Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard

The criminal defendant's right to a fair and impartial trial in the California courts is guaranteed by the United States[1] and California[2] constitutions. Fundamental to this right is a trial free from prejudicial pretrial publicity.[3] One way courts can avoid the prejudice of pretrial publicity is to grant a defendant's motion for change of venue.[4] In *Maine v. Superior Court*,[5] the California Supreme Court adopted a liberal standard for reviewing change of venue motions and held that a change of venue must be granted whenever pretrial publicity creates a "reasonable likelihood" that the defendant cannot have a fair trial without such relief.[6] *Maine* directed the appellate courts to apply this standard when reviewing a trial court's ruling on a change of venue motion.[7]

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1. U.S. CONST. amends. VI, XIV. The sixth amendment right to jury trial has been made applicable to the states via the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). The right to jury trial guarantees the defendant a fair trial by a panel of impartial, "indifferent" jurors. *In re* Murchison, 349 U.S. 133 (1965).

2. The criminal defendant's right to jury trial is guaranteed by CAL. CONST. art I, § 16 ("Trial by jury is an inviolate right and shall be secured to all . . . ."). Even prior to *Duncan v. Louisiana*, the California courts recognized that the defendant was entitled to a fair trial in the state courts. *See* People v. Mahoney, 201 Cal. 618, 627, 258 P. 607, 610 (1927).

3. Irvin v. Dowd, 366 U.S. 717, 726 (1960) (where "adverse publicity caused a sustained excitement and fostered a strong prejudice" against the defendant, his right to a fair and impartial trial was violated). Where the media disseminate prejudicial or inadmissible information prior to trial, the defendant's due process rights are violated. Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (media coverage of defendant's uncounseled confession held to be a violation of his due process rights).

Another issue raised by prejudicial pretrial publicity, the potential conflict between freedom of the press under the first amendment and the due process right to a fair trial, is outside the scope of this Comment. For a discussion of this issue, see ABA COMM. ON FAIR TRIAL & FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1966) [hereinafter cited as REARDON REPORT]; Sturm, *Judicial Control of Pretrial and Trial Publicity: A Reexamination of the Applicable Constitutional Standards*, 6 GOLDEN GATE U.L. REV. 101 (1975).

4. Maine v. Superior Court, 68 Cal. 2d 375, 382-83, 438 P.2d 372, 376-77, 66 Cal. Rptr. 724, 728-29 (1968).

5. 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968).

6. *Id.* at 383, 438 P.2d at 377, 66 Cal. Rptr. at 729. *See* CAL. PENAL CODE § 1033(a) (West Supp. 1982).

7. 68 Cal. 2d at 384 n.9, 438 P.2d at 378 n.9, 66 Cal. Rptr. at 730 n.9.

This Comment demonstrates that the California courts have departed from the *Maine* reasonable likelihood standard and argues that that standard should be restored. The Comment is divided into three parts. Part I discusses the development and characteristics of the state and federal standards for change of venue. Part II shows that California courts have retreated from the reasonable likelihood standard by applying a more stringent standard for postconviction review, and by adopting, in effect, the federal standard for change of venue appellate review. Part III presents two alternative reform proposals for restoration of the reasonable likelihood standard.

I
LEGAL BACKGROUND

This Part reviews change of venue precedent. Section A discusses the alternative federal tests for determining whether a state court's denial of a change of venue motion is consistent with due process. Section B traces the development of the California reasonable likelihood test for evaluating a change of venue ruling.

A. Alternative Federal Tests for Change of Venue

Under the United States Constitution, a defendant may challenge a state court's denial of his change of venue motion by showing that prejudicial publicity in the original venue has produced either "inherent prejudice" or "actual prejudice." The federal Constitution requires a state court to grant a change of venue whenever either of these tests is satisfied. Failure to grant a change of venue may result in reversal of the conviction or a successful habeas corpus petition.[8]

While both federal tests are primarily concerned with the effect of prejudicial publicity, the tests differ with respect to the evidence used to determine whether an impartial jury can be found. The "actual prejudice" test focuses on the results of voir dire.[9] If the defendant can

8. *See* People v. Tidwell, 3 Cal. 3d 62, 76, 473 P.2d 748, 758, 89 Cal. Rptr. 44, 54 (1970). A criminal defendant convicted in state court may seek federal court review of the denial of his change of venue motion. Pursuant to 28 U.S.C. § 2254 (1976), he may do so in a petition for a writ of habeas corpus, on the basis that his constitutional due process right to a trial by impartial jurors was violated.

9. The courts' application of the actual prejudice test is not always confined to the results of voir dire. In Murphy v. Florida, 421 U.S. 794 (1975), the Supreme Court suggested it was employing a "totality of circumstances" test that included consideration of "general community atmosphere." *Id.* at 802. *See* Goldsmith, *Due Process Denial Not Presumed When Knowledge of Past Misdeeds Is Possessed By The Jury: "Totality of Circumstances" Test Will Be Used to Determine Fairness of Trial*—Murphy v. Florida, *421 U.S. 794 (1975)*, 13 AM. CRIM. L. REV. 285, 289 (1975); Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981) (court considered voir dire in context of inherent prejudice test, rather than actual prejudice test). The actual prejudice test, as analyzed in this Comment, is defined as a test based on the results of voir dire. According to the United States

show, through voir dire, that any of the jurors held a sufficiently strong opinion about the defendant's guilt or innocence prior to trial, a change of venue should be granted.[10] Alternatively, if pretrial or trial publicity is sufficiently prejudicial and widespread, a change of venue will be granted on the grounds that "inherent prejudice" exists, irrespective of the results of voir dire.

1. Development of the Actual Prejudice Test

a. Origins of the Actual Prejudice Test

The requirement that jurors be impartial is of venerable origin.[11] The actual prejudice test is derived from cases establishing the standard for challenging jurors for cause on the grounds of partiality. As stated in *Reynolds v. United States*,[12] a juror is excused for partiality when "the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality."[13] A positive and decided opinion is enough, while a light impression is insufficient. This standard has been used to determine whether pretrial publicity has prejudiced jurors so much that a change of venue or continuance is necessary to ensure a fair trial.[14]

b. The Issue of Actual Prejudice in Change of Venue Rulings

In *Irvin v. Dowd*,[15] the United States Supreme Court held that as long as a juror could render a verdict based on the evidence presented, it was of no consequence that he had a preconceived opinion concerning the defendant's guilt. *Irvin* is the seminal case applying the actual prejudice standard to review of change of venue motions. Its test re-

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Supreme Court, such a test cannot be satisfied unless the the defendant establishes "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality . . . ." Murphy v. Florida, 421 U.S. at 800; Irvin v. Dowd, 366 U.S. at 723.

10. *See* Irvin v. Dowd, 366 U.S. 717 (1961).

11. The requirement that jurors be impartial is of ancient vintage. Lord Coke observed that jurors must be "indifferent" before hearing evidence of defendant's guilt at trial. 1 LORD COKE, COMMENTARY ON LITTLETON § 155b (Hargrave & Butler ed. 1823).

Before a juror would be cousidered partial, however, his opinion had to be founded on "some evidence." A juror with a "mere impression" not founded on some evidence was impartial. On the other hand, a juror with "strong and deep impressions which close the mind against the testimony that may be offered in opposition to them" was considered partial. Reynolds v. United States, 98 U.S. 145, 155 (1878).

12. 98 U.S. 145 (1878).

13. *Id.* at 156.

14. In Stroble v. California, 343 U.S. 181 (1952), the United States Supreme Court first addressed the issue of whether inflammatory pretrial publicity made a fair trial impossible. The Court concluded that the defendant had made no affirmative showing that community prejudice or jury prejudice existed, or that the jury's deliberations were affected. *Id.* at 195.

15. 366 U.S. 717 (1961).

quires evidence of actual prejudice caused by pretrial publicity.[16]

Although the *Irvin* Court declined to establish a constitutional standard for judging jurors' impartiality in the change of venue context, and directed instead that the issue be decided on a case-by-case basis,[17] the Court did provide some guidance. The Court apparently equated an impartial juror with Lord Coke's "indifferent" juror,[18] but made it clear that the requirement of indifferent jurors did not mean that potential jurors had to be completely ignorant about the case.[19] It stated that the "mere existence of any preconceived notions as to the guilt or innocence of the accused, without more, [would not] rebut the presumption of prospective juror's impartiality . . . ."[20] If a juror can lay aside any preconceived opinion about the defendant's guilt and render a verdict based on evidence presented at trial, the presumption of impartiality should be upheld.[21] To do otherwise, the Court asserted, would be to establish an impossible standard. Citing *Reynolds*, the Court stated that when one challenges the denial of a change of venue motion, one bears the burden of demonstrating "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."[22]

2. *Development of the Inherent Prejudice Test*

a. *Origins of the Standard*

The focus and burden of proof underlying the inherent prejudice test flow from its rationale. The rationale underlying the inherent prejudice test is that the circumstances surrounding the trial may be so inflammatory that the defendant cannot obtain a fair trial, even if twelve jurors declare they can be impartial. Thus, the inherent prejudice test focuses on the circumstances and publicity of a given case. If the requirements are met, the trial court must conclude, without considering the results of voir dire, that a presumption of prejudice has arisen.[23] Consequently, the burden of proof required under the inherent prejudice test is more onerous than that of the actual prejudice test; the defendant must show circumstances so egregious that the court

16. The *Irvin* Court based its holding on fourteenth amendment due process grounds alone; the sixth amendment right to jury trial had not yet been incorporated via the fourteenth amendment's due process clause. *Id.* at 721-22.

