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STUDENT COMMENTS

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PRETRIAL DETENTION IN THE DISTRICT OF COLUMBIA: A COMMON LAW APPROACH

Pretrial detention under the District of Columbia Court Reform and Criminal Procedure Act of 1970[1] marks an important break with 181 years of federal bail policy, which has remained virtually unchanged since the Judiciary Act of 1789.[2] Much has been written[3] on the constitutionality of this part of the controversial act because it appears to reverse the movement towards bail reform which resulted in the Federal Bail Reform Act of 1966.[4] Since the pretrial detention law affords judges[5] in the District of Columbia a procedure by which they may deny bail entirely to some defendants before they come to trial, the law has evoked strong objections.[6]

Despite this criticism, there has been no careful analysis of how the eighth amendment excessive bail clause applies to pretrial detention.[7] This clause states that "[e]xcessive bail shall not be required." It is the only part of the Constitution which governs the granting or denying of bail. Since pretrial detention is the refusal to set bail for the accused, it is essential to determine the meaning of the excessive bail clause in order to test the constitutionality of the new pretrial detention law.

This comment will examine the meaning of the excessive bail clause in terms of the common law. Since the Supreme Court has never satisfactorily interpreted the clause, its interpretation requires a determination of its common law meaning. The common law limitations on denial of bail found in the excessive bail clause, as they existed when the clause was ratified, will be set forth. This comment will then demonstrate how the common law surrounding bail, as it presently exists under the eighth amendment, permits pretrial detention. The objections to the procedural aspects of pretrial detention will be considered and answered, and the limited applicability of pretrial detention will be noted.

THE BACKGROUND OF PRETRIAL DETENTION: THE BAIL REFORM ACT OF 1966

Pretrial detention of dangerous offenders was presented to Congress in 1969 as part of President Nixon's "war on crime," to fulfill campaign promises to halt the ever-rising crime rate.[8] Senate Bill 2600[9] was introduced as an amendment to the Bail

[1] PUB. L. 91-358. Pretrial detention law to be codified as D.C. CODE ENCYCL. ANN. §§ 23-1321-32 [hereinafter cited as D.C. CODE].

[2] *Compare* the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91, *with* FED. R. CRIM. P. 46 (Rule 46 is the successor to § 33 of the Act).

[3] *See* Allington, *Preventive Detention of the Accused before Trial*, 19 U. KAN. L. REV. 109 (1970); Borman, *The Selling of Preventive Detention 1970*, 65 NW. U. L. REV. 879 (1971); Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 GEO. L. REV. 287 (1969); Hruska, *Preventive Detention: the Constitution and the Congress*, 3 CREIGHTON L. REV. 36 (1969); Mitchell, *Bail Reform and the Constitutionality of Bail Reform*, 55 VA. L. REV. 1223 (1969); Portman, *"To Detain or Not to Detain"—A Review of the Background, Current Proposals, and Debate on Preventive Detention*, 10 SANTA CLARA LAW. 224 (1970); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970); Comment, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941 (1970); Comment, *The Costs of Preventive Detention*, 79 YALE L. J. 926 (1970); Comment, *Preventive Detention and the Proposed Amendments to the Bail Reform Act of 1966*, 11 WM. & MARY L. REV. 525 (1969).

[4] 18 U.S.C. §§ 3141-52 (Supp. II, 1966).

[5] The term "judges," as used in this comment, includes also United States Commissioners, magistrates, and all others who are qualified under applicable state or federal law to set bail.

[6] *See, e.g.*, Hickey, *supra* note 3; Portman, *supra* note 3.

[7] *See, e.g.*, Allington, *supra* note 3, at 111-12; Borman, *supra* note 3, at 901-03, 914-15.

[8] *See* statement of Sen. Hruska, a co-sponsor of S. 2600, 91st Cong., 1st Sess. (1969), on its introduction to the Senate, 115 CONG. REC. S7906 (daily ed. July 11, 1969). S. 2600 was made a part of S. 2601, 91st Cong., 2d Sess. (1970).

[9] 91st Cong., 1st Sess. (1969). The text of the proposed bill may be found at 115 CONG. REC. S7908-09 (daily ed. July 11, 1969).

Reform Act of 1966, as applied to the District of Columbia, to allow

> for legislative authorization to consider danger to the community in setting nonfinancial pretrial release conditions, to detain certain defendants found to be dangerous, to revoke the release of those defendants who violate release conditions and to punish those who commit crimes while released on bail with added penalties.[10]

The Bail Reform Act itself had established a policy of pretrial release for as many defendants as possible on personal recognizance or on an unsecured personal appearance bond.[11] Money bail was to be the judge's last resort as a condition which would assure appearance at trial. The act was meant to end the abuses of the money bail system, especially the unequal treatment of rich and poor and the high social cost of keeping thousands of people in jail before trial for long periods of time without just cause.[12]

With some misgivings,[13] the federal district courts implemented this policy, often goaded by the circuit courts.[14] However, any benefits from the reform were quickly overshadowed by the sharply rising crime rates across the country, most noticeably, from the viewpoint of Congress at least, in the District of Columbia. Reports of continued criminal conduct by those released on bail created pressure for some sort of measure to confine dangerous defendants before trial,[15] since this could no longer be accomplished *sub rosa* by setting exorbitant bail. The pretrial detention law met

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[10] *Id.* at S7909 (letter of Atty. Gen. Mitchell to the President of the Senate).

[11] Beyond release on personal recognizance or unsecured appearance bond, conditions available, in order of stringency, are: 1) supervisory custody, 2) restrictions on travel, association, or abode, 3) appearance bond with up to 10% refundable cash deposit with the court, 4) secured bail bond or deposit of cash with the court for the face amount, 5) any other condition reasonably necessary, including nighttime confinement. 18 U.S.C. §§ 3146 (a) (1)–(5) (Supp. II, 1966).

[12] The purpose of the Bail Reform Act was
> to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

H.R. REP. No. 1541, 89th Cong., 2d Sess. 5 (1966). *See* S. REP. No. 750, 89th Cong., 1st Sess. 5 (1965).

The studies of the bail system which prompted the act emphasized the fact that nearly all defendants will come to trial whether released on bond, or on personal recognizance.

Early studies pointed out the wastefulness of detaining defendants unable to post bond, since a large number of them were eventually nol-prossed, got suspended sentences, or minor sentences in the county jail. *See, e.g.*, Morse & Beattie, *Survey of the Administration of Criminal Justice in Oregon*, 11 ORE. L. REV. 1 (supp. 1932), where the percentages in these categories were found to be 54.2%, 13.6%, and 24.1% respectively, leaving only 8.1% of all felony cases studied to be sentenced to the state penitentiary. *Id.* at 220. Later studies found large numbers of defendants unable to post relatively low bail bonds. *See* Foote, et al., *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); Roberts, et al., *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 685 (1958). In New York City, for example, 18% of those who had bail set at $500 could not post bail, 28% could not post bail at $1,000, and 45% could not post bail at $1,500. Roberts, *supra*, at 707; similar results in Foote, *supra*, at 1032–33.

The Manhattan Bail Project resulted from these studies in 1961. Funded by a private philanthropist, the project set up a bail agency which was to interview defendants after they were charged, in order to recommend the release of good bail risks to the court on personal recognizance only. Ares, et al., *The Manhattan Bail Project: an Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 71–72 (1963). In contrast to the normal forfeiture rate of 3% of those released on bail, the Manhattan Bail Project releasees showed only a 1.6% rate of forfeiture. PROCEEDINGS OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, *Interim Report* xxii–xxiii (1965). These results prompted experiments by the federal government and a number of states. *Id.* at xx–xxi; PROCEEDINGS OF THE INSTITUTE ON THE OPERATION OF PRETRIAL RELEASE PROJECTS 9, (1966). A 3% overall forfeiture rate was achieved in a similar project in the District of Columbia. R. MOLLEUR, ET AL., BAIL REFORM IN THE NATION'S CAPITAL 31 (1966). The results also contributed to the writing of the Bail Reform Act. *Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R. 6934, H.R. 10195 and S. 1357 Before Subcomm. No. 5 of the House Judiciary Comm.*, 89th Cong., 2d Sess., ser. 13, at 21–34, 41 (1966) (statements of Atty. Gen. Clark and James V. Bennett of the A.B.A.).

[13] United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969). Judge Frankel complained that he had no choice but to reduce bail for five defendants accused of several skyscraper bombings. The U.S. Commissioner set bail at $100,000 to $300,000, which was reduced to $20,000 to $50,000. For the aftermath of this decision, *see* United States v. Melville, 309 F. Supp. 822; 309 F. Supp. 824 (S.D.N.Y. 1970); People v. Melville, 62 Misc.2d 366, 308 N.Y.S.2d 671 (N.Y.C. Crim. Ct. 1970).

[14] Courts setting money bail, instead of releasing on personal recognizance, were reversed in United States v. Bronson, 433 F.2d 537 (D.C. Cir. 1970); United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968); *see* Allen v. United States, 386 F.2d 634, 637 (1967) (dissenting opinion). *But see id.* at 634 (majority opinion) (There is no right to release on recognizance).

[15] Mitchell, *supra* note 3, at 1236–37. While Sen. Hruska admitted that Atty. Gen. Mitchell's figures on the recidivism rate of those out on bail, up to 82% in one study he cited, may be overblown, any substantial rate is "cause for public and official concern." 115 CONG. REC. S7907 (daily ed. July 11, 1969). A more believable figure is about 10%. Hickey, *supra* note 3, at 302–03; Portman, *supra* note 3, at 236. In his own article, however, the only figure Sen. Hruska cited was the 82% rate. Hruska, *supra* note 3, at 61.

this demand by allowing a judge to order detention without bail in carefully limited circumstances and under well-defined procedures.[16]

Constitutionality of Pretrial Detention: Excessive Bail

The Supreme Court has dealt with the excessive bail clause infrequently, because the federal law regarding bail has been well-settled since the Judiciary Act of 1789.[17] Under the Act, everyone charged with a noncapital offense must be granted the right to release on bail. The federal courts have uniformly upheld that right.[18] As a result, the Court has dealt with the excessive bail clause in only two cases, decided during the same term.

In *Stack v. Boyle*,[19] very high bail was ordered for several defendants charged under the Smith Act based on the government's allegation that a Communist conspiracy existed such that they would flee the country upon command if set free on bail. Chief Justice Vinson, speaking for the Court, held that to protect the absolute right to bail before trial in noncapital cases and to preserve the presumption of innocence, only clear evidence could justify high bail.[20] The Court vacated the district court's denial of applications for bail.[21]

Then in *Carlson v. Landon*[22] the Court refused to apply the protection of the excessive bail clause of the eighth amendment. This was a deportation case involving several alien Communists[23] who were held without bail by the Attorney General pending their deportation hearings. The five-man majority, per Justice Reed, held that Congress retained the right to grant the Attorney General power to refuse bail in such proceedings. The majority alluded to the excessive bail clause in the English Bill of Rights of 1688 to show that Congress retained the power to define "the classes of cases in which bail shall be allowed."[24] That remained the power over bail rights which Parliament held at common law. The Court reasoned that this power was incorporated into the United States Constitution by the eighth amendment excessive bail clause, since it was practically the same as the English clause.[25]

In his dissent, Justice Black found that by the majority's conception of the eighth amendment,

> [that] Amendment's ban on excessive bail means just about nothing.... Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all.... The Amendment is thus reduced below the level of a pious admonition.[26]

Justice Black contended that the excessive bail clause, as a part of the American Bill of Rights of 1789, was intended to give more protection than its counterpart in the English Bill of Rights of 1688.[27]

[16] There are a number of conditions which act as procedural safeguards. The judge may order pretrial detention only in cases of certain specified offenses. D.C. Code §§ 23-1322(a)(1)-(3). He may order it only if "there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community." § 23-1322(b)(2)(B). The hearing must be held immediately upon the defendant's being brought before the judge. § 23-1322(c)(3). The defendant has a right to counsel. § 23-1322(c)(4). His testimony may not be used at trial. § 23-1322(c)(6). He has a right to immediate appeal of the detention order, which must be promptly determined. § 23-1324(b). If detained, he must be held separately from convicts "to the extent practicable." § 23-1321(h). He shall be released from detention "for limited periods of time to prepare defenses or for other proper reasons." § 23-1321(h)(2).

The text of the pretrial detention law may be found in 7 BNA Crim. L. Reptr. 3295-97 (1970).

[17] *See* note 2 *supra*.

[18] Note, *Preventive Detention before Trial*, 79 Harv. L. Rev. 1489 (1966).

[19] 342 U.S. 1 (1951).

[20] *Id.* at 4-6. Justice Jackson, concurring, noted that Congress, in Fed. R. Crim. P. 46, had assumed the risk that some defendants will try to flee while out on bail, in furthering a policy of keeping people out of jail until being proven guilty. *Id.* at 8. He also condemned the trial court's bowing to government pressure and public opinion in setting such high bail. *Id.* at 10.

[21] *Id.* at 11.

[22] 342 U.S. 524 (1952).

[23] Justice Black's description of the petitioners shows them to be distinctly ordinary, non-violent people. *Id.* at 549-51.

[24] *Id.* at 545-46. The example cited was capital offenses, where federal courts were given the discretion by Congress to deny bail through the Judiciary Act of 1789. *Id.* at 545 n. 45. *See* 1 Stat. 91 (now Fed. R. Crim. P. 46).

The majority's interpretation of the excessive bail clause in the English Bill of Rights, 1 W. & M., st. 2, c. 1 (1688), is oversimplified at best. *See* note 32 *infra* for Blackstone's summation of the effects of various acts of Parliament from the Statute of Westminster I, 3 Edw. 1, c. 15 (1275) to the Habeas Corpus Act, 31 Car. 2, c. 2 (1679). A more detailed development of the categories which are bailable and nonbailable can be found in A. Highmore, A Digest of the Doctrine of Bail 147-67 (1791). Today, only treason cannot be bailed by the trial judge, though judges of the High Court can do so. Magistrates' Courts Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 8 (1952).

[25] 342 U.S. at 545-46. The only difference is that the American clause is in mandatory language, while the English clause is precatory.

[26] *Id.* at 556.

[27] *Id.* at 557.

Justice Burton, joining Justice Frankfurter's dissenting opinion, suggested that the eighth amendment necessarily implied a right to bail:

> The Amendment cannot well mean that, on the one hand, it prohibits the denial of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing.[28]

Stack v. Boyle did not define the phrase "excessive bail." *Carlson v. Landon* appeared to interpret it but in a sharply divided 5–4 decision. Furthermore, a deportation hearing is not a criminal proceeding so *Carlson* did not deal with the right to bail pending a criminal trial. Rather, *Carlson* set forth two contradictory lines of dicta. The majority held that Congress may set classes of offenses where bail is not mandatory. This was what Congress did in 1789 when it allowed judges to deny bail in capital cases. The minority asserted that the excessive bail clause would be but a "pious admonition" [29] if so interpreted, since Congress could easily avoid the clause entirely by declaring offenses nonbailable. Therefore, the only way to make the clause an effective safeguard was to infer from it an absolute right to bail.

The majority's view does not prevent the danger which the minority foresaw. Yet the minority's view does not comport with the literal language of the clause. "Excessive bail shall not be required" deals on its face only with the amount of bail set, if bail is set at all. Neither view rules criminal procedure, thereby necessitating use of the ordinary principles of constitutional construction to examine the meaning of "excessive bail" at common law.[30] Such an examination will show that bail may not be denied arbitrarily, but only for good cause.

At common law, English judges exercised broad discretion in granting or denying bail in various classes of cases, subject to the requirement of the English Bill of Rights that "excessive bail ought not to be required." [31] According to Blackstone, some offenses could not be bailed by the trial court; others could be bailed at the trial court's discretion; a third class of offenses had to be bailed in all cases.[32] These classes depended on the seriousness of the offense and not on whether a capital offense was involved.

