VI

CRIMINAL PROCEDURE

A. SEIZURE AND SEARCH: THE CALIFORNIA CONSTITUTION AS AN INDEPENDENT GROUND

People v. Brisendine.[1] The California Supreme Court held that it is not bound by the United States Supreme Court's interpretation of the fourth amendment in construing a substantially identical clause of the California constitution barring unreasonable searches and seizures.[2] Thus the court refused to follow *United States v. Robinson*[3] and *Gustafson v. Florida*,[4] a pair of recent U.S. Supreme Court decisions holding that a full search of a person is constitutionally permissible when incident to an arrest. Instead, the court held that the California constitution authorizes only a pat-down search for weapons of persons arrested for citation offenses which do not involve "fruits" or "instrumentalities" of a crime.

I. The Decision

a. The Facts

Two deputy sheriffs inspecting for county fire code violations in the Deep Creek area of the San Bernardino National Forest were told by an illegal camper of the presence of other campers who possessed marijuana. The officers located four campers, including the defendant, and arrested them for having an open campfire. Normally, persons detained for this offense are cited and immediately released; however, the officers decided to escort the campers out of the area both because camping was illegal and because the officers had left their citation books in their patrol car. Before beginning the return journey, which involved a difficult hike over a primitive trail at night, the officers searched the campers and their effects. Because defendant's knapsack was too solid for a deputy to determine its contents by squeezing, the deputy began to search its interior. He located and opened an opaque bottle and several

1. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (Mosk, J.) (4-3 decision).

2. Article I, § 13 of the California constitution provides:

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

This wording is substantially identical to the fourth amendment of the United States Constitution.

3. 414 U.S. 218 (1973).

4. 414 U.S. 260 (1973).

envelopes which contained illegal drugs. Based upon this evidence, defendant was convicted of possession of marijuana and restricted dangerous drugs.[5] The supreme court reversed in a lengthy opinion by Justice Mosk, holding that the discovery of the contraband was the fruit of an unreasonable search.[6] Justice Burke, joined by Justices Clark and McComb, filed a dissent.[7]

b. The Court's Reasoning

1. Search of Defendant's Person. The court held first that the deputies acted reasonably in searching the defendant's person for weapons. It was unnecessary to reach this issue, since the evidence in question was obtained exclusively from defendant's knapsack. However, the court chose to use this case to clarify the permissible scope of a search of an arrested person.

Under an exception to the warrant requirement, police may ordinarily search an arrested person and the area within the person's control.[8] In 1972, however, the California Supreme Court in *People v. Superior Court (Simon)*[9] joined several other jurisdictions in refusing to allow such a search incident to an arrest for a traffic violation which will be disposed of by citation and immediate release.[10]

Simon was based largely upon the California Supreme Court's 1970 decision in *People v. Superior Court (Kiefer).*[11] In that case, the court upheld suppression by the trial court of marijuana found in a vehicle whose driver had been stopped for speeding. The court read the United States Supreme Court's decisions in *Preston v. United States*[12] and *Chimel v. California*[13] as imposing a requirement that all warrantless searches be reasonable in scope.[14] The California court reasoned that three purposes could justify a search incident to an arrest: (1) discovery of instrumentalities or fruits of crime; (2) seizure of contraband; and (3) removal of weapons from the suspect.[15] Certainly, the court reasoned, traffic offenses did not involve instrumentalities or fruits of the crime. Furthermore, it was not reasonable to suppose that every

5. 13 Cal. 3d at 532-34, 531 P.2d at 1101-02, 119 Cal. Rptr. at 317-18.
6. *Id.* at 545, 531 P.2d at 1109, 119 Cal. Rptr. at 325.
7. *Id.* at 553, 531 P.2d at 1115, 119 Cal. Rptr. at 331.
8. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969).
9. 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972), *noted in* 61 CALIF. L. REV. 481 (1973).
10. *See, e.g.*, State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); People v. Marsh, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967).
11. 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970).
12. 376 U.S. 364 (1964).
13. 395 U.S. 752 (1969).
14. 3 Cal. 3d at 813, 478 P.2d at 452, 91 Cal. Rptr. at 732.
15. *Id.* at 812-13, 478 P.2d at 451, 91 Cal. Rptr. at 731.

traffic offender would possess contraband.[16] Finally, the court held the risk to the arresting officer was not great enough to justify a search of every stopped vehicle for weapons.[17] Rather, a vehicle could be searched for contraband or weapons only if the officer had specific, independent cause to believe they might be present.[18]

The court in *Simon* extended *Kiefer* to require that independent cause be shown for a weapons search of a traffic offender's person. The court reasoned that since a stop for a traffic violation resembled a stop-and-frisk, the same requirement of reasonableness imposed by the Supreme Court upon the latter[19] ought to apply to the former.[20] As in *Kiefer*, the court examined the traditional justifications for a search incident to arrest and found that a requirement of independent cause adequately balanced the interests of the detained person in privacy and of the arresting officer in avoiding injury.[21]

The *Simon* decision left open the question of the permissible scope of the search when a traffic offender is to be taken to a magistrate for posting of bond. In a concurring opinion, Chief Justice Wright asserted that the danger of transporting a prisoner would justify a weapons search where the offender is taken to a magistrate.[22] The court in *Brisendine* adopted this reasoning.[23] Since escorting the defendant and his companions out of the forest was analogous to taking a prisoner to a magistrate, the court concluded that a "pat-down" search for weapons of the campers was allowable.[24]

By applying *Simon* and *Kiefer* to the campfire violation in *Brisendine*, the court indicated that the analysis of *Simon* and *Kiefer* is not confined to traffic violators. Instead, the court has in effect promulgated a three-tiered classification for determining the proper scope of a search of a person arrested for an offense involving neither fruits nor instrumentalities. If the offense is disposed of by citation and immediate release, no search is possible without independent probable cause. If the offender is to be transported but not booked, a pat-down weapons search is permissible, but a more extensive search requires independent probable cause. If the offender is to be booked, the traditional full body search is apparently permissible.[25]

16. *Id.* at 814-15, 478 P.2d at 452-53, 91 Cal. Rptr. at 732-33.
17. *Id.* at 828-830, 478 P.2d at 463-64, 91 Cal. Rptr. at 743-44.
18. *Id.* at 830, 478 P.2d at 464, 91 Cal. Rptr. at 744.
19. Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968).
20. 7 Cal. 3d at 203, 496 P.2d at 1217-18, 101 Cal. Rptr. at 849-50.
21. *Id.* at 205-06, 496 P.2d at 1219, 101 Cal. Rptr. at 851.
22. *Id.* at 215, 496 P.2d at 1226, 101 Cal. Rptr. at 858.
23. 13 Cal. 3d at 537, 531 P.2d at 1104, 119 Cal. Rptr. at 320.
24. *Id.* at 537-38, 531 P.2d at 1104-05, 119 Cal. Rptr. at 320-21.
25. Courts in other jurisdictions have suggested that the scope of such a search be

2. Search of Suspect's Effects. The court similarly concluded that a search of the defendant's effects for weapons was valid. Because Brisendine's was a citation offense which, like a traffic offense, involve neither fruits nor instrumentalities, the court declared that specific cause for the search, independent of the arrest, was necessary.[26] Likening the situation to the transportation of an arrestee to the police station, the court found a weapons search was justified by the need of the officers to protect themselves and by their inability to feasibly deprive defendant of possession of the knapsack throughout the difficult hike out of the forest.[27] Likewise, the officers were justified in searching the knapsack because a pat-down had failed to disclose whether the pack contained weapons.[28]

However, the court held that the opening of the opaque bottle and envelopes was not justified. According to the court, the possibility that these items contained some sort of exotic weapon was too remote to permit a search. If, on the other hand, objects within the knapsack had looked or felt like weapons, further investigation would have been allowable.[29]

II. The Significance of Brisendine: *the California Constitution as an Independent State Ground*

The decision in *Brisendine* is not significant only for the limits it places on police searches of minor offenders. Perhaps the greater importance of the decision lies in its rejection of the United States Supreme Court's holdings in *United States v. Robinson*[30] and *Gustafson v. Florida*[31] that a full search is constitutionally permissible when incident to any "custodial arrest."

In *Robinson*, the defendant was arrested for driving with a revoked license. A District of Columbia policeman, in conducting a pat-down search according to prescribed regulations, felt an object in the defendant's coat. The policeman pulled out the object, a cigarette pack, looked inside, and found heroin.[32] The Court of Appeals for the District of Columbia held the evidence inadmissible.[33] Like the California Supreme Court in *Brisendine*, the court held that the search could

limited by a probable cause requirement. *See, e.g.*, State v. Kaluna, 520 P.2d 51 (Hawaii 1974).

26. 13 Cal. 3d at 540, 531 P.2d at 1106, 119 Cal. Rptr. at 322.
27. *Id.* at 540-41, 531 P.2d at 1106-07, 119 Cal. Rptr. at 322-23.
28. *Id.* at 542-43, 531 P.2d at 1107-08, 119 Cal. Rptr. at 323-24.
29. *Id.* at 543-44, 531 P.2d at 1108-09, 119 Cal. Rptr. at 324-25.
30. 414 U.S. 218 (1973).
31. 414 U.S. 260 (1973).
32. 414 U.S. at 220-23.
33. 471 F.2d 1082 (D.C. Cir. 1972).

be justified only by the need to disarm the offender[34] and that the probability of finding a weapon inside the cigarette pack was too slight to justify looking inside.[35]

The Supreme Court reversed. Justice Rehnquist, writing for the majority, held that a full search was a permissible incident to any lawful arrest. The Court rested its decision largely upon the desirability of avoiding case-by-case adjudication of the reasonableness of a particular search; rather, the Court held that the fact of the arrest itself furnished sufficient justification for a search.[36]

Similarly, in the companion case of *Gustafson v. Florida*,[37] the Court held that the police could constitutionally conduct a full body search of a person arrested for driving without a license. Justice Powell, concurring in both cases, offered a slightly different justification for the results, asserting that an arrested person retains no significant interest in privacy.[38] Under his view, the search of an arrested person is not a "search" subject to the "reasonableness" limitation of the fourth amendment.[39] Justice Marshall, joined by Justices Brennan and Douglas, dissented in both cases, arguing that the fourth amendment compelled case-by-case adjudication of reasonableness and that the rule enunciated by the majority would lead to unjustified invasions of privacy.[40]

Although based on different assumptions, the *Robinson* and *Gustafson* holdings are not necessarily in conflict with *Simon* and *Kiefer*. The United States Supreme Court expressly refused to deal with the problem of the permissible scope of a search incident to a stop for a traffic violation which will be disposed of by citation.[41] In addition, it may be argued that the state legislature, in instituting the citation system for traffic offenses, intended to bar the treatment of minor traffic offenders like other arrested persons.[42]

Brisendine involved more than a citation, however; therefore, as Justice Burke pointed out in his dissenting opinion,[43] *Robinson* and

34. *Id.* at 1098.
35. *Id.* at 1089-90 n.9.
36. 414 U.S. at 235.
37. 414 U.S. 260 (1973).
38. 414 U.S. at 237.
39. *Cf.* Katz v. United States, 389 U.S. 347 (1967).
40. 414 U.S. at 241-43.
41. 414 U.S. at 236 n.6.
42. *See* People v. Marsh, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967). Thus lower courts in New York have continued to follow *Marsh* after *Robinson*, since *Marsh* was largely decided as a matter of statutory construction. *See* People v. Copeland, 77 Misc. 2d 649, 354 N.Y.S.2d 399 (Dist. Ct. 1974); People v. Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 111 (Crim. Ct. 1974).
43. 13 Cal. 3d at 557-8, 531 P.2d at 1118, 119 Cal. Rptr. at 334.

Gustafson are essentially indistinguishable from *Brisendine*, since all three cases concerned the scope of a search incident to a lawful arrest. Nevertheless, the majority opinion in *Brisendine* refused to follow the Supreme Court's interpretation of what constitutes a reasonable search and seizure in that context. The court asserted that while it agreed with the United States Supreme Court that a police officer was entitled to search a prisoner for weapons before transportation, the arrested person still retained enough interest in personal privacy to justify protection against a full search in the absence of cause.[44] *Brisendine* was based upon the California constitution's proscription of unreasonable seizures and searches.[45] Since the United States Supreme Court will not review a judgment which rests on an "adequate state ground,"[46] reliance on the California constitution thus had the effect of insulating the decision from reversal by the Supreme Court.

III. The Two Approaches Contrasted

Two kinds of factors must be taken into account in judging the correctness of the *Brisendine* result: (1) the wisdom of the substantive rule promulgated by the decision, and (2) the desirability of differing interpretations of substantially identical constitutional language.

a. The Substantive Merits of Brisendine

Perhaps the primary issue in choosing between the rules of *Brisendine* and *Robinson-Gustafson* is the problem of police safety. Under *Brisendine*, an officer may conduct only a pat-down frisk for weapons of a suspect who is being transported, rather than the full search allowed by *Robinson*. While a frisk can be rather detailed and intrusive,[47] there is substantial disagreement over whether it will suffice to protect the officer.[48] Recent empircial investigation suggests that, at least in the context of traffic stops, police security is only marginally improved by the *Robinson-Gustafson* rule. Shootings of officers who are stopping vehicles typically occur while the officer is walking from the police car

44. 13 Cal. 3d at 547 n.15, 531 P.2d at 1011 n.15, 119 Cal. Rptr. at 327 n.15.

45. CAL. CONST. art. I, § 13.

46. *See, e.g.*, Dep't of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875).

47. " '[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' " Terry v. Ohio, 392 U.S. 1, 17 n.13, *quoting* Priar and Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481 (1954).

48. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. CT. REV. 127, 148 [hereinafter cited as LaFave]; Robinson v. United States, 471 U.S. 1082, 1100 (D.C. Cir. 1972) (discussing an evidentiary hearing on the sufficiency of a *Terry*-type search).

to the stopped vehicle.[49] A full search after the officer has reached the stopped car would do little to allay this threat.

A second consideration is that police searches for contraband, particularly narcotics, will be drastically reduced by *Brisendine*. A choice between *Brisendine* and *Robinson-Gustafson* on this issue necessarily involves a judgment as to the importance of enforcing narcotics laws. To some extent, *Brisendine* involves a judicial determination that the police should be discouraged from using enforcement of traffic laws as a means of justifying searches for drugs where probable cause cannot be found.[50]

The court in *Brisendine* appeared to shy away from speaking overtly on the contraband issue. Unlike *Simon* and *Kiefer*, the facts in *Brisendine* suggested some reason for the police to believe that the campers had marijuana.[51] In cases both before and after *Brisendine*, the court has stated that a contraband search may be carried out if probable cause exists;[52] but in *Brisendine* the court restricted the rationale for the traditional search incident to arrest to finding instrumentalities of a crime and discovering weapons.[53] This omission might well be due to confusion in the case law regarding the proper purposes of the search incident to arrest.[54]

The *Brisendine* holding, however, is a step towards solving another contraband-related problem: the "pretext" or "timed" search, which enables police officers to search for contraband by relying on the

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49. *See* Schaffer, Harmon & Helbrush, *Robinson At Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE L. REV. 1, 53-54 (1974) [hereinafter cited as Schaffer]; Comment, *The Scope of Searches Incident to Traffic Arrests in California: Rejecting the Federal Rule*, 9 U.S.F. L. REV. 317, 332-33 (1974) [hereinafter cited as Comment, U.S.F. L. REV.].

50. Project, *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A.L. REV. 1499, 1533-35 (1968); Schaffer, *supra* note 48, at 61-2.

51. 13 Cal. 3d at 533, 531 P.2d at 1101, 119 Cal. Rptr. at 317. As indicated *supra* p. 442, the deputies had been told by another camper of the presence in the area of persons possessing marijuana. Since the informant was not known to the deputies, his information might not have constituted probable cause. *See* Aguilar v. Texas, 378 U.S. 108 (1964).

52. People v. Norman, 14 Cal. 3d 929, 539 P.2d 237, 123 Cal. Rptr. 109 (1975); People v. Longwill, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975); People v. Superior Court (Simon), 7 Cal. 3d 186, 202-3, 496 P.2d 1205, 1216-17, 101 Cal. Rptr. 837, 848-49 (1972).

53. *Id.* at 539, 531 P.2d at 1105, 119 Cal. Rptr. at 321.

54. *See* Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964). Neither *Preston* nor *Chimel* mentioned contraband as a legitimate object of search incident to arrest. "Instrumentalities, fruits and contraband" are repeatedly mentioned as justifications for such searches in Warden v. Hayden, 387 U.S. 294 (1966). However, the case did not actually involve contraband. *See* Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433, 434 n.12 (1969).

suspect's commission of a traffic or other minor offense while under surveillance. The judiciary has attempted to prevent such searches by allowing the defendant to gain suppression of evidence by showing the improper motive.[55] The rule, however, has been difficult to enforce. The *Brisendine* case is illustrative. Defendant sought to argue that the search of his knapsack was not a search for weapons, but was intended to uncover narcotics. No attempt had been made by the officers to secure the prisoners, who were allowed to retain possession of a hunting knife and camping hatchet during the trek out of the forest; however, the court concluded that substantial evidence existed to justify the "implied finding" of the trial court that the search was motivated by the officers' fear for their safety.[56] This disposition shows the extent to which an appellate court is restricted in "pretext" cases by the findings of fact below; it is also illustrative of judicial reluctance to invoke the "pretext" rule when there is an arguably legitimate motive for search.[57]

The main ruling in *Brisendine* offers a more fruitful means of limiting "pretext" searches. If the police cannot undertake a full search incident to arrests for minor offenses without independent probable cause, their ability to use the commission of such offenses as a justification for a search is correspondingly limited.[58]

Another criterion for choosing between *Brisendine* and *Robinson* stems from the need for clear rules for police to follow. It has been suggested that since few police officers are lawyers, judicial standards for valid searches ought to be as clear as possible.[59] The *Robinson* rule meets this criterion, since it permits a full search in every case of a full arrest. Yet the *Brisendine* rule also reduces uncertainty about the permissible scope of a given search. The three-tiered structure created by *Brisendine* is in accord with the present statutory system for handling traffic arrests[60] and ought not to create too much confusion when applied to non-traffic offenses. The requirement of probable cause to frisk is likewise already familiar to police officers through *Terry v. Ohio*.[61]

A final concern is the extent to which either the *Brisendine* or *Robinson* rule adequately protects the arrested person's privacy interest. The *Robinson* approach seems to undervalue this interest. Probably a

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55. *See, e.g.*, Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968) and Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

56. 13 Cal. 3d at 534-36, 531 P.2d at 1102-03, 119 Cal. Rptr. at 318-19.

57. *See* Note, 61 CALIF. L. REV. 481, 495 (1973) for a discussion of the difficulties inherent in an examination of the officer's motive.

58. *Cf.* LaFave, *supra* note 47, at 156.

59. *See id.* at 141.

60. The California system of handling traffic offenders is briefly outlined in *Brisendine*. 13 Cal. 3d at 536, 531 P.2d at 1103-04, 119 Cal. Rptr. at 319-20.

61. 392 U.S. 1 (1968).

great many persons are guilty at one time or another of a minor offense which may be punished by arrest. It seems extreme to say that every such person must stand by and watch personal effects be rifled or submit to an intimate and intrusive search. Only the most extreme public policy concerns would appear to justify this result.

b. Brisendine *and the Independent State Ground*

In *Brisendine*, the California Supreme Court used a state constitutional provision which is practically identical to the fourth amendment to impose a higher standard for police searches than that articulated by the United States Supreme Court. The California precedents relied upon in *Brisendine* had been based upon U.S. Supreme Court decisions interpreting the fourth amendment; the sudden switch to the California constitution in *Brisendine* seemed motivated by the California court's desire to preserve a rejected interpretation of the fourth amendment.[62]

The California Supreme Court is, of course, the ultimate expositor of the state constitution. Justice Robert Thompson of the California District Court of Appeal has argued, however, that the court ought to accept as authoritative the interpretations by the United States Supreme Court of similar provisions of the Federal Constitution.[63] Justice Thompson pointed principally to (1) the desirability of uniformity in decisions; (2) the danger that, by basing decision solely on the state constitution; the court is inviting reversal of its decisions through initiative constitutional amendment; and (3) the greater expertise of the United States Supreme Court.

None of these arguments is wholly persuasive. First, it is contended that the police will be more effectively deterred by the presence of a nationwide rule. It would seem, however, that the main concern of a California police officer would be understanding the California rule; the presence of a different rule in other states would appear to be of only peripheral importance. As long as the California rule is clear, the deterrence function of search and seizure law would seem to be effectively served.

The desire for uniformity is also based on concerns about judicial prestige. Public esteem of the judiciary may be largely based on the belief that courts apply settled principles in a neutral manner rather than imposing individual judges' notions of proper public policy. A conflict in decisions undercuts this belief. Yet it must be recognized that the

62. *See* 13 Cal. 3d at 548 n.15, 531 P.2d at 1111 n.15, 119 Cal. Rptr. at 327 n.15.

63. *See, e.g.*, People v. Norman, 14 Cal. 3d 929, 940-42, 539 P.2d 237, 245-47, 123 Cal. Rptr. 109, 117-19 (1975) (Clark, J., dissenting), *quoting* the vacated opinion below of Justice Thompson at 112 Cal. Rptr. 43 (2d Dist. 1974).

judicial function involves more than "finding the law;" rather, every court decision necessarily implies views on public policy. Thus, while judges must recognize the seriousness of inconsistency of decision, they cannot be bound by another court's policy perceptions,[64] particularly in as policy-laden an area as search and seizure law. Indeed, there is nothing novel about the imposition of higher constitutional standards by a state than those demanded by the Federal Constitution; many state courts have struck down economic regulatory legislation which would likely have been upheld by the United States Supreme Court.[65]

Concern for judicial prestige is also the basis for the fear that basing decisions on the California constitution alone would invite reversal of decisions by state constitutional amendment. However, the possibility of reversal of judicial decision through the political process is not an evil, but a necessary check on judicial power. Without the possibility of constitutional amendment, courts would in effect be a continuing constitutional convention, functioning almost entirely outside the democratic process. The danger of decisions like *Brisendine* is that the court will be tempted to base decisions whenever possible on both the state constitution and the Federal Constitution to establish a history of use of the state constitution.[66] This dual reliance both precludes Supreme Court review and hampers state constitutional amendment.

Finally, the contention that the United States Supreme Court possesses more expertise than state courts on search and seizure issues seems unconvincing. It is probably true, as Justice Thompson argues, that the quality of briefing and oral argument is better in the Supreme Court. Yet the Supreme Court can hear only a relatively small number of criminal cases; its perception of the criminal process may be somewhat distorted as compared to a state supreme court with a large criminal docket. Indeed, the expertise may be more present at the state than at the federal level. Yet the opposing view to Justice Thompson's—that the California Supreme Court in interpreting the state constitution need give no more weight to United States Supreme Court decisions than to, for instance, decisions of the Nevada Supreme Court[67] —seems likewise unconvincing. Despite the virtues of federalism, there are, as Justice Thompson notes, costs in uniformity and

64. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 640, 493 P.2d 880, 887, 100 Cal. Rptr. 152, 159 (1972).

65. *See generally* Paulsen, *The Persistence of Economic Due Process in the States*, 34 MINN. L. REV. 91 (1950) and Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958).

66. *See* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 757 (1972).

67. *See* Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 283-84 (1973).

prestige in adopting views contrary to the U.S. Supreme Court's. Rather, the California Supreme Court should attempt to formulate the special factors which may serve as a basis for a departure from a federal constitutional rule of decision.[68]

Such special factors existed in *Brisendine*. In a troubled field of law such as search and seizure, states need to be able to experiment with new approaches. If a rule of decision works well at the state level, other courts, including the United States Supreme Court, may be encouraged to adopt it. On the other hand, if experience under the state rule proves unsatisfactory, the damage will be confined to a particular jurisdiction. Moreover, California and federal law have long been divergent in the area of search and seizure; in contrast to the United States Supreme Court, the California Supreme Court has permitted a defendant standing to object to the introduction of evidence obtained in violation of the constitutional rights of a third party.[69] No apparent disruption has resulted from this lack of uniformity.

Additionally, special factors of California law justify the *Brisendine* decision. Unlike many states, California has a clear and detailed statutory structure for dealing with minor offenders. While a U.S. Supreme Court decision must necessarily be oriented towards jurisdictions with the minimum of sophistication in the law, the California court can utilize the existing citation structure for fashioning understandable limitations on search.

It seems unfortunate that the court in *Brisendine* did not mention such special factors. Instead, Justice Mosk's majority opinion suggests that the court will regard itself free to fashion a different rule than that articulated by the United States Supreme Court whenever a majority of California Supreme Court justices disagree with the Supreme Court. As previously noted, such a course could be ultimately dangerous to the court's prestige. It seems likely, however, that the greatest limitation on the use of the independent state ground will arise from the fear of judicial activists that the doctrine could be used by more conservative judges to reach unpalatable results. For instance, conceivably the California constitution could be used as a basis for striking down all state economic regulatory legislation, even if such legislation would be allowable under the Federal Constitution.

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68. For attempts to isolate such criteria, *see* Schaffer, *supra* note 48, and Comment, U.S.F. L. REV. *supra* note 48.

69. *See* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). The court reaffirmed the rule in Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971), despite the United States Supreme Court's decision in Alderman v. United States, 394 U.S. 165, 171-76, that third party exclusion was not required by the fourth amendment.

Conclusion

The California Supreme Court's decision in *Brisendine* is significant both for its impact on the state's search and seizure law and for its reliance on the state constitution rather than the United States Supreme Court's interpretation of the fourth amendment. The decision can be expected to stir greater interest in the use of state constitutional bills of rights to experiment with expanding personal liberties. The subsequent history of the substantive rule enunciated in *Brisendine*, however, will likely depend on the consequences of the decision on police safety and law enforcement.

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B. RIGHTS OF MENTALLY DISORDERED SEX OFFENDERS

People v. Burnick;[1] *People v. Feagley*;[2] *People v. Bonneville*.[3] The *Burnick* court held that the due process clause of the federal constitution requires the state to prove its case beyond a reasonable doubt when it institutes post-conviction commitment proceedings under California's mentally disordered sex offender law. *Feagley* held that the due process and jury trial provisions of the California Constitution and the equal protection clauses of both the state and federal constitutions require a unanimous jury verdict at the commitment trial, and that confinement of a mentally disordered sex offender on the grounds of a state prison without provision of treatment constitutes cruel and unusual punishment as a matter of both state and federal constitutional law. Relying on *Burnick* and *Feagley*, *Bonneville* summarily reversed a commitment order entered after a jury had found the defendant to be a mentally disordered sex offender by a preponderance of the evidence and according to a ten to two vote.

Under California's mentally disordered sex offender law,[4] an individual convicted of any criminal offense may be committed for an

1. 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) (Mosk, J.) (4-3 decision).

2. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975) (Mosk, J.) (4-3 decision).

3. 14 Cal. 3d 384, 535 P.2d 404, 121 Cal. Rptr. 540 (1975) (Mosk, J.) (4-3 decision).

