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III. Constitutional Law

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CONSTITUTIONAL LAW

A. Abortion

People v. Barksdale. The California Therapeutic Abortion Act of 1967 authorized licensed doctors to perform abortions if specified procedural steps were followed and certain substantive criteria met. In Barksdale the California Supreme Court found that the language describing one of the two situations in which abortions were permissible — "if there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" — was so vague that it deprived a pregnant woman desiring an abortion of due process of law. The provision allowing abortion for pregnancies resulting from rape and incest was held inseverable from the subdivision found unconstitutionally vague and therefore also void, as were the procedural requirements of approval by a hospital committee and, in the case of rape or incest, submission to the district attorney for determination of probable cause. The remaining provisions of the Act, that abortions must be performed by licensed physicians and surgeons, in hospitals accredited by the Joint Commission on Accreditation of Hospitals, and before the twentieth week of pregnancy, were found both severable and valid.

The immediate practical importance of the case was short-lived. Two months after Barksdale, the United States Supreme Court, in Doe v. Bolton, invalidated sections of a Georgia statute quite similar to the

5. 8 Cal. 3d at 327, 503 P.2d at 262, 105 Cal. Rptr. at 6.
7. 8 Cal. 3d at 334, 503 P.2d at 267, 105 Cal. Rptr. at 11.
9. 8 Cal. 3d at 334, 503 P.2d at 267, 105 Cal. Rptr. at 11.
13. 8 Cal. 3d at 334, 338, 503 P.2d at 267, 270, 105 Cal. Rptr. at 11, 14.
The companion case to *Bolton, Roe v. Wade,*\(^6\) clearly invalidated as an unconstitutional restriction on a woman's interest in deciding whether to bear children not only statutes similar to the Therapeutic Abortion Act, but any act regulating the situations in which abortions may be performed during the first six months of pregnancy.\(^7\) Thus, the specificity of the language used to regulate abortions is immaterial, and the suggestion, perhaps implicit in *Barksdale,* that the legislature could, if it used more precise language, limit the availability of abortion to only those women in specific predicaments, is no longer tenable. Further, *Bolton* and *Wade* read together modify the California court's holding on which provisions of the Therapeutic Abortion Act are still enforceable. The requirement that the abortion be performed by a licensed doctor remains valid.\(^8\) The state can, however, require only operations after the first three months of pregnancy to be performed in a hospital.\(^9\) It cannot insist that abortions be performed only in those hospitals accredited by the Joint Committee on Accreditation of Hospitals,\(^10\) and it cannot proscribe abortions necessary to save the life of the mother, even after the twentieth week.\(^11\)

But *Bolton* and *Wade* do not deprive *Barksdale* of significance. For one thing, *Barksdale* may represent the adoption of a new standing theory for defendants raising constitutional issues in the California courts. Second, *Barksdale* may presage a new judicial approach to statutes that are widely violated but rarely enforced. Finally, in finding parts of the abortion law void for vagueness, *Barksdale* represents the culmination of one of the two main lines of judicial attack upon abortion statutes, while *Bolton* and *Wade,* premised on impermissible infringement of a privacy-based right, represent the other.\(^12\) A comparison of the decisions highlights the strengths and weaknesses of two approaches to judicial review seemingly very different in the extent to which legislative decision-making is controlled.


\(^{16}\) 93 S. Ct. 705 (1973).

\(^{17}\) *Id.* at 732.

\(^{18}\) *Id.*

\(^{19}\) *Id.*

\(^{20}\) *Doe v. Bolton,* 93 S. Ct. at 749.

\(^{21}\) *Roe v. Wade,* 93 S. Ct. at 732.

\(^{22}\) For a summary of the recent abortion litigation and citations to the various decisions, see George, *The Evolving Law of Abortion,* 23 CASE W. RES. L. REV. 708, 749-54 (1972).
I. DEFENDANT'S STANDING TO RAISE THE CONSTITUTIONAL ISSUES

a. The court's analysis

Although the Barksdale opinion begins with the substantive issue of vagueness and only subsequently discusses the defendant's right to raise the issue, the case is best understood by considering the latter point first. All that is clear about the defendant's situation from the supreme court's opinion or the district court of appeals' decision is that he was a licensed physician who performed an abortion outside of a hospital during the first thirteen weeks of pregnancy. The court assumed that there was no advance approval by a hospital committee, but did not specify whether approval was sought and denied or not sought at all.