17. *Id.* at 724-25.

18. "He that is of a jury, must be . . . one that hath such freedome of mind as he stands indifferent as he stands unsworne." 1 LORD COKE, *supra* note 11.

19. 366 U.S. at 722-23.

20. *Id.* at 723.

21. *Id.*

22. *Id.*

23. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975); Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

need not even pause to consider voir dire.[24]

Sheppard v. Maxwell[25] was the first case to suggest that a reasonable likelihood standard for evaluating pretrial publicity might be required under the federal Constitution.[26] In *Sheppard*, there was virulent and incriminating publicity about the defendant before and during the trial. The trial itself was conducted in a carnival atmosphere pervaded by newspaper and television reporters.[27] Language in the *Sheppard* opinion suggested that a liberal standard should be applied in evaluating the potential prejudice resulting from media coverage. Specifically, the *Sheppard* Court stated that "where there is a *reasonable likelihood* that prejudicial publicity prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."[28] Thus, *Sheppard* declared that a reasonable likelihood standard was needed to protect the defendant's right to a fair trial. Yet by not holding that reasonable likelihood was constitutionally mandated, the Court left some uncertainty as to the standard state courts must use in considering motions for change of venue.[29]

b. The Current Inherent Prejudice Standard

The confusion caused by *Sheppard* was, at least at the federal level, temporary. In *Murphy v. Florida*,[30] the Supreme Court declined to follow, and did not even discuss, the reasonable likelihood standard suggested in *Sheppard*. Instead, *Murphy* clarified the meaning of *Sheppard* by characterizing it as a case in which the level of publicity both before and during trial was so prejudicial as to create a conclusive presumption of prejudice,[31] which the Court called "inherent prejudice." Thus, *Murphy* made it clear that the reasonable likelihood standard hinted at in *Sheppard* is not required by the federal Constitution. In fact, although it did not purport to apply the inherent prejudice test, but rather a reasonable likelihood test, *Sheppard* is one of three cases that have subsequently been characterized as examples of inherent prejudice.[32]

Murphy has come to be understood as clarifying that there are two

24. *See infra* text accompanying notes 70-71.
25. 384 U.S. 333 (1966).
26. *Id.* at 362-63.
27. *Id.* at 358.
28. *Id.* at 363.
29. *See infra* text accompanying notes 45-48.
30. 421 U.S. 794 (1975).
31. *Id.* at 798-99.
32. People v. Hillery, 10 Cal. 3d 897, 900, 519 P.2d 572, 574, 112 Cal. Rptr. 524, 526 (1974); People v. Manson, 61 Cal. App. 3d 102, 183, 132 Cal. Rptr. 265, 313-14 (2d Dist. 1976), *cert. denied*, 430 U.S. 986 (1977).

alternative grounds upon which a federal court may overturn a state court conviction when a change of venue has been denied. One alternative is a showing of actual prejudice, as illustrated by *Irvin*.[33] Failing that, a conviction may be reversed if the kind of inherent prejudice exemplified in *Sheppard* can be demonstrated.[34] Thus, *Murphy* dispels the confusion caused by *Sheppard* by making it clear that the two alternative federal tests are the actual and inherent prejudice standards—the Supreme Court appears to have abandoned the reasonable likelihood standard in the context of constitutional review of state court change of venue rulings.

B. The California Reasonable Likelihood Standard

*1. The Pre-*Maine *Change of Venue Standard*

Prior to *Maine v. Superior Court*,[35] the California Penal Code gave trial courts the discretion to grant a change of venue "on the ground that a fair and impartial trial cannot be had in the county."[36] Under the controlling case law, the California appellate courts employed an "abuse of discretion" test when reviewing appeals of change of venue rulings made pursuant to this standard.[37] To prevail on appeal, the defendant was required to show "prejudicial error in the denial of a

33. 366 U.S. at 723.

34. The *Murphy* Court concluded that the petitioner had "failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process . . . permits an inference of actual prejudice." 421 U.S. at 803. In Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981), for example, the Fifth Circuit affirmed the denial of a habeas corpus petition and rejected the argument that the petitioner was denied a fair trial because the trial court had denied his motion for a change of venue. Relying on language in *Irvin* and *Murphy*, the court stated:

> [I]n order to establish a deprivation of due process, [the defendant] must show that potential jurors were actually prejudiced by the pretrial publicity . . . . However, when the defendant proffers evidence of pervasive community prejudice in the form of highly inflammatory publicity or intensive media coverage, prejudice is presumed and there is no further duty to establish actual bias.

Id. at 1051. Other federal courts have articulated the standard in similar fashion. *See* Brinlee v. Crisp, 608 F.2d 839, 846 (10th Cir. 1979) ("We feel that the record does not demonstrate that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice."), *cert. denied*, 444 U.S. 1047 (1980); Haney v. Rose, 642 F.2d 1055, 1060 (6th Cir.) ("[W]e cannot conclude that Haney did not receive a fair trial. He has failed to show that the setting of the trial was inherently prejudicial or that the [jurors' knowledge] permits an inference of actual prejudice."), *cert. denied*, 452 U.S. 908 (1981). *See also* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 4.02, at 88-89 (3d ed. 1977) (discussion of the alternate federal tests for actual and inherent prejudice).

35. 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968).

36. CAL. PENAL CODE § 1033 (West 1970), *repealed by* Act of Nov. 12, 1971, ch. 1476, § 2, 1971 Cal. Stat. 2915.

37. *See, e.g.*, People v. McKay, 37 Cal. 2d 792, 793, 236 P.2d 145, 147 (1951); People v. Modesto, 66 Cal. 2d 695, 705, 427 P.2d 788, 794, 59 Cal. Rptr. 124, 130, *cert. denied*, 389 U.S 1009 (1967). Prior to *Maine*, California appellate courts had reversed only four out of 66 convictions involving the change of venue issue. *See Maine*, 68 Cal. 2d at 382 n.6, 438 P.2d at 377 n.6, 66 Cal. Rptr. at 729 n.6.

change of venue."[38]

The suggestion in *Sheppard v. Maxwell*[39] of a reasonable likelihood standard threw the California standard for appellate review of change of venue motions into question. In *People v. Modesto*,[40] the defendant argued that, under *Sheppard*, his conviction had to be be reversed because of prejudicial pretrial publicity. Declining to adopt the *Sheppard* reasonable likelihood standard, the California Supreme Court observed that *Sheppard* required a change of venue only where there was evidence of prejudicial publicity both before and during trial.[41] Because *Modesto* involved only pretrial publicity, *Sheppard* was deemed inapposite. Thus, the court concluded, *Sheppard* did not require a change of venue on the *Modesto* facts.

2. *Adoption of the Reasonable Likelihood Standard*

Shortly therafter, however, in *Maine v. Superior Court*,[42] the California Supreme Court overruled *Modesto* and adopted *Sheppard*'s reasonable likelihood standard. *Maine* held that motions for change of venue in criminal trials should be granted if the reviewing court finds that "because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had."[43] This standard was held to be available on both pretrial and postconviction appeals of change of venue rulings.[44]

a. *Rationale for the Reasonable Likelihood Standard*

Although it did not tie the reasonable likelihood standard to either the federal or the state constitution, *Maine* did imply that the reasonable likelihood standard is mandated by the defendant's right to a trial by a fair and impartial jury. The California Supreme Court stated that "[i]n applying this standard . . . [we effectuate the requirement] that every person accused of crime is entitled to a trial by a fair and impartial jury."[45] The court also stated that the *Sheppard* sensitivity to potential prejudice made the adoption of the reasonable likelihood standard "imperative,"[46] but that granting a change of venue on the

38. 66 Cal. 2d at 705 n.2, 427 P.2d at 795 n.2, 59 Cal. Rptr at 124 n.2.