4. CAL. WELF. & INST'NS CODE § 6300 *et seq.* (West 1972). The genesis of the mentally disordered sex offender law was the Sexual Psychopath Act of 1934, ch. 447, § 1, [1939] Cal. Stats. 1783. The term "mentally disordered sex offender" replaced the term "sexual psychopath" in 1963. Ch. 1913, § 3, [1963] Cal. Stats. 3907.

indefinite term to the State Department of Health upon a finding that he is a mentally disordered sex offender. A mentally disordered sex offender is defined by statute as any person who, because of mental illness, has a predisposition to commit sex crimes to a degree that makes him a danger to the health and safety of others.[5] Once adjudged a mentally disordered sex offender, an individual may be confined in a state hospital if he is found to be amenable to hospitalization.[6] If not found to be amenable to hospitalization, the person adjudged a mentally disordered sex offender, before *Feagley*, faced confinement in an "institutional unit."[7] Before *Feagley*, most mentally disordered sex offenders found unamenable to hospitalization were housed in the institutional unit on the grounds of the California Men's Colony in San Luis Obispo County, a medium security state prison.[8] Some were confined at Vacaville or at San Quentin.[9] A brief statement of the facts in *Burnick* and *Feagley* will illustrate the basic procedural mechanism which the challenged statute established for commitment of these two classes of sex offenders.

Burnick[10] was convicted in municipal court of misdemeanor violations of the Penal Code stemming from a series of consensual sexual acts with two boys 13 and 15 years old. Pursuant to section 6302(a) of the

5. CAL. WELF. & INST'NS CODE § 6300 (West 1972).

6. As it applies to mentally disordered sex offenders found amenable to treatment, § 6316 provides:

> If, after examination and hearing, the court finds that the person is a mentally disordered sex offender and that the person could benefit by treatment in a state hospital, the court in its discretion has the alternative to return the person to the criminal court for further disposition or may make an order committing the person to the department [of Health] for placement in a state hospital for an indeterminate period . . . .

CAL. WELF. & INST'NS CODE § 6316 (West Supp. 1975).

7. As it applies to mentally disordered sex offenders found unamenable to hospitalization, § 6316 provides:

> If, after examination and hearing, the court finds that the person is a mentally disordered sex offender but will not benefit by care or treatment in a state hospital the court shall then cause the person to be returned to the court in which the criminal charge was tried . . . . If . . . such court is satisfied that the person is a mentally disordered sex offender but would not benefit by care or treatment in a state hospital it may recertify the person to the superior court of the county. The superior court may make an order committing the person for an indefinite period to the State Department of Health for placement in a state institution or institutional unit for the care and treatment of mentally disordered sex offenders . . . .

Id. Section 6326 instructs the Director of Health to establish one or more institutional units on the grounds of a facility or facilities under the jurisdiction of the Department of Corrections or the Department of Health. *Id.* § 6326.

8. 14 Cal. 3d at 346-47, 535 P.2d at 377-78, 121 Cal. Rptr. at 513-14. *See* Comment, *Toward a Less Benevolent Despotism: The Case for Abolition of California's MDSO Laws*, 13 SANTA CLARA LAW. 579, 602 (1973).

9. 14 Cal. 3d at 346 n.5, 535 P.2d at 378 n.5, 121 Cal. Rptr. at 514 n.5.

10. For the *Burnick* court's dicussion of the facts, see 14 Cal. 3d at 310-13, 535 P.2d at 354-56, 121 Cal. Rptr. at 490-92.

Welfare and Institutions Code,[11] the trial judge adjourned the proceedings and certified Burnick to the superior court to determine whether or not he was a mentally disordered sex offender. After a hearing and examination, the superior court found that Burnick was a mentally disordered sex offender who would benefit by treatment in a state hospital, and committed him to a state hospital for an indeterminate period under section 6316.[12] Burnick demanded review of the commitment order as provided by section 6318[13] and waived a jury trial at the review proceedings. The court determined that a preponderance of the evidence showed Burnick to be a mentally disordered sex offender, and re-committed him to the state hospital under section 6321.[14]

Feagley[15] was charged with Penal Code violations on the basis of an incident during which he caressed the hair of two eight-year-old girls. No force or threat of force was involved. Feagley pleaded guilty to the lesser included offense of simple battery, a misdemeanor punishable by a fine not exceeding $1000 and/or six months imprisonment in the county jail. After an investigation revealed that Feagley had a history of similar compulsive conduct, the criminal proceedings were adjourned as in *Burnick*, and Feagley was certified to the superior court. At the hearing and examination,[16] Feagley was found to be a mentally disordered sex

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11. Section 6302(a) provides:

When a person is convicted of any criminal offense, whether or not a sex offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such a person is a mentally disordered sex offender within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article . . . .

CAL. WELF. & INST'NS CODE § 6302(a) (West 1972).

12. *See* note 6 *supra.*

13. Section 6318 provides:

If a person ordered under Section 6316 to be committed as a mentally disordered sex offender to the department [of Health] for placement in a state hospital for care and treatment, or any friend in his behalf, is dissatisfied with the order of the judge so committing him, he may, within 15 days after the making of such order, demand that the question of his being a mentally disordered sex offender be tried by a judge or by a jury in the superior court of the county in which he was committed . . . .

CAL. WELF. & INST'NS CODE § 6318 (West 1972).

14. Section 6321 provides:

If the judge adjudges or the verdict of the jury is that [the alleged mentally disordered sex offender] is a mentally disordered sex offender the judge shall adjudge that fact and make an order similar to the original order for commitment to the department [of Health] for placement in a state hospital . . . .

Id. § 6321.

15. For the *Feagley* court's discussion of the facts, see 14 Cal. 3d at 342-44, 348-49, 535 P.2d at 375-76, 379-80, 121 Cal. Rptr. at 511-12, 515-16.

16. Prior to his hearing and examination, Feagley was temporarily confined in the state hospital for a period of observation and diagnosis under former § 6316, ch. 1667,

offender who would not benefit by hospitalization, and was committed to the institutional unit on the grounds of the California Men's Colony for an indeterminate period under section 6316.[17] Feagley demanded a review of the commitment order by jury trial pursuant to section 6318.[18] At the trial, the court, relying on section 6321,[19] instructed the jury that it could reach a verdict upon agreement of three-fourths of the panel. Feagley was found to be a mentally disordered sex offender by a vote of nine to three, and was re-committed to the California Men's Colony.

This description of the way the mentally disordered sex offender law operates reveals a peculiar blend of civil proceeding and criminal sanction. More precisely, the sex offender law can be characterized in two different ways—as a mechanism for commitment of the dangerous mentally ill or as a mechanism for incremental punishment of persons convicted in criminal court upon post-conviction findings of mental illness and dangerousness. To resolve the standard of proof issue presented in *Burnick*, the court was not called upon to commit itself to either one of these characterizations as an analytical base. As part I of this Note will demonstrate, the *Burnick* analysis shows that due process demands the reasonable doubt standard whichever characterization is chosen.

In contrast, the cruel and unusual punishment claim in *Feagley* required the court to decide whether and to what extent the sentence imposed upon an adjudicated mentally disordered sex offender could reasonably be characterized as incremental punishment. The court's holding invalidating confinement of mentally disordered sex offenders in institutional units is defensible only to the extent that it is predicated on a reading of the sex offender law as a mechanism for incremental

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§ 37, [1967] Cal. Stats. 4107. 14 Cal. 3d at 344, 349, 535 P.2d at 376, 379, 121 Cal. Rptr. at 512, 515.

17. *See* note 7 *supra.*

18. *See* note 13 *supra.* By its terms, § 6318 applies only to mentally disordered sex offenders originally committed to a state hospital. As the *Feagley* court noted, 14 Cal. 3d at 348, 535 P.2d at 378-79, 121 Cal. Rptr. at 514-15, a mentally disordered sex offender found to be unamenable to treatment and committed to an institutional unit technically has no right to a review by judge or jury of his original commitment order. But, as the *Feagley* court also noted, *id.*, the People have interpreted § 6318 to apply to all mentally disordered sex offenders, including those committed to an institutional unit, in obedience to the mandate of People v. Washington, 269 Cal. App. 2d 246, 251, 74 Cal. Rptr. 823, 826 (4th Dist. 1969). *Washington* held that the sex offender statute denied equal protection of the laws insofar as it granted review of the original commitment order only to those committed to a state hospital. *Id.*

19. Section 6321 provides:

> The trial shall be had as provided by law for the trial of civil causes, and if tried before a jury the person shall be discharged unless a verdict that he is a mentally disordered sex offender is found by at least three-fourths of the jury. . . .

CAL. WELF. & INST'NS CODE § 6321 (West 1972).

punishment in its application to mentally disordered sex offenders found unamenable to hospitalization. Part II of this Note will explore this reasoning.

The *Feagley* court's unanimous jury holding is the subject of part III. That holding was clearly and properly a product of the court's decision to characterize as a commitment statute, rather than as a device for incremental punishment, those portions of the sex offender law which provide for confinement of mentally disordered sex offenders in a state hospital. In reaching its result, the *Feagley* court demonstrated an awareness of the implications of this characterization and proved itself willing to act to bring the sex offender law into closer alignment with California's general commitment procedures.

I. Proof Beyond a Reasonable Doubt

The mentally disordered sex offender law contains a provision requiring that the trial in sexual psychopath proceedings be conducted "as provided by law for the trial of civil causes . . . ."[20] It was this provision which led the *Burnick* trial court to apply a preponderance of the evidence test to the issue of Burnick's status as a mentally disordered sex offender.[21] The supreme court, however, construed Evidence Code section 115 to permit judicial imposition of a heavier or lesser burden of proof in particular civil cases.[22] Noting that the choice of a standard of proof is a matter peculiarly within the competence of the judiciary, the court turned to two United States Supreme Court cases—*Specht v. Patterson*[23] and *In re Winship*[24]—for guidance in making its choice.

Specht was a challenge on due process grounds to Colorado's Sex Offenders Act. The Act provided for incremental punishment of those convicted of specified sex crimes upon a finding that such persons constituted threats of bodily harm to the public, or were habitual offenders and mentally ill.[25] Either finding triggered sentencing for an indeterminate term in lieu of the sentence for the underlying sex crime.[26] Because the Colorado proceeding involved the making of a new charge[27] leading to increased punishment,[28] contingent upon the finding of new facts,[29] the *Specht* court analyzed it as a new and separate

20. *Id.*
21. 14 Cal. 3d at 313-14, 535 P.2d at 356, 121 Cal. Rptr. at 492.
22. *Id.* at 314, 535 P.2d at 357, 121 Cal. Rptr. at 493.
23. 386 U.S. 605 (1967).
24. 397 U.S. 358 (1970).
25. 386 U.S. at 607.
26. *Id.*
27. *Id.* at 610.
28. *Id.* at 609, *quoting* United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966).
29. 386 U.S. at 608.

criminal proceeding. The Court then held that the findings of fact necessary to prove the new charge could be made only after a hearing at which the accused was afforded the "full panoply" of the protections of due process.[30]

When viewed as a scheme providing for harsher[31] dispositions of certain criminal defendants after conviction upon the making of a new charge which necessitates additional findings of fact, California's mentally disordered sex offender law begins to look like the kind of incremental punishment mechanism at issue in *Specht*. The "new charge" under the California scheme is that the defendant is a mentally disordered sex offender; the required findings of fact are that the defendant is mentally ill and that, because of his propensity to commit sex crimes, he is a danger to others.[32] While stressing the "fundamental similarity"[33] between the Colorado statute and California's sex offender law, the

30. *Id.* at 609, *quoting* United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966). In so holding, the Court compared the Sex Offenders Act to recidivist statutes in certain jurisdictions which provide for increased sentences for habitual offenders, 386 U.S. at 610. The Court also noted a series of its earlier cases, such as Oyler v. Boles, 368 U.S. 448, 452 (1962), which teach that, when the state proceeds against a convicted criminal defendant under a recidivist statute, the defendant is entitled to such due process protections as notice of the charge of recidivism and an opportunity to be heard with counsel on the issue of whether he comes within the terms of the statute. The Court, however, did not explore the full implications of its comparison. When the issue at a post-conviction proceeding is not susceptible of proof through production of judicial records, as it is in recidivist proceedings, but rather involves an assessment of an individual's mental health and potential dangerousness, as in *Specht* and cognate statutory schemes, the case for the protections of due process is all the stronger. *See* United States *ex rel.* Gerchman v. Maroney, *supra* at 311.

31. The sentence under the mentally disordered sex offender law is always an indeterminate sentence. CAL. WELF. & INST'NS CODE § 6316 (West Supp. 1975). This means that, except in cases where the conviction triggering the sex offender proceeding carries a possible life sentence and the Adult Authority could constitutionally fix a life term (for the constitutional limits on life sentences, see *In re* Rodriguez, 14 Cal. 3d 639, 653-56, 537 P.2d 384, 394-97, 122 Cal. Rptr. 552, 562-65 (1975)), an adjudication under the sex offender law always *might* entail a period of incarceration in excess of the maximum that could be served upon sentence for the triggering conviction—a period of potential incarceration solely attributable to the adverse determination at the sex offender trial. The sanction provided by the sex offender law can thus be said to be harsher in that, except in a limited class of cases, it always involves potentially longer incarceration. An adverse determination under the Colorado proceeding at issue in *Specht* similarly involved, in all but a limited class of cases, potentially longer incarceration than would have been possible had the defendant been sentenced on his underlying conviction. *Compare* Act of Feb. 11, 1963, ch. 96, § 1, [1963] Colo. Laws 282 (repealed 1968) (conviction for rape may trigger sentencing under the Sex Offenders Act), *with* Act of April 20, 1907, ch. 165, § 4, [1907] Colo. Laws 358 (repealed 1971) (maximum criminal punishment for rape is life imprisonment). The *Specht* Court did not hesitate to classify the Colorado scheme as a mechanism for "magnified" punishment. Specht v. Patterson, 386 U.S. 605, 609 (1967), *quoting* United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966).

32. See text accompanying note 5 *supra*.

33. 14 Cal. 3d at 318, 535 P.2d at 359, 121 Cal. Rptr. at 495.

Burnick court was forced to concede that the reasonable doubt standard was not one of the protections which *Specht* explicitly made applicable to the Colorado proceeding. But the court pointed out that the petitioner in *Specht* had not claimed the right to proof beyond a reasonable doubt and that, at the time *Specht* was decided, the due process clause had not been read to require proof beyond a reasonable doubt in every criminal proceeding.[34] *In re Winship*, a later case, mandated the reasonable doubt standard in criminal prosecutions, and it was to *Winship* that the *Burnick* court turned for the last link in its chain of reasoning.

Winship held that criminal defendants were entitled to proof beyond a reasonable doubt of every fact necessary to prove the crime with which they were charged.[35] The Court justified imposition of this stringent standard by pointing to the "immense importance" to the individual of the interests jeopardized in every criminal prosecution—upon conviction, criminal defendants face loss of liberty through incarceration and are certain to incur social stigma.[36] *Winship* then went on to hold that the reasonable doubt standard is required at that stage of a juvenile proceeding which adjudicates the delinquency of the juvenile.[37] The Court reasoned that, in terms of the individual interests at stake, the juvenile proceeding was "comparable in seriousness" to a felony prosecution.[38] The Court concluded that "civil labels and good intentions"[39] do not insulate a proceeding from the protections of due process if an individual stands to lose his liberty and good name as a result of an adverse determination.[40]

After reviewing *Winship*, the *Burnick* court proceeded to examine the "seriousness" of California's sex offender proceeding in terms of its impact on the individual against whom the state proceeds. The court found that the institutional confinement which mentally disordered sex offenders face is a more severe deprivation of liberty than that faced by juvenile delinquents.[41] The court also found that the stigma associated with commitment as a mentally disordered sex offender is greater than that associated with an adjudication of juvenile delinquency, both because of the prevailing unenlightened social attitudes towards mental illness and sexual deviancy and because the rule of confidentiality in juvenile proceedings does not apply to proceedings intitiated under the

34. *Id.* at 317, 535 P.2d at 359, 121 Cal. Rptr. at 495.
35. *In re* Winship, 397 U.S. 358, 364 (1970).
36. *Id.* at 363.
37. *Id.* at 368.
38. *Id.* at 366, *quoting In re* Gault, 387 U.S. 1, 36 (1967).
39. 397 U.S. at 365-66.
40. *Id.* at 367.
41. 14 Cal. 3d at 319, 535 P.2d at 360, 121 Cal. Rptr. at 496.

sex offender law.[42] In light of this comparative analysis of the seriousness of the two proceedings in terms of the stigmatization and loss of liberty which each might entail, the court concluded that due process required the application of the reasonable doubt standard at the mentally disordered sex offender trial.[43]

Thus, the *Burnick* court relied upon *Winship* to determine when a proceeding which consists of a charge necessitating findings of fact and which involves some form of involuntary loss of rights and privileges upon proof of the charge requires application of the reasonable doubt standard. The court properly concluded that the sex offender proceeding is analytically indistinguishable from a traditional criminal prosecution in terms of what is at stake for the individual.[44]

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42. *Id.* at 321-22, 535 P.2d at 362, 121 Cal. Rptr. at 498.

43. *Id.* at 324-25, 535 P.2d at 364, 121 Cal. Rptr. at 500.

It is the presence of these indicia of seriousness to a compelling degree which distinguishes the sex offender proceeding from prison disciplinary hearings and parole and probation revocation hearings—proceedings which can also be said to involve a new charge, new findings of fact, and a governmental sanction upon proof of the charge. Recent United States Supreme Court cases in these areas have accorded certain due process protections to the individual who is the subject of state action. Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison disciplinary hearings). These protections include the right to written notice of the claimed violations, the opportunity to be heard before a neutral hearing body, and the right to a written statement by the factfinder as to the evidence relied upon. *See also In re* Love, 11 Cal. 3d 179, 520 P.2d 713, 113 Cal. Rptr. 89 (1974) (applying *Morrissey* and *Gagnon* to parole revocation in California).

None of these cases required the reasonable doubt standard at the adjudicatory stage of the challenged proceeding. In the parole and probation revocation context, it is doubtful whether any qualitatively different and meaningfully greater stigma flows from revocation than the parolee or probationer has already incurred as a result of his original criminal conviction. Furthermore, the liberty which the revocation proceeding jeopardizes is not "the absolute liberty to which every citizen is entitled," but rather only the "conditional" liberty which parole or probation entails. (Morrissey v. Brewer, *supra* at 480). In the prison disciplinary context, only the overscrupulous would worry about the added stigmatization which a convicted criminal incurs as a result of an adverse determination at a disciplinary hearing. Moreover, the liberty jeopardized is not the "absolute" liberty of the free citizen or even the "conditional" liberty of the parolee or probationer. Rather, it is only that vastly restricted liberty which prisoners generally have in the absence of added disciplinary sanctions. Segregation from the general prison population or loss of prison privileges are very real deprivations to the prisoner but they qualitatively differ from the deprivation which results from penal confinement in the first instance.

44. Having reached this conclusion, the court turned to confront the state's argument that both the "predictive" purpose of the sex offender proceeding and the nature of the testimony typically offered in support of the state's case necessitated a less stringent standard of proof. Specifically, the state argued for a lesser standard on the grounds that "predictive" judgments of the kind the finder of fact was called upon to make in the sex offender proceeding were less susceptible to error than were judgments adjudicating the occurrence of specific events in the past. 14 Cal. 3d at 325, 535 P.2d at 364-65, 121 Cal. Rptr. at 500-01. The state also argued that it was not reasonable

Significantly for purposes of comparison with the court's holdings in *Feagley*, the result in *Burnick* does not depend on the choice of a given characterization of the sex offender proceeding. Whether the sex offender law is characterized as a mechanism for incremental punishment which comes into play upon post-conviction findings of mental illness and dangerousness or whether, leaving aside its association with the criminal justice system, the law is seen as a device for commitment of the dangerous mentally ill, the sex offender proceeding can be said to entail the making of a charge necessitating findings of fact and to involve the involuntary loss of valued rights and privileges if the charge is proven. Since the sex offender proceeding contains these elements, the analysis in *Winship* was properly invoked.

II. Confinement in an Institutional Unit

In the portion of the *Feagley* court's opinion which invalidates as cruel and unusual punishment confinement of mentally disordered sex offenders in institutional units, there are indications—some quite explicit—that the court's holding is grounded on the proposition that any

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to ask a finder of fact to determine an individual's status beyond a reasonable doubt where evidence of that status came in the form of necessarily tentative psychiatric diagnoses. *Id.* at 330, 535 P.2d at 368, 121 Cal. Rptr. at 504.

The argument that the factfinder's task is easier in a "predictive" proceeding is, as the court recognized, entirely unpersuasive in the light of studies and articles (cited *id.* at 327 n.18, 535 P.2d at 366 n.18, 121 Cal. Rptr. at 502 n.18) demonstrating the inability of the psychiatric profession to reliably predict future dangerousness. The court concluded, rightly, that the predictive nature of the proceedings *strengthens* the need for the reasonable doubt standard. *Id.* at 328, 535 P.2d at 367, 121 Cal. Rptr. at 503. See note 30 *supra*. The argument that the standard of proof should be relaxed when the state's case rests on medical diagnoses persuaded the District Court of Appeal in People v. Valdez, 260 Cal. App. 2d 895, 904, 67 Cal. Rptr. 583, 589 (2d Dist. 1968), a case involving proceedings for involuntary commitment under CAL. WELF. & INST'NS CODE §§ 3000 *et seq.* (West 1972). But the *Burnick* court suggested that, after *In re* Winship, 397 U.S. 358 (1970), the preponderance of the evidence standard mandated by *Valdez* in commitment proceedings for narcotics addiction may well be open to challenge. 14 Cal. 3d at 331 n.21, 535 P.2d at 369 n.21, 121 Cal. Rptr. at 505 n.21. *But see* Lynch v. Baxley, 386 F. Supp. 378, 393 n.12 (M.D. Ala. 1974), agreeing "in principle" with *In re* Winship but rejecting the reasonable doubt standard in civil commitment proceedings because it demanded "a degree of proof virtually unattainable at this stage in the development of psychiatric medicine."

Whatever the merits of these arguments considered apart from the result dictated by *Specht* and *Winship*, the fact that the adjudication made at the sex offender proceeding is in effect a prediction of future dangerousness and that the testimony offered at the trial is in the form of medical diagnoses in no way lessens what is at stake for the individual against whom the state proceeds. As the analysis in *Burnick* indicates, the individual stands to lose his personal liberty and to be stigmatized as a result of an adverse determination. See text accompanying notes 41-43 *supra*. These factors trigger invocation of the reasonable doubt standard, and do not become any less compelling when considered in light of the "predictive" aspect of the proceeding or the necessarily tentative quality of the testimony.

confinement for status violates the eighth amendment unless accompanied by adequate treatment.[45] This proposition is questionable as a matter of constitutional law, and is not compelling support for the *Feagley* result. The court appeared to rely chiefly on *Robinson v. California*,[46] a United States Supreme Court case, and two earlier California decisions, *In re Gary W.*[47] and *In re De La O*,[48] for its assertion that confinement for status is cruel and unusual punishment unless adequate treatment is furnished. These cases cannot be read to support the court's assertion. What they do suggest, however, is that a statutory scheme which confines for status is vulnerable to attack under the eighth amendment if the sanction imposed can be characterized as punitively intended.[49]

Robinson held that imprisonment of a narcotics addict as a criminal solely on the basis of his status as an addict constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[50] The Court indicated in dictum that while a state could not make the fact of mental or physical illness a criminal offense it could provide for programs of compulsory hospitalization of the mentally or physically ill "involving quarantine, confinement, or sequestration."[51] *Robinson* did not hold or imply that the absence of adequate institutional care would expose a program of compulsory hospitalization for status to eighth amendment challenge.[52] As the California Supreme Court

45. In its most explicit statement of this position, the court declares:

> [I]nvoluntary confinement for the "status" of having a mental or physical illness constitutes a violation of the cruel and unusual punishment clause of both the state and federal constitutions . . . unless it is accompanied by adequate treatment.

14 Cal. 3d at 359, 535 P.2d at 386, 121 Cal. Rptr. at 522.

46. 370 U.S. 660 (1962).

47. 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

48. 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963).

49. The court's assertion that any involuntary confinement for status is cruel and unusual punishment unless adequate treatment is provided is inconsistent with the court's lengthy inquiry into the nature of institutional unit confinement. 14 Cal. 3d at 360-75, 535 P.2d at 387-98, 121 Cal. Rptr. at 523-34. Apparently, the lack of adequate treatment is one factor among several leading the court to a finding that the mentally disordered sex offender law is a product of a legislative intent to punish in its application to sex offenders found not amendable to hospitalization. See text accompanying notes 54-55 *infra*. Nevertheless, because it is possible to read the institutional unit holding in *Feagley* as predicated on the court's right-to-treatment language, and because the right-to-treatment rationale may have been at work in moving the court to foreclose the possibility that untreatable sex offenders found to be dangerous to others can constitutionally be confined in non-penal institutions (see text accompanying notes 65-66 *infra*), it seems important to point out the flaws in the court's right-to-treatment approach. This analysis is undertaken not as a theoretical exercise, but rather in order to forestall reliance on the right-to-treatment approach in future cases.

50. 370 U.S. at 667.

51. *Id.* at 666.

52. In their careful and exhaustive study, *Developments in the Law—Civil Com-*

clearly understood in *Gary W.* and *De La O*, when a statutory scheme which confines for status is challenged as cruel and unusual punishment, the issue is whether the statute can be said to imprison an individual as a criminal—in essence, whether it can be said to *punish*—or whether instead it must be considered as a scheme for compulsory hospitalization.[53] If the statute is read as a scheme for hospitalization, absence of treatment alone does not supply the element of punitive intent and eighth amendment analysis is inappropriate. If the statute is the product of a legislative intent to punish, however, it becomes vulnerable under *Robinson* as impermissible punishment for status.

The *Feagley* court may well have been aware that the real issue presented by Feagley's cruel and unusual punishment claim went to the punitive nature of the sex offender law in its application to those found unamenable to hospitalization. The court cites *Gary W.* as "controlling"[54] and the bulk of its analysis seems to be a sustained attempt to determine, guided by the standards in *Gary W.*, whether the confinement of this class of mentally disordered sex offenders in institutional units is punitive in nature.[55] *Gary W.* involved a statutory program which authorized the California Youth Authority to maintain control of a ward committed to its custody beyond the date set for his mandatory release upon a judicial finding that the ward was physically dangerous to others because of mental or physical deficiency, disease, or abnormality. The *Gary W.* court upheld this statutory scheme against a claim that it constituted cruel and unusual punishment for status. The court reached this result on the basis of its finding that confinement under the chal-

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mitment of the Mentally Ill, 87 HARV. L. REV. 1190 (1974), the commentators express serious doubt as to whether the sanction imposed under civil commitment statutes can or should be considered punishment for purposes of the eighth amendment. *Id.* at 1330-33. The commentators find that the due process clause may be read to guarantee a right to treatment for the dangerous mentally ill after civil commitment in cases where treatment is a factor in the commitment decision. *Id.* at 1327-28. Even where treatment is not a factor and the commitment is effected solely on the state's showing of great potential dangerousness, the commentators reason that the least restrictive alternative doctrine may require that available treatment be provided. *Id.* at 1328. The most recent Supreme Court case dealing with these problems is O'Connor v. Donaldson, 95 S. Ct. 2486 (1975). The *O'Connor* Court explicitly declined to decide whether the due process clause, or any other constitutional provision, requires treatment of the dangerous mentally ill after involuntary commitment. *Id.* at 2492.

53. *In re* Gary W., 5 Cal. 3d 296, 301, 486 P.2d 1201, 1205, 96 Cal. Rptr. 1, 5; *In re* De La O, 59 Cal. 2d 128, 136, 378 P.2d 793, 798, 28 Cal. Rptr. 489, 494.

54. 14 Cal. 3d at 360, 535 P.2d at 387, 121 Cal. Rptr. at 523.