In our federal system, this judicial discretion was severely limited with the passage of the Judiciary Act of 1789. Section 33 of the Act[33] gave defendants an absolute privilege to claim pretrial bail in all noncapital cases. In a capital case, federal judges could grant or deny bail according to the circumstances of the matter and the normal practice of the courts. Federal judges were and are apparently willing to grant bail to capital offenders if the defendant can establish good cause.[34] The law has

[28] *Id.* at 569.

[29] *Id.* at 556.

[30] By these principles, the United States Constitution must be interpreted according to the common law.

> The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court . . . has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.

Smith v. Alabama, 124 U.S. 465, 478–79 (1888). *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898). Erie R. Co. v. Tompkins, 304 U.S. 64, 78, *cert. denied*, 305 U.S. 637, *reh. denied*, 305 U.S. 673 (1938), specifically excepts constitutional matters from the general rule that there is no "federal general common law." The English common law in its entirety was not incorporated into the Constitution, but was to be used by the American courts as far as it was applicable. Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); Patterson v. Winn, 30 U.S. (5 Pet.) 233 (1831).

[31] 1 W. & M., st. 2, c. 1 (1688).

[32] 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *298–300 (Jones ed. 1916). The first class contains: 1) treason, 2) murder, 3) manslaughter, if the guilt is clear, 4) prison-breaking, 5) outlawry, 6) abjuring the realm, a self-banishing punishment, 7) approvers, those who have confessed guilt and implicated accomplices, 8) those taken in the act of felony, 9) arson, and 10) excommunicants. The second class contains: 1) known thieves, 2) all other felons, of bad character, and 3) accessories to felony, of bad character. The third class contains: 1) manslaughter, if of good reputation, 2) felons, other than those above, and 3) accessories, other than those above.

Today, English trial judges have discretion to grant or deny bail in all cases except treason, where only judges of the High Court can grant bail. Magistrates' Courts Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, §§ 7(2), 8 (1952). The judges were first given this power under the Criminal Justice Administration Act, 7 Geo. 4, c. 64, § 34 (1826), which repealed all the old statutes collected by Blackstone. *See* 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 238–39 (1883).

[33] 1 Stat. 91.

[34] *See, e.g.*, United States v. Jones, 26 F.Cas. 658 (No. 15,495) (C.C.D. Pa. 1813), where Justice Bushrod Washington admitted bail for a person charged with piracy and suffering from possible pneumonia: "The humanity of laws, not less than the feelings of the court, favour the liberation of the prisoner upon bail, under such circumstances." *See* United States v. Burr, 25 F.Cas. 55, 62 (No. 14,693) (C.C.D. Va. 1807), where Chief Justice Marshall refused to deny Aaron Burr admission to bail despite a charge of treason. Lack of a specific arrest for treason and lack of a hearing on the

been made certain by the strict limitation on judicial discretion with regard to pretrial bail. Therefore, few federal cases have ever been decided on this issue.[35]

There are several cases on the common law concerning bail under state law, however. These cases elucidate the common law as it exists under a constitutional excessive bail clause. Yet the cases arise only in a few states since most jurisdictions have an additional constitutional provision which guarantees a right to bail in noncapital cases. The states can be separated into two groups: 1) those which guarantee bail in all but capital cases and 2) states which only guarantee against the imposition of excessive bail.[36] The bail provisions in the first group resemble the language of article II of the Northwest Ordinance of 1787: "All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." The bail provisions in the second group are based on the common law right to bail limited only by state constitutional provisions identical to that of the eighth amendment: "Excessive bail shall not be required." The District of Columbia properly belongs in the second group. Its constitution is the United States Constitution, and its bail provision is that of the eighth amendment.

Several state supreme courts within the second group have interpreted their excessive bail clauses according to the common law.[37] Typical of these cases is *People ex rel. Shapiro v. Keeper of City Prison.*[38] This case summed up the earlier New York cases to hold that the common law, as limited by the excessive bail clause in the New York constitution, does not guarantee a right to pretrial bail in any kind of criminal case.[39] The right to bail

evidence sustaining the charge were listed by Marshall as the reasons for refusing to deny bail. *See also* United States *ex rel.* Covington v. Caparo, 297 F. Supp. 203 (S.D.N.Y. 1969); Wansley v. Wilkerson, 263 F. Supp. 54 (W.D. Va. 1967). *But see* Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964); United States v. Rice, 192 F. 720 (C.C.S.D.N.Y. 1911).

[35] Bail pending appeal is quite another matter, since there has never been thought to be a right to it. There have been a number of cases dealing with what criteria ought to be used in granting or denying bail pending appeal. *See, e.g.*, Rehman v. California, 85 S.Ct. 8 (Douglas, Circuit Justice, 1964); Williamson v. United States, 184 F.2d 280 (Jackson, Circuit Justice, 1950). The appeal bail rights of the poor have also come up. *See* Bandy v. United States, 81 S.Ct. 25 (Douglas, Circuit Justice), *reh.* 81 S.Ct. 197 (Douglas, Circuit Justice, 1960), *reh.* 82 S.Ct. 11 (Douglas, Circuit Justice), *cert. denied*, 368 U.S. 852 (1961), *cert. denied*, 369 U.S. 815, *cert. denied*, 369 U.S. 831 (1962).

[36] Provisions in the first group:
1) Right to bail in all cases (one state): ALASKA CODE CRIM. P. § 12.30.010 (1970).
2) Right to bail, except capital offenses when the proof is evident or the presumption of guilt great (38 states): ALA. CONST. art. I, § 16; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 6; COLO. CONST. art. II, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IOWA CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS § 9; KY. CONST. § 16; LA. CONST. art. I, § 12; ME. CONST. art. I, § 10; MD. ANN. CODE Rule 777(a) (1970); MINN. CONST. art I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. III, § 19; NEV. CONST. art. I, § 7; N.H. REV. STAT. ANN. § 597:1 (1970); N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 20; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; PA. CONST. art. I, § 14; S.C. CONST. art. I, § 20; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; VT. CONST. ch. 2, § 32; WASH. CONST. art. I, § 20; W. VA. CODE ANN. § 62-1C-1 *et seq.* (1970); WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 14.
3) Right to bail, except for treason or murder (4 states): IND. CONST. art. I, § 17; MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; ORE. CONST. art. I, § 14.
4) Right to bail, except capital or life imprisonment offenses (one state): R.I. CONST. art. I, § 9.
5) Right to bail, except life imprisonment without parole offenses (one state): HAWAII REV. STAT. § 709-4 (1970).
Total in first group: 45 states. Provisions in the second group:
6) Right to bail for misdemeanors, otherwise by judicial discretion (3 states): GA. CODE ANN. § 27-901 (1970); N.Y. CODE CRIM. P. § 553 (McKinney 1970); VA. CODE § 19.1-110 (1970). Georgia actually gives bail as a matter of right for noncapital cases, by case law. Reid v. Perkerson, 207 Ga. 27, 60 S.E.2d 151 (1950); Newsome v. Scott, 151 Ga. 639, 107 S.E. 854 (1921).
7) Bail by judicial discretion for most cases (one state): N.C. GEN. STAT. § 15-102 (1969).
8) Bail by judicial discretion for most cases, except treason is nonbailable (one state): MASS. ANN. LAWS ch. 264, § 1, ch. 276, § 42 (1969). Massachusetts apparently gives bail as a matter of right for all noncapital offenses, by case law. Commonwealth v. Baker, 343 Mass. 162, 177 N.E.2d 783 (1961).
Total in second group: 5 states. All states in the second group have excessive bail provisions: GA. CONST. art. I, § 11; MASS. CONST. pt. 1, § 27; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 14; VA. CONST. § 9.
From Comment, *Bail: an Ancient Practice Reexamined*, 70 Yale L.J. 966, 977-78 (1961), updated and rearranged.

[37] Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822 (1906); Fischer v. Ball, 212 Md. 517, 129 A.2d 822 (1957); Commonwealth v. Baker, 343 Mass. 162, 177 N.E.2d 783 (1961); People *ex rel.* Klein v. Kruger, 25 N.Y.2d 497, 255 N.E.2d 522, 307 N.Y.S.2d 207 (1969); People *ex rel.* Lobell v. McDonnell, 296 N.Y. 109, 71 N.E.2d 423 (1947); People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943). *See* discussions of the common law right to bail, as affected by their own constitutions in State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740 (1960).

[38] 290 N.Y. 393, 49 N.E.2d 498 (1943).

[39] Judge Desmond, who wrote the opinions in both *Shapiro* and *Lobell*, *supra* note 37, noted that New York's constitution was atypical because it had no

extended to all misdemeanor cases by statute,[40] but in all other cases bail was to be granted or denied according to judicial discretion. The court cautioned, however, that judicial discretion was far from absolute. Bail could not be denied arbitrarily for there was an excessive bail clause in the state constitution. There must be ample justification stated by the judge to deny bail and the denial must follow the ordinary practice of the courts of the state.[41] In *People ex rel. Lobell v. McDonell*,[42] the court listed factors to be considered by the judge: the nature of the offense, its penalty, the probability of the defendant's appearing at trial, his pecuniary and social condition, his general reputation and the strength of the evidence against him.[43] *People ex rel. Klein v. Kruger*[44] implied yet another condition—danger to the community.

In New York and in a few other states,[45] the common law bail system survives because the excessive bail provisions in their constitutions do not grant a right to bail. These states have adopted the common law generally and have not significantly changed the common law by statute as it relates to bail. The other states have either changed the common law by enacting constitutional provisions which guarantee a right to bail or achieved this result by statute.[46] The District of Columbia remains in the common law bail system category since the Federal Constitution nowhere specifically guarantees a right to bail. It only protects[47] against against excessive bail. Although the Judiciary Act of 1789 created a right to bail for all noncapital federal offenses, that statutory right can be altered without contravening the eighth amendment excessive bail clause. The District's pretrial detention law only returns to judges some of the discretionary power to deny bail that they held at common law in 1791 when the eighth amendment was ratified.[48]

right-to-bail clause, only an excessive bail clause. *Id.* at 398, 49 N.E.2d at 500. Apparently, he forgot this when he wrote in 1952 that "most states" followed this type of discretionary rule. Desmond, *Bail—Ancient and Modern*, 1 BUFF. L. REV. 245, 247 (1952).

[40] N.Y. CODE CRIM. P. § 553 (McKinney 1970).

[41] 290 N.Y. at 398–99, 49 N.E.2d at 501.

[42] 296 N.Y. 109, 71 N.E.2d 423 (1947).

[43] *Id.* at 111, 71 N.E.2d at 425. *Lobell* did more than any English case did up to the time of Blackstone in listing the factors a judge may properly consider in exercising his judicial discretion. For example, Highmore discussed in great detail the classes of offenses for which bail must be granted or denied, the power of the judge to grant or deny bail, and the strict penalties for a judge's abuse of his discretion, but he never said a word about how a judge should make his decision. *See* A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL 147–69,169–86,187–94 (1791).

[44] 25 N.Y.2d 497, 502, 255 N.E.2d 552, 555–56, 307 N.Y.S.2d 207, 212 (1969). This hint was picked up by a trial judge to detain before trial a person charged with several skyscraper bombings. People v. Melville, 62 Misc.2d 366, 308 N.Y.S.2d 671, 678 (N.Y.C. CRIM. CT. 1970). If not overruled, this case will become a precedent for pretrial detention solely on the basis of danger to the community, at least as far as the common law of New York is concerned. *But see* United States v. Melville, 309 F. Supp. 824; 309 F. Supp. 822 (S.D.N.Y. 1970); 306 F. Supp. 124 (S.D.N.Y. 1969), where the district judges were struggling with the Bail Reform Act.

[45] *See* note 36 *supra*, paras. 6–8.

[46] *See* note 36 *supra*, paras. 1–5. *Cf.* Lessee of Levy v. McCarter, 31 U.S. (6 Pet.) 102 (1832), where Justice Story held that the New York statute of descents had effectively repealed the statute of descents of William III. In New York, for example, there is a right to bail for all misdemeanors, by statute. People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943). In North Carolina, there was a provision in the constitution of 1776 guaranteeing the right to bail. This was left out of the 1868 constitution, which leaves the right to bail uncertain in that state. *See* State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890).

[47] ch. 20, § 33, 1 Stat. 91.

[48] An argument can be made that the United States Constitution, as a separate entity, the constitution of the District of Columbia, should be interpreted according to the District's common law. That common law was taken from Maryland by the Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103, which provides "that the laws of the state of Maryland, as they then existed, should be, and continue in force in that part of the [D]istrict which was ceded by that state." Lee v. Lee, 33 U.S. (8 Pet.) 44 (1834). The act is now codified as D.C. CODE § 49–301 (1966).

The laws of Maryland included the common law of England, as it existed on July 4, 1776. MD. CONST. DECL. RIGHTS art. 5. The common law was adopted subject to changes by the state legislature, but none were made until the codification of 1810. *See* Assoc. of Western Ry. v. Riss & Co., 320 F.2d 785 (D.C. Cir. 1963); Gertman v. Burdick, 123 F.2d 924 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 824 (1942); Coomes v. Clements, 4 Harr. & J. 480 (Md. 1819).

Maryland has not changed the common law rules of bail other than by an excessive bail clause in its constitution, so the courts there still have judicial discretion over bail. Fischer v. Ball, 212 Md. 517, 129 A.2d 822 (1957). Maryland rule of court 777, which guarantees a pretrial right to bail for all but capital offenses, does not have the force of a statute since it is only a judicial determination about the granting of bail. *Id.*

The Judiciary Act of 1789 has granted a right to bail in noncapital cases in the District of Columbia from the time of its establishment in 1801. However, the interpretation of the eighth amendment excessive bail clause depends on the District's common law, not on its statutes. Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950). While the District's courts have never ruled on the common law as it relates to bail, Maryland's highest court has done so in *Fischer v. Ball*. The lower District courts, in the absence of a clear statement by the Supreme Court or the District of Columbia Circuit Court of Appeals, must

The early common law interpretation of the excessive bail clause is logically sound when it is viewed apart from recent interpretations by state courts. The interpretation suggested by the majority in *Carlson v. Landon*—that Congress could deny the right to bail to some categories of offenses—is untenable. This would allow the protection of the eighth amendment excessive bail clause to be emasculated by a statute requiring denial of bail.[49]

To the minority of the Court, the above interpretation made no sense because it would reduce the excessive bail clause to a "pious admonition." [50] Therefore, they believed that an absolute right to bail must be inferred.[51] Those adhering to the minority's interpretation rejected the idea that the excessive bail clause was obviously copied from the English Bill of Rights of 1688,[52] but they could find no direct evidence that the authors of the American Bill of Rights thought there was any difference.[53] The Northwest Ordinance of 1787 and the Judiciary Act of 1789 explicitly guarantee a right to bail. There is no good explanation why the eighth amendment, passed by Congress just a few days before it passed the Judiciary Act, should be so vague in comparison on the subject of bail rights, if one is to infer fairly a right to bail from it.[54]

The common law approach to the interpretation of the excessive bail clause is not as extreme as either the majority or the minority position in *Carlson v. Landon*. Under modern conditions, while a judge supposedly has considerable discretion in deciding whether or not to grant bail, he may not deny bail without good cause.[55] His discretion has been reduced as the common law on bail evolved. In New York, where there is enough reported case law to analyze the process of that evolution, there is a strong presumption in favor of granting bail,[56] with a full hearing deemed necessary before bail may properly be denied.[57]

defer to the Maryland courts' determination of the common law. Watkins v. Rives, 125 F.2d 33 (D.C. Cir. 1941); *In re* Parnell's Est., 275 F. Supp. 609 (D.D.C. 1967); Gerace v. Liberty Mut. Ins. Co., 264 F. Supp. 95 (D.D.C. 1966). The Maryland court's conclusion in *Fischer v. Ball* was that the excessive bail clause did not imply a right to bail in any kind of criminal case. As in the New York cases, *see* text accompanying notes 38–44 *supra*, it was cautioned that bail cannot be denied arbitrarily, but only in the exercise of sound judicial discretion. The District's pretrial detention law only allows the exercise of such discretion when it says, "a judicial officer *may* order pretrial detention." D.C. CODE § 23–1322(a) (emphasis added).

[49] Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 969 (1965).