39. 384 U.S. 333 (1966).

40. 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967), *overruled in* Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968).

41. *Id.* at 705-06 n.2, 427 P.2d at 795 n.2, 59 Cal. Rptr. at 131 n.2.

42. 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968).

43. *Id.* at 383, 438 P.2d at 377, 66 Cal. Rptr. at 729 (quoting REARDON REPORT, *supra* note 3, at 119).

44. 68 Cal. 2d at 384 n.9, 438 P.2d at 378 n.9, 66 Cal. Rptr. at 730 n.9.

45. *Id.* at 384, 438 P.2d at 378, 66 Cal. Rptr. at 730.

46. *Id.*

basis of pretrial publicity alone was not required.[47]

Maine did not hold the reasonable likelihood standard to be constitutionally mandated under either the federal or state constitution.[48] *Maine* did, however, provide three identifiable policy justifications for the standard. First, and most importantly, the California Supreme Court believed it too onerous to require a defendant to prove actual prejudice on the part of individual jurors.[49] The court reasoned that it is almost impossible to assess the precise extent of a juror's prejudice; it therefore sought to protect a defendant from the situation in which a juror unconsciously harbors bias, yet maintains that he or she has not formed an opinion on the case.[50] Thus, the court viewed the reasonable likelihood standard, which errs on the side of caution, as necessary to account for the potential of hidden bias.

Second, the *Maine* court sought to eliminate the procedural dilemma that defense counsel faced under the previous abuse of discretion standard. Under that standard, if a motion for change of venue were denied, counsel could not appeal the ruling until after conviction. Counsel was therefore forced to preserve a record for the appellate court by lodging numerous objections to potential jurors during voir dire and exhausting defensive peremptory challenges. Both actions, however, could harm the defendant's case. Repeated objections to jurors were likely to alienate the trial judge and potential jurors. Exhausting peremptory challenges forced counsel to predict whether jurors seated after he had used up his peremptories would be more biased than those he had previously challenged.[51] The reasonable likelihood standard alleviated these pressures on defense counsel by liberalizing the standard under which change of venue would be granted.

Finally, the *Maine* court saw the opportunity for pretrial appellate

47. *Id.* at 383, 438 P.2d at 378, 66 Cal. Rptr. at 730.

48. *Cf.* Burton v. United States, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of a case.").

49. 68 Cal. 2d at 382-83, 438 P.2d at 377, 66 Cal. Rptr. at 729. *See* A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 103 (1967); Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to Be Impartial; A Plea for Reform*, 38 S. CAL. L. REV. 672 (1965).

This reasoning was amplified in Judge Friedman's opinion in Corona v. Superior Court, 24 Cal. App. 3d 872, 877-78, 101 Cal. Rptr. 411, 415 (3d Dist. 1972):

> When community attention is focused upon the suspect of a spectacular crime, the news media's dissemination of incriminatory circumstances sharply threatens the integrity of the coming trial. . . .
>
> The goal of a fair trial in the locality of the crime is practicably unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media.

50. 68 Cal. 2d at 380-81, 438 P.2d at 375-76, 66 Cal. Rptr. at 727-28; REARDON REPORT, *supra* note 3, at 127.

51. *Id.*

review as a safeguard against external pressures that might influence the trial judge to deny a change of venue motion. The court noted that local pressure on the trial judge could compromise the defendant's right to a fair and impartial trial by creating an incentive to deny a transfer of the case.[52] The *Maine* decision sought to alleviate this problem by creating the right to seek a pretrial writ of mandate, which would provide a defendant with an independent evaluation of the facts by a tribunal immune from local political and financial pressures.[53]

b. Reasonable Likelihood of Prejudice Standard Defined

The reasonable likelihood standard describes the standard of proof that a defendant must meet in order to show prejudice resulting from denial of a change of venue. Although the precise amount of evidence necessary to show a reasonable likelihood of prejudice is uncertain, the required showing is less than by a preponderance of the evidence. Following *Maine*, in *People v. Tidwell*,[54] the California Supreme Court said in dictum that the reasonable likelihood standard required a showing less onerous than a preponderance of the circumstances.[55] Later, in *Frazier v. Superior Court*,[56] the supreme court stated that the reasonable likelihood of prejudice does not mean that "prejudice must be 'more probable than not.' "[57] Rather, a change of venue should be granted "whenever a defendant has shown *even* a 'reasonable likelihood' that he will not receive a fair trial."[58]

c. Mechanics of Applying the Reasonable Likelihood Standard

Along with its mandate that California courts focus on the publicity and circumstances surrounding the trial, *Maine* gave the courts guidance in implementing the reasonable likelihood standard. The supreme court held that the abuse of discretion standard was no longer adequate after *Sheppard v. Maxwell*.[59] Rather, to determine whether there was a reasonable likelihood of prejudice in a given case, *Maine* imposed a duty on the appellate courts to make an independent evaluation of the circumstances surrounding the trial.[60] This required a de novo review of evidence relating to the nature, frequency, and timing

52. 68 Cal. 2d at 386-87, 438 P.2d at 379-80, 66 Cal. Rptr. at 731-32.

53. *E.g.*, Frazier v. Superior Court, 5 Cal. 3d 287, 292, 486 P.2d 694, 697-98, 95 Cal. Rptr. 798, 801-02 (1971) (court noted that some of the pretrial publicity had focused on the fact that the local county would have had to bear the additional costs resulting from a change of venue).

54. 3 Cal. 3d 62, 473 P.2d 748, 89 Cal. Rptr. 44 (1970).

55. *Id.* at 69, 473 P.2d at 753, 89 Cal. Rptr. at 49.

56. 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971).

57. *Id.* at 294, 486 P.2d at 699, 95 Cal. Rptr. at 803.

58. *Id.* at 294-95, 486 P.2d at 699, 95 Cal. Rptr. at 803 (emphasis in original).

59. *Maine*, 68 Cal. 2d at 382, 438 P.2d at 376, 66 Cal. Rptr. at 728.

60. *Id.*

of publicity and its effect on the community.[61] Where the exhibits, opinion polls, and affidavits relating to prejudicial publicity established a reasonable likelihood of prejudice, the court was to grant the defendant's motion for a change of venue or continuance.[62]

Since *Maine*, the California courts have identified a number of circumstances favoring a change of venue in given cases. Initially, courts found that certain circumstances, such as sensational crimes, prominent victims, or small communities supported a change of venue in individual cases. This case-by-case analysis of the circumstances later evolved into a rather rigid checklist of factors that courts consider in change of venue cases. The most commonly cited factors are: 1) the nature and gravity of the crime charged; 2) the nature, extent, and timing of the publicity; 3) the relative prominence of the victim; 4) the prominence of the defendant; and 5) the size of the local county.[63]

Maine provided for limited pretrial review of change of venue rulings. If the trial court denied a change of venue motion, the defendant could seek to have the decision reviewed by a state appellate court prior to trial, but only if such review was sought prior to the jury's impanelment. Pretrial appellate review would be sought by a writ of mandate.[64] To avoid impairment of judicial efficiency through un-

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61. *Id.* at 383, 438 P.2d at 377, 66 Cal. Rptr. at 729.

62. *Id.*

63. *See, e.g.*, People v. Martinez, 82 Cal. App. 3d, 1, 13, 147 Cal. Rptr. 208, 215 (5th Dist. 1978); People v. Witt, 53 Cal. App. 3d 154, 170, 125 Cal. Rptr. 653, 664 (5th Dist. 1975), *cert. denied*, 425 U.S. 916 (1976); *In re* Miller, 33 Cal. App. 3d 1005, 1011, 109 Cal. Rptr. 648, 652 (5th Dist. 1973). Some courts employ more than the five factors mentioned. *See* People v. Bicknell, 114 Cal. App. 3d 388 (1st Dist. 1980), *officially depublished pursuant to* CAL. CT. R. 976(d) (West 1982).

64. 68 Cal. 2d at 380-81, 438 P.2d at 375-76, 66 Cal. Rptr. at 727-28. Application for a writ of mandate is a commonly used procedural mechanism for seeking review of trial court rulings prior to final judgment. A writ of mandate will be issued where the trial court has abused its discretion. *Id.* at 381, 438 P.2d at 376, 66 Cal. Rptr. at 728.

Prior to *Maine*, a pretrial writ of mandate to compel change of venue was allowed in civil cases. CAL. CIV. PROC. CODE § 400 (West 1973) provides:

> When an order is made by the superior court granting or denying a motion to change the place of trial, the party aggrieved by such order may, within 10 days after service of a written notice of the order, or within such additional time not exceeding 20 days as the court may within the original 10 days allow, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring trial of the case in the proper court. The petitioner shall file a copy of such petition in the trial court immediately after the petition is filed in the court of appeal. The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final. The clerk of the court of appeal shall file with the clerk of the trial court, a copy of any final order or final judgment immediately after such order or judgment becomes final.