55. The analysis in *Feagley* seems similar to that made in *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1264 n.340 (1974), a discussion of commitment "associated with the criminal justice system." The discussion concludes that the nature and indicia of this type of confinement suggest a legislative intent to punish, thus invoking the holding of *Robinson*, which outlawed punishment for status.

lenged statute was manifestly for the purpose of treatment alone,[56] and because there was no evidence that wards committed pursuant to the statute "are incarcerated in penal institutions among the general prison population, or are customarily detained without treatment."[57]

The *Feagley* court in effect consulted *Gary W.* for the standards to be used in determining when a legislative scheme that confines for status can be said to punish or to imprison those individuals subjected to confinement as criminals. The court began its analysis by pointing out that, unlike the juvenile ward statute in *Gary W.*, the sex offender law has not traditionally been seen as intended primarily for the provision of care and treatment.[58] Though, as the court noted, there may be a statutory right to treatment for sex offenders found unamenable to hospitalization embedded in the language of the sex offender law,[59] the *Feagley* court read *Gary W.* to hold that the effect of a statutory declaration of this right could be negated by evidence of either penal incarceration among the general prison population or detention without treatment.[60] The court then turned to the realities of Feagley's confinement at the institutional unit on the grounds of the California Men's Colony. The court found that the entire prison had been classified as an institutional unit, that no effort was made to segregate mentally disordered sex offenders from the general prison population, and that the treatment afforded mentally disordered sex offenders was negligible.[61]

What the *Feagley* court could have derived from this inquiry, and what it may indeed have concluded *sub silentio*, is that confinement in an institutional unit imprisons as criminals those individuals confined and that the sex offender law, insofar as it operates upon sex offenders found unamenable to hospitalization, is not a device for the involuntary hospitalization of the dangerous mentally ill but rather is a mechanism for incremental punishment of convicted criminal defendants upon post-conviction findings of mental illness and dangerousness. So viewed, the conclusion is compelled that the punishment imposed is impermissible punishment for status under *Robinson v. California*.[62] If the *Feagley*

56. 5 Cal. 3d 296, 301, 486 P.2d 1201, 1205, 96 Cal. Rptr. 1, 5.

57. *Id.* at 302, 486 P.2d at 1206, 96 Cal. Rptr. at 6.

58. 14 Cal. 3d at 361, 535 P.2d at 388, 121 Cal. Rptr. at 524.

59. *Id.* at 360, 535 P.2d at 387, 121 Cal. Rptr. at 523.

60. *Id.* at 362, 535 P.2d at 388-89, 121 Cal. Rptr. at 524-25.

61. *Id.* at 363-71, 535 P.2d at 389-95, 121 Cal. Rptr. at 525-31.

62. It has been argued that such confinement becomes punishment for status, and therefore unconstitutional, only at the expiration of the maximum term which could have been imposed if the individual had been sentenced to prison on his underlying criminal conviction. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1264 n.340 (1974). Until the expiration of that period, the argument continues, incarceration can be deemed a valid penal sanction for proven criminal con-

opinion can be read in this way, its holding invalidating confinement of mentally disordered sex offenders in institutional units is soundly based and defensible. To the extent that it rests on the proposition that any involuntary confinement for status is cruel and unusual punishment unless adequate treatment is provided, however, the *Feagley* holding can be seriously questioned.[63]

To remedy the constitutional defect which it perceived, the court in effect struck from the sex offender law those portions of the statute which provided for confinement of sex offenders found to be unamenable to hospitalization. In the future, mentally disordered sex offenders found to be unamenable to hospitalization[64] must be sentenced for the criminal offense that originally triggered the sex offender proceeding.[65] It is questionable that the court needed to go this far. There may be a societal interest in confining mentally ill sex offenders who are dangerous to others even if no known treatment exists or the subject resists the efforts of his doctors. Nothing in *Robinson* or *Gary W.* prohibits confinement of such individuals in institutions other than prisons—perhaps segregated hospital wards—for custodial care.[66] The court's

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duct. *Id.* However, the line between a valid sanction for conduct and an invalid sanction for status is not as easily drawn as this argument suggests. In California, at least, the maximum term that can constitutonally be imposed on a particular offender without running afoul of the constitutional strictures against excessive and disproportionate punishment will not in all cases be as long as the maximum term prescribed by law for a given offense. *See In re* Rodriguez, 14 Cal. 3d 639, 653, 537 P.2d 384, 399, 122 Cal. Rptr. 552, 562 (1975). In view of the impracticability of determining, for each mentally disordered sex offender housed in an institutional unit, when incarceration for conduct ends and incarceration for status begins, the *Feagley* court properly concluded that the incarceration must be deemed from its inception to be incarceration for status.

63. See note 49 *supra.*

64. The *Feagley* court clearly indicated that Feagley was entitled to have the issue of his *unamenability* to hospitalization submitted to the jury and proven by the People beyond a reasonable doubt. 14 Cal. 3d at 347, 349, 535 P.2d at 378, 379-80, 121 Cal. Rptr. at 514, 515-16. The question is, however, whether the opinion can be said to mandate submission of the *amenability* issue to the jury at the commitment trial aud to require the state to prove amenability beyond a reasonable doubt. After *Feagley*, a mentally disordered sex offender found to be unamenable to hospitalization must be returned to the criminal court for sentencing. See text accompanying note 65 *infra.* It is unlikely that the court meant to compel the state to prove a fact which, if proven, would result in the termination of the proceedings. Instead, it is reasonable to suppose that the court meant to require the state to prove beyond a reasonable doubt that each person against whom it proceeds under the sex offender law will be able to benefit by hospitalization if found to be a mentally disordered sex offender. This reading of *Feagley*, however, is not without its problems. As the court noted, 14 Cal. 3d at 349, 535 P.2d at 379-80, 121 Cal. Rptr. at 516-16, there are no standards whatsoever for determining amenability to hospitalization, and the court did not venture to formulate any for the future guidance of trial judges.

65. *Id.* at 376, 535 P.2d at 398, 121 Cal. Rptr. at 534.

66. *Cf. Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1328 & n.48 (1974).

sweeping language unnecessarily foreclosed legislative consideration of this option.

III. Unanimous Jury

The institutional unit holding in *Feagley* invalidated those portions of the sex offender law which provided for confinement of sex offenders in prisons or prison-like institutions. With the indicia of imprisonment absent, the mentally disordered sex offender law begins to look like a device for "civil" commitment of the dangerous mentally ill.[67] In refusing to give effect to the statutory authorization[68] of a three-fourths verdict from the jury at the commitment trial, the *Feagley* court made two independent attacks on the constitutionality of a less than unanimous verdict. One attack was a state due process attack; the other was a state and federal equal protection attack.

a. Due Process

Feagley's state due process argument is another version of the federal due process argument made by the *Burnick* court. The substance of both arguments is that the sex offender proceeding is so much like a criminal trial in terms of the interests jeopardized by an adverse determination that the safeguards of the latter ought to be applied to the former.[69] In *Burnick*, however, as in *Winship*,[70] the source of the protection at issue—the standard of proof beyond a reasonable doubt—was the due process clause of the federal constitution. In *Feagley*, the source of the right to a unanimous jury verdict was the jury trial provision[71] and the due process clause[72] of the state constitution.

What distinguishes the analysis in *Feagley* from the analysis made by the United States Supreme Court in *Winship* is that the *Feagley* court, though willing to give some weight to an inquiry into the comparative consequences of the challenged proceeding and a criminal trial, was at least equally swayed by those "trappings"[73] of the challenged proceeding which made it look like a criminal prosecution in form. Under this "trappings" analysis, the court noted that, at the trial level, the sex offender proceeding was part of the criminal docket and that a judge of the criminal division of the superior court presided over the required hearing. The court further noted, *inter alia*, that the district

67. Statutes in most states authorize and have traditionally sanctioned the commitment of mentally ill individuals who are dangerous to others. *Developments in the Law —Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1203-04, 1223 (1974). Commitment statutes in many states are more inclusive. *Id.* at 1203-04.

68. CAL. WELF. & INST'NS CODE § 6321 (West 1972).

69. See text accompanying notes 41-43 *supra*.

70. *In re* Winship, 397 U.S. 358 (1970).

71. CAL. CONST. art. I, § 16.

72. CAL. CONST. art. I, § 7.

73. 14 Cal. 3d at 350, 535 P.2d at 380, 121 Cal. Rptr. at 516.

attorney presented the state's case at these hearings as he would at a criminal trial, and that, as in criminal prosecutions, Feagley was entitled to be present, to have court-appointed counsel, and to compel the attendance of witnesses. Finally, the court turned to its earlier ruling in *Gross v. Superior Court*,[74] where a statute providing free transcripts "in criminal cases" for defendants who wished to appeal was held to apply to a defendant in a mentally disordered sex offender proceeding who wished to appeal his order of commitment. In making this kind of analysis, the California court announced its willingness to consider formal similarities to criminal prosecutions when determining the applicability to nominally "civil" proceedings of due process protections guaranteed by the state constitution to criminal defendants.

b. Equal Protection

The equal protection attack on the constitutionality of the three-fourths verdict was an independent basis for the court's unanimous jury holding in *Feagley*. It is by far the more important of the two bases in terms of future implications.

The equal protection argument followed from the court's view of the sex offender law as a civil commitment mechanism. Once this characterization was chosen, differences in treatment between persons confined under the sex offender law and persons committed for similar disabilities under California's general civil commitment statute became vulnerable to challenge under the fourteenth amendment's guarantee of equal protection of the laws.

Essential to this argument was a consideration of the terms and provisions of the Lanterman-Petris-Short Act,[75] California's general civil commitment statute, a carefully thought-out legislative scheme. Under the Act, a doctor, police officer, or court may, upon reasonable cause, order involuntary hospitalization of a person believed to be dangerous to others because of mental illness for a period of treatment and evaluation not to exceed 72 hours.[76] At the end of this period, a court may detain the individual for not more than 14 days of "intensive treatment" under conditions that insure the provision of intensive care.[77] When this 14-day period expires, the individual may be confined for a further period of 90 days only upon a showing of a recent threat or attempt to inflict physical harm on another and upon a finding that, as a result of mental disorder, the individual presents an "imminent threat of physical harm to others."[78] This commitment may be renewed for successive 90-day

74. 42 Cal. 2d 816, 270 P.2d 1025 (1954).
75. CAL. WELF. & INST'NS CODE §§ 5000 *et seq.* (West 1972).
76. *Id.* § 5150 (West Supp. 1975), § 5206 (West 1972).
77. *Id.* § 5250 (West 1972).
78. *Id.* § 5300.

terms only upon a similar finding of dangerousness coupled with a showing of a threat or an attempt to inflict physical harm on another during the preceding 90-day commitment period.[79] An individual facing a 90-day commitment is entitled to a trial by jury to determine whether he meets the commitment standards;[80] the decision of the jury in favor of commitment must be unanimous.[81]

After taking note of this unanimous jury provision in the Lanterman-Petris-Short Act, the *Feagley* court consulted three United States Supreme Court cases: *Baxstrom v. Herold*,[82] *Humphrey v. Cady*,[83] and *Jackson v. Indiana*.[84] *Baxstrom* invalidated and *Humphrey* questioned, on equal protection grounds, statutory schemes denying a jury trial in commitment proceedings to a particular class in the face of general commitment procedures that guaranteed jury review for all other classes.[85] *Jackson* held that Indiana law denied equal protection to incompetent criminal defendants in that the standards for pre-trial commitment of such persons were more lax, and the standards of release more stringent, than comparable standards under Indiana's general civil commitment laws.[86] The *Feagley* court invoked the reasoning of these cases and branded as arbitrary and irrational California's discriminatory denial of a unanimous jury requirement for the commitment of mentally disordered sex offenders in the light of the unanimous jury provision of the Lanterman-Petris-Short Act.

In making this equal protection argument, the *Feagley* court laid the analytical base for potentially sweeping judicial reforms of the sex offender law through the importation of other features of the Lanterman-Petris-Short Act into the sex offender statute. Indeed, the court seemed to be aware of the implications of its argument. In a footnote,[87] the court implied that *Jackson v. Indiana* may compel the application to the sex offender law of the Lanterman-Petris-Short commitment standard,[88] as well as its provision for mandatory release after no more than 90 days of hospitalization,[89] at least "to the extent the same persons may be committed under either program."[90]

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79. *Id.* § 5304 (West Supp. 1975).
80. *Id.* § 5303 (West 1972).
81. *Id.*
82. 383 U.S. 107 (1966).
83. 405 U.S. 504 (1972).
84. 406 U.S. 715 (1972).
85. Baxstrom v. Herold, 383 U.S. 107, 110 (1966); Humphrey v. Cady, 405 U.S. 504, 510 (1972).
86. 406 U.S. at 730.
87. 14 Cal. 3d at 358 n.15, 535 P.2d at 386 n.15, 121 Cal. Rptr. at 522 n.15.
88. See text accompanying note 78 *supra*.
89. See text accompanying note 79 *supra*.
90. 14 Cal. 3d at 358 n.15, 535 P.2d at 386 n.15, 121 Cal. Rptr. at 522 n.15.

In fact, *Jackson v. Indiana*, along with *Baxstrom v. Herold* and *Humphrey v. Cady*, seems to compel this result. Both the Lanterman-Petris-Short Act and the sexual psychopath law as interpreted in *Burnick* and *Feagley* are schemes for commitment of those individuals found to be dangerous because of mental illness. The sole distinction in terms of focus is that the sex offender law is designed to operate only on a subclass of the dangerous mentally ill—mentally ill persons who are dangerous because of their propensity to commit *sex* crimes. There can be no valid reason for singling out this subclass for special discriminatory treatment.

The *Feagley* court displayed commendable restraint, however, in staying its hand from further tinkering with the sex offender law in order to redress this discrimination. Interpreting the sex offender law to include whichever of the many features of the Lanterman-Petris-Short Act are deemed appropriate for importation would involve the court in wholesale re-legislation, a task more properly left to the legislature once it has the benefit of judicial guidance as to the equal protection problems presented. By basing its unanimous jury holding on an equal protection analysis and by pointing out where that analysis might take it in the future, the *Feagley* court made a simply formulated, easily implemented, and important reform. At the same time, it indicated to the legislature that further reforms might be imposed judicially in the absence of corrective legislative action.

Conclusion

Burnick and *Feagley* are, or can be read to be, sensible and principled efforts to make coherent changes in the mentally disordered sex offender law. The California Supreme Court purged the law of those portions which imprisoned adjudicated mentally disordered sex offenders as criminals and reformed those portions which operate to hospitalize mentally disordered sex offenders as patients. The court's equal protection analysis suggests the direction that legislative reform should take. The sex offender law should be rewritten to include, at the very least, the standards for commitment and mandatory release of the dangerous mentally ill found in the Lanterman-Petris-Short Act. If these changes are made, the mentally disordered sex offender law will become a mechanism through which, by means of a triggering criminal conviction, the state's attention is directed to a subclass of the dangerous mentally ill, otherwise commitable under the general commitment statute. It is only this limited function which the mentally disordered sex offender law can constitutionally serve.

Fred Friedman

C. PROTECTION OF BANK RECORDS AGAINST UNREASONABLE SEARCH AND SEIZURE

Burrows v. Superior Court.[1] The California Supreme Court addressed the issue whether article 1, section 13 of the California constitution,[2] protecting the individual against unreasonable searches and seizures, is violated when the government obtains bank records of a depositor's transactions through an informal request for production. The court held in the affirmative and directed that the trial court grant a motion to suppress information so obtained.

Burrows, an attorney, had represented a client in an action for child support. The client was ordered by the court to make payments to his former wife and Burrows was suspected of having misappropriated those funds. A search warrant was issued based upon the testimony of a deputy district attorney to the effect that Burrows had requested that the client send the payments to him for transmittal to the court trustee. Although the client had made payments from June through December 1971, neither the court trustee nor the former wife had received any of the payments. The search warrant authorized a search of Burrows' office. His office and car were searched exhaustively and many of his financial records were removed. Within a few days of the search, the removed materials were given to a detective, who contacted three banks by telephone and requested information on Burrows. The detective filed investigative reports indicating that all three of the banks had given him information.[3] Two of the banks denied at the suppression hearing that they had given the detective any information. The third bank verified that copies of Burrows' monthly bank statements had been photocopied and sent to the sheriff's department.[4]

Burrows was ultimately charged with grand theft. He moved to suppress all evidence obtained from his office, his automobile and the bank. The motion was denied by the trial court and Burrows petitioned the California Supreme Court to annul the lower court's order and compel it to grant the motion. The court held that Burrows' motion to suppress the bank records and items found in the search of his home and car should be granted as the documents were obtained in violation of article 1, section 13 of the California constitution. This Note will

1. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974) (Mosk, J.) (unanimous decision), *modified*, 13 Cal. 3d 732a (advance sheets) (1975).

2. The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

3. Brief of Wesley S. Burrows in support of Petition for Hearing at 19-20.

4. *Id.*

focus on what the court considered "the most significant and novel issue in this case: whether the police violated petitioner's right under the California constitution in obtaining, without benefit of legal process, copies of statements from a bank in which he maintained an account."[5]

Under California case law, a violation of the protection against unreasonable searches and seizures depends upon whether

> the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion.[6]

This Note will examine whether a bank depositor has a reasonable expectation of privacy as to bank records and, if so, what governmental behavior unreasonably interferes with that expectation.

I. Reasonable Expectation of Privacy

a. Protection of Information or Protection of Ownership and Possession.

Whether or not the individual's expectation that his bank records will remain confidential is reasonable depends upon the balance between the individual's interest in the confidentiality of his records and the government's interest in access to those records. In *Burrows*, the court perceived that a depositor has a legitimate expectation that his records will remain confidential, for the information included in those records indicates a great deal about the depositor. As the court noted, "the totality of bank records provides a virtual current biography"[7] of the individual. The court also quoted the concurring opinion of Mr. Justice Powell in *California Bankers Association v. Shultz*:

> Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.[8]

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5. 13 Cal. 3d at 242, 529 P.2d at 592-93, 118 Cal. Rptr. at 168-69.

6. People v. Krivada, 5 Cal. 3d 357, 364, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971), *vacated and remanded per curiam*, 409 U.S. 33 (1972), *aff'd on rehearing*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973), *cert. denied*, 412 U.S. 919 (1973). The test was first adopted in People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

7. 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

8. 416 U.S. 21, 78-79 (1974), *quoted in* 13 Cal. 3d at 246, 529 P.2d at 595, 118 Cal. Rptr. at 171. Mr. Justice Douglas, dissenting in *California Bankers Ass'n v. Schultz*, noted:

> In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation . . . *ad infinitum*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

416 U.S. 21, 85 (1974).

Against this interest of the individual is the government's interest in having quick and informal access to bank records. As noted in *Burrows*, use of banks has become almost a necessity of modern life.[9] The records banks possess can reveal a tremendous amount of information about an individual. Easy access to such information would facilitate law enforcement and enable the government to better control anti-social behavior. Formalizing the access would obviously place a cost on the law enforcement mechanism.[10]

The federal decisions have, with few exceptions, resolved the clash of interests in favor of the government and against the customer, holding that a customer does not have a fourth amendment interest in bank records.[11] Typical of the general refusal by the federal courts to protect the records is the case of *Harris v. United States*.[12] In that case, Harris, the depositor, moved to quash a grand jury subpoena directing an official of his bank to produce certain of Harris's records. Harris argued that the bank was his agent in transactions involving the bank and that the records were therefore in his constructive possession rather than in the legal possession of the bank. He argued further that although the bank possessed only microfilm of the documents, and not the originals, his rights should also apply to the microfilm. The court, however, held that as the microfilm was made by the bank for its own convenience and business purposes, the bank owned the microfilmed records and the depositor had no rights in them. Thus, the microfilm could be subpoenaed "over the objection of the depositor, notwithstanding the fact that the records concern the account of the depositor."[13]

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9. 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

10. Law enforcement may not be more inefficient if access is formalized; perhaps requiring law enforcement agents to explain and justify their actions will foster better allocation decisions.

11. *See* United States v. Continental Bank & Trust Co., 503 F.2d 45 (10th Cir. 1974); Fifth Avenue Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973); Harris v. United States, 413 F.2d 316 (9th Cir. 1969); United States v. Bank of Commerce, 405 F.2d 931 (3d Cir. 1969), *cert. denied*, 348 U.S. 838 (1954); Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968); O'Donnell v. Sullivan, 364 F.2d 43 (1st Cir. 1966), *cert. denied*, 385 U.S. 969 (1966); *In re* Cole, 342 F.2d 5 (2nd Cir. 1965), *cert. denied*, 381 U.S. 950 (1965); De Masters v. Arend, 313 F.2d 79 (9th Cir. 1963), *petition for cert. dismissed*, 375 U.S. 936 (1963); United States v. Peoples Deposit Bank & Trust Co., 112 F. Supp. 720 (E.D. Ky. 1953), *aff'd* 212 F.2d 86 (6th Cir. 1954), *cert. denied*, 348 U.S. 838 (1954).

12. 413 F.2d 316 (9th Cir. 1969).

13. *Id.* at 318. *See also* De Masters v. Arend, 313 F.2d 79 (9th Cir.), *petition for cert. dismissed*, 375 U.S. 936 (1963), where an I.R.S. agent examined bank records reflecting deposits without subpoena or other formal process after which a summons was issued directing another branch bank to produce records. The court noted that as to the records,

> the taxpayers had no interest . . . of the kind the Fourth Amendment was intended to protect. Their interest was no different nor greater than that which they would have in denying [the IRS] access to documentary evidence belong-

In other words, *Harris* denied the depositor's claim for fourth amendment protection by holding that possession and ownership of the records is the determinative factor in evaluating fourth amendment rights where bank records are concerned. Since it is the bank, rather than the depositor, who has possession and ownership of the records, the depositor can claim no fourth amendment protection. While not clearly relying on the reasoning of *Harris*, the United States Supreme Court, in dicta, has approved of the holding that the depositor has no fourth amendment interest in the records.[14]

The California Supreme Court, however, has rejected the notion that abandonment of claims of ownership and possession deprives one of protection against unreasonable searches and seizures. In *People v. Krivda*,[15] it held that a search and seizure unreasonably interfered with the defendant's reasonable expectation of privacy where police seized narcotics during a search of defendant's trash immediately after it had been dumped into an empty garbage truck.[16] The court reasoned that the defendant had a reasonable expectation of privacy "*until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere.*"[17] It cited *Katz v. United States*[18] for the doctrine that "what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."[19] Thus, the

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ing to, in the possession of, and to be produced by, any third person, which might contain information damaging to the taxpayers.

313 F.2d at 85 n.11.

14. *See* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974); Donaldson v. United States, 400 U.S. 517 (1971). The issue may be directly considered in United States v. Miller, 500 F.2d 751 (5th Cir. 1974), *petition for hearing and petition for rehearing en banc denied*, 508 F.2d 588, *cert. granted*, 421 U.S. 1010 (1975), where a depositor is seeking to assert his fourth amendment interest against the government's use of an invalidly authorized grand jury subpoena.

15. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded per curiam*, 409 U.S. 33 (1972), *aff'd on rehearing*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973).

16. *Id.* The defendant had placed his trash cans in front of his house. The trash was dumped into an empty garbage truck at which point the police asked the trash collector if they might inspect the trash. The collector consented and the police searched and seized narcotics. The government had contended that once the trash can was placed on the street, anyone could peruse the contents; thus no reasonable expectation of privacy existed as to the contents of the trash.

17. *Id.* at 366, 486 P.2d at 126, 96 Cal. Rptr. at 68, *quoting from* People v. Edwards, 71 Cal. 2d 1096, 1104, 458 P.2d 713, 718, 80 Cal. Rptr. 633, 638 (1969) (italics added by the court in *Krivda*).

18. 389 U.S. 347 (1967).

19. People v. Krivda, 5 Cal. 3d at 365, 486 P.2d at 1267-68, 96 Cal. Rptr. at 67-68, *quoting* Katz v. United States, 389 U.S. 347, 351-52 (1967) (emphasis added by the court in *Krivda*). In *Katz*, the defendant's telephone conversation from a public telephone was monitored by the police who had, without a warrant, attached an electronic amplifying device to the outside of the booth. Much of the argument presented before the Court was directed at identifying whether the telephone booth was a constitutionally

court explicitly recognized that the individual may abandon claims of ownership and possession without rendering unreasonable the expectation that information will remain private.

In *Burrows*, the court extends the logic of *Krivda*. In *Krivda*, information was abandoned for the purpose of its destruction; in *Burrows*, it was "abandoned"—given to the bank—for the maintenance of such records as would assure that the identity of the individual's account remained established. Signature cards, loan guarantees, bank statements, and other records ensure that the business dealings of the parties remain correct. Such information will never lose its identity. Yet, to the extent that *Krivda* emphasizes that the individual's expectation concerning the confidentiality of information should be respected, the bank statement should always be protected. The court in *Burrows* found this interest in protection unaffected by the fact that the bank statement is arguably the property of the bank.[20] The court stated:

> [T]he distinction is not significant with relation to petitioner's expectation of privacy. That the bank alters the form in which it records the information transmitted to it by the depositor . . . does not diminish the depositor's anticipation of privacy in the matters which he confides to the bank.[21]

Thus the court in *Burrows* focused not on ownership or possession of a physical object, but on an expectation that information imparted to a bank would remain confidential as long as it was capable of identifying the depositor.[22]

Having decided that it was information rather than property that should be protected, the court seemed willing to protect all information

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protected area. The Court rejected this formulation, noting that "the Fourth Amendment protects people not places." 389 U.S. at 351. It therefore protects "what [an individual] seeks to preserve as private, even in an area accessible to the public." *Id.* Thus, the government's actions were held to constitute an unreasonable search and seizure.

20. Such an argument was found persuasive in Harris v. United States, 413 F.2d 316 (9th Cir. 1969). *But see* Note, *Government Access to Bank Records*, 83 YALE L.J. 1437, 1450 (1974).

21. 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

22. Although this Note will use the terms depositor and customer to denote those individuals who will receive protection under this decision, the court gives only a general indication of the class of people to be protected. The court noted that a "customer" has a reasonable expectation of privacy as to the records. *Id.*

The California Commercial Code defines "customer" to mean "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." CAL. COMM. CODE § 4104(e) (West 1964). However, the court seems to interpret "customer" more broadly for it would protect loan applications "and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential." 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172. Thus the decision may apply to persons who never had an account with the bank. This rationale should also lead the court to protect the records of individuals who at oue time had an account but do not presently have one.

given to the bank. The court noted that the logic of its decision would extend protection to

> checks, savings, bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential.[23]

Yet the court does not indicate why protection of the depositor's expectations of privacy must necessarily lead to protection of all information about the depositor which the bank may have. The court could have allowed access to some bank records and refused access to others. For example, it could have granted access to bank statements and refused access to checks and deposit slips on the theory that release of the information on bank statements—dates and amounts of deposits and withdrawals—would not substantially infringe upon the depositor's expectation of privacy, while release of the information on the other documents would substantially infringe upon that expectation.[24]

Protection of information on a selective basis would require a balancing test for each requested document or item of information. Suppose, for example, the police ask the bank whether a named individual has an account at the bank. Perhaps this information should not be protected considering that the existence of an account reveals very little about a person, while this basic information is needed for the government to get further information through means of legal process. Particularly in major metropolitan areas, it would be difficult to subpoena every bank in order to learn where a suspect banks. This reasoning might also extend to the account number, address, and signature of the depositor, all of which are on the signature card.[25] The court might also have limited its decision by excluding from protection information the depositor purposefully supplied to the bank, such as loan applications.[26]

Thus, the court's argument that allowing any access to the police must, as a matter of principle, open up all of a bank's records[27] may be overstated. A depositor's expectation of privacy may be reasonable as

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23. 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

24. *Cf.* Kelley v. United States, 503 F.2d 93, 94 (9th Cir. 1974):

> Inclusion of canceled checks of the taxpayer among the documents sought, wonld seem to give standing, at least as to such checks.

