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# California's New Scheme For The Commitment Of Individuals Found Incompetent To Stand Trial

MARJORY WINSTON PARKER\*

Concepts of basic fairness and the belief that a mentally incompetent criminal defendant is unable to adequately defend himself have led to the view that such a defendant should not be made to stand trial, even with the assistance of counsel.<sup>1</sup> What action if any, then, may a state take regarding an individual charged with a criminal act who is incompetent to stand trial? Until recently the answer in California was simple. The defendant was committed to a state hospital or other treatment facility until he attained the capacity to stand trial,<sup>2</sup> that is, until he was able to understand the nature of the proceedings taken against him and to assist counsel in the conduct of a defense in a rational manner.<sup>3</sup> If he never

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\* B.A., 1950, University of Washington; LL.B., 1965, Georgetown University. Deputy Attorney General, State of California. The author's opinions or conclusions expressed herein are her own and do not in any way represent the views of the State of California, its departments, agencies, or officers. California Assemblyman Frank Murphy, author of Assembly Bill 1529, requested the assistance of the Attorney General in drafting the legislation. Over an eighteen month period, the author of this article worked closely with the Assemblyman and his staff. Equally involved and making major contributions were Laurance S. Smith, Los Angeles County Deputy Public Defender, and Karen Pedersen, Consultant to the Senate Committee on the Judiciary. The author of this article also appeared and testified before the Senate Judiciary Committee in support of Assembly Bill 1529.

1. See, e.g., *In re Buchanan*, 129 Cal. 330, 333, 61 P. 1120, 1121 (1900); *People v. Maynard*, 347 Ill. 422, 425, 179 N.E. 833, 835 (1932). Cf., e.g., *People v. Lawson*, 178 Cal. 722, 725, 174 P. 885, 887 (1918).

2. CAL. PEN. CODE §1370, as amended, CAL. STATS. 1968, c. 599, at 1270.

3. E.g., *People v. Aparicio*, 38 Cal. 2d 565, 567, 241 P.2d 221, 223 (1952). It should be noted that the Penal Code was amended by Chapter 1511, statutes of 1975,

attained the requisite competency, his commitment operated as a life sentence. It made no difference whether he was charged with murder or petty theft.<sup>4</sup> Nor was it important that there was no judicial determination that there existed probable cause to believe that the accused had in fact committed the crime charged; the mere filing of a criminal complaint was sufficient.<sup>5</sup> Thus the net effect of a scheme designed to protect a defendant's sixth amendment rights was, in some cases, more severely oppressive than a deprivation of those rights.<sup>6</sup>

In 1972 the United States Supreme Court delineated principles of equal protection and due process which, when applied by the California Supreme Court, put an end to the then existing scheme for the commitment of incompetent criminal defendants.<sup>7</sup> The California Legislature responded with a new and more equitable commitment scheme which became effective in September 1974.<sup>8</sup> California's new law is a complex attempt to integrate and resolve the conflicting concerns of protecting society from dangerous individuals who are not subject to criminal prosecution, preserving a libertarian policy regarding the indefinite commitment of mentally incompetent individuals who have *not been charged with criminal conduct*, and safeguarding the freedom of incompetent criminal defendants who present no threat to the public.

This article will discuss the new statutory scheme for the involuntary commitment of mentally incompetent criminal defendants in California and the old law which it has replaced. It will discuss the United States Supreme Court and California cases which motivated the change and the difficulty such cases presented to the California Legislature. Finally,

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to substitute the term "mental incompetence" for the former term "insanity" without changing the meaning. This change was to eliminate confusion with the insanity defense available under Penal Code Section 1026, and with the diminished capacity defense at the guilt phase. See, e. g., *People v. Miller*, 7 Cal. 3d 562, 498 P.2d 1089, 102 Cal. Rptr. 841 (1972); *People v. Brock*, 57 Cal. 2d 644, 371 P.2d 296, 21 Cal. Rptr. 560 (1962).

4. Section 1367 of the Penal Code provides that no mentally incompetent person may be tried for a "public offense."

5. The court could at that time commit a defendant to a treatment facility prior to a grand jury or preliminary hearing establishing probable cause. See CAL. PEN. CODE §1368, as amended, CAL. STATS. 1937, c. 133, at 373.

6. Criticisms of the traditional procedures for handling mentally incompetent criminal defendants have been adequately covered elsewhere and will not be dealt with here. For an excellent treatment of this area see Janis, *Incompetency Commitment: The Need For Procedural Safeguards and a Proposed Statutory Scheme*, 23 CATH. U.L. REV. 720 (1974); also see *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). It should be noted that this literature discusses commitment procedures with the premise that one may be committed on the grounds of "dangerousness." California does not presently provide for civil commitment on these grounds. See text accompanying notes 71-74 *infra*.

7. *Jackson v. Indiana*, 406 U.S. 715 (1972); *In re Davis*, 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973).

8. CAL. STATS. 1974, c. 1511.

it will address the question of whether the new California law complies with the constitutional mandates of those cases.

CALIFORNIA'S LAW FOR THE COMMITMENT OF MENTALLY  
INCOMPETENT INDIVIDUALS

A. *California's Special Problem*

Until September 1974, the California Penal Code permitted a criminal defendant who had been found incompetent to stand trial to be committed indefinitely to state mental hospitals.<sup>9</sup> The commitment procedures provided that if, at any time prior to judgment, doubts arose regarding the competency of the defendant to stand trial, the court was required to suspend the prosecution and order a hearing on the issue of competency either by the court, or if demanded, by jury.<sup>10</sup> Upon a determination that the defendant was incompetent to stand trial, that is, that he was unable to understand the nature and purpose of the proceedings or to assist counsel in his defense, he was committed to a state hospital and confined until he regained his mental competence.<sup>11</sup> If the defendant regained mental competence he was returned to the court for trial or dismissal of the criminal charges pending against him.<sup>12</sup>

In 1972 the United States Supreme Court in the case of *Jackson v. Indiana*<sup>13</sup> held that an Indiana commitment scheme similar to that of California denied such defendants equal protection of the laws and violated due process. In *Jackson*, the Court held that the Indiana statute deprived a defendant of equal protection because it subjected him to *commitment* standards more lenient and *release* standards more stringent than the standards generally applicable to persons committed under Indiana's civil commitment laws.<sup>14</sup> The effect of the Indiana scheme, said the Court, was to condemn persons against whom criminal charges were made, but not yet proved, to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by ordinary civil commitment procedures.<sup>15</sup> The Court also held that the Indiana scheme violated due process under the fourteenth amendment,<sup>16</sup> and ruled that a defendant committed under the Indiana scheme could not be held more than a reasonable period of time necessary to determine whether there was a substantial probability that he would at-

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9. CAL. PEN. CODE §1370, *as amended*, CAL. STATS. 1968, c. 599, at 1270.

10. CAL. PEN. CODE §1368, *as amended*, CAL. STATS. 1937, c. 133, at 373.

11. CAL. PEN. CODE §1370, *as amended*, CAL. STATS. 1968, c. 599, at 1270.

12. CAL. PEN. CODE §1372, *as amended*, CAL. STATS. 1968, c. 599, at 1270.

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

14. 406 U.S. at 730.