Pretrial mandate proceedings were used in criminal proceedings as well. The *Maine* court specifically referred to a number of such pretrial circumstances, including a writ of mandate to:

> require a trial court to give a defendant before trial an opportunity to inspect and copy statements made by him to law enforcement officers and to have the benefit of discovery of other prosecution evidence . . . [;] to compel a trial court to permit hypnotic examina-

timely delay, however, appellate courts would review a trial court ruling before trial only if the petition for review was made prior to impanelment of the jury.[65] This restriction on the pretrial remedy prevents an appellate court from considering before trial any evidence of prejudice revealed by voir dire. Thus, the only point at which the appellate courts could consider evidence of bias uncovered by voir dire would be during postconviction review.

Maine and later cases made it clear that the reasonable likelihood standard applied not only to pretrial but also to postconviction review.[66] If a motion for a change of venue was not granted when the reasonable likelihood standard was met, any resulting conviction was reversible upon the appellate court's finding that the prejudicial pretrial publicity created the reasonable likelihood that the defendant did not receive a fair trial.[67]

II

RETREAT FROM THE REASONABLE LIKELIHOOD STANDARD

This Part first argues that the state and federal standards for change of venue are inconsistent with one another. It then shows that, despite *Maine*'s directive that the reasonable likelihood standard be applied to both pretrial and postconviction appeals, courts now appear to be applying the more onerous federal standard to postconviction appeals. Finally, it analyzes the problems caused by this heavier postconviction burden.

A. Inconsistency Between State and Federal Standards

Neither the inherent prejudice test nor the actual prejudice test of the federal standard can be reconciled with California's reasonable likelihood standard. Because it does not require a showing of actual prejudice, the reasonable likelihood standard is less onerous than the federal actual prejudice standard.[68] Indeed, one of the primary rationales for adoption of the reasonable likelihood standard was to account for any hidden biases harbored by jurors who claim impartiality.[69]

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tion of a defendant in order to adequately prepare for trial; to compel dismissal of a criminal action not brought to trial within the time required by law; to compel dismissal where a defendant has been denied the constitutional right to a speedy trial; and . . . to require transfer of a case from one conrt to another.

Maine, 68 Cal. 2d at 378, 438 P.2d at 374, 66 Cal. Rptr. at 726 (citations omitted).

65. *Id.* at 381, 438 P.2d at 376, 66 Cal. Rptr. at 728.

66. *Id.* at 384 n.9, 438 P.2d at 378 n.9, 66 Cal. Rptr. at 730 n.9.

67. *See, e.g.*, People v. Tidwell, 3 Cal. 3d 62, 69, 473 P.2d 748, 753, 89 Cal. Rptr. 44, 49 (1970).

68. *See supra* text accompanying notes 49-50.

69. *Maine*, 68 Cal. 2d at 383, 438 P.2d at 377, 66 Cal. Rptr. at 729. *See supra* text accompanying notes 49-50.

Similarly, the federal inherent prejudice standard forces a defendant challenging a conviction on the grounds of prejudicial publicity to make a greater showing than that required under the reasonable likelihood standard. Inherent prejudice has been found in cases "entirely lacking in the solemnity and sobriety to which a defendant is entitled."[70] Under the inherent prejudice test, the defendant must show "egregious" trial circumstances and publicity suggesting either "identifiable prejudice to the accused" or "such a probability that prejudice will result that it is deemed inherently lacking in due process."[71] The showing required under the reasonable likelihood standard need not rise to this level. The defendant need only show the possibility of prejudice by less than a preponderance of the circumstances; in other words, he need not even show that prejudice is more probable than not.[72]

B. Implicit Adoption of the Federal Standard in Postconviction Review

Although the federal and state standards cannot be reconciled, no California court has recognized this inconsistency, and later cases have attempted to reconcile the two standards. *Murphy v. Florida*[73] made it apparent that the *Maine* reasonable likelihood standard was not mandated by the federal Constitution. The most recent postconviction case decided by the California Supreme Court, *People v. Harris*,[74] which purported to apply the reasonable likelihood standard, actually exemplifies the California courts' retreat from that standard. It can be understood only if viewed as applying the more stringent federal standard.

1. Initial Retreat from Maine

Although later cases ostensibly accepted *Maine*'s admonition that the reasonable likelihood standard be applied to both pretrial and postconviction review, soon after *Maine* the California courts nevertheless began to imply that a greater showing would be required on postconviction review. In *Fain v. Superior Court*,[75] in which the defendant appealed, before trial, the court's denial of his change of venue motion, the California Supreme Court expressed a strong preference for the

70. Murphy v. Florida, 421 U.S. at 799.

71. Sheppard v. Maxwell, 384 U.S. 333, 352 (1966); Estes v. Texas, 381 U.S. 532, 542-43 (1965). *See also* Goldsmith, *supra* note 9, at 295.

72. *See supra* text accompanying notes 54-58.

73. 421 U.S. 794 (1975).

74. 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981).

75. 2 Cal. 3d 46, 465 P.2d 23, 84 Cal. Rptr. 135 (1970).

pretrial remedy over postconviction appeal.[76] In holding that there was a reasonable likelihood of prejudice, the court found it important that the case at bar was a pretrial application for writ of mandate directing a change of venue, and not a postconviction appeal.[77] Thus, the court implied that it would be more receptive to pretrial appeals.

Shortly thereafter, in *People v. Quinlan*,[78] the California Court of Appeal suggested that a greater showing would be required on postconviction review. Although the court stated that the reasonable likelihood standard would apply to appeals both before and after trial, it also said that "it does not follow that the showing required to invoke the standard will necessarily be the same in both procedural situations."[79] The *Quinlan* court reasoned that, while doubts might be resolved in favor of the defendant on the pretrial appeal, if the defendant elected to await trial and conviction, he "cannot complain if inferences of possible prejudice available on a semisilent record have been refuted by the actualities of voir dire and of trial."[80]

The California Supreme Court, too, began to take note of the defendant's failure to seek a pretrial writ of mandate. In *People v. Sommerhalder*,[81] the court's analysis suggested that the court did not find a reasonable likelihood of prejudice in part because defense counsel had not exhausted peremptory challenges or sought a pretrial writ of mandate.[82] Thus, although earlier cases purported to apply a reasonable likelihood standard on postconviction review, subsequent cases evidenced an unwillingness to do so.

2. *Retreat to the Federal Standard After* Murphy

a. *California's Appellate Courts and the Federal Standard*

People v. Manson[83] is California's most detailed attempt to explain the interrelationship between the federal and state standards for criminal change of venue. *Manson*, decided soon after *Murphy v. Florida*,[84] was the first California case to discuss the federal standard in the postconviction setting.

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76. *Id.* at 54, 465 P.2d at 27-28, 84 Cal. Rptr. at 139-40.

77. *Id.*

78. 8 Cal. App. 3d 1063, 88 Cal. Rptr. 125 (2d Dist. 1970).

79. *Id.* at 1069, 88 Cal. Rptr. at 129.

80. *Id.* at 1070, 88 Cal. Rptr. at 129-30. Subsequent intermediate appellate court decisions have adopted the *Quinlan* rationale for postconviction review. *See, e.g.*, People v. Jurado, 115 Cal. App. 3d 470, 484, 171 Cal. Rptr. 509, 515 (5th Dist. 1981); People v. Caldwell, 102 Cal. App. 3d 461, 471, 162 Cal. Rptr. 397, 402 (1st Dist. 1980).

81. 9 Cal. 3d 290, 508 P.2d 289, 107 Cal. Rptr. 289 (1973).

82. *Id.* at 303, 508 P.2d at 297-98, 107 Cal. Rptr. at 297-98.

83. 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (2d Dist. 1976), *cert. denied*, 430 U.S. 986 (1977).

84. 421 U.S. 794 (1975).