25. *See* United States v. Mara, 410 U.S. 19, 21 (1973) (an individual has no expectation of privacy as to his handwriting). *Cf.* Fifth Avenue Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973), where an F.B.I. agent visited a bank and was allowed to inspect the committee's fund account sheet and signature card, and was advised of the account's opening balance. The agent communicated this information to the F.B.I. Though there was no subpoena or other legal process, the court held that the agent's activity "by no means rose to the level of a constitutional invasion of privacy." *Id.* at 332.

26. *See* United States v. Cleveland Trust Co., 474 F.2d 1234 (6th Cir. 1973).

27. 13 Cal. 3d at 244, 529 P.2d at 593, 118 Cal. Rptr. at 169.

to some classes of information he "confides" to the bank, but not as to others. Society may not want to recognize that all information "confided" is subject to protection. It is possible, however, that no workable test can be developed which will distinguish those items held by a bank in which the depositor has a reasonable expectation of privacy and those items in which he does not. If this is the case, the courts will either have to protect all information concerning a depositor held by a bank, or open it all to free government access. If this is the choice, *Burrows* indicates that the court will choose the former and protect all information concerning a depositor held by a bank.

b. *Protection of the Expectation of Confidentiality of the Bank-Customer Relationship*

Burrows strengthens the understanding that the provision against unreasonable searches and seizures protects not only possession or ownership, but an individual's expectations of privacy as to information. Yet the depositor allows the bank access to the records. This complicates the analysis and raises two important issues. The first is whether the bank's access to the information will negate any expectation of privacy as to the records. The second is whether the bank, as a third party in the conflict between the bank depositor and the government, has an independent right to release the information.

The issue of whether the bank can independently consent to a release of the records depends on whether a court will protect the depositor's interest in confidentiality. This contemplates a particularized understanding of the interests of the individual depositor, the bank, and society at large. These interests must be balanced to see whether the expectation of confidentiality is reasonable, or more accurately, whether society is willing to enforce it.

1. The Depositor's Interests. The depositor's expectation of confidentiality is usually related to the depositor's expectation of privacy with regard to certain information. The question becomes one of the conditions under which a third party who has access to the information may validly consent to a search thereof. It could be argued that in cases involving the issue of the validity of a third party consent the defendant still has a reasonable expectation of privacy, but that if the third party's consent is valid there will be no unreasonable governmental interference. Yet the reason there is no governmental interference, according to the usual line of analysis, is that the police are asking a party whose relationship with the defendant is such that, as to that defendant, no expectation of privacy exists.[28] Thus a third party can give the police

28. *See* People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964); People v. Daniels, 16 Cal. App. 3d 36, 93 Cal. Rptr. 628 (4th Dist. 1971). Both cases

permission to search those areas where the third party is not precluded by the defendant's reasonable expectation of privacy; *e.g.*, common living areas.[29] However, the third party cannot consent to a search of those areas where the third party has no right of access due to the defendant's reasonable expectation of privacy; *e.g.*, a closed suitcase owned by the suspect.[30]

According to this line of analysis, because the depositor has granted the bank access to information concerning the depositor, the depositor has no reasonable expectation of privacy vis-à-vis the bank. The individual is aware that the information will be read by many different bank employees. Thus, the depositor may not have shown sufficient interest in protecting the records to justify societal protection. In *Harris v. United States* the court noted:

> Moreover, the client, by writing the check which the attorney will later cash or deposit at the bank, has set the check afloat on a sea of strangers. . . . [T]he attorney knows when cashing or depositing it, that the check will be viewed by various employees at the bank where it is cashed or deposited, at the clearing house through which it must pass, and at his own bank to which it will eventually return.[31]

Thus, it could be argued that the bank, once the depositor "confides" in it by granting access to his records, can independently authorize a search. In other words, because the depositor has no right of privacy against the bank as to the confided records, the bank can consent to a release of that information.

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were cited in *Burrows*. In each case the defendant was living in a home to which other individuals had rights of access and in which the defendant possessed no ownership interest. In *Daniels*, officers asked defendant's mother questions concerning her son's behavior. She discussed her son's behavior and commented that the police were free to search the house including defendant's room. This all occurred while defendant was being held in custody in another room. The court held that the mother was authorized to consent to the search of the premises "including the bedroom in which the son slept, the dresser, dresser drawers and the bed in that bedroom." 16 Cal. App. 3d at 42, 93 Cal. Rptr. at 631. However she did not have authority to consent to a search of a closed suitcase found in defendant's room. In *Cruz*, guests in an apartment gave the police permission to search the premises and the officers opened closed suitcases pursuant to their search. The search of defendant's suitcase could not be sustained on consensual grounds although the search of other areas was permissible. Yet bank records are different than closed suitcases, as the information which is relevant for the police is not hidden from the eyes of the bank. *Cf.* United States v. Guterma, 272 F.2d 344, 346 (2d Cir. 1959). To the extent that *Daniels* and *Cruz* are relevant, it would not be unreasoned to suggest that just as the guests could consent to a search of the areas to which they had access, so could the bank consent to a search of records to which the bank had access.

29. People v. Daniels, 16 Cal. App. 3d 36, 42, 93 Cal. Rptr. 628, 631 (4th Dist. 1971).

30. *Id.*

31. 413 F.2d 316, 319-20 (9th Cir. 1969).

Yet the right of privacy between two parties is only one aspect of the relationship. Although the depositor is aware that numerous bank employees will have occasion to view the records, society may still be willing to deny valid consent in order to protect the relationship. The totality of information which a bank has reveals a total biography of the individual; yet, as the *Burrows* court noted, banking is such a necessity in society that the giving of this information is not completely volitional.[32] Analyzed in another way, the importance of the information is such that people might be unwilling to deal with banks if there were no confidentiality. Thus it may be desirable to protect the depositor from governmental intrusion into this warehouse of information notwithstanding the usual doctrine that giving one's consent to a third person's access to information permits the third person to release that information.[33] To accomplish this policy of protecting particular institutionalized relationships, the legal fiction of limited consent was developed.[34] The depositor is said to have limited his consent to the bank's viewing the documents only for internal purposes. As noted by Justice Marshall:

> The fact that one has disclosed private papers to the bank, for a limited purpose, within the context of a confidential customer-bank relationship, does not mean that one has waived all right to the privacy of the papers.[35]

2. The Bank's Interests. The bank may have rights and needs of its own which may affect the characterization of its relationship with the depositor and the rights arising out of that relationship.[36] The court in *Burrows* characterized the bank as "a neutral entity with no significant

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32. 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

33. People v. Murphy, 8 Cal. 3d 349, 359, 503 P.2d 594, 600-01, 105 Cal. Rptr. 138, 144-45 (1972).

34. *See* Krauss v. Superior Court, 5 Cal. 3d 418, 487 P.2d 1023, 96 Cal. Rptr. 455 (1971); People v. Baker, 12 Cal. App. 3d 826, 90 Cal. Rptr. 508 (1st Dist. 1970).

35. California Bankers Ass'n v. Shultz, 416 U.S. 21, 95-96 (1974) (Marshall, J., dissenting).

36. The bank has an independent interest in the records, and can independently assert that, as to it, the government is engaging in an unreasonable search and seizure. The bank can always refuse to answer an informal police request and demand formal legal process. If a subpoena is issued, the bank could refuse to comply on the grounds that (1) the subpoena is facially defective (*e.g.*, not authorized by statute), *see* United States v. Bremicker, 365 F. Supp. 701, 703 (D. Minn. 1973); (2) the material sought is not relevant to a legitimate investigation, *id.*; or (3) the subpoena is overbroad in the sense that there may be an alternative which would be less costly to the bank. Where the search could be conducted under a less expensive procedure or where the subpoena sought to be enforced is unnecessarily broad, the subpoena may be considered to be unreasonable as to the bank. *See* United States v. Northwest Pennsylvania Bank & Trust Co., 355 F. Supp. 607 (W.D. Pa. 1973); United States v. First Nat'l Bank, 173 F. Supp. 716 (W.D. Ark. 1959). (However, there is a general duty to respond to a subpoena even where there will be some financial burden imposed upon the bank. United States v. Continental Bank & Trust Co., 503 F.2d 45 (10th Cir. 1974); United States v. Bremicker, 365 F. Supp. 701 (D. Minn. 1973).)

interest in the matter,"[37] and as "a detached and disinterested entity."[38] However, the bank may not be neutral with respect to the depositor's transactions. In the context of deciding whether it was reasonable for Congress to compel the bankers to keep records under the Bank Secrecy Act,[39] the United States Supreme Court noted:

> The bank is a party to any negotiable instrument drawn upon it by a depositor, and upon acceptance or payment of an instrument incurs obligations to the payee.
>
> . . . .
>
> Banks are therefore not conscripted neutrals in transactions involving negotiable instruments.[40]

This might argue for an independent right on the part of the bank to disclose information concerning its depositors in order to protect its interest in the integrity of negotiable instruments. Yet, the social considerations leading to a desire to protect the information counterbalance the generalized interest the bank may have in assuring acceptability of negotiable instruments. Not all requests by the government directly involve the integrity of negotiable instruments. To the extent that the interest would allow the bank to consent in all situations where the government asks for information, the bank's interest is no different than any citizen's generalized interest in preventing criminal activity. If the bank could consent simply because it has a generalized interest in preventing crime, the depositor would have very little protection. If the information contained in bank records is being protected because of the totality of the information in the records, then the depositor should be protected from government fishing expeditions. If the records are to be protected at all, the government should not be allowed to determine when the records can be obtained, which it would be able to do if the bank could consent merely because it, like any other citizen, has a generalized interest in preventing criminal activity.

Thus, *Burrows*, in holding that the bank cannot in general validly consent to the production of depositor records, held that in the balance between the customer's interest in confidentiality arising out of the bank-customer relationship and the government's interest in access to information for purposes of law enforcement, the depositor's interest must prevail. Therefore the depositor has a reasonable expectation of privacy in the information and the bank may not consent to the release of information concerning the depositor.

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37. 13 Cal. 3d at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170.

38. *Id.* at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

39. Bank Secrecy Act of 1970, Pub. L. 91-508, 84 Stat. 1114 (codified in sections of 12 U.S.C. and 31 U.S.C.).

40. California Bankers Ass'n v. Shultz, 416 U.S. 21, 48-49 (1974).

The bank, however, has a more particularized independent interest in protecting the integrity of its negotiable instruments. Where the depositor has engaged in an action which would directly affect the bank, the bank's interest in disclosing information in order to protect itself may outweigh the interest of the depositor in confidentiality. *Burrows* recognized that "if the bank is not neutral, as for example where it is itself a victim of the defendant's suspected wrongdoing, the depositor's right of privacy will not prevail."[41] Is such an exception to the usual rule—that the bank may not consent—justified?[42] There is support for it in existing case law. Where a landlord suspects injury to himself, *e.g.*, a possible fire hazard, he may enter the premises of a tenant. He may either request police to witness his entry or, after discovering a hazard, request that the police enter, in which case evidence found in plain view is admissible in any trial of the tenant.[43]

Although there is support for this exception, it must be treated with caution. It is precisely in the case in which the bank believes it is hurt that it will ignore its depositor's rights. Even if the bank suspects injury to itself, it may still be appropriate to prevent the government from using the injury as an excuse to engage in exploratory searches not related to the injury suffered by the bank. The court's exception leaves open the possibility of complete police discretion as to what information qualifies as relevant to the particular inquiry. Thus it is appropriate for the court to demand that requests by police relate only to information relevant to the investigation of an act to which the bank is considered to be non-neutral. When police ask for non-relevant information, the bank is still neutral and the depositor's right of privacy must prevail. Therefore, any non-relevant evidence which is taken by the police is seized in violation of the depositor's rights.[44] As a remedy, the courts

41. 13 Cal. 3d at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170.

42. It is important to recognize what the court is not discussing. If the bank were acting as a truly private citizen any evideuce the police might receive from the bank would not be subject to exclusion as a product of an unreasonable search and seizure. The bank would not be considered as acting in a truly private capacity under any of the following conditions: (1) if the bank were hired and paid by the police; (2) if the bank were to give documents to the government at the express request of the government; (3) if the bank participated in planning and implementing a joint operation with the law enforcement agency; or (4) if the police were to stand by and watch the bank violate the rights of its depositors. Dyas v. Superior Court, 11 Cal. 3d 628, 522 P.2d 674, 114 Cal. Rptr. 114 (1974). However it would not be enough if the police simply told the bank to be on guard against criminal activity. People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

43. People v. Minervini, 20 Cal. App. 3d 832, 98 Cal. Rptr. 107 (2d Dist. 1971); People v. Plane, 274 Cal. App. 2d 1, 78 Cal. Rptr. 528 (1st Dist. 1969); People v. Rightnour, 243 Cal. App. 2d 663, 52 Cal. Rptr. 654 (5th Dist. 1966).

44. It may also be appropriate to prevent the police from alleging au injury to the bank as a reason for gaining access to information concerning the depositor without legal process. An accommodation must be made between the conflicting interests of the

should exclude the non-relevant evidence in any subsequent proceeding. If the government is in doubt as to relevancy, it will have an incentive to obtain formal process. Arguably, the bank should also suffer liability if it hands over non-relevant information to the police, for as to the non-relevant information the bank-customer confidential relationship still exists.[45]

The consent exception in *Burrows* does not seem to be limited to cases involving bank injury. The exception applies when the bank is not neutral; the fact of bank injury is given only as an example.[46] It is difficult to speculate as to the full reach of the exception. Perhaps, the court is willing to allow consent not only in cases in which the bank has already suffered financial injury, but also in situations in which the bank's interest in protecting the integrity of negotiable instruments is directly affected.

One such area is that of worthless document prosecutions and forgery prosecutions. When a bank returns a check marked NSF (not

depositor, bank and law enforcement. Assuming the accommodation permits an exception allowing consent when the bank is injured, a distinction could be drawn between the case in which the bank notified the police of its suspicions, in which case the police may request relevant records without legal process, and the case in which the bank was notified by the police that they thought injury to the bank might be occurring, in which case legal process would be needed. This distinction would be consistent with the landlord entry cases. For example, in People v. Minervini, 20 Cal. App. 3d 832, 98 Cal. Rptr. 107 (2d Dist. 1971), the fact that the manager contacted the police regarding a possible burglary was considered by the court in its determination.

However, the test would create inequitable results in certain cases. Not all crimes against the bank are easily discoverable by the bank. Where the police notified the bank of a suspected injurious act by a specific individual, the bank may investigate and find criminal activity, but it may not give the information to the police unless the police issue formal process. Otherwise the evidence will be excluded. If the bank were to notify the police that there is reason to issue formal process, the bank may be considered as having acted as an agent of the police, *see* note 42 *supra*, and the evidence may still be considered as having been obtained without legal process. The equities between the depositor and the bank do not seem to suggest that the bank should be placed in this untenable position. Despite such difficulties, the test is suggestive of the need for the court to focus on the police behavior, questioning whether the police are evading the holding of *Burrows*, by suggesting injury to the bank.

45. Although the case law is sparse, it is clear that banks have an implied contractual duty not to disclose information concerning their depositors, except where the depositor consents or where disclosure is authorized by law. *See* Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962); Peterson v. Idaho, 83 Idaho 578, 367 P.2d 284 (1961); Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969); *see also* Tournier v. Nat'l Provincial & Union Bank of England, [1924] 1 K.B. 461. The theory is that as to non-relevant information, the bank still has an implied obligation to keep the information confidential. Thus, non-relevant information is protected against informal requests by the police and the bank should be held liable if it consents to an informal search which would violate *Burrows*. *But see* CAL. FINANCIAL CODE § 1917 (West Supp. 1975). If a law enforcement officer issues a crime report for an insufficient funds case, the bank will suffer no liability in giving out the information requested.

46. See text accompanying note 41 *supra*.

sufficient funds) it is questionable whether the bank has suffered an injury. Clearly the bank does not lose any money. Still, under certain conditions, drawing a check without sufficient funds is a violation of the criminal law. Under section 476(a) of the California Penal Code,[47] neither the bank nor the merchant need lose money for a crime to be committed. The crime is completed when the defendant draws a check without sufficient funds with an intent to defraud. The intent to defraud is directed at either the bank or a third party—it does not matter which one suffers the loss.[48] Similarly, where a defendant sought to commit forgery against a bank, the bank need not be injured for a crime to be committed.[49] These then might represent cases in which the bank, though not injured, may not be considered neutral.[50]

Yet the fact that in the end the bank will not be financially injured by an NSF check indicates that the bank is already adequately protected from its depositor's check bouncing activities. Thus, the equities favoring bank consent are not as strong as a case in which the bank has been financially injured. It is critical that the court limit its exception allowing consent to situations in which the bank needs the protection. If the bank, on its own, finds a suspected criminal violation, whether or not it is related to its own interests, it may inform the police without being subject to liability.[51] If the bank's suspicions seem justified, the

47. CAL. PENAL CODE § 476(a) (West 1970).

48. People v. Fisher, 11 Cal. App. 2d 232, 234, 53 P.2d 769, 769 (2d Dist. 1936); *see also* People v. Kitchens, 164 Cal. App. 2d 529, 331 P.2d 127 (1st Dist. 1958).

49. *See* People v. Weitz, 42 Cal. 2d 338, 267 P.2d 295 (1954); CAL. PENAL CODE § 470 (West 1970).

50. Insufficient fund cases are not an insignificant problem. In 1973, the Los Angeles Police Department received 47,157 worthless document reports for a reported loss to merchants in the City of Los Angeles of $6,949,498.00. Brief of Appellate Committee of the California District Attorney's Association in support of Petition for Rehearing, at 9 n.1. During that same period 28,079 crimes designated as insufficient funds violations were reported. *Id.* at 31. In Los Angeles County, 26,655 people were booked for check and forgery offenses in sheriff's fiscal year 1973. *Id.* at 33.

Given the magnitude of the problem, the police department may not be able to handle such offenses if a search warrant is needed to get information from the bank. First, as to Penal Code section 476(a) misdemeanor violations, the police could not get a search warrant. *See* CAL. PENAL CODE § 1524 (West 1970). Second, many of the cases involve less than three checks, which may not be enough to show probable cause that there was an intent to defraud. Finally, the demand for search warrants would overload the police. During an 11 month period in Los Angeles County only 1,078 search warrants were issued, none of which were for worthless document prosecutions. Brief of Appellate Committee of the California District Attorney's Association in Support of Petition for Rehearing, at 11. Thus the police may begin to ignore worthless check prosecutions since the time spent may not justify a prosecution. Of course, the police could always attempt to establish a weak but prima facia case, file an accusatory pleading, and then have subpoenaing powers. *See* CAL. PENAL CODE § 1326 (West 1975). It would be unfortunate if district attorneys were to begin prosecuting people just to establish their subpoenaing powers. Many people later found to be innocent will be subject to unnecessary government interference.

51. See cases cited in note 45 *supra*. If the bank acts as a truly private citizen

government will be able to get legal process to secure the records although the bank will be prevented from handing over the records without legal process. Where the government informs the bank of a suspicion of injury to the bank, the government will of course have to seek legal process in order to get a depositor's records.

Thus, the exception attempts to protect those fact situations in which neither the government nor the bank can articulate sufficiently, to justify the issuance of legal process, the basis for suspicion of criminal activity by the depositor. Viewed in this perspective, it is clear that the court, given its reason for creating the general search and seizure protection for information concerning bank customers, should strictly limit those cases in which the bank can consent, the appropriate test being whether the bank needs the consent exception because it needs added protection from the depositor.

3. Summary. In determining whether a depositor has a reasonable expectation of privacy as to records of his transactions held by the bank, the *Burrows* court examined both the nature of the interest being protected and the nature of their relationship between the bank and the depositor. The court focused on protecting information rather than ownership or possession of the records. Though focusing on protecting information, the court need not have protected any information imparted to the bank, for arguably information might only be protected against government access where access to the information has not been granted to a third party. However, the court correctly reasoned that the confidentiality of the bank-depositor relationship should still be protected because bank use has become a necessity in modern society and the average citizen cannot effectively choose to protect his interest in privacy by not engaging in transactions with banks. Thus the court has recognized a societal interest in protecting the bank-customer relationship due to the necessity of bank use and to the totality of information to which the bank has become a party.

II. Legal Process

Where a reasonable expectation of privacy exists, the government can obtain bank records only through "legal process."[52] The question, then, is what constitutes legal process? Clearly a well drafted search warrant based upon probable cause would be sufficient legal process,[53]

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when giving the information to the police, the evidence will not be excluded. See the discussion at note 42 *supra.*

52. Burrows v. Superior Ct., 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

53. *Id.* at 248-50, 529 P.2d at 596-98, 118 Cal. Rptr. at 172-74.

just as an informal request would not.[54] Yet governmental agencies also have subpoenaing powers and may attempt to subpoena the bank and ask it to produce the information.[55] Subpoena requirements are far less stringent than search warrant requirements.[56] Thus, a subpoena might reach information that a search warrant would not. Because of this, law enforcement agencies, whenever possible, will probably choose a subpoena duces tecum over a search warrant.[57]

When the documents are subpoenaed, the bank can independently demand judicial enforcement of the subpoena.[58] The federal cases

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54. In *Burrows* the court finds an informal request to be an unreasonable governmental interference (*i.e.*, invalid legal process).

55. Burrows could have been investigated by the Committee of State Bar under CAL. BUS. & PROF. CODE §§ 6049, 6050 (West 1974). *See* Johnson v. State Bar of California, 4 Cal. 2d 744, 52 P.2d 928 (1935). In California, an administrative agency may be authorized to investigate matters relevant to its statntory mandate. CAL. GOV'T CODE §§ 1180-81 (West 1966). The district attorneys have subpoenaing powers under CAL. PENAL CODE 1326 (West Supp. 1975), and a grand jury may subpoena a witness pursuant to its investigations. CAL. PENAL CODE § 939.2 (West Supp. 1975).

56. "Insofar as the prohibition against unreasonable searches and seizures can be said to apply at all it requires only that the inquiry be one which the agency demanding production is authorized to make, that the demand be not too indefinite, and that the information sought be reasonably relevant." Brovelli v. Superior Court, 56 Cal. 2d 524, 529, 364 P.2d 462, 465, 15 Cal. Rptr. 630, 633 (1961). *See also* People v. West Coast Shows, Inc., 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290, 297 (1st Dist. 1970). The subpoenaing powers of an administrative agency have been held to be analogous to the power of a grand jury, which does not depend upon a case or controversy, but can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." People v. West Coast Shows, Inc., 10 Cal. App. 3d at 470, 89 Cal. Rptr. at 296, *quoting* United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). For a more recent characterization of the administrative agency powers as not being unlike the grand jury power, *see* United States v. Bisceglia, 420 U.S. 141 (1975).

An administrative subpoena is issued pursuant to the agency's investigatory power. *See generally* CAL. GOV'T CODE §§ 11180-81 (West 1966). The subpoena need not meet the requirements of section 1985 of the California Code of Civil Procedure, which would require the subpoena be accompanied by an affidavit showing good cause for the production of the documents. Fielder v. Berkeley Properties Co., 23 Cal. App. 3d 30, 99 Cal. Rptr. 791 (1st Dist. 1972). The rationale is that the party has the right to contest the subpoena by demanding a court order; thus, the individual is no worse off than when subpoenaed judicially under section 1985.

57. In a criminal investigation, the agency might prefer a search warrant if the information is crucial, as the search warrant is available prior to judicial proceedings. If, however, an administrative agency has the authority to investigate the case, the criminal authorities may defer to the administrative agency which has subpoenaing powers at the investigatory stage.

An agency may also choose a search warrant if the privilege against self-incrimination would protect the information if subpoenaed but not if recovered under a search warrant. *See* United States v. Blank, 459 F.2d 383, 385 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972). *But see* Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). *See also* VonderAHE v. Howland, 508 F.2d 364, 371 (9th Cir. 1974). For a discussion of the applicability of the privilege against self-incrimination to bank records, see text accompanying notes 80-99 *infra*.

58. See note 36 *supra*.

suggest that although the bank may demand judicial enforcement, the depositor's interest in the records is not sufficient to allow him to demand judicial enforcement of the subpoena.[59] This leaves open the issue whether under California law a depositor can independently assert his interest against unreasonable searches and seizures by challenging the sufficiency of a subpoena.

In attempting to distinguish federal cases in which the depositor was not allowed to assert a fourth amendment interest in bank records, the *Burrows* court said:

> [T]he foregoing and other federal cases involved more than an informal request for information; the material was furnished in response to a summons or subpoena issued either by an administrative body in connection with an investigation, which process is enforced by judicial order [citation omitted] or by a court in the context of a criminal proceeding.
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> If the federal cases were to be interpreted more broadly than their facts justify, we would find their rationale unconvincing.[60]

It is possible to read the court's distinguishing of federal cases to be an acceptance of the proposition that only informal requests are not sufficient legal process. If this is so, why does the court cite *United States v. Miller*[61] as being consistent with its rationale? In *Miller*, law enforcement officials subpoenaed bank records with an unauthorized grand jury subpoena. The evidence thus obtained was excluded in *Miller* because the court found that the seizure violated defendant's fourth amendment rights. *Miller* would thus allow the depositor protection against unauthorized subpoenas.

Possibly the court, in light of its approving citation of *Miller*, is suggesting that a facially invalid subpoena[62] as well as an informal request is not legal process. However, an overbroad subpoena (*e.g.*, asking for all records of Burrows' transactions since he was born) still would be legal process within the *Burrows* analysis. This result would create an unprincipled distinction, incompatible with either the federal law which the court is attempting to distinguish[63] or the logic of the constitutional protection against unreasonable searches and seizures. As noted in *People v. Tarantino*:[64]

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59. *See, e.g.*, Garrett v. United States, 511 F.2d 1037, 1039 (9th Cir. 1975).

60. 13 Cal. 3d at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170.

61. United States v. Miller, 500 F.2d 751 (5th Cir. 1974), *petition for rehearing and petition for rehearing en banc denied*, 508 F.2d 588, *cert. granted*, 421 U.S. 1010 (1975).

62. The holding of *Miller*.

63. Federal cases have held that a depositor has no recognized interest in the records, whether the records were informally requested, De Masters v. Arend, 313 F.2d 79 (9th Cir.), *petition for cert. dismissed*, 375 U.S. 936 (1963), or subpoenaed, Harris v. United States, 413 F.2d 316 (9th Cir. 1969). *See generally* cases cited at note 11 *supra*.

64. 45 Cal. 2d 590, 290 P.2d 505 (1955).

> Absent some grave emergency, the Fourth Amendment [and Article 1, section 19] has interposed a magistrate between the citizen and the police. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[65]

Having established a protection against unreasonable searches and seizures in the United States and California Constitutions, an overbroad subpoena will violate that protection. It is up to a neutral magistrate to decide whether the subpoena is overbroad as to the depositor.[66]

The mode of analysis in determining violations of the fourth amendment to the United States Constitution and article 1, section 13 of the California constitution is to determine first whether an individual has a reasonable expectation of privacy and then to determine whether the government has unreasonably interfered with it. Even if an individual has a reasonable expectation of privacy, the government may reasonably interfere with it and there is no constitutional violation if it does so. Thus, a valid subpoena as a reasonable government interference does not unreasonably violate the depositor's expectation of privacy. However an overbroad subpoena or an overbroad search warrant is invalid and an unreasonable governmental interference with the depositor's expectation of privacy. Therefore, legal process must include a valid search warrant and a valid subpoena as to the depositor, but should not include subpoenas or search warrants which are overbroad or suffer from any other defect which would render them invalid.