15. *Id.*

16. *Id.*

tain competency in the foreseeable future.<sup>17</sup> If his return to competency in the near future was not foreseeable, the Court stated, then the defendant must either be released or committed pursuant to civil proceedings applicable to those not charged with crimes.<sup>18</sup>

One year later, in *In re Davis*,<sup>19</sup> the California Supreme Court followed *Jackson* and held that when there is no reasonable likelihood that a criminal defendant will regain competency to stand trial in the foreseeable future, he must either be released or subjected to commitment proceedings initiated pursuant to California civil commitment laws as embodied in the Lanterman-Petris-Short Act (hereinafter referred to as the LPS Act).<sup>20</sup>

The civil commitment scheme contained in the LPS Act provides for 72-hour,<sup>21</sup> 14-day,<sup>22</sup> and 90-day<sup>23</sup> civil commitments and a one-year renewable conservatorship.<sup>24</sup> Under the LPS Act a person who as a result of mental disorder is a danger to himself or to others, or gravely disabled, may be taken into custody and placed in a county designated facility for 72-hour treatment and evaluation, with or without a court order.<sup>25</sup> Under certain circumstances, he may be detained for an additional 14-day period of intensive treatment.<sup>26</sup> Additionally, an individual may be confined for a maximum of 90 days if he has threatened, attempted, or inflicted physical harm on another after being taken into custody, or if he has attempted or inflicted physical harm on another which resulted in his being taken into custody, provided that he presents an imminent threat of substantial physical harm to others as a result of mental disorder.<sup>27</sup>

At the time of the *Jackson* and *Davis* cases, long-term involuntary commitment under the LPS Act was imposed only upon individuals categorized as "gravely disabled," that is, "unable to feed, clothe and

17. *Id.* at 738.

18. *Id.*

19. 8 Cal. 3d 798, 50 P.2d 1018, 106 Cal. Rptr. 178 (1973).

20. See *id.* at 807, 505 P.2d at 1025, 106 Cal. Rptr. at 185. The Lanterman-Petris-Short Act (Welfare and Institutions Code Section 5000 *et seq.*) extensively revised California's mental health law. One of its stated purposes was "[t]o end the inappropriate, indefinite, and involuntary [civil] commitment of mentally disordered persons . . . , and to eliminate legal disabilities . . . ." CAL. WELF. & INST. CODE § 5001.

21. CAL. WELF. & INST. CODE §§5151, 5171, 5213, 5230.

22. CAL. WELF. & INST. CODE §§5254, 5260.

23. CAL. WELF. & INST. CODE §5300.

24. CAL. WELF. & INST. CODE §5361.

25. CAL. WELF. & INST. CODE §§5150 (without a court order), 5200, 5213 (with a court order).

26. CAL. WELF. & INST. CODE §§5254, 5260. The grounds for certifying an individual for 14 days of involuntary intensive treatment are that the individual, as a result of a mental disorder or impairment by chronic alcoholism, is a danger to himself or others or is gravely disabled. CAL. WELF. & INST. CODE §5250.

27. CAL. WELF. & INST. CODE §5300.

house themselves.”<sup>28</sup> Such individuals could be confined for one-year renewable periods until the disability lapsed or was cured.<sup>29</sup> However, the LPS Act contained no specific provision for the commitment of criminal defendants who were found incompetent to stand trial. While such defendants may well have fit into the category of persons who are a danger to themselves or others so that short term commitments under the LPS Act were possible, they would not necessarily fit into the category of “gravely disabled” persons necessary for long-term commitment. Thus, if the LPS Act were used to commit incompetent criminal defendants, the 90-day period would typically constitute the maximum period of commitment.<sup>30</sup>

In contrast to the California scheme for civil commitment of the mentally disordered, most states provide for the indefinite commitment of persons who are potentially dangerous to themselves or others even though they have not been charged with criminal offenses.<sup>31</sup> In those states a dangerous criminal defendant may be indefinitely committed, as may any other person, on the ground of dangerousness.<sup>32</sup> California has rejected the preventative approach to civil mental incompetents. In California, after the LPS Act, an individual is not civilly committed for an indefinite period unless he is “gravely disabled,” this is, unless he is unable to feed, clothe, or house himself.<sup>33</sup> Therefore, the *Jackson-Davis* mandate posed a special problem in California. Specifically, exact compliance with the holdings in *Jackson* and *Davis* without any modification of the California criminal commitment procedures would have required handling a mentally incompetent criminal defendant solely under the civil commitment procedures.<sup>34</sup> In many cases, a mentally incompetent defendant would have been immune from more than a short-term restraint on his liberty. A defendant charged with an atrocious crime would be close to complete freedom if he could initially convince a jury that he was mentally incompetent to stand trial, and then at his civil commitment hearing, establish that he was capable of caring for

28. CAL. WELF. & INST. CODE §5008, as amended, CAL. STATS. 1971, c. 1593, at 3335.

29. See CAL. WELF. & INST. CODE §§5350, 5361.

30. Although unable to participate in a criminal proceeding, the defendant may indeed be capable of maintaining a minimal physical existence in his accustomed environment, or he may have friends or relatives to care for him. Thus, the same disability which makes the defendant incapable of participating in a trial will not necessarily prevent his functioning in other areas, particularly that of caring for himself. However, evidence that the defendant has committed a dangerous crime more strongly suggests that he may in fact be dangerous in the future. See Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 466 (1967).

31. See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1203-07 (1974).

32. See Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 463 (1967).

33. See text accompanying notes 28-29 *supra*.

34. See text accompanying notes 13-20 *supra*.

himself, and not, therefore, gravely disabled as required for long-term civil commitment.<sup>35</sup>

In response to this problem, the California Legislature passed Assembly Bill 1529, authored by Assemblyman Frank Murphy, which was enacted into law during the 1973-74 legislative session.<sup>36</sup> The bill was expressly declared to be a legislative response to the *Davis* holding<sup>37</sup> and was designed to bring California's criminal commitment procedure into conformity with the guidelines laid out in *Jackson* and *Davis*.

## B. *A New Criminal Commitment Scheme*

Assembly Bill 1529, which became effective as an urgency measure on September 27, 1974, amended both the California Penal Code<sup>38</sup> and the LPS Act.<sup>39</sup> As a result of these amendments, criminal defendants found incompetent to stand trial are now subject to an initial commitment for a definitely limited period not to exceed three years.<sup>40</sup> Thereafter, any further commitment may occur only if the defendant falls within the new standards set forth in the LPS Act.

### 1. *Precommitment Procedures*

Under the new law, a criminal defendant who is mentally incompetent, that is, who is unable to understand the nature of the proceedings against him and to rationally assist counsel in the conduct of a defense as a result of a mental disorder, may not be tried or sentenced while under this disability.<sup>41</sup> When a doubt arises as to the defendant's mental competence, the court must state that doubt on the record and, if necessary, recess the proceedings to permit defense counsel to form an opinion as to his client's competency to stand trial.<sup>42</sup> If defense counsel shares the court's doubt regarding the defendant's competence, a special hearing shall be held in the superior court to determine the question of competence.<sup>43</sup> Even if counsel believes that the defendant is competent, the

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35. See text accompanying notes 28-29 *supra*.

