thereby disserving the purpose underlying the limitation of section 1040 to information acquired in confidence. The determination of whether a particular complaint has been acquired in confidence should depend on the complainant's wishes rather than the policy of an agency primarily interested in preventing disclosure.[36] Thus, an agency should be allowed to invoke the privilege only where complaints are expressly given in confidence, with all other complaints subject to disclosure upon the requisite showing of good cause.

A court will not automatically sustain the privilege whenever it is invoked. Rather, it will apply the balancing test of section 1040. Under that test, disclosure will be ordered unless the public interest in confidentiality outweighs the necessity for disclosure in the interest of justice. The following analysis suggests that in most cases where discovery of complaints is sought to establish an officer's use of excessive force, the privilege should not be sustained.

a. The public interest in confidentiality

The general public interest in preserving the confidentiality of complaint records has three analytically distinct components. One of these, as previously discussed, is the interest in encouraging citizens to come forward with complaints. Another is the public interest in assuring the criminal defendant a fair trial. Finally there is a somewhat broader interest in promoting effective law enforcement.

It has already been observed that the interest in encouraging persons to submit complaints of police brutality is perhaps better served by disclosure than by confidentiality.[37] Similarly, the interest in provid-

34. Pitchess v. Superior Court, 109 Cal. Rptr. 596, 598 (2d Dist. 1973), *hearing granted*, Cal. Sup. Ct. (Nov. 28, 1973).

35. On the other hand, persons who are not themselves victims of police misconduct and who complain strictly out of a sense of civic duty could be deterred from coming forward by a policy of disclosing complaints. *See, e.g.*, City Council of the City of Santa Monica v. Superior Court, 204 Cal. App. 2d 68, 76, 21 Cal. Rptr. 896, 901 (2d Dist. 1962); Hill v. Superior Court, 10 Cal. 3d 812, 822-23, 518 P.2d 1353,1360, 112 Cal. Rptr. 257, 264 (1974).

36. See note 28 *supra*.

37. See text accompanying note 35 *supra*.

ing a fair trial demands that the state which prosecutes a defendant not withhold material information from him.[38] The interest in promoting effective law enforcement requires more extended consideration.

The thought of disclosing law enforcement records may evoke fears that the effectiveness of law enforcement generally would suffer by compromising its internal security. In the context of records pertaining to such matters as ongoing criminal investigation, these fears are probably justified. Disclosing records relating only to officer misconduct, on the other hand, could have no foreseeable effect on law enforcement efforts to restrain criminal activity.[39] A more realistic concern is that the disclosure of records of police misconduct might adversely affect law enforcement by discouraging the accurate keeping of such records. This consideration would weigh more heavily if accurate records of police misconduct were maintained even now, in the absence of routine disclosure; regrettably, this is not the case.[40] Fur-

38. This notion found expression in a dictum of United States v. Reynolds, 345 U.S. 1, 12 (1953): "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Accord,* People v. Castiel, 153 Cal. App. 2d 653, 658, 315 P.2d 79, 82 (1st Dist. 1957). *See also* CAL. EVID. CODE § 1040, Legislative Comment (West 1966). The policy expressed in *Reynolds* is codified in CAL. EVID. CODE § 1042(a) (West Supp. 1974).

39. *See* People v. Pearson, 111 Cal. App. 2d 9, 18, 24, 244 P.2d 35, 43, 47 (2d Dist. 1952), holding that papers related to investigations of persons suspected of criminal activities should be kept confidential as a matter of public policy. A similar rationale was advanced in Kott v. Perini, 283 F. Supp. 1, 2 (N.D. Ohio 1968), to protect police records concerning the arrest, questioning, arraignment, trial and sentencing of the defendant. Without considering the significant differences between this type of information and records of police misconduct, the court in City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 785, 109 Cal. Rptr. 365, 369 (2d Dist. 1973), relied on *Kott v. Perini* in holding the latter records privileged.

40. In general, complaint review systems are administered by police department persounel. Note, *The Administration of Complaints by Civilians Against the Police,* 77 HARV. L. REV. 499, 500 (1964). This results in a conflict of interest which often produces investigations which are slanted against the complainants and defensive of the police. Levine, *Implementing Legal Policies Through Operant Conditioning: The Case of Police Practices,* 6 L. & SOC. REV. 195, 204 (1971) [hereinafter cited as Levine]. "The investigating officers or the commanding officers who report on the incident are often superiors who have previously given very favorable performance ratings to the subject policeman and who are likely to continue to be in daily work relationship with him. Only the most blatant offense, supported by incontrovertible evidence, could induce the investigators and superiors to abandon their fellow officer." Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office,* 118 U. PA. L. REV. 1023, 1028 (1970) [hereinafter cited as Schwartz]. Disciplinary action is rarely imposed, and if imposed it is likely to be much lighter than the degree of misconduct would appear to warrant. Levine, *supra* at 204-05; Schwartz, *supra* at 1031-32. For example, an examination of 25 randomly selected files of the Philadelphia District Attorney relating to complaints of police brutality revealed that the most severe penalty imposed was a ten-day suspension during which the officer took part of his paid vacation. Schwartz, *supra* at 1031. "In one file, an im-

thermore, it seems odd to offer the fallibility of those who keep the records as a justification for preserving confidentiality; it is more appropriate to consider the deterrent effect which disclosure would probably have on police brutality.

It is also unlikely that the threat of disclosure would discourage able persons from pursuing careers in law enforcement; only records indicating the use of excessive force would be subject to production, and a prospective officer should not anticipate engaging in such conduct. Unfortunately, there is a possibility that police morale would be adversely affected by a liberal rule of disclosure, which might in turn be reflected in a less enthusiastic approach to law enforcement responsibilities generally. Such an effect, however, would be counteracted by the beneficial consequences of increased police accountability. A rule rendering the pursuit of grievances against the police easier and more effective, as would a policy of disclosure, should help lessen the disaffection for the police presently felt by certain segments of society; the task of law enforcement would become correspondingly easier.[41]

Taken together, then, the various considerations forming the public interest in preserving the confidentiality of complaint records are not compelling. It remains, however, to evaluate the interest in favor of disclosure.

b. The necessity for disclosure in the interest of justice

The necessity for disclosure of complaint records in the interest of justice depends mainly on the importance of the records to the preparation of the defense. In general, instances of police brutality go unwitnessed.[42] If the victim is then charged with committing a violent crime against the officer,[43] the defense must depend exclusively upon

---

proper and utterly baseless arrest, unjustified clubbing, and falsification of the patrol log resulted in . . . a short suspension. One might have expected the separation of such policemen from the force . . . ." *Id.* at 1031-32.

41. The police department is society's instrumentality to maintain law and order, and to be fully effective it must have public confidence and cooperation. Confidence can exist only if it is generally recognized that the department uses its enforcement procedures with integrity and zeal, according to law and without resort to oppressive measures. Law observance by the police cannot be divorced from law enforcement. When official conduct feeds a sense of injustice, and raises barriers between the department and segments of the community, and breeds disrespect for the law, the difficulties of law enforcement are multiplied.

Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966) (footnotes omitted). *See generally*, REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 299-322 (Bantam 1968).

42. Levine, *supra* note 40, at 202.

43. This has been referred to as a "cover charge," because it is made to legitimate the officer's own illegal behavior. Levine, *supra* note 40, at 203. Generalizations about police behavior are of course unwise, since practice varies widely among departments.

the defendant's testimony where records of prior complaints against the officer are withheld. Under these circumstances, the issue of credibility becomes the "fulcrum upon which the determination of the defendant's guilt or innocence must be balanced."[44] The defendant, who may perhaps be guilty of some unrelated offense or simply a member of an unpopular minority group, will seldom enjoy the sympathy of the jury.[45] In this situation, even the smallest amount of favorable evidence is vital in raising the requisite reasonable doubt of guilt. Clearly, then, complaint records would not only be material to the defense of cases such as this, but potentially decisive to their outcome.

The probability that the defendant is telling the truth should not be discounted merely because the witness whom he contradicts is a police officer. Clothing police testimony with a presumption of truthfulness is understandable in situations where only the defendant's guilt is at issue, for otherwise convictions would be unreasonably difficult to secure.[46] Such a presumption is not justified, however, where the de-

---

Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 25 (1962). Nevertheless, one commentator has stated that "[p]olice will almost invariably fabricate criminal charges against their victims to justify the force which was used. . . . [T]he intensity of violence used against defendants determines the seriousness of the charges preferred against them . . . ." Levine, *supra* note 40, at 203-04.

44. People v. Brandow, 12 Cal. App. 3d 749, 755, 90 Cal. Rptr. 891, 895 (2d Dist. 1970). Several cases have recognized that the improper exclusion of evidence of credibility can be especially prejudicial in the absence of witnesses other than the accused and the supposed victim. Hill v. Superior Court, 10 Cal. 3d 812, 819, 518 P.2d 1353, 1357-58, 112 Cal. Rptr. 257, 261-62 (1974); People v. Rowland, 262 Cal. App. 2d 790, 798, 69 Cal. Rptr. 269, 274 (2d Dist. 1968); People v. Mascarenas, 21 Cal. App. 3d 660, 669, 98 Cal. Rptr. 728, 734 (2d Dist. 1971); *In re* Ferguson, 5 Cal. 3d 525, 534, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971); People v. Hurlburt, 166 Cal. App. 2d 334, 342, 333 P.2d 82, 87-88 (1st Dist. 1958).

45. The victims of police brutality are usually unemployed lower-class men, such as drunks and migrants. Most juries would not be inclined to believe the testimony of such persons as against that of a police officer. Levine, *supra* note 42, at 206. There have recently been indications, however, that this is no longer invariably the case. TIME, Feb. 4, 1974, at 79.

46. *See, e.g.*, People v. Shafer, 101 Cal. App. 2d 54, 59, 224 P.2d 778, 781 (2d Dist. 1950) (prosecution for possession of heroin), in which the court stated:

> For a court to take the testimony of arresting officers as against that of the person accused is a daily occurrence in every city in America. If the prosecution were compelled to call in a host of private citizens or even one to substantiate the testimony of law-enforcing agencies the state would become a bedlam and enforcement would become impossible. Officers are men employed, appointed or elected by reason of their intelligence and good moral character. . . . When they come into court to give their testimony of events they have witnessed, even though the circumstances of the detection and arrest were unusual, they are not on that account to be discredited; neither is the accused necessarily to be believed.

A similar viewpoint was expressed in People v. Lara, 253 Cal. App. 2d 600, 605, 61 Cal. Rptr. 303, 307 (2d Dist. 1967) (prosecution for sale of heroin): "We assume that Officer Foresta spoke the truth when he testified that he had no further information con-

fendant's testimony accuses the officer of using excessive force. When confronted with possible criminal and civil liability, it is unrealistic to suppose that an officer will invariably tell the truth.[47]

Thus, in light of the competing interests in confidentiality and disclosure, a court should seldom sustain a claim of privilege under section 1040 where a defendant seeks to discover complaints of police brutality to support a theory of self-defense. Perhaps the privilege is justifiable where the encounter between the defendant and the officer was observed by several truly impartial witnesses who are available to testify at trial.[48] With this additional source of evidence, the relative impact of complaint records on the preparation of the defense would be diminished, rendering the necessity for disclosure in the interest of justice correspondingly weaker. Even so, discovery should not be lightly denied, for evidence of previous complaints against the officer could still mean the difference between conviction and acquittal.[49] Assum-

---

cerning the informant. . . . Certainly there is no presumption that police officers will commit perjury."

47. The risk of criminal and civil liability, however, is less than would be expected. Prosecutions for police brutality are relatively rare. B. COOK, THE JUDICIAL PROCESS IN CALIFORNIA 103 (1967); *see* Berger, *Law Enforcement Control: Checks and Balances for the Police System*, 4 CONN. L. REV. 467, 478-79 (1971). This may indicate that the standard for charging police with crimes differs from that generally applied. *See* Cohen, *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363, 370 (1972). The successful pursuit of tort remedies against police officers is also unlikely. *See* LA FAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 412-25 (1965); Berger, *supra* at 478-79. The temptation to release the officer from civil liability in return for a favorable plea bargain is so great that many complaints never result in litigation at all. *See* Levine, *supra* note 40, at 205. Beyond this, the victim may let the matter drop for fear of subsequent police harassment or the adverse disposition of pending criminal charges. *See* LA FAVE, *supra* at 424.

There has been considerable comment on the problems of police perjury and brutality. *See generally* Cohen, *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363 (1972); Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551 (1967); Kamisar, *Do Police Sometimes Practice "Civil Disobedience," Too?*, TRIAL, Oct./Nov. 1968, at 15; Comment, *The Problem of Police Brutality*, 10 SANTA CLARA LAW. 168 (1969). The tendeucy of police to shape their testimony was mentioned in Veney v. United States, 344 F.2d 542, 543 (D.C. Cir. 1965).

48. Only the availability of *impartial* witnesses should mitigate the defendant's interest in obtaining discovery. The encounter between the defendant and the officer may have been witnessed by other police officers, but such witnesses could hardly be considered impartial. (Under the "Brothers Code," police are reluctant to testify against fellow officers: interviews conducted in a large midwestern city revealed that 77 per eent would not testify against another officer for stealing $500 from a drunk. Levine, *supra* note 40, at 202-03.) Neither should the availability of witnesses obviously allied with the defendant derogate from his interest in disclosure, since their credibility would likely be discounted by the jury with the result that the credibility of the defendant and the officer would remain the pivotal issue.

49. Before upholding a claim that complaint records are privileged, a court should also consider the observation recently made in Gill v. Manuel, 488 F.2d 799, 803 (9th Cir. 1973): "We do not believe that § 1040 is intended to provide a shield behind which *law enforcement personnel* may seek refuge for possible wrongdoings. It seems

ing, however, that the privilege is sustained, there remains the further issue of the proper sanction to be imposed on the prosecution under Evidence Code section 1042(a).

c. The sanction required by section 1042(a)

Whenever a claim of privilege is sustained in a criminal proceeding, Evidence Code section 1042(a) directs that the court "*shall* make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon *any* issue in the proceeding to which the privileged information is material."[50] Where the privileged information is material only to a collateral issue, presumably the code merely requires an appropriate jury instruction. On the other hand, where the information is material to the issue of guilt, the court apparently must dismiss the prosecution altogether. In any event, once the court has identified all issues to which the withheld evidence is material, the mandatory language of section 1042(a) leaves little room for judicial discretion as to sanction. Nevertheless, the court in *Pitchess* stated: "[T]he decision on the propriety of . . . a motion [under section 1040] *and* its possible attendant consequences under Evidence Code section 1042, subdivision (a), will remain in the sound discretion of the trial court . . . ."[51] Unfortunately this language may confuse the extent of the trial court's discretion. Certainly the determination whether the privilege should be sustained under section 1040 is discretionary; if the privilege is sustained, however, the inflexible requirements of section 1042(a) prohibit the exercise of any further discretion as to the sanction imposed on the prosecution. In short, the language in *Pitchess* suggesting that a court may determine both the existence of the privilege and its "possible attendant consequences" is somewhat misleading. However, this difficulty can be easily resolved if the word "and" is read as intending "with."

In order to determine correctly the proper sanction to apply under section 1042(a), it is necessary to identify all issues to which the complaint records are material. Justice Clark, in his brief concurring opinion in *Pitchess*, asserted that the complaint records sought in that case were material "solely" to the deputies' use of excessive force on *previous* occasions, and concluded that invocation of the privilege to bar disclosure of such records should result only in a finding of fact adverse to the prosecution on that collateral issue.[52] This, however, overlooks

---

reasonable that law enforcement officers are obligated to reveal the *true and complete* facts of any investigation to those responsible without any special immunity." (Emphasis in original.)

50. CAL. EVID. CODE § 1042(a) (West Supp. 1974) (emphasis added).

51. 11 Cal. 3d at 540, 522 P.2d at 311, 113 Cal. Rptr. at 903 (emphasis added).