Another aspect of the legal process problem is the question of when the depositor may challenge the adequacy of the process. If the protection against unreasonable searches and seizures is meant to prevent impermissible searches rather than to exclude evidence impermissibly obtained, the depositor should be allowed to move to quash subpoenas which he considers unreasonable.[67] If the subpoena is valid, the

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65. *Id.* at 594, 290 P.2d at 509, *quoting* McDonald v. United States, 335 U.S. 451, 455 (1948).

66. "Those provisions [California Constitution article 1, section 13, and the fourth amendment to the United States Constitution] protect the people from unreasonable invasions of privacy by the police, and the determination of what is reasonable cannot be left to them." People v. Tarantino, 45 Cal. 2d 590, 594, 290 P.2d 505, 509 (1955).

67. *See* Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir. 1956), *cert. denied*, 352 U.S. 833 (1956). The court stated:

> Such a motion to quash is entitled to be made by the owner of books and papers, in relation to a grand jury investigation of him, as to a subpoena duces tecum issued against a third party, in whose possession the books and papers are, but who is merely a custodian, without personal right in the books and papers as such, and with constructive possession and control of them thus remaining in the owner. The law recognizes no distinction between constructive possession, with control, and physical possession, as a basis for a subpoena to compel production, so that such process directed to and served upon an owner,

government will obtain all that it seeks. However, the right to challenge allows the depositor to assure that the government intrusion is limited.

The capacity to protect one's rights depends upon notice that the government is attempting to subpoena bank records.[68] Thus, it should be recognized that the depositor has a constitutional right to receive notice from the government when it subpoenas his bank records. Without adequate notice, the right to challenge the subpoena would be meaningless.[69] Although the bank could be required to give notice as part of an implied contractual obligation to the depositor,[70] there are many cases in which the bank is unaware of the whereabouts of its depositors. The government usually is aware of the depositor's whereabouts since it is investigating him,[71] and it has greater resources to utilize in finding him.

Once the depositor is given the right to object to the subpoena, this may affect the duties of the bank. First, the bank should suffer liability if it gives out the requested information before the date and time set in the subpoena; otherwise the depositor's ability to challenge the subpoena would be severely undermined.[72] Secondly, if the bank is notified before the time of an administrative hearing that the depositor does not consent to the subpoena, the bank should be able, in good faith, to refuse to comply with the subpoena until ordered to do so by a court.[73]

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who is in constructive possession and control, is as legally capable of commanding the production of his books and papers as is one against a third party, who is in physical possession of them for him. The question of whether to issue a subpoena against the owner or against the third party thus ordinarily is in such a situation merely one of procedural choice and convenieuce. Substantively, each involves, except as to the task of appearing and making delivery, the same aspects of reach, deprivation and seizure-effect against the owner.

68. *In re* Cole, 237 F. Supp. 274, 278 (S.D.N.Y. 1964), *reversed,* 342 F.2d 5 (2nd Cir. 1965), *cert. denied,* 381 U.S. 950 (1965) (no protectable interest).

69. 237 F. Supp. at 278. The federal cases have consistently rejected any notice requirement. However the rejection is based upon the depositor's lack of fourth amendment interest in the records. *See* United States v. Continental Bank & Trust Co., 503 F.2d 45 (10th Cir. 1974).

70. See the discussion at note 45 *supra.*

71. An interesting case in which the bank had greater information than the government is United States v. Bisceglia, 420 U.S. 141 (1975). The I.R.S. issued a "John Doe" summons to the bank calling for the production of deposit slips showing certain deposits. The information the government was requesting was the name of the depositor.

72. A possible bank defense to liability is that the subpoena would have been upheld as valid, and therefore the depositor was not injured. However, the essence of the violation is the bank's release of the information without depositor consent.

73. In the past, when a bank received a summons it had the privilege of deciding whether or not it would respond or await an appropriate court order. Cooley v. Bergin, 27 F.2d 930 (D. Mass. 1928). *See generally* 92 A.L.R.2d 900, 912-13. However, *Cooley,* in refusing to enjoin a bank from complying with a summons, reasoned that the depositor had no fourth amendment interest in the records, that they were the property of the bank, and therefore that the most petitioner could claim would be that the

It would be possible to require the depositor to go to court and get an order enjoining the bank from complying until the subpoena has been judicially enforced. Certainly, the depositor could always choose this route. However, this would force the depositor to go to court twice, first to get the injunction, and then to fight the subpoena; thus other alternatives should be open to the depositor. A simple solution would be to allow the depositor to simply notify the bank that the subpoena should not be complied with until a court order is obtained.[74] Once the bank is notified, it would have a valid excuse for refusing to comply with the subpoena before it is judicially enforced.[75]

Notifying the bank of the depositor's opposition to the subpoena is important, for this will constrain the bank from releasing information concerning the depositor until ordered to do so by the court. However, the depositor may not be fully protected against government seizure of the information until he moves to quash the subpoena issued by the grand jury or district attorney or, in the context of an administrative subpoena, gives notice to the government hearing officer of his refusal to accept the subpoena.[76]

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information they contain should not be disclosed for the deliberate purpose of inflicting substantial injuries upon it.

74. An alternative would be that the bank should suffer liability unless it has the consent of its depositor or the court enforces the subpoena to turn over the records. However, requiring the bank to wait for judicial enforcement where it has not received consent from its depositor would be a very inefficient method of protecting the depositor's interests. In the schema noted in the text, the bank merely brings the documents to the hearing; if the depositor intervenes, then the bank must await judicial approval. If the depositor does not intervene, the bank can hand over the records. In the latter case, the depositor may challenge later use of the records only if he did not receive adequate notice. Even if the bank were to await judicial approval of the subpoena, the depositor would still be able later to argue that his rights had been violated, especially since it is not clear to what extent the bank may challenge the subpoena as being an unreasonable search and seizure as to the depositor.

75. Earlier cases indicated that the bank had an obligation to respond unless a valid legal excuse existed. In United States v. Bremicker, 365 F. Supp. 701 (D. Minn. 1973), the bank had contended that the confidentiality of the bank records could be destroyed only in response to a court order—administrative subpoenas being insufficient. The court held that the bank had an obligation to respond even without court order, unless the bank could allege that the subpoena was invalid. In *Bremicker* the depositor was considered to have no protectable interst. Once the depositor has a protectable interest and the depositor has notified the bank to refuse the subpoena, the bank cannot validly comply with the subpoena. If the depositor notifies the hearing officer, the hearing officer is under an obligation to get the subpoena judicially enforced. Thus a valid legal excuse exists such that the bank can refuse to comply regardless of whether the bank alleges any invalidity of the subpoena.

76. As opposed to grand jury or district attorney subpoenas, the depositor need not move to quash the subpoena; he need only inform the hearing officer that he is refusing to consent to the bank's production of the records. The agency must then petition the court for an order compelling production. CAL. GOV'T CODE § 11187 (West 1966). The court will entertain the motion and the depositor must show cause why he has re-

In the case of a grand jury or district attorney subpoena, government acceptance of the information offered by the bank would be reasonable at the time and place noted on the subpoena if the government had not received notice of the depositor's motion to quash. After receipt of the motion to quash, government acceptance would be unreasonable until the court denies the motion and orders enforcement of the subpoena.[77]

The reasonableness of government behavior is more problematic in the context of administrative subpoenas. Once the depositor has notified the hearing officer of his refusal to accept the subpoena, the government is on notice that the bank does not have the power to comply with the subpoena. Thus, the government has an affirmative duty not to accept the bank records. However, if the hearing officer has not been notified and the bank, although notified by the depositor, wrongfully hands over the documents to the government, the government, in accepting the documents, may not be acting unreasonably. Although the depositor may have an action against the bank, the reasonableness of the government action must depend upon an evaluation of the appropriate conduct for the government in the absence of notification from the depositor that he objects to the subpoena, notwithstanding that the depositor may have given notice to other interested parties.

There are three possible reasons why the hearing officer has not been notified by the depositor: (1) the depositor has not had notice of the subpoena; (2) he had notice of the subpoena and intends not to challenge the subpoena; or (3) he has notified the bank but not the hearing officer. Each of these three possible rationales for the failure of the depositor to notify the hearing officer must be taken into account in developing an appropriate standard for government action where it has received no notification from the bank depositor of his refusal to accept the subpoena.

A possible standard for government behavior where it has not received notification is that it must always get judicial enforcement of the subpoena; *i.e.*, a court order compelling production of the materials named in the subpoena. However, where the depositor has not been given adequate notice of the subpoena, he should be given the opportu-

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fused to comply with the subpoena. *Id.* § 11188. Disregard of the administrative subpoena will not lead to contempt proceedings; however, disregard of the court's order requiring production will subject the party to contempt. *Id.*

77. If the depositor does not have adequate notice of the subpoena he can object to it when an attempt is made to introdnce evidence which was obtained through use of the subpoena. *See, e.g.*, United States v. Miller, 500 F.2d 751 (5th Cir. 1974), *petition for rehearing and petition for rehearing en banc denied*, 508 F.2d 588, *cert. granted*, 421 U.S. 1010 (1975).

nity to challenge the subpoena at a later date after he has received notice. Requiring the government to get judicial enforcement would not conclude the issue since the depositor could later challenge the subpoena. Furthermore, if the depositor has notice of the subpoena, but prefers not to challenge it, then it does not make sense for the government to get judicial enforcement. Thus in these two cases, one could argue that the government should not be required to obtain judicial enforcement of the subpoena.[78]

However, judicial enforcement may still be appropriate because of the possibility that the depositor had adequate notice and notified the bank but not the hearing officer. Yet even here, judicial enforcement may not be necessary. If the government asks the bank whether the depositor has consented to the subpoena and the bank answers in the affirmative, then perhaps the government is acting reasonably if it accepts the subpoenaed documents. Only if the bank independently objects to the subpoena would judicial enforcement be required.

Perhaps then, where the government has not heard from the depositor, it can accept offered documents without judicial enforcement, although judicial enforcement would still be required where the bank independently rejects the subpoena. Where the depositor had not received adequate notice of the subpoena, he would be able to contest the validity of the subpoena at a later time. Where the depositor has received notice of the subpoena he should be treated as if he were subpoenaed. To that extent the bank is acting as his agent, and the depositor should be held to the actions of his agent. Thus, if the bank turns over the subpoenaed materials without judicial enforcement, the depositor, if he had adequate notice of the subpoena and failed to notify the hearing officer of his objections at or before the hearing, should be deemed to have waived his right to challenge the subpoena, even if the bank's delivery of the material violated his express instructions to the bank.

III. Application of the Privilege Against Self-Incrimination to Records Held by the Bank

Although *Burrows* goes a long way toward curbing government access to bank records, the requirements for obtaining a subpoena are

78. A counter argument is that since the government is not required to issue an affidavit accompanying the subpoena which would show why the government was requesting the particular document, see note 56 *supra*, it should be required to get judicial enforcement since it then will be forced to show good cause. Judicial enforcement is especially desirable since in many cases, the investigation may not lead to criminal or civil charges. However, unless the government is met with an adversary in the hearing, the hearing will only prevent the worst abuses, whereas in the majority of cases the subpoenas will probably be rubber-stamped. Considerations of efficiency weigh against forcing the government to get judicial approval.

such that the government's intrusion may still be great.[79] If the records were in the possession of the depositor and the government attempted to subpoena them, the individual could invoke his privilege against self-incrimination,[80] unless the documents were considered to be excepted from the privilege.[81] If the depositor could invoke his privilege against self-incrimination as to information possessed by the bank which if possessed by him would be protected, this could provide an alternative means of protecting information held by a bank. This raises the question whether the court should treat records held by the bank as if they were being held by the depositor.

By implication, the courts have answered this question in the negative. The courts have refused to hold that depositors have a privilege against self-incrimination which would immunize bank records. The United States Supreme Court in *California Bankers Association v. Shultz*[82] indicated in dicta its approval of this position:

> Since a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment right, [citations omitted] the depositor plaintiffs here present no meritorious Fifth Amendment challenge to the recordkeeping requirements.[83]

The position of the courts stems largely from the decision of the United States Supreme Court in *Couch* v. *United States*,[84] in which the taxpayer was denied invocation of her fifth amendment privilege against compulsory self-incrimination for business and tax records in the possession of her accountant.[85]

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79. See the discussion at note 56 *supra.*

80. U.S. CONST. amend. V; CAL. CONST. art. I, § 15 cl. 5.

81. The privilege would not be available if the documents were not considered his personal papers, *see* Bellis v. United States, 417 U.S. 85 (1974), or were subject to a required records exception, *see* Shapiro v. United States, 335 U.S. 1 (1948) (quoted at note 92 *infra*).

82. 416 U.S. 21 (1974).

83. *Id.* at 55.

84. 409 U.S. 322 (1973).

85. In *Couch*, petitioner was the sole proprietress of a restaurant. For the preceding nine years she had given her accountant bank statements, payroll records, and reports of sales and expenditures . . . for the purpose of preparing her income tax returns. The I.R.S. commenced an investigation of petitioner's tax returns and issued a summons directed against the accountant, ordering him to produce the business and tax records of the petitioner in his possession. The Court considered the fifth amendment privilege to be a personal privilege:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. . . . The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege . . . . It is extortion of information from the accused himself that offends our sense of justice.

Id. at 328.

The Court confirmed its belief that ownership of the document was of little help

In a more recent decision, *Bellis v. United States*,[86] the Court held that the privilege against self-incrimination did not justify the refusal by a partner in a small law firm to comply with a subpoena requiring the production of partnership records, although it noted that the privilege did apply to the business records of the sole proprietor. The Court focused on the difference in control and expectation of privacy or confidentiality.[87]

In a number of respects, the bank-depositor relationship is different than the accountant-taxpayer relationship presented in *Couch*.[88] There the Court held that there was little expectation of privacy since income tax returns would be based upon much of the information. Having no expectation that the bank will use the information (assuming there has been no express consent), the depositor has a greater expectation of confidentiality as to the records held by the bank than as to records held by an accountant. The bank-depositor relationship may be an instance in which Mr. Justice Brennan thought the privilege to exist:

> In my view, the privilege is available to one who turns records over to a third person for custodial safekeeping rather than disclosure of the information [citations omitted]; to one who turns records over to a third person at the inducement of the Government [citations omitted]; to one who places records in a safety deposit box or in hiding; and to similar cases where reasonable steps have been taken to safeguard the confidentiality of the contents of the records.[89]

As to information supplied by the customer to a bank for the purpose of securing a commercial loan or for information the customer has allowed the bank to give to other institutions, the taxpayer can be said to have shown less interest in his desire for confidentiality.[90]

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in determining fifth amendment rights: "To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line." *Id.* at 331. Instead, the Court designated actual possession of the documents as a critical variable. *Id.* at 333. However, the Court also noted that there might be situations in which "constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Id.* at 333. For the majority, "the criterion for Fifth Amendment immunity remains not the ownership of property but 'the "physical or moral compulsion" exerted.'" *Id.* at 336, *quoting in part* Perlman v. United States, 247 U.S. 7, 15 (1918).

86. 417 U.S. 85 (1974).

87. *Id.* at 92.

88. Couch v. United States, 409 U.S. 322 (1973).

89. *Id.* at 337. (Brennan, J., concurring).

90. *See* United States v. Cleveland Trust Co., 474 F.2d 1234 (6th Cir. 1973), where an I.R.S. summons was issued to a trust company for financial reports and data on the taxpayer. The court held that by supplying financial reports of the trust company for the purpose of securing a loan, the taxpayer lost his constitutional right to privacy as to information in the report and his privilege against self-incrimination would not immunize the records. The privilege might still immunize the identities of those people with whom depositor had transactions, if such identities would tend to incriminate

Banks, under the Bank Secrecy Act,[91] are required to retain photocopied records of transactions falling under U.S. Treasury Department regulations. An issue arises, then, as to whether such photocopied records should be included in the "required records" exception to the privilege against self-incrimination.[92] Certainly, the records would come within the exception as to the bank. However, our interest is directed at the depositor, thus perhaps the courts should examine the Bank Secrecy Act in relation to the interests of the depositor.[93] In *Grosso v. United States*,[94] the Court stated that in order for the required records exception of *Shapiro* to apply,

> first, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents.[95]

Considered in light of these criteria, bank records might seem to come within the required records exception.[96] However, the government should not be able to legitimate an exception to the privilege against self-incrimination simply by legislating a restriction to the right

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depositor. However, this may fly in the face of the "accountant" decisions in which the courts did not distinguish between records held by the accountant which would have no tax consequences and documents held by the accountant which did have tax consequences—all records were held not to be privileged. The "accountant" decisions could possibly be distinguished as the courts noted that the accountant has the discretion to decide which documents to use. *See, e.g.*, Couch v. United States, 409 U.S. 322 (1973); *In re* Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

91. Bank Secrecy Act of 1970, Pub. L. 91-508, 84 Stat. 1114 (codified in sections of 12 U.S.C. and 31 U.S.C.).

92. The required records exception was formulated by the United State Supreme Court in Shapiro v. United States, 335 U.S. 1 (1948). *Shapiro* states:

> [T]he privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.

Id. at 33, *quoting in part* Davis v. United States, 328 U.S. 582, 589-90 (1946).

93. The government could not defeat the depositor's privilege against self-incrimination by requiring the depositor, himself, to keep the documents. *See* Hill v. Philpott, 445 F.2d 144, 146 n. 2 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Yet, our facts are one step removed from *Philpott*, as the bank is required to keep the records, not the depositor.

94. 390 U.S. 62 (1968). Here, the Court distinguished *Shapiro* and found a deprivation of fifth amendment rights where a gambler was convicted of failure to pay an occupational tax.

95. *Id.* at 67-68.

96. The public aspect of the requirement is not severe. In United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), the court held that closing statements in contingent fee cases were subject to the exception, even though the statement could be divulged only upon written order of the Presiding Judge of the Appellate Division of the New York State Court.

of privacy. Doesn't the government deny the depositor any possibility of claiming his privilege against self-incrimination by requiring the bank to retain the records?[97] Mr. Justice Brennan noted in *Couch*, "If private, testimonial documents held in the owner's possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the Government."[98]

However, in all probability, the California Supreme Court will follow the consensus and hold that the privilege against self-incrimination does not immunize records of depositor transactions held by the bank. The privilege against self-incrimination, being absolute and protecting only incriminating statements, has been viewed by the courts as a peculiar right, a right which the courts have been lax to expand.[99] One looks to the privilege against self-incrimination, only because of the reason that, given the minimal standards that subpoenas must meet, the information is not otherwise well protected. Perhaps it would be better for the courts to re-evaluate the standards which must be met for subpoenaing the information.

Conclusion

In *Burrows* v. *Superior Court*, the California Supreme Court held that the state constitutional protection against unreasonable searches and seizures is generally applicable to bank records. The court balanced the interests of the customer, the bank, and the government and found that only when the bank is not neutral as to the information asked for by the government will the depositor have no expectation of privacy. Thus generally, the government can only get access to the information through either a search warrant or a subpoena.

The *Burrows* holding is limited to a case in which the police informally requested bank records. However, the logic of the decision suggests that where a subpoena is issued to the bank asking it to produce records of a particular customer, the customer should be given notice of the subpoena and an opportunity either to move to quash a judicial subpoena or effectively to refuse to consent to the bank's compliance with an administrative subpoena until it is judicially enforced.

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97. The courts might simply suggest that because prior to the Bank Secrecy Act banks photocopied records and were never legally required to give the photocopied records back to the depositor, the fact that the government now compels the banks to keep the records should be immaterial.

98. Couch v. United States, 409 U.S. 322, 337 (unnumbered footnote).

99. *See, e.g., In re* Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

The issue left unresolved by the court is what standard law enforcement agencies must meet to satisfy the requirement of sufficient legal process when subpoenaing records held by a third party.[100] Unless the court is willing to hold that the privilege against self-incrimination is applicable to records held by a third party, it must either utilize the existing standard for sufficient legal process, which may not adequately protect bank records, or begin to articulate more stringent requirements which the government must meet before a subpoena, directed to a third party possessing information protected against unreasonable searches and seizures, is held to be valid. This last alternative would suggest re-evaluation of the adequacy of the search and seizure protection afforded to the individual, thus avoiding the anomaly of giving greater search and seizure protection to records held by a third party than to records held by the investigated individual.

Lawrence A. Hobel

D. JUDICIAL POWER TO DISMISS CRIMINAL CHARGES

People v. Orin.[1] The California Supreme Court considered the scope of judicial discretion authorized by Penal Code Section 1385. That section permits a judge to dismiss criminal charges whenever such a dismissal will be "in furtherance of justice."[2]

The defendant allegedly broke into an apartment occupied by three persons, attempting to rob all three, and assaulting one. He was charged with attempted robbery, burglary, and assault with a deadly

100. Subsequent to the *Burrows* decision, the district attorney attempted to subpoena, for use at trial, records of Burrow's transactions held by the bank. Affidavit in support of Application for Order In Re Contempt and Application for Stay of Proceedings (filed September 26, 1975). As the records subpoenaed were copies of records illegally seized from Burrow's home, the evidence would most likely be excluded. Wong Sun v. United States, 371 U.S. 471, 484-88 (1963). The more interesting issue is what standard the district attorney must meet in order to issue a valid subpoena directing a bank to produce records of a depositor's transactions in a criminal proceeding.

1. 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975) (Sullivan, J.) (unanimous opinion).

2. Section 1385 provides:

> The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

CAL. PENAL CODE § 1385 (West 1970).

weapon (counts I, II, and III, respectively).[3] At his arraignment, the defendant entered a plea of not guilty to each count.

When the case was called for trial, the district attorney immediately stated that the People wished to proceed to trial on all three counts and that he would refuse to accept any guilty plea to only the third count, assault with a deadly weapon.[4] The defendant, through his counsel, then announced that he was willing to withdraw his previous plea to the third count and enter a plea of guilty.[5] The trial judge stated that the court was:

> willing to accept that plea at this time as to Count III and put the matter of the disposition of the remaining counts over to the time of probation and sentence proceedings. This would be in the nature of a plea bargain in which the People do not wish to enter, as stated by [the prosecutor] and with the further understanding that if the Court feels that it cannot at that time accept it, that the Court would allow you to set the plea aside and go to trial. . . . The Court feels that we can proceed on that basis. The Court, on it's [sic] own motion, will dismiss the remaining counts against you.[6]

After reciting appropriate *Tahl* waivers,[7] the defendant, over the prosecution's objection, entered a plea of guilty to the third count.

At the sentencing hearing, the court denied a prosecution motion to withdraw the guilty plea and allow the People to proceed to trial on all counts. The judge stated:

> Well, the Court, especially after getting the probation report and it seems like there was some psychiatrist report in connection with that, . . . which would indicate there would be probably a serious problem concerning the specific intent required as to the 211 robbery because of the excessive use of alcohol, and the factual situation in connection with it, still feels this would be the proper plea and so finds. . . .[8]

The defendant was sentenced to a term of from six months to life in the state prison.[9] The first two counts were then dismissed in the "interests of justice," pursuant to Penal Code Section 1385.[10]

Upon the People's appeal,[11] the supreme court reversed, holding that the dismisal was an abuse of the trial court's discretion.[12] The

3. 13 Cal. 3d at 940, 533 P.2d at 195, 120 Cal. Rptr. at 67.
4. *Id.*
5. *Id.*
6. *Id.* at 940-41, 533 P.2d at 195, 120 Cal. Rptr. at 67.
7. *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969), *cert denied*, 398 U.S. 911 (1970) (ensuring the voluntariness of a plea of guilty).
8. 13 Cal. 3d at 941, 533 P.2d at 196, 120 Cal. Rptr. at 68.
9. *Id.* at 941, 950, 533 P.2d at 196, 202, 120 Cal. Rptr. at 68, 74.
10. See note 2 *supra.*
11. The People were authorized to appeal by CAL. PENAL CODE § 1238(a)(8) (West 1970).
12. 13 Cal. 3d at 951, 533 P.2d at 203, 120 Cal. Rptr. at 75.

court remanded the case for trial, with directions to grant the defendant leave to withdraw his guilty plea to count III, if he so desired.[13]

The supreme court dealt with two separate questions when it resolved the dispute in *Orin*. First, to what extent should a judge personally participate in the plea negotiation process as it is presently-conducted in California? Second, under what circumstances can a trial court dismiss criminal charges upon its own motion without obtaining the approval of the prosecutor? The California Supreme Court's resolution of these problems can be analyzed by examining the practice of plea bargaining in California and the state's policy of conserving judicial resources in order to promote speedy disposition of criminal cases.

I. Judicial Plea Bargaining

Before discussing the concept of judicial discretion, the *Orin* court paused briefly to consider the subject of judicial participation in plea bargaining.[14] The practice of plea bargaining is considered necessary by most observers if a judicial system which commands only limited resources is to achieve a speedy dispatch of criminal litigation.[15] In general, plea bargaining has also received both legislative and judicial authorization in California. The practice usually begins when the prosecutor and the defendant, through counsel, come to an agreement concerning the offenses to which the defendant will plead guilty, the necessity of a sentence, and the terms of probation. The procedures which are followed subsequent to this agreement are set forth in Penal Code Section 1192.5.[16] That section provides that a defendant may offer a guilty plea to a felony charge and specify the bargained-for punishment "to the same extent as it may . . . be fixed by the court."[17] The guilty plea may also affect other powers available to the court,[18] such as sentencing or discretion to grant probation.

Under section 1192.5, a negotiated plea must be both accepted by the prosecutor and approved by the court before it becomes effective.[19] Before accepting a negotiated plea, the trial court must inquire into the voluntariness and factual basis of the plea, and evaluate the plea's

13. *Id.*

14. *Id.* at 942-43, 533 P.2d at 196-97, 120 Cal. Rptr. at 68-69.

15. *See, e.g.*, People v. West, 3 Cal. 3d 595, 599, 477 P.2d 409, 410, 91 Cal. Rptr. 385, 386 (1970).

16. CAL. PENAL CODE § 1192.5 (West Supp. 1975). Although section 1192.5 applies on its face only to pleas to certain felonies, the California Supreme Court has ruled that the section's procedures provide a guideline to trial courts considering various other bargains involving negotiated pleas. People v. West, 3 Cal. 3d 595, 607-08, 477 P.2d 409, 416-17, 91 Cal. Rptr. 385, 392-93 (1970).

17. CAL. PENAL CODE § 1192.5 (West Supp. 1975).

18. *Id.*

19. *Id.*

general desirability.[20] If these conditions are not met, the guilty plea is deemed withdrawn.[21] The policy behind the use of this system is that society obtains a more efficient and speedy administration of justice without creating coercive pressures which could induce innocent defendants to plead guilty in order to avoid severe punishment.

According to the court in *Orin*, implicit in this process of plea negotiation is a " 'bargaining' between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other . . . ."[22] The court noted, however, that the statutory authority for plea bargaining[23] did not contemplate that a judge might substitute himself as a representative of the People. Thus, the court proclaimed, there was no issue of a plea bargain in *Orin* because the prosecutor was not involved in the negotiations.[24] Nevertheless, despite the fact that no plea bargain had occurred, the court went on to discuss its philosophy regarding judicial participation in actual plea bargains.

Much of what the supreme court said concerning judicial participation in the plea bargaining process can be characterized as dictum.[25] Nevertheless, dicta from the California Supreme Court is fairly persuasive dicta, and thus it is important to analyze the court's reasoning in order to formulate guidelines for future trial court conduct. While a majority of jurisdictions do not allow judicial participation in plea negotiations,[26] judges do play some role in many areas of the country.[27] By examining the reasons advanced by various authorities for either condemning or approving judicial participation in the bargaining process, and by comparing these ideas with the *Orin* court's analysis, one can arrive at some reliable conclusions regarding the status of future judicial involvement with plea bargaining in California.