[50] 342 U.S. 524, 556. This view has been espoused in an incorrect dictum in Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960), dealing with bail rights of juveniles. The court cited a passage in Stack v. Boyle, 342 U.S. 1, 4 (1951), which spoke to the right to bail in noncapital cases under federal law. That federal law is found in the Judiciary Act of 1789 and its successors, however. It is not in the eighth amendment.

[51] *See* 342 U.S. at 556.

[52] *Id.* at 557.

[53] Foote, *supra* note 49, at 989. Professor Foote explains this only with general statements by the framers of the Bill of Rights that it was meant to give more protection than its English counterpart. *Id.* at 985–88.

[54] *Id.* at 971. *See* Note, *supra* note 18, at 1500.

[55] The common law approach has been dismissed as a "widely-held interpretation which fails to give effective protection even against judicial action, let alone possible legislative abuse." Foote, *supra* note 49, at 970. This is belied by the courts' practice. *Id.* at 979 n. 102, citing one of his bail studies, *supra* note 12, 106 U. PA. L. REV. at 697–98.

[56] People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943).

[57] People *ex rel.* Singer v. Corbett, 26 App. Div.2d 770, 271 N.Y.S.2d 92 (1966); People v. Bach, 61 Misc.2d 630, 306 N.Y.S.2d 365 (Dutchess Co. Ct. 1970).

The early nineteenth century New York courts followed the common law as it was summarized in the eighteenth century. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *296–300 (Jones ed. 1916); 1 J. CHITTY, CRIMINAL LAW *93–99 (5th Amer. ed. 1847); 2 W. HAWKINS, PLEAS OF THE CROWN ch. 15, §§ 40 *et seq.*, 80 (6th ed. 1788). The rule was

> that if it stands indifferent whether a person charged with a felony is guilty or not, he ought to be bailed; and that even in capital cases, where there is any circumstance to induce the court to suppose he may be innocent, they will bail; and that the judges will in general exercise the power of bailing in favor of a prisoner in every case not capital, though they will not exercise it when the prisoner is notoriously guilty, by his own confession or otherwise, without the existence of some special causes to induce it.

People v. Goodwin, 1 Wh. Cr. Cas. 434, 445–46 (N.Y. Sup. Ct. 1820). *See Ex parte* Tayloe, 5 Cow. 39 (N.Y. App. Div. 1825); People v. Dixon, 4 Park. Cr. Rep. 651 (N.Y. Sup. Ct. 1856); People v. Van Horne, 8 Barb. 158 (N.Y. Sup. Ct. 1850); People v. Lohman, 2 Barb. 450 (N.Y. Sup. Ct. 1848). Interestingly, in the leading case, People v. Goodwin, the court was of the view that the fifth amendment protection against double jeopardy was applicable to the states, since the United States Constitution *and* its amendments were the supreme law of the land. People v. Goodwin, 1 Wh. Cr. Cas. 470 (N.Y. Sup. Ct. 1823).

There was a considerable softening of this position in the early twentieth century cases. *See* People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498 (1943); People *ex rel.* Shapiro v. Keeper of City Prison, 265 App. Div. 474, 482, 39 N.Y.S.2d 526, 533 (1943) (dissenting opinion); Amer. Civil Liberties Union v. McAdoo, 229 App. Div. 511, 514, 242 N.Y.S. 696, 699 (1930) (dissenting opinion); People *ex rel.* Ackerson v. Warden of City Prison, 167 Misc. 475, 3 N.Y.S.2d 412 (Sup. Ct. 1937). *But see* People v. Mott, 97 Misc. 86, 162 N.Y.S. 272 (Sup. Ct. 1916); People v. Ackerson, 166 Misc. 130, 1 N.Y.S.2d 427 (Kings Co. Ct. 1937).

The major concern about the common law approach is the ability of the judges to exercise discretion properly. Justice Black in particular was motivated to infer a right to bail from the excessive bail clause because he distrusted the ability of trial judges to deny bail fairly in the McCarthy era.[58] But it should be no more difficult for a trial judge to interpret the phrase "excessive bail" than it has been to interpret such phrases as "due process of law." Trial judges are charged with the duty of determining in the first instance exactly what *amount* of bail is or is not excessive. With the quick appeal guaranteed by the pretrial detention law, improper detention orders should receive prompt enough appellate determination to prevent injustice.[59]

Constitutionality of Pretrial Detention: Procedural Aspects

A number of objections to pretrial detention can be raised as possible violations of the procedural guaranties of the fifth, sixth, and eighth amendments. Regarding the sixth amendment right to counsel, the District of Columbia pretrial detention law does provide for representation by counsel at the pretrial hearing.[60] It also allows the defendant himself temporary release to help prepare his defense.[61] But there are more subtle ways to hinder the preparation of a defense than flat denials of access to counsel. Placing counsel under the burden of talking with his client only in the inconvenient and uncomfortable confines of a county jail has a deleterious effect on his attitude towards the client and the case.[62] At the same time, the defendant might be discouraged by his lawyer's attitude and the atmosphere of the jail. When the accused is released to help with his defense, he is ordinarily placed in the custody of a United States marshal. There is, then, an opportunity for official interference.[63] Much will depend on whether the sixty-day limit on detention is short enough to obviate serious harm, and on what official attitudes are effected in temporarily releasing defendants.

There is a combined question of eighth amendment cruel and unusual punishment and fifth amendment due process in the pretrial imprisonment itself. Imprisonment for only sixty days is probably not cruel and unusual. Only when the length of time served is far out of proportion to the normal penalty have the courts found the fact of imprisonment to be cruel and unusual.[64]

Whether any imprisonment before conviction, no matter how short, is a violation of due process of law depends upon a balancing of the rights of the acquitted detainees with the rights of society. Apparently, the period of pretrial detention will be deducted from the convicted detainee's sentence.[65] The acquitted detainee can get no credit for time served, nor any other type of compensation. Confinement of an innocent person has always been avoided by the courts.[66] Hence, a

[58] 342 U.S. at 558. Justice Black is still concerned:

> I realize that it is far easier to substitute individual judges' ideas of 'fairness' for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right.... As I have said time and time again, I prefer to put my faith in the written words of the Constitution itself, rather than to rely on the shifting, day-to-day standards of fairness of individual judges.

In re Winship, 397 U.S. 358, 377–78 (1970) (dissenting opinion).

[59] *See* D.C. Code § 23–1324.

[60] *Id.* § 23-1322(c)(4).

[61] *Id.* § 23-1321(h)(2) states, in part:

> [F]or good cause shown, [the person detained] shall be released upon order of the judicial officer in the custody of the United States marshall or other appropriate person for limited periods of time to prepare defenses or for other proper reasons.

[62] Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 1125, 1147 (1965); Portman, *supra* note 3, at 248.

[63] Portman, *supra* note 3, at 247, poses the hypothetical of a black defendant, accompanied by two white policemen in uniform, looking for someone he knows only as "Charlie" in the midst of the black ghetto. *Cf.* United States *ex rel.* Hyde v. McMann, 263 F.2d 940 (2d Cir.), *cert. denied sub nom.* United States *ex rel.* Hyde v. Lavallee, 360 U.S. 937 (1959) (defendant in custody of policeman, looking for a prostitute known as "Jo Ann" on lower west side of New York City).

[64] *See* Weems v. United States, 217 U.S. 349 (1910); O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (dissenting opinion of Field, J.); Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957). *Cf.* Dickey v. Florida, 398 U.S. 30 (1970) (8 years between indictment and trial yields cognizable claim under sixth amendment speedy trial clause); Smith v. Hooey, 393 U.S. 374 (1969) (6 years); Comment, *The Convict's Right to a Speedy Trial*, 61 J. Crim. L.C. & P.S. 352, 360 (1970).

[65] 18 U.S.C. § 3568 (Supp. II, 1966), applied by former D.C. Code § 23-909, which applied the whole Bail Reform Act to the District of Columbia, including § 3568. However, under the codification, §§ 23-901-08 are replaced by §§ 23-1301-08, § 23-909 is omitted, and §§ 23-1321-32 are applied to the District in lieu of 18 U.S.C. §§ 3141-52. § 3568 has not been put into the new codification anywhere, but ought to apply, absent a specific restriction in the District of Columbia Code, as a federal statute applicable to all federal jurisdictions.

[66] Stack v. Boyle, 342 U.S. 1, 8 (1951) (concurring opinion); Hudson v. Parker, 156 U.S. 277 (1895); *Ex parte* Tayloe, 5 Cow. 39, 55 (N.Y. App. Div. 1825)

great deal will depend upon how carefully District of Columbia judges conduct pretrial detention hearings.

Another due process question is the reasonableness of the criteria the judge must consider at the pretrial detention hearing.[67] Danger to specific persons[68] is a judicially established criterion for denying bail.[69] Several Supreme Court justices have focused on yet another factor in dealing with applications for bail pending appeal[70]—danger to the community.[71] Conceptually, both categories make good sense when added to the traditional criteria which aid the judge in deciding whether to release the defendant on bail.

Finding out whether a defendant is a danger to the community is not easy, however. Evidence of a defendant's direct threats to witnesses and others constitutes the obvious but exceptional case. Inveterate drug addicts, listed under § 23-1323, are not entirely free from compulsion, so that for them, Attorney General Mitchell's allusion to civil commitment is not as illogical as it sounds.[72] For other offenders, pretrial detention is a matter of predicting the individual's future voluntary behavior. No psychological test yet devised reveals whether someone accused of armed bank robbery, for example, will repeat the crime or commit a different offense within a specified period of time.[73] Limiting the application of pretrial detention to certain classes of offenses provides a judge no help in deciding *which* offenders in those classes are dangerous. While "the insight and experience of trial judges" [74] represents the predictive tool which criminologists lack, it is uncertain whether this tool will achieve "fundamental fairness" [75] in deciding which offender is so dangerous to the community that he must be detained. This problem can be avoided only if pretrial detention is used sparingly, in the

(concurring opinion). Blackstone, too, was concerned:

> [I]n this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only.

4 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *300 (Jones ed. 1916).

More recently, dealing with the District of Columbia Sexual Psychopath Act, Judge Bazelon has said that

> when a determination of 'dangerousness' will result in a deprivation of liberty, no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts. Incarceration may not seem 'punishment' to the jailers, but it is punishment to the jailed. Incarceration for a mere propensity is punishment not for acts, but for status, and punishment for status is hardly favored in our society. (footnotes omitted).

Cross v. Harris, 418 F.2d 1095, 1101–02 (D.C. Cir. 1969).

Judge Burger (now Chief Justice) denied that this was purely preventive detention for anticipated conduct alone, and warned against "substituting our own predilections concerning psychiatry" for the policy judgments of the legislature. *Id.* at 1109.

[67] There has been a great deal of discussion about the reasonableness of the classification of offenses in § 23-1322(a) which are subject to pretrial detention. Hickey, *supra* note 3, at 310–13; Mitchell, *supra* note 3, at 1235–37; Tribe, *supra* note 3, at 382–83. Once the limits of constitutional discretion under the excessive bail clause are established, however, it is not the class of offense which is the constitutional problem, but how judicial discretion is exercised within that class. A judge cannot sweep the streets of all persons charged with a particular offense, but must analyze each case separately and withhold bail only for the best of reasons. Otherwise, he will be violating the excessive bail clause of the eighth amendment. Uniformly high bail for a whole class of offenders was the vice condemned in Stack v. Boyle, 342 U.S. 1 (1951). *See* Carlson v. Landon, 342 U.S. 524, 558 (1952) (dissenting opinion of Frankfurter, J.).

[68] D.C. CODE § 23-1322(b)(2)(B).

[69] Fernandez v. United States, 81 S.Ct. 642 (Harlan, Circuit Justice, 1961) (threatening witnesses); United States v. Rice, 192 F. 720 (C.C.S.D.N.Y. 1911).

[70] Sellers v. United States, 89 S.Ct. 36 (Black, Circuit Justice, 1968); Rehman v. California, 85 S.Ct. 8 (Douglas, Circuit Justice, 1964); Carbo v. United States, 82 S.Ct. 662 (Douglas, Circuit Justice, 1962); Leigh v. United States, 82 S.Ct. 994 (Warren, Circuit Justice, 1962). *But see* Williamson v. United States, 184 F.2d 280, 282 (Jackson, Circuit Justice, 1950):

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

[71] D.C. CODE § 23-1322(b)(2)(B).

[72] Mitchell, *supra* note 3, at 1233.

[73] Students of recidivism have tried to find out how to predict commission of future crimes, but most of their work has been on a statistical level of factor analysis for groups, rather than for individuals. *See, e.g.*, Carney, *Predicting Recidivism in a Medium Security Correctional Institution*, 58 J. CRIM. L.C. & P.S. 338 (1967); Unkovic & Dursay, *An Application of Configurational Analysis to the Recidivism of Juvenile Delinquent Behavior*, 60 J. CRIM. L.C. & P.S. 340 (1969). *But see* Arnold, *A Functional Explanation of Recidivism*, 56 J. CRIM. L.C. & P.S. 59 (1965).

Sen. Hruska is not worried about the ability of trial judges to predict future behavior, since they have to make predictions when they suspend sentences, grant probation, or set bail. Hruska, *supra* note 3, at 53. Predicting that a person will *not* commit another crime after conviction and predicting that he will *not* try to flee trial are not the same, however, as trying to predict that he *will* commit another crime within sixty days after indictment.

[74] Mitchell, *supra* note 3, at 1241.

[75] *Id.* at 1242.

clearest cases of danger to specific individuals or the general public. The requirement that there be "clear and convincing" evidence of danger[76] may not be discriminating enough to fulfill due process, but evidence of danger beyond a reasonable doubt ought to be satisfactory.[77]

Conclusion

Pretrial detention does not violate the eighth amendment protection against excessive bail as that amendment is interpreted under the common law of the District of Columbia. All that the pretrial detention law effects is a partial repeal of the federal statute rendering bail mandatory for defendants in noncapital cases. It simply grants judges a limited power to deny bail before trial, a power which they held under the common law before 1789. This result is similar to the situation which currently exists in the five states which allow considerable discretion to their judges in granting or denying bail.[78]

While the law does not violate the excessive bail clause, some procedural difficulties may arise including interference with right to counsel and punishment before conviction based on predictions of future criminal conduct. None of these problems is an insuperable obstacle to finding pretrial detention constitutional on its face. Although a pretrial detention order is guaranteed immediate review by the appellate court,[79] the order is to be "affirmed if it is supported by the proceedings below."[80] The trial courts will thus normally make the final determinations about detention for good or ill. It is possible that this quick appellate review could produce a backlog of cases, a backlog which might outlast the sixty-day detention period and render the appeal moot.[81] It should not, however, be presumed beforehand that pretrial detention will be administered unconstitutionally.[82]

Pretrial detention, if used judiciously, should complement the changes in the bail system occasioned by the Bail Reform Act of 1966. Under the money bail system, trial judges could, and often did, set excessive bail to keep "dangerous" offenders in jail before trial.[83] After the Bail Reform Act became law, excessive bail was not so readily imposed because, with the setting of money bail the exceptional case, a high bail figure attracted more attention on appeal.[84] Yet there was never any constitutional right to bail in all noncapital cases, nor was there any good reason why public safety, when actually endangered, could not be taken into account in determining pretrial release. Under the District of Columbia law, judges may now do openly what they have always done under the pretense of assuring appearance at trial.

As outlined herein, pretrial detention cannot be used constitutionally to rid the streets of possible offenders. This may be contrary to the intentions of the authors of the law, who were searching for a change in the Bail Reform Act

> to protect those innocent members of our society who might be victims of an accused criminal whose character and background showed high recidivist tendencies.[85]

Bail cannot be denied an accused on a mere suspicion that he may commit another crime. There must be a clear and convincing showing that he is so dangerous to the community that no less stringent measure, such as supervised custody or nighttime confinement,[86] will adequately protect

[76] D.C. Code § 23-1322(b)(2).

[77] *Cf. In re* Winship, 397 U.S. 358 (1970), where the Supreme Court found the evidentiary standard of "beyond a reasonable doubt" to be constitutionally necessary at trial.