The defendant's standing to raise the constitutional issue must be considered against the background of People v. Belous, an earlier California Supreme Court case that invalidated the abortion statute in effect prior to the Therapeutic Abortion Act. The statute invalidated in Belous clearly relegated to the person who performed an abortion the decision whether the operation was necessary to preserve the life of the mother. Since the doctor-defendant in Belous was subject to prosecution for misapplication of the statutory standard, he had standing to claim that the standard was so vague that it did not give him fair warning of what constituted the crime.

The Belous court suggested, however, that the situation might be different under the Therapeutic Abortion Act, which had already been passed when Belous was decided. Under that Act, the court said, doctors performing an abortion could not be held criminally responsible, "[a]t least in cases where there has been adherence to the procedural requirements of the statute." Thus, as the dissent in Barksdale points out, Belous intimates that the doctor had no interest in whether the statutory standards that justify an abortion are vague, since he was not responsible for applying those standards.

Given this situation, it is questionable whether the defendant in Barksdale should have been able to assert that the statutory language

24. 8 Cal. 3d at 325, 503 P.2d at 260, 105 Cal. Rptr. at 4.
25. Id.
27. Id. at 972, 458 P.2d at 206, 80 Cal. Rptr. at 366.
28. Id. at 959, 458 P.2d at 197, 80 Cal. Rptr. at 357.
29. Cf. id. at 960, 458 P.2d at 197, 80 Cal. Rptr. at 357.
30. Id. at 973, 458 P.2d at 206, 80 Cal. Rptr. at 366.
31. 8 Cal. 3d at 345, 503 P.2d at 275, 105 Cal. Rptr. at 19 (Burke, J., dissenting and concurring).
establishing the standards to be applied was unconstitutionally vague. Indeed, the court seemed to agree that the doctor had no direct interest. But the court went on to find that the doctor did have standing to raise the vagueness issue. This conclusion, as suggested below, may well be correct. The court, however, avoided discussing the subtle standing difficulties presented by Dr. Barksdale's claim, apparently preferring to dispose of the issue as quickly and superficially as possible. Its discussion on standing is therefore vague, poorly reasoned and, in parts, obviously wrong.

The court rested the doctor's standing on the patient's right to challenge the statute. According to the court, "a patient seeking an abortion . . . certainly has an interest in asserting that the statute fails to fairly advise her of its prohibitions." Since a patient may not be able to assert this right, her "physician has standing to assert his patient's rights where they may not otherwise be established."32

Although it is true that the patient is herself guilty of a felony if she submits to an illegal abortion,33 it is difficult to see why this fact alone puts her in a different position than the doctor.34 The court did not make clear the relevance of the patient's possible criminal liability. It intimated, however, that she, unlike the doctor-defendant, could be convicted if the committee wrongly applied the statutory standards and permitted an abortion later held to be illegal.35 If this were so, the patient would have an interest in the vagueness of the statutory standards.

As a matter of statutory interpretation, however, this conclusion is untenable. If, as the court said in Belous and reiterated in Barksdale,36 the Act authorized abortions by a licensed doctor when approved in advance by a hospital committee, a woman could hardly be held a felon for submitting to an authorized abortion. Further, such a construction would run counter to the underlying purpose of the Therapeutic Abortion Act—providing legal hospital-performed abortions for women in certain situations.37 Women would be reluctant to give up the anonymity of unauthorized illegal abortions in favor of a hospital-performed abortion that might be held illegal once completed, since prosecution would be facilitated by identification of the woman from

32. 8 Cal. 3d at 333, 503 P.2d at 266, 105 Cal. Rptr. at 10.
34. In fact, according to one commentator, only one woman had been prosecuted under section 275 as of 1967, and she was acquitted. ABORTION: LEGAL AND ILLEGAL: A DIALOGUE BETWEEN ATTORNEYS AND PSYCHIATRISTS 6 (J. Kummer ed. 1967).
35. 8 Cal. 3d at 333, 503 P.2d at 266, 105 Cal. Rptr. at 10.
36. Id. at 332, 503 P.2d at 266, 105 Cal. Rptr. at 10.
37. Hearings on AB 2310 Before the Assembly Interim Comm. on Criminal Procedure, Santa Monica, passim (1964) [hereinafter cited as Hearings].
hospital records. Since the court's rationale for finding that the woman would have standing is unconvincing, it is to little avail to conclude that, following Griswold v. Connecticut, the doctor has standing to assert rights for the patient.

b. An alternative formulation

Barksdale therefore departs from the cases upholding the right to assert the constitutional claims of third persons. Usually, such an assertion was allowed in cases not involving first amendment rights only when a single statutory section had both constitutional and unconstitutional applications. The defendant, as to whom the application was constitutional, could assert the rights of those as to whom it was unconstitutional because the constitutional applications could not be severed from the unconstitutional to leave a viable statute. In Barksdale, for example, the traditional situation would have been presented if the doctor were himself responsible for applying the statutory criteria and had performed an abortion for health reasons clearly not grave. He could then assert that even though the statute was not vague as to him, it did not give fair notice to those doctors seeking to apply its health criteria conscientiously. He could claim that it would be impractical to invalidate the section as to such doctors, but maintain it as to him.