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20. *Id.*; *In re* Tahl, 1 Cal. 3d 122, 132-33, 460 P.2d 449, 456-57, 81 Cal. Rptr. 577, 584-85 (1969), *cert. denied*, 398 U.S. 911 (1970).

21. CAL. PENAL CODE § 1192.5 (West Supp. 1975).

22. 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69.

23. See text accompanying notes 16-21 *supra.*

24. 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69.

25. Indeed, the court can be criticized for deciding such an important issue without the benefit of adverse argument by the parties. Neither of the parties argued in support of the concept of judicial plea bargaining. *Id.* at 942, 533 P.2d at 196, 120 Cal. Rptr. at 68. Yet the court considered an important issue, despite what even the court recognized are the benefits of adversary argument. *Id.* at 947, 533 P.2d at 200, 120 Cal. Rptr. at 72.

26. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 72 (1968) [hereinafter cited as ABA STANDARDS]; *see, e.g.*, People v. Clark, 515 P.2d 1242 (Colo. 1973); State v. Griffey, 35 Ohio St. 2d 101, 113, 298 N.E.2d 603, 610 (1973).

27. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 905 n.12 (1964). *See also* Barker v. State, 259 So. 2d 200, 204 (Fla. App. 1972).

In general, commentators have noted that several problems can occur whenever a judge participates in the plea negotiation process.[28] Three of these problems are quite serious; the *Orin* court referred to two of them in its opinion.[29]

The first substantial problem is that a judge's participation in the bargaining process may intentionally or unintentionally coerce defendants into entering guilty pleas. In *United States ex rel. Elksnis v. Gilligan*,[30] Judge Weinfeld explained that:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.[31]

Even the innocent defendant might be induced to plead guilty.[32] There is a certain amount of subtle coercion involved in plea bargaining even without judicial involvement: presumably, the defendant is induced to plead guilty by the perceived possibility of a lighter sentence than if he were convicted by trial. Judicial participation converts this possibility into a distinct probability and, consequently, reinforces any underlying coercion already present.[33]

A second disadvantage of direct judicial involvement with plea bargaining is that it "impairs the judge's objectivity in passing upon the voluntariness of the plea when offered."[34] Section 1192.5[35] of the California Penal Code requires the trial court to determine the voluntariness of a negotiated guilty plea before it is accepted. If the judge has had a hand in inducing the defendant to accept a "bargain," it is that

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28. *See generally* ABA STANDARDS, *supra* note 26, at 1-3, 71-74; Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 29 (1974) [hereinafter cited as Gallagher]; Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082 (1967); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964).

29. 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69.

30. 256 F. Supp. 244 (S.D.N.Y. 1966).

31. *Id.* at 254. *See also* Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969).

32. ABA STANDARDS, *supra* note 26, at 73.

33. Gallagher, *supra* note 28, at 36-38.

34. United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 255 (S.D.N.Y. 1966).

35. CAL. PENAL CODE § 1192.5 (West Supp. 1975). *See also* Boykin v. Alabama, 395 U.S. 238 (1969); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

much harder for him to determine that the plea was voluntary.[36] This loss of objectivity also prevents the judge from independently evaluating the desirability of the plea agreement for society and all others concerned[37] as required by section 1192.5.[38]

A final problem with judicial participation in bargaining, and a problem the *Orin* court did not consider, is that the appearance of fairness and judicial impartiality may be compromised, regardless of an individual judge's ability to remain objective. After turning down a proposal tendered by a trial court, a defendant could be excused for believing that the court has prejudged him to be guilty.[39] It may even appear that the judge "begrudges him the exercise of his right to trial."[40] Judicial involvement in the plea negotiations, therefore, may undermine a defendant's belief that he received a fair trial. This is, of course, a serious problem for our judicial system, where often the appearance of justice is as important as its reality.[41]

Balanced against these three disadvantages of a judicial role in plea bargaining are the purported benefits of such participation. The benefit most often identified is that judicial involvement prevents a defendant from "pleading in the dark,"[42] *i.e.*, a judge's direct participation in the negotiations permits the defendant to reduce the risk in his own mind of making a "bad deal." If the judge explains to him how sentencing is likely to be handled if there is no plea, and if he has the explicit promise of a certain disposition from the judge, he is less likely to feel that he is giving up his right to trial for either an unknown or an insignificant reduction in his sentence.[43] This information, which only the judge can fully supply, may increase the defendant's perception of the judicial system's fairness because he will more likely feel that he received the

36. *See* ABA STANDARDS, *supra* note 26, at 73. *See also* Comment, *Judicial Supervision Over California Plea Bargaining: Regulating the Trade*, 59 CALIF. L. REV. 962, 995 (1971).

37. 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69.

38. CAL. PENAL CODE § 1192.5 (West Supp. 1975).

39. Gallagher, *supra* note 28, at 44.

40. Scott v. U.S., 419 F.2d 264, 273 (D.C. Cir. 1969).

41. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 (1951).

42. ABA STANDARDS, *supra* note 26, at 73-74; Gallagher, *supra* note 28, at 33-36; Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 183 (1964).

43. Although the indeterminate sentence for any charged crime can be determined in advance, each judge will have an individual viewpoint about the propriety of suspension of sentence or the terms, if any, of probation when given the specific facts of the defendant's conduct. Thus, in the absence of information concerning the judge's sentencing practices, a defendant may be uncertain as to the actual punishment which he is likely to receive from the court. *See* CAL. PENAL CODE § 1168 (West 1970). This argument is perhaps strongest when the defendant is represented by counsel unfamiliar with the past practices of the particular judge assigned to the case.

best possible disposition of his case under the circumstances. Furthermore, this information will improve defendants' bargaining positions because they will have more accurate information than they would otherwise have had. Finally, this process will increase the frequency of plea agreements, thus helping to reduce court congestion.

A reduction in criminal court congestion is certainly desirable. Although most commentators have concluded that the benefit of reducing the risks of pleading in the dark is not worth the concomitant costs of judicial involvement,[44] the balancing called for here is not so cut and dry. There are certain forms of judicial involvement which, if strictly limited, can reduce the risk of bargaining while still avoiding many of the disadvantages of deeper judicial involvement. Can a trial court engage in such limited action after the *Orin* decision?

In *Orin*, the supreme court faced the problem of a trial judge who became directly involved in plea negotiations with defense counsel, to the exclusion of the prosecutor. The court did not directly consider the situation where the trial judge's participation would be both extensive and supplemental to the efforts of the adverse parties; neither did it deal with a limited participation by the trial court.[45] A full-scale judicial effort in addition to the bargaining between prosecutor and defense attorney is susceptible to the same criticisms levelled against judicial plea bargaining without prosecutorial participation.[46] A more limited judicial role, however, appears to be neither harmful nor prohibited by statute.[47] Thus, if a trial court takes care to limit its actions, it may be able to participate in plea negotiations without violating the principles expressed in the *Orin* decision.

At least one other jurisdiction has developed a rule of limited judicial involvement. In *Commonwealth v. Rothman*,[48] the prosecution and defense had engaged in a series of plea negotiations. An impasse was reached when the prosecution offered a 2½ year minimum sentence and the defense countered with a one year minimum; both sides refused to budge. The trial court judge then intervened, suggesting a compromise of 1½ years. The judge stated that if this compromise was rejected the defendant could demand a trial before another judge.[49] The

44. *See, e.g.*, ABA STANDARDS, *supra* note 26, at 74, and text accompanying notes 30-41 *supra*.

45. The supreme court stated that "the court has no authority to *substitute* itself as the representative of the People in the negotiation process . . . ." 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69 (emphasis added).

46. See text accompanying notes 30-41 *supra*.

47. CAL. PENAL CODE § 1192.5 (West Supp. 1975) does not by its terms prohibit limited judicial involvement.

48. 222 Pa. Super. 385, 294 A.2d 783 (1972) (allocatur refused).

49. *Id.* at 387, 294 A.2d at 784.

compromise was eventually accepted by both sides. Although Pennsylvania had a general rule against judicial participation in plea bargaining,[50] the Superior Court of Pennsylvania held that this limited involvement did not render the subsequent guilty pleas invalid.[51] Most of the "dangers of judicial over-reaching contemplated by the prohibition against participation in plea discussions were not present"[52] in these circumstances. A similar rule should be developed in California. If a situation comparable to that in *Rothman* develops, a court should feel free to suggest a compromise.

Limited involvement could also help solve other problems. For example, a trial court should be capable of communicating its thoughts concerning appropriate punishment for whatever crime is involved if requested to do so by the prosecution or defense. This would help to reduce the risk of pleading in the dark. The court should also make known to the parties that if either party feels that, as a result of the court's limited participation in the plea negotiations, the court has become biased or tainted in some way, the court will transfer the case to a different trial court.[53] The court system would therefore achieve many of the benefits of full-scale judicial involvement in plea bargaining without suffering too much of its costs. The attainment of this goal will not be prevented if the philosophy of *Orin* is extended to cover major judicial participation in addition to both prosecution and defense efforts. However, *Orin* should not be held to apply to the more limited judicial roles discussed above.

II. The Scope of Judicial Discretion to Dismiss an Action

a. Judicial Discretion and Section 1385

The *Orin* court began its analysis of section 1385 by explaining that while a trial court's discretion under that section is broad, it is not absolute. A court's power is limited by the requirement that a dismissal be "in furtherance of justice," a requirement necessitating "consideration both of the constitutional rights of the defendant, and *the interests of society* [as] *represented by the People.*"[54] Society has a legitimate

50. Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969).

51. 222 Pa. Super. at 387, 294 A.2d at 784.

52. *Id.*

53. *See* Commonwealth v. Rothman, 222 Pa. Super. 385, 387, 294 A.2d 783, 784-85 (1972) (Spaulding, J., concurring). The mechanism for such a transfer could be similar to that used for transfering cases when a judge is challenged for prejudice. CAL. CODE CIV. PRO. § 170.6 (West Supp. 1975). This mechanism might also become a means of "judge-shopping," but this risk could be minimized by only allowing such transfers once.

54. 13 Cal. 3d at 945, 533 P.2d at 199, 120 Cal. Rptr. at 71 (emphasis in original).

interest in the prosecution of crimes when there exists "probable cause . . . to believe conviction is warranted."[55] The court assumed that the *only* reason for the trial court's dismissal of the first two charges was because the defendant had entered a plea of guilty to the third count.[56] The court held that the dismissal was not in the interests of justice and, therefore, that it was an abuse of discretion to dismiss charges in this case for this reason alone.[57] The supreme court can be chided for deciding the case without considering some other possible motives of the trial court for the dismissal.[58] As will be seen below, this weakness in the court's opinion prevented what could have been a clearer understanding of the full scope of the decision.

In one sense, it seems unobjectionable to hold that a trial court abuses its discretion if it dismisses an action over the People's objection, without providing any answer to that objection. In another sense, however, one can argue that the court should have remanded the case to the trial court for a further explanation of its reasons.[59] That mode of disposition would have enabled the supreme court both to disapprove of unreasonable dismissals which thwart society's interest in complete prosecutions and at the same time to express clearly its thoughts on those factors which do justify the exercise of such a power.[60] Despite its lack of clarity, however, the *Orin* court did allude to some possible justifications. An evaluation of *Orin* thus turns to the question of what justifi-

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55. *Id.* at 947, 533 P.2d at 200, 120 Cal. Rptr. at 72.

56. According to the court, both parties agreed that this was the reason for the dismissal. *Id.* at 948, 533 P.2d at 201, 120 Cal. Rptr. at 73. Unfortunately, the fact that the parties did so agree may have caused the supreme court to refrain from any further speculation as to the trial court's motivation.

57. *Id.* at 950-51, 533 P.2d at 203, 120 Cal. Rptr. at 75. In reversing the dismissal order of the trial court, the supreme court noted that the trial judge had failed to state in the minute order his reasons for dismissing the charges. This failure was in and of itself justification for reversal. While section 1385 grants the power to dismiss charges to a trial court, the dismissal is effective only if "[t]he reasons for the dismissal [are] set forth in an order entered upon the minutes." CAL. PENAL CODE § 1385 (West 1970). *But cf.* 13 Cal. 3d at 945 n.10, 533 P.2d at 198 n.10, 120 Cal. Rptr. at 70 n.10. Thus the court could have reversed the order independently of any abuse of judicial discretion. *Id.* at 943-45, 951, 533 P.2d at 197-99, 203, 120 Cal. Rptr. at 69-71, 75. Instead, the *Orin* court also considered the trial court's reasons for dismissal, even though it really did not know what those reasons were.

58. But see note 56 *supra.*

59. *Cf.* People v. Borousk, 24 Cal. App. 3d 147, 100 Cal. Rptr. 867 (2d Dist. 1972).

60. There must be some justification which is valid since section 1385 does not condition the exercise of the trial court's power to prior approval by the prosecutor. *See* 13 Cal. 3d at 949, 533 P.2d at 201, 120 Cal. Rptr. at 73. Although the court might justify its disposition in *Orin* on the grounds that valid justifications can be considered in future cases, a remand for redetermination could also have given the trial court in *Orin* an opportunity to explain its action, perhaps fully justified in the light of the circumstances.

cations for the exercise of dismissal power will be acceptable in the future.

Several justifications would seem acceptable. If trial of the defendant on counts I and II after conviction on count III would result in both a waste of court time and harassment of the defendant, the trial court should be justified in dismissing counts I and II.[61] An example of such harassment can be found in *People v. Superior Court (Mowry)*.[62] In that case, the defendant, an habitual forger of checks, was charged with two counts of forgery. He entered a plea of guilty to one charge and the prosecution dismissed the other. Six weeks later, the district attorney brought another charge of forgery. The Second District Court of Appeal affirmed the trial court's dismissal of the charge pursuant to section 1385. The trial court had considered its own sentencing practices, which would have been to impose a concurrent sentence upon the defendant, thus increasing his prison liability by six weeks plus the time of trial.[63] The court of appeals agreed with the lower court that a trial resulting in this slight increase in penalty served no purpose but harassment of the defendant.[64]

Similarly, in *Orin* the trial court may have concluded that, given its own sentencing practices, even if the defendant were also convicted on counts I and II, the probable sentence would not significantly change. The *Orin* court attempted to deal with this possibility by noting that although convictions on both the second and third counts carried the same maximum sentences (life), the minimum sentence for count III (assault with a deadly weapon) was six months while the minimum sentence for count II (burglary, with a "use" allegation[65]) was five years. Consequently, conviction on the dismissed count would have significantly increased the defendant's sentence. This response, however, fails to account for the sentencing judge's power to suspend the

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61. In *People v. Superior Court (Howard)*, the supreme court stated:

> If a trial judge is convinced that the only purpose to be served by a trial or a retrial is harassment of the defendant, he should be permitted to dismiss notwithstanding the fact that there is sufficient evidence of guilt, however weak, to sustain a conviction on appeal.

69 Cal. 2d 491, 504, 446 P.2d 138, 147, 72 Cal. Rptr. 330, 339 (1968).

62. 20 Cal. App. 3d 684, 97 Cal. Rptr. 886 (2d Dist. 1971).

63. *Id.* at 687, 97 Cal. Rptr. at 888.

64. *Id.*

65. CAL. PENAL CODE § 12022.5 provides:

> Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, rape, burglary, or kidnapping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years.

CAL. PENAL CODE § 12022.5 (West 1970). There was no explanation why a use allegation was not made for count III.

imposition of sentence under Penal Code section 1203.1.[66] The trial judge in *Orin* may have had a practice of arranging the sentences of those convicted of multiple-count crimes so that the lowest possible minimum and highest possible maximum sentence would be imposed. Thus, by suspending sentence on count II and imposing a sentence for count III, the court would have effectively sentenced Orin to a term of from six months to life. This would provide the greatest possible amount of discretion to the Department of Corrections, allowing it to release the defendant at the time it judged best, given all the circumstances.[67] The trial judge, therefore, could have legitimately felt that the final result of conviction on all counts would not significantly differ from the results upon conviction on count III alone. He could then have concluded that a trial would only waste limited judicial resources and harass the defendant.[68]

A related issue, which the court did not discuss, centers upon the trial court's evaluation of the difficulty of proving all of the elements of charged crimes. Although the facts are not completely clear in *Orin*, there apparently was a possible defense of diminished capacity due to the excessive use of alcohol.[69] Arguably, a trial court could consider the difficulties and expense inherent in conducting trials that involve these issues. For example, the court might analyze the issues and, in the light of its experience as applied to the facts of the individual case, decide that the problem will be extremely difficult for any jury to resolve in a principled manner after hearing the conflicting views of several psychiatrists. When the defendant pleads guilty to a single count, the court can conserve judicial resources by dismissing the highly technical charges.

It can be argued, however, that such decisions are beyond the trial court's competence to make because they require the court to usurp for itself the traditional fact-finding role of the jury. If the prosecution

66. Surely the court was not suggesting that a judge cannot suspend the sentence on the severest offense following a multi-count conviction. *See* Respondent's Petition for Rehearing in the Supreme Court at 2-3, People v. Orin, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975).

67. The district attorney's office would, of course, be able to communicate its views concerning the defendant's behavior to the Department.

68. Since the *Orin* court quoted *Mowry* without disapproval, 13 Cal. 3d at 950 n.13, 533 P.2d at 202 n.13, 120 Cal. Rptr. at 74 n.13, it might have accepted this argument if it had been made clearly by the defense before the Petition for Rehearing. *Cf.* People v. Borousk, 24 Cal. App. 3d 147, 161-62, 100 Cal. Rptr. 867, 878-79 (2d Dist. 1972).

For certain crimes there are severe collateral consequences of conviction, regardless of the sentence imposed. In these cases, the factor of a small change in ultimate sentence is not determinative. *See, e.g.*, CAL. PENAL CODE § 290 (West Supp. 1975) which requires registration of those convicted of certain sex offenses.

69. See text accompanying note 8 *supra*.

chooses to expend some of its limited resources in an attempt to prove that the defendant did possess the requisite capacity to commit a crime, perhaps that decision should be respected. Furthermore, formulating standards to guide a trial court in deciding when an issue is too tough for a jury would be difficult indeed. Thus, this justification for dismissal over the prosecution's objection should not be relied upon except in conjunction with other justifications.

A final reason for dismissing charges is to counteract the negative influence of a district attorney's office which refuses to engage in plea bargaining. The *Orin* court alluded to a solution for this problem when it stated that "[a] court may alleviate this burden . . . by means of a permissible exercise of judicial sentencing discretion in the appropriate case."[70] The court may have been referring at this point to the trial court's power to suspend sentences on one or more counts after conviction.[71] On the other hand, the court appeared to equate the words "sentencing discretion" with the power to dismiss under section 1385.[72] Thus *Orin* may be read as authorizing section 1385 dismissals when a trial court feels that the prosecutor is being unduly restrictive with regard to plea bargaining. This type of discretion is similar to that involved in judge-suggested compromises, discussed above, and is desirable for the same reasons.[73] The statement that a trial court can exercise the power to dismiss in order to prevent prosecutorial obstructionism is somewhat meaningless, however, without sufficient guidelines to enable the lower courts to make such decisions. Especially considering the *Orin* court's strong dictum against "judicial plea bargaining" and the consequent reticence of the trial courts to become involved in this process in any way, the failure of the court to provide some basic standards is unfortunate.

Furthermore, it was at least arguable that the district attorney's office involved in *Orin* did have an obstructionist policy. Although there was no prosecutorial policy against plea bargaining *per se*,[74] deputy district attorneys were forbidden to engage in "sentence bargaining" with defendants.[75] The justification for this policy was to prevent those committing similar crimes from bargaining for different sen-

70. 13 Cal. 3d at 949, 533 P.2d at 202, 120 Cal. Rptr. at 74.

71. CAL. PENAL CODE § 1203.1 (West 1970). See text accompanying notes 66-67 *supra*.

72. 13 Cal. 3d at 949, 533 P.2d at 201, 120 Cal. Rptr. at 73.

73. See text accompanying notes 48-53 *supra*.

74. Evelle J. Younger, General Directive (Feb. 1, 1966), *as amended* November 20, 1967, at 2-3, *quoted in* Supplemental Submission of the People after Oral Argument, at 2, People v. Orin, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975).

75. Joseph P. Busch, Special Directive (Jan. 11, 1974) at 1, *quoted in* Supplemental Submission of the People after Oral Argument, at 3-4, People v. Orin, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975).

tences.[76] But the distinction between plea bargaining and sentence bargaining may be more illusory than real. As noted above, most defendants are primarily interested in their final punishment, not the technical name of the crime to which they plead guilty.[77] A policy against discussing "sentencing," defined broadly, may in practice be just as obstructionist as a policy of refusing to engage in "plea bargaining." The *Orin* court did not discuss the district attorney's policy. It is thus still possible for the supreme court to accept such an argument in the future. Nevertheless, the fact that the court did not apply this reasoning in *Orin* indicates that the court will probably require a more forceful example of obstructionism before it will allow a trial judge to so justify a dismissal pursuant to section 1385.

Thus the decision in *Orin* can be read as saying a little or a lot about the power to dismiss. Broadly read, it could prevent a trial judge from ever dismissing criminal charges when the prosecution objects. More narrowly construed, however, it merely states that a trial court abuses its discretion if it dismisses without reason. Most likely, the court intended some middle position. Since the *Orin* court did not remand for a determination of the lower court's reasons, it failed to clarify which justifications it would consider valid. However, when a trial court feels that a trial and subsequent conviction will result in little effect on the resultant punishment, the court should be free to conserve judicial time and alleviate criminal court congestion. Similarly, *Orin* should be construed as allowing trial courts to dismiss pursuant to section 1385 whenever they reasonably discern a prosecution policy of obstructing efficient plea bargaining.

b. Section 1385 and the Doctrine of Separation of Powers

The decision in *Orin* also raises a subsidiary issue, an issue which was apparently not considered by the supreme court. The requirement that a court have a strong justification before dismissing a charge over the prosecution's objection may effectively inhibit the trial courts from dismissing without prosecutorial consent.[78] Such a result seemingly contradicts the separation of powers doctrine as expressed in a recent line of cases,[79] and may indicate that the supreme court is somewhat dissatisfied with its own analysis of that doctrine.

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76. *Id.* at 4; People v. Orin, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975). Punishment may vary from judge to judge, however, regardless of the prosecutor's desire for similarity.

77. See note 42 *supra* and accompanying text.

78. Indeed, the fact that the *Orin* court set out no clear justifications for dismissing without prosecutorial approval may inhibit trial judges who are concerned with their reversal record from ever dismissing over the People's objections.

79. See text accompanying notes 86-87 *infra.*

In a series of recent decisions,[80] the California Supreme Court has ruled that the exercise of judicial power cannot be conditioned on executive approval. The case of *People v. Superior Court (On Tai Ho)*[81] addressed a problem somewhat similar to the controversy in *Orin*. In *Ho*, the defendant had been arrested for possession of approximately six ounces of marijuana. He asked that his case be disposed of under an experimental program[82] which would divert his case from the criminal courts and ultimately result in dismissal of the charge.[83] The statute authorizing this disposition required the concurrence of the district attorney before the judge's decision to divert was effective.[84] The prosecutor refused to consent in *Ho* because "the quantity of marijuana seized gave rise to 'some inference' that it may have been held for sale . . . ."[85]

Without discussing the trial court's reasons for ordering the defendant's diversion over the prosecution's objection, the supreme court held that the court's decision to divert could not constitutionally be conditioned on the prosecutor's approval.[86] After "[t]he decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature."[87] Under the constitutional separation of powers doctrine, the judge could not be required to "bargain" with a prosecutor before making the judicial decision to divert the defendant and eventually to dismiss the charge.

Although the line of cases of which *Ho* is a part can be factually distinguished from *Orin*, it may well be that *Orin* subtly undercuts them. In this line of cases, the supreme court did not examine the trial court's reason for refusing to consider the objections of the prosecution. Perhaps it was assumed that the lower court's justification was valid. The supreme court in *Orin* may have been indicating that in the future a lower court should pause and carefully consider the substance of a prosecutor's objection to a judicial decision before it decides that the People's interest is outweighed by other considerations. However, *Orin* must be read as limiting this kind of careful consideration to thoughtful reflection upon the prosecutor's argument and not as advising a total

80. *See, e.g.*, People v. Tenorio, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970); Esteybar v. Municipal Court, 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971); People v. Navarro, 7 Cal. 3d 248, 497 P.2d 481, 102 Cal. Rptr. 137 (1972); People v. Superior Court (On Tai Ho), 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

81. 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

82. CAL. PENAL CODE §§ 1000-1000.4 (West Supp. 1975).

83. *Id.* § 1000.2.

84. *Id.*

85. 11 Cal. 3d at 64 n.5, 520 P.2d at 409 n.5, 113 Cal. Rptr. at 25 n.5.

86. *Id.* at 61, 65, 520 P.2d at 407, 409, 113 Cal. Rptr. at 23, 25.

87. *Id.* at 65, 520 P.2d at 410, 113 Cal. Rptr. at 26, *quoting* People v. Tenorio, 3

deference to the district attorney for fear of reversal for "abuse of discretion." Otherwise, in the area of judicial decisionmaking in general, and section 1385 dismissals in particular, the *Orin* court will have effectively taken away what the state constitution[88] gave to the judiciary through the separation of powers doctrine.

Conclusion

In *People v. Orin*, the California Supreme Court disapproved of the concept of judicial plea bargaining. Although this disapproval is particularly sound when applied to full-scale judicial involvement in plea negotiations, *Orin* should not be construed so as to preclude limited judicial participation in order to facilitate the bargaining process. The supreme court also ruled that a trial court cannot without reason dismiss criminal charges over the objection of the prosecution. The *Orin* court could have disposed of the case via remand, a disposition that would have provided guidelines to the lower courts regarding when a dismissal is reasonable. Nevertheless, the decision in *Orin* can and should be limited to the extent required to allow reasonable justifications for dismissal. In particular, when a lower court feels that the result of a trial will differ insignificantly from the result of a dismissal of charges, or if the district attorney is pursuing a policy regarding plea bargaining that unreasonably impedes the flow of cases through the criminal courts, the trial court should feel justified in dismissing in the interests of justice pursuant to section 1385.

Charles F. Gorder, Jr.

E. NO JUDICIALLY CREATED NOTICE-OF-ALIBI PROCEDURE

Reynolds v. Superior Court.[1] The California Supreme Court refused to validate a judicially created notice-of-alibi procedure, holding that such a procedure should be created by legislative, rather than judicial, action. The court expressly reserved decision on the validity of a notice-of-alibi procedure under the state and federal constitutions.[2]

Cal. 3d at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252 (1970).

88. CAL. CONST. art. III, § 3 (West Supp. 1975).

1. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437, *modified* 13 Cal. 3d 204b (advance sheets) (1974) (Wright, C.J.) (unanimous decision).

2. *Id.* at 837, 528 P.2d at 46, 117 Cal. Rptr. at 438.