36. CAL. STATS. 1974, c. 1511. Assemblyman Murphy was especially concerned with the problem since his district included Santa Cruz County where three mass murderers, Edmund E. Kemper III, Herbert Mullin, and John L. Frazier, among them had perpetrated 23 killings in less than a three year period, *People v. Kemper*, No. 50628 (Super. Ct., Santa Cruz County, May 17, 1973); *People v. Mullin*, No. 50219 (Super. Ct., Santa Cruz County, Mar. 14, 1973); and *People v. Frazier*, No. 45252 (Super. Ct., Santa Cruz County, Oct. 28, 1970).

37. A.B. 1529, CAL. STATS. 1974, c. 1511.

38. See text accompanying notes 9-12 *supra*.

39. See text accompanying notes 21-30 *supra*.

40. See text accompanying note 69 *infra*.

41. CAL. PEN. CODE §1367.

42. CAL. PEN. CODE §1368(a).

43. CAL. PEN. CODE §1368(b).

court may nevertheless order such a hearing on its own motion.<sup>44</sup> When the charge against the defendant is a felony, the competency hearing may not be held until after filing of the indictment or information.<sup>45</sup>

In the case of a felony, a demurrer or a motion to dismiss pursuant to California Penal Code Sections 995 (insufficiency of indictment or information) or 1538.5 (motion to return property or suppress evidence) may be made at any time, even while the proceedings to determine the defendant's competence are pending.<sup>46</sup> Where the charge is a misdemeanor, the defense may demur or move to dismiss on the ground that there is not probable cause to believe that a public offense has been committed and that the defendant is guilty thereof, or make a motion under Penal Code Section 1538.5.<sup>47</sup> Such motions or demurrers, if originated in the municipal or justice court, must be made in the court having jurisdiction over the misdemeanor complaint before a competency hearing may be held in the superior court.<sup>48</sup> In ruling on a motion to dismiss a misdemeanor complaint on a "no probable guilt" ground, the court has wide discretion regarding the matters it may or may not consider.<sup>49</sup>

If the information, indictment, or misdemeanor complaint survives the defendant's challenges as to its validity, a hearing is then held on the question of mental competency to stand trial.<sup>50</sup> The defendant is entitled to have the issue of his competency tried by the court or a jury.<sup>51</sup> The court must first appoint a psychiatrist or licensed psychologist and other appropriate experts to examine the defendant. If the defendant is not seeking a finding of incompetence, then two psychiatrists, licensed psychologists, or a combination thereof shall be appointed; one may be named by the defendant and one by the prosecution.<sup>52</sup> The defendant is presumed to be competent;<sup>53</sup> thus the party contending that the defendant is mentally incompetent shall first introduce evidence to that effect.<sup>54</sup> Each party then may introduce rebuttal evidence and deliver final arguments.<sup>55</sup> The trial will proceed unless the defendant is found mentally

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44. *Id.*

45. CAL. PEN. CODE §1368.1(a).

46. *Id.*

47. CAL. PEN. CODE §1368(b). It should be apparent that the 1974 amendment does not create a "misdemeanor preliminary hearing." The statute does not amend Penal Code Section 995 to provide for misdemeanor preliminary hearings; it deals only with criminal defendants who are, or may be, mentally incompetent to stand trial.

48. CAL. PEN. CODE §1368.1(d).

49. See CAL. PEN. CODE §1368.1(c). Affidavits or even a complaint signed and sworn to by a percipient witness may be adequate.

50. See CAL. PEN. CODE §§1368.1, 1369.

51. See CAL. PENAL CODE §1369.

52. CAL. PEN. CODE §1369(a).

53. CAL. PEN. CODE §1369(f).

54. See CAL. PEN. CODE §1369(b).

55. See CAL. PEN. CODE §§1369(d)-(e).



incompetent<sup>56</sup> by a preponderance of the evidence,<sup>57</sup> and the jury's verdict on the question of competence must be unanimous.<sup>58</sup> If the defendant is determined to be incompetent to stand trial, the criminal proceedings are suspended and the defendant is ordered to be placed in a treatment facility.<sup>59</sup>

## 2. *Penal Code Commitment*

Within 90 days of a commitment made pursuant to Penal Code Section 1370, the superintendent of the treatment facility must send the committing court a written report concerning the defendant's progress toward restoration of his mental competence.<sup>60</sup> If the report indicates a substantial likelihood that the defendant will regain his mental competency in the foreseeable future, he will remain in the treatment facility.<sup>61</sup> Thereafter, reports must be submitted to the committing court at six-month intervals.<sup>62</sup>

If at any time during a commitment pursuant to Penal Code Section 1370 the superintendent certifies that a defendant has regained his competence, the court must order the defendant returned for trial.<sup>63</sup> On the other hand, if at any time during the Penal Code commitment the superintendent reports that there is no substantial likelihood that the defendant will regain his mental competence in the foreseeable future, the committing court must order the defendant returned to court. The committing court must then either release the defendant or commit him civilly pursuant to the amended provisions of the LPS Act.<sup>64</sup> If at any time during the Penal Code commitment the pending criminal charge is dismissed,<sup>65</sup>

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56. See CAL. PEN. CODE §1370.

57. CAL. PEN. CODE §1369(f).

58. *Id.*

59. CAL. PEN. CODE §1370(a).

60. CAL. PEN. CODE §1370(b).

61. *Id.*

62. *Id.*

63. See CAL. PEN. CODE §§1370(a), 1372(c).

64. See CAL. PEN. CODE §§1370(b)-(c).

65. Nothing in the 1974 amendment operates to vitiate the provisions of Penal Code Section 1385, which permits dismissals of criminal actions, and pursuant to Penal Code Section 1370(d), such dismissals remain available notwithstanding the commitment of a defendant as incompetent to stand trial. On the other hand, neither a Penal Code commitment pursuant to section 1370 nor a subsequent civil conservatorship as "gravely disabled," has been made the basis, per se, for dismissal of the underlying criminal charge. There may be circumstances under the new procedures, as there were under the old procedures, when the prosecuting attorney or the court will wish to dismiss the action in the furtherance of justice. One such circumstance in which the prosecuting attorney might wish to have the criminal charges dismissed would involve a defendant who (1) has spent the maximum period permissible under a Penal Code commitment, (2) is still incompetent to stand trial, and (3) is charged with a nonviolent felony or misdemeanor and thus is not "gravely disabled" pursuant to section 5008(h)(2) of the Welfare and Institutions Code. The prosecuting attorney in such a case may be amenable to the dismissal of the criminal charge and the placing of the defendant under a civil conservatorship under section 5008.1(h) of the Welfare and Institutions Code on the

the defendant must be released from any commitment order made but without prejudice to the initiation of appropriate civil commitment proceedings under the LPS Act.<sup>66</sup>

If a defendant remains committed pursuant to Penal Code Section 1370 for 18 months,<sup>67</sup> he must be returned to the committing court for a second competency hearing. At this hearing, the court must reach one of three conclusions: (1) that the defendant has become competent to stand trial; (2) that the defendant is not yet competent but is likely to regain competence to stand trial in the foreseeable future; or (3) that the defendant is not likely to recover competence but is subject to civil commitment under the amended LPS Act.<sup>68</sup>

If the court determines that there is a substantial likelihood that the defendant will regain mental competence in the foreseeable future, he will be returned to the treatment facility, and again the superintendent will submit periodic reports regarding the defendant's progress. The maximum period of time during which the defendant may be so confined, including the original 18-month period, is limited to three years or the maximum term of incarceration for the most serious offense with which he is charged, whichever is shorter.<sup>69</sup> At the end of that period, if the defendant is still not competent to stand trial, he is again returned to the committing court, which shall order the defendant committed civilly pursuant to the amended LPS Act or released if he is not eligible for a civil conservatorship.<sup>70</sup>

In summary, a criminal defendant who is adjudged to be mentally incompetent to stand trial may leave his Penal Code commitment and become subject to the provisions of the LPS Act either when the initial commitment period expires, or during the initial commitment period, when the court or the superintendent of the treatment facility determines that the defendant is unlikely to regain competency in the foreseeable future.