Alternatively, Barksdale would have presented a typical jus tertii question if the case had turned, as did the court of appeals' decision, on the privacy rights of the patient to choose whether to bear children. Then the committee's involvement would have been under primary attack as a violation of the patient's constitutional rights. The doctor could claim that if the legislature could not require the patient to submit to the committee's procedure, it would be impossible to uphold

38. The court apparently cites Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971), as supporting the conclusion that the committee's decision would not necessarily save a woman from conviction even if she abided by it. 8 Cal. 3d at 333, 503 P.2d at 266, 105 Cal. Rptr. at 10. But in Ballard the court merely issued a writ of mandate compelling a hospital committee to entertain, according to the statutory criteria, the abortion application of a minor living at home, even though she had no parental consent. The case did not say whether the committee's ultimate decision would insulate the woman from prosecution if she respected it.

39. 381 U.S. 479 (1965). In Griswold it was clear that the patients were themselves liable under state law, although convictions of patients were, as in this situation, almost unheard of.


as severable the requirement that the doctor get committee approval to avoid conviction.

This latter alternative suggests that the Barksdale holding on standing would have been justified if the decision on the merits had taken a different approach to the vagueness issue. One of the evils of an excessively vague statute is that it allows discriminatory or arbitrary administrative decisions that are difficult to review. If the Therapeutic Abortion Act were considered to give a woman the right to an abortion in certain situations, then vague statutory language might deprive her of that legislative intendment. That is, since the legislature has not clearly told the committee what to do, the committee might deny abortions in situations in which the legislature meant to allow them.

The patient's complaint, then, could be seen as similar to that of the aspiring optician in Blumenthal v. Board of Medical Examiners who complained of a provision making employment by a licensed optician for five years a prerequisite to licensing. This provision, said the California Supreme Court, gave a private group exclusionary powers without providing standards for the exercise of those powers, thereby precluding effective review of the exercise of the delegated powers: "Delegated power must be accompanied by suitable safeguards to guide its use and to protect against its misuse." Because of this failure to provide standards, the court invalidated the employment requirement for licensing entirely. Through a similar analysis, the committee requirement in Barksdale could itself be attacked: the validity of the requirement would turn on whether the applicable statutory standards were clear enough to ensure that a woman's application for an abortion was not determined on whim or prejudice. If the standards the committee had to apply were vague, then the requirement that the woman submit to the committee's deliberations might become unconstitutional. Were this accepted as the gravamen of the vagueness attack, the doctor's standing to assert his patient's rights to a decision by a proper tribunal would follow.

The court's analysis of the merits of the Barksdale controversy did not, however, proceed in this fashion. Rather, the court first held the statutory criteria unconstitutionally vague and then held the committee requirement inseverable because "without valid criteria for approval, the statutory scheme requiring a mechanism for such approval is destroyed." Nor does the court's discussion of the standing problem suggest that the court conceived of the claim being raised by the

43. 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962).
44. Id. at 236, 368 P.2d at 105, 18 Cal. Rptr. at 505.
45. 8 Cal. 3d at 334, 503 P.2d at 267, 105 Cal. Rptr. at 11.
doctor as the patient's right to have her abortion application considered by a delegated body with sufficiently clear legislative guidance.

c. Relevance of Eisenstadt v. Baird

The court's holding on standing must, therefore, be seen as a significant departure from previous principles. As such, it is quite similar to Eisenstadt v. Baird, a recent United States Supreme Court case that was not cited by the California court.

In Baird, the Court found that a defendant who provided contraceptives to unmarried persons could challenge a state statute allowing distribution of contraceptives only to married people, even though he was prosecuted also under a separate section of the statute that prohibited distribution of contraceptives by unauthorized individuals. Because the defendant intended to protect the rights of those persons as to whom the statute was alleged to be unconstitutional, the Court said, he had standing to raise those rights as a defense. The Court noted that unmarried people receiving contraceptives could not be convicted under the statute, and, consequently, were denied a forum.