I. The Decision

a. Background

Reynolds was charged with kidnap, rape, attempted murder, drugging, and sexual molestation. At the request of the prosecution, the trial court issued a discovery order directing Reynolds to give the prosecutor at least three days notice before calling any alibi witnesses and to disclose the witnesses' names, addresses and telephone numbers. In turn, the prosecutor was ordered to supply Reynolds with any evidence which would impeach Reynold's alibi witnesses. The order provided that the sanction for nondisclosure by either party would be exclusion at trial of the testimony or other evidence offered in violation of its terms.[3]

Prior to trial, Reynolds petitioned the California Supreme Court for a writ of prohibition restraining enforcement of the discovery order. The court granted a hearing, primarily to resolve a conflict in two published district court of appeal decisions.[4] In *People v. Hall*,[5] the Second District Court of Appeal upheld a pretrial discovery order directing the defendant to disclose the identity of alibi witnesses whom he intended to call at trial. The court ruled that the trial judge's exclusion of alibi testimony from witnesses whose identities had not been disclosed was a "particularly appropriate" sanction for violation, and thus did not constitute prejudicial error.[6] Two months later, in *Rodriguez v. Superior Court*,[7] the First District Court of Appeal held that, in the absence of enabling legislation, a trial court was without authority to require disclosure of names of alibi witnesses. The court indicated by way of dictum that the only legally available sanction would be a contempt proceeding against the noncomplying defense attorney.[8]

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3. The order of the superior court judge is set forth at 12 Cal. 3d at 843 n.11, 528 P.2d at 51 n.11, 117 Cal. Rptr. at 443 n.11. As it applied to the prosecution, the order provided:

> [A]ny product of the people, oral or written, of an interview with the defendant's alibi witnesses shall be made available to the defendant within forty-eight hours after being obtained by the prosecution.

The trial judge orally indicated that the "product" which the prosecution was required to disclose included statements of alibi witnesses, "rap sheets," and any other material which the defendant ought to have "as a matter of fundamental fairness." *Id.* at 844 n.12, 528 P.2d at 51 n.12, 117 Cal. Rptr. at 443 n.12.

4. *Id.* at 836-37, 528 P.2d at 46, 117 Cal. Rptr. at 428.

5. 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (2d Dist. 1970).

6. *Id.* at 565-67, 86 Cal. Rptr. at 506-07.

7. 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1st Dist. 1970).

8. *Id.* at 498-9, 88 Cal. Rptr. at 157. The court rested its conclusion on CAL. EVID. CODE § 700, which provides: "Except as otherwise provided by statute, every person is qualified to be a witness and no person is disqualified to testify to any matter." The court reasoned that, since there was no statutory provision for exclusion of alibi

b. The Court's Opinion

In reaching its decision, the supreme court reviewed previous California decisions on prosecutorial discovery, examining particularly its own holdings in *Jones v. Superior Court*[9] and *Prudhomme v. Superior Court.*[10] It also considered two United States Supreme Court decisions dealing with notice of alibi statutes, *Williams v. Florida,*[11] and *Wardius v. Oregon.*[12]

Jones is the earliest California Supreme Court decision permitting criminal discovery for the prosecution.[13] Defendant, charged with rape, was granted a continuance on the day of trial to gather evidence to support a defense of impotence. The district attorney successfully moved for discovery, requesting the names and addresses of physicians who had treated defendant for the injuries which allegedly had caused impotence or who would testify about the injuries. The district attorney also requested all relevant medical reports and X-rays. Defendant sought a writ of prohibition restraining enforcement of the discovery order.

The California Supreme Court upheld the order insofar as it required disclosure of evidence which the defendant intended to introduce to support the impotence defense. The court cited previous cases sanctioning the extension of pretrial discovery rights to defendants in criminal trials. The court read this case law not as a response to constitutional compulsion, but rather as the product of a concern for the orderly ascertainment of the truth.[14] Reasoning that this concern is equally weighty when the prosecution seeks discovery, the court declared that discovery should not be a "one-way street," and announced that discovery of defendants would be permitted to the extent that it did not interfere with the accused's constitutional rights.[15]

The court in *Jones* rejected the argument that the discovery order violated the privilege against self-incrimination. The court, relying on decisions in other states upholding notice-of-alibi procedures,[16] held that

testimony, a trial judge would be powerless to prevent a defendant from calling alibi witnesses whose identities had not been revealed pursuant to a discovery order.

9. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

10. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970); *see also* Bradshaw v. Superior Court, 2 Cal. 3d 332, 466 P.2d 680, 85 Cal. Rptr. 136 (1970) (a companion case to *Prudhomme.*).

11. 399 U.S. 78 (1970).

12. 412 U.S. 470 (1973).

13. Prior to *Jones,* all prosecutorial discovery was pursuant to statute. D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY § 15.01 n.16 (2d ed. 1972) [hereinafter cited as LOUISELL & WALLY].

14. 58 Cal. 2d at 59-60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

15. *Id.* at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

16. *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

an order accelerating the disclosure of evidence that will voluntarily be given at trial to support an affirmative defense does not substantially impair an accused's fifth amendment rights.[17]

Eight years later, the court limited the scope of *Jones* in *Prudhomme v. Superior Court.*[18] In that case, the trial court had ordered defendant's attorney to disclose to the prosecution the names, addresses, and expected testimony of the witnesses to be called by the defense. The California Supreme Court found the order too broad and held that the prosecution may discover evidence only if the requested disclosure clearly cannot possibly tend to incriminate the defendant.[19] The essential factor to be considered, the court held, is whether the disclosure might conceivably lighten the prosecution's burden in proving its case in chief.[20] The decision, while ending the prosecution practice of asking for broad discovery orders,[21] sanctioned reasonable requests for factual information relating to a particular defense.[22]

Three months after *Prudhomme,* the United States Supreme Court, in *Williams v. Florida,*[23] upheld a Florida notice-of-alibi statute against the contention that it violated the accused's privilege against self-incrimination. The court followed the reasoning of *Jones,* holding that the required disclosure does not constitute compulsory incrimination since the requirement merely advances the disclosure of evidence that will voluntarily be introduced at trial.[24] The Court further held that the liberal discovery rights which the Florida statute accorded criminal defendants and the reciprocal duties of disclosure imposed upon the state defeated defendant's arguments that the statutory scheme denied him a fair trial and

17. The court stated that the notice-of-alibi statute " 'set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he would voluntarily and without compulsion give at trial.'" *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882, quoting Dean, *Advance Specification of Defense in Criminal Cases,* 20 A.B.A.J. 435, 440 (1934).

Justice Peters vigorously dissented from the court's opinion. He argued that the defendant's protections against self-incrimination and right to presumption of innocence mandated that discovery in criminal prosecutions be a "one-way street." He also objected to the decision on the basis that such a procedural innovation should come from the legislature, not the courts. *Id.* at 65-68, 372 P.2d at 923-26, 22 Cal. Rptr. at 883-86.

18. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

19. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

20. *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133. The court's concern that prosecutorial orders could violate the defendant's right against self-incrimination may have stemmed in part from the U.S. Supreme Court's emphasis on expansion of the scope of protection under the fifth amendment. *See, e.g.* Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

21. LOUISELL & WALLY, *supra* note 13 at § 15.02.

22. 2 Cal. 3d at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

23. 399 U.S. 78 (1970).

24. *Id.* at 85.

due process of law.[25] The Court appeared particularly swayed by what it perceived as the state's legitimate interest in protecting itself against an easily-fabricated last-minute alibi defense.[26]

In *Wardius v. Oregon*,[27] the Court emphasized that reciprocal discovery rights are essential to the constitutionality of a notice-of-alibi rule. Thus the Court struck down as violative of the fourteenth amendment's due process clause an Oregon statute which, while providing for compulsory disclosure by the defendant, did not on its face mandate disclosure by the state.[28]

After reviewing the conflicts among these decisions, the court in *Reynolds* concluded that a decision on the merits of the discovery order would entail facing the problems presented by notice-of-alibi procedures under the California and federal constitutions.[29] In effect, a decision on the merits would establish, by judicial decision, a complete notice-of-alibi procedure.[30] The court reasoned that, while it was proper for a court to invoke its common law rule-making powers to implement protections guaranteed by the state and federal constitutions, it was undesirable to use these powers to design a procedure not required by law and to chart the permissible limits of prosecutorial discovery.[31] The court concluded that creation of a comprehensive notice-of-alibi rule was best left to the legislature, whose product could then be judged by constitutional standards.

II. Advantages of a Legislative Solution

Although the court in *Jones* may have anticipated legislative development of a notice-of-alibi procedure, no such development took place. The rule set forth in *Jones*—that evidence was discoverable if the defendant intended to offer it at trial to support an affirmative defense—proved difficult to apply because of the difficulty of determining what constituted an "affirmative defense."[32] In addition, the *Jones* opinion did not indicate the appropriate sanctions for enforcement of a discovery order. The consequences of these inadequacies were inconsistency of application and an expansion of prosecutorial discovery at the expense of the defendant's interests.[33]

25. *Id.* at 81-82.
26. *Id.*
27. 412 U.S. 470 (1973).
28. *Id.* at 475-76.
29. 12 Cal. 3d at 842-43, 528 P.2d at 49-50, 117 Cal. Rptr. at 441-42.
30. *Id.* at 845 n.16, 528 P.2d at 52 n.16, 117 Cal. Rptr. at 444 n.16.
31. *Id.* at 845-46, 528 P.2d at 52-53, 117 Cal. Rptr. at 444-45.
32. Comment, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135, 141 (1963); Wilder, *Prosecution Discovery and the Privilege Against Self-Incrimination*, 6 AM. CRIM. L.Q. 3, 18)1967).
33. Illustrative cases following *Jones* are Ruiz v. Superior Court, 275 Cal. App. 2d

The *Prudhomme* decision limited the scope of prosecutorial discovery but, as in *Jones*, announced a standard of discovery which proved difficult to apply consistently. As in *Jones*, the court in *Prudhomme* failed to indicate the appropriate sanctions for disobedience of a discovery order. The opinions of the district courts of appeal in *People v. Hall*[34] and *Rodriguez v. Superior Court*[35] illustrate the problems in applying the *Prudhomme* standard.

This history shows the difficulty of developing discovery rules in a complex field by judicial action. A carefully and narrowly-drawn statute would serve to delineate the rights and duties of the parties, ensure greater uniformity in application of discovery rules and promote certainty in the criminal trial process.[36] In addition, legislative development of a notice-of-alibi rule would allow greater participation by affected members of the bar and public. The legislature will also be able to avail itself of the experience of the bar under the judicial rules allowing prosecutorial discovery and of the experience of other states with notice-of-alibi rules.[37] It will thus be better able to evaluate the state's need for discovery and to assess the impact upon effective protection of the defendant's interests.

III. Difficulties in Formulating Notice-of-Alibi Rules

Any notice-of-alibi statute involves a balancing of the state's interest in promoting justice through improved methods for ascertaining the truth with the defendant's privilege against self-incrimination.

One important state interest served by a notice-of-alibi statute is the prevention of perjury by defendants and witnesses. An alibi defense is easily fabricated and difficult to contradict[38] when the state lacks suffi-

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633, 80 Cal. Rptr. 523 (1st Dist. 1969); McGuire v. Superior Court, 274 Cal. App. 2d 583, 79 Cal. Rptr. 155 (2d Dist. 1969); People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1st Dist. 1966). The California Supreme Court further expanded discovery in People v. Pike, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969), *cert. denied*, 406 U.S. 971 (1972). In that case, the court upheld a pretrial order directing defense counsel to provide the names, addresses, and expected testimony of all defense witnesses. The scope of this decision was limited subsequently by *Prudhomme*.

34. 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (2d Dist. 1970).

35. 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1st Dist. 1970).

36. See Lapides, *Cross-Currents in Prosecutorial Discovery*, 7 U.S.F. L. REV. 217 (1973) and Kane, *Criminal Discovery*, 7 U.S.F. L. REV. 203 (1973) for the view that legislation in the area of prosecutorial discovery is undesirable and that courts can best establish such a procedure.

37. For a recent compilation of state prosecutorial discovery provisions, see Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 637-50.

38. Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1010 (1972).

cient notice for investigation.[39] Allowing the prosecution an opportunity to investigate the defense discourages perjury by defendants through reducing the likelihood that a false alibi defense will succeed. This result promotes the truth-seeking function of courts, and vindicates society's interest in punishing the guilty. A related state interest furthered by a notice-of-alibi statute is the prevention of surprise at trial. A prosecutor with advance notice of an alibi defense has an opportunity to gather rebuttal or impeaching evidence.

In addition, a notice-of-alibi procedure could serve to faciliate the settlement of cases without trial. A defendant may be less inclined to attempt to bluff in the hope of obtaining a better plea settlement. Cases may be settled earlier, freeing the overtaxed resources of the criminal justice system.

The defendant's dominant interest in avoiding prosecutorial discovery of alibi information is in ensuring that discovery does not lead to incriminating information.[40] Alibi information can be the source of incriminatory information. For instance, defendant may have been engaged in illegal bookmaking activities at the time of the alleged offense. To establish an alibi, he would have to reveal his participation in another criminal offense. Accelerating the timing of the disclosure deprives defendant of the opportunity to wait until after the prosecution has presented its case before choosing to reveal potentially incriminatory information. The defendant may find himself an unwilling instrument of his own conviction—a result which runs counter to the self-incrimination privilege.

Reconciling these interests will be a difficult task. To some extent, the United States Supreme Court's decisions in *Williams* and *Wardius* and the California Supreme Court's holdings in *Jones* and *Prudhomme* will limit the legislature's choices. It is clear from these decisions both that reciprocal discovery rights must be accorded the defendant and that fruits of discovery which could tend to lighten the prosecution's burden

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39. *See* Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 903 (1968):

> [A] particular need exists for disclosure of the alibi defense to the prosecutor because . . . alleged alibis may be more easily verified or disproven than many other defenses.

40. There are three considerations which might motivate a defendant to withhold disclosure of true alibi witnesses. First, the defendant might seek the advantages of surprise which silence affords. Second, the defendant might fear intimidation or manipulation of his witnesses by the government, either through threats of prosecution or by offers of immunity or attractive bargains. Third, the defendant might wish to protect either the privacy of his witnesses or his relationship with them from the intensive government investigation which would probably follow disclosure. Moreover, there is also the independent likelihood that the undisclosed witnesses will agree to commit perjury. Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342, 1350 (1972).

cannot be introduced at trial. While the present discovery rights accorded criminal defendants may be sufficient to meet the first of these mandates, procedural rules will have to be devised to prevent improper introduction of evidence. One likely approach would be a provision providing for *in camera* proceedings by the trial court whenever a claim of privilege is asserted. Both the questioned evidence itself and facts showing its potentially incriminatory effect could there be considered.

Conclusion

The *Reynolds* decision signifies judicial reluctance to draft the terms of a notice-of-alibi statute. Instead, the court left to the legislature the difficult task of weighing the competing interests involved. The previous decisions of the California and United States Supreme Court on prosecutorial discovery will, however, give some guidance to the legislature on the proper limits of a notice-of-alibi procedure.

Coraltha Lewis

F. USE OF PROBATION REVOCATION HEARING TESTIMONY IN SUBSEQUENT CRIMINAL TRIALS

People v. Coleman.[1] The California Supreme Court responded to the dilemma of a probationer who had to choose between exercising his constitutional right to speak in his own behalf at a probation revocation hearing and to protect his privilege against self-incrimination on pending criminal charges based on the same conduct that gave rise to the revocation hearing. Instead of granting the probationer's request for continuance of the revocation hearing until the collateral criminal proceedings were completed, the court created a limited exclusionary rule to govern the use in subsequent criminal proceedings of testimony given by probationers at revocation hearings.[2]

While on probation, John Coleman was taken into custody and charged as an accessory to a grand theft allegedly committed by his common law wife.[3] His revocation hearing was scheduled for January 1, 1975, 5 days before his trial on the accessory charge. After the trial

1. 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384, *modified*, 14 Cal. 3d 1626 (advance sheets) (1975) (Wright, C.J.) (unanimous opinion).

2. The rule was given prospective effect only. 13 Cal. 3d at 896, 533 P.2d at 1047, 120 Cal. Rptr. at 407.

3. The facts are fully stated in 13 Cal. 3d at 871-73, 533 P.2d at 1029-30, 120 Cal. Rptr. at 389-90.

court denied Coleman's motion for a continuance of the revocation hearing until after the trial, he chose not to testify at the hearing. His probation was then revoked on the basis of a transcript of the preliminary hearing held on the criminal charge.[4]

On appeal, Coleman claimed that the lower court's scheduling of the revocation hearing prior to the criminal trial violated his due process rights by forcing him to choose between the exercise of two constitutionally protected rights. Without deciding Coleman's constitutional claim, the supreme court reversed the revocation of his probation, using its supervisory power over state courts to require that testimony given by probationers at revocation hearings be excluded from later criminal trials on related charges, except for purposes of impeachment or rebuttal.[5] In its decision, the court anticipated the application of its reasoning to other situations in which a person facing possible criminal charges must choose between exercising the right to speak in a judicial or administrative proceeding and protecting the privilege against self-incrimination.

Part I of this Note will examine the supreme court's refusal to base its decision on the Federal Constitution. Part II will discuss the remedy requested by the probationer and that provided by the supreme court. Finally, part III will explore possible applications of the *Coleman* remedy in other contexts.

I. The Constitutional Tension

a. The Rights and Policies at Stake

Both the state and the probationer have strong interests in the full presentation of evidence concerning an alleged probation violation. The fact-finder requires complete information, both to assess the dangers to the community of continued probation and to facilitate a probationer's reintegration with society.[6] The probationer must exercise his constitutional right to speak at the revocation hearing[7] in order to ensure that

4. Apparently, the accessory charge was later dismissed on the motion of the People. 13 Cal. 3d at 873 n.3, 533 P.2d at 390 n.3, 120 Cal. Rptr. at 1030 n.3.

5. The court cited People v. Vickers, 8 Cal. 3d 451, 461-62, 503 P.2d 1313, 1321, 105 Cal. Rptr. 305, 313 (1972) and Bryan v. Superior Court, 7 Cal. 3d 575, 587-89, 498 P.2d 1079, 1087-89, 102 Cal. Rptr. 831, 839-41 (1972), as cases recognizing this supervisory power. 13 Cal. 3d at 888, 533 P.2d at 1041, 120 Cal. Rptr. at 401. This supervisory power over the state courts is more completely discussed, in another context, in Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437, *modified*, 13 Cal. 3d 204a (advance sheets) (1975).

6. 13 Cal. 3d at 873-74, 533 P.2d at 1031, 120 Cal. Rptr. at 391; *cf.* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 82 (1967).

7. *See* Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973); Morrissey v. Brewer, 408 U.S. 471, 488 (1972).

the proceeding yields an "informed, intelligent and just" decision.[8] These interests would be jeopardized if a probationer declined to speak due to fear of possible self-incrimination.

Whenever a probationer's testimony at a probation revocation hearing is used against him in a subsequent trial, two policies served by the fifth amendment are jeopardized. First, the use of this testimony upsets the state-individual balance at trial,[9] a balance normally maintained by the privilege against self-incrimination, the presumption of innocence, and the state's burden of proving guilt beyond a reasonable doubt before the defendant is required to present any evidence. Second, the possible use of this testimony impairs the fifth amendment protections against cruelty by forcing the probationer to choose among self-incrimination, perjury, or probation revocation.[10]

b. The Right to Relief

Although the supreme court recognized that a probationer's choice whether or not to testify at a revocation hearing would necessarily undermine one set of constitutional values, it was unwilling to grant relief on constitutional grounds. This reluctance is understandable; the controlling United States Supreme Court decision, in the consolidated cases of *McGautha v. California* and *Crampton v. Ohio*,[11] found no constitutional infirmity in another state practice which forced a defendant to choose between two constitutional rights. The Ohio unitary trial procedure required a defendant to make any pleas for mercy in sentencing before guilt was determined.[12] The Court assumed, arguendo, that the defendant had a constitutional right to allocution, but nonetheless decided that a state-imposed choice between this right and the privilege against self-incrimination did not violate the Constitution.

Where, as in *McGautha* and *Coleman*, no specific provision of the Bill of Rights is jeopardized by silence,[13] and no penalties are imposed

8. 13 Cal. 3d at 873, 533 P.2d at 1031, 120 Cal. Rptr. at 391, *citing* Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

9. Although California courts emphasize the state-individual balance, great deference to this balance is not required by the Federal Constitution. *Compare* Wardius v. Oregon, 412 U.S. 470 (1973) and Williams v. Florida, 399 U.S. 78 (1970), *with* Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437, *modified*, 13 Cal. 3d 204a (advance sheets) (1975) and Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

10. The court analogized this predicament to the "cruel trilemma of self-accusation, perjury or contempt." 13 Cal. 3d at 878, 533 P.2d at 1034, 120 Cal. Rptr. at 394, *quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Compare note 21 *infra* and accompanying text.

11. 402 U.S. 183 (1971). *McGautha* was consolidated with Crampton v. Ohio, 402 U.S. 183 (1971),*vacated*, 408 U.S. 941 (1972), which challenged the Ohio unitary trial procedure. References to the case in this Note will be to *McGautha* only.

12. The jury had discretion to impose the death sentence. 402 U.S. at 194.

13. *See* Simmons v. United States, 390 U.S. 377 (1968). In *Simmons*, the Court

for the act of remaining silent itself,[14] the test of constitutionality fashioned by *McGautha* is "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[15] Applying this test in *McGautha*, the Court questioned the argument that fifth amendment values are impinged upon significantly when a defendant waives the privilege against self-incrimination in order to influence the outcome of an issue other than guilt at trial. Without mentioning the policy favoring a state-individual balance at trial,[16] the Court reasoned that "the only [fifth amendment value] affected to any appreciable degree is that of 'cruelty.' "[17] Since this cruel choice was indistinguishable from similar difficult choices routinely required at trial,[18] the Court decided that the Constitution did not mandate relief.

McGautha and several other recent Supreme Court opinions reveal a conception of federalism according to which the Constitution safeguards only minimum thresholds of fairness and leaves fuller protection of individual rights to the states.[19] Noting this trend, the California Supreme Court chose to base its holding on state grounds,[20] rather than to apply the *McGautha* test and distinguish *McGautha* on its facts. Nonetheless, the court's decision to provide relief in *Coleman* implicitly drew a constitutional rationale from *McGautha*.

The supreme court's *McGautha* opinion indicated that a due process analysis is required when constitutional tensions arise between speech and silence.[21] In *McGautha*, the due process safeguards at trial,

considered intolerable the constitutional tension created when testimony given by the defendant to establish standing at a suppression hearing was used against him in a subsequent criminal trial. The Court ruled that the testimony was inadmissible for affirmative use at trial. The scope of this holding was significantly reduced by *McGautha*, which limited *Simmons'* application to cases where the protection of a specific provision of the Bill of Rights would be sacrificed by the exercise of the fifth amendment right to remain silent. 402 U.S. 183, 211-12 (1971).

14. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70 (1973); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); *cf.* Malloy v. Hogan, 378 U.S. 1 (1964).

15. 402 U.S. at 213.

16. For a United States Supreme Court view of the state-individual balance, see Wardius v. Oregon, 412 U.S. 470 (1973) and Williams v. Florida, 399 U.S. 78 (1970).

17. 402 U.S. at 214.

18. *But see The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 282, 291 (1971).

19. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 609-12, 618-19 (1974); Cupp v. Naughten, 414 U.S. 141, 144-46, 149-50 (1973). Other cases are cited at 13 Cal. 3d at 887 n.18, 533 P.2d at 1040 n.18, 120 Cal. Rptr. at 400 n.18.

20. 13 Cal. 3d at 887 n.18, 533 P.2d at 1040 n.18, 120 Cal. Rptr. at 400 n.18. Of course, the federal trend does not explain the court's refusal to base its decision on state constitutional grounds. The court ignored state constitutional adjudication for two reasons: first, it was unnecessary; and second, it would have been difficult to fashion a constitutional rule that would apply adequately to a wide range of situations. Nevertheless, the court will face similar difficulties in determining the scope of the "supervisory" principle articulated in *Coleman*.

21. Twice, *McGautha* gave this clue:

including counsel's statutory right to argue to the jury for mercy in sentencing,[22] minimized the danger that arbitrary punishment would be imposed if the defendant chose not to speak.

Accordingly, the *Coleman* opinion focused on the procedural safeguards provided in the proceeding held before trial.[23] If only rudimentary due process protections are available in those proceedings, it is likely that a defendant's choice to remain silent will result in an arbitrary decision. As it becomes more likely that the decision will be arbitrary, the defendant will feel more pressure to testify. When this risk of arbitrariness becomes excessive and serious personal deprivation may ensue, judicial relief will be granted.[24] Applying this analysis to probation revocation hearings, the court concluded, sub silentio, that the minimal due process guarantees characteristic of

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> It is undeniably hard to require a defendant on trial for his life and desirous of testifying on the issue of punishment to make nice calculations of the effect of his testimony on the jury's determination of guilt. The issue of cruelty this arising, however, is *less closely akin to the crue ltrilemma of self-accusation, perjury or contempt'* [citations omitted] *than to the fundamental requirements of fairness and decency embodied in the Due Process Clauses.*

402 U.S. 183, 214-15 (1971) (emphasis added). As if to explain why the Due Process Clauses were not violated in this case, the Court noted later:

> Petitioner's contention therefore comes down to the fact that the Ohio single-verdict trial may deter the defendant from bringing to the jury's attention evidence peculiarly within his own knowledge, and it may mean that the death verdict will be returned by a jury which never heard the sound of his voice. *We do not think that the possibility of the former is sufficiently great* to sustain petitioner's claim *that the single-verdict trial may deprive the jury of a rational basis for fixing sentence* . . . . [W]e do not think the Constitution forbids a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all.

402 U.S. 183, 220 (1971) (emphasis added). The Court so analyzed petitioner's situation in *McGautha* because, even though he did not address the jury, his attorney could argue for mercy. 402 U.S. at 218-19. *Cf.* Wardius v. Oregon, 412 U.S. 470 (1973) (notice-of-alibi statute invalid because no reciprocal discovery); Williams v. Florida, 399 U.S. 78, 81 (1970) (due process is protected by reciprocal discovery provided in notice-of-alibi statute.

22. 402 U.S. at 218-19.

23. The *Coleman* opinion was influenced by a First Circuit case using a similar due process analysis. Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973), *vacated,* 418 U.S. 908 (1974). The First Circuit abandoned this approach on rehearing. Palmigiano v. Baxter, 510 F.2d 534 (1st Cir. 1974), *cert. granted,* 95 S. Ct. 2414 (1975).

24. In extreme instances where due process safeguards are minimal and the proceedings may impose serious personal deprivations, the relief will rest on constitutional grounds. 13 Cal. 3d at 885-86, 533 P.2d at 1039, 120 Cal. Rptr. at 399. The court did not indicate whether a constitutional analysis in these cases would be based on the state constitution or on the Federal Constitution (thus requiring that *McGautha* be distinguished). The court's acknowledgement that in some cases relief may be constitutionally compelled, and its decision not to use constitutional grounds in *Coleman,* could indicate that relief was not constitutionally compelled in *Coleman.* This reading goes farther than necessary, however, since the need for a constitutional decision was removed by the availability of an alternative ground for relief.

parole revocation proceedings—the state's lesser burden of proof[25] and the more relaxed rules of evidence[26] —create a risk of arbitrary decisions (or perhaps coerced testimony)[27] sufficient to justify judicial relief in the form of an exclusionary rule of evidence.