[78] *See* note 36 *supra*, paras. 6–8.

[79] D.C. Code § 23-1323(b).

[80] The detainee must be released after sixty days unless the trial has started, or the defendant has delayed it with motions other than continuances. *Id.* § 23-1322(d)(1)(A). At least one of the law's backers in Congress displayed a willingness to limit appellate review:

> Another benefit of this proposal is that it will eliminate appellate review by the U.S. Court of Appeals. This Court of Appeals is notorious. Getting a conviction past Judge Bazelon and Judge Wright is like passing a ship between Scylla and Charybdis.

116 Cong. Rec. H1965 (daily ed., Mar. 19, 1970) (statement of Rep. Broyhill).

[81] *See* note 36 *supra*, paras. 6–8.

[82] The bail system has been used in the past for political ends, however, and it is possible that pretrial detention, especially if the sixty-day time limit is ever removed, could be used the same way against "subversives" and minorities. *See* R. Goldfarb, Ransom: A Critique of the American Bail System 49–81 (1965). Judge Crockett has vividly described the effects of racism on the bail system in an account of his controversial actions during mass arrests in Detroit in 1969. Crockett, *A Black Judge Speaks*, 53 J. Am. Jud. Soc'y. 360 (1970).

[83] Hickey, *supra* note 3, at 288; Portman, *supra* note 3, at 226.

[84] *See, e.g.*, United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969).

[85] Mitchell, *Wiretapping and Pretrial Detention—Balancing the Rights of the Individual with the Rights of Society*, 53 J. Am. Jud. Soc'y. 188, 191 (1969).

[86] *See* D.C. Code § 23-1321(a).

society. While pretrial detention may be a useful tool for certain circumstances,[87] it is not, if judiciously applied, the crime-fighting tool many of its proponents intended it to be.

[87] For example, in the forty-one states whose constitutions declare a right to bail, *supra* note 36 (Maryland, New Hampshire, and West Virginia, in para. 2, and Hawaii, in para. 5, grant this right only by statute), the abolition of the death penalty has been thought to guarantee a right to bail before trial for all offenders. State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); City of Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999 (1925). If the death penalty were abolished in the District of Columbia, the result would have been the same under 18 U.S.C. § 3146 (Supp. II, 1966), but for the pretrial detention law.

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THE THREE-JUDGE COURT ACT OF 1910: PURPOSE, PROCEDURE AND ALTERNATIVES

INTRODUCTION

In the Three-Judge Court Act of 1910, Congress provided for an extraordinary measure to safeguard state legislation from hasty invalidation by federal judges.[1] In its present form as Section 2281 of the Judicial Code, the measure provides that an injunction restraining the enforcement of a state statute on constitutional grounds can only be issued by a district court composed of three judges.[2] The jurisdiction of the special court is determined by a single district judge from the allegations of the complaint.[3] If he is satisfied that a certain case is one for three judges, the district judge requests the chief judge of the circuit to appoint a circuit judge and another district judge to sit with the requesting judge as a three-judge court.[4] Upon an order of the three-judge court which either grants or denies an interlocutory or permanent injunction, direct appeal to the Supreme Court may be taken by any party.[5]

While clear in conception, the Three-Judge Act has proven complex in application. The confusion stems from a long line of Supreme Court interpretations of the Act which have had a negative effect on the Act's operation. Specifically, the Court has established numerous threshold prerequisites to the convening of a three-judge court which are both complex and unworkable. These standards have in turn made appeals from district courts more frequent. The appellate structure associated with the three-judge court, however, is inadequate to deal with such appeals. As a result, litigants often find themselves involved in time-consuming and expensive appeals on the threshold question of whether or not they should be in a three-judge court. Notwithstanding these procedural problems, the Act has placed a strain on judicial resources by providing for direct appeal to the Supreme Court of a final decision of the statutory court, and, to a

[1] Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. (The Act is formally referred to as the Mann-Elkins Bill.) The 1910 Act was not the first three-judge court measure provided by Congress. In 1903, Congress required three-judge courts to be convened to hear antitrust and railroad cases which were considered important by the Attorney General. Act of Feb. 11, 1903, ch. 544 § 1, 32 Stat. 823. In 1906, Congress provided for a three-judge court to hear cases wherein orders of the Interstate Commerce Commission were attacked. Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 592.

[2] 28 U.S.C. § 2281 (1964) provides:

> An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[3] *Ex parte* Metropolitan Water Co., 220 U.S. 539 (1911).

[4] 28 U.S.C. § 2284 (1964) describes how the court is to be formed, and the function of each judge. The relevant parts of this Section provide:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court . . . shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
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> . . . .
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> (3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court . . . .
>
> . . . .
>
> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

[5] 28 U.S.C. § 1253 (1964) provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

lesser extent, by providing for three judges to perform the work of one.

This comment will address itself to the question of whether the benefits of the Three-Judge Act justify its continued existence in light of the burdens the Act has placed on courts and litigants alike. A first section will explore the purposes of the Three-Judge Act, both as they existed at the Act's passage and as they exist today. A second section will attempt to order some of the procedural difficulties which surround the special court. It will include an analysis of the discretion of a single district judge in summoning a three-judge court, as well as the appellate review of one-judge and three-judge decisions associated with the special court. A third section will suggest two alternatives by which the benefits of the Act might be retained with fewer costs to the courts and prospective litigants. The first alternative will assume retention of the Three-Judge Act, while the second will be founded on its abrogation.

I. The Purpose of the Three-Judge Court Act

Shortly after the turn of the century, the Supreme Court in *Ex parte Young*[6] rendered a decision which delighted the commercial powers of the day. In essence, the Court held that a state officer could be enjoined by a federal court from enforcing a state statute deemed objectionable to the federal constitution. As a result of this decision, the states were impaired in their ability to regulate commerce within their borders. This occurred because every time state legislation was enacted which was directed at the regulation of business, carefully selected federal judges sympathetic to business interests would enjoin the enforcement of the regulatory enactments.[7] Consequently, as the number of injunctions grew so did the anger of state legislators, who resented having "one little federal judge" [8] enjoining their state regulatory schemes. It was out of this anger that the Three-Judge Act was born.[9]

The immediate purpose for the passage of the Act was to prevent business from using the injunction to avoid state taxation statutes, and other state regulation. The broader purpose for the Act's passage was to harmonize federal-state regulations.[10] The three-judge measure was thought to assure these goals by offering the states the more thorough deliberation of three federal judges,[11] as well as direct review in the Supreme Court of the special court's decisions.[12]

[6] 209 U.S. 123 (1908).

[7] Indicative of the sentiments of state officers was a remark made by Governor Byrnes of South Dakota in his inaugural address:

> It was the boast of representatives of the railroads that in 13 minutes after the governor had signed at Pierre the act fixing passenger shares at 2 cents per mile the Federal judge at Sioux Falls had signed his sweeping order restraining the Attorney General and all State attorneys from attempting to enforce it.

49 Cong. Rec. 4773 (1913) as quoted from Note, *The Three Judge District Court and Appellate Review*, 49 Va. L. Rev. 538, 540 (1963).

[8] 45 Cong. Rec. 7256 (1910) (remarks of Senator Overman).

[9] In the Judiciary Act of 1937, Congress passed a twin three-judge court provision requiring three judges to entertain suits which sought to enjoin the enforcement of an Act of Congress. Act of Aug. 24, 1937, ch. 754, 50 Stat. 752. The passage of the Act was prompted by fears of Congress that New Deal Legislation would be invalidated by single federal judges. Why the three-judge measure was thought to achieve this end is not clear. For in the same Act there were other measures which substantially mitigated against any protective advantage Congress might have sought from a three-judge court. The first section of the Judiciary Act of 1937 gave the Government the right to intervene in any suit in which an Act of Congress was attacked on constitutional grounds, and the second section provided for direct appeal to the Supreme Court whenever an Act of Congress was declared unconstitutional. [Each of these measures has been retained with slight changes. The first section is now 24 U.S.C. § 2403 (1964), and the second is 28 U.S.C. § 1252 (1964). The three-judge measure is presently incorporated in 28 U.S.C. § 2282 (1964).] Although the first two sections of the Judiciary Act of 1937 were subject to extensive debate, the lack of controversy generated by the three-judge provision has led a number of commentators to conclude that it was added as an afterthought. *See* Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. Chi. L. Rev. 555, 563 and Note, *supra* note 7, at 544. It has been further argued that there is no need to provide a mediating device between two branches of the same government. A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts. Commentary § 1374 at 248 (April 1968 Draft). The American Law Institute has advocated that the three-judge court provision with respect to federal acts be abolished, but that the three-judge provision regarding state statutes be retained. A.L.I. Study *supra*.

[10] As Senator Overman commented:

> Whenever one judge stands up in a state and enjoins the governors and the attorney general, the people resent it, and public sentiment is stirred, as it was in my state, when there was almost a rebellion, whereas if three judges declare that a statute is unconstitutional the people would rest easy under it.

45 Cong. Rec. 7256 (1910).

[11] See remarks of Senator Brown, 45 Cong. Rec. 7257 (1910), and Senator Overman, 45 Cong. Rec. 7256 (1910).

[12] Professor Currie points out that speedy appeal to the Supreme Court was emphasized in arguments on behalf of the Expediting Act of 1903 where direct appeal was first provided for three-judge court decisions. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 75.

While it has been persuasively argued that the specific purpose for which the Act was passed has been outdated by subsequent legislation,[13] the more general purpose for the passage of the Act is as valid today as it was in 1910. It seems likely that state legislators would be no more content to see single federal judges enjoining the operation of apportionment plans, welfare schemes, and civil rights statutes today than they were to see a single judge enjoin their taxation plans in 1910. The special court can, therefore, still be viewed as an important palliative between the Federal Government and the states. Furthermore, the three-judge court has in recent years become of special value to civil rights groups and welfare litigants who desire the ready access to the Supreme Court which the Act provides for. During the October 1969 term of the Supreme Court, thirteen cases arising under Section 2281 were treated by the Court on the merits.[14] Of these, seven cases involved civil rights and welfare class actions.[15]

[13] *See* Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 559 (1960). It is argued that the Johnson Act of 1934, and Tax Injunction Act of 1937 substantially foreclosed district court adjudication of suits which sought to enjoin the enforcement of state public utility rate orders and state tax collection. It was just these sorts of suits which prompted the 1910 Act.

[14] Gunn v. University Committee to End the War in Vietnam, 399 U.S. 383 (1970) (disorderly conduct statute attacked by War protesters); Evans v. Cornman, 398 U.S. 419 (1970) (Maryland voting requirement attacked); Wyman v. Rothstein, 398 U.S. 275 (1970) (disparity in New York welfare payments attacked); Lewis v. Martin, 397 U.S. 552 (1970) (California determination of AFDC payments attacked); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland limit on AFDC payments attacked); Wheeler v. Montgomery, 397 U.S. 280 (1970) (Administrative procedure challenged with respect to eligibility to obtain old age benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (denial of hearing to AFDC recipients attacked); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Fruit and Vegetable statute challenged); Reetz v. Bozanich, 397 U.S. 82 (1970) (Alaskan fishing statute challenged); Goldstein v. Cox, 396 U.S. 471 (1970) (New York Surrogate Court Procedure Act attacked); Turner v. Fouche, 396 U.S. 346 (1969) (Statute authorizing jury selection methods challenged); Carter v. Commission of Green County, 396 U.S. 320 (1969) (Statute authorizing jury selection methods challenged); Hall v. Beals, 396 U.S. 45 (1969) (Colorado residency voting requirement attacked).

[15] Wyman v. Rothstein, 398 U.S. 275 (1970); Lewis v. Martin, 397 U.S. 552 (1970); Dandridge v. Williams, 397 U.S. 471 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970); Turner v. Fouche, 396 U.S. 346 (1969); Carter v. Jury Commission of Green County, 396 U.S. 320 (1969).

II. THE OPERATION OF THE THREE-JUDGE COURT

In determining whether or not the continued existence of the Three-Judge Act can be justified, the finding that the Act serves a useful function is merely the point of departure. For if in the operation of the Act its benefits prove so illusory that they are outweighed by the costs which the three-judge court imposes on judicial resources, the Act should be abolished. This section will analyse the viability of the three-judge court in light of its operation.

A. *To Convene or Not to Convene a Three-Judge Court—The Plight of the District Judge*

The Supreme Court first interpreted the Three-Judge Act in *Ex parte Metropolitan Water Co.*[16] In that case, the Court made the role of the district judge in convening a three-judge court a simple one. It held that whenever an injunction against the enforcement of a state statute was sought on the ground of the unconstitutionality of that statute, a three-judge court was to be convened.[17] The discretion of the single judge was to be limited to ascertaining whether or not federal jurisdiction existed in each case.

Since *Ex parte Metropolitan Water Co.*, the Supreme Court has expanded the discretion of a single judge to convene a three-judge court considerably. As a result, district judges must now make detailed and confusing inquiries with respect to three-judge court jurisdiction. The following

[16] 220 U.S. 539 (1911).

[17] Section 2281 merely states that a single judge cannot grant an interlocutory or permanent injunction. It was the contention of the district judge in *Metropolitan* that he had the authority to deny injunctive relief under the 1910 Act. The Supreme Court, in a mandamus proceeding, made it quite clear, however, that the Act forbade a district judge from either granting or denying injunctive relief.

> We find no . . . implication anywhere in the section justifying that there was an intention on the part of Congress that the single justice or judge . . . need not call to his assistance two other judges . . . in the event that he was of opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose that the application . . . should be heard . . . whether the claim of unconstitutionality be or not be meritorious. . . ."

220 U.S. 539, 545 (1911).

The Second Circuit has recently departed from this interpretation of the 1910 Act. In *Astro Cinema Corp. v. Mackell*, 422 F.2d 293 (2d Cir. 1970), the court reached the conclusion that a three-judge court should have been convened under present tests of three-judge court jurisdiction but, nevertheless, refused to convene a three-judge court on the ground that the three-judge provision should not apply to instances in which a single judge does not grant injunctive relief.

analysis focuses on this development and correspondingly examines the difficult questions which a single judge must decide before a three-judge court can be convened.

1. *The Substantial Question Doctrine*

In 1933, the Supreme Court in the landmark decision of *Ex parte Poresky*[18] decided that in order for a three-judge court to be convened the constitutional challenge to a state statute must be a substantial one. In so ruling, the Court circumvented the words of the Three-Judge Act which make no allusion to substantial constitutional questions. The Court reasoned that a constitutional claim which was insubstantial did not raise a case or controversy, and in the absence of a case or controversy federal question jurisdiction could not be invoked.[19] Although the Court's rationale has not worn well,[20] the substantial question inquiry has been universally adopted[21] despite what some commentators consider an attempt to abrogate *Poresky* in a 1942 amendment to the Three-Judge Act.[22]

[18] 290 U.S. 30 (1933).

[19] *Id.* at 32. The Court indicated, however, that where federal jurisdiction exists independently of federal question jurisdiction, the substantiality test was not to be applied. *Id.*

[20] In Bailey v. Patterson, 369 U.S. 31 (1962), the Court permitted a single judge to enjoin the enforcement of a state statute when no substantial question existed with respect to the statute's constitutionality. Under the *Poresky* rationale, however, a district judge does not have jurisdiction to entertain a claim which does not raise a substantial constitutional question, and could not, therefore enjoin the enforcement of a state statute. A number of lower courts simply take for granted the fact that the substantial question inquiry relates only to the jurisdiction of the three-judge court and has nothing to do with federal jurisdiction. National Mobilization Committee To End The War In Viet Nam v. Foran, 297 F. Supp. 1, 3 (N.D. Ill. 1968), O'Hair v. United States, 281 F. Supp. 815, 818 (D.D.C. 1968). In Rosado v. Wyman, 397 U.S. 397, 404 (1970), Mr. Justice Harlan referred to the *Poresky* rationale as "a maxim more ancient than analytically sound."

[21] In *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), the Court indicated that the substantial question requirement was a precondition to the convening of a three-judge court. Since that decision, the substantial question test has been consistently followed in the lower courts.