Thus, as in Barksdale, the Court allowed the defendant to challenge the statute even though—indeed, because—the third persons whose rights he claimed to assert were not liable under the statute, and even though he had violated a section of the statute different from the one determined to be unconstitutional.

Baird's resolution of the standing issue seems to give defendants the right to raise constitutional questions according to the same criteria applied to plaintiffs in affirmative actions challenging statutes. It suggests that, since defendants can undoubtedly suffer an "injury in fact" as a consequence of the litigation, the values of the adversary system can be preserved as long as it can be determined that their subjective intent in violating the statute was to provide a forum for the determination of the constitutional rights of third persons. Such a theory goes a long way toward recognizing civil disobedience as a valid way of challenging the constitutionality of statutes.

d. Justification for expanding defendant's standing

The justification for such a standing theory can be seen if we

46. 405 U.S. 438 (1972).
47. Actually, it was not clear from the record whether the distributee was married or not. Id. at 460 (White, J., concurring). The Court's opinion, however, assumes that she was unmarried.
48. 405 U.S. at 446.
49. Id. at 445-46. See also text accompanying notes 33-36 supra.
consider the result if the defendant in Barksdale were not permitted to raise the vagueness claim because he had not applied to the hospital committee for approval. Bolton and Wade make clear that there is an alternative way for both a doctor and his pregnant patient to challenge the constitutionality of an abortion law—by bringing an affirmative action for an injunction and declaratory relief in federal court.\textsuperscript{52} Ballard v. Anderson,\textsuperscript{53} a recent California Supreme Court decision, involving the Therapeutic Abortion Act, proceeded similarly in state court: a doctor and his pregnant patient brought an affirmative suit for mandamus to compel a hospital abortion committee to consider an abortion petition presented without the minor patient's parents' consent.

The defect of such an affirmative action from the patient's point of view is, however, also made clear by Bolton, Wade, and Ballard. In all three cases, the pregnancy had proceeded to term and the unwanted child was born by the time the appeals were completed. While all three cases were found not mooted, even though the individual patients involved no longer could benefit from an abortion,\textsuperscript{54} the affirmative procedure failed to protect the rights of those who brought it. In order to protect the individual patient from bearing an unwanted child, a defendant-doctor willing to risk prosecution if his constitutional claim on behalf of his patient is denied should have, at a minimum, the ability to raise the same claims he could raise as a plaintiff.

Thus, the question becomes whether, in order to bring an affirmative suit, it would have been necessary for Dr. Barksdale to have first applied to an abortion committee and been denied. In Ballard, the patient and doctor did apply for committee approval; they challenged the committee's statutory interpretation of the consent requirement only after the committee refused to consider the application without parental consent.\textsuperscript{55} However, the challenge in Ballard was based on that very committee interpretation, not on the allegation that the statute was so vague that the committee's decision was unpredictable.

In Barksdale, on the other hand, to have required a negative committee decision as a condition to an affirmative action would not have sharpened the issues. Although a refusal to approve the abortion might suggest that the plaintiff's situation was one clearly outside the statutory language, however vague it might be, one consequence of a

\textsuperscript{53} 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).
\textsuperscript{55} 4 Cal. 3d at 878, 484 P.2d at 1348, 95 Cal. Rptr. at 4.
vagueness allegation may be to give standing to raise the issue of whether the entire statute is void to a person to whom the statute does give fair warning. Therefore, to require committee denial would be gratuitous. Since a doctor in Barksdale's position would be able to raise an affirmative claim, Barksdale as a defendant should have the same right.

e. Limitations on expanded standing

The Barksdale standing theory suggested by Baird has much to recommend it as a way of reviewing unconstitutional statutes. Without limiting its application, however, it would surely be open to abuse. For one thing, the self-appointed, subjective nature of the defendant's interest in the challenged statute might allow a defendant with no advocate role to manufacture one after indictment to avoid prosecution. While such a post hoc advocate might effectively raise the constitutional rights of others, it would be a poor law-enforcement mechanism to allow defendants to avoid prosecution because of the constitutional rights of persons with whom they had no concern until prosecuted.

Further, some degree of connection between the defendant's prosecution and the statute attacked as unconstitutional would have to be maintained. Otherwise, a defendant could, for example, steal contraceptives from a doctor, be indicted for theft, and seek to avoid prosecution on the basis that his purpose in stealing such contraceptives was to allow them to be distributed to those who were unconstitutionally denied them by statutory restrictions. In terms of moral culpability, such a defendant might deserve punishment even if his constitutional claim were upheld. If so, he should not be able to raise the claim.