II. The Remedy

a. An Exclusionary Rule

Having determined that the choice forced upon petitioner Coleman was "unnecessarily inconsistent"[28] with constitutional values, the court fashioned a remedy designed to ensure that the state's requests for early probation revocation proceedings would not be influenced by an "illegitimate desire to gain an unfair advantage at trial."[29] Thus, the testimony given by a probationer at a revocation hearing, and any fruits of this testimony, are inadmissible at subsequent criminal trials on charges "arising out of the alleged violation of the conditions of his probation,"[30] except for purposes of impeachment or rebuttal. Direct or derivative use of that testimony to impeach the probationer is permissible only where his testimony at the subsequent criminal trial is "so clearly inconsistent" with his testimony at the revocation hearing, or the evidence derived therefrom, that the prior statements should be admitted "to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing."[31] Trial courts are to determine the admissibility of revocation hearing testimony and evidence allegedly derived from that testimony by applying evidentiary standards based on those applicable to evidence obtained by official misconduct in violation of the fourth and fifth amendments.[32]

25. People v. Hayko, 7 Cal. App. 3d 604, 609, 86 Cal. Rptr. 726, 729 (1st Dist. 1970); People v. Vanella, 265 Cal. App. 2d 463, 71 Cal. Rptr. 152, 157 (2d Dist. 1968).

26. People v. Calais, 37 Cal. App. 3d 898, 904, 112 Cal. Rptr. 685, 689 (3d Dist. 1974); People v. Hayko, 7 Cal. App. 3d 604, 609-10, 86 Cal. Rptr. 726, 729-30 (1st Dist. 1970).

27. Framed in terms of potential coercion of testimony, the analysis approaches a fifth amendment argument. *McGautha* would not support this approach, stating that "testimony to secure a benefit from the Government is not *ipso facto* 'compelled,'" (402 U.S. 183, 212 (1971)) and that "[i]t is not contended, nor could it be successfully, that the mere force of evidence is compulsion of the sort forbidden by the privilege." *Id.* at 213. But the Court's language, cited at note 21 *supra*, indicates that coercion resulting from the likelihood that certain actions will be arbitrary may be evaluated by a due process analysis.

28. 13 Cal. 3d at 872, 533 P.2d at 1030, 120 Cal. Rptr. at 390.

29. *Id.* at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402. In practice, the *threat* of scheduling the revocation hearing prior to trial greatly affects a defendant's actions.

30. 13 Cal. 3d at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

31. *Id.* at 899, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

32. *Id.* at 890 & n.20, 533 P.2d at 1042 & n.20, 120 Cal. Rptr. at 402 & n.20. Since the procedure and proof requirements are so similar to existing exclusionary rules, they will not be discussed in detail in this Note. For the court's extended

The court characterized its remedy as "coextensive with the scope of the privilege against self-incrimination."[33] Although the *Coleman* exclusionary rule is not as far-reaching as is the full exclusion required for involuntary confessions,[34] it parallels the rules governing evidence obtained in violation of *Miranda v. Arizona*.[35] Only a year earlier in a *Miranda* violation case, the California court had reasoned that as long as the trustworthiness of evidence is not doubted,[36] a limited exclusionary rule satisfies the fifth amendment and sufficiently deters police misconduct. If trustworthiness of the evidence is the proper standard, it follows—since the court's analysis in *Coleman* was premised on the truth of the probationer's testimony—that revocation hearing statements do not warrant the protection of a full exclusionary rule.

Although the impeachment exception is compatible with current state and federal constitutional law, it does not induce the state to modify its revocation scheduling practices.[37] While the court did not endorse the state's filing of revocation motions prior to criminal trials to obtain impeachment evidence, it refused nevertheless to forbid impeachment use of the evidence because, "under modern principles of Anglo-Saxon jurisprudence," the privilege against self-incrimination does not encompass the right to lie at trial.[38] The result of this view of the privilege against self-incrimination is an exclusionary rule that does not

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description of the evidentiary standards to be used in applying the rule, see 13 Cal. 3d at 889-96, 533 P.2d at 1042-47, 120 Cal. Rptr. at 402-07.

33. 13 Cal. 3d at 892, 533 P.2d at 1044, 120 Cal. Rptr. at 404, *quoting* Kastigar v. United States, 406 U.S. 441, 453 (1971).

34. *See* People v. Underwood, 61 Cal. 2d 113, 389 P.2d 937, 37 Cal. Rptr. 313 (1964).

35. 384 U.S. 436 (1955). Impeachment use of evidence obtained in violation of *Miranda* is permissible unless the testimony has been coerced in the "traditional" sense and is thus untrustworthy. People v. Nudd, 12 Cal. 3d 204, 207, 534 P.2d 844, 846, 115 Cal. Rptr. 372, 374 (1974), *citing* Harris v. New York, 401 U.S. 222 (1971).

36. *See* People v. Nudd, 12 Cal. 3d 204, 207, 534 P.2d 844, 846, 115 Cal. Rptr. 372, 374 (1974), *citing* Harris v. New York, 401 U.S. 222 (1971).

37. *See, e.g.*, People v. Nudd, 12 Cal. 3d 204, 207 n.2 (majority opinion), 212-13 (dissenting opinion), 524 P.2d 844, 846 n.2 (majority opinion), 849 (dissenting opinion), 115 Cal. Rptr. 372, 374 n.2 (majority opinion), 377 (dissenting opinion) (1974); State v. Brewton, 247 Ore. 241, 245, 422 P.2d 581, 583, *cert. denied*, 387 U.S. 943 (1967); Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1219-21 (1971) [hereinafter cited as *Anxious Observations*]; Note, 39 GEO. WASH. L. REV. 1241, 1246-47 (1971); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 44, 51-52 (1971).

38. 13 Cal. 3d at 892, 533 P.2d at 1044, 120 Cal. Rptr. at 404. This assertion can be questioned. *See Anxious Observations, supra* note 37, at 1221-23. But as a matter of constitutional law the proposition is well-established. Harris v. New York, 401 U.S. 222 (1971); People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974). This proposition is further supported by the language of Simmons v. United States, 390 U.S. 377, 394 (1968), where only "direct" use of the testimony given at a suppression hearing was prohibited. *Accord*, Brown v. United States, 411 U.S. 223, 228 (1973); *cf.* United States v. Kahan, 415 U.S. 239, 242-43 (1974).

safeguard fifth amendment values to the same extent as would a claim of the full fifth amendment privilege itself.[39] Thus limited, the remedy may actually encourage the state to schedule revocation hearings before trial as a matter of course, despite the court's stated desire to curb this practice.[40]

Even full exclusion of revocation hearing testimony, however, would not remove all state incentives to schedule the hearings prior to trial. As the court noted,[41] testimony at the revocation hearing often includes admissions of probation violations and explanations of mitigating circumstances. Therefore, the state may seek early revocation hearings to obtain disclosure of a probationer's trial strategy, alibis or other trial defenses. Even the carefully articulated *Coleman* rule cannot compensate a probationer for the state's acquisition of this information, much of which is not available through bona fide criminal discovery.[42] Although mitigation of these problems is not constitutionally required,[43] it would better comport with state criminal discovery laws and help maintain a balance at trial between the interests of the state and the rights of the individual.

b. An Alternative Remedy—Delay

Because of the shortcomings of an exclusionary rule, the defendant[44] and several amici[45] requested instead a judicial rule requiring the delay of a revocation hearing until after trial on the criminal charges. The court, however, did not discuss this alternative remedy and did not attempt to identify governmental interests that would be prejudiced by requiring delay. The court's failure to evaluate the merits of delaying the revocation hearing is the most regrettable aspect of the *Coleman* opinion. By apparently choosing not to examine the conflicting policies behind the scheduling of revocation hearings, the court side-stepped the opportunity to articulate those factors that should most influence trial

39. *See* Kastigar v. United States, 406 U.S. 441, 458-59, 461 (1972).

40. 13 Cal. 3d at 889, 533 P.2d at 1041-42, 120 Cal. Rptr. at 401-02.

41. *Id.* at 874, 533 P.2d at 1031, 120 Cal. Rptr. at 391.

42. *See, e.g.*, Reynolds v. Superior Court, 12 Cal 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437, *modified*, 13 Cal. 3d 204a (advance sheets) (1975) (rejecting judicial promulgation of a notice-of-alibi rule); Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970) (forbidding compelled disclosure of evidence which might tend to incriminate defendant).

43. *See* Wardius v. Oregon, 412 U.S. 470 (1973) (notice-of-alibi statute invalid because no reciprocal discovery); Williams v. Florida, 399 U.S. 78, 82-86 (1970) (reciprocal discovery in Florida's notice-of-alibi rule constitutional).

44. Petitioner's Brief for Hearing at 17.

45. Brief for ACLU and Public Advocates as Amici Curiae; Brief for Aid in Criminal Defense as Amicus Curiae; Brief for California Public Defender's Ass'n as Amicus Curiae; Brief for S.F. Public Defender as Amicus Curiae at 4.

court exercise of discretion in scheduling revocation hearings and failed to emphasize that delay will be appropriate in many cases, if not most.

An examination of the requested delay would have revealed that effectuation of the state's legitimate interest in a prompt revocation hearing following a probation violation will often prejudice the probationer's defense at a later trial. While the nature of probation probably justifies the speedy reincarceration of a delinquent probationer by procedures that are independent of and less formal than those required for prosecution of a criminal charge, the probation system was not—and constitutionally could not be—designed as a substitute, shortcut or discovery device for prosecution of the criminal charge itself. The tension thus inherent in the scheduling of the probation revocation hearing and the criminal trial cannot be eased by a broad, judicially imposed scheduling rule such as the one requested by the defendant in *Coleman.* A more detailed analysis of the interests underlying the tension will explain why a judicially designed delay rule would be inadequate, and will suggest when delay should be granted in the discretion of the court hearing the revocation motion.

Several state interests served by the exclusionary rule established by the court in *Coleman* would not be prejudiced by a judicially imposed delay of the revocation hearing. First, the state's interest in using fresh evidence at a prompt revocation hearing would be adequately replaced in most cases by the benefits of using fresh evidence at an early trial in the event that trial were scheduled prior to the revocation hearing.[46] Second, any state interest in the prevention of perjury, an interest presently served by an impeachment exception, could be safeguarded whenever the revocation hearing was delayed by considering at the revocation hearing any inconsistencies between the testimony given at the trial and that given at the revocation hearing. Admittedly, delay of the formal revocation hearing after the motion for revocation had been filed would incur the additional costs of prerevocation hearings. But since these prerevocation proceedings must only determine probable cause,[47] costs could be reduced by combining them with the preliminary hearing on the criminal charges.[48]

More substantial, and more difficult to accommodate if the probation revocation proceeding were delayed, however, would be the state's interest in public safety. Whenever bail (on the new criminal charges)

46. This interest is shared by the defendant in both the revocation proceedings and at trial. See text accompanying note 57 *infra.*

47. 13 Cal. 3d at 894-95, 533 P.2d at 1045-46, 120 Cal. Rptr. 4105-10.

48. *Id.* at 895, 533 P.2d at 1046, 120 Cal. Rptr. at 406. Nor will these proceedings require substantial additional judicial energies. The probationer will be unlikely to present a full defense at the pre-revocation hearing for the same reasons that he seeks a delay of the formal hearing.

or other available civil procedures[49] are not likely to restrain the probationer adequately, the interest in public safety can be protected by arresting the probationer for the alleged probation violation[50] and detaining him without bail until the hearing.[51] Whenever the probationer is detained in this manner, he is entitled to a reasonably prompt revocation hearing.[52] If he were also entitled to delay of the revocation hearing until after trial, the state would have to file criminal charges within a few days of its revocation request in order to satisfy both of the probationer's rights. Problems might arise if the state were to require additional preparation time to confront the stricter evidence rules and higher standards of proof at trial. In these instances, the defendant would face a new conflict: either waive the right to a speedy revocation hearing in order to preserve the privilege against self-incrimination, or face the dilemma which arose in *Coleman* in order to obtain prompt disposition of the revocation question.[53] Nonetheless, a defendant arguably would be in a better position with the option of delay than he would be without it. Were he to value protection of his defense to criminal charges more highly than he did the right to a prompt revocation hearing, he could remain in custody until the revocation hearing were held. Should he choose instead to waive his right to delay, he could be protected at a subsequent trial by an exclusionary rule. But the fairness of this view of the judicially imposed delay option—a solution that appears to satisfy the interests of both the state and the probationer—is dubious when it is understood that the probationer's option may be illusory. In practice, the substantial and understandable desire to leave jail would often dictate the "choice" of an early revocation hearing. Thus, the supreme court was cautious—as lower courts exercising their scheduling discretion also should be—of "reconciling" the parties' respective interests by resort to a rule that would often offer the probationer prolonged incarceration as an alternative to a prior revocation hearing.

A judicially imposed delay requirement would also have consequences for the exercise of prosecutorial discretion. The state's decision to proceed with a revocation hearing before a criminal trial reflects practical considerations[54] and is supported by implicit legislative sanc-

49. *See In re* Underwood, 9 Cal. 3d 345, 350-51 & n.8, 508 P.2d 721, 724-25 & n.8, 107 Cal. Rptr. 401, 404-05 & n.8 (1973).

50. CAL. PENAL CODE § 1203.2 (West Supp. 1975).

51. There is no statutory authorization or constitutional requirement for bail after arrest for a probation violation. *See In re* Law, 10 Cal. 3d 21, 513 P.2d 621, 109 Cal. Rptr. 573 (1973) (no right to bail in a "parole hold"). By discussing the need for prompt revocation hearings, the *Coleman* opinion implied that there is no right to bail for probationers. 13 Cal. 3d at 895-96, 533 P.2d at 1046-47, 120 Cal. Rptr. at 406-07.

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

53. Remarkably, the court in *Coleman* suggested that a defendant could seek a prompt revocation hearing by waiving his right to the exclusionary rule! 13 Cal. 3d at 896, 533 P.2d at 1047, 120 Cal. Rptr. at 407.

54. See text accompanying notes 55 to 58 *infra*.

tion.[55] Although this decision will *not* usually compel *denial* of delay, the trial court—when making case-by-case scheduling decisions—should have discretion to weigh the state's need for a pretrial revocation hearing against the defendant's interests in delay.

The first, and least substantial, impact of a delay rule on prosecutorial tactics would be its effect on plea bargaining. The present flexibility to seek revocation before trial strengthens the state's plea bargaining posture because the probationer must choose between revealing his defense or risking the consequences of silence at the revocation hearing. Faced with this choice, a probationer is more likely to plea bargain to new charges in return for a promise that revocation will not be pursued. However, this practice is based on the state's intent or threat to use the revocation hearing as a discovery device—a use clearly disfavored in *Coleman.*

The second, and more significant, impact of a delay rule would be the effect on prosecutorial discretion in the filing of criminal charges. Often the necessity and desirability of filing or prosecuting criminal charges will be determined by the outcome of the revocation hearing. Where the state desires only to incarcerate the probationer, as in *Coleman,* it will file both a revocation request and criminal charges, with the intention of dropping the criminal charges if the revocation motion succeeds. In such cases, the effect of a delay rule on the state interest would be primarily economic: although the state could still make use of the lower burden of proof and more relaxed rules of evidence at a revocation hearing after the defendant was acquitted of criminal charges, it would first be forced to litigate the criminal charges. In addition, if the probationer were found not guilty of the criminal offense, the delay could impair the state interest in credibility; it would "look bad" to go through a revocation hearing after a probationer had been acquitted of the very criminal charges that formed the basis for revocation.[56]

A delay rule could also affect prosecutorial discretion in cases where the decision to file criminal charges has not been made at the time that revocation is requested. For example, the state may possess evidence that is admissible at the revocation hearing, but inadmissible at trial.[57] Although a motion for revocation may be supportable, the desirability of filing criminal charges will be uncertain until the state determines the likelihood of discovering additional evidence. In these

55. See text accompanying note 60 *infra.*

56. To carry this analysis to its logical conclusion would require routine scheduling of revocation hearings before trial in order to disguise the difference in standards—truly a triumph of form over substance.

57. See note 26 *supra.*

cases, the revocation hearing might be significantly delayed if it had to be postponed until after the trial or after a final determination that criminal charges will not be filed. In this context, the state's interest in using fresh evidence at an early revocation hearing becomes more substantial. The problem would be most extreme when, at the time of the revocation motion, the state does not contemplate filing criminal charges, but is still not prepared to abandon the possibility that they might be filed. Conceivably, these difficulties could be cured by restricting the delay requirement to those cases where charges are pending at the time that the revocation motion is filed. As will be discussed later, however, such a limit would encourage state evasion of delay through its timing of criminal charges.[58]

As a response to the problems that would have been posed by a judicially mandated delay rule, the *Coleman* decision allows lower courts to weigh the competing interests in each case in reaching a decision whether to delay the revocation hearing. This reliance on lower court discretion offers several advantages. The trial court can consider complicating factors, such as additional grounds for revocation, the seriousness of the additional grounds, and their bearing on the need for a pretrial revocation hearing. It can also consider the absence of crucial witnesses, particularly those faced with pending criminal charges, and the likelihood that they will be available at a later hearing. And, as suggested above,[59] the court could consider the likelihood that criminal charges will be filed or, if they are already filed, that they will be prosecuted.

Furthermore, the discretion vested in trial courts as a result of *Coleman* may best accord with the statute governing probation revocation. Although the language of the statute is not dispositive, a fair reading indicates that the legislature contemplated the possibility of holding a revocation hearing prior to trial. Penal Code section 1203.2 allows the court to revoke probation where it has reason to believe that the probationer "has subsequently committed other offenses, *regardless whether he has been prosecuted for such offenses.*"[60] Read narrowly, the statute requires only that the state's decision to file charges should not affect a court's determination whether an offense that can lead to revocation of probation has been committed. By acknowledging the independence of the revocation hearing from the criminal charges, however, the statute also suggests that revocation hearings may be held regardless of whether charges are pending or contemplated. Thus construed, the statute is permissive: if the interests of justice require, a

58. See text accompanying notes 62-63 *infra.*
59. See text accompanying notes 56-58 *supra.*
60. CAL. PENAL CODE § 1203.2 (West Supp. 1975).

trial court *may* revoke probation even though criminal charges are pending.

c. The Exercise of Trial Court Discretion

As has been demonstrated, the California Supreme Court properly declined to impose a delay rule for every situation in which criminal charges will be brought for the same activity that forms the basis of the probation revocation request. Instead, the court apparently left the scheduling decision to the discretion of the trial court.

Lower courts properly exercising the scheduling discretion acknowledged by the supreme court should weigh competing interests when scheduling probation revocation hearings. Thus, the court should rarely deny continuance of the hearing when criminal charges have been filed contemporaneously with the revocation motion, since it is possible that the probationer will be prejudiced by disclosure at the revocation hearing of evidence that is normally unavailable to the state through discovery.[61] Where bail can obviate the need for prolonged incarceration pending the revocation hearing, it is tempting to suggest that delay be mandatory. But if delay were automatic and prosecutors chose to avoid this delay by postponing the filing of charges until after the revocation hearing in order to avoid this delay—as a hypothetical in the amicus brief of the California District Attorneys Association suggests[62] —two undesirable consequences would follow. First, courts would face routine evasion of judicial policy in an area particularly unsuited to judicial control. To avoid this evasion, courts would be forced to formulate rules to govern the timing of criminal charges—an inappropriate action for bodies lacking formal legislative or rule-making powers.[63] Second, courts would be confronted with an increasing number of cases where the probationer faces possible, but not pending, criminal charges. In these cases accommodation of the state's interests and those of the probationer is extremely difficult.

Therefore, even where it appears that automatic delay would be acceptable, the desirable alternative is to allow courts to exercise informed discretion in scheduling proceedings—the remedy suggested by *Coleman*. By considering relevant state interests, the courts can retain the cooperation of prosecutors while protecting the interests of the probationer. By encouraging normal prosecutorial practices, the courts will also be better able to pinpoint the real interests of the state and probationer in each case.

61. *See* cases cited in note 42 *supra*.

62. Brief for the Appellate Committee of the California Dist. Attorneys Ass'n as Amicus Curiae at 21.

63. *See* Reynolds v. Superior Court, 12 Cal. 3d 834, 849, 528 P.2d 45, 55, 117 Cal. Rptr. 437, 447, *modified*, 13 Cal. 3d 204a (advance sheets) (1975).

Of course, the state, may still be tempted to delay filing charges until the revocation motion has been adjudicated. To remove this temptation, when revocation proceedings are initiated prior to the filing of criminal charges, the court should evaluate—in camera if necessary—the reasons criminal charges cannot be filed. Ultimately, if such judicial determinations are thwarted by the state's less-than-full disclosure, remedial legislation may be required.

For an illustration of the appropriate exercise of trial court discretion consider the facts of *Coleman.* The probation revocation request alleged grounds related to the culpability of Coleman's wife.[64] Her testimony at the revocation hearing could possibly have exonerated him but incriminated her. Coleman's testimony, in turn, would have revealed his defenses and might have incriminated his wife. Thus, there were great pressures on both Coleman and his wife not to testify at the revocation hearing.[65] Since both of them had been criminally charged prior to his revocation hearing, a short delay of the revocation hearing could have eliminated the pressures and increased the likelihood of a fair revocation decision. In a case such as *Coleman,* the arguments for delay are convincing.

III. Implications

The *Coleman* remedy will almost certainly be extended to testimony given in prison disciplinary proceedings; indeed, it may even be constitutionally compelled in such proceedings.[66] Since the due process safeguards in prison disciplinary proceedings are more rudimentary than those in probation revocation hearings,[67] they present an even sharper

64. Petitioner's Brief for Hearing at 11-12.

65. The testimony was particularly important since it would have supplemented with a probation report recommending against revocation. Petitioner's Brief for Hearing at 11-12.

66. Consider the following observations by the California Supreme Court:

> At one end of the spectrum of concurrent proceedings are those which accord the defendant minimal procedural rights but which have the potential of imposing serious personal deprivations. Prison disciplinary hearings epitomize this class. The need for accommodaton is here the greatest, and may well be constitutionally compelled. If already minimal protections are further eroded by the need to preserve intact the defendant's full rights at a pending criminal trial, there are insufficient safeguards against the imposition of arbitrary deprivations at the concurrent proceeding.

13 Cal. 3d at 885-86, 533 P.2d at 1039, 120 Cal. Rptr. at 399. The court's approach was influenced by the reasoning of a federal case which addressed this question. In Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973), *vacated,* 418 U.S. 908, *modified,* 510 F.2d 534 (1st Cir. 1974), *cert. granted,* 95 S. Ct. 2414 (1975), the First Circuit granted "use" immunity for statements made at a prison disciplinary hearing. Subsequent to the decision in *Coleman,* however, the First Circuit reconsidered and provided relief only when a prisoner was specifically advised that his silence would be held against him. 510 F.2d 534, 536 (1st Cir. 1974), *cert. granted,* 95 S. Ct. 2414 (1975).

67. 13 Cal. 3d at 884 n.16, 533 P.2d at 1038 n.16, 120 Cal. Rptr. at 398 n.16;

conflict to constitutional values than that presented in *Coleman*. The prisoner's interests will be substantially jeopardized if his decision to remain silent in the absence of an exclusionary rule results in arbitrary disciplinary sanctions and an increased period of incarceration.[68]

In addition to the extension of the *Coleman* remedy to prison disciplinary proceedings, it is likely that a *Coleman*-type limited exclusionary rule will be applied to the testimony given by parolees at parole revocation hearings.[69] Here the interests are identical to those articulated in *Coleman*. In fact, the non-judicial nature of the parole revocation hearing dictates even greater scrutiny of the procedural protection provided parolees.[70]

The impact of *Coleman* on civil proceedings is more problematical. According to the supreme court, the application of the *Coleman* rule may depend on whether the state is the adverse party in both civil and criminal proceedings.[71] Where the state is the complaining party in both, the trial court may fashion relief to remove the illegitimate government incentive to schedule the proceedings so that the defendant's testimony in a civil action can be used against him at trial. Where the state is not the adverse party in the civil proceeding, the supreme court's analysis in *Coleman* suggests that testimony in the civil proceeding will be unprotected because of the extensive due process protections against an arbitrary civil trial judgment if a potential criminal defendant refuses to testify at the civil proceeding. The court strongly implied that no relief will be provided when the potential criminal defendant initiates the civil proceedings.[72] And even where the potential criminal defendant is also the defendant in the civil proceeding, the plaintiff's legitimate interest in prompt determination of a good faith claim will often justify denying the defendant's request for delay of the civil matter. An exclusionary rule prohibiting use of the defendant's civil proceeding

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Wolff v. McDonnell, 418 U.S. 539, 559-72 (1974).

68. Society's interest in rehabilitation may be less evident in prison proceedings than it is in proceedings related to the probation system, but it is nonetheless impaired when arbitrary disciplinary sanctions unnecessarily delay a prisoner's release and subsequent reintegration with society.

69. "Parole and probation revocation proceedings are, of course, equivalent in terms of the requiremeuts of due process. (*Gagnon v. Scarpelli*, . . . 411 U.S. 778 at p. 782.)" 13 Cal. 3d at 876-77 n.8, 533 P.2d at 1033 n.8, 120 Cal. Rptr. at 393 n.8. While the procedures employed in the two proceedings need not be identical, they must offer "equivalent due process safeguards." People v. Vickers, 8 Cal. 3d 451, 458, 503 P.2d 1313, 1319, 105 Cal. Rptr. 305, 311 (1972).

70. Since the similarities between probation revocation hearings and both prison disciplinary and parole revocation hearings are so apparent, an exclusionary rule should be required in those proceedings from the date of *Coleman's* publication.

71. 13 Cal. 3d at 888, 533 P.2d at 1041, 120 Cal. Rptr. at 401.

72. *Id.* at 884, 533 P.2d at 1039, 120 Cal. Rptr. at 399, *citing* Simmons v. United States, 390 U.S. 377, 394 & n. 23 (1968).

testimony in a subsequent criminal trial, however, would help the defendant without jeopardizing the plaintiff's interests. Such an extension of the *Coleman* remedy would be permissible because the court's analysis in *Coleman* defines only where relief would be mandatory, but does not preclude extending relief to other appropriate situations. The supreme court would, therefore, be wise to use its supervisory power over lower courts to provide relief in those civil proceedings in which relief appears to be warranted.

Conclusion

People v. Coleman secures for probationers a protection otherwise unavailable in most state[73] and federal courts.[74] Despite the confusion surrounding the constitutional requirements in the federal courts, the California Supreme Court made a thoughtful effort to alleviate the tension between a probationer's constitutional right to speak in his own behalf at a probation revocation hearing and his fifth amendment protection against self-incrimination on pending or possible criminal charges based on the same conduct. Although the exclusionary rule formulated in *Coleman* is not completely satisfactory—in part because of the court's failure to examine publicly the potentially desirable alternative remedy requested by the defendant, delay of the revocation proceedings until completion of the criminal prosecution—the result in *Coleman* is a viable compromise of the interests at stake. Despite the supreme court's apparent reluctance to discuss the factors that should influence trial court's exercise of discretion in scheduling revocation hearings, it is hoped that courts hearing motions for revocation of probation will use their discretion to delay revocation hearings where the shortcomings of the *Coleman* exclusionary rule are most apparent.

Phil Peters

73. People v. Carr, — Colo. —, 524 P.2d 301 (1974) (no prejudice by court's refusal to continue revocation hearing until termination of criminal proceeding); Borges v. State, 249 So. 2d 513 (Fla. Ct. App. 1971) (pending criminal charges are not grounds for continuance of probation revocation hearing); Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973) (no constitutional infirmity in probation revocation proceedings held prior to trial); Gonsalves v. Howard, — R.I. —, 324 A.2d 338 (1974) (no constitutional infirmity); State v. Ryan, — Mont. —, 533 P.2d 1076 (1975) (choice is strategic and not repugnant to the Constitution).

74. *See, e.g.*, Palmigiano v. Baxter, 510 F.2d 534 (1st Cir. 1974), *cert. granted*, 95 S. Ct. 2414 (1975); Flint v. Mullen, 499 F.2d 100 (1st Cir. 1974).