[22] *See* Currie, *supra* note 12 at 21; Bereuffy, *The Three-Judge Federal Court*, 15 ROCKY MT. L. REV. 64, 71. Professor Currie indicates that the Bar Association Committee which initiated the passage of the amendment was of the opinion that it would overrule *Poresky*. The amendment in its present form is 28 U.S.C. § 2284(5) (1964). The sentence which was thought to overrule *Poresky* provides in part: "A single judge shall not . . . dismiss the action, or enter a summary or final judgement." The reasons the amendment did not overrule *Poresky* are two: First, 28 U.S.C. § 2284, which sets out the procedure for the convening of the special court refers only to those actions "required" to be heard by a three-judge court. Since an insubstantial question is not required to be so heard under *Poresky*, the Amendment is not controlling. Second, the beginning of part 5 of § 2284 refers to the actions of one of the judges of the three-judge court, not to the original district judge who convenes the court. The "single judge" referred to in the above sentence can be easily construed to refer to one of the three judges and not the district judge. *See* note 4 supra.

In 1963, the Court further extended the substantial question doctrine in *Bailey v. Patterson*,[23] holding that where prior decisions of the Supreme Court make frivolous any claim to the constitutionality of a state statute a single judge need not convene a three-judge court. The Court in *Bailey* refused to take an appeal from a three-judge court on the ground that one judge instead of three should have decided the case.[24] Just as the Court in *Poresky* held that a clearly constitutional state statute did not raise a substantial constitutional question and did not, therefore, merit a three-judge hearing, so the Court in *Bailey* held that a state statute which, in view of prior decisions, was clearly unconstitutional also failed to raise a substantial constitutional question and should not be brought before a three-judge court. While one commentator has suggested the *Bailey* rationale should be only applied to civil rights cases,[25] *Bailey* like *Poresky* has received subsequent Supreme Court ratification.[26]

The substantial question inquiry has put the single judge in the curious position of deciding whether a statute is clearly constitutional or clearly unconstitutional before he can determine whether he or a three-judge court has jurisdiction to hear the case. To make this inquiry, the *Poresky* Court offered the following definition of what it considered an unsubstantial question to be:

> The question may be plainly unsubstantial, either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.[27]

The characterization of a claim as "obviously without merit" can hardly be viewed as a helpful qualification of the meaning of "unsubstantial

[23] 369 U.S. 31 (1962).

[24] *Id.* at 33.

[25] *See* Currie, *supra* note 12, at 65.

[26] Rosado v. Wyman, 397 U.S. 397 (1970); Turner v. City of Memphis, 369 U.S. 350 (1962).

[27] 290 U.S. 30, 32 (1933).

question." Nor do "previous decisions" of the Supreme Court provide a single judge with a clear standard by which to convene a three-judge court. Different factual situations, new constitutional theories, and conflicting Supreme Court rulings make such a determination difficult. As a result, the substantial question inquiry depends largely on the predilections of individual judges. Two recent cases illustrate the variations which exist between courts with respect to what the substantial question inquiry involves.

In *National Mobilization Committee to End the War in Viet Nam v. Foran*,[28] a district judge denied a three-judge court hearing on the ground that the celebrated Anti-Riot Act raised no substantial constitutional question. In affirming the district judge, the Court of Appeals for the Seventh Circuit found that a Supreme Court decision upholding an Arkansas disorderly conduct statute foreclosed any constitutional question with respect to the Anti-Riot Act.[29] In fact, the two statutes were arguably quite different in-as-much as the conduct proscribed in the Anti-Riot Act went beyond the scope of the activities proscribed by the Arkansas statute upheld by the Supreme Court.[30] The Seventh Circuit, nonetheless, found the two statutes sufficiently similar to preclude a three-judge hearing. To reach such a conclusion the Seventh Circuit implicitly gave the Anti-Riot Act a narrow interpretation, and, in so doing, sanctioned the right of district judges to interpret challenged statutes in order to obviate their raising substantial constitutional questions. Under such an interpretation of the substantiality doctrine few three-judge courts would be convened. For if a district judge was unable to narrow a statute sufficiently to avoid a constitutional challenge, he would either (1) only convene a three-judge court when he himself thought it likely that the statute was unconstitutional or (2) enjoin the enforcement of the state statute himself on the basis that it was clearly unconstitutional.

The Fifth Circuit, which forms far more three-judge courts than any other circuit,[31] takes a more liberal approach than the Seventh Circuit. In *Hargrave v. McKinney*,[32] the court overruled the decision of a district judge who found no substantial question in a constitutional attack on a Florida educational tax requirement. While the language of the court of appeals would seem to indicate scepticism on its part that the claim was particularly meritorious, the court nevertheless felt obligated to convene a three-judge court under its interpretation of the substantiality definition proposed in *Poresky*. The court held that a claim need only be arguable to merit the invocation of a three-judge court.

> Regardless of our personal reactions to the merits of plaintiffs' position and regardless of the novelty of the theories which support their position, we cannot say that their view of the taxing scheme is beyond challenge.... All we decide is that the claim is such an arguable one as to be "substantial" within the *Poresky* definition.[33]

2. *Quasi-Jurisdictional Questions*

The *Poresky* Court established that the substantial question inquiry must be made initially by the single judge and not by the three-judge court. This follows because the substantial question inquiry goes to the question of federal jurisdiction itself, and the district judge must ascertain his own jurisdiction before a three-judge court can be convened. Therefore, the three-judge court cannot in the first instance determine its own jurisdiction with regard to the substantiality of plantiff's claim because for it to do so would be to presuppose that federal jurisdiction exists.

[28] 297 F. Supp. 1 (N.D. Ill. 1968).

[29] 411 F.2d 934 (7th Cir. 1969).

[30] The Anti-Riot Act forbids persons from travelling in interstate commerce "with intent" to incite or encourage a riot and performing "any... overt act" in furtherance thereof. 18 U.S.C. § 2101 (1968). The overt act to which the Anti-Riot Act refers could be a telephone call or it could be rioting itself. The Arkansas statute as interpreted by the Supreme Court of Arkansas required that a person actually take part in an unlawful assemblage with the intention to resort to force or violence in order to fall under the statute's proscriptions. Cole v. Arkansas, 338 U.S. 345, 348–49 (1949). For this statute to foreclose a substantial constitutional question with respect to the Anti-Riot Act would require at the least that the "overt act" referred to in the Anti-Riot Act be interpreted to encompass presence at a riot.

[31] Of 215 Three-Judge Courts convened in 1969, 57 were convened in the Fifth Circuit. (*See* 1969 DIV. ADMIN. OFF., U.S. COURTS, ANN. REP. 135). The 5th Circuit's approach to the substantial question doctrine was well elucidated by Judge Brown in Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968):

> In this day and time of dynamic expansion of constitutional principles and their application to new and sometimes unheard of situations it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial. It is the better course—certainly from an administrative standpoint—to forego the doubts, constitute a 3-Judge Court, and allow that court to determine initially this and the other issues.

Id. at 913.

[32] 413 F.2d 320 (5th Cir. 1969).

[33] *Id.* at 328.

With respect to questions which might be called quasi-jurisdictional, however, there is some confusion over which of these two courts, the single-judge or the three-judge court, should decide such questions in the first instance. For example, the three-judge court is classified as a court in equity because of the kind of relief it provides. As such, before a statutory court can decide a question on the merits, plaintiff must have attained "equity jurisdiction". This can occur only if plaintiff has exhausted legal and administrative remedies.[34] It is not certain, however, whether a single judge should make such equitable jurisdictional determinations before convening a three-judge court or whether such determinations should be left to the three-judge court itself. In *Stratton v. St. Louis S. W. Ry.*,[35] the Court implied that questions concerning equitable jurisdiction were not to be decided by a single judge. Similarly, in *Idlewild Bon Voyage Liquor Corp. v. Epstein*,[36] the Court stated in *dicta* that if the complaint "at least formally alleges a basis for equitable relief" [37] the inquiry of the single judge with respect to questions of equitable jurisdiction ends. Yet a number of lower courts have either not interpreted these cases as foreclosing their dismissing a complaint on equitable grounds, or have simply disregarded them.[38]

Similar to questions of equitable jurisdiction is the quasi-jurisdictional doctrine of abstention (retaining jurisdiction but waiting for state courts to interpret a challenged statute).[39] With respect to that doctrine, the Supreme Court has been much more explicit. In *Stratton v. St. Louis S.W. Ry Co.*,[40] the Court ruled that a district judge could not abstain in a case where a three-judge court was otherwise required. The Court reasoned that abstention could have the effect of a grant[41] of denial[42] of injunctive relief by a district judge, and this was exactly what the Court had interpreted the three-judge provision to proscribe.[43] At least one lower court has stated, however, that a district court can indeed abstain in proper circumstances.[44]

If, as the substantiality doctrine would seem to suggest, the Supreme Court follows a policy of limiting three-judge court jurisdiction, it is curious that the Court has not chosen to treat questions of equity jurisdiction and abstention as threshold prerequisites to the convening of a three-judge court. The prospect of a single judge convening a three-judge court only to have the special court later dismiss itself for want of equity jurisdiction strikes of wastefulness. Not only would the district judge have had to determine the substantiality of plaintiff's claim, but also the Supreme Court would be bound to review the decision of the three-judge court dismissing itself.[45]

[34] The Court has recently invoked the doctrine of equitable jurisdiction to remove numerous suits from the federal forum, and from three-judge courts in particular. In Younger v. Harris, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971), the Court ruled that federal courts should not entertain constitutional attacks on state statutes brought by persons facing good faith state prosecution for violation of such statutes. The Court intimated that a federal court should intervene only where a challenged statute was being used by state officers to harass plaintiff, or a state statute was clearly an unconstitutional abridgement of First Amendment rights.

[35] 282 U.S. 10 (1930), the *Stratton* Court said that the district judge should not have dismissed "for want of equity." *Id.* at 13. Yet the lower court had denied petitioner relief on the ground that the statute was constitutional. St. Louis S.W. Ry. v. Emmerson, 27 F.2d 1005, 1009 (S.D. Ill. 1928). Professor Currie has referred to *Stratton* as "mighty weak authority" for the proposition that a single judge cannot dismiss on equitable grounds. Currie, *supra* note 12, at 25.

[36] 370 U.S. 713 (1962).

[37] *Id.* at 715.

[38] Duncombe v. State of New York, 267 F. Supp. 103 (S.D. N.Y. 1967); Rosso v. Puerto Rico, 226 F. Supp. 688 (D.P.R. 1964); Linehan v. Waterfront Commission, 116 F. Supp. 401 (S.D. N.Y. 1953); Priceman v. Dewey, 81 F. Supp. 557 (E.D. N.Y. 1949).

[39] The abstention doctrine was developed by the Supreme Court in Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), in the interest of comity between federal and state courts. Although after the Judiciary Act of 1875 federal courts had the duty to respect plaintiff's right to the federal forum whenever his claim was founded on a constitutional provision, the Court in *Pullman* ruled that federal courts should defer to state courts in special circumstances. Where, for example, a state court construction of a challenged state statute could avoid the constitutional issue raised by plaintiff, the Court has held abstention to be the proper procedure. Reetz v. Bozanich, 397 U.S. 82, 87 (1970). Similarly, when state criminal proceedings have commenced after plaintiff has filed his complaint in federal court, the Court has held that federal courts should not interfere with the state prosecution. Douglas v. City of Jeanette, 319 U.S. 157, 164 (1942).

[40] 282 U.S. 10 (1930), followed in Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 716 (1962).

[41] Where a temporary restraining order was in effect, abstention would have the effect of a preliminary injunction.

[42] The Supreme Court has interpreted the Three-Judge Act as not permitting a district judge to grant or deny injunctive relief. *See* note 17 *supra* and accompanying text.

[43] Stratton v. St. Louis S.W. Ry., 282 U.S. 10, 17 (1970).

[44] Duncombe v. State of New York, 267 F. Supp. 193 (S.D. N.Y. 1967). Such circumstances would be in the face of an impending criminal prosecution.

[45] See *infra* note 97 and accompanying text.

3. Alternative Statutory Attacks

Another instance in which the discretionary limits of the single judge are unclear is when a claim is presented before a single judge which asserts alternative causes of action, one based on a constitutional provision and the other on nonconstitutional (e.g., statutory) grounds. Although the Supreme Court has consistently held that if the constitutional claim is substantial a single judge must convene a three-judge court to hear both claims,[46] a recent Supreme Court decision casts considerable doubt on the necessity of a single judge to do so.

In *Rosado v. Wyman*,[47] Justice Harlan indicated in *dicta* that where there are alternative causes of action, one based on a constitutional argument and the other based on statutory grounds:

> ... (T)he most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the District Court at a time when district court calendars are over-burdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court.[48]

Justice Harlan would thus suggest that the three-judge court and single-judge should have concurrent jurisdiction over the statutory claim. In support of this proposition, Justice Harlan inappropriately cited *Swift & Co. v. Wickham*.[49] Unlike Justice Harlan's hypothetical, *Swift* involved a situation where plaintiff's constitutional claim was held by the Supreme Court to not merit three-judge adjudication.[50] As a result, the Court stated that the case could have been decided by a single judge on all issues. Justice Harlan suggests, however, that even where the constitutional claim is a viable one, the three-judge court should remand the statutory claim to the single judge to be disposed of by him. The Supreme Court has never so held.[51]

If accepted by lower courts, Justice Harlan's proposal would further limit three-judge jurisdiction. Like other such limitations of three-judge power, the proposal would have the virtue of reducing both three-judge courts and direct appeals to the Supreme Court.[52] With respect to its negative effects, the proposal would delay access to the three-judge forum while the single judge was deciding the statutory question. Further, the arrangement would result in the curious situation of plaintiff's claims being carried in two courts at the same time. For example, if the district judge were to dismiss the statutory claim, plaintiff would then have to argue that claim in the court of appeals while for the first time arguing his constitutionally-based claim before a three-judge court. Moreover, if the district judge decided to abstain from deciding the statutory question until state remedies were exhausted, his decision would have the effect of foreclosing the dormant constitutional attack and would fall under the proscriptions of *Idlewild Bon Voyage Liquor Corp. v. Epstein*.[53]

4. State Statutes—Geographical Scope and Unconstitutional Applications

If Section 2281 makes one thing clear, it is that in order for a three-judge court to be convened the unconstitutionality of a state statute must be alleged. Although the originators of the Three-Judge Act did not see fit to qualify what was meant by a state statute, the Supreme Court did. Early in the Court's interpretation of the Act, the Court ruled that Congress intended the three-judge provision to apply only to cases "of unusual gravity".[54] The Court reasoned that a three-judge court need not be convened unless "a state statute of general and statewide application is sought to be enjoined".[55] The Court thus determined that a state statute which affected only one area of a

[46] Florida Lime Growers v. Jacobsen, 362 U.S. 73 (1970); Zemel v. Rusk, 381 U.S. 1 (1965). Each of these cases refer to alternative constitutional and non-constitutional attacks on state statutes. Where a constitutional attack on a state statute is presented with other counts which are not directed against the statute, at least one court has held that the counts of the complaint should be split, allowing the constitutional question to be determined by a three-judge court, and the non-statutory attacks to be determined by the district judge. *See* Smuck v. Hobsen, 408 F.2d 175 (D.C. Cir. 1969).

[47] 397 U.S. 397 (1970).

[48] *Id.* at 403. Although *Rosado* itself involved a situation where the constitutional question raised by petitioner became moot during the course of litigation, Justice Harlan suggests that the single judge should decide the statutory claim even when it is joined with a substantial constitutional claim which is not moot. *Id.*

[49] 382 U.S. 111 (1965).

[50] In *Swift*, the Court overruled its recent decision in Kessler v. Dept. of Public Safety, 369 U.S. 153 (1962), in which it had held that constitutional challenges invoking the Supremacy Clause could be brought before a three-judge court.

[51] *See* note 46 *supra* and accompanying text.

[52] Where plaintiffs were granted relief on the statutory claim by the district judge, there would be no need to convene the three-judge court.