### 3. *Civil Code Commitment*

Under the LPS Act, a "gravely disabled" individual is eligible for a one-year conservatorship which may be renewed yearly on a showing

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ground that he is unable to feed, clothe, and house himself assuming, of course, that such is the case.

66. CAL. PEN. CODE §1370(e).

67. Eighteen months is the optimal time for reconsideration of a defendant's competence. Records of the Department of Health indicate that of the defendants committed under Penal Code Section 1370 who are returned for trial, the majority are returned within two years. Letter from Stanley S. Chun, Crime Studies Analyst, Dep't of Justice, to the author, Mar. 7, 1975, on file at the *Pacific Law Journal*.

68. CAL. PEN. CODE §1370(b)(2).

69. CAL. PEN. CODE §1370(c)(1).

70. While the statute contains no express instruction that the defendant will be ordered released, it is apparent that such must be the result because there is no authority allowing further confinement or prosecution of the criminal offense.

that the individual remains "gravely disabled."<sup>71</sup> The 1974 amendment to the LPS Act<sup>72</sup> redefined "gravely disabled" to include two classes of persons. The first class consists of the same persons who were subject to long-term commitment under the pre-amended version of the LPS Act, namely, those persons unable to feed, clothe, or house themselves.<sup>73</sup> The second class includes the individual (1) who has been found mentally incompetent to stand trial under Penal Code Section 1370; (2) who is charged with having committed a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person; (3) against whom there is pending an indictment or information; and (4) who, as a result of mental disorder, is unable to understand the nature and purpose of the proceedings taken against him and to assist counsel in the conduct of his defense in a rational manner.<sup>74</sup>

When a criminal defendant has been found to be gravely disabled, the court then orders the conservatorship investigator of the county to initiate conservatorship proceedings.<sup>75</sup> The defendant is thereafter treated in the same manner as any other civilly committed individual, except that he remains subject to trial on the underlying violent felony.<sup>76</sup>

It should be noted that upon termination of the Penal Code commitment, defendants charged with misdemeanors and nonviolent felonies are subject to only those provisions of the LPS Act which bear no relation to the pendency of criminal charges. Thus long-term commitment of criminal defendants will be imposed only upon those defendants who are charged with violent felonies or who are unable to feed, clothe, or house themselves.<sup>77</sup>

## CONSTITUTIONAL COMPLIANCE

### A. Initial Penal Code Commitment

The primary justification for criminal incompetency commitments is the state's interest in bringing to trial an individual who has been accused of a criminal offense.<sup>78</sup> In furtherance of this interest, the state may place an individual under mental treatment to facilitate his recovery so that he may be tried with a minimum delay.<sup>79</sup> When involuntary commitment is

71. See CAL. WELF. & INST. CODE §§5360, 5361.

72. CAL. STATS. 1974, c. 1511.

73. CAL. WELF. & INST. CODE §5008(h)(1). See text accompanying note 28 *supra*.

74. CAL. WELF. & INST. CODE §5008(h)(2).

75. CAL. PEN. CODE §1370(c)(2).

76. See CAL. WELF. & INST. CODE §5369.

77. See text accompanying notes 71-74 *supra*.

78. Cf. *Greenwood v. United States*, 350 U.S. 366 (1956).

79. See Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 462 (1967).

founded on this rationale, however, there must be a substantial likelihood that the defendant's incapacity is curable and that the type of treatment offered at the institution of commitment will promote his recovery. If the defendant's commitment is not justified by progress toward regaining competence, the state has no legitimate interest in his continued commitment on this ground. The commitment of such an individual would no longer further the state's legitimate interest in bringing him to trial.<sup>80</sup> California's new Penal Code commitment scheme has taken into account these considerations. Thus, a defendant found incompetent to stand trial is no longer susceptible to indefinite commitment merely because of his incompetence to stand trial on the charges pending against him.<sup>81</sup> Unlike the Indiana commitment procedures condemned by the Court in *Jackson*,<sup>82</sup> California's initial commitment scheme makes the "likelihood of recovery" a chief factor in such an individual's continued confinement.<sup>83</sup> The California scheme provides for a continuing review of a defendant's mental condition in order to insure that he is promptly removed from criminal commitment if he attains competence, or if he is not likely to respond to such care and treatment. Thus, California's procedure insures that an incompetent defendant's initial commitment is justified by progress toward the goal of recovery.

The California commitment scheme is designed to satisfy the limitations in *Jackson* regarding the length of a commitment. Although the Court in *Jackson* expressly refused to set specific limits on duration, it did limit the commitment to a period reasonably necessary to determine the likelihood that the defendant will regain competency.<sup>84</sup> The California scheme places definite limitations on the initial period of confinement, allowing a maximum period of three years or the maximum length of incarceration for the offense charged, whichever is shorter.<sup>85</sup> This three-year or maximum-sentence limitation must be considered a legislative judgment that upon the expiration of the established period the state interest in bringing the defendant to trial becomes outweighed by considerations of individual freedom. The greater the maximum sentence for the crime charged, the greater is the state's interest in bringing the defendant to trial and thus the greater the length of confinement before the state interest is outweighed by considerations of individual freedom.

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80. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

81. See text accompanying note 64 *supra*.

82. 406 U.S. at 730.

83. See CAL. PEN. CODE §1370(b).

84. 406 U.S. at 738.

85. CAL. PEN. CODE §1370(c)(1).

This approach for determining the reasonable period of initial commitment under the California scheme was suggested by the California Supreme Court in *Davis* when it set forth guidelines that a trial court should consider in exercising its discretion as to whether continued commitment pending trial is justified. The court stated:

To guide its discretion, the trial court should consider, among other things the *nature of the offense* charged, the *likely penalty or range of punishment for the offense*, and the length of time the person has already been confined.<sup>86</sup>

Other courts have used the maximum-sentence limitation. In *Waite v. Jacobs*<sup>87</sup> a criminal defendant had been committed to a mental hospital after he was found not guilty by reason of insanity. He had been confined for over nine of the ten years for which he might have been sentenced criminally. He filed a petition for habeas corpus, and at the hearing the key issue was whether the government should bear the burden of proving that continued confinement beyond the maximum period of criminal incarceration was justified.<sup>88</sup> The court held that after the expiration of the period for which an acquittee might have been incarcerated had he been convicted, it might be irrational, within the meaning of the equal protection doctrine, to distinguish between an acquittee (one acquitted on the basis of insanity at the time of the offense) and a civil commitTEE.<sup>89</sup> Acquittees who had already been confined for that period, therefore, might be entitled to treatment no different from that afforded civil commitTEES. The court reasoned that after confinement for the maximum-sentence term, even a person who was fully accountable for a crime is free to rejoin the community.<sup>90</sup>

The California Legislature has implicitly determined that the state's interest in bringing such an individual to trial will dissipate upon reaching expiration of his maximum sentence and any further commitment will have to be justified on the same basis as other civil commitments. Furthermore, as the *Waite* court recognized, even before the expiration of the maximum-sentence period it might be necessary to release such individuals from confinement.