In both Baird and Barksdale, however, the defendants probably met any such limiting criteria. Their purpose in violating the statute was to challenge it, and the statutory section they could perhaps constitutionally be convicted under was part of the same legislative scheme as the section they challenged as unconstitutional as to others. In Barksdale, in fact, the committee requirement was held inseverable from the language deemed unconstitutionally vague; in Baird the limitations on who could distribute contraceptives were suggested to be themselves invalid as overbroad if, as the court found, the state had no health purpose in limiting the persons to whom contraceptives could be distributed.

Thus seen, the Barksdale opinion suggests that the doctor was

56. Void-for-Vagueness, supra note 42, at 97.
57. See 8 Cal. 3d at 332, 503 P.2d at 266, 105 Cal. Rptr. at 10.
seeking to assert his patient's rights to have the abortion decision made according to standards clear to the person deciding, no matter who that person was. Implied in the court's opinion, then, is the notion that a woman has the right to decide whether to bear children, and that this right cannot be abridged except by clear legislative intent and for valid reasons of state interest. The fact that the woman could not be convicted if she submitted to the committee's decision therefore becomes immaterial: the doctor was asserting on her behalf not the right to be free from prosecution under an unconstitutional standard but the right not to have her fundamental interests abridged unconstitutionally. Since the doctor, as a defendant, had an interest in the litigation, since he intended to challenge the legislative scheme, and since the vagueness language challenged was part of the same legislative scheme as the procedural section he incidentally violated, he could properly raise the rights of his patient. Barksdale, therefore, accepts as California law Baird's expanded standing doctrine for defendants in civil disobedience cases.

II. THE VAGUENESS ANALYSIS AND ITS IMPLICATIONS

The notion that a statute can be drawn so vaguely that it violates due process subsumes several related but distinct values. Most commonly recognized is the principle of fair warning: people are entitled to know in advance whether they will be criminally liable for a contemplated act. Also involved, however, is the notion that an ambiguously worded statute can lead to arbitrary decisions. When the legislature has not given sufficient guidance, triers of fact can apply the law to a given defendant on whim or for a discriminatory motive. Effective review on appeal is precluded if the statute is broad enough to make its application to a given defendant not clearly erroneous. Finally, the vagueness doctrine serves as a buffer, protecting other constitutional rights, by requiring that a statute possibly infringing on recognized rights be drawn clearly enough to permit judicial appraisal of the validity of the balance the legislature has struck between the interests of the individual and those of the public.

a. Fair warning

In Barksdale, the court's vagueness analysis seemed to concentrate

59. 8 Cal. 3d at 326, 503 P.2d at 261, 105 Cal. Rptr. at 5; see People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199-200, 80 Cal. Rptr. 354, 359 (1969).
62. Void-for-Vagueness, supra note 42, at 75, 90.
primarily on the fair warning principle. Its discussion centered on whether the assertedly vague language "established meaningful standards for the physicians who must administer it." Since the court agreed with the dicta in Belous that the doctor performing the abortion could not be convicted if he followed the statutory procedure, the fair warning problem concerned primarily to the members of abortion committees.

By concentrating on fair warning, the court chose the approach perhaps least conducive to dispassionate application. As the court recognized, most penal statutes require potential defendants to judge their acts by standards not mathematically precise. Thus, a court concerned with the fair warning principle must somehow determine when language becomes so indefinite that it makes the risk taken by the potential defendant too great. Attempts to discover this point necessarily turn on seemingly trivial matters. For this reason, vagueness decisions often appear disingenuous and motivated by a desire to reach a given result. The Barksdale vagueness analysis is no exception.

The Therapeutic Abortion Act provides, in the section challenged in Barksdale as vague, that an abortion may be performed if the committee decides there is "a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother." According to the court, the "substantial risk" language may

63. 8 Cal. 3d at 331, 503 P.2d at 265, 105 Cal. Rptr. at 7 n.3. See also id. at 328 n.3, 503 P.2d at 263 n.3, 105 Cal. Rptr. at 9 n.3.

64. This statement is based upon the assumption that members of an abortion committee which authorizes an abortion later determined to be illegal could be convicted under California Penal Code section 274. It is not clear that this is so. The Barksdale dissenters suggest that committee members could not be convicted. See 8 Cal. 3d at 345, 503 P.2d at 275, 105 Cal. Rptr. at 19 (Burke, J., dissenting and concurring).