[53] *See* notes 34–36 *supra* and accompanying text.

[54] *Ex parte* Collins, 277 U.S. 565, 567 (1928).

[55] Moody v. Flowers, 387 U.S. 97, 101 (1967).

state was foreclosed from three-judge court adjudication.

The Court has offered a number of examples as to what it considers a statute of local applicability.[56] In its most recent example, *Moody v. Flowers*,[57] the Court held that a state statute which affected only one county of the state did not necessitate a three-judge hearing. The Court was not impressed with the fact that a majority of counties in the state were governed by similar statutes.[58] In a companion case to *Moody*, however, the Court did find three judges were required where a state statute applied to all counties.[59]

Although the Court's distinction may have lacked substance,[60] it at least had the virtue of being simple for a district judge to work with. Two recent rulings, however, appear to have returned the district judge to a state of uncertainty. In *Alabama State Teachers Association v. Public School and College Authority*,[61] the Court affirmed a decision of a three-judge court concerning an Alabama statute which authorized a bond issue for the construction of a local branch of Auburn University. And in *Evans v. Cornman*,[62] the Court affirmed the decision of a three-judge court which dealt with an order by the Maryland Board of Registry denying the right to vote to residents living on the grounds of the National Institute of Health. In neither case could it be said that the geographical concern of the statute was statewide.

With respect to the jurisdiction of the three-judge court to enjoin state statutes which are being unconstitutionally applied but which are constitutional on their face, the Supreme Court has been equally ambiguous. In *Turner v. Fouche*,[63] the Supreme Court affirmed the decision of a three-judge court which held a Georgia statute constitutional on its face but unconstitutional in its application. The three-judge court had granted injunctive relief with respect to the unconstitutional manner in which the statute was being carried out. In affirming, the Supreme Court stated that three-judge courts could properly fashion remedies which proscribed constitutional conduct without invalidating a statute which could be carried out constitutionally.[64]

Although the *Turner* decision followed a number of Supreme Court rulings which permitted three-judge courts to enjoin the unconstitutional enforcement of state statutes,[65] the jurisdiction of three-judge courts to entertain such constitutional challenges is not as simple as the *Turner* court would indicate. In a footnote in *Turner*, the Court states:

> The appellees also propose a distinction between attacks on statutes and attacks upon the results of their administration, and urge that the appellant's case comes within the latter category. But this argument overlooks the line, delineated by our past decisions, that falls between a petition for injunction on the ground of the unconstitutionality of a statute, either on its face or as applied, which requires a three-judge court, and a petition seeking an injunction upon the unconstitutionality of the result obtained by the use of a statute not attacked as unconstitutional.[66]

The Court's distinction between "unconstitutional applications" and "unconstitutional results" stems from two earlier Supreme Court rulings. In *Ex parte Bransford*[67] and *Phillipps v. United States*,[68] the Court ruled that where a state officer acted outside the scope of his statutory authority in seeking to enforce a state statute, the case was not one for a three-judge court because the "action complained of" was not "directly attributable to the statute".[69] The Court reasoned that the unauthorized activities of the state officers in each case in no way affected the validity of the state statutes which they were improperly enforcing.

Whatever the theoretical niceties, the distinction

[56] Rorick v. Board of Commissioners, 307 U.S. 208 (1939) (Florida statute applicable only to Everglade Drainage District denied three judges); *Ex parte* Public National Bank, 278 U.S. 101 (1928) (State statute authorizing state tax assessment for the city of New York denied a three-judge court); *Ex parte* Collins, 277 U.S. 565 (1928) (statute permitting towns to assess costs of street improvements denied three judges).

[57] 387 U.S. 97, 101 (1967).

[58] *Id.* at 102.

[59] Sailors v. Board of Education, 387 U.S. 105 (1967).

[60] The only distinction between Sailors v. Board of Education, 387 U.S. 105 (1967), and Moody v. Flowers, 387 U.S. 97 (1967), is that in *Moody* the majority of counties in the state were subject to similar but separate statutes, while in *Sailors* each county was governed by one statute. The effect of an injunction in both cases would have substantially the same effect. It would be a rare state officer who would pursue the same policy in one county which he had been enjoined from pursuing in another.

[61] 393 U.S. 400 (1969).

[62] 398 U.S. 419 (1970).

[63] 396 U.S. 346 (1970).

[64] *Id.* at 355.

[65] Fleming v. Rhodes, 331 U.S. 100, 102–104 (1947); Query v. United States, 316 U.S. 486, 489 (1942).

[66] 396 U.S. 346, 353 n. 10 (1970).

[67] 310 U.S. 354 (1940).

[68] 312 U.S. 246 (1941).

[69] *Ex parte* Bransford, 310 U.S. 354, 361 (1940).

espoused by the Supreme Court does not lend itself easily to practical application. In order to determine whether or not a three-judge court should be convened, a district judge must make a difficult inquiry into the legislative history of a particular statute in order to determine whether or not the challenged means by which the statute is being carried out was intended by the legislature. The difficulty in making such inquiries is effectively illustrated by two cases where courts attempted to apply the distinction developed from *Bransford* and *Phillipps*. In *Tyrone, Inc., v. Wilkinson*,[70] police seized a film under a state obscenity statute without first affording the owner a prior hearing to determine whether or not the film was in fact obscene. The district court having ruled in favor of the film owner, the state's attorney argued on appeal that petitioner's attack on the constitutionality of the seizure was an attack on the state's search and seizure statute and a three-judge court should have, therefore, been convened.[71] The Fourth Circuit dismissed the state's argument and refused to convene a three-judge court on the ground that the challenged activity was the result of the improper enforcement of a valid state statute. In a similar factual situation, the Second Circuit in *Astro Cinema Corp. v. Mackell*[72] ruled that the challenged police activities were within the scope of the search and seizure state and a three-judge court should have been convened. In reaching opposite conclusions on the basis of similar facts, the Fourth Circuit cited *Phillipps v. United States*[73] and the Second Circuit cited *Ex parte Bransford*.[74]

In summary, the Supreme Court has imposed numerous conditions on district judges which are prerequisite to the convening of a three-judge court. Although the Supreme Court cannot be criticized for inaugurating those standards, it can be criticized for the lack of clarity and uniformity those standards provide. The result of the use of these standards by district courts is to force litigants to take expensive and time-consuming appeals to the court of appeals on the threshold question of three-judge court jurisdiction. To the extent that such appeals effectively deny litigants access to the three-judge forum, the purposes of the Three-Judge Act are compromised.

[70] 410 F.2d 639 (4th Cir. 1969).
[71] *Id.* at 643.
[72] 422 F.2d 293 (2d Cir. 1970).
[73] 410 F.2d 639, 643 (4th Cir. 1969).
[74] 422 F.2d 293, 297 (2d Cir. 1970).

B. *Appellate Review*

Because of the number and complexity of threshold determinations which both one-judge and three-judge courts must make with respect to three-judge court jurisdiction, an efficient means of reviewing those determinations is imperative if the goals of the Three-Judge Act are to be realized. Unfortunately, the appellate structure associated with three-judge courts can hardly be described as efficient.[75] The Three-Judge Act itself did not provide for review of questions relating to three-judge jurisdiction, and although the Supreme Court can be credited for recently making efforts to create a more orderly system of appeal,[76] the present appellate system associated with the three-judge court is wholly inadequate. The system both exerts a strain on judicial resources, and ties litigants up in costly and time-consuming appeals on threshold questions.

Where a district judge refuses to convene a three-judge court for any reason, the Supreme Court has recently indicated that review of that decision lies in the court of appeals.[77] In reaching

[75] Some commentators have referred to the three-judge court appellate structure as "so complex as to be virtually beyond belief." C. WRIGHT, THE LAW OF FEDERAL COURTS § 50, at 193 (1970).

[76] *See, e.g.*, Mengelkoch v. Industrial Welfare Commission, 393 U.S. 83 (1968); Wilson v. City of Port Lavaca, 391 U.S. 352 (1968); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

[77] Where a district judge has refused to convene a three-judge court for want of federal jurisdiction, the court of appeals has always been the proper place to review that decision. Eastern States Petroleum Corp. v. Rogers, 265 F.2d 593 (D.C. Cir. 1959), *appeal dismissed*, Eastern States Petroleum Corp. v. Prettyman, 361 U.S. 805 (1959); Carrigan v. Sunland-Tujunga Telephone Co., 263 F.2d 568 (9th Cir. 1959), *cert. denied*, 359 U.S. 975 (1959); White v. Gates, 253 F.2d 868 (D.C. Cir. 1958), *cert. denied*, 356 U.S. 973 (1958). Where a single judge has granted federal jurisdiction and decided a case on the merits which a three-judge court should have heard, the court of appeals has refused to review his decision either on the merits or on his decision not to convene a three-judge court. Idlewild Bon Voyage Corp. v. Rohan, 289 F.2d 426 (2nd Cir. 1961); Wicks v. Southern Pacific Co., 231 F.2d 130 (9th Cir. 1956), *cert. denied*, 351 U.S. 946 (1956). Although it would seem obvious that if a district judge had jurisdiction to determine whether or not a three-judge court should be convened the court of appeals had jurisdiction to review that decision, the Supreme Court in *Stratton v. St. Louis S.W. Ry.* ruled that where a single judge inappropriately decided a case which should have been decided by a three-judge court, review could not be had in the court of appeals of the single judge's decision. 282 U.S. 10, 16 (1930). It was not until *Idlewild Bon Voyage Corp. v. Epstein* that the Supreme Court indicated that *Stratton* only meant that a court of appeals could not review the single judge's decision on the merits. It did not limit the court of appeals from reviewing the deci-

this doctrine, the Court found it necessary to speak through two decisions—each handed down within four years of the other. In *Idlewild Bon Voyage Liquor Corp. v. Epstein*, the Court strongly implied that all questions of three-judge court jurisdiction are reviewable in the court of appeals,[78] and in *Schackman v. Arnebergh*, the Court turned this implication into fact, citing *Idlewild* as authority for the proposition that review can indeed be had in the court of appeals.[79]

Similarly, when a single judge grants a three-judge hearing either correctly or incorrectly and the three-judge court dissolves itself for want of statutory jurisdiction, the Supreme Court seems to have recently made the proper place of review of that action the court of appeals. In both *Wilson v. City of Port Lavaca*[80] and *Mengelkoch v. Industrial Welfare Commission*,[81] the Court found that the decision of a three-judge court dismissing itself on jurisdictional grounds was comparable to the denial of a three-judge court by a single judge, and was thus appealable in the court of appeals.

Unfortunately, however, the right to take an appeal from the decision of the three-judge court dissolving itself for want of jurisdiction is not as simple as the Supreme Court indicates. When a three-judge court dissolves itself on jurisdictional grounds, it has not rendered a final decision from which an appeal can be taken to the court of appeals.[82] The special court has merely transferred the case to the single judge to be decided by him on the merits. Professor Currie points out that in *Mengelkoch* the single judge rendered a final decision on the merits on the same day the three-judge court dissolved itself for want of jurisdiction, and it was the decision of the single judge, not the three-judge court, which was actually appealed from in the court of appeals.[83] While such an interpretation of the *Mengelkoch* decision is quite plausible, the *Mengelkoch* Court nevertheless offered strong language to the effect that it was the interlocutory order of the three-judge court dissolving itself which could be appealed to the court of appeals.[84]

sion of the single judge not to convene a three-judge court. 370 U.S. 713, 716 (1962).

[78] 370 U.S. 713 (1962).

[79] 387 U.S. 427 (1967). According to Judge Friendly:

> If a court of appeals does not exactly have jurisdiction of an appeal in a case such as this, it has something sufficiently similar to enable it to reverse for the convening of a three-judge court.

Gold v. Lomenzo, 425 F.2d 959, 961 (2d Cir. 1970).

[80] 391 U.S. 352 (1968) (mem). In Wilson v. City of Port Lavaca, 285 F. Supp. 85 (S.D. Tex. 1968), the three-judge court inappropriately entered its decision as a final judgement and the district judge adopted that opinion as his own. *Id.* at 88. Once the three-judge court found itself without jurisdiction to decide the case, it should have dissolved itself immediately. Professor Currie would appear to criticize the Supreme Court for ignoring "the once relevant fact that the three-judge court had rendered a final decision." Currie, *supra* note 71, at 163. Yet the Supreme Court has never taken an appeal from a three-judge court which lacked jurisdiction to decide the case. *See* note 84 *infra* and accompanying text. Judge Brown, the circuit member of the Wilson panel, has suggested that when the three-judge court lacks jurisdiction it should adopt the opinion of the district judge as its own in the event that the court of appeals or Supreme Court subsequently finds that the case was one for three-judges. Both higher courts would simply treat the single judge decision as a three-judge decision, and permit an appeal to be taken to the Supreme Court. Jackson v. Choate, 404 F.2d 910, 913 (5th Cir. 1968). It is quite likely that this was what was intended in *Wilson*. The error the court made was technical. Instead of having the district judge adopt the three-judge opinion as his own, the three-judge court should have adopted the decision of the single judge as its own.

[81] 393 U.S. 83 (1968) (mem).

[82] Presumably, appeals from the district court to the Court of appeals can only be taken from final decisions of the district court. J. MOORE, FEDERAL PRACTICE RULES PAMPHLET 906 (1970). Where a three-judge court dissolves itself for want of federal jurisdiction, appeal of that decision may be taken to the court of appeals because plaintiff's claim has been foreclosed from further adjudication. Where, however, a three-judge court found that it did not have the power to decide a case, but that a single judge did, plaintiff has not been put out of court by the three-judge decision. The decision of the three-judge court dissolving itself might be compared to a change of venue. Plaintiff has simply been transferred from one district court to another. Similarly, when a single judge grants federal jurisdiction, denies plaintiff a three-judge hearing, and goes on to rule on the merits of plaintiff's claim, his initial decision denying a three-judge forum cannot be appealed until he has rendered a final decision on the merits. In fact, not until quite recently was even a final decision of the single judge appealable in the court of appeals. *See, supra* note 75 and accompanying text.

[83] Currie, *Appelate Review of the Decision Whether or Not to Empanel a Three-Judge Federal Court*, 37 U. CHI. L. REV. 159, 163–64 (1969). Professor Currie would advocate that mandamus be sought in the court of appeals to compel the convening of a three-judge court where (1) a three-judge court dissolves itself for want of statutory jurisdiction and leaves the case to the single judge to be decided on the merits, and (2) a single judge refuses to convene a three-judge court and retains jurisdiction to decide the case on the merits. *Id.* at 164.

[84] The Court indicated in a footnote in *Mengelkoch* that it was not important whether or not the single judge adopted the opinion of the three-judge court as his own for an appeal to be taken to the court of appeals. 393 U.S. 83, 84 (1968) (mem). The Court would imply that an appeal could therefore be taken from "the decision" of the three-judge court. Since, however, a three-judge court does not have jurisdiction to render a final decision where it finds that a case should be heard by a single judge, the Court in *Mengelkoch* must have been referring to the decision of the three-judge court to disband for want of jurisdiction as the decision from which an appeal can be taken.

TABLE I—WHEN A SINGLE JUDGE CONVENES A THREE-JUDGE COURT[87]

S.J. Correctly Convenes	(1) S.J.—3J.Ct.—S.C.
	(2) S.J.—3J.Ct.—S.J.—Ct.App.—S.C.—S.J.—3J.Ct.—S.C.
	(3) S.J.—3J.Ct.—S.J.—Ct.App.—S.J.—3J.Ct.—S.C.
S.J. Incorrectly Convenes	(4) S.J.—3J.Ct.—S.C.—Ct.App.
	(5) S.J.—3J.Ct.—S.J.—Ct.App.
	(6) S.J.—3J.Ct.—S.J.—Ct.App.—S.J.—3J.Ct.—S.C.—Ct.App.