The California Legislature has provided for a similar possibility. The three-year or maximum-sentence periods were established as the outer limitations, and provisions were made for those in which due process

86. *In re Davis*, 8 Cal. 3d 798, 807, 505 P.2d 1018, 1025, 106 Cal. Rptr. 178, 185 (1973) (emphasis added).

87. 475 F.2d 392 (D.C. Cir. 1973).

88. *See id.* at 393-94.

89. *Id.* at 395.

90. *See id.* at 396.

would compel an earlier release. The California scheme has taken separate cognizance of such situations by requiring periodic reports and by requiring mandatory judicial review after 18 months of confinement, both safeguards being directed toward the continued assurance that the defendant's initial confinement is justified by the realizable goal that he will be returned for trial.

It should be underscored here that the pretrial safeguards afforded to all criminal defendants are now afforded to criminal defendants who are incompetent to stand trial.<sup>91</sup> In the past, for example, a criminal defendant found incompetent at arraignment had no opportunity to challenge the sufficiency of the evidence supporting the felony charge against him.<sup>92</sup> As noted previously, under the new procedures one accused of a felony may not be committed as mentally incompetent to stand trial until he has been bound over after a preliminary or grand jury hearing establishing probable cause to believe that he committed the crime charged.<sup>93</sup> The state interest in prosecuting persons charged with crimes is strengthened when there is a showing of probable cause to believe the defendant committed the crime, as contrasted with a more limited interest when a mere unsupported accusation has been filed against him. Arguably such preliminary hearings violate the defendant's right to counsel because he is unable to rationally assist counsel in the preparation of his defense. However, as recently held in *Chambers v. Municipal Court*,<sup>94</sup> the preliminary hearing in the case of a mental incompetent serves a different function than the preliminary hearing in other cases. In the former case, the function of the preliminary hearing is solely to provide an evidentiary basis for committing the defendant under the LPS Act. Thus an attack on the preliminary hearing on the ground that the defendant was not competent is premature until it is apparent that the defendant is going to

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91. See text accompanying notes 47-48 *supra*.

92. Once the defendant had been adjudged insane, *all* of the criminal proceedings were suspended. CAL. PEN. CODE §1368, *as amended*, CAL. STATS. 1937, c. 133, at 373. Thus the defendant could make no pretrial motions. The American Law Institute has suggested in the Model Penal Code the adoption of the following provision: "The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant." MODEL PENAL CODE §4.06, alternative subsection (3) (Proposed Official Draft, 1962).

93. See text accompanying notes 45-49 *supra*. An amendment to A.B. 1529 by the Assembly Criminal Justice Committee, not contained in the final version of the bill, provided for what might be termed a "pretrial" trial in the superior court after the defendant was found to be mentally incompetent. A.B. 1529, 1973-74 Regular Session, *as amended*, Jan. 23, 1974. The "pretrial" trial would have consisted of a full adversary hearing on the merits to provide a record to justify a different classification for equal protection purposes. If a defendant were found to be mentally incompetent at the 1368 hearing, and then "guilty" at the "pretrial" trial, it would still have been necessary to try him again on the question of guilt or innocence when he recovered his mental competency.

94. 43 Cal. App. 3d 809, 118 Cal. Rptr. 120 (1975).

be brought to trial on the information. The court noted that if and when the defendant does become competent to stand trial the information may be set aside because the accused was not lawfully committed by the magistrate.<sup>95</sup> Thus, a grand jury indictment or a new preliminary hearing would be necessary in order to bring the defendant to trial.

In *Davis* the California Supreme Court, upon review of the constitutionality of the state hospital commitment and release procedures for incompetent criminal defendants, concluded that petitioner's commitments were proper, but that some provision must be made to assure that defendants do not face the indefinite commitment condemned in *Jackson*.<sup>96</sup> Therefore, the initial Penal Code commitment provided in the new statute appears to be in compliance with the *Davis* court's interpretation of *Jackson*, since under the new scheme the defendant is not susceptible to an indefinite commitment. In light of these legitimate state interests and the *Davis* court's expressed approval of limited commitment of an incompetent defendant where the likelihood of recovery is a factor in his release, the temporary commitment of incompetent defendants under California's Penal Code commitment should withstand constitutional scrutiny.

#### B. Long-Term Civil Commitment under the LPS Act

While the limited initial period of commitment of incompetent defendants may be justified by the state interest in expeditiously bringing a criminal defendant to trial, that interest becomes less significant as support for the indefinite commitment of defendants under the renewable conservatorship proceedings of the LPS Act. A defendant who is subject to these latter proceedings may be detained even though there is no substantial likelihood that he will attain competence to stand trial in the foreseeable future. There are two directions of constitutional attack which arguably could be taken against the LPS Act's indefinite commitment standards. First, because there is but a limited class of persons subject to indefinite commitment on this basis, an equal protection argument could be marshalled. Secondly, it could be argued that the new law fails to meet the constitutional standards of due process because the state

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95. *Id.* at 813, 118 Cal. Rptr. at 123. In *Jackson* the Supreme Court noted:

Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetency. . . . We do not read this Court's previous decisions to preclude the States from allowing at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions, through counsel.

406 U.S. at 740-41.

96. 8 Cal. 3d at 806, 505 P.2d at 1024, 106 Cal. Rptr. at 184.

has no legitimate interest in the indefinite commitment of defendants subject to the new law or because procedural protections are inadequate. While these two arguments are to some extent overlapping, there are some differences. Accordingly, they will be addressed separately.

### 1. *Equal Protection*

Theon Jackson was a twenty-seven year old deaf mute with the mental capacity of a preschool child.<sup>97</sup> He was charged in Indiana by affidavit with two counts of robbery,<sup>98</sup> allegedly having stolen property and cash totaling approximately nine dollars. Upon entering pleas of not guilty, Jackson was found by the court to be incompetent to stand trial, removed from the criminal process, and committed until such time as he could be certified sane. For Jackson this was, as a practical matter, a life commitment; there was little if any possibility that Jackson would ever attain the level of mental competence required to stand trial.<sup>99</sup> Indiana's civil commitment statutes<sup>100</sup> allowed for indefinite commitment only upon a showing of dangerousness to self or others, or an inability to care for oneself,<sup>101</sup> neither of which could have been established from the facts on the record in Jackson's case.

The specific equal protection holding of *Jackson* was that "the mere filing of criminal charges" does not provide an adequate basis for differentiation in the application of standards of commitment and release to different classes of mental incompetents.<sup>102</sup> The equal protection holding in *Jackson* was an extension of the rationale of the 1966 case of *Baxstrom v. Herold*.<sup>103</sup> In that case the defendant had been convicted of second degree assault and sentenced to a two and one-half to three year term in the state penitentiary. In accordance with New York's statutes, near the end of his sentence the defendant was certified by the prison physician as insane, and was removed to a state mental institution under the jurisdiction of the State Department of Corrections. Six months later when his sentence expired, the defendant was again certified as insane and formal custody shifted from the Department of Corrections to the Department of Mental Hygiene. Nevertheless, Baxstrom remained in

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97. *Jackson v. Indiana*, 406 U.S. 715 (1972).