The *Manson* court mistakenly equated the state and the federal standards. It explicitly acknowledged that the *Maine* reasonable likelihood standard applied to postconviction review and did not require a showing of actual prejudice.[85] Nevertheless, the *Manson* court employed the more onerous two-part federal standard. First, it described the inherent prejudice test as requiring "an apparent and flagrant departure from fundamental due process."[86] It found no such flagrant departure. Next, the court characterized the federal actual prejudice test as a "totality of circumstances" test,[87] and found that this test was not satisfied. The court apparently reasoned that, because the defendant had not shown prejudice under either of the federal tests, there was no reasonable likelihood of prejudice.[88] Thus, the *Manson* court must have equated the state standard with the federal standards, without recognizing that the two are inconsistent. Indeed, the ultimate inquiry under what the court termed a "totality of circumstances" approach is whether one can show actual prejudice.[89] Such a showing is not required under the reasonable likelihood standard.[90]

Subsequent appellate court decisions did not recognize that *Manson* applied a standard inconsistent with the reasonable likelihood standard. The appellate courts ostensibly continued to apply the reasonable likelihood standard on postconviction review.[91]

b. People v. Harris: *The California Supreme Court and the Federal Standard*

In *People v. Harris*,[92] the California Supreme Court purported to apply the reasonable likelihood standard but actually abandoned that standard for postconviction review. As is true of *Manson*, the *Harris*

85. 62 Cal. App. 3d at 184, 132 Cal. Rptr. at 314.

86. *Id.* at 185, 132 Cal. Rptr. at 315.

87. *Id.* at 186-87, 132 Cal. Rptr. at 316. The term "totality of circumstances" is apparently derived from the *Murphy* Court's statement that, having failed to find an inherently prejudicial atmosphere like that in Estes v. Texas, 381 U.S. 532 (1964) and Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court would look for "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Murphy*, 421 U.S. at 799. The *Murphy* Court thus went on to consider the record to ascertain if there was any actual prejudice to be found in the record. *See id.* at 800-02.

88. *See supra* note 87.

89. *See supra* notes 33-34 and accompanying text.

90. This equation of the two standards is not explicit in *Manson*. The court concluded that "we note the absence of either 'prejudice to the appellants from the publicity [or] a probability thereof.'" 61 Cal. App. 3d at 192, 132 Cal. Rptr. at 319 (citations omitted).

91. *See, e.g.*, People v. Jurado, 115 Cal. App. 3d 470, 483, 171 Cal. Rptr. 509, 514 (5th Dist. 1981); People v. Caldwell, 102 Cal. App. 3d 461, 470, 162 Cal Rptr. 397, 402 (1st Dist. 1980); People v. Martinez, 82 Cal. App. 3d 1, 13, 147 Cal. Rptr. 208, 215 (5th Dist. 1978).

92. 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679, *cert. denied*, 454 U.S. 882 (1981).

court's analysis can be explained only by concluding that the court applied the *Murphy* federal standard for postconviction review.

The facts surrounding the *Harris* case strongly indicated a reasonable likelihood of prejudice. The press in San Diego, where the murders occurred, extensively publicized the crime and the charges against Harris. The community was aware that Harris was accused of shooting two teenage boys at such close range that fragments of flesh adhered to his gun; it knew that after killing the boys, he ate their food and laughed about the murders.[93] Moreover, the press gave much attention to a confession by Harris' accomplice, his brother, who expressed horror over the brutality of the killings.[94]

The media exhaustively publicized the facts of *Harris*. Cartoons and editorials portrayed the defendant as "subhuman" or as human sewage.[95] The press gave extensive attention to the prosecution's decision to seek the death penalty.[96] Editorials overwhelmingly favored capital punishment.[97] Public opinion polls conducted prior to the trial demonstrated that the publicity had a substantial prejudicial impact. One pollster commented that he had never encountered higher public awareness of a particular crime.[98] Even the prosecution publicly admitted that the adverse publicity might make it difficult to impanel an impartial jury.[99]

This high level of awareness became evident during voir dire. At least ninety percent of the jurors admitted exposure to pretrial publicity or discussions about the case. Several veniremen admitted to strong feelings about the case. Veniremen who might have been unaware of the publicity, or who at least did not have preconceived notions about the defendant's guilt, were exposed to discussions about his guilt or innocence in the jury room.[100]

i. Use of a Heavier Burden for Postconviction Appeal. Although the facts of *Harris* provide manifest evidence of pretrial prejudice, the court did not find a reasonable likelihood of prejudice, reasoning that the large population of San Diego County made prejudice unlikely.[101] In arriving at its decision, the *Harris* court considered five factors used in previous pretrial cases.[102] It recognized that the nature of the crime

93. *Id.* at 971, 623 P.2d at 260, 171 Cal. Rptr. at 699 (Bird, C.J., dissenting).
94. *Id.* at 966, 623 P.2d at 257, 171 Cal. Rptr. at 696 (Bird, C.J., dissenting).
95. *Id.* at 969, 623 P.2d at 259, 171 Cal. Rptr. at 698 (Bird, C.J., dissenting).
96. *Id.* at 968, 623 P.2d at 258, 171 Cal. Rptr. at 697 (Bird, C.J., dissenting).
97. *Id.* at 967, 623 P.2d at 258, 171 Cal. Rptr. at 697 (Bird, C.J., dissenting).
98. *Id.* at 972, 623 P.2d at 261, 171 Cal. Rptr. at 699 (Bird, C.J., dissenting).
99. *Id.* at 968, 623 P.2d at 258, 171 Cal. Rptr. at 697 (Bird, C.J., dissenting).
100. *Id.* at 973, 623 P.2d at 261, 171 Cal. Rptr. at 700 (Bird, C.J., dissenting).
101. *Id.* at 949, 623 P.2d at 246, 171 Cal. Rptr. at 686 (opinion of the court).
102. *See supra* text accompanying note 63.

and the nature and extent of the publicity weighed in favor of finding a reasonable likelihood of prejudice, and that the prominence of the victim and defendant were "neutral" factors.[103] However, it felt that the large population of San Diego County made it likely that twelve impartial jurors could be found and thus "tipped the balance" against finding a reasonable likelihood of prejudice.[104]

It might be argued that the large population in *Harris* distinguishes it from cases with which *Harris* appears inconsistent, and that therefore the *Harris* court still applied the reasonable likelihood standard. The California Supreme Court's treatment of population as determinative[105] in *Harris*, however, is both inconsistent with precedent and without firm support in reason. Although the size of the community can mitigate the potential for prejudice,[106] even the case relied on by *Harris*—*People v. Manson*[107]—was explicit about considering population as only one element of the inquiry. *Manson* stated that in each case, "it must be shown how . . . population neutralizes or dilutes the impact of adverse publicity."[108] Despite its reliance on *Manson*, the *Harris* court failed to explain why a large population was determinative against a finding of prejudice.

Maine and subsequent pretrial cases made it clear that a large population is not determinative and does not foreclose the possibility of a reasonable likelihood of prejudice. In *Smith v. Superior Court*,[109] the facts were much less prejudicial than those in *Harris*, yet the court of appeal held that the pretrial publicity had created a reasonable likelihood of prejudice in Los Angeles County—the most populous county in California. The court reasoned that, in light of the "deluge" of pretrial publicity, even the largest county in California could be infected with prejudice.[110]

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103. 28 Cal. 3d at 948-49, 623 P.2d at 246, 171 Cal. Rptr. at 686.

104. *Id.*

105. It is unclear precisely what value the *Harris* court placed on each of the five factors it considered. Although the court refers to the prominence factors as "neutral," *id.*, it may have intended to suggest that these two factors weighed against a change of venue. If so, it apparently felt that the factors weighed three to two against a change of venue. Alternatively, the *Harris* court may have intended to drop the prominence factors from its analysis entirely. In this case, the court must have determined that community size outweighed the two factors supporting a change of venue—nature and extent of publicity, and nature and gravity of the crime.

106. *Maine*, 68 Cal. 2d at 385-86, 438 P.2d at 378-79, 66 Cal. Rptr. at 730-31.

107. 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (2d Dist. 1976), *cert. denied*, 430 U.S. 986 (1977), *cited in* People v. Harris, 28 Cal. 3d at 949, 623 P.2d at 247, 171 Cal. Rptr. at 686.

108. 61 Cal. App. 3d at 189, 132 Cal. Rptr. at 318 (quoting Lansdown v. Superior Court, 10 Cal. App. 3d 604, 609, 89 Cal. Rptr. 154, 157 (5th Dist. 1970)).

109. 276 Cal. App. 2d 145, 80 Cal. Rptr. 693 (2d Dist. 1969).

110. *Id.* at 150, 80 Cal. Rptr. at 697. The *Smith* court observed that "[c]arried to its logical conclusion, the district attorney's argument, if valid, would require that all motions for a change of venue in Los Angeles County must be denied because of its population, regardless of the amount of pretrial publicity which surrounds a notorious criminal case." *Id.*

Subsequently, in *Fain v. Superior Court*,[111] the California Supreme Court addressed the issue of whether the size of a community could eliminate the possibility of a reasonable likelihood of prejudice. Citing *Smith*,[112] the court observed that, despite the relatively large size of the community, the crime remained "a significant event in the community here involved."[113] Hence, it found a reasonable likelihood of prejudice and granted a change of venue.