52. *Id.* at 541, 522 P.2d at 311-12, 113 Cal. Rptr. at 903-04.

the fact that Evidence Code section 1103 endorses the admission of such evidence to prove the *present* use of excessive force.[53] In enacting section 1103, the legislature envisioned that evidence of the victim officer's character (including complaints about his past conduct) could be determinative of the defendant's guilt.[54] Therefore, complaints that the officer used excessive force on prior occasions are material to the ultimate issue of whether the defendant was acting in self-defense in response to the present use of excessive force.[55] By this reasoning, section 1042(a) (which mandates an adverse order on *any* issue to which the privileged information is material) requires dismissal of the prosecution whenever complaint records are withheld under a claim of privilege.[56]

CONCLUSION

The criminal defendant who has been falsely accused of assaulting a police officer faces a formidable task in proving his innocence. This is so because the question of guilt is often resolved without the benefit of evidence other than the conflicting testimony of the defendant and the officer. Inasmuch as the average jury will attach little credibility to the defendant's version as against that of the officer, conviction is virtually assured. Much can be done to even the balance by according to the defense liberal discovery of citizen complaints against the officer. *Pitchess*, insofar as it promises to require this, is a laudable development in the law of criminal discovery.

This development will prove nugatory, however, if the accompanying question of privilege is not thoughtfully considered as well. Although the balancing test prescribed by Evidence Code section 1040

53. CAL. EVID. CODE § 1103 (West 1966).

54. [U]nder Sections 1102 and 1103, the defendant in a criminal case is given the right to introduce character evidence that would be inadmissible in a civil case. However, evidence of the character of the defendant or the victim—though weak—may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt. And, since his life or liberty is at stake, the defendant should not be deprived of the right to introduce evidence even of such slight probative value.

CAL. EVID. CODE §§ 1102, 1103, Legislative Comment (West 1966).

55. Justice Mosk's opinion in *Pitchess* apparently acknowledged the materiality of complaint records to the issue of guilt by observing that "the information which defendant seeks may have considerable significance to the preparation of his defense . . . ." 11 Cal. 3d at 538, 522 P.2d at 309, 113 Cal. Rptr. at 901.

56. Following the supreme court's opinion in *Pitchess*, the sheriff's department, choosing not to claim the privilege under section 1040, made the requested information available to defendant Escheveria. Escheveria subsequently pleaded guilty to one count of misdemeanor battery pursuant to a plea bargain. The sheriff's department now routinely furnishes complaint records which are not deemed harmful to the reputation of the officer involved. Telephone interview with defense counsel Miguel F. Garcia of the Model Cities Center for Law and Justice, Los Angeles, California, Jan. 23, 1975.

indicates that courts should require disclosure in most instances, judicial discretion nevertheless will be exercised at times in favor of preserving confidentiality. Where a claim of privilege is in fact sustained, the defense is deprived of possibly vital evidence bearing on the issue of guilt. Accordingly, in such cases the prosecution should be dismissed if full effect is to be given Evidence Code section 1042(a). Recognizing that the broader issue is the accountability of the police for their own illegal conduct, it is imperative that these questions be properly resolved.

Jeffrey S. Allen

C. *Guilty Plea Protection and Administration*

Mills v. Municipal Court; *People v. Superior Court (Wicks)*;[1] *In re Birch*;[2] *In re Yurko*.[3] In these decisions the California Supreme Court extended constitutional standards relating to guilty pleas set out in *Boykin v. Alabama*[4] and *In re Tahl*[5] to misdemeanor pleas and to admissions of prior convictions, and held that the record must show that the defendant was informed of the direct consequences of his guilty plea or admission. The court sought to protect the rights of criminal defendants pleading guilty by mandating flexible procedural safeguards to be followed by the trial courts, and by requiring active judicial protection of those rights when defendants are without counsel. The court also acted to guarantee a record of the guilty plea proceedings to facilitate review on both direct appeal and subsequent collateral attack.

1. *Boykin-Tahl* STANDARDS

a. Mills and Wicks

Mills pleaded nolo contendere[6] to a misdemeanor drunk driving charge in 1971 and was fined 350 dollars.[7] In 1972 he was again con-

1. 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973) (Tobriner, J.) (unanimous decision) (consolidated opinion).

2. 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973) (Tobriner, J.) (unanimous decision).

3. 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974) (Wright, C.J.) (6-1 decision) (Mosk, J., dissenting).

4. 395 U.S. 238 (1969).

5. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).

6. A plea of nolo contendere results in the conviction of the defendant, but the conviction may not be used in civil proceedings. CAL. PENAL CODE § 1016 (West 1970). A defendant pleading nolo contendere has the same constitutional rights as a defendant who pleads guilty. *In re* Gannon, 26 Cal. App. 3d 731, 737, 103 Cal. Rptr. 224, 228 (3d Dist. 1972). For the purposes of the *Boykin-Tahl* standards, a plea of nolo contendere is the functional equivalent of a plea of guilty. Mills v. Municipal Court, 10 Cal. 3d 288, 298 n.7, 515 P.2d 273, 280 n.7, 110 Cal. Rptr. 329, 336 n.7 (1973).

7. Although Mills was referred to an attorney by a friend, he never discussed the

victed of misdemeanor drunk driving and his license was suspended for one year pursuant to Vehicle Code section 13352.[8] Mills then attacked his prior conviction on the grounds that the record in the prior case neither indicated that he had been advised of his constitutional rights, nor that he had waived them.[9]

The *Wicks* case presented an unusual situation. Wicks was arrested on a misdemeanor drunk driving charge. At first, he pleaded not guilty. Later, however, his attorney appeared in court in his absence and tendered a printed "change of plea" form published by the San Diego Municipal Court. Wicks had filled out and signed the form. On it a defendant represents that he has been advised of:

> (a) The right to be tried by a jury; (b) The right to confront and cross-examine all the witnesses against him; (c) The right at the trial to present evidence in his favor and either to testify for himself, or, if he wishes, he may remain silent; (d) The right to a speedy and public trial; (e) The right to have witnesses subpoenaed to testify in his behalf and to obtain all evidence which might exonerate the defendant; (f) The right to have a qualified lawyer defend him at all stages of the proceedings; that said attorney may be of defendant's own choice or shall be court appointed if the defendant is unable to afford counsel.[10]

The form contained a provision waiving the rights and a declaration that the defendant had discussed the contents of the form with his attorney. Wicks initialed each item. The form also contained a declaration by the attorney that he had personally read, discussed, and explained the contents of the form to the defendant. Despite the attorney's oral reaffirmation that Wicks had signed and initialed the form, the trial court refused to accept it as a guilty plea unless the defendant was personally present in the courtroom.[11] Wicks then sought a writ of mandate to compel the court to accept his plea through his attorney.

Considering *Mills* and *Wicks* together, the California Supreme

---

facts with the attorney. Nevertheless, the attorney recommended a no contest plea in a conference with Mills just before the hearing. On Mills' authorization, the attorney entered the plea while Mills sat in the spectator area. Although Mills alleged that he could not hear what was being said by the judge or the attorneys, 10 Cal. 3d at 293-94 n.3, 115 P.2d at 277 n.3, 110 Cal. Rptr. at 333 n.3, he did not contend that his plea was invalid because it was not personally entered.

8. CAL. VEH. CODE § 13352 (West Supp. 1974). This section requires the automatic suspension of the defendant's driver's license on the second conviction.

9. Mills sought a writ of mandate directing the court which had accepted his plea of nolo contendere to vacate the plea. This procedural approach has been likened to a writ of habeas corpus. Cooper v. Justice Court, 28 Cal. App. 3d 286, 290-91, 104 Cal. Rptr. 543, 546-47 (4th Dist. 1972). *See* Thomas v. Dep't of Motor Vehicles, 3 Cal. 3d 335, 338-39, 475 P.2d 858, 860, 90 Cal. Rptr. 586, 588 (1970); Fitch v. Justice Court, 24 Cal. App. 3d 492, 494, 101 Cal. Rptr. 227, 228 (1st Dist. 1972).

10. 10 Cal. 3d at 295, 515 P.2d at 278, 110 Cal. Rptr. at 334.

11. *Id.* at 296, 515 P.2d at 279, 110 Cal. Rptr. at 335.

Court held that in misdemeanor, as in felony cases, a guilty plea is not valid unless the record shows a knowing and voluntary waiver of the constitutional rights involved. It further held that the misdemeanor context permits flexible procedures for the application of these standards, such as the *Wicks* entry of plea through counsel, as long as the record clearly demonstrates a personal awareness and waiver.

b. Standards regulating acceptance of guilty pleas in felony cases

By pleading guilty[12] a defendant waives rights accorded by the fifth and sixth amendments of the United States Constitution. Early Supreme Court cases established that to constitute a waiver, the defendant's act must manifest "an intentional relinquishment or abandonment of a known right or privilege"[13] and that a guilty plea would not effectively waive the constitutional rights involved unless the plea was entered voluntarily and with an understanding of the consequences.[14] These standards were inconsistently applied by lower courts and by the Supreme Court itself.[15] The standards were strictly applied in cases involving coercion,[16] misrepresentation,[17] or the defendant's mental incompetence.[18] Other cases declined to overturn questionable waivers or guilty pleas, citing such factors as the presumption against an unintelligent waiver,[19] the presumption that a defendant is informed of the consequences of his plea by his counsel,[20] the presumption that a waiver is motivated by tactical considerations,[21] benefits received by the defendant in exchange for the waiver or guilty plea,[22] and the possibility that strict application of the standards would lead to "a mass exodus from the federal penitentiaries"[23] and undermine effective law enforcement.[24]

---

12. Unless otherwise indicated, references to guilty pleas shall apply to pleas of nolo contendere as well, and to acts of the defendant which are "tantamount to a plea of guilty." 10 Cal. 3d at 301-02 n.10, 515 P.2d at 283 n.10, 110 Cal. Rptr. at 339 n.10. *See* note 6 *supra.*

13. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

14. Kercheval v. United States, 274 U.S. 220, 223 (1927).

15. *See* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest,* 54 CALIF. L. REV. 1262, 1263 (1966); Note, *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 181, 181-82 (1969).

16. Machibroda v. United States, 368 U.S. 487, 493 (1962).

17. Von Moltke v. Gillies, 332 U.S. 708, 728-29 (1948).

18. United States *ex rel.* Codarre v. Gilligan, 363 F.2d 961, 965 (2d Cir. 1966).

19. Moore v. Michigan, 355 U.S. 155, 161-62 (1957).

20. Orr v. United States, 408 F.2d 1011, 1012 (6th Cir. 1969).

21. Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969).

22. Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790, 794 (1970); Womack v. Craven, 431 F.2d 1191, 1192 (9th Cir. 1970).

23. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

24. United States v. Parrino, 212 F.2d 919, 922 (2d Cir. 1954) (". . . we may not properly let sympathy, thus engendered, by intrusion into the field of criminal ad-

In *McCarthy v. United States*,[25] however, the Supreme Court radically changed the manner in which guilty pleas could be accepted by requiring federal judges to examine defendants personally to ensure that guilty pleas were entered voluntarily and with an understanding both of the nature of the charge and the consequences of the plea.[26] In addition, the Court held that if the record did not clearly show that the plea was entered "voluntarily and knowingly," the defendant was entitled to have the plea vacated and to plead anew.[27] *McCarthy* involved the application of Rule 11 of the Federal Rules of Criminal Procedure,[28] but in *Boykin v. Alabama*,[29] the standards of a voluntary and knowing entry of plea and the recordation rule were held to be constitutionally required in state court proceedings. The *Boykin* standards were explicated by the California Supreme Court in *In re Tahl*[30] where the court held that "the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea."[31]

The *Boykin-Tahl* rules resulted from two aspects of the doctrine of constitutional waiver. First, while earlier cases had been concerned primarily with the coerciveness of the setting in which constitutional rights were waived[32] and with the importance of those rights,[33] recent cases have concentrated on the waiver of rights in the plea bargaining context.[34] The complexity of the negotiations, frequently beyond the understanding of the defendant, and the necessity for enforcement of the expectations of the parties have led to the requirement that the plea

---

ministration disturb the finality of criminal process and thus undermine effective law enforcement").

25. 394 U.S. 459 (1969).

26. *Id.* at 467.

27. *Id.* at 469. The *McCarthy* rules were later held to apply prospectively only. Halliday v. United States, 394 U.S. 831 (1969).

28. Rule 11 reads:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

FED. R. CRIM. P. 11.

29. 395 U.S. 238 (1969).

30. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).

31. *Id.* at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584 (emphasis in original).

32. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

33. *E.g.*, Fay v. Noia, 372 U.S. 391 (1963). *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 181, 185-86 (1969).

34. *E.g.*, Santobello v. New York, 404 U.S. 257 (1971); People v. West, 3 Cal. 3d 595, 606, 477 P.2d 409, 415, 91 Cal. Rptr. 385, 391 (1970).

bargain be memorialized in the record and that the judge take an active role in ensuring that the defendant has an understanding of the bargain to which he has acquiesced.[35]

Secondly, courts have expressed concern over the large number of collateral attacks on guilty pleas.[36] The recordation requirement affects collateral attacks primarily in two ways. First, it facilitates review because the major factual questions of whether the defendant was ever informed of his rights and whether he waived them may often be resolved by the record on its face, thus allowing more expeditious disposition of both clearly meritorious and clearly frivolous contentions.[37] In addition, it serves to deter unmeritorious collateral attacks because of the decreased likelihood of success.

Moreover, strict standards are acceptable because a finding of an ineffectual waiver of constitutional rights results in less burdensome consequences in the case of guilty pleas than in other contexts. Since a guilty plea results in the immediate conviction of the defendant, there is no wasted trial if the conviction is overturned and the defendant is allowed to plead anew.[38] Indeed, vacating the guilty plea may result

---

35. *See* Comment, *Judicial Supervision over California Plea Bargaining: Regulating the Trade*, 59 CALIF. L. REV. 962 (1971). The duty of the judiciary was stressed in *In re* Birch, 10 Cal. 3d 314, 319, 515 P.2d 12, 15, 110 Cal. Rptr. 212, 215 (1973) ("Moreover, in scrutinizing waivers of counsel by defendants requesting to plead guilty, we have directed trial courts to assume an active, protective role to ensure that both the defendant's waiver of counsel and his guilty plea are knowingly and understandingly made."). Guilty pleas in the context of plea bargains are more fully discussed in the text accompanying notes 88-93 *infra*.

36. *E.g.*, McCarthy v. United States, 394 U.S. 459 (1969). The burgeoning number of collateral attacks on convictions, however, has had surprising beneficial side effects:

> "The [California] Department of Corrections fought like hell to stop the practice of inmate lawyers," said Philip Guthrie, department spokesman. "Most of us were concerned about the power jailhouse lawyers could wield and the possibility of serious trouble. But we misjudged the situation because it didn't turn out that way at all." . . .
>
> "Instead of becoming a serious problem, as we thought it might, jailhouse law has actually served as a calming influence," [Nelson P. Kempsky, deputy director of the California Department of Corrections] said. "If an inmate can vent his hostility in legal briefs filed in the courts, he's less likely to be a disruptive influence in the prison population." . . . .
>
> Instead of creating the problems prison authorities feared, relaxed restrictions on jailhouse lawyers and the opening of prison law libraries have paid dividends in easing tensions and providing a constructive activity for hundreds of prisoners.

Hazlett, *Studying Behind Bars—The Boom in Jailhouse Law*, San Francisco Chronicle, Oct. 27, 1974, This World, at 25, col. 2-3.

37. Because the defendant's express waiver of constitutional rights appears on the face of the record, a court may dispose of a collateral attack without an evidentiary hearing. *But cf.* Meller v. Missouri, 431 F.2d 120 (8th Cir. 1970), *cert. denied*, 400 U.S. 996 (1971) (court reporter lost his 15-year-old notes); United States v. Cariola, 323 F.2d 180, 183 n.1 (3d Cir. 1963) (trial judge, court reporter dead, no notes).