98. *Jackson v. State*, 253 Ind. 487, 255 N.E.2d 515 (1970).

99. 406 U.S. at 717-19.

100. IND. ANN. STAT. §221201 *et seq.*, (now IND. CODE §§ 16-14-9-1 to 16-14-9-31, 16-13-2-9 to 16-13-2-10, 35-5-3-4, 16-14-14-1 to 16-14-14-19, 16-14-15-5, 16-14-15-1, 16-14-19-1 (1971)).

101. See 406 U.S. at 727-28.

102. See text accompanying note 15 *supra*.

103. 383 U.S. 107 (1966).



the same institution, an institution which was used primarily for the confinement and care of mentally ill prisoners.<sup>104</sup>

Baxstrom argued, *inter alia*, that since his sentence had expired he should not be denied the rights and privileges given to persons committed under the civil statutory scheme. Most importantly in this respect, Baxstrom was not provided a jury trial on the issue of his sanity, although such trial was required before a nonprisoner could be involuntarily committed.<sup>105</sup> The state argued that the different procedures for prisoners and nonprisoners were based upon the reasonable classification differentiating the "civilly insane" from the "criminally insane."<sup>106</sup> The court rejected the state's argument, holding that

[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. . . . For purposes of granting judicial review before a jury on the question of whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.<sup>107</sup>

In *Jackson*, the Court noted that the rationale of *Baxstrom* was fully applicable to the standards for commitment and release of mentally ill criminal defendants,<sup>108</sup> even though *Baxstrom* dealt with procedural rather than substantive rules for commitment.

Without exploring the many facets of the equal protection clause, it should be noted that the determination of whether an individual has been denied equal protection frequently turns on the particular test which a court applies to a given set of facts.<sup>109</sup> A law is not an unconstitutional denial of equal protection if it operates equally on all members of a class,<sup>110</sup> and the class is properly selected. A classification is generally valid if it is reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legis-

104. *Id.* at 108-10.

105. See N.Y. MENTAL HYGIENE LAW §74 (McKinney 1971).

106. 383 U.S. at 111.

107. *Id.* at 111-12.

108. 406 U.S. at 729.

109. While the classifications generally do not have to be drawn with mathematical precision, classifications which are underinclusive or overinclusive might not withstand judicial scrutiny. Generally, the courts have been more willing to uphold classifications which are underinclusive rather than overinclusive. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1082-87 (1969). However, grossly overinclusive classifications have been upheld by the courts under exigent circumstances, even where the class itself, race, was suspect. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

110. *Wadley v. Los Angeles County*, 205 Cal. App. 2d 668, 23 Cal. Rptr. 154 (1962); *Smith v. Nettleship*, 195 Cal. App. 2d 393, 15 Cal. Rptr. 836 (1961); *Loeff v. Long Beach*, 153 Cal. App. 2d 174, 314 P.2d 518 (1957).

lation.<sup>111</sup> The designation of the class may in itself constitute unlawful discrimination unless there appears to be a reason why the law is not made applicable to all generally.<sup>112</sup> However, the legislature is not compelled to extend the application of a statute to all instances that might conceivably fall within the ambit of the harm to be prevented.<sup>113</sup> It may deal with one aspect of a problem without including all the others that might be affected in the same area.<sup>114</sup> If a valid ground for a classification exists, it is not unconstitutional merely because it does not include every other class that might have been included.<sup>115</sup> For example, a statute making a crime applicable to specific classes is valid if the classification defines those from whom the evil is mainly to be feared.<sup>116</sup>

Neither *Jackson* nor *Baxstrom* expressly identified the precise equal protection standard used in striking the respective statutory schemes. However, in reaching the due process holding of *Jackson*, the Court did identify the type of state interests which are generally advanced to support the involuntary indefinite commitment of an individual. These interests include dangerousness to self, dangerousness to others and the need for care, or treatment or training.<sup>117</sup> As for the interest in bringing a mentally incompetent defendant to trial, it may justify a temporary commitment but for only so long as there is a substantial likelihood that the individual will regain competence to stand trial.<sup>118</sup>

The state's classification in *Jackson* was drawn *solely* along lines of whether there were *any* pending criminal charges against the individual;

111. *Cossack v. City of Los Angeles*, 11 Cal. 3d 726, 734, 523 P.2d 260, 265, 114 Cal. Rptr. 460, 465 (1974).

112. *Mordecai v. Board of Supervisors*, 183 Cal. 434, 438, 192 P. 40, 41 (1929); *Rauer v. Williams*, 118 Cal. 401, 408, 50 P. 691, 693 (1897); *In re Jentzsch*, 112 Cal. 468, 474, 44 P. 803, 804 (1896); see *Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604 (1891). But a statute which, on its face, applies to all generally may be a denial of equal protection if it is designed to single out a particular social group and stigmatizes its members. *Parr v. Municipal Court*, 3 Cal. 3d 861, 868, 479 P.2d 353, 358, 92 Cal. Rptr. 153, 158 (1971).

113. *Simpson v. Municipal Court*, 14 Cal. App. 3d 591, 600, 92 Cal. Rptr. 417, 422 (1971); *Riggins v. Riggins*, 139 Cal. App. 2d 712, 718, 294 P.2d 751, 754 (1956); see, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-89 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

114. *First Unitarian Church v. Los Angeles County*, 48 Cal. 2d 419, 433, 311 P.2d 508, 516 (1957), *rev'd on other grounds*, 357 U.S. 545 (1958); see *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955).

115. E.g., *People v. Evans*, 40 Cal. App. 3d 582, 588, 115 Cal. Rptr. 304, 308 (1974); *In re Rameriz*, 193 Cal. 633, 650, 226 P. 914, 921 (1924). But see *People v. Rappard*, 28 Cal. App. 3d 302, 305, 104 Cal. Rptr. 535, 536-37 (1972) (refusing to apply the rational basis test where the class, alienage, is suspect).

116. *In re Herrera*, 23 Cal. 2d 206, 213, 143 P.2d 345, 348 (1943); *Martin v. Superior Court*, 194 Cal. 93, 101, 227 P. 762, 765 (1924); *In re Rameriz*, 193 Cal. 633, 650, 226 P. 914, 921 (1924); *Gutknecht v. City of Sausalito*, 43 Cal. App. 3d 269, 281, 117 Cal. Rptr. 782, 790 (1974); *People v. Finston*, 214 Cal. App. 2d 54, 57-58, 29 Cal. Rptr. 165, 168 (1963).

117. 406 U.S. at 737.

118. See *id.* at 738.

if so, he could be indefinitely committed under more lenient standards than could the general population.<sup>119</sup> Clearly, none of the requisite state interests were achieved by the Indiana classification condemned in *Jackson*, since the mere pendency of *any* criminal charge would not necessarily indicate a propensity toward dangerousness to self or others or a particularly urgent need for care. While some, and perhaps many, persons in Jackson's class were no doubt dangerous or in severe need of help, equal protection requires that the class itself be created to isolate such persons. In *Jackson* the ratio of "class misfits" to "true class members" was potentially too high.