The *Harris* court provided no reasoned support for its conclusion that population tipped the balance against finding a reasonable likelihood of prejudice. Although the court failed to consider the language from *Fain*, public opinion polls indicating an unprecedented level of community awareness of the crime and the shock and outrage expressed in the media are persuasive evidence that, despite San Diego's large population, the crime was a significant event in the community. Therefore, the size of the community in *Harris* does not adequately explain why the court found that no reasonable likelihood of prejudice arose from the pretrial publicity. Courts in pretrial cases involving similar crimes with similar levels of pretrial publicity have been more sensitive to the potential for prejudice than the *Harris* court was, and have granted writs requiring change of venue.[114]

Harris, therefore, reached a result that is contrary to precedent. *Harris*' use of the population factor does not fairly distinguish it from previous cases. The *Harris* court's analysis can only be explained as imposing a more onerous standard.

ii. Implicit Adoption of the Federal Actual Prejudice Test. The *Harris* court found support for its decision by looking to voir dire and implicitly applying the federal actual prejudice test. The court said that voir dire had made it clear that the large population had "dissipated the impact of pretrial publicity . . . ."[115] Borrowing directly from the language of *Murphy* and *Irvin*, the majority stated that none of the controlling California precedent could be interpreted "[t]o hold that the mere existence of any preconceived notions as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality" where the juror can set aside that im-

111. 2 Cal. 3d 46, 465 P.2d 23, 84 Cal. Rptr. 135 (1970).

112. *Id.* at 52 n.1, 465 P.2d at 26 n.1, 84 Cal. Rptr. at 138 n.1.

113. *Id.* at 52, 465 P.2d at 26, 84 Cal. Rptr. at 138.

114. The recent California Supreme Court decision in Martinez v. Superior Court, 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981) is indicative of the greater sensitivity on pretrial review. The *Martinez* court ordered a change of venue, even though the court conceded that the publicity involved in that case was less inflammatory than that in *Harris*. *Id.* at 581, 629 P.2d at 505, 174 Cal. Rptr. at 704.

115. 28 Cal. 3d at 949, 623 P.2d at 247, 171 Cal. Rptr. at 686.

pression.[116] This attempt to reconcile post-*Maine* precedent with *Murphy* suggests that the court is applying an actual prejudice standard to postconviction review.[117] If the revelation of a juror's "mere" preconceptions of guilt or innocence is insufficient to show the reasonable likelihood of prejudice, then all the defendant can do is prove that those preconceived notions were so imbedded that the juror could not set them aside—in other words, that the juror was actually prejudiced. Thus, although the *Harris* majority continued to employ the term "reasonable likelihood," it in fact used the actual prejudice test.

iii. Implicit Adoption of the Inherent Prejudice Test? The *Harris* court did not clearly establish what showing would excuse the defendant from having to show actual prejudice through voir dire. The court is, of course, constrained by the federal constitutional requirement that a state court must reverse in cases of inherent prejudice.[118]

In fact, the majority's analysis, albeit perfunctory, does suggest that before voir dire will be disregarded, the defendant must show inherent prejudice. The court emphasized that California precedent was not inconsistent with the proposition that "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime . . . presumptively deprives the defendant of due process."[119] This language tracks the *Murphy* court's discussion of the inherent prejudice test. The analysis suggests that the court in *Harris* first inquired whether there was inherent prejudice. Finding none, it looked to see if there was actual prejudice. Thus, it appears that California courts have also adopted the inherent prejudice prong of the federal test, and that they will require a showing as great as inherent prejudice before they will disregard voir dire.

C. Problems Reintroduced by Use of the Federal Standard on Postconviction Review

This Comment has argued that the California courts have abandoned the *Maine* reasonable likelihood standard in postconviction review. Because no court has addressed the implications of this retreat, the standard has been discarded without discussion of the concerns that

116. *Id.* (quoting Irvin v. Dowd, 366 U.S. 717, 722-23 (1961)).

117. The dissent in *Harris* attempted to reconcile the reasonable likelihood standard with United States Supreme Court venue rulings, particularly Murphy v. Florida, 421 U.S. 794 (1975). *See* 28 Cal. 3d at 980-81, 623 P.2d at 266, 171 Cal. Rptr. at 705 (Bird, C. J., dissenting). The dissent's analysis, however, falls prey to the same infirmity that plagues the majority's analysis—the *Murphy* opinion contains no support for the reasonable likelihood standard.

118. *See supra* text accompanying notes 30-34.

119. 28 Cal. 3d at 949, 623 P.2d at 247, 171 Cal. Rptr. at 686 (quoting Murphy v. Florida, 421 U.S. 794, 799 (1975)).

led to its adoption, to the detriment of the defendant's right to a fair trial.

1. Unfairness of the Actual Prejudice Standard.

The actual prejudice standard reintroduced in *Harris* is vulnerable to the same criticisms that motivated its replacement by the reasonable likelihood standard. It ignores the policy rationale underlying *Maine*, which was particularly concerned with the inability of voir dire to uncover hidden biases that jurors might consciously or unconsciously harbor.[120] The California Supreme Court adopted the reasonable likelihood standard to take into account any actual biases not discovered through voir dire. Although trial courts attempt to use empirical factors and public opinion polls as a measure of the level of bias, these indicators cannot be exact. Therefore, a reasonable likelihood standard, which allows a margin for any unrevealed bias, is necessary on pretrial and postconviction review to ensure that all circumstances surrounding the case, including voir dire, are assessed.

The *Harris* opinion's language is borrowed from *Irvin v. Dowd*.[121] *Irvin* requires the defendant to distinguish between "mere preconceived notions as to guilt or innocence" that the juror is capable of laying aside for purposes of trial, and the "actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."[122] The court in *Maine*, however, was apparently persuaded by commentators who argued that the *Irvin* actual prejudice test placed an unfair burden on the defendant.[123] *Maine* relied on authority disputing the notion that a juror should be presumed to be impartial simply because he could convincingly assert that he could lay aside his preconceived opinion.[124] Thus, the *Maine* court adopted the reasonable likelihood standard on the belief that individual jurors, and judges, could not accurately assess whether the juror harbored a bias against the defendant. Nevertheless, despite this policy rationale underlying *Maine*, the California Supreme Court has chosen to return to the actual prejudice test.

2. Reappearance of Procedural Dilemmas

Because the California Supreme Court has reinstated the actual prejudice standard for postconviction review, defense counsel will

120. 68 Cal. 2d at 380, 438 P.2d at 375-76, 66 Cal. Rptr. at 727-28.

121. 366 U.S. 717 (1961).

122. *Id.* at 723.

123. *See* Note, *Fair Trial v. Free Press: The Psychological Effect of Pre-trial Publicity on the Juror's Ability to be Impartial; A Plea For Reform*, 38 S. CAL. L. REV. 672 (1965); REARDON REPORT, *supra* note 3, at 126-27.

124. *See* Note, *supra* note 123, at 683-85.

again be faced with the procedural dilemmas *Maine* sought to eliminate.[125] Although a pretrial writ of mandate is now available, a court of appeal could still mistakenly deny the writ if defense counsel fails to compile a sufficiently impressive showing of empirical data prior to voir dire, or does not appeal the change of venue ruling and voir dire later reveals a great likelihood of prejudice. If confronted with a jury panel reasonably likely to be biased in evaluating the defendant's guilt or innocence, counsel is then in the same predicament he was in before *Maine*.[126] Under the inherent/actual prejudice postconviction standard, counsel will be forced to preserve for appeal a record demonstrating inherent or actual prejudice. Thus, as he did before *Maine*, counsel must risk alienating judge and jurors with lengthy questioning to ferret out statements showing bias. The *Maine* reasonable likelihood standard made such questioning unnecessary because the defendant was not required to show actual prejudice.

Moreover, defense counsel will be under pressure to exhaust peremptory challenges. Under *Quinlan*[127] and *Sommerhalder*,[128] it appears that counsel must exhaust peremptory challenges or risk a finding of waiver on the prejudice issue.[129] Therefore, the defense counsel will face the same dilemma he faced prior to *Maine*—whether to challenge a particular juror, and thus risk seating another juror with deeper biases after he has exhausted his peremptory challenges.