ABBREVIATIONS
S.J.–single judge
Ct.App.–court of appeals
3J.Ct.–three-judge court
S.C.–Supreme Court

The Tenth Circuit has recently interpreted the *Mengelkoch* decision in such a fashion and reviewed an interlocutory order of a three-judge court.[85]

If the *Mengelkoch* Court did intend that an appeal can be taken from the decision of the three-judge court dissolving itself, litigants would be spared the possibility of trying a case before a district judge only to have the decision of the district judge voided if the court of appeals subsequently finds that the three-judge court was properly convened to begin with. Such a holding, however, would seem questionable in light of the fact that the same situation exists when a single judge refuses to convene a three-judge court and subsequently decides a case on the merits. The Supreme Court has never intimated that the preliminary decision of the single judge denying petitioners a three-judge hearing can be immediately appealed.

Although it is now clear in most cases where to appeal one-judge and three-judge decisions on the question of three-judge court jurisdiction, the appellate mechanism associated with such review is far from adequate.[86] When a single judge convenes a three-judge court, a litigant might pass through as many as eight courts before his claim is finally decided on the merits because of misinterpretations of as few as one statutory prerequi-

[85] Petuskey v. Rampton, 431 F.2d 378, 382 (10th Cir. 1970).

[86] The following charts in the text illustrate the number of courts through which litigants might pass in seeking to gain access to the three-judge forum. The charts are based on the premise that federal subject matter jurisdiction exists. Where a case is, therefore, not one for a three-judge court, it is one for a single judge. The decisions from which appeals are taken are those concerning questions as to whether or not a three-judge court should be convened (except where an appeal is taken from a final decision of a three-judge court). The charts further assume that appeals are not taken from the decision of the three-judge court dissolving itself.

[87] The analysis of the chart is as follows:

(1) A district judge correctly convenes a three-judge court. The court agrees that it should be convened and decides the merits of the case. The Supreme Court acknowledges jurisdiction, and reviews the three-judge court's decision. Each court correctly decided that three-judge court jurisdiction existed.

(2) A district judge convenes a three-judge court which incorrectly dismisses itself for want of jurisdiction. The case is remanded to the single judge to rule on the merits of the claim. The court of appeals reviews the decision of the single judge on the merits, incorrectly agreeing that the case was not one for three judges. The Supreme Court grants certiorari, voids the decisions of the court of appeals and district judge on the ground that a three-judge court should have been convened, and remands the case to the district judge to convene a three-judge court. The three-judge court rules on the merits of the claim, and the Supreme Court acknowledges jurisdiction and reviews that decision.

(3) A district judge convenes a three-judge court which incorrectly dismisses itself for want of jurisdiction. The case is remanded to the single judge to rule on the merits of the claim. The court of appeals voids the decision of the single judge on the ground that a three-judge court should have been convened, and remands the case to him to convene a three-judge court. The three-judge court is reconvened, and its decision is reviewed by the Supreme Court.

(4) A district judge incorrectly convenes a three-judge court, which incorrectly decides the case on the merits. A dual appeal is filed in the Supreme Court and court of appeals by the losing party. Upon the Supreme Court's refusal to accept jurisdiction on the ground that the three-judge court should not have been convened, the court of appeals grants jurisdiction to review the decision of the three-judge court on the merits.

(5) A district judge convenes a three-judge court which correctly dismisses itself for want of jurisdiction. The single judge decides the case on the merits and the court of appeals reviews that decision.

(6) A district judge convenes a three-judge court which correctly dismisses itself. The single judge decides the case on the merits. On appeal, the court of appeals incorrectly voids the judgment of the single judge believing the case to be one for a three-judge court and remands the case to the district judge to convene a three-judge court. The three-judge court decides the

TABLE II—WHEN A SINGLE JUDGE DENIES A THREE-JUDGE COURT[88]

S.J. Incorrectly Denies	(1) S.J.—Ct.App.—S.C.—S.J.—3J.Ct.—S.C.
	(2) S.J.—Ct.App.—S.J.—3J.Ct.—S.C.
S.J. Correctly Denies	(3) S.J.—Ct.App.
	(4) S.J.—Ct.App.—S.J.—3J.Ct.—S.C.—Ct.App.

ABBREVIATIONS
S.J.–single judge
Ct.App.–court of appeals
3J.Ct.–three-judge court
S.C.–Supreme Court

site to three-judge jurisdiction. This might occur for example where a single judge correctly convenes a three-judge court which incorrectly dissolves itself for want of statutory jurisdiction. The single judge must then decide the case on the merits, and a timely appeal of his decision may be taken to the court of appeals. If the court of appeals fails to rectify the original error of the three-judge court dissolving itself, the Supreme Court must grant certiorari, void the judgements of both the court of appeals and the single judge, and remand the case to the single judge to reconvene a three-judge court. Upon an order of the three-judge court either granting or denying injunctive relief, review on the merits may at last be had in the Supreme Court. Similarly, when a single judge refuses to convene a three-judge court, a litigant might pass through six courts before his claim is adjudicated on the merits and his last appeal is taken. In fact, whenever a three-judge court or single judge makes an error with respect to just one of the prerequisite standards to three-judge court jurisdiction, a litigant will on the average have to pass through five courts.[89]

Once a fortunate litigant has gained access to the three-judge forum, he may find that appeal of that tribunal's judgement was not as assured as he might have imagined. As has been pointed out above, if the three-judge court decides to dissolve itself for lack of jurisdiction, appeal of that action lies to the court of appeals and not the Supreme Court.[90] But what of the situation where the three-judge court decides a case on the merits after it incorrectly decided that it was properly convened. Should appeal of that decision be taken to the Supreme Court or the court of appeals? While at least one circuit court has insisted that the Supreme Court must take the appeal,[91] the Court in *Public*

case on the merits. A dual appeal is taken to the Supreme Court and the court of appeals. The Supreme Court denies jurisdiction on the ground that a three-judge court should not have been convened. The court of appeals reviews the decision of the three-judge court on the merits.

[88] (1) A district judge refuses to convene a three-judge court and decides the case on the merits (his original decision not to convene the three-judge court is non-appealable). The court of appeals improperly reviews the decision of the district judge on the merits. The Supreme Court grants certiorari, voids the decision of the district court and court of appeals on the ground that the case was one for three judges, and remands the case to the district judge to convene a three-judge court. The three-judge court decides the case on the merits, and the Supreme Court reviews that decision on appeal.

(2) A single judge refuses to convene a three-judge court and decides the case on the merits (his original decision not to convene the three-judge court is non-appealable). The court of appeals correctly voids his decision, and remands the case to him to convene a three-judge court. The three-judge court decides the case on the merits, and review is had in the Supreme Court.

(3) The district judge correctly denies a three-judge court and decides the case on the merits. The court of appeals reviews his decision on appeal.

(4) The district judge denies a three-judge court and decides the case on the merits. On appeal, the court of appeals incorrectly voids the judgment of the district judge and remands the case to him to form a three-judge court. The three-judge court decides the merits of the case, and a dual appeal is filed to the Supreme Court and the court of appeals. The Supreme Court finds that the three-judge court should not have been convened. The court of appeals then acknowledges jurisdiction to review the decision of the three-judge court on the merits.

[89] *See* notes 87 and 88 *supra* and accompanying text.

[90] *See* notes 76–78 *supra* and accompanying text.

[91] According to Judge Brown, even where a three-judge court lacked jurisdiction:

> It is clear that a judicial review of the merits is not within the power of the court of appeals and that its role is narrowly limited to testing a denial of three-judge status.

Mayhue's Super Liquor Store, Inc. v. Mieklejohn, 426 F.2d 142, 145 (5th Cir. 1970).

Service Comm. v. Brashear Freight Lines, Inc.[92] held that when three-judges ruled on a question which one judge should have decided, an appeal of the merits of that decision should be treated as a single-judge decision and taken to the court of appeals.

Nor is it certain that a decision by a properly convened three-judge court will necessarily obtain review in the Supreme Court. Although the Supreme Court is bound by statute to review an order by a three-judge court granting or denying an interlocutory or permanent injunction,[93] the Court in *Goldstein v. Cox*[94] declined to review an order of a three-judge court denying plaintiff summary judgment. The three-judge court had ruled in effect that the challenged statute was not unconstitutional on its face.[95] The Supreme Court stated that only where plaintiff specifically requests a preliminary injunction along with his motion for summary judgement is the Supreme Court bound to review the order of the three-judge court.[96] Similarly, in *Mitchell v. Donovan*,[97] the Court refused to review a decision of a three-judge court in which a declaratory judgement had been granted but where the injunctive relief remedy was considered moot. The Court held that the three-judge decision was not one which granted or denied an interlocutory or permanent injunction, and appeal, therefore, should be taken to the court of appeals.[98]

In all other cases, the Supreme Court will review a final decision of a properly convened three-judge court whether or not the decision goes to the merits of the constitutional claim. In *Zwickler v. Koota*,[99] the Court accepted jurisdiction of a case in which a three-judge court had abstained from deciding the constitutional issue. And in *Natural Gas & Pipeline Co. v. Slattery*,[100] the Court reviewed a decision of a three-judge court which denied the requested relief on the ground that administrative remedies had not been exhausted.

III. Two Alternatives to the Present Three-Judge Court System

In light of the procedural difficulties which federal judges and litigants alike must face in coping with Section 2281, it is doubtful that the benefits to be gained from the three-judge forum surpass the expenses incurred.[101] There are two approaches which might be taken to solve the present procedural difficulties. One would be for the Supreme Court to clarify each of the standards it has beset on district courts with respect to when a three-judge court should be convened. Such a solution would require a Herculean effort by the Court, and this is not to be counted on. A more plausible solution would be to simplify the appellate structure associated with three-judge courts such that the various determinations involving three-judge court jurisdiction would no longer trigger the complex chain of appeals which they do now. This section will look to two means by which the three-judge appellate structure might be simplified. The first will assume the retention of Section 2281, while the second will be founded on its abrogation.

If Section 2281 were not to be abolished, one method to prune many of the inefficiencies which now exist is that suggested by Chief Judge Brown of the Fifth Circuit. In *Jackson v. Choate*,[102] Judge Brown proposed that the roles of the single-judge and three-judge court be merged into one. The role of the single-judge would be limited to ascertaining whether the complaint requested an injunction against the enforcement of a state statute alleged to violate the Federal Constitution. The three-judge court would deal with all threshold questions with respect to its own jurisdiction.[103] In the event that the three-judge court found that it lacked jurisdiction to decide a case and left the case to be

[92] 312 U.S. 621 (1941). This approach was followed in Bailey v. Patterson, 369 U.S. 31 (1962), and Turner v. City of Memphis, 369 U.S. 350 (1962). In *Turner*, to avoid wasting time, the Court treated the appeal from the three-judge court as a writ of certiorari and decided the case on the merits. 369 U.S. 353–354.

[93] *See* note 5 *supra*.

[94] 396 U.S. 471 (1970).

[95] Goldstein v. Cox, 299 F. Supp. 1389 (S.D. N.Y. 1968).

[96] Goldstein v. Cox, 396 U.S. 471, 478–79 (1970).

[97] 398 U.S. 427 (1970). But see *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970), where the Supreme Court refused to review a decision of a three-judge court to stay its mandate granting injunctive relief pending the next session of the Texas legislature.

[98] 398 U.S. at 430.

[99] 389 U.S. 241 (1967).

[100] 302 U.S. 300 (1937). But see Wilson v. City of Port Lavaca, 391 U.S. 352 (1968), where an argument could be made that a decision by a three-judge court to deny relief on equitable grounds is appealable to the court of appeals. In that case, however, the three-judge court ruled that it had not been correctly convened. Wilson v. City of Port Lavaca, 285 F. Supp. 85, 87 (S.D. Tex. 1968). *See* note 73 *supra* and accompanying text.

[101] Chief Justice Burger recently questioned the need for the three-judge court in his State of the Judiciary Message. Burger, *The State of the Judiciary, 1970*, 56 A.B.A.J. 929, 933 (1970).

[102] 404 F.2d 910 (5th Cir. 1969).

[103] *Id.* at 913.

decided by a single judge, Judge Brown would advocate that the remaining two members of the panel join in the merits decision of the single judge.[104] In that way, if the court of appeals or Supreme Court subsequently overruled the decision of the three-judge court dismissing itself, the decision of the single judge on the merits could be treated as a three-judge court decision and appeal could be taken directly to the Supreme Court.[105]

One of the problems involved with these suggestions is that a great many more three-judge courts could be convened than at present. While this may be true, the argument that three-judge courts put a strain on judicial resources is generally overstated. In 1969, approximately 151 three-judge courts were formed pursuant to Sections 2281 and 2282.[106] Even if this figure were doubled it would seem but a small thorn in the side of district judges who in 1969 disposed of 103,932 cases.[107] This is particularly true in view of the fact that three-judge cases generally do not involve factual controversies and can be disposed of on the basis of the complaint.[108]

Another difficulty with the Brown approach is that litigants are denied the deliberation of three judges whenever the three-judge court joins in the opinion of the single judge and the court of appeals subsequently finds that the case should have been decided by a three-judge court. Although appeal could be taken directly to the Supreme Court from the decision of the single judge due to the concurrence of the other two members of the original three-judge panel, findings of fact and conclusions of law will, nonetheless, be by one judge instead of three. While it is clear that the other two members of the panel would not join in the opinion of the district judge unless they fully agreed with him, the element of deliberation between three judges would still be lacking.

Notwithstanding these difficulties, the procedural benefits from the Brown approach would be numerous. No longer would single judges incorrectly enjoin state activities, or deny plaintiff his day in court because of frequent appeals on the threshold question of three-judge court jurisdiction. The various criteria which the Supreme Court has imposed on the single judge with respect to the impaneling of a three-judge court would become the burden of the special court itself. Although the lack of clarity inherent in these standards would still exist, they would no longer set off the complex appellate mechanism which they do now.

A far simpler alternative than that offered by Judge Brown would be to repeal Section 2281 and in its place grant an expedited appeal to the court of appeals on the same criteria which exist now in deciding whether or not to convene a three-judge court.[109] Whenever a single judge found the case to be one for special appellate review, the court of appeals would simply give the appeal[110] special preference on its docket. If there were any triable issues of fact involved, the single judge could act as a master in chancery, or fact finder for the court of appeals without ruling on the merits. Where the single judge thought the case not to be one for special appellate review, he could simply treat the case as one for one judge determination and correctly or incorrectly rule on the merits. If he incorrectly ruled on a case which should have been designated for special review, the court of appeals would simply ignore his decision and rule on the merits of the case as if it had come up the correct way. Whether the single judge was right or wrong

[104] *Id.*

[105] The court of appeals would remand the case to the district judge who would enter a fresh decree, this time with a three-judge stamp. From that decree direct appeal could be taken to the court of appeals. As an alternative to having the three-judge court join in the opinion of the single judge, it would be even simpler to cloak the court of appeals with three-judge authority when a case comes up which should have been tried by the three-judge court. This, too, would avoid the necessity of reconvening the special court, and the absurdity of one three-judge court overruling another three-judge court in order to form a third three-judge court. This would, however, involve a statutory change.

[106] There were 215 final decisions of three-judge courts in 1969. Of these, 81 were civil rights cases, 69 involved state regulations in general, 1 involved reapportionment, and 64 involved orders of the I.C.C. The cases in the first three categories would fall under Sections 2281 and 2282. *See* 1969 DIV. ADMIN. OFF., U.S. COURTS ANN. REP. 135.

[107] *Id.* at 49. There were 73,354 civil cases and 30,578 criminal cases disposed of in the district courts in 1969.

[108] Jackson v. Choate, 404 F.2d 910, 913 (5th Cir. 1968).

[109] *See* Comment, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L. J. 1646, 1653, where the possibility of an expedited appeal was considered but rejected.