38. Of course, if much time elapsed after the entry of the invalid guilty plea, the

only in striking another bargain or, if the defendant has already spent time in prison pending his successful collateral attack, the government may feel that further punishment is unnecessary.[39]

c. Extension of guilty plea standards to misdemeanors

In *Tahl* and cases following it, the California Supreme Court had no occasion to consider the applicability of felony guilty plea standards to misdemeanors.[40] The lower courts, however, agreed that the *Boykin-Tahl* requirement of recorded, express waivers of constitutional rights applied to some extent to misdemeanors.[41] Even the California Attorney General's office had conceded this.[42] But since the two court of appeal cases which had decided the point both involved jail sentences,[43] the issue still remained whether the possibility of incarceration was a prerequisite to the invocation of the *Boykin-Tahl* protections. The question was not one purely of theory, for one major concern was that if all criminal proceedings were within the *Boykin-Tahl* rules, regardless of whether incarceration were possible, then logically the rules would apply to the millions of California traffic violations.[44]

The court of appeal in the *Mills* case[45] sought to limit the application of the *Boykin-Tahl* rules to cases involving significant sanctions or where the defendant would be subject to significantly increased sanctions on subsequent violations of the law.[46] In *Mills* the defendant's

---

evidence would be stale and witnesses may be unavailable. There has been little discussion of whether judges should be more lenient in overturning guilty pleas when the government makes no showing of substantial prejudice. *Cf.* United States v. Sambro, 454 F.2d 918, 927 (D.C. Cir. 1971) (Leventhal, J., dissenting).

39. *Cf.* United States *ex rel.* Codarre v. Gilligan, 363 F.2d 961, 967 (2d Cir. 1966) (defendant incarcerated 23 years).

40. Mills v. Municipal Court, 10 Cal. 3d 288, 291, 515 P.2d 273, 275-76, 110 Cal. Rptr. 329, 331-32 (1973).

41. Mills v. Municipal Court, 105 Cal. Rptr. 271 (4th Dist. 1972), *hearing granted*, Cal. Sup. Ct. (Feb. 28, 1972); Cooper v. Justice Court, 28 Cal. App. 3d 286, 104 Cal. Rptr. 543 (4th Dist. 1972); *In re* Gannon, 26 Cal. App. 3d 731, 103 Cal. Rptr. 224 (3d Dist. 1972); Fitch v. Justice Court, 24 Cal. App. 3d 492, 101 Cal. Rptr. 227 (1st Dist. 1972) (dictum).

42. Respondents' Reply Brief at 5, Fitch v. Justice Court, 24 Cal. App. 3d 492, 101 Cal. Rptr. 227 (1st Dist. 1972).

43. Cooper v. Justice Court, 28 Cal. App. 3d 286, 104 Cal. Rptr. 543 (4th Dist. 1972); *In re* Gannon, 26 Cal. App. 3d 731, 103 Cal. Rptr. 224 (3d Dist. 1972). Both cases involved the imposition of a suspended sentence on probation revocation. In Fitch v. Justice Court, 24 Cal. App. 3d 492, 495-96, 101 Cal. Rptr. 227, 229 (1st Dist. 1972), the court expressed the opinion that the *Boykin-Tahl* rules applied to misdemeanors, but held that it had no jurisdiction to consider the petitioner's claim.

44. *See In re* Johnson, 62 Cal. 2d 325, 336 n.8, 398 P.2d 420, 427 n.8, 42 Cal. Rptr. 228, 235 n.8 (1965).

45. 105 Cal. Rptr. 271 (4th Dist. 1972), *hearing granted*, Cal. Sup. Ct. (Feb. 28, 1972).

46. *Id.* at 275.

second conviction for misdemeanor drunk driving subjected him to an automatic one-year suspension of his driver's license.[47]

Analogizing to *Argersinger v. Hamlin*,[48] the government in *Mills* urged the California Supreme Court, if it intended to extend the *Boykin-Tahl* requirements to misdemeanors at all, to make them applicable only to those misdemeanors which result in the defendant's imprisonment. In *Argersinger*, the United States Supreme Court held that the sixth amendment of the United States Constitution required that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[49] The court, however, rejected the government's suggestion. It noted first that *Argersinger* carefully avoided considering the right to counsel when the criminal defendant is not facing imprisonment.[50] Second, the court reiterated that the three rights enumerated in *Boykin* and *Tahl*—the privilege against self-incrimination, the right to a jury trial, and the right to confrontation—are applicable to *all* misdemeanors in California.[51] Since the purpose of the *Boykin-Tahl* rules is to ensure a knowing and binding waiver of those rights when a defendant pleads guilty, the rules should apply whenever those rights are at stake.[52] Third, an *Argersinger* rule would force judges to determine at the outset of the proceedings whether imprisonment is a consequence of the guilty plea. Such a procedure would create practical problems for trial judges which would far outweigh any value in reducing state expense or delay, especially since the alternative is the simple and inexpensive one of obtaining an express, recorded waiver.[53]

In holding that the *Boykin-Tahl* rules apply to misdemeanors, the court distinguished situations in which the forfeiture of bail terminates the proceedings.[54] This, of course, is frequently the case with traffic violations.[55] While admitting that the consequences of bail forfeiture are the same as those of a conviction, the court thought that "any rule that would require every traffic violator either to appear in court personally or obtain an attorney to appear for him would be significantly

47. CAL. VEH. CODE § 13352 (West Supp. 1974). But certain other prior traffic violations will also automatically revoke a driver's license upon subsequent conviction. CAL. VEH. CODE § 13350 (West Supp. 1974).

48. 407 U.S. 25 (1972).

49. *Id.* at 37.

50. 10 Cal. 3d at 300, 515 P.2d at 281-82, 110 Cal. Rptr. at 337-38.

51. *Id.* at 300, 515 P.2d at 282, 110 Cal. Rptr. at 338.

52. *Id.*

53. *Id.* at 301, 515 P.2d at 282, 110 Cal. Rptr. at 338.

54. *Id.* at 302 n.11, 515 P.2d at 283 n.11, 110 Cal. Rptr. at 339 n.11.

55. *Id.*; *In re* Johnson, 62 Cal. 2d 325, 336 n.8, 398 P.2d 420, 427 n.8, 42 Cal. Rptr. 228, 235 n.8 (1965) (78% of over 5,000,000 traffic offenses); CAL. VEH. CODE § 13103 (West Supp. 1974).

more onerous—to both courts and defendants—than could possibly be justified by the benefits obtained."[56] And without explanation, the court held that the *Boykin-Tahl* rules do not apply to infraction cases in which incarceration is not an applicable sanction.[57]

d. Flexible procedures

While holding the *Boykin-Tahl* express, recorded waiver rules applicable to misdemeanors, the court indicated a willingness to allow diverse procedures for acceptance of guilty pleas as long as there is documentary proof of the defendant's knowledge and express waiver of fundamental rights. This approval of flexible procedures comes as no surprise, for in earlier cases the court had expressed a willingness to accept procedures which reasonably sought to balance the protection of constitutional rights against the convenience of the courts and defendants.[58]

1. Defendants represented by counsel. The court expressly approved the means by which the defendant in *Wicks* attempted to enter his guilty plea *in absentia.* The form proffered by Wicks' attorney enumerated the constitutional rights of which defendant was informed and which he waived. It also was initialed and signed by him, and contained the declaration of his attorney. Thus, it would have fully satisfied the dual purposes of the *Boykin-Tahl* rules: "first, insuring that a defendant is aware of his constitutional rights and has voluntarily and knowingly waived them; and second, insuring that an adequate record of these facts is made so as to facilitate review on appeal or collateral attack."[59]

The court relied heavily on Penal Code section 1429[60] which allows a defendant to enter a misdemeanor plea through his counsel. The court felt that that provision constituted an explicit determination by the legislature that "for many misdemeanor defendants an absolute requirement of presence in court would frequently impose a greater burden than the punishment for the crime itself."[61]

---

56. 10 Cal. 3d at 302 n.11, 515 P.2d at 283 n.11, 110 Cal. Rptr. at 339 n.11.

57. *Id.* at 302 n.13, 515 P.2d at 283 n.13, 110 Cal. Rptr. at 339 n.13.

58. *E.g., In re* Johnson, 62 Cal. 2d 325, 336, 398 P.2d 420, 425, 42 Cal. Rptr. 228, 233 (1965); *In re* Smiley, 66 Cal. 2d 606, 622, 427 P.2d 179, 189, 58 Cal. Rptr. 579, 589 (1967); Blake v. Municipal Court, 242 Cal. App. 2d 731, 733-34, 51 Cal. Rptr. 771, 773 (1st Dist. 1966); *see In re* Sheridan, 230 Cal. App. 2d 365, 368-70, 40 Cal. Rptr. 894, 895-97 (2d Dist. 1964).

59. 10 Cal. 3d at 305, 515 P.2d at 285, 110 Cal. Rptr. at 341.

60. CAL. PENAL CODE § 1429 (West 1970).

61. 10 Cal. 3d at 306, 515 P.2d at 285-86, 110 Cal. Rptr. at 341-42. The court gave less deference to a provision in the California Constitution which said that "trial by jury may be waived in all criminal cases, by the consent of both parties, *expressed in open court by the defendant and his counsel.*" CAL. CONST. art. I, § 7 (1928) (emphasis added). On November 5, 1974, the voters of California amended the constitution. The right to a jury trial is now found in art. I, § 16, which reads in part: "A

While the court approved the entry of a guilty plea through counsel, it failed to delineate precisely the scope of the attorney's role in the process. Illustrative of the problems which may arise is *Dale v. City Court*,[62] a 1951 court of appeal case. In *Dale* the court held that the trial court properly exercised its discretion in refusing to vacate a misdemeanor guilty plea entered by counsel in defendant's absence. Both the defendant and her counsel filed affidavits alleging that the plea had been entered without actual authority, and there was no evidence to the contrary. Nevertheless, the court of appeal held that the trial court could refuse to vacate the plea since "an attorney acting and appearing for a party is presumed to have authority to take action in all procedural matters involved in the proceeding in which he represents his client."[63] Under the *Mills* rationale, however, an attorney's entry of a guilty plea as in *Dale* would not be binding on the defendant. Since the attorney offered no documentary evidence showing the defendant's knowledge and waiver of his *Boykin-Tahl* rights, the guilty plea would be constitutionally deficient under *Mills*[64] and thus voidable by the defendant. In other words, under *Mills* the attorney entering a guilty plea for an absent defendant is more of a messenger than an agent.

2. *Defendants not represented by counsel.* The court also approved the use of flexible procedures in accepting guilty pleas from defendants not represented by counsel. The court reaffirmed the procedures attacked in *In re Johnson*,[65] where the trial judge collectively advised several defendants of their rights, but individually, at the arraignment, questioned each to ascertain whether he had heard and understood the judge's advice. The court indicated, however, that any procedure which failed to provide an adequate record showing that the de-

jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."

62. 105 Cal. App. 2d 602, 234 P.2d 110 (3d Dist. 1951). The *Mills* court relied on *Dale* in holding that the California constitution did not require that the waiver of the right to a jury trial be made personally by the defendant in open court. 10 Cal. 3d at 306-07 n.16, 515 P.2d at 286 n.16, 110 Cal. Rptr. at 342 n.16; CAL. CONST. art. I, § 16 (1974). However, the court did not discuss the *Dale* agency theory.

63. 105 Cal. App. 2d at 607-08, 234 P.2d at 114. Arguably, the presumption of authority should not extend to acts of an agent, such as the entry of a guilty plea by an attorney, that have substantial probability of detrimentally affecting the interests of the principal or which waive the principal's important constitutional rights. For such acts to bind the defendant, more specific evidence of authority should be required than the lone fact that the attorney is defendant's counsel.

64. In a footnote the court emphasized that the waiver must be by the defendant even though the defendant does not appear in court; however, a written waiver meets this requirement because it is "by the defeudant." 10 Cal. 3d at 305 n.15, 515 P.2d at 285 n.15, 110 Cal. Rptr. at 341 n.15. *See also* note 80 *infra*.

65. 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965). See cases cited note 58 *supra*.

fendant had been fully informed of his rights, and had knowingly and voluntarily waived them, would be deficient.[66]

In re Birch[67] illustrates the necessity for an on-the-record showing both that an unrepresented defendant was personally informed of his constitutional rights and that he personally waived them. Birch, by personal appearance, pleaded guilty to a misdemeanor. On the day that he entered his plea, the deputy city attorney had gathered all the unrepresented defendants together and had collectively read them their constitutional rights.[68] After ascertaining that none of the defendants had any questions concerning their rights, he passed out waiver forms similar to the forms used in *Wicks*.[69] Later, however, the deputy was unable to find a waiver form signed by the defendant. The California Supreme Court held that these facts did not establish that the defendant had been informed of his rights.[70] To provide an adequate record, the text of the collective advice should be incorporated into the record,[71] and there should be either a document signed by the defendant acknowledging that he had been informed of his rights and had waived them, or a transcript of a colloquy between the judge and the defendant with the same information.[72] The defendant, after all, may not have heard what was being said when all the defendants had been collectively advised, may have been absent from the courtroom at that time, may have been asleep, or may not understand English. Therefore, a record which fails to show that the defendant had been informed of his rights, even if it shows that he waived them, is insufficient.[73]

Birch also demonstrates the problems inherent in certain types of waiver recordations. The clerk's docket in that case contained a rubber-stamped entry stating:

---

66. 10 Cal. 3d at 303, 307, 515 P.2d at 283-84, 286-87, 110 Cal. Rptr. at 339-40, 342-43.

67. 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973).

68. *Id.* at 320 n.6, 515 P.2d at 15 n.6, 110 Cal. Rptr. at 215 n.6. The deputy city attorney's statement was not included in the record, a shortcoming of which the court disapproved. *Id.* The court also suggested that the trial judge inform the defendants himself. *Id.*

69. See text accompanying note 10 *supra.*

70. 10 Cal. 3d at 320-21, 515 P.2d at 15-16, 110 Cal. Rptr. at 215-16.

71. 10 Cal. 3d at 320 n.6, 515 P.2d at 16 n.6, 110 Cal. Rptr. at 216 n.6. The court also recommended that the collective advice be given by the judge. *Id.* Failure to incorporate the text or having someone other than the judge give the collective advice probably is not reversible error, however. *See In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965).

72. This procedure was recommended by the court in *Mills.* 10 Cal. 3d at 307, 515 P.2d at 286-87, 110 Cal. Rptr. at 342-43.

73. *Id.* at 320-321, 515 P.2d at 16, 110 Cal. Rptr. at 216. *Cf.* Blake v. Municipal Court, 242 Cal. App. 2d 731, 734-736, 51 Cal. Rptr. 771, 773-74 (1st Dist. 1966) (defendant informed of right to counsel but record failed to show waiver).

DEFENDANT EXPRESSLY WAIVED HIS RIGHT TO:
—COUNSEL
—JURY TRIAL . . .
—CONPRONTATION . . .
—SELF-INCRIMINATION . . .[74]

Each item had been checked off by hand. The court did not pass on the sufficiency of such a recordation of the defendant's waiver of counsel because the record failed to disclose whether the defendant had been fully informed of his right to counsel. Nevertheless, it is doubtful that such an entry would be sufficient under the *Boykin-Tahl* recordation standards.[75] First, the entry reflects only a layman's interpretation of the defendant's acts—there is no indication of what the defendant did to waive his rights. Second, such an entry is inherently unreliable. With the pace at which a crowded municipal court operates, it is likely that the clerk would check off each entry as a matter of routine, whether or not the defendant actually waives his rights.[76] Finally, such a procedure is insufficient in the light of alternatives which are more protective of the defendant's rights without being unduly burdensome to the court, *e.g.*, an oral examination by the judge or a written, signed waiver form.[77]

e. Impact and effect

1. Extension of rights to misdemeanors. As a practical matter, by extending the *Boykin-Tahl* express, recorded waiver requirements to misdemeanors, the court probably does little to protect the interests of defendants. True, the formalities of making an express waiver of constitutional rights will impress upon defendants the significance of their acts, thus lessening the possibility of a waiver of rights due to care-

74. *Id.* at 317 n.3, 515 P.2d at 13 n.3, 110 Cal. Rptr. at 213 n.3.

75. In Dulin v. Henderson, 448 F.2d 1238 (5th Cir. 1971), the record contained a document reciting:

> Defendant Dulin is called before the bar and advised by the Court of his right to have counsel represent him and that the Court will appoint an Attorney for him if he has no funds, and defendant waives his right to counsel.

Id. at 1239-40. The court vacated the state court conviction, holding that the defendant cannot be presumed to have voluntarily and knowingly waived his right to counsel by a "mere recitation" in a minute entry. *Id.* at 1240.