3. Failure to Counteract External Pressures

Finally, the California Supreme Court's implicit return to the federal standard means that it has adopted a standard that fails to counteract external pressures, such as community sentiment, local elections, or financial considerations, which may influence a trial court, both in its change of venue ruling and at trial.[130] Of course, the defendant has the option of pursuing a pretrial writ of mandate *prior* to voir dire. Voir dire itself, however, may provide additional evidence of a reasonable likelihood of prejudice. Local considerations may influence a judge to deny the motion even after voir dire reveals such a level of prejudice. After voir dire, however, the defendant has lost the opportunity for a pretrial appeal. Because voir dire cannot be considered on pretrial review, the reasonable likelihood standard must be available on postconviction review, as *Maine* intended, to correct the possible external

125. *See supra* text accompanying note 51.
126. *See id.*
127. 8 Cal. App. 3d 1063, 88 Cal. Rptr. 125 (2d Dist. 1970).
128. 9 Cal. 3d 290, 508 P.2d 289, 107 Cal. Rptr. 289 (1973).
129. *See supra* text accompanying notes 78-81.
130. *See supra* text accompanying notes 52-53.

influences that might affect the trial court's ruling on a motion made after voir dire.

III
PROPOSALS FOR REFORM

The foregoing analysis demonstrates that, despite its declarations to the contrary, the California Supreme Court has drifted far from the *Maine* reasonable likelihood standard. This Part considers whether that standard should be restored or abandoned. The first Section discusses the evaluation of voir dire and the circumstances surrounding a case. The second Section argues that, because the *Maine* reasonable likelihood standard is based on sound policy considerations, it should be restored. More specifically, the supreme court should either (1) reaffirm the *Maine* reasonable likelihood standard as the constitutionally mandated standard to be used at both the pretrial and postconviction stages; or (2) continue to apply the federal standard during postconviction review, but improve the pretrial standard by allowing the defendant to apply for a pretrial writ of mandate after voir dire.

A. Reconstructing the Reasonable Likelihood Standard

1. Evaluating the Evidence: A Totality of Circumstances Approach

Maine dictated that all circumstances be considered in determining whether pretrial publicity has produced a reasonable likelihood of prejudice.[131] Such a "totality of the circumstances" approach is, by definition, not a mechanical standard. It requires sifting through and evaluating all the facts and circumstances surrounding the case.

Nevertheless, courts have moved towards a more mechanical approach by limiting their evaluation in many cases to a list of five factors. This list includes: 1) nature and extent of the offense; 2) nature and extent of the publicity; 3) size of the community; 4) status of the defendant in the community; 5) popularity and prominence of the victim.[132] Use of this list narrows the inquiry. Some circumstances, such as local political pressures, cannot be characterized as one of the above factors, yet could be important in determining whether a reasonable likelihood of prejudice exists. Thus, courts should abandon their "checklist" of factors. Instead, they need to examine the totality of circumstances in order to get an accurate assessment of the reasonable likelihood of prejudice.

131. *Maine*, 68 Cal. 2d at 384-85, 438 P.2d at 378, 66 Cal. Rptr. at 730.

132. *See, e.g.*, People v. Harris, 28 Cal. 3d 935, 974, 623 P.2d 240, 262, 171 Cal. Rptr. 679, 701 (1981); People v. Martinez, 82 Cal. App. 3d 1, 13, 147 Cal. Rptr. 208, 215 (5th Dist. 1978); People v. Witt, 53 Cal. App. 3d 154, 170, 125 Cal. Rptr. 653, 664 (5th Dist. 1975), *cert. denied*, 425 U.S. 916 (1976); *In re* Miller, 33 Cal. App. 3d 1005, 1011-12, 109 Cal. Rptr. 648, 652 (5th Dist. 1973).

This totality of circumstances approach would reduce the likelihood of a court's erroneously evaluating whether there is a reasonable likelihood of prejudice. Under *Maine*, the ultimate inquiry is whether the effect of publicity has created a reasonable likelihood of prejudice. Therefore, the publicity should be the focus of the inquiry; other facts and circumstances should provide only a context in which to evaluate the effect of that publicity. Under the present scheme, the nature and extent of the publicity is only one of several factors of indeterminate weight that the courts consider. This unfocused evaluation of several factors can only obfuscate the central issue and thus increase the frequency of erroneous decisions. Under a totality of circumstances approach, the central inquiry into the effect of pretrial publicity would not be clouded. All surrounding circumstances would be considered, but only as the context in which the key factor, the effect of pretrial publicity, is measured. Such an approach is more likely to result in a decision reflecting the true effect of pretrial publicity, and thus decrease the chance of erroneous decisions.

2. *Evaluating Voir Dire*

Following *Maine*, courts should not give undue weight to the results of voir dire. While the *Maine* court did not specifically evaluate voir dire, it did recognize that voir dire cannot accurately reveal the precise level of prejudice[133] and therefore found the reasonable likelihood standard necessary. In accordance with this reasoning, voir dire responses are unreliable and therefore should not be used to rebut evidence of preexisting juror prejudices.

Since *Maine*, the courts have, on postconviction review, increasingly emphasized voir dire, thus implicitly relying on its ability to uncover bias. For example, they have suggested that jurors' claims of impartiality during voir dire can rebut other evidence suggesting a reasonable likelihood of prejudice exists.[134] *Harris* went so far as to hold that when jurors have admitted opinions about the defendant's guilt, the trial courts should draw the line between those jurors who can set their opinions aside and those who cannot.[135] This reliance upon voir dire is directly contrary to a primary reason for adoption of the reasonable likelihood standard in *Maine*: voir dire is not reliable in uncovering prejudice.

133. *See supra* text accompanying notes 49-50.

134. *See supra* text accompanying notes 78-80.

135. *See supra* text accompanying notes 115-16.

B. *Two Procedural Proposals*

1. *Return to the* Maine *Standard on Pretrial and Postconviction Review*

Murphy v. Florida made it clear that the reasonable likelihood standard is not required under the federal Constitution.[136] However, *Maine* left open the question whether the standard is required by the California Constitution.[137]

The California courts should recognize the reasonable likelihood standard as necessary to the right to a fair trial under the California Constitution. Under the state constitution, a criminal defendant has the right to a fair trial.[138] This right includes the right to a fair and impartial jury.[139] Although the California Constitution does not explicitly grant a defendant the right to the reasonable likelihood standard, that standard is a prophylactic rule necessary to protect his right to a fair and impartial jury.[140]

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136. *See supra* text accompanying notes 33-34.

137. The adoption of an independent state reasonable likelihood standard is consistent with the California Supreme Court's power to interpret the state constitution. The United States Supreme Court sets minimum constitutional standards for the state courts; it does not prevent states from giving more protection to the rights of criminal defendants. For a discussion of the doctrine of independent and adequate state grounds, see Minnesota v. National Tea Co., 309 U.S. 551 (1940); Fox Film v. Fuller, 296 U.S. 207 (1935). *But cf.* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979) (arguing against abuse of the doctrine by overuse).

Numerous California decisions have construed the state constitution to provide broader protection than that provided by the federal Constitution. *E.g.*, People v. Pettingill, 21 Cal. 3d 231, 247-48, 578 P.2d 108, 118-19, 145 Cal. Rptr. 861, 871-72 (1978) (protection against self-incrimination); People v. Hannon, 19 Cal. 3d 588, 606-07, 564 P.2d 1203, 1214-15, 138 Cal. Rptr. 885, 896-97 (1977) (right to speedy trial); People v. Brisendine, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1111-12, 119 Cal. Rptr. 315, 326 (1975) (protection from unlawful search and seizure). In these cases, the California Supreme Court has relied on the state constitution as an independent ground for the rights in question. The rationale behind the concept of an independent state doctrine was recently explained in People v. Bustamonte, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981). *Bustamonte* established the California criminal defendant's right to counsel at preindictment lineups:

> [J]ust as the United States Supreme Court bears ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law . . . . [We] must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.

Id. at 97, 634 P.2d at 932, 177 Cal. Rptr. at 581-82 (quoting People v. Chavez, 26 Cal. 3d 334, 352, 605 P.2d 401, 412, 161 Cal. Rptr. 762, 773 (1980)). *But cf.* Criminal Justice—Initiative Statutes and Constitutional Amendment (Proposition 8), 1982 Cal. Legis. Serv. 1164 (West) (codified at CAL. CONST. art. I, § 28) (use of independent state grounds in evidence law thrown into question by recent constitutional amendment).

138. CAL. CONST. art. I, § 16. The California Supreme Court has established the separate state constitutional grounds for the right to a fair and impartial jury as one of the procedural guarantees incident to a trial by jury. People v. Howard, 211 Cal. 322, 324, 295 P. 333, 334 (1930); People v. Estorga, 206 Cal. 81, 85-86, 273 P. 575, 577 (1928).

139. *See* People v. O'Bryan, 165 Cal. 55, 66, 130 P. 1042, 1046 (1913).