To convict committee members, section 274 would have to be interpreted so that the language "provides, supplies, or administers to any woman" would cover the mere act of authorizing the operation, without any physical involvement. Alternatively, conviction might be permitted if the committee members were viewed as agents of the hospital, and the provision of hospital facilities viewed as "providing, supplying, or administering." For cases on what constitutes complicity in an abortion, decided before the committee requirement was imposed, see, e.g., People v. Collins, 186 Cal. App. 2d 329, 9 Cal. Rptr. 33 (2d Dist. 1960), cert. denied, 366 U.S. 904 (1961); People v. Davis, 43 Cal. 2d 661, 276 P.2d 801 (1954), cert. denied, 349 U.S. 905 (1955).


66. For this view, see Void-For-Vagueness, supra note 42, at 75: "[I]n the great majority of instances the concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures."

be impermissibly vague here because it separates criminal from non-criminal conduct, rather than merely distinguishing various degrees of criminal conduct. The court has elsewhere suggested, however, that similarly vague language can be used to separate criminal from non-criminal conduct. Indeed, in some situations a valid legislative purpose could not be achieved other than by similarly imprecise language. The court would not want to invalidate such legislation unless the imprecision would deter conduct not only otherwise permitted but either socially useful or affirmatively protected. Perhaps just because holding "substantial" to be unconstitutionally vague here would induce attacks upon the term in other situations in which it serves a legitimate function as a judicial standard, the court declined to declare the term vague, instead basing its decision on different language in the Act.

The court then turned to the requirement of "grave" impairment of health. It concluded that a committee could not determine from the language of the statute the degree of harm to health necessary to justify an abortion. To support this conclusion, the court used two approaches. First, it speculated upon the possible meanings of the phrase, relying on the dictionary definitions of the words, and concluded that they are widely divergent. Second, the court purported to demonstrate confusion about the meaning of the words by pointing to evidence of conflicting interpretations by those charged with applying the statute.

The first approach—evaluation of the possible meanings of statutory language—is commonly employed in vagueness analysis. As used in Barksdale, however, it suggests that constitutional decisions can turn on little more than sophisticated word games. The court initially created a straw man by asserting that the pertinent phrase could mean abortion on demand, at least in the first trimester, since even a normal pregnancy could be said to seriously impair health. The Barksdale court pointed to the dicta in Belous that the Therapeutic Abortion Act establishes a medical test—whether the woman's health would be furthered by bearing to term or aborting—as interpreting the

68. 8 Cal. 2d at 328 n.3, 503 P.2d at 263 n.3, 105 Cal. Rptr. at 7 n.3.
71. 8 Cal. 3d at 330, 503 P.2d at 264, 105 Cal. Rptr. at 8.
72. Id. at 329, 503 P.2d at 263-64, 105 Cal. Rptr. at 7-8.
73. 71 Cal. 2d at 971, 458 P.2d at 205, 80 Cal. Rptr. at 365.
language to allow abortions as a matter of routine in the first trimester. But a common sense interpretation of the statutory language would hardly lead to the conclusion that the legislature used these words to convey this meaning. Though statistics show that hospital abortions result in death with less relative frequency than pregnancies carried to term, this does not mean that doctors in an individual case could not consider continuation of a pregnancy less harmful than an abortion, even if no "exceptional medical circumstances" were present. Modern obstetrics stresses that carrying a fetus is a normal female body function, and that most of the traditional notions that activity should be restricted are best disregarded in a normal pregnancy. Further, both death from abortion and death from childbirth are now rare. Thus, a doctor conscientiously applying the Belous medical test would probably base his decision on health effects less catastrophic than the risk of death; he might well conclude that the pregnancy seemed so normal than an abortion would be more harmful to health than bearing the child.

The court conceded that the legislature must have meant that something more than the usual impairment of a pregnant woman's health must occur for an abortion to be justified. But, the court concluded, "[p]ersons of common intelligence in significant numbers will agree that the slightest impairment of health is of grave concern while others of like intelligence may demand considerably more." However, the reference to "persons of common intelligence" is misplaced. When the judicial concern is with fair warning, surely the intelligibility of the language should be judged by the ability of those addressed to understand it. Here, the statute is addressed to medical doctors on abortion committees, and the medical test suggested in Belous comports with the weighing of risks doctors routinely undertake. Thus, the language can be made more certain by reference to a technical standard.