76. This is probably what happened in *Birch*, as the transcript of the court proceedings did not indicate that the defendant was informed of, or waived his constitutional rights.

77. *But cf.* Meller v. Missouri, 431 F.2d 120, 123-24 (8th Cir. 1970), *cert. denied*, 400 U.S. 996 (1971) (volntariness presumed from judge's docket, clerk's minutes, and testimony of witnesses, when the transcript notes to the hearing held 15 years in the past were lost). Cases decided before *Boykin* and *Tahl* held that docket entries constituted adequate records. *E.g., In re* Smiley, 66 Cal. 2d 606, 622, 427 P.2d 179, 189, 58 Cal. Rptr. 579, 589 (1967).

lessness or inattention.[78] It is unlikely, however, that more than a few defendants are unaware that by pleading guilty they are waiving the right to a jury trial, the right to confrontation, or the privilege against self-incrimination.

On the other hand, extension of recordation requirements should ease the burden on appellate courts of reviewing challenges to guilty pleas and deter many frivolous challenges based on alleged failures of trial courts to inform defendants of their rights or to obtain waivers.

2. Flexible procedures. Approval of flexible procedures may prove detrimental to the constitutional rights of defendants. Relaxation of procedures will allow more expeditious handling of misdemeanor guilty pleas, thus relieving the burden on overcrowded trial courts and benefitting defendants who otherwise may be required to attend tedious court sessions awaiting dispositions that are foregone conclusions. But procedures designed with an eye to administrative convenience may lose sight of their primary goal: implementation of the rigorous standards protecting defendants who plead guilty.

For example, allowing a represented defendant to enter his guilty plea through counsel shifts responsibility for informing the defendant of his rights from the judge to the attorney. Yet the failure of attorneys to fulfill this responsibility adequately was one important reason for the genesis of the *Boykin-Tahl* requirements.[79] Both *Boykin* and *Tahl* advocated active judicial participation in the guilty plea process to ensure that the defendant's rights are protected.[80] But a judge can-

78. By requiring a record showing that the defendant *waived* his rights, *Boykin-Tahl* indirectly ensured that the defendant was *informed* of the rights prior to their waiver. In fact, a record showing only that defendant purported to waive his rights may be insufficient absent evidence showing that he was fully informed of his rights. *See In re* Birch, 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973) (docket entry indicating only defendant's waiver of counsel insufficient without independent evidence that he had been informed of right to counsel).

79. *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 181, 187 (1969). The facts in *Boykin* suggest that counsel was inadequate. The defendant pleaded guilty to first degree murder. The punishment, however, was to be determined by the jury, not by the judge. Thus, there was no chance to bargain for a lenient punishment in exchange for the plea. And by presenting exculpatory evidence at a trial on the substantive crime, the defendant could plant a seed of doubt in the jurors' minds that, while not strong enough to acquit him, could save him from a death sentence.

80. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); *In re* Tahl, 1 Cal. 3d 122, 133 nn.6-7, 460 P.2d 449, 457 nn.6-7, 81 Cal. Rptr. 577, 585 nn.6-7 (1969). Even in *Tahl,* however, the court stated that an oral affirmation to the court by counsel that he had advised the defendant of his right to counsel and an oral waiver by the defendant in court of that right "would satisfy the requirement of an express, on-the-record waiver of that right. . . . The explanation need not necessarily be by the court, although the waiver must be by the defendant." 1 Cal. 3d 122, 133 n.6, 460 P.2d 449, 457 n.6, 81 Cal. Rptr. 577, 585 n.6. The court went on to note, however, that "wherever there is doubt an explicit and direct canvassing of the right with the defendant by the trial court is to be preferred, and may be necessary." *Id.* Since a defendant might

not determine whether a defendant has a meaningful understanding either of the rights waived or the consequences of the plea[81] if the defendant is not present in the court at the time of the waiver. In the defendant's absence, the judge has no opportunity to ascertain whether the defendant does not understand his rights or the consequences of his plea because of mental incompetence,[82] a language barrier,[83] emotional overload,[84] drug or alcohol incapacitation,[85] incompetent counsel,[86] or simply because of an unfortunate misunderstanding.[87]

---

never appear in court under the *Mills* procedure, it would be rather difficult for the trial court to resolve a "doubt" as to whether the attorney had adequately explained the defendant's rights to him. An unconvinced court may wish personally to interrogate the defendant. But does the defendant have a right to avoid a personal appearance? Petitioner Wicks sought to assert such a right, but the court bypassed the issue by refusing to give its decision retroactive effect. 10 Cal. 3d at 311, 515 P.2d at 289, 110 Cal. Rptr. at 345.

On the whole, the Mills decision may reflect a conclusion that overburdened courts are no more able to ensure protection of defendants' rights than are overburdened attorneys.

81. The requirement that a defendant understand the consequences of a guilty plea before its entry is discussed in the text accompanying notes 128-197 *infra*.

82. United States *ex rel.* Codarre v. Gilligan, 363 F.2d 961 (2d Cir. 1966) (epilepsy, brain damage, family history of mental illness); DuBois v. Mancusi, 325 F. Supp. 694 (W.D.N.Y. 1971) (borderline mental retardation).

83. *See* Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966); Cervantes v. Cox, 350 F.2d 855 (10th Cir. 1965); United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1966).

84. McLaughlin v. Rogster, 346 F. Supp. 297 (E.D. Va. 1972) (crippled by fear); United States *ex rel.* Bresnock v. Rundle, 300 F. Supp. 264 (E.D. Pa. 1969) (disturbed, highly emotional); United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1966) (troubled psyche).

85. United States *ex rel.* Wakeley v. Russell, 309 F. Supp. 68 (E.D. Pa. 1970) (inebriated); United States *ex rel.* Collins v. Maroney, 287 F. Supp. 420 (E.D. Pa. 1968) (narcotics withdrawal); *see* Harris v. United States, 426 F.2d 99, 100 (6th Cir. 1970) (dictum); Gannon v. United States, 208 F.2d 772 (6th Cir. 1953) (influence of drugs).

86. Colson v. Smith, 315 F. Supp. 179 (N.D. Ga. 1970), *aff'd*, 438 F.2d 1075 (5th Cir. 1971); United States *ex rel.* Dennis v. Rundle, 301 F. Supp. 1291 (E.D. Pa. 1969); *In re* Hawley, 67 Cal. 2d 824, 433 P.2d 919, 63 Cal. Rptr. 831 (1967); *see* United States v. Parrino, 212 F.2d 919, 923 (2d Cir. 1954) (Frank, J., dissenting).

87. In Anders v. Turner, 379 F.2d 46 (4th Cir. 1967), the defendant was indicted on state charges of felonious breaking and entering and felonious larceny. The larceny count was reduced to a misdemeanor when it was discovered that the amount stolen was less than originally thought. The breaking and entering count remained a felony since it was not dependent on the amount taken. The trial judge in examining the defendant said:

> [Y]our attorney . . . has entered a plea for you of breaking and entering and non-felonious larceny and that you authorize and empower and direct him to enter such plea for you.

Id. at 48. The defendant thought he was pleading guilty to two misdemeanors. The federal court found such a misunderstanding "entirely natural" and held that the guilty plea had not been understandingly and intelligently made.

In United States v. Cariola, 323 F.2d 180 (3d Cir. 1963), after the prosecution rested, the judge commented that he did not think that the government had proven its case, that there was at most a minor or "technical" violation, and that if the defendant

Shifting responsibility for the protection of defendant's rights from the judge to the attorney is especially significant in plea bargaining. The majority of guilty pleas are the result of plea bargains.[88] Because the ultimate bargains reached depend heavily on the skill and motivation of the attorneys[89] as well as on the coerciveness of the setting,[90] commentators have emphasized the importance of judicial supervision.[91] Plea-bargain recordation requirements[92] greatly facilitiate judicial supervision, but the new procedures approved in *Mills* will make it difficult for judges to ascertain either the role counsel has played, the coerciveness of the setting in which the defendant agreed to the bargain, or even the factual background of the case.[93]

In addition, the new procedures may work these potential injus-

---

changed his plea to a "technical plea of guilty" he could serve his term by sitting in the back of the courtroom for the rest of the day. The defendant followed this advice, not realizing that he had thereby convicted himself of a felony. The court of appeals, however, found this to be a tactical decision. 324 F.2d at 185. *But see* 323 F.2d at 189 (Biggs, C.J., dissenting). *See also* Gilbert v. United States, 466 F.2d 533 (5th Cir. 1972) (defendant did not know that, under existing law, conviction of more than one of the seven counts with which he was charged was impermissible); United States v. Hedgecoe, 420 F.2d 458 (4th Cir. 1970) (defendant did not know intent was an element of the crime).

88. Comment, *Judicial Supervision over California Plea Bargaining: Regulating the Trade*, 59 CALIF. L. REV. 962, 965 (1971).

89. *Id.* at 967. The skill of the defendant's attorney is especially important because, aside from the complexities of legal issues and the range of dispositional alternatives, the defendant's attorney frequently must operate with insufficient knowledge of the strength of the prosecution's case because of inadequate discovery. *See* Margolin, *Toward Effective Criminal Discovery in California—A Practitioner's View*, 56 CALIF. L. REV. 1040 (1968); Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527 (1971).

90. For example, a defendant unable to obtain release on bail may agree to a bargain simply to get out of jail. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444-45 (1971).

91. See notes 88-89 *supra*. Often counsel cannot be relied upon to obtain the best disposition for their clients:

> But frequently counsel, particularly assigned counsel, work on only a flat fee basis and it is in their interest to get the defendant to plead guilty so they can get their fee and move on to the next case. Consequently, if the Court is to surround the guilty plea process with the same degree of safeguards as are present at trial, it will have to rely on the guilty plea judge.

The Supreme Court, 1969 Term, 84 HARV. L. REV. 148, 152 (1970).

92. People v. West, 3 Cal. 3d 595, 608-11, 477 P.2d 409, 417-19, 91 Cal. Rptr. 385, 393-95 (1970).

93. Even in the felony context, however, courts have indicated that there is some room for flexibility. *In re* Tahl, 1 Cal. 3d 122, 133, 460 P.2d 449, 457, 81 Cal. Rptr. 577, 585 (1969); *In re* Sutherland, 6 Cal. 3d 666, 669, 493 P.2d 857, 859, 100 Cal. Rptr. 129, 131 (1972); *see* North Carolina v. Alford, 400 U.S. 25, 39 (1970). Even under the "strict" procedures required in felony cases, judges are often likely to proceed in a routine fashion and fail rigorously to attempt to ascertain the understanding of the defendant of the rights waived or the voluntariness of the plea. See cases cited notes 82-87 *supra*.

tices[94] without even fulfilling the goal of relieving a burden from appellate courts.[95] Because *Mills* permits the *Boykin-Tahl* requirements to be satisfied by less stringent procedures, the net result may be that the direct and collateral attacks which the appellate courts had hoped would be deterred will simply shift to other aspects of the guilty plea process, such as whether the defendant was mentally competent to understand the attorney's explanation of the rights waived. In other words, the "flexible procedures" themselves may provide, not remove, grounds for attack.

f. Conclusion

The court in *Mills* intended to extend to misdemeanors the protections which presently surround the entry of guilty pleas in felony cases. Because of an overly solicitous view of the administrative problems of the lower courts and of the interests of defendants who do not desire to appear in court, the effect of *Mills* may be to extend that protection very little. At the same time, *Mills* may ultimately disserve the interest of the appellate courts in more adequately reviewing challenges to guilty pleas and in deterring unmeritorious claims.

II. CONSEQUENCES OF GUILTY PLEA

a. Birch and Yurko[96]

Birch was arrested while urinating in a Los Angeles Taco Bell parking lot at 1:30 a.m. and charged with engaging in "lewd or dissolute conduct" in a public area.[97] He appeared without counsel at his arraignment and, after being informed of the misdemeanor with which he was charged, pleaded guilty. The judge suspended imposition of sentence on the condition that Birch spend five days in jail. After his release, Birch was required to register as a sex offender pursuant to section 647(a) of the Penal Code.[98]

In vacating Birch's guilty plea, the court first noted that "the trial court has a responsibility to determine, before accepting a defendant's waiver of counsel and plea of guilty, that an unrepresented defendant 'understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, [and] the punishments

94. Similarly, flexible procedures may dilute the protection of the rights of unrepresented defendants. See, *e.g.*, the discussion of *In re* Birch at notes 65-77 *supra*.

95. This will be particularly true since the court held that its ruling would apply prospectively only. 10 Cal. 3d at 308, 515 P.2d at 287, 110 Cal. Rptr. at 343.

96. *In re* Birch, 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973); *In re* Yurko, 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974).

97. 10 Cal. 3d at 316, 515 P.2d at 12, 110 Cal. Rptr. at 212.

98. CAL. PENAL CODE § 647(a) (West 1970).

which may be exacted.' "[99] Then the court concluded that a trial court's responsibility required it to advise defendants of "unusual and onerous" sanctions which may result from a guilty plea.[109] Thus, because the record failed to show that Birch was aware of the peculiarly harsh consequences, his plea was vacated. The clear implication of the opinion was that the trial court's duty is mandated by the federal constitution.[101]

Yurko was charged with first degree burglary.[102] On the day of his trial, the prosecution filed an amended complaint alleging three prior felony convictions. On the advice of his counsel, Yurko admitted the priors, and subsequently was convicted by a jury. Because of his three prior convictions, he was sentenced under Penal Code section 644[103] which required that he be adjudged a habitual criminal and sentenced to prison for life.

Yurko brought a petition for a writ of habeas corpus. The court first noted that an admission of priors results in "additional penalties and sanctions which may be even more severe than those imposed upon a finding of guilt,"[104] and that by such admission a defendant waives constitutional protections which are the "functional equivalent" of those waived by a guilty plea.[105] The court concluded, in light of this similarity, that the *Boykin-Tahl* doctrine requires the trial court to inform the defendant of his constitutional rights and receive an on-record waiver of them before accepting the admission of priors.[106] Finally, because a finding of habitual criminalty may severely affect "punishment and other sanctions," and because advising the defendant would burden the judicial system only minimally, the court held that a defendant must be informed that his admission could result in a judgment of habitual criminality, and that such an adjudication could affect his

99. 10 Cal. 3d at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216 (emphasis added).

100. *Id.*

101. In *Yurko* the court emphasized that the trial court's duty in *Birch* was "constitutionally compelled." 10 Cal. 3d at 864 n.7, 519 P.2d at 565-66 n.7, 112 Cal. Rptr. at 517-18 n.7.

102. 10 Cal. 3d at 860, 519 P.2d at 562, 112 Cal. Rptr. at 514.

103. CAL. PENAL CODE § 644 (West 1970). Subsection (*a*) requires an adjudgement of habitual criminality and imprisonment for life for any defendant convicted of certain felonies who "shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penal institution," of certain enumerated felonies. Subsection (*b*) is identical except that it involves three priors instead of two. Subsection (*c*) provides that "in exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal . . ."

104. 10 Cal. 3d at 862, 519 P.2d at 564, 112 Cal. Rptr. at 516.

105. *Id.* at 863, 519 P.2d at 564, 112 Cal. Rptr. at 516.

106. *Id.* at 863, 519 P.2d at 565, 112 Cal. Rptr. at 517.

sentence and parole substantially.[107] The court expressly declined, however, to base its decision on constitutional grounds, relying instead on its supervisory power over the lower courts.[108] Giving its rulings prospective application only, the court denied relief to Yurko.[109]

The balance of this Note will consider three issues raised by the court's decisions in *Birch* and *Yurko*. First, it will examine the court's determination that an admission of priors is tantamount to a plea of guilty. Second, it will consider the foundations for the judicial duty to inform the defendant of the consequences of his acts. Finally, it will investigate the scope of the defendant's right to know the consequences of his plea.

b. Admission of priors as the functional equivalent of a guilty plea

In California, the defendant must be allowed to "plead" to an allegation of prior convictions before trial.[110] If the defendant admits the priors, they are excluded from the reading of the indictment to the jury.[111] Thus, the defendant may wish to admit priors for tactical reasons: preventing the priors from prejudicing the jury increases the chances of acquittal.[112] If the defendant denies the priors, the jury which decides the question of guilt must also determine whether the

---

107. *Id.* at 864, 519 P.2d at 565, 112 Cal. Rptr. at 517.