Unlike the statutory scheme condemned in *Jackson*, the amended LPS Act does not single out individuals for different commitment treatment solely because criminal charges have been filed. Rather, the parameters of the class are narrowly drawn so as to encompass only those cases where there is probable cause to believe that the defendant committed a *violent felony* and where the criminal charges are still pending.<sup>120</sup> Other than these criminal defendants, the only individuals subject to indefinite commitment are persons who are unable to feed, clothe, and house themselves.<sup>121</sup> The basic state interest to be achieved by the added classification under the new California law is the interest in protecting society from dangerous individuals who, but for their inability to stand trial, would be subject to criminal prosecution. Since the California scheme, unlike the scheme condemned in *Jackson*, isolates and classifies only those individuals held to answer for *violent felonies*, it would seem to represent a much more rational means of achieving this state interest.

Clearly, if the legislature had met the problem posed by *Jackson* by simply amending the LPS Act to permit the indefinite commitment of *anyone* who is "potentially dangerous," no constitutional question would have been presented.<sup>122</sup> This is the basic scheme of most states and was in fact offered to the legislature in the form of Senate Bill 1705 during the 1973-74 Regular Session.<sup>123</sup> Though attractive in its simplicity, the proposed bill conflicted with California's orientation regarding

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119. See text accompanying note 15 *supra*.

120. See CAL. WELF. & INST. CODE §5008(h)(2).

121. See CAL. WELF. & INST. CODE §5008(h)(1).

122. Cf. 406 U.S. 715; 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178.

123. A more efficient solution to the *Jackson* problem was offered by Senate Bill 1705, as introduced by Senator Craig Biddle. If passed, this bill would have enlarged the criteria for civil commitment under the LPS Act to permit indefinite confinement of anyone on the ground of potential dangerousness. Although Senate Bill 1705 was attractive for its lack of complexity, and had the support of the Attorney General, letter from the Attorney General to the *Pacific Law Journal*, May 6, 1975, it is not certain that the bill would have been approved by the legislature.

involuntary civil commitments. The California Legislature, by rejecting Senate Bill 1705, indicated its continued unwillingness to permit the indefinite commitment of an individual merely because his *psychiatric profile* indicates "potential dangerousness." Rather, the California Legislature has required a probable cause hearing with full procedural and evidentiary safeguards provided to the criminal defendant, showing that the defendant has "already unhappily manifested the reality of anti-social conduct"<sup>124</sup> and may therefore reasonably be considered more dangerous than civil committees.<sup>125</sup>

Under the new scheme it can be argued that there may be "class misfits" who are indefinitely committed. That is, an individual who meets all the requirements for indefinite commitment under the amended LPS Act may nevertheless not be potentially dangerous. It is theoretically possible that an individual who has committed a violent act has acted entirely "out of character" and will not do so again, or that an individual who is dangerous may be "cured" or may otherwise lose his propensity for violence. On the face of the new California law, the commitment of the incompetent defendant who has committed a violent act but is in fact no longer dangerous continues.<sup>126</sup>

However, a substantially smaller portion of the class created by the California scheme would be "class misfits" than under the Indiana classification condemned in *Jackson*. Again, the amended LPS Act, unlike the Indiana classification, attempts to distinguish between criminally charged mental incompetents who are dangerous and those who are not; the requirement for evidence showing probable cause to believe that a *violent felony* was committed is at least equivalent to a finding of potential dangerousness.<sup>127</sup> Thus the amended LPS Act arguably meets the equal protection standards set down in *Jackson* albeit not in a manner specifically detailed in *Jackson* or the cases approved by *Jackson*.

Moreover, several other factors tend to mitigate the problem in the California scheme arising from the existence of "class misfits." First, even though formally under the jurisdiction of the institution to which he is committed, the defendant may be treated as an outpatient if the superintendent of the institution is of the opinion that the defendant is not a menace to the health and safety of others, and if, after a hearing, the

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124. *Dixon v. Jacobs*, 427 F.2d 589, 604 (D.C. Cir. 1970).

125. *See Waite v. Jacobs*, 475 F.2d 392, 396 (D.C. Cir. 1973); *Overholser v. O'Beirne*, 302 F.2d 852, 859-60 (D.C. Cir. 1962).

126. See text accompanying notes 71-76 *supra*.

127. In a significant respect the new California commitment standard provides a greater protection to the individual than the post-*Jackson*, "potentially dangerous" civil commitment standard used in most states. In California the individual must have acted. Under the post-*Jackson* Indiana civil commitment procedures, a mere psychiatric prophecy is enough to justify what amounts to a commitment for life.

court does not disapprove of such decision.<sup>128</sup> Secondly, where there is probable cause to believe that the defendant has committed a violent felony, there is a substantially greater state interest in ultimately bringing the defendant to trial. Just as the legislature is unwilling to deprive an individual of his liberty solely on the basis of psychiatric opinion, the legislature is understandably reluctant to release an individual who has committed a violent felony solely because psychiatric opinion indicates that there is no substantial likelihood that the individual will attain the capacity to stand trial.<sup>129</sup> Indeed, it would be somewhat inconsistent to forbid confinement on the basis of psychiatric opinion alone, and yet allow such opinion to form the sole basis for release of a criminal defendant who had been held to answer for a violent felony. Thirdly, the existence of a record of evidence at a preliminary or grand jury hearing is itself an important distinction from the *Jackson* situation, where the mere filing of criminal charges formed the basis for distinguishing among mentally incompetent individuals. It is indeed significant in this respect that the defendant who is found incompetent to stand trial under the California scheme may obtain suppression of illegally seized evidence and may challenge the indictment or information in the same manner as any other criminal defendant.<sup>130</sup>

Despite these clear distinctions from the Indiana commitment procedures condemned in *Jackson*, a court could nevertheless conclude that the new California law fails to meet the *Jackson* equal protection standards simply because there is no requirement for an *express finding* of "potential dangerousness" by the trial court at the time of commitment. Such a result, however, is unlikely. A defendant committed under Penal Code Section 1370 has been found potentially dangerous. The new statute reflects a legislative finding that probable cause to believe a person committed a felony involving physical violence to another human being constitutes an indication of a propensity for violence.<sup>131</sup> In *Greenwood v. United States*,<sup>132</sup> a federal court upheld an indefinite commitment on the basis of potential dangerousness even though it had to read that requirement into a statute to correct a constitutional deficiency in the federal procedures.<sup>133</sup> The great care taken by the California Legislature to

128. CAL. PEN. CODE §§1372(b)-(c), 1374; CAL. WELF. & INST. CODE §5369.

129. The literature provides support for the legislature's apparent reluctance to permit a determination of such importance to be based almost entirely on a psychiatric judgment. See, e.g., Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways*, in THE PSYCHIATRIC FORUM 151 (Usdin ed. 1975); Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist's Views of Durham and Brawner*, 1973 WASH. U.L.Q. 87; Rosenham, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973).

130. See text accompanying notes 45-46 *supra*.

131. See note 129 *supra*.

132. 350 U.S. 366 (1956).

133. *Id.* at 373.

insure that a mentally incompetent criminal defendant receives every possible protection of the law would make a similar approach by the California courts seemingly unnecessary.