To buttress its conclusion that the "gravely impair" standard is impermissibly ambiguous, the court looked to the clause which purports to define "mental health." This section was added to assure

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74. People v. Barksdale, 8 Cal. 3d at 329, 503 P.2d at 263, 105 Cal. Rptr. at 7.
75. A. Guttman, PREGNANCY AND BIRTH (1962).
76. 8 Cal. 3d at 329, 503 P.2d at 264, 105 Cal. Rptr. at 8.
77. Doe v. Bolton, 93 S. Ct. 739, 751 (1973); United States v. Vuitch, 402 U.S. 62, 70-71 (1970). Strangely, the Barksdale court fails to mention Vuitch, although it is the only United States Supreme Court case dealing with vagueness statutes and abortion laws. See also People v. Barksdale, 8 Cal. 3d at 342, 503 P.2d at 273, 105 Cal. Rptr. at 17 (Burke, J., concurring and dissenting).
79. The term "mental health" as used in Section 25951 means mental illness
fears that the mental health standard applied by committees would be so broad that it would permit abortions at will. Perhaps because the section was hastily drafted, it is indeed somewhat absurd; as the court noted, it defines "mental health" as "mental illness." But, as the court admitted after having its fun with the legislature, the legislators almost certainly did not intend to require prior derangement for an abortion to be permitted. Indeed, later in the decision the court explicitly recognized that literal interpretations should be abandoned when they result in "absurd consequences which the legislature did not intend." Once it abandoned its suggestion that the legislature intended absurd consequences, the court turned to consider whether the definition of mental health, fairly interpreted, was unconstitutionally vague.

b. Other vagueness values

At this point, the court diverged from the traditional vagueness analysis by relying on empirical data. This change in approach also signaled a change in the underlying vagueness values with which the court was concerned—from that of fair warning to those of precise standards of guilt and assurance of judicial review of statutes infringing on constitutional rights.

I. Use of empirical evidence

As evidence for its view that the statute's definition of mental health lacks clarity, the court noted that 98.2 percent of all abortions performed in 1970 were for mental health reasons, even though legal writers commenting on the Act soon after it was passed suggested that the mental health standard was somewhat stricter than that for civil commitment. From these facts, the court concluded that the standard must be vague: pregnancy is unlikely to cause so many women to become disturbed enough to be committed to mental institutions, and thus "two groups . . . have been forced to guess at the meaning of this provision and have reached radically different interpretations."


81. 8 Cal. 3d at 330, 503 P.2d at 264, 105 Cal. Rptr. at 8.

82. Id.

83. Id. at 334, 503 P.2d at 267, 105 Cal. Rptr. at 11 [quoting Bruce v. Gregory, 65 Cal. 2d 666, 675-74, 423 P.2d 193, 198, 56 Cal. Rptr. 265, 270 (1967)].

84. 8 Cal. 3d at 330-31, 503 P.2d at 265, 105 Cal. Rptr. at 9 [citing Leavy & Charles, supra note 3, at 8].

85. 8 Cal. 3d at 331, 503 P.2d at 265, 105 Cal. Rptr. at 9.
What the court failed to mention, however, is that the primary author of the Act also contended that the language was intended to reach only very serious mental disorders. At a public hearing before the passage of the Act, it was suggested that perhaps the mental standard should be stated clearly as "loss of sanity." Senator Beilenson, the author of the Act, stated that "the intent of the author of this bill is really for severe complications of this sort." Section 25954 was added after this hearing in order, again according to Beilenson, "to gain legislative support, in answer to the fear that 'mental health' by itself would be a catchall for abortions." Thus, the legislative intent is as clear as possible, considering the lack of any official committee reports in California.

Perhaps significantly, the court failed to include legislative intent as derived from legislative history in its list of ways to clarify assertedly vague statutes, even though several cases it cited for vagueness standards do so. As a matter of fair warning, legislative intent may indeed be an inappropriate tool for interpreting the words of a statute which by themselves fail to communicate what is prohibited. Potential defendants can fairly be charged with common sense interpretations, technical interpretations appropriate to the class of people covered, and perhaps common law meanings, but not with a knowledge of legislative proceedings prior to the passage of the statute.

As noted above, however, a common sense interpretation of the mental health definition would suggest that the mental health justification for an abortion should be narrowly construed. Further, the article to which the court refers as suggesting that a strict standard was intended was addressed precisely to those charged with applying the law, so that there was a more than ordinary opportunity for knowledge of