108. Id. at 864 & n.7, 519 P.2d at 565-66 & n.7, 112 Cal. Rptr. at 517-18 & n.7. *Compare* McCarthy v. United States, 394 U.S. 459, 464 (1969).

109. 10 Cal. 3d at 865-66, 519 P.2d at 566-67, 112 Cal. Rptr. at 518-19. Justice Mosk would have granted Yurko relief. *Id.* at 867, 519 P.2d at 567, 112 Cal. Rptr. at 519 (Mosk, J., concurring and dissenting).

110. The procedures for proving prior convictions is set out in CAL. PENAL CODE § 1025 (West 1970):

> When a defendant who is charged in the accusatory pleading with having suffered a previous conviction pleads either guilty or not guilty of the offense charged against him, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered in the minutes of the court, and the question whether or not he has suffered such previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose, or by the court if a jury is waived. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial.

111. *Id.*; CAL. PENAL CODE § 1093 (West 1970).

112. But the priors can still be disclosed to the jury in certain circumstances. *E.g.*, People v. Peete, 28 Cal. 2d 306, 319-20, 169 P.2d 924, 932 (1946) (impeachment); People v. Faulkner, 28 Cal. App. 3d 384, 393, 104 Cal. Rptr. 625, 631 (1st Dist. 1972) (prior conviction an element of the crime of possession of a firearm by a felon); People v. Santa Maria, 207 Cal. App. 2d 306, 314, 24 Cal. Rptr. 492, 497 (2d Dist. 1962) (prior used to prove defendant's knowledge of marijuana).

allegation of the priors is true.[113] If the defendant denies the priors but pleads guilty to the substantive offense with which he is charged, then a special jury must be impaneled.[114] In any case, the issue of the prior convictions is tried in the same manner as any other factual issue.[115] Thus, admitting or denying a prior is strikingly similar to pleading guilty or not guilty to one count in a multi-count indictment or information. The principal difference is that the punishment or other sanction imposed by virtue of the admission of the prior is dependent on a conviction on the primary charge.

Previous cases, however, rejected the contention that an admission of prior convictions was equivalent to a plea of guilty.[116] Instead, they were said to involve mere admissions of collateral facts.[117] This characterization was probably motivated by a belief that proof of priors involved only the presentation of copies of court and prison records.[118] Under this reasoning a defendant admitting priors merely waived a formal right to contest an issue which could not in practicality be refuted. The admission was then no more than a stipulation to the truthfulness of certain documents submitted to the court.

This assessment of the complexity of the issue is no longer realistic, if it ever was. First, habitual criminal statutes enumerate specific crimes of which the defendant must have been convicted before he may be adjudged a habitual criminal.[119] Whether the prior conviction is among the ones enumerated in the statute can be a complicated issue, particularly if out-of-state crimes, federal crimes, or plea-bargained convictions are involved. Second, the habitual criminal statutes require not only that the defendant was previously convicted of certain crimes, but that he suffered prison terms for each of them as well.[120] Because of the burgeoning variety of dispositional alternatives to imprisonment in a federal or state penitentiary, the imprisonment requirement may well involve complicated issues of fact and law.[121] Third, the particular

113. CAL. PENAL CODE § 1025 (West 1970). See note 110 *supra.*

114. *Id.*

115. *See, e.g.*, People v. Collins, 117 Cal. App. 2d 175, 183, 255 P.2d 59, 64 (2d Dist.), *cert. denied*, 346 U.S. 803 (1953).

116. *E.g.*, People v. Franco, 4 Cal. App. 3d 535, 540-41, 84 Cal. Rptr. 513, 517 (2d Dist. 1970); *accord*, People v. Wilson, 20 Cal. App. 3d 507, 511, 97 Cal. Rptr. 774, 776 (2d Dist. 1971).

117. *Id.*

118. The fact of a prior conviction is not ordinarily difficult of proof; it can be shown by certified copies of the indictment or information and the judgment. Service of a term of imprisonment can be shown by prison records. *In re* McVickers, 29 Cal. 2d 264, 272, 176 P.2d 40, 46 (1946).

119. See note 103 *supra.*

120. *Id.*

121. *See* In re Propp, 251 Cal. App. 2d 896, 899, 60 Cal. Rptr. 23, 25 (1st Dist. 1967).

time when another conviction and imprisonment occurred may be an issue.[122] Fourth, inadequate records may present proof problems. Finally, and perhaps most significantly, recent California cases have allowed prior convictions sought to be used to augment punishment to be attacked because of constitutional deficiencies in the prior proceedings.[123]

By admitting the priors, therefore, the defendant foregoes the right to have these potentially complex factual and legal issues tried and thus gives up the constitutional rights incident to that determination—to confront witnesses, to have a jury determine the factual issues, and the privilege against self-incrimination. The waiver of these rights by an admission of priors is thus, as the *Yurko* court stated, the " 'functional equivalent' of the waivers embodied in a plea of glilty to an independent criminal charge."[124]

The scope of the court's holding that *Boykin-Tahl* rules apply to admission of priors is potentially expansive. First, under a *Mills*-type analysis,[125] the *Yurko* holding should apply to misdemeanors; the same constitutional rights are affected.[126] Less certain, however, is whether the *Yurko* holding is also applicable to other fact admissions. For example, a state may make oral copulation a crime, and provide for augmented punishment if the act is performed on a minor. Under the *Yurko* reasoning, a defendant admitting or stipulating to the age of the victim would be within the ambit of the *Boykin-Tahl* rules, because just as the admission of priors waives the right to contest their existence

122. For example, if defendant's arrest on the primary charge results in revocation of probation on the prior, there may be a question whether he has served a prison term on the prior.

123. *In re* Woods, 64 Cal. 2d 3, 409 P.2d 913, 48 Cal. Rptr. 689 (1966); *In re* Bartlett, 15 Cal. App. 3d 176, 182-85, 93 Cal. Rptr. 96, 100-02 (4th Dist. 1971). The California Supreme Court has not faced the issue of whether an admission of priors waives the defendant's right to challenge their constitutional validity. The Ninth Circuit Court of Appeals has held that a counseled defendant who admitted a prior could not then challenge it. Womack v. Craven, 431 F.2d 1191 (9th Cir. 1970). It does not appear, however, that the petitioner in *Womack* claimed either that the defect in his admission was the failure of the trial court to advise him of his *Boykin-Tahl* rights or of the consequences of the admission. In addition, the Ninth Circuit appears to have now concluded that an admission of priors can be challenged on the grounds that the defendant was not advised of the consequences of his act. Wright v. Craven, 461 F.2d 1109 (9th Cir. 1972) (per curiam), *affirming* 325 F. Supp. 1253 (N.D. Cal. 1971).

124. 10 Cal. 3d at 863, 519 P.2d at 564, 112 Cal. Rptr. at 516.

125. See text accompanying notes 40-53 *supra*.

126. Section 644 applies only to certain felonies. Other provisions do not specify that the priors be enumerated crimes, or do not require prison terms, and thus present simpler proof issues than section 644. *See* CAL. PENAL CODE §§ 667 (augmented punishment for felons convicted of petty theft), 3024 (minimum terms for conviction with prior felonies) (West 1970). *But see* CAL. PENAL CODE § 666 (West 1970) (augmented punishment for prior petit theft or larceny conviction and imprisonment on subsequent conviction of same).

and constitutionality, a stipulation waives the right to adjudicate the fact that the person upon whom the act of oral copulation was performed was a minor. In each case punishment is augmented by the admission of facts which otherwise the state has to plead and prove.

There may be a distinction between these two situations, however, inhering in the defendant's knowledge of the consequences of his waiver. The *Yurko* court repeatedly emphasized that by admitting priors, and thereby waiving *Boykin-Tahl* rights, the defendant subjects himself to "additional penalties and sanctions."[127] Before *Yurko*, a defendant could admit priors without knowledge of the possible sanctions beyond those for the primary charge. In the oral copulation example, however, the defendant is presumably aware that his fact admission may augment punishment because defendants are advised at arraignment of the elements of both the serious offense and the included offense, and the punishment for each. The reading of the indictment or information, then, informs a defendant of the consequences of admitting any material fact which tends to prove an element of any of the crimes alleged. The scope of *Yurko*'s application of the *Boykin-Tahl* rules may perhaps be limited, therefore, to situations in which the consequences of fact admission are or may be unknown to the defendant.

c. Judicial responsibility to inform defendant of the consequences of his acts

Both *Birch* and *Yurko* place responsibility on trial judges to inform the defendant of the consequences of his acts. In *Birch* the court's duty was constitutional, based on the defendant's waiver of his right to counsel.[128] In *Yurko*, however, the supreme court established a nonconstitutional duty to insure that the defendant is informed of the consequences of his admission of priors.[129] Whether the court's duty is constitutionally or nonconstitutionally based is significant. Failure by a court to carry out a fundamental constitutional duty renders a defendant's plea or admission automatically subject to collateral attack; failure to conform to a judicial procedural rule, however, is not normally vul-

127. 10 Cal. 3d at 862, 863, 519 P.2d at 563, 564, 112 Cal. Rptr. at 575, 576. In *Tahl* the court implied that a reading of the indictment and a recitation of punishments may partially fulfill the duty to inform the defendant of the nature of the charges and the consequences of a guilty plea. 1 Cal. 3d at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584.

128. 10 Cal. 3d at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216. Waiver of counsel may be ineffective because the defendant was not informed of the right to counsel, see notes 65-73 *supra* and accompanying text, because the waiver was inadequately recorded, see notes 74-77 *supra* and accompanying text, or, even if the preceding two requirements are satisfied, because the record fails to show that the defendant was informed of the consequences of waiver.

129. 10 Cal. 3d at 864, 519 P.2d at 565, 112 Cal. Rptr. at 517.

nerable to collateral attack.[130] In addition, the court in *Yurko* indicated that a defendant would have to show prejudice before a court would set aside his admission.[131] Under the federal constitutional rule, no showing of prejudice is required.[132]

1. *Constitutional duty: waiver of counsel.* Absent prior training in law, a defendant who waives counsel probably does so without any awareness of the complexity of the issues he is facing. To prevent such improvident, unknowing waivers,[133] the United States Supreme Court attached to the right to counsel the requirement that any waiver of counsel is constitutionally void unless made intelligently and understandingly.[134] Thus, the Court placed on trial judges the duty to ensure that defendants' pleas are constitutionally viable:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trail judge of determining whether there is an intelligent and competent waiver by the accused.[135]

The California Supreme Court has interpreted this federal rule as requiring judges to notify defendants of the possible consequences of

130. Collateral attacks on prior criminal proceedings generally are restricted to jurisdictional or constitutional defects. *See* Comment, *Criminal Law: The Use of Habeas Corpus for Collateral Attacks on Criminal Judgments,* 36 CALIF. L. REV. 420 (1948). Prior convictions, however, may be attacked on the basis that they do not fit within the requirements of California's habitual criminal provisions, even though the priors were validly admitted and the trial court had jurisdiction to hear the issue. *In re* McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); *In re* Seeley, 29 Cal. 2d 294, 176 P.2d 24 (1946). The *McVickers-Seeley* rule, however, is limited to the "same narrow questions" raised in those cases. *In re* Finley, 68 Cal. 2d 389, 392, 438 P.2d 381, 383-84, 66 Cal. Rptr. 733, 735-36 (1968). In particular, it is unlikely that the scope of collateral attack will be extended to non-constitutional procedural defects in the admission of priors, *see e.g., In re* Winchester, 53 Cal. 2d 528, 532, 348 P.2d 904, 907, 2 Cal. Rptr. 296, 299 (1960); *cf., In re* Ponce, 65 Cal. 2d 341, 420 P.2d 224, 54 Cal. Rptr. 752 (1966); unless there are "exceptional circumstances" which present a "question of law that is sufficiently important to justify this extraordinary remedy." *In re* Jackson, 61 Cal. 2d 500, 504, 393 P.2d 420, 422, 39 Cal. Rptr. 220, 222 (1964). Moreover, even under the "exceptional circumstances" basis for attack, the petitioner is limited further by requirements that he show prejudice and that no other means exist by which the matter can be considered. *Id.* at 508, 393 P.2d at 425, 39 Cal. Rptr. at 225. As a practical matter, therefore, failure of the trial judge to satisfy his judicially imposed duty when accepting an admission of priors is not likely to be vulnerable to collateral attack unless that duty is also required by the constitution.

131. 10 Cal. 3d at 864, 519 P.2d at 565-66, 112 Cal. Rptr. at 517-18.

132. Boykin v. Alabama, 395 U.S. 238, 244 (1969) (reversible error if record is deficient); *see In re* Tahl, 1 Cal. 3d 122, 132, 460 P.2d 449, 456, 81 Cal. Rptr. 577, 584 (1969).

133. Courts have been admonished to "indulge every reasonable presumption against waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

134. Carnley v. Cochran, 369 U.S. 506, 513 (1962).

135. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

their waiver of counsel. "One purpose of the constitutional guaranty is to protect an accused from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified if it were held that a waiver made in ignorance of its consequences would remove the protection of the Constitution."[136]

The duty of the trial court is exhaustive; the judge must ensure that the defendant is aware of the complexity of the issues and the interests at stake. "[T]he court cannot accept a waiver of counsel from anyone accused of a serious public offense without first determining that he 'understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted.' "[137] This constitutional judicial duty is applicable to misdemeanors as well.[138]

The importance of the rule is well illustrated by *In re Birch*.[139] The defendant, accused of engaging in lewd or dissolute conduct in a public place, waived counsel without being told that one of the consequences of conviction was a requirement to register as a sex offender. Had he been told of this serious consequence, the defendant might well have reconsidered his intent to waive counsel. In addition, he was probably unaware of substantial arguments he could have made in defense,[140] or, even if convicted, to avoid the stigma of the sex registration requirement.[141]

2. *Judicial rule: admissions of priors.* In *Yurko* the court established a judicial rule requiring trial judges to notify defendants admitting prior convictions of the consequences of their admissions, noting the "severe sanctions"[142] at issue, the "numerous and complex circumstances in which those sanctions and the degrees thereof are to be made applicable,"[143] and that the "consequences of admission could, without imposing any undue burden on the judicial process, be explained to an accused."[144] Because of this new state court judicial rule, it was unnecessary to decide whether such a judicial duty is also constitutionally required.[145]

136. People v. Chesser, 29 Cal. 2d 815, 821, 178 P.2d 761, 764 (1947).

137. *In re* James, 38 Cal. 2d 302, 313, 240 P.2d 596, 603 (1952), *quoting* People v. Chesser, 29 Cal. 2d 815, 822, 178 P.2d 761, 765 (1947).

138. *E.g., In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); *In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967).

139. 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973).

140. *See id.* at 318 n.4, 515 P.2d at 14 n.4, 110 Cal. Rptr. at 214 n.4.

141. *See id.* at 321 n.8, 322 n.9, 515 P.2d at 16 n.8, 17 n.9, 110 Cal. Rptr. at 216 n.8, 217 n.9.

142. 10 Cal. 3d at 864, 519 P.2d at 565, 112 Cal. Rptr. at 517.

143. *Id.*

144. *Id.*

145. *Id.* at 864 n.7, 519 P.2d at 565-66 n.7, 112 Cal. Rptr. at 517-18 n.7.