There is yet another form that an equal protection attack may take. Specifically, it may be argued that while the California commitment standards are constitutionally sound, after the individual has been committed for a period in excess of the maximum period of incarceration for the crime charged, the fact that he probably committed such crime is no longer a valid basis for treating him differently than other individuals. In *Waite v. Jacobs*,<sup>134</sup> a similar argument was advanced by the defendant who had been found not guilty of assault with a deadly weapon by reason of insanity. The District of Columbia commitment scheme provided a judicial hearing and a determination of dangerousness as a prerequisite to the commitment of *noncriminal* individuals.<sup>135</sup> This defendant, however, had received no such hearing, and the state argued that the fact of the insanity acquittal was a sufficient basis for treating such individuals differently.<sup>136</sup> The court held that the acquittal would justify different treatment but for only so long as the maximum period of incarceration for the crime of which he was acquitted.<sup>137</sup> After the defendant had been committed for such period, he must be placed on an equal footing with all other individuals.<sup>138</sup> However, the *Waite* holding would appear to be inapplicable to a defendant who is committed in California, even when his period of commitment extends beyond the maximum period for which he could have been penally incarcerated. In California the long-term commitee is not committed because there is probable cause that he committed a violent felony. Rather, the fact that there is such probable cause is evidence of dangerousness; dangerousness is the reason he is committed. Thus the length of commitment is *unrelated to the penal sentence for the crime charged*. Unlike the scheme in *Waite*, the California scheme does not discriminate among dangerous individuals. Rather, it merely defines the evidentiary prerequisite to the commitment of incompetents where the incompetent has been criminally charged; in such cases potential dangerousness is established by probable cause to believe that a violent felony has been committed. Because potential dangerousness, and not the crime charged, is the basis for the commitment, it would seem that the amended LPS Act places all potentially dangerous individuals, criminally charged or otherwise, on an equal footing. Thus it would appear that the classification discussed in *Waite* does not exist

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134. 475 F.2d 392 (D.C. Cir. 1973).

135. *Id.* at 395-96.

136. *Id.* at 395.

137. *Id.*

138. *Id.* at 399.

under the California scheme, and that an equal protection argument relying on the *Waite* rationale would be unlikely to meet with success.

## 2. Due Process

Arguments may be put forth that the indefinite commitment provisions of the amended LPS Act deprive a defendant of either procedural or substantive due process. Procedurally, the California scheme manifests abundant concern for the incompetent defendant. Among other protections, counsel is required at the hearing on incompetency,<sup>139</sup> a unanimous jury verdict is required on the issue of incompetence,<sup>140</sup> no long-term commitment may be imposed in the absence of a preliminary or grand jury hearing,<sup>141</sup> the defendant has access to pretrial motions for challenging the sufficiency and the legality of the evidence at the preliminary hearing,<sup>142</sup> and periodic review of his commitment is required in the form of yearly conservatorship hearings.<sup>143</sup> Indeed, it is unlikely that any challenge based upon procedural due process would succeed.

In *Jackson*, while issues of procedural due process were alluded to, the Indiana scheme was primarily invalidated on the basis of substantive due process.<sup>144</sup> In this area there is substantial overlap with the considerations presented in the equal protection discussion. If the state discriminates it must do so by classifications which are reasonably related to a valid state interest. If there is no valid state interest in the discrimination, then not only will the classifications fall under equal protection, but the scheme is likely to fall under the due process clause as well. The key issue in both areas is the existence *vel non* of a valid state interest, a valid purpose for constructing the statutory scheme in the manner chosen.

In *Jackson* the Court stated that "[a]t the least, due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed" when the duration is indefinite, *i.e.*, potentially a lifetime commitment for the individual.<sup>145</sup> *Jackson* appears to require that the purpose of such commitment be the protection of society or the individual himself.<sup>146</sup> If the California scheme meets the due process requirements of *Jackson* the

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139. CAL. PEN. CODE §1368.

140. CAL. PEN. CODE §1369(f).

141. CAL. PEN. CODE §1368.1(a).

142. *Id.*

143. CAL. WELF. & INST. CODE §§5350, 5361.

144. See 406 U.S. at 731-38. Other cases also manifested a concern for the procedures involved in the commitment of incompetent criminal defendants. *E.g.*, *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

145. 406 U.S. at 738.

146. See text accompanying note 109 *supra*.

predominant state interest must be the protection of society, *i.e.*, the commitment of dangerous individuals.

As noted previously, the legislature has chosen to base the prerequisites of indefinite commitment upon the traditional tools of judicial procedure rather than upon a psychiatric opinion that an individual may be dangerous.<sup>147</sup> While a finding of probable cause that a defendant has committed a violent felony is not the precise equivalent of a finding of dangerousness, the former finding would appear to offer substantially more protection than the latter.

It is unlikely that the *Jackson* dicta which suggests that "dangerousness" must be found will be mechanically applied to invalidate the new law. Moreover, even if dangerousness is required, the courts may find it to be implied from either the LPS Act commitment standards or the outpatient provisions applicable to the superintendent of the treatment facility. In either case, periodic review at the conservatorship hearings may be had to assure that the individuals who are confined are in fact dangerous. Not only would the requirements of due process thereby be met, but the libertarian policy with respect to civil commitment would be preserved.

#### CONCLUSION

The new commitment scheme in California is an attempt to reconcile two important considerations: the protection of society from dangerous individuals who are incompetent to stand trial and therefore not subject to penal incarceration, and the protection of individuals from indefinite commitment based only upon a psychiatric opinion that the individual is dangerous. Substantial procedural protections are afforded to criminal defendants subject to commitment as incompetent to stand trial, and continued review of their commitment is required. The initial Penal Code commitment is fully consistent with constitutional standards. The conservatorship commitment standards under the amended LPS Act will no doubt be subjected to constitutional challenge, but it is likely that the new law will be sustained. If the courts were to strike the new law as failing to comply with the constitutional standards of *Jackson*, the legislature would have but two alternatives: (1) to resign itself to the release of all criminal defendants who are incompetent to stand trial but are capable of providing their own food, clothes, and housing; or (2) to change the civil commitment procedures to permit indefinite commitment of "potentially dangerous" noncriminals. The first alternative is unlikely to be chosen; but if it were chosen,

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147. See text accompanying notes 120-21 *supra*.



the probable result would be an increased reluctance on the part of judges, juries and even psychiatrists to conclude that a defendant is incompetent to stand trial. A community might believe that it is better served by prosecuting and sentencing a dangerously insane individual than by allowing his insanity to immunize him from any form of long-term commitment.<sup>148</sup> It is more likely that the legislature would choose the second alternative. If *Jackson* is interpreted to require a psychiatric evaluation of dangerousness as the sole justification for indefinite commitment, equal protection would further mandate equal treatment for all persons evaluated as dangerous. Such a mandate would necessarily include noncriminals, and a showing of probable cause that the individual has committed a violent felony would be an unconstitutional distinction among dangerous individuals. The ironic result would be to void a statutory scheme as violative of due process and equal protection so that it would be replaced with a system that is constitutional, but less concerned for the rights of the civilly incompetent, as well as incompetent criminal defendants.

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148. See, e.g., *United States v. Bennett*, 460 F.2d 872, 881 (D.C. Cir. 1972).