[110] The term "appeal" is used in the figurative sense. The court of appeals would have original jurisdiction over any merits decision of a special review case. There would thus be no final dicision of a single judge from which an appeal could be taken. When a single judge found a case to be one for special review, he would notify the chief judge of the circuit who would in turn give the case special preference on the circuit court's docket.

on either threshold or merits questions, the court of appeals could decide on all questions before it.[111]

If Congress so desired, direct review to the Supreme Court of special review cases could be incorporated as a feature of the system. While there can be no doubt that the Supreme Court finds direct appeal from three-judge decisions an imposition,[112] the relief the Supreme Court would receive by transferring three-judge appeals to the courts of appeals is dubious. First, under Section 1254(2) which permits direct appeal to the Supreme Court from decisions of courts of appeal rendering state statutes unconstitutional,[113] the Court would receive many of the same appeals it would have received from three-judge decisions. Second, it must be supposed that the Court would grant certiorari in many former three-judge cases in which a declaratory judgment did not issue from the court of appeals. Third, speedy access to the Supreme Court is perhaps the most important feature of the three-judge court system and is of itself a sufficient reason for maintaining direct appeal.[114]

The special review procedure would maintain all the benefits of the three-judge court system with almost none of the costs. The three circuit judges could be seen as forming an even more august body than the former special court of two district judges and one circuit judge. The entire appellate morass associated with the three-judge court would be eliminated, and speedy access to the Supreme Court could be easily provided for by Congress in special review cases. The extra strain on the court of appeals of approximately 150 cases which they would not have normally heard is a small price to pay considering circuit judges are presently required in three-judge cases, and appeals of threshold questions concerning three-judge court jurisdiction would no longer exist.

[111] The only procedural delay a litigant might encounter under the special review approach would be where a single judge inappropriately decided a special review case on the merits. In lieu of immediate review in the court of appeals, litigants would be obliged to take a timely appeal to the court of appeals. Such an appeal would engender a delay of only a few months. Compared with the delay and procedural confusion which now exists when a single judge makes such an error, this would hardly seem to cause litigants irreparable injury.

[112] U.S. v. Singer Mfg. Co., 374 U.S. 174, 175 n.1 (1963).

[113] 28 U.S.C. § 1254(2) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> ....
>
> (2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution....

[114] Alternatively, Congress might simply provide for direct review in the Supreme Court of former three-judge court cases by means of existing statutory measures which provide for direct review from decisions of the court of appeals. Under 28 U.S.C. § 1254(2), any decision of the court of appeals which renders a state statute unconstitutional can be appealed directly to the Supreme Court. Thus, in any former three-judge court case in which a statute was declared unconstitutional on its face, direct review would be available. Reliance on this provision would, however, remove a large number of former three-judge court cases from the direct review advantages they once had. These would include (1) those cases in which plaintiff was denied injunctive relief and (2) those cases in which the unconstitutional enforcement of a statute was enjoined without the statute itself being struck down.

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RECENT TRENDS IN THE CRIMINAL LAW

MIRANDA PROBLEMS

In *Harris v. New York*, __ U.S. __, 91 S. Ct. 643 (1971) the Supreme Court restricted the applicability of *Miranda v. Arizona*, 384 U.S. 436 (1966). Speaking for a five-man majority, Chief Justice Burger held that a defendant's statement could be used to impeach his credibility, even though such a statement would be inadmissible under *Miranda* to establish the case in chief. During cross examination the prosecution used questions and answers from a partially inconsistent prior statement to impeach defendant Harris' testimony that he had not sold heroin. "The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt." [1]

The Court recognized that this result was contrary to "some comments in the *Miranda* opinion," but considered that language to be dictum and thus not controlling.[2] Instead it relied on *Walder v. United States*, 347 U.S. 62 (1954), where the Court permitted otherwise inadmissible evidence to be used for impeachment purposes. Unlike that of Harris, however, Walder's impeachment concerned a collateral matter.[3] The Court admitted the dissimilarity, but extended the *Walder* principle for a variety of reasons, including the following: (1) impeachment is valuable for assessing credibility; (2) there is only "speculative possibility" that limited use of illegal statements will encourage police misconduct; (3) the deterrent effect of the exclusionary rule is sufficiently served by limiting inadmissibility of illegal statements to the case in chief; (4) a person testifying has the duty to speak truthfully and thus may be subjected to "the traditional truth-testing devices of the adversary process;" and (5) *Miranda* should not become "a license to use perjury by way of a defense." [4]

The Court's approach to this case restricts *Miranda* in several respects. First, the Court finds the rule of *Miranda* inapplicable in a *Harris*-type situation, treating the language used in applying the *Miranda* principle to such instances as mere dictum.[5] Second, the Court seems to discard the premise of *Miranda* "that without proper safeguards" the interrogation process "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not do so freely." [6] In other words, the Court seems to reject the idea that absence of a complete *Miranda* warning creates an inherently coercive situation. There is a marked contrast in *Harris*, where the Court concedes the statement would be inadmissible to prove the case in chief because a complete *Miranda* warning was absent, but also points out that there was no claim of coercion or involuntariness.[7] In terms of *Miranda*, such a claim would be unnecessary, for absence of the warning is equated with coercion. In this respect, a departure from the *Miranda* rationale is apparent. Finally, it implicitly rejects the view that such a statement tends to prove "guilt by implication" even if use is

[1] __ U.S. at __, 91 S. Ct. at 644.

[2] *Id.* at __. Although unspecified, the Court apparently referred to this language:

> In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

[3] The facts of that case differ considerably from *Harris*. Walder was arrested on a narcotics charge in 1950, but the case was dismissed after illegally seized evidence had been suppressed. In 1952 he was again arrested on a narcotics charge. In the trial of the second case, he denied that he *ever* purchased, sold or possessed narcotics. The prosecution impeached his testimony by introducing evidence that in 1950 he had in fact possessed narcotics, as he had admitted at the time in an affidavit filed in the suppression hearing. The Court characterized this as collateral and added:

> Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Walder v. United States 347 U.S. 62, 65 (1954).

[4] __ U.S. at __, 91 S. Ct. at 646.

[5] *See supra* note 2.

[6] 384 U.S. at 467.

[7] __ U.S. at __, 91 S. Ct. at 645.

supposedly confined to impeachment. Although these restrictions seem apparent, it is unclear how narrowly the Supreme Court will come to read *Miranda*.

Two California decisions indicate a further restriction of the *Miranda* principle. The court in *People v. Thomas*, 12 Cal. 3d 1102, 91 Cal. Rptr. 867 (1970), held that no *Miranda* warning was required prior to search without a warrant where the defendant consented to the search. The court's ruling resulted despite its finding that Thomas was "in custody or otherwise deprived of his freedom of action," and thus in a situation which would seemingly require that a complete *Miranda* warning precede any statement elicited from him.[8] The court instead avoided the impact of *Miranda* by deciding: "A consent to search, as such, is neither testimonial, nor communicative in the Fifth Amendment sense," [9] *i.e.* consent to search is not a "statement," although the effect may be just as damning.

In *People v. Houle*, 13 Cal. 3d 892, 91 Cal. Rptr. 874 (1970), the court extended the holding in *People v. Bauer*, 1 Cal. 3d 368, 374, 461 P. 2d 637, 640, 82 Cal. Rptr. 357, 360 (1969), that waiver of rights after receiving the *Miranda* warning was intelligent although the defendant was under the influence of narcotics. The waiver in *Bauer* occurred contemporaneously with the arrest and prior to the search. The factual pattern differs in *Houle*, where first the defendant's apartment was searched, contraband found and then the defendant was arrested upon returning to the apartment. The *Miranda* warnings were finally given at police headquarters.[10] Houle was under the influence of amphetamines, and because of that fact, the court felt *Bauer* disposed of all *Miranda* problems. This overlooks the potential impact of the discovery of contraband on his mental state. In addition it ignores the significance of the time-lag between arrest and warning.[11]

[8] 12 Cal.3d 1102, 1106, 91 Cal. Rptr. 867, 870 (1970). These are the threshold circumstances requiring the *Miranda* warning, *i.e.* warning must accompany loss of freedom. 384 U.S. at 445 and 467.

[9] 12 Cal.3d 1102, 1109, 91 Cal. Rptr. 867, 872 (1970).

[10] A bail bondsman legitimately arrested Houle "for bail jumping" at his apartment and in the process found amphetamines and a hypodermic needle. The bondsman's search would have been illegal if conducted by a police officer, but was permissible because of his character as a private citizen. Thus the evidence was admissible. 13 Cal.3d 892, 896, 91 Cal. Rptr. 874, 876 (1970).

[11] *See supra* note 8.

Indigent Imprisonment

Tate v. Short, __ U.S. __, 91 S. Ct. 668 (1971), held that imprisonment for inability to pay a fine because of indigency is unconstitutional. This extended the holding of *Williams v. Illinois*, 399 U.S. 235 (1970), that invidious discrimination occurs if the total time of an indigent's imprisonment exceeds the maximum statutory limit because of the "work off" of a fine imposed in addition to imprisonment.[12] The constitutional basis for each decision was the Equal Protection Clause. "Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." [13] The supposed justification for such imprisonment is not penal but fiscal, *i.e.* augmenting state revenue. The Supreme Court found no such purpose could possibly be served, for the fine is never paid (because of defendant's indigency) and the state additionally bears the cost of imprisonment. In effect, there is discrimination without rational basis. The Court referred to *Williams* to re-assert the existence of alternatives available to the state so that its valid interest in enforcing fines could be secured.[14] The decision left unresolved the constitutionality of imprisonment when the alternatives fail and the defendant has made reasonable efforts to pay the fines. Justice Blackmun's concurrence suggested a possible favorable result arising from *Tate:* elimination of the fine altogether as alternative punishment for traffic offenses and sole reliance on imprisonment to reduce "the frightful carnage" of highway accidents.[15]

Prisoner Rights

In *Edwards v. Schmidt*, 321 F. Supp. 68 (W.D. Wis. 1971), the defendants claimed that 42 U.S.C. section 1983 permitted them to sue the state and compel prison officials to return them to a juvenile detention center from an adult prison. The defendants also asserted that the right to waive the

[12] *See* 62 J. Crim. L. C. & P. S. 56 (1971), for a brief discussion of the *Williams* decision.

[13] __ U.S. at __, 91 S.Ct. at 671.

[14] The Court mentioned two (installment payment of fines and a parole requirement specifying certain work during the day to satisfy the fine) and suggested there were other possibilities. Williams v. Illinois, 399 U.S. 235, n. 24 at 244-45 (1970).

[15] __ U.S. at __, 91 S.Ct at 672.

requirement of exhaustion of state remedies, a procedural advantage of a section 1983 suit, is also applicable to prisoner actions. The court held for the petitioners and remanded the case for a trial on the merits, ruling that the case was distinguishable from a federal habeas corpus suit. The court explained that prisoners using section 1983 to redress injustices concerning their confinement rather than injustices incurred at trial were bringing "extraordinary prisoner suits," not habeas corpus actions. Since the nature of the issues involved distinguishes the suits, the court stated that a section 1983 suit was not a disguised habeas corpus suit for purposes of avoiding state administrative and judicial review.

After creating a separate category for section 1983 prisoner suits, the court addressed what it felt was the real problem in the case, *i.e.* could state administrative remedies be waived? Earlier cases such as *Houghton v. Shafer*, 392 U.S. 639 (1968), referred to the *Monroe v. Pape*, 365 U.S. 167 (1961) line of cases holding that state administrative exhaustion was unnecessary. In *Houghton* prison officials confiscated legal materials being used by the petitioner to file an appeal. The petitioner brought a section 1983 action and was relieved of the necessity to appeal through the state correctional system before getting into court. *Talbert v. Eyman*, 434 F.2d 625 (9th Cir. 1970), permitted a petitioner to bring a section 1983 action to recover damages for injuries sustained by the refusal of prison authorities to give him insulin for his diabetic condition. Following the lead established by *Houghton* and *Talbert*, the court in *Edwards* held that state administrative remedies need not be exhausted. Thus, the *Edwards* decision recognized "extraordinary prisoner suits as separate actions, procedurally and substantively, from habeas corpus suits. This gives prison inmates an alternative in attempting to redress "unconstitutional" conditions of their confinement free of the delay in exhausting state remedies.

Contempt and the Unruly Defendant

In *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S. Ct. 499 (1971), the United States Supreme Court held that where a judge has been insulted by a defendant and then waits until the end of the trial before sentencing the defendant for contempt of court, a separate judge must try the contempt charge. In *Mayberry* the trial judge was insulted continually by the defendant. At one point in the trial the judge placed the defendant in another room with a loudspeaker because of the defendant's refusal to be silent. Finding that the defendant had been contumacious in behavior during eleven of twenty-three days of trial, the judge sentenced the defendant to more than one year but less than two years for each day of contempt. Therefore, the final contempt sentence was no less than eleven nor more than twenty-two years. The Supreme Court granted certiorari and found that the lower court properly excluded the defendant, but that "evenhanded justice" would favor another judge trying the defendant on the issue of contempt. The Fourteenth Amendment concept of due process guarantees that the defendant will not be prejudiced by any retributive motives of the trial judge. Surmising that the possibility for retribution existed where the judge awaited the end of the trial to sentence the defendant for contempt, the Court held in such situations that another judge should sentence the defendant. Chief Justice Burger added a *caveat* that summary removal was the best procedure with a disruptive defendant. Guidelines for requiring a judge other than the trial judge to hear a trial on contempt were absent from the opinion. Other than the factual inferences in *Mayberry*, no standards exist for deciding when the alternate judge is necessary.

Misdemeanor and Venue

In *Groppi v. Wisconsin*, 400 U.S. 505, 91 S. Ct. 490 (1971), the Supreme Court held that where a state undertakes to grant a jury trial for misdemeanor offenses, it must also assure the defendant's right to an impartial jury. This, the Court concluded, includes the right to a change of venue, which was barred by Wisconsin statute.[16] The Court, however, appeared to view a change of venue as a last resort for securing impartiality since it would first be appropriate for a defendant to exhaust his opportunity to receive continuances and to exercise his peremptory and cause challenges for exclusion of jurors.[17] The majority refused to decide whether the Fourteenth Amendment required a jury trial for misdemeanors. The con-

[16] The Wisconsin Supreme Court construed a venue statute for felony offenses to bar change of venue for misdemeanors. The propriety of this construction seemed to trouble both the majority and concurring justices. 400 U.S. 505, 511, 91 S.Ct. 490, 495 (1971).

[17] The majority did not discuss the adequacy of a motion for a new trial because of jury partiality. Justice Black in dissent thought the existence of this further alternative prevented constitutional infirmity, and he pointed out that the Wisconsin Supreme Court rested its decision on this basis. *Id.* at 496.

curring Justices (Burger and Blackmun) thought no constitutional distinction between felony and misdemeanor should exist for determining the defendant's right to a fair trial.[18]

Electronic Surveillance

In the first judicial tests of the wiretapping provision of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. section 2511(3),[19] two district courts have held that warrantless electronic eavesdropping of domestic dissident groups is unconstitutional. The court in *United States v. Smith*, 321 F. Supp. 424 (C.D. Calif. 1971), held that even though the President is given broad discretion to initiate warrantless taps of phonelines, he is nonetheless bound by the exclusionary rule derived from the Fourth Amendment. The court expressly reserved any opinion as to the President's power to issue wiretap orders against foreign subversive groups. In *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), a district court in Michigan similarly concluded that the Fourth Amendment requires that warrants precede electronic surveillance of domestic dissidents. The court also held that the defendant is entitled to the log of all illegal wiretaps. This ruling coincides with *Alderman v. United States*, 394 U.S. 165 (1969), in which the Supreme Court, in a case prior to the Ominibus Crime Control Act, ruled that evidence uncovered in unconstitutional wiretapping must be revealed to the defendants in pre-trial discovery.

Therefore, in two separate district court cases, the wiretapping provision in section 2511(3) has been applied to domestic groups in accordance with previous case law. Any wiretapping of domestic political radicals must be authorized by a warrant obtained in accord with the Fourth Amendment. Second, the log of all illegal wiretaps must be made available to the defendant. Hence, the wiretapping provision of the 1968 Act, over government objection, has been narrowly interpreted.

[18] *Id.* at 494.

[19] This section reads:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack nor other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Editor's Note

After the *Recent Trends* Section went to press, the Court of Appeals for the Sixth Circuit Affirmed the *Sinclair* decision in *United States v. U.S. District Court*, 39 U.S.L.W. 2574 (6th Cir. April 20, 1971).