The court suggested by its broad language that the judicial duty applies to any admission of any prior conviction, even though in other cases an admission would not require sanctions as severe as, nor involve issues as complex as those in *Yurko*.[146] On the other hand, it is unclear whether the court will be willing to extend the rule to similar fact admissions, such as the admission of an element of a crime, which also involve serious ramifications and complex issues.[147]

3. Boykin-Tahl and the duty to inform. *Boykin* and *Tahl* require trial judges to ensure that the record evidences the defendant's "full understanding of what the plea connotes and of its consequences."[148] A record deficient in this respect is per se prejudicial; the defendant may plead anew without having to prove that actual prejudice resulted or that he in fact was unaware of the consequences.[149]

The duty to inform arises from the defendant's waiver of his right to a jury trial, right to confrontation, and the privilege against self-incrimination. Whether a defendant was represented by counsel is by itself irrelevant to the application of the duty. The defendants in *Boykin* and *Tahl*, after all, both had counsel. Indeed, the *Boykin-Tahl* requirements resulted, in part, from a suspicion that defense counsel frequently failed to advise their clients adequately.[150]

The court in *Yurko* recognized that a defendant forfeits his *Boykin-Tahl* rights by admitting priors.[151] Yet the court refused to hold that the trial judge, as a matter of federal constitutional law, was required to ensure that the record showed that the defendant was informed of the consequences of his admission. The court was entitled to base its decision on nonconstitutional grounds, but it made little sense to do so. The Ninth Circuit Court of Appeals had already taken the position that an admission of priors in state proceedings by a counseled defendant invokes the same federal constitutional protections that attend guilty pleas.[152] The California Supreme Court will thus be

146. CAL. PENAL CODE § 644 (West 1970) imposes a mandatory life imprisonment on the requisite showing of prior convictions and imprisonment therefor. See note 103 *supra*. Other sections impose less severe sanctions and do not require a showing that the defendant served prison sentences on his prior convictions. *E.g.*, CAL. PENAL CODE §§ 667, 3024 (West 1970).

147. See notes 126-27 *supra* and accompanying text.

148. Boykin v. Alabama, 395 U.S. 238, 244 (1969); *In re* Tahl, 1 Cal. 3d 122, 132, 460 P.2d 449, 456, 81 Cal. Rptr. 577, 584 (1969) ("consequences of his plea").

149. See note 132 *supra*.

150. See note 79 *supra* and accompanying text. In *Tahl* the court equated the constitutional duty to inform the defendant of the consequences of waiving his *Boykin* rights with the trial court's duty when the defendant waives counsel. 1 Cal. 3d at 133 n.7, 460 P.2d at 457 n.7, 81 Cal. Rptr. at 585 n.7. See text accompanying notes 136-137 *supra*.

151. 10 Cal. 3d at 863, 519 P.2d at 565, 112 Cal. Rptr. at 517.

152. Wright v. Craven, 461 F.2d 1109 (9th Cir. 1972) (per curiam). The court

faced immediately with petitions urging habeas corpus jurisdiction over unknowing post-*Boykin*[153] admissions of priors by counseled defendants. Since a constitutional question is a prerequisite to state habeas corpus jurisdiction,[154] the court will have to determine in the very near future the constitutionality of the trial court's duty to inform the defendant of the consequences of his admission.[155]

d. Direct versus collateral consequences

Not every guilty plea consequence is of such significance as to trigger the trial court's duty to inform the defendant. While the United States Supreme Court has not passed on this issue, lower courts have recognized that some consequences are "direct," and thus must be shown on the record to have been explained to the defendant, while others are "collateral," and thus need not be explained. Very few courts, however, have proposed a method of analysis; the result is a "catalog" of consequences.[156]

Thus, the defendant must be told the maximum and minimum sentence for the crime to which he is pleading guilty,[157] that he is ineligible

---

adopted the opinion below of Judge Wollenberg, 325 F. Supp. 1253, 1257 (N.D. Cal. 1971). *See* Mounts v. Boles, 326 F.2d 186, 188 (4th Cir. 1963); Gannon v. United States, 208 F.2d 772, 774 (6th Cir. 1953).

153. In Wright v. Craven, 325 F. Supp. 1253 (N.D. Cal. 1971), *aff'd*, 461 F.2d 1109 (9th Cir. 1972) (per curiam), the petitioner's admission of priors occurred before *Boykin*. Thus, the court had no occasion to apply the *Boykin-Tahl* recordation requirements. Nevertheless, the court strongly implied that all post-*Boykin* admissions must conform to *Boykin* standards. 325 F. Supp. at 1258. But in *Yurko* the California Supreme Court attempted to limit the retroactive effect of its decision. 10 Cal. 3d at 865, 519 P.2d at 566, 112 Cal. Rptr. at 518. While the California court may justifiably harbor apprehension at vacating large numbers of admissions made after *Boykin* and before *Yurko*, it makes little sense to attempt to limit retroactivity when any attempt would be frustrated by the federal courts.

154. See note 130 *supra*.

155. Nothing prevents defendant's counsel or the prosecution from providing an adequate record. But in the absence of any such attempt, the trial judge must act to see that evidence of the defendant's awareness of the consequences of his waivers appears on the face of the record.

156. United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972). The federal courts seem to apply the same standards to state convictions as to federal convictions. *E.g.*, Mathis v. Hocker, 459 F.2d 988 (9th Cir. 1972).

157. *Id.*; Fortia v. United States, 456 F.2d 194, 195 (5th Cir. 1972); United States *ex rel.* Hill v. United States, 452 F.2d 664, 665 (5th Cir. 1971); United States v. Frontero, 452 F.2d 406, 415-16 (5th Cir. 1971); United States v. Perwo, 433 F.2d 1301, 1302 (5th Cir. 1970); Wade v. Wainwright, 420 F.2d 898, 900 (5th Cir. 1969); Tucker v. United States, 409 F.2d 1291, 1295 (5th Cir. 1969); Castro v. United States, 396 F.2d 345, 349 (9th Cir. 1968) (en banc); *see* Marvel v. United States, 380 U.S. 262 (1965), *vacating* 335 F.2d 101 (5th Cir. 1964); Stephen v. United States, 426 F.2d 257, 258 (5th Cir. 1970); Combs v. United States, 391 F.2d 1017 (9th Cir. 1968); Harper v. United States, 368 F.2d 53, 56 (10th Cir. 1966); Freeman v. United States, 350 F.2d 940, 942 (9th Cir. 1965); Pilkington v. United States, 315 F.2d 204, 210 (4th Cir.

for probation or parole if that is the case[158] and the judge has reason to believe that the defendant is ineligible,[159] and that an admission of prior convictions may aggravate punishment.[160] Consequences held to be collateral are the possibility of consecutive rather than concurrent sentences;[161] the possible effect of conviction on other criminal proceedings,[162] on good time credits,[163] or on subsequent convictions;[164] that the conviction could have collateral estoppel effect in other pro-

---

1963). *Contra,* United States *ex rel.* Toland v. Phimister, 296 F. Supp. 1027, 1029 (S.D.N.Y. 1969).

158. Moody v. United States, 469 F.2d 705, 708 (8th Cir. 1972); United States v. Smith, 440 F.2d 521, 526 (7th Cir. 1971); Bye v. United States, 435 F.2d 177, 180 (2d Cir. 1970); Harris v. United States, 426 F.2d 99, 101 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433, 437 (10th Cir. 1970); Berry v. United States, 412 F.2d 189, 192-93 (3d Cir. 1969); Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964). *Contra,* Smith v. United States, 324 F.2d 436, 441 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 957 (1964); Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967) (trial judge, after accepting the plea, told defendant "in a marijuana case, you don't get no parole").

The Fifth Circuit adopted the D.C. Circuit's rule in *Trujillo.* In Sanchez v. United States, 417 F.2d 494 (5th Cir. 1969), the court admitted that if the issue were before it for the first time, they would hold that defendant had to be informed of his ineligibility for parole. 417 F.2d at 496. In Spradley v. United States, 421 F.2d 1043 (5th Cir. 1970), the court went through great contortions to distinguish *Trujillo.* The court again felt constrained to follow *Trujillo* in United States v. Farias, 459 F.2d 738, 740 (5th Cir. 1972). A rehearing *en banc* was called to overrule *Trujillo,* but Congress then passed new legislation mooting the issue as it pertained to Farias. United States v. Farias, 488 F.2d 852, 853 (1974) (*en banc*).

159. In Mathis v. Hocker, 459 F.2d 988 (9th Cir. 1972), the defendant did not disclose his prior convictions, probably hoping to conceal them from the judge. Thus, the defendant was not entitled to be warned that he would be ineligible for parole because of the priors.

160. Wright v. Craven, 325 F. Supp. 1253 (N.D. Cal. 1971) (Wollenberg, J.), *aff'd,* 461 F.2d 1109 (9th Cir. 1972) (*per curiam*); Mounts v. Boles, 326 F.2d 186, 188 (4th Cir. 1963); *see* Crabtree v. Boles, 339 F.2d 22 (4th Cir. 1964); Gannon v. United States, 208 F.2d 772, 774 (6th Cir. 1953).

161. Masciola v. United States, 469 F.2d 1057, 1059 (3d Cir. 1972); Johnson v. United States, 460 F.2d 1203 (9th Cir. 1972); Hinds v. United States, 429 F.2d 1322, 1323 (9th Cir. 1970); Orr v. United States, 408 F.2d 1011, 1012 (6th Cir. 1969). *Contra,* Marshall v. United States, 431 F.2d 355, 358 (7th Cir. 1970) (dictum). But the duty to inform arises in special circumstances. United States v. Myers, 451 F.2d 402 (9th Cir. 1972) (guilty plea to Federal charges while in state custody); Smith v. United States, 400 F.2d 860, 862 (6th Cir. 1968) (defendant requested concurrent sentences); Luckman v. Burke, 299 F. Supp. 488 (E.D. Wis. 1969) (judge's letter to defendant indicated concurrent sentences).

162. Hightower v. United States, 455 F.2d 481, 482 (6th Cir. 1972) (effect of federal conviction on state court proceedings); *see* People v. Searcie, 37 Cal. App. 3d 204, 211, 112 Cal. Rptr. 267, 271 (2d Dist. 1974).

163. Hutchison v. United States, 450 F.2d 930, 931 (10th Cir. 1971) (defendant was convicted of escaping from prison; on his return to custody, prison authorities revoked his accumulated good time credits).

164. Hartmann v. Municipal Court, 35 Cal. App. 3d 891, 893, 111 Cal. Rptr. 126, 127 (1st Dist. 1973).

ceedings;[165] and that the conviction may result in deportation,[166] disenfranchisement,[167] public shame,[168] loss of passport and foreign travel rights,[169] discharge from the armed forces,[170] or loss of a business license.[171] The only general rule which has emerged is that the defendant must be told of any factor which affects the maximum or minimum sentence.

California cases in this area are sparse. *Birch* held that the defendant must be informed that a guilty plea would result in registration as a sex offender,[172] and *Yurko* established that a defendant must be made aware that an admission of priors may result in a determination of habitual criminality, may extend the maximum sentence, and may limit the availability of parole.[173] Other cases have held that possibility of treatment as a mentally disordered sex offendor is a direct consequence[174] while violation of probation,[175] deportation,[176] or aggravated sanctions on a subsequent conviction[177] are not.

In view of the many significant consequences of a conviction, the lack of any guidelines or method of analysis places a substantial burden on trial judges, and threatens the viability of large numbers of guilty pleas.[178]

---

165. *See* United States v. Carlino, 400 F.2d 56, 57 n.1 (2d Cir. 1968) (tax fraud conviction as collateral estoppel in subsequent action to recover tax and penalties); United States v. Miss Smart Frocks, Inc., 279 F. Supp. 295, 299 (S.D.N.Y. 1968) (same).

166. United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973); United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971); United States v. Parrino, 212 F.2d 919, 922 (2d Cir. 1954); People v. Flores, 38 Cal. App. 3d 484, 487, 113 Cal. Rptr. 272, 274 (4th Dist. 1974).

167. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963); United States v. Miss Smart Frocks, Inc., 279 F. Supp. 295, 299-300 (S.D.N.Y. 1968).

168. *See* United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).

169. Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964).

170. Redwine v. Zuchert, 317 F.2d 336, 338 (D.C. Cir. 1963).

171. United States v. Casanova's, Inc., 350 F. Supp. 291, 292 (E.D. Wis. 1972). Query whether the voluntariness rule should apply to corporate defendants.

172. 10 Cal. 3d at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216.

173. 10 Cal. 3d at 864, 519 P.2d at 565, 112 Cal. Rptr. at 517.

174. *In re* Leyva, 8 Cal. App. 3d 404, 406, 87 Cal. 265, 267 (2d Dist. 1970).

175. People v. Searcie, 37 Cal. App. 3d 204, 211, 112 Cal. Rptr. 267, 271 (2d Dist. 1974).

176. People v. Flores, 38 Cal. App. 3d 484, 487, 113 Cal. Rptr. 272, 274 (4th Dist. 1974).

177. Hartmann v. Municipal Court, 35 Cal. App. 3d 891, 893, 111 Cal. Rptr. 126, 127 (1st Dist. 1973).

178. The predicament has been aptly described by the Third Circuit Court of Appeals:

> But the pertinent question is: what consequences? To hold that no valid sentence of conviction can be entered under a plea of guilty unless the defendant is first apprised of all collateral legal consequences of the conviction would result in a mass exodus from the federal penitentiaries.
>
> . . . .

Several relevant factors can be discerned from case precedents, including the *Birch* and *Yurko* opinions. The severity and inevitability of the consequence are important factors. Consequences which do not affect substantial interests are unlikely to be influential in the defendant's decision to plead guilty.[179] Furthermore, effects which are remote or which depend on unlikely contingencies may not warrant the judicial burden of informing each defendant of every possible effect of his conviction.[180] The contingency of the consequences must be considered, however, in the light of their impact on the defendant's interest. Thus, while the federal government has the discretion to decline to bring deportation proceedings,[181] in view of the likelihood of that possibility and the severe impact that deportation would have on the defendant,[182] the judge should notify the defendant of this consequence if it is known that the defendant is an alien.

Another factor is whether the consequence pertains to the punishment for the crime. Since punishment results directly from conviction, not depending on the occurrence of other events, it seems natural that

---

> Any such requirement would impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws.
>
> . . . . Due regard for the constitutional rights of those accused of crimes has properly resulted in the imposition of increasingly onerous responsibilities on trial judges. But unsolicited advice concerning the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required.

United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

179. In *Birch* the court noted the "onerous" nature of the consequences, 10 Cal. 3d at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216, and in *Yurko* the consequences involved "severe sanctions," 10 Cal. 3d at 864, 519 P.2d at 565, 112 Cal. Rptr. at 517.

180. For example, in *Yurko* the sanctions of Penal Code section 644 were required upon a finding that the enumerated priors occurred. See note 103 *supra*. In *Birch* the court noted that sex registration "follows inexorably" from the conviction. 10 Cal. 3d at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216. But even those consequences were not necessarily inevitable. In *Birch* the court noted that a convicted defendant could apply for a court order releasing him from "all penalties and disabilities of conviction" at the end of his jail sentence. 10 Cal. 3d at 322 n.9, 515 P.2d at 17 n.9, 110 Cal. Rptr. at 217 n. 9. Thus, registration as a sex offender, was not strictly "inexorable." Similarly, Penal Code section 644(c), at issue in *Yurko*, gives the trial judge discretion to provide that the defendant is not an habitual offender in "exceptional" cases. See note 103 *supra*. In *In re* Ponce, 65 Cal. 2d 341, 344, 420 P.2d 224, 226, 54 Cal. Rptr. 752, 754 (1966), the court implied that the defendant had waived his right to contest his admission of priors by failing to invoke section 644(c). No such contention was made in *Yurko*, however.

181. This was noted in United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973), and People v. Flores, 38 Cal. App. 3d 484, 488, 113 Cal. Rptr. 272, 274 (4th Dist. 1974).

> 182. Deportation, while not literally constituting criminal punishment, may have far more dire effects on this defendant than his sentence of imprisonment for two years. For all practical purposes, the court sentenced him to serve (a) two years in jail and (b) the rest of his life in exile.