140. Similarly, the United States Supreme Court views the procedural rules from Miranda v.

Juror responses during voir dire cannot be relied upon to represent bias accurately. A juror may falsely deny knowledge and prejudice to obtain a place on the jury.[141] Moreover, even honest jurors who believe that they can set aside prejudice may be unconsciously influenced by initial impressions gleaned from the media.[142] Because it errs on the side of caution, only the reasonable likelihood standard can fairly take into account this potential for hidden bias. When a right as fundamental and important as the right to a fair trial is at stake, such a standard is needed. As *Maine* recognized, if a defendant is denied this right, "one of the most important purposes for which Government is organized and Courts of Justice established will have definitively failed."[143]

Assuming that the reasonable likelihood standard for change of venue is constitutionally required, it could nevertheless be argued that on postconviction review, it should have only limited force because of California's harmless error rule.[144] Under the California Constitution, violation of a state constitutional guarantee warrants reversal only where a "miscarriage of justice"[145] is apparent. In many cases, this requires that the defendant show prejudice.[146]

The reasoning in a line of cases following *People v. Byrnes*[147] suggests that the California harmless error rule should not prevent reversal of a conviction obtained in the face of a reasonable likelihood of prejudice. *Byrnes* held that, in cases involving violations of the defendant's right to a public trial—a fundamental right guaranteed by the state constitution—the defendant need not show prejudice.[148] Because the court found that, in a practical sense, the defendant could not easily show prejudice from the denial of this right, it declined to require a showing of prejudice.

The *Byrnes* analysis supports the proposition that a denial of a

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Arizona, 384 U.S. 436 (1966), as prophylactic rules. In Michigan v. Tucker, 417 U.S. 433 (1974), the Supreme Court said that *Miranda*'s procedural safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Id.* at 444.

141. Corona v. Superior Court, 24 Cal. App. 3d 872, 878-79, 101 Cal. Rptr. 411, 415-16 (3d Dist. 1972).

142. *Id.*

143. *Maine*, 68 Cal. 2d at 384, 438 P.2d at 378, 66 Cal. Rptr. at 730.

144. California's harmless error rule is part of the California Constitution. CAL. CONST. art. VI, § 13.

145. *Id.*

146. *See, e.g.*, People v. Pompa-Ortiz, 27 Cal. 3d 519, 612 P.2d 941, 165 Cal. Rptr. 851 (1980) (violation of defendant's rights during preliminary examination subject to "harmless error" rule).

147. 84 Cal. App. 2d 72, 190 P.2d 290 (2d Dist. 1948).

148. The California Supreme Court reinforced the viability of the *Byrnes* rationale in People v. Pompa-Ortiz, 27 Cal. 3d 519, 612 P.2d 941, 165 Cal. Rptr. 851 (1980), where the court distinguished cases emphasizing the importance of a public trial from those involving preliminary examinations. *Id.* at 527, 612 P.2d at 945, 165 Cal. Rptr. at 855.

change of venue when there is a reasonable likelihood of prejudice would not be harmless error on postconviction review. The right at issue—the defendant's right to a fair and impartial trial—is fundamental. Moreover, one of the primary rationales underlying the reasonable likelihood standard was the difficulty in accurately measuring the extent of actual bias harbored by an individual juror.[149] Thus, a defendant may be unable to show prejudice from the denial of a fundamental right. Under such circumstances, California's harmless error rule does not bar reversal of a conviction when a change of venue has been denied and a reasonable likelihood of prejudice existed.

2. *Implementation of the Reasonable Likelihood Standard Through Pretrial Remedies Alone*

a. *Implementation*

Even if the courts are unwilling to recognize that the reasonable likelihood standard for postconviction review is required under the California Constitution, the *pretrial* standard would be more effective at protecting a defendant from biased jurors if the defendant could apply for a writ of mandate after voir dire. This reform would afford the courts the opportunity, prior to conviction, to view all evidence of the veniremen's exposure to pretrial publicity.[150] Once it is certain that the evidence of voir dire will be considered initially under a pretrial reasonable likelihood standard, the imposition of a postconviction actual prejudice standard will be less objectionable and far less likely to result in upholding a conviction when the defendant had not received a fair trial before impartial jurors.

b. *Preserving Judicial Efficiency*

Maine specifically declined to allow a pretrial writ of mandate after voir dire because of a concern for judicial efficiency, i.e., an appeal after voir dire would stay the trial after the jury had already been impaneled.[151]

The judicial efficiency problems associated with such procedural reform can be overcome. First, voir dire on the issue of prejudicial publicity need not involve actual impanelment of the jury. The veniremen could be questioned about their exposure to pretrial publicity before general voir dire is conducted and before any challenges to the

149. *See supra* text accompanying notes 48-50.

150. The fact that voir dire provides the best evidence of *exposure* is not meant to suggest that it provides accurate evidence of each juror's precise level of prejudice. *See supra* text accompanying notes 121-124.

151. 68 Cal. 2d at 381, 438 P.2d at 376, 66 Cal. Rptr. at 728.

veniremen are lodged.[152] The purpose of this preliminary voir dire would not be to ascertain the precise level of bias held by each juror, but to discover generally the level of community exposure reflected in the jury pool. Thus, the veniremen would ask what they had heard about the case, not whether they considered themselves biased by that information.

The California Supreme Court's actions in *Lucero v. Superior Court*[153] suggest that it has already implicitly sanctioned this practice. In *Lucero*, prior to the defendant's application for writ of mandate, the trial court had already conducted one week of *Witherspoon*[154] voir dire, but had not progressed to general voir dire for impanelment of the jury.[155] During this preliminary voir dire, the court questioned the jurors about their exposure to pretrial publicity.[156] After the court of appeal summarily denied the defendant's writ, the California Supreme Court stayed the trial and directed the appellate court to consider the merits of the defendant's application. Although the appellate court subsequently denied the defendant's application for a writ of mandate, the California Supreme Court apparently felt that any judicial efficiency concerns were outweighed by the necessity of protecting the defendant's right to a fair trial.

Furthermore, the proposed change need not result in increased applications for a pretrial writ of mandate. The courts could return to the pre-*Maine* policy of allowing trial judges to postpone their rulings on the change of venue motion until some point during or after voir dire.[157] Because the trial court would make only one change of venue ruling, this postponement would ensure defendant's inability to file multiple applications for pretrial writs and thereby to overburden the courts.

Finally, and most importantly, if the courts are committed to affording the defendant the benefit of the reasonable likelihood standard on pretrial review, the need to consider the veniremen's level of exposure outweighs efficiency concerns. Although *Maine* declined to allow a pretrial writ of mandate after voir dire, it gave the defendant a reasonable likelihood standard of review on postconviction appeal.[158] If

152. *See* Lucero v. Superior Court, 122 Cal. App. 3d 484, 493, 176 Cal. Rptr. 62, 66 (4th Dist. 1981).

153. Petition for Hearing at 19-20, Lucero v. Superior Court, 122 Cal. App. 3d 484, 493, 176 Cal. Rptr. 62 (4th Dist. 1981).

154. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968) (only jurors who object to imposition of capital punishment under any circumstances are permitted to be excluded).

155. Petition for Hearing at 19, *Lucero*.

156. *Id.*

157. *See Maine*, 68 Cal. 2d at 380, 438 P.2d at 375, 66 Cal. Rptr. at 727.

158. *Id.* at 384 n.9, 438 P.2d at 378 n.9, 66 Cal. Rptr. at 730 n.9.

the *Maine* reasonable likelihood standard is desirable, the concern for judicial efficiency in the pretrial setting should weigh less heavily. Moreover, without considering voir dire, the courts cannot truly claim to be applying a reasonable likelihood standard to all the evidence of possible prejudice. Therefore, since the fundamental right of a fair trial is at stake, the courts should not, simply because of the potential for delay, hesitate to implement a reform that will make the pretrial reasonable likelihood determination more meaningful.

CONCLUSION

In *Maine v. Superior Court*, the California Supreme Court went beyond the minimum protection afforded state criminal defendants under the federal Constitution and held that a change of venue motion should be granted when there is a reasonable likelihood that the defendant would otherwise be denied a fair trial. The underlying rationale of the *Maine* decision—that where the defendant's right to a fair and impartial trial is threatened by prejudicial pretrial publicity, that right cannot be adequately safeguarded through the use of an actual prejudice standard on postconviction review—remains viable today. Thus, the *Maine* court initiated substantive and procedural reforms intended to address specific inadequacies in the existing appellate review process.

The recent decision in *People v. Harris* demonstrates the California courts' reluctance to reverse a conviction on the basis of the reasonable likelihood standard. Because of this reluctance, the *Harris* court deviated from the *Maine* standard and applied the federal standard on postconviction review. The court's departure from the *Maine* standard threatens to vitiate the reasonable likelihood standard without addressing the due process concerns that motivated the original implementation of the standard.

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