United States v. Parrino, 212 F.2d 919, 924 (2d Cir. 1954) (Frank, J., dissenting).

this consequence should always be brought to the defendant's attention.[183] Many disabilities, however, are imposed by statute and inevitably follow conviction even though they may not be intended specifically as punishment. Registration as a sex offender,[184] disenfranchisement,[185] and denial of passport rights are examples. Since these consequences may affect a defendant's trial decisions similarly or even more substantially than the possibility of a larger fine or extended incarceration, they should also fall within the court's duty to inform.[186]

The court should also consider the defendant's reasonable expectations. While courts may be justified in presuming that a defendant is aware of some of the consequences of his plea,[187] other consequences

183. The court in *Yurko* seemed to adopt this factor as a controlling one. The court mentioned the "punishment and other sanctions," "sanctions and the degrees thereof," "increase in prison the term or terms," and "eligibility for parole," and finally held that the defendant had to be informed of the "full penal effect" of his admission of priors. 10 Cal. 3d at 864-65, 519 P.2d at 565-66, 112 Cal. Rptr. at 517-18. Query, however, whether the court meant to require that the defendant be informed that his sentences may be consecutive, see note 161 *supra*, that his probation may be violated, see note 175 *supra*, or that his accumulated good time credits may be taken away from him on his return to prison, see note 163 *supra*. In addition, in view of the dramatic increase in violence in California state prisons, *see* M. YEE, THE MELANCHOLY HISTORY OF SOLEDAD PRISON (1973), should the defendant be informed of the possibility of a prison term, as opposed to a term in the county jail? *Cf.* Anders v. Turner, 379 F.2d 46, 48 (4th Cir. 1967) (defendant should have been informed that he was pleading guilty to a felony rather than a misdemeanor).

The federal courts of appeals, in holding that ineligibility for parole is a "direct" consequence, distinguished between consequences which were "civil" and those which were "criminal." *See* cases cited note 158 *supra*.

184. The purpose of the sex offender registration provision is not to punish the defendant further, but to assist the police in the surveillance of persons likely to commit sex crimes. *In re* Smith, 7 Cal. 3d 362, 367, 497 P.2d 807, 810-11, 102 Cal. Rptr. 335, 338-39 (1972); Barrows v. Municipal Court, 1 Cal. 3d 821, 825-26, 464 P.2d 483, 486, 83 Cal. Rptr. 819, 822 (1970).

185. CAL. CONST. art. II, § 3. On November 5, 1974, the voters of California approved an amendment to the constitution which provided for re-enfranchisement on the completion of imprisonment and parole. But persons convicted of certain crimes are still precluded from holding public office or serving on juries. CAL. CONST. art. XX, § 11; CAL. GOV'T CODE § 3000 (West 1966).

186. In Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 957 (1964) the court held that since parole was a matter of "legislative grace," the defendant did not have to be informed of his ineligibility for parole before pleading guilty. Every other federal circuit (except the Fourth, which has not yet passed on the matter) has rejected this reasoning. *See* note 158 *supra*.

Other consequences, such as public disapproval or difficulty in gaining employment, are not statutorily imposed and thus a defendant has less justification in demanding that he be notified of them.

187. This is the justification for holding that the defendant need not be told that his sentences may be consecutive rather than concurrent. *E.g.*, Orr v. United States, 408 F.2d 1011, 1012 (6th Cir. 1969) ("He knows that he is subject to a sentence within the full range of the penalty provided by statute."). See cases cited note 161 *supra*. Yet, it makes more sense to hold the defendant only to the expertise of an average layman. *See* Stephen v. United States, 426 F.2d 257, 258 (5th Cir. 1970); United States v.

may be so unusual[188] or involve such complex issues of law or penal administration that it must be presumed that the defendant is unaware of them. For example, in rejecting the "legislative grace" theory behind eligibility for parole,[189] the federal courts have pointed out that *in*eligibility is the exception to the general rule and thus failure to inform a defendant that one consequence is parole ineligibility violates the expectations of the accused.[190]

Finally, a judge must consider any special facts of which he has actual knowledge.[191] When a judge is aware that an individual defendant's special interest is at stake, he must inform the accused of consequences which jeopardize that interest even if ordinarily these consequences would not fall within the duty to inform.[192]

For example, if the judge is presented with facts which indicate that the defendant may be an alien,[193] he should inform the defendant of the possibility of deportation. This places little burden on trial courts since they need not inform every defendant of deportation, which is normally considered a collateral consequence. On the other hand, this extends the notice-of-consequences rule to situations where justice requires it.[194]

Hedgecoe, 420 F.2d 458 (4th Cir. 1970); Anders v. Turner, 379 F.2d 46, 48 (4th Cir. 1967) (defendant's mistake "entirely natural"); *cf. In re* Jingles, 27 Cal. 2d 496, 498, 165 P.2d 12, 14 (1946). The court in *Yurko* mentioned the "numerous and complex circumstances" in which habitual criminality may apply. 10 Cal. 3d at 864, 519 P.2d at 565, 112 Cal. Rptr. at 517.

188. For example, in *Birch* the court stated:

> While petitioner possibly might have suspected that a guilty plea could result in a short jail sentence, we cannot believe that he was aware that as a consequence of urinating in a parking lot at 1:30 in the morning he would be required to register as a *sex offender.*

10 Cal. 3d at 322, 515 P.2d at 17, 110 Cal. Rptr. at 217 (emphasis supplied).

189. See note 186 *supra.*

190. *E.g.*, Bye v. United States, 435 F.2d 177, 180-81 (2d Cir. 1970).

191. Obviously, the judge has no duty to advise the defendant of consequences which are dependent on facts which the defendant conceals. Mathis v. Hocker, 459 F.2d 988, 989 (9th Cir. 1972). Likewise, there is no duty to forewarn when subsequent changes in the law produce important consequences. Brady v. United States, 397 U.S. 742 (1970). See cases cited note 165 *supra.*

192. For example, in United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972), the judge was aware that the defendant, before him on federal charges, was serving time for a state offense. Under federal law, any federal sentence imposed would not begin to run until the defendant was released from state custody. In these circumstances, the judge should have informed the defendant of the unavailability of a coucurrent sentence. The same reasoning requires the judge to inform the defendant of his ineligibility for parole because of the particular crime with which he is charged. *E.g.*, Smith v. United States, 400 F.2d 860, 862 (6th Cir. 1968). See cases cited note 158 *supra.*

193. For example, alien status may be indicated by the defendant's attire or by the defendant's inability to speak English.

194. Some of the cases cited above which denied defendant relief exhibited "special facts." *E.g.*, United States v. Santelises, 476 F.2d 787, 788 (2d Cir. 1973) (defendant alien charged with use of false immigration papers); Hutchison v. United States, 450 F.2d 930, 931 (10th Cir. 1971) (defendant charged with escaping from federal prison,

For similar reasons, the judge should exercise special caution when the behavior or appearance of the defendant indicates that he may lack capacity to assess adequately the implications of his guilty plea.[195] Thus, if the defendant appears drugged or intoxicated,[196] the judge should continue the arraignment until the effects are no longer present. If the defendant is unable to speak or understand English, an interpreter should be provided and the judge should then canvass the defendant to ensure that he has not been prejudiced by language disability.[197]

III. CONCLUSION

Birch and *Yurko*, more than the *Mills* and *Wicks* cases, represent significant steps toward the protection of defendants' interests. Many if not most defendants are aware that a guilty plea waives the right to a jury trial, the right to confrontation, and the privilege against self-incrimination, and therefore only in rare instances will advice as to these waivers cause a defendant to change his plea. It is far more likely, however, that an accused will have serious second thoughts when informed, for example, that, by pleading guilty, he will have to register as a sex offender for life or could be deported from the country.[198]

---

lost good time credits); Redwine v. Zuchert, 317 F.2d 336 (D.C. Cir. 1963) (defendant a member of the Air Force); People v. Searcie, 37 Cal. App. 3d 204, 210, 112 Cal. Rptr. 267, 270 (2d Dist. 1974) (judge knew defendant was on probation).

195. See cases cited notes 82-87 *supra.*

196. *See* Gannon v. United States, 208 F.2d 772 (6th Cir. 1953) (drugged); United States *ex rel.* Wakeley v. Russell, 309 F. Supp. 68 (E.D. Pa. 1970) (inebriated); United States *ex rel.* Collins v. Maroney, 287 F. Supp. 420 (E.D. Pa. 1968) (narcotic withdrawal).

197. *See* Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966).

198. The purpose of informing the defendant of the guilty plea consequences is to enable him to make a reasoned and realistic assessment of his case so that he may understandingly enter his plea. *Compare* Brady v. United States, 397 U.S. 742, 755 (1970), *with* United States v. Myers, 451 F.2d 402, 405 (9th Cir. 1972). Thus, in Stephen v. United States, 426 F.2d 257, 258 (5th Cir. 1970), the defendant pleaded guilty after being informed that he could get twenty years on each of two counts, and was sentenced to less than twenty years in total. Actually, because both counts arose from the same statute, he could not have been sentenced on more than one count. Although arguably the defendant was not prejudiced by the judge's error since he received a sentence of less than twenty years anyway, he was still entitled to have his plea vacated and to plead anew because information given to him by the judge *may have influenced* his decision to plead guilty. *See* Moody v. United States, 469 F.2d 705, 708 (8th Cir. 1972); United States v. Smith, 440 F.2d 521, 526-27 (7th Cir. 1971); Bye v. United States, 435 F.2d 177, 180 (2d Cir. 1970); Berry v. United States, 412 F.2d 189, 191-92 (3d Cir. 1969); Durant v. United States, 410 F.2d 689, 691-92 (1st Cir. 1969). *Compare*, Combs v. United States, 391 F.2d 1017 (9th Cir. 1968). The judge's misinformation or omission is "harmless error" only if it would not have affected the defendant's decision to plead guilty in any way. *See* United States v. Bronson, 449 F.2d 302, 305 (10th Cir. 1971), *cert. denied*, 405 U.S. 994 (1972).

Thus, both *Birch* and *Yurko* provide substance to the constitutional guaranty that a defendant will not be bound to a waiver of his rights made in ignorance of facts necessary to make an intelligent decision.

Mills and *Wicks*, on the other hand, primarily serve to ease the burden, although perhaps only marginally so, of administering guilty pleas. This may come about, however, only at the cost of individual injustice. Whether the supreme court has properly struck the balance between administrative convenience (*Mills* and *Wicks*) and defendants' individual rights (*Birch* and *Yurko*) is the question which remains to be answered.

Adrian Arima

D. Right to an Attorney Judge in Justice Courts

Gordon v. Justice Court.[1] The supreme court ruled that California justice court judges must be attorneys if presiding over criminal cases in which the defendant faces possible imprisonment.[2] The court concluded that the due process right to a fair trial mandates this standard of qualification for justice court judges, whose criminal jurisdiction includes misdemeanors punishable by a fine of up to $1000, or a maximum term of one year in the county jail, or both.[3] The court indicated in dictum that the same standard would hold for justice court judges conducting preliminary hearings in felony cases.[4] *Gordon* leaves untouched the ability of lay judges to preside over criminal infractions punishable by fine only and over all civil cases within justice court jurisdiction.[5]

Gordon represents a commendable move toward ensuring professional competence in criminal trials in California's inferior courts. Its immediate impact, however, may be one of dislocation in those courts.

Section I of this Note will discuss the court's due process rationale. Section II will explain the present qualification requirements for jus-

1. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974) (Burke, Acting P.J.) (unanimous decision), *modified*, 12 Cal. 3d 607a (1974), *cert. denied*, 43 U.S.L.W. 3453 (U.S. Feb. 18, 1975).

2. Although the court does not specify what is meant by "attorney," the term apparently denotes a person licensed to practice law in California, since the court refers to the "State Bar examination required of one seeking to be an attorney." 12 Cal. 3d at 329-30, 525 P.2d at 76, 115 Cal. Rptr. at 636.

3. CAL. PEN. CODE § 1425 (West Supp. 1974). Justice Courts also have jurisdiction over several types of civil matters. *See* CAL. CODE CIV. PRO. § 112 (West Supp. 1974).

4. 12 Cal. 3d at 326 n.2, 525 P.2d at 74 n.2, 115 Cal. Rptr. at 634 n.2.

5. *Id.*

tice court judges. Finally, section III will explore the practical impact of *Gordon* on the California lower court system.

I. THE DUE PROCESS RATIONALE

Defendants Gordon and Arguijo were brought before non-attorney justice court judges on misdemeanor charges.[6] Each moved for disqualification of his judge[7] on the ground that lay judges are per se incompetent to preside over criminal cases. Defendants sought extraordinary pretrial relief on behalf of themselves and all those similarly situated. The case came before the supreme court on appeal from a demurrer sustained by the superior court. Although in the meantime both Gordon and Arguijo had pleaded guilty to lesser charges before attorney judges, the court decided the case was not moot since it posed " 'an issue of broad public interest that is likely to recur . . .' "[8]

The court's general thesis was that lay justices of the peace are an anachronism whose potential for prejudicing a criminal defendant's fundamental right to a fair trial is great enough to offend modern notions of due process.[9] The court noted two tests for determining whether a procedure satisfies due process requirements for a fair trial: In a pre-trial evaluation, the court ascertains whether "in the absence of relief a *reasonable likelihood* exists that a fair trial cannot be had."[10] In a post-trial determination, the test is whether "there was a reasonable *probability* of prejudice."[11] In *Gordon* the court found that the probability that a criminal defendant would be prejudiced by the use of a lay judge was great enough to amount to a denial of due process.[12]

In reaching this conclusion, the court emphasized the increasing complexity of modern criminal law and procedure. Complex legal and constitutional issues often arise in even the most petty cases.[13]

6. 12 Cal. 3d at 326, 525 P.2d at 73-74, 115 Cal. Rptr. at 633-34. Gordon was charged with disturbing the peace (CAL. PEN. CODE § 415 (West 1972)) and failing to disburse (CAL. PEN. CODE § 416 (West 1972)). Arguijo was charged with driving under the influence of alcohol (CAL. VEH. CODE § 23102(a) (West Supp. 1974)).

7. Motion was made under CAL. CODE CIV. PRO. § 170.8 (West Supp. 1974).

8. 12 Cal. 3d at 326 n.1, 525 P.2d at 74 n.1, 115 Cal. Rptr. at 634 n.1, *quoting In re* William M., 3 Cal. 3d 16, 23, 473 P.2d 737, 741, 89 Cal. Rptr. 33, 37 (1970).

9. The due process holding made it unnecessary for the court to consider whether the differing qualifications for municipal and justice court judges works a violation of equal protection for criminal defendants appearing before lay justice court judges.

10. 12 Cal. 3d at 329, 525 P.2d at 75, 115 Cal. Rptr. at 635, *citing* Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968), and Frazier v. Superior Court, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971).

11. 12 Cal. 3d at 329, 525 P.2d at 76, 115 Cal. Rptr. at 636, *citing* Ward v. Village of Monroeville, 409 U.S. 57 (1972).

12. 12 Cal. 3d at 329, 525 P.2d at 76, 115 Cal. Rptr. at 636.

13. The court noted, for example, that First Amendment issues might be raised in a case such as Gordon's, where the charges of disturbing the peace and failure to

Because every criminal defendant is entitled to a jury trial,[14] a justice court judge must able to deal with voir dire, evidentiary rulings, decisions on prejudicial comment and argument, and jury instructions.[15] The acceptance of guilty pleas requires an evaluation of whether the plea meets the standards imposed by both the United States and California Supreme Courts,[16] and sentencing requires at least an equal expertise.[17] In light of this trend towards increased complexity, the court concluded that only through the use of attorney judges could the rights of criminal defendants facing possible jail sentences be assured of protection.[18]

The court buttressed its conclusion by reference to the right to counsel[19] as extended to all offenses punishable by imprisonment.[20]

> Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process.[21]

An alternative view of the right to counsel, of course, is that the defendant must be represented by an attorney because the prosecution is so armed, and fairness is served by an equally matched duel. Since the adversaries are equals, the presiding officer need be only a neutral and detached decision-maker.[22] This argument is un-

---

disperse arose from Gordon's conduct at a political demonstration. 12 Cal. 3d at 330, 525 P.2d at 77, 115 Cal. Rptr. at 637. A recent study of California's lower court system commissioned by the Judicial Council noted that "[i]ncreasing arrests and court appearances have resulted from social protests involving such areas as civil rights and anti-war demonstrations. These proceedings have required considerable judicial time and effort because of an increasing awareness of litigants regarding their constitutional rights and their greater familiarity with the judicial process." BOOZ, ALLEN & HAMILTON, INC., FINAL REPORT ON THE CALIFORNIA LOWER COURT STUDY 8 (1971) [hereinafter cited as LOWER COURT STUDY].

14. CAL. CONST. art. I, § 7.

15. In Crouch v. Justice of the Peace Court, 7 Ariz. App. 460, 440 P.2d 1000 (1968), the Arizona Court of Appeals held that it does not violate the due process clause for lay justices of the peace to give jury instructions.

16. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969); *In re* Birch, 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1974); Mills v. Municipal Court, 10 Cal. 3d 288 515 P.2d 273, 110 Cal. Rptr. 329 (1974); *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).

17. *See* People v. Navarro, 7 Cal. 3d 248, 259 n.7, 102 Cal. Rptr. 137, 144 n.7, 497 P.2d 481, 488 n.7 (1972).

18. 12 Cal. 3d 330, 525 P.2d 76, 115 Cal. Rptr. 636.

19. *See* Gideon v. Wainwright, 372 U.S. 335 (1963), in which the sixth amendment right of indigent criminal defendants to appointed counsel was made applicable to the states through the Fourteenth Amendment.

20. 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638 n.11, *citing* Argersinger v. Hamlin, 407 U.S. 25 (1972).

21. 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638.

22. This view was adopted by the Kentucky Court of Appeals in rejecting the right to counsel argument for attorney judges in police courts. Ditty v. Hampton, 490 S.W.2d 772, 775 (Ky. Ct. App. 1972) (as modified on denial of rehearing (1973)). *Ditty* was

persuasive, however, to the extent that modern judges must be active participants in criminal proceedings, and therefore need to be of professional training as rigorous as that of counsel for both sides.[23]

Nor did the court consider the right to appeal from a justice court judgment a sufficient remedy for the possibility of prejudice.[24] The court found appeal to be a particularly inadequate remedy in the context of justice court verdicts because justice courts are not courts of record.[25] There is often no transcript of the original proceeding, and appeal is based instead upon the justice court judge's statement of the case.[26] The possibility of error is thus compounded in the process of appeal.

It is not clear whether the court will extend its reasoning in *Gordon* to include criminal infractions punishable only by fine. While it is apparent that differential treatment of the latter type of case would be inconsistent with the logic of *Gordon*, nonetheless, the court may refrain from extending the holding to all criminal infractions in deference to future legislative action on lower court reform.

II. QUALIFICATIONS OF JUSTICE COURT JUDGES

California presently has 215 judicial districts with justice courts;[27]

followed by the Kentucky Court of Appeals without further discussion in Waggoner v. Castleman, 492 S.W.2d 929 (1973)). The right to counsel argument was also rejected, but without analysis, in Melkian v. Avent, 300 F. Supp. 516 (N.D. Miss. 1969).

23. It is not clear, however, that the justice court judge need pass the State Bar examination in order to qualify as professionally competent. The availability of the bar examination as a standard by which competence ostensibly can be measured and the fact that all other judges and practicing attorneys in California must pass this examination (CAL. CONST. art. VI, § 15 (judges), CAL. BUS. & PROF. CODE §§ 6060(f), 6062(d) (West 1974) (attorneys)) doubtless account for the court's unhesitating grasp of license to practice in California as a due process requirement for justice court judges.

24. 12 Cal. 3d at 331-32, 525 P.2d at 77-78, 115 Cal. Rptr. at 637-38. *See generally* Maine v. Superior Court, 68 Cal. 2d 375, 378, 438 P.2d 372, 374, 66 Cal. Rptr. 724, 726 (1968), *quoting* Brown v. Superior Court, 34 Cal. 2d 559, 562, 212 P.2d 878, 880 (1949). *But see* Ditty v. Hampton, 490 S.W.2d 772, 776 (Ky. Ct. App. 1972), in which the Kentucky Court of Appeals went so far as to indicate that because of the right to a *de novo* trial in a court of general jurisdiction, a guilty plea and sentence in an inferior court amounts to little more than an offer of settlement. Such an argument might be made with respect to appeals in civil cases from justice courts in California, for a *de novo* trial is always available on civil appeals embracing questions of fact or fact and law. CAL. CODE CIV. PRO. § 904.4 (West Supp. 1974). However, the right to review in criminal cases results in a new trial at the superior court level only if the reviewing court decides that a new trial would be proper. CAL. PEN. CODE § 1469 (West 1970).

25. CAL. CONST. art. VI, § 1.

26. 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638. The record on appeal, of course, contains all pleadings, written motions, notices, instructions, exhibits, affidavits, and other documents, as well as the transcript, or, when there is no transcript, the statement of the case. CAL. R. CT. 183(a).

27. Computed from roster of justice court judges furnished by the Judicial Council,

only 84 (or 39.1 percent) of the judges of these courts are attorneys.[28] In regard to lay justices of the peace, one commentator has stated:

> With no training in the law, no training in the process of judicial thought, no mental habit of mind which is acquired only by constant experience in legal reasoning, it would indeed be strange if a justice of the peace did not treat each case as a unique proposition . . . . The justice which such a tribunal is capable of dispensing is but the outcropping of the experiences of a personality . . . variable as the personalities of the justices who comprise the justice of the peace system.[29]

Such an indictment of lay justices is perhaps unfair in California where, under the direction of the Judicial Council, a policy of upgrading the qualifications of justice court judges has been in effect for over two decades. The qualification requirements for justice court judges have been set by the Legislature: a judge must either be a member of the State Bar or have passed a qualifying examination prescribed by the Judicial Council within the previous four years.[30] A grandfather clause excepts from these requirements incumbent lay judges who have served continuously since before the Reorganization Act of 1950.[31] These latter judges, whose qualifications have gone totally untested, will disappear over time from the roster.

November, 1974.

Each California county is divided into one or more judicial districts. Those districts with a population of less than 40,000 have a justice court; those with a population of greater than 40,000 have a municipal court. CAL. CONST. art. VI, § 5. Justice court judges are chosen by election in their respective counties or judicial districts (CAL. CONST. art. VI, § 16(b)) and serve for a term of six years. CAL. GOV'T CODE § 71601 (West 1964).

28. Computed from roster of justice court judges furnished by the Judicial Council, November, 1974.

29. Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118, 127-28 (1927).

> [T]he notion of a layman, ignorant of the law, deciding the legal rights of . . . defendants in criminal cases is wholly irreconcilable with the fundamental tenet of our government that justice shall be administered in accordance with established principles of law and not at the whim, or caprice or personal notions of justice held by some individual exercising the power of the state.

Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 828.

30. CAL. GOV'T CODE § 71601 (West 1964).

31. *Id.* The lower courts were reorganized pursuant to a plan recommended to the California Legislature by the Judicial Council and approved by the voters in 1950. Previously, California's courts of limited jurisdiction consisted of two categories of municipal courts, township justice courts, city justice courts, special city courts, and police courts. These courts were replaced by municipal and justice courts in accordance with the population of redrawn districts. *See* Cheshire, *Lower Court Reorganization*, 29 TAX DIGEST 149 (1951). *See also* Traynor, *Rising Standards of Courts and Judges*, 40 CAL. STATE B.J. 677, 689-90 (1965).

The qualifying examination for candidates for justice court judgeships is a three-hour written test covering the functions and procedures of the justice court, and includes a survey of the Evidence and Penal Codes.[32] Although the first test, given in 1952, yielded a pass rate of 93 percent,[33] standards were toughened in subsequent years by the introduction of essay answers and some analysis of court opinions. As a result, the pass rate declined to 73 percent in 1958, 61 percent in 1964, and 45 percent in 1970.[34]

The Judicial Council has also promulgated the well-received and widely used *California Justice Court Manual*, a handbook on the operation of those courts. It sponsors workshops and educational forums for justice court judges, featuring discussions of current issues and problems.[35]

Despite these efforts to train justice court judges, the process of upgrading has been unable to eradicate damaging statistics concerning the qualifications of lay judges. According to a 1971 Judicial Council survey, 37 percent of the judges who qualified by examination had only a high school education.[36] Thirteen lay judges reported that they had not had even that much schooling.[37] These facts were noted with dismay by the *Gordon* court,[38] and undoubtedly they influenced its decision. The court compared the Judicial Council examination and the educational qualifications of lay judges with the comprehensive two-and-one-half day State Bar examination and its educational pre-

---

32. *See* Opening Brief for Appellants at 9-10 (Court of Appeal of the State of California, Third Appellate District).

While the contents of the test are confidential, the office of the Judicial Council verified this general description and noted that the examination does include some substantive criminal and civil law.

33. Hennessey, *Qualification of California Justice Court Judges: A Dual System*, 3 PAC. L.J. 439, 449 n.53 (1972) [hereinafter cited as Hennessey].

34. *Id.* at 449 n.53, 450.

35. *Id.* at 452-455. One problem faced by all new judges, both attorneys and lay persons, is that most must acquire their skills as judges on the job.

> Currently, there is no organized and statewide pre-service training program for all new lower court judges which orients them to their judicial duties and responsibilities prior to their assuming the bench. Efforts have been made by several judicial districts to eliminate this void. . . . The absence, however, of a formalized and continning pre-service training program which includes all new judges throughont the state remains a problem today . . .

LOWER COURT STUDY, *supra* note 13, at 30.

36. Hennessey, *supra* note 33, at 445. One hundred and eleven of the 125 judges who had qualified by passing the Judicial Council examination responded to the survey questionnaire.

37. *Id.* at 446. It is worth mention, however, that almost as many lay judges, 35.1% had or were studying law, and three had become members of the State Bar after serving as lay judges for a number of years. *Id.* at 444-45.

38. 12 Cal. 3d at 330 n.7, 525 P.2d at 76 n.7, 115 Cal. Rptr. at 636 n.7.

requisites.[39] The result, unsurprisingly, was a hands-down victory for the attorney standard of qualification. A word of praise was given to the Judicial Council and an apology made to the lay judges,[40] but the court concluded that "so long as a reasonable likelihood exists that a non-attorney judge will be unable to afford a defendant a fair trial, due process requires that the system be further refined."[41]

III. IMPACT ON THE COURT SYSTEM

In support of its argument that due process requires an attorney judge where a criminal defendant faces the possibility of a jail sentence, the court contrasted the "vast increase in the number of attorneys in all areas of the state and [the] substantial improvement in roads, highways and transportation"[42] with the 14th century English circumstances under which the justice of the peace system originated, and the early American circumstances under which it was perpetuated.[43] The court concluded that these changes in the availability of attorney judges argued for a higher standard of due process than was previously practicable.[44]

Such an argument is striking, but it detracts from the fact that there are still large parts of California where distances between populated areas are substantial, and attorney justice court judges simply nonexistent.[45] *Gordon* raises the possibility that a large proportion of criminal matters within the jurisdiction of justice courts will have to be transferred to other judicial districts, or heard by attorney judges assigned by the Judicial Council and brought in from other districts.[46]

---

39. *See* 12 Cal. 3d at 329-30, 525 P.2d at 76, 115 Cal. Rptr. at 636.

40. The court noted that under the supervision of the Judicial Council, California's justice court system has led "the way toward better qualified lay judges," and that "nonlawyers who are interested, competent and dedicated to the work of the courts can perform an important role in the efficient administration of justice." 12 Cal. 3d 333, 525 P.2d at 79, Cal. Rptr. at 639, *quoting* Heunessey, *supra* note 33, at 470, 474.

41. 12 Cal. 3d at 333, 525 P.2d at 79, Cal. Rptr. at 639.

41. 12 Cal. 3d at 333, 525 P.2d at 79, Cal. Rptr. at 639.

42. 12 Cal. 3d at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635.

43. *Id.* at 327, 525 P.2d at 74-75, 115 Cal. Rptr. at 634-35.

44. The court quoted language from Justice Frankfurter's opinion for the majority in *Wolf v. Colorado*, 338 U.S. 25 (1949), which expresses the notion of due process as a "living principle," whose requirements are not rigidly fixed but must be assessed in the light of contemporary circumstances. 12 Cal. 3d at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635.

45. *See* LOWER COURT STUDY, *supra* note 13, at 82, regarding the availability of attorneys in some counties.

46. Both of these possibilities are mentioned by the court. 12 Cal. 3d at 334, 525 P.2d at 79, 115 Cal. Rptr. at 639. Venue may be changed in justice courts under CAL. PEN. CODE § 1034 (West 1972) where "there is a reasonable likelihood that a fair and impartial trial cannot be had in the judicial district," and under CAL. PEN. CODE § 1035

Where the matter must be transferred, *Gordon* may result in moving it to another county since as many as 12 counties in California have neither an attorney justice court judge nor a municipal court.[47] Thus, to the extent that the court's due process conclusion rested on a balancing of the potential benefits of an upgraded standard of qualification for justice court judges against the likelihood of hardship in its implementation, the latter end of the scale was perhaps not given enough weight. Since a restructuring of California's lower court system, however, would be palpably beyond the proper function of the court, it is understandable that the court concluded that the hardship foreseen would be tolerable. Not incognizant of the practical difficulties imposed by *Gordon*,[48] the court modified its ruling to render it effective on February 1, 1975,[49] thereby affording a short period during which necessary adjustments could be made.

In some areas of the state, the immediate impact of *Gordon* may be significantly reduced by waivers of the new right.[50] Such waivers may result from hardships or delays imposed by transfers or the wait for an attorney judge, or may simply result from public confidence in the justice court system as it has been. Strategic factors may also induce waivers. Such considerations might include the reputed attitude of a judge regarding the offense charged, or the attorney's or client's ongoing relationship with the lay judge (assuming such relationships are fairly common in rural areas having justice courts). If the attorney feels that a lay judge may resent being passed over, for example, he or she may wish to consider the possible effect on other cases pending before that judge. On the other hand, waiver is strategically less desirable if a technical defense is contemplated, or if the case is complicated. The possibility of waiver may also affect the plea bargaining process.[51]

(West 1972) for the convenience of the parties. In addition, CAL. CODE CIV. PRO. § 170.8 (West 1972) provides that the Chairman of the Judicial Council may assign a judge to hear an action or proceeding when there is no qualified judge to hear it.

47. Figure furnished by the Judicial Council, November 4, 1974.

48. *See* 12 Cal. 3d at 333, 525 P.2d at 79, 115 Cal. Rptr. at 639.

49. 12 Cal. 3d 607a (1974).

50. One Kern County lay judge told this author that he expected a substantial number of waivers, running perhaps as high as 90%. Interview, November 4, 1974.

51. Lay judges might make a pretrial determination of whether imprisonment should be retained as a sentencing option for each case. If it is not, then presumably *Gordon* would permit the lay judge to hear it. *Cf.* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972):

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

Such short-term solutions as transfers, temporary assignments, and waivers, however, will not forestall the eventual replacement of lay judges by attorneys in the wake of *Gordon*, for it makes little sense to elect an officer who has been legally disabled from performing a substantial part of his or her duties. In the long run, the role of the lay judge must become part of the larger issue of lower court reform, an issue properly within the province of the legislature.

A more comprehensive solution to the dilemmas of *Gordon*, for example, would entail the elimination of justice courts and the implementation of an expanded municipal court system. The task of such a system would be to account for the special problems of rural areas consistently with a single standard of quality for all California lower courts. The needs of rural areas could be served through branch facilities staffed by full-time attorney judges or by circuit-riding attorney judges of municipal or county courts.[52] Lay persons who formerly held positions as justice court judges could be utilized as magistrates or commissioners with subordinate judicial functions. These magistrates could handle uncontested small claims and other minor matters.[53] Their functions would have to be clearly delineated, unquestionably within the range of their professional competence, and always subject to the supervision of attorney judges. Within these limitations, however, lay magistrates could provide a valuable service to the judicial system and to their communities.

CONCLUSION

The due process holding of *Gordon* will no doubt have a positive effect on the administration of justice in California's justice courts. Attorney judges generally will be better able to render decisions protective of the rights of accused persons and consistent with legal norms and principles. Perhaps more importantly, through the pressures created by implementation of *Gordon*, the pace of lower court reform in California will surely be quickened. Hopefully, such reform will include streamlining those courts in addition to upgrading the qualifications of their officers.

Dorothy Robinson

---

52. *See* LOWER COURT STUDY, *supra* note 13, at 56. Circuit riding non-attorney commissioners were also recommended. *Id.* at 84.

53. *See* LOWER COURT STUDY, *supra* note 13, at 82-85.

For a survey of the use of lay personnel in inferior courts in other states and England, *see* Hennessey, *supra* note 33, at 465-72. *See also*, Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 397-403 (1964).