86. Hearings, supra note 37, at 72-73.
88. 8 Cal. 3d at 327, 503 P.2d at 262, 105 Cal. Rptr. at 6. The court, in a footnote, suggested that legislative history can be helpful in resolving ambiguities. Id. at 332 & n.9, 503 P.2d at 266 & n.9, 105 Cal. Rptr. at 10 & n.9. The court concluded, however, in the same footnote, that the legislative history of the Therapeutic Abortion Act was of no help, since it showed only abandonment of the general initial intent to bring the law into accord with 1967 medical practices: "The result is that we are not able to turn to the medical standards of 1967 as an aid in determining the meaning of the particular provisions which have disturbed us." Id.
89. See, e.g., People v. McCaughan, 49 Cal. 2d 409, 414, 317 P.2d 974, 977 (1957); Connally v. General Constr. Co., 269 U.S. 385, 394 (1926). Connally suggests that legislative intent may be an appropriate interpretive tool only if the statutory language is awkward, clumsy, or imprecise, but not if it is vague. The mental health definition here under discussion is not vague standing alone, although a literal interpretation would be nonsensical.
90. 8 Cal. 3d at 327, 503 P.2d at 262, 105 Cal. Rptr. at 6.
the legislative intent. Thus, the data indicating that therapeutic abortion committees had applied the statute expansively does not prove that defendants were not given fair warning that they were risking prosecution by approving abortions on showings of minor impairments of mental health. Indeed, the apprehension of the medical profession which the court reports suggests that doctors were quite aware of this risk.

Moreover, the statistics on the percentage of abortion applications approved in different areas of the state suggest, as the dissent points out, a conclusion opposite from that which the court reached. By 1970, the percentage of abortions approved was quite uniform throughout the state, ranging from 94.6 to 99.3 percent. The court regarded this uniformity as a sign that doctors were incapable of applying the medical standards, pointing to the wider variations in the earlier years to show serious confusion about the meaning of the statutory health standards. Just as likely, however, the statistics indicate that doctors were increasingly willing to grant abortions as it became clear that committees expansively applying the standards were not being prosecuted, and as abortion became a more socially acceptable procedure.

Thus, the empirical evidence suggests not that doctors misunderstood the language of the statute, but that the language was widely flouted. Fair warning then was not really a problem. Rather, the real issues become the possibility of discriminatory or arbitrary enforcement and the chance that women would be denied abortions in situations in which the right to an abortion is constitutionally compelled.

2. Standard for trier of fact

The possibility of discriminatory enforcement flows from a vague statute because the trier of fact can apply the statute to a given person as he chooses. In the Barksdale situation, the members of abortion committees, although charged with conforming to the statutory criteria, in practice were not, and in theory perhaps could not be, prosecuted for wrongly applying the standards. Thus, the possibility of unjust

91. It is also significant, perhaps, that one of the "commentators," Mr. Leavy, was Senator Beilenson's law partner. Thus, his opinion on the legislative intent was not mere academic speculation.
92. 8 Cal. 3d at 331, 503 P.2d at 265, 105 Cal. Rptr. at 9.
93. Id. at 331 n.7, 503 P.2d at 265 n.7, 105 Cal. Rptr. at 9 n.7.
94. Id. at 342, 503 P.2d at 273, 105 Cal. Rptr. at 17 (Burke, J., dissenting and concurring).
96. See note 64 supra and accompanying text. See also United States v. Vuitch, 402 U.S. 62, 96-97 (1971) (Stewart, J., dissenting in part), interpreting an abortion law in a manner which implies that prosecution of the doctor performing the abortion for misapplication of the statutory criteria is precluded.
prosecution because of application of a vague standard in court was slight. The more serious potential abuse was that the abortion committee would make arbitrary decisions because the statutory standard it was charged with applying was subject to many interpretations. As a practical matter, therefore, the trier of fact whose discretion must be limited in Barksdale, is not the jury or judge in a criminal prosecution, but the abortion committee.

The Barksdale court’s reliance on empirical evidence in order to show a widespread practice contrary to the intended legislative proscription may nonetheless have broad implications for attacks on rarely enforced criminal statutes. By considering such evidence, Barksdale indicated that the manner in which a statute is interpreted by those charged with applying it has much claim to judicial recognition as the legislative intent reflected in the language of the statute. Thus, if a statute is widely violated and widely unenforced by the police, the enforcement policy might become a gloss on the words of the statute. The statute would be vague because interpreted differently by those writing and those applying it.

Such an approach has much merit: widely unenforced statutes do become, in practice, statutes without effectively prescribed standards of application, subject to discriminatory or arbitrary use. Evidence of the interpretation given the statute by those charged with enforcing it at least precludes the unbridled dictionary-flipping a vagueness allegation often calls forth. Further, while it might be claimed that recognizing the operational use of a statute as evidence of vagueness might encourage people to disobey statutes, it is really the lack of enforcement, rather than the possibility of constitutional attack, which motivates the disregard of statutory proscription in these situations.

3. Buffer zone protection of other constitutional rights

The Barksdale court noted that Belous had recognized that abortion statutes infringe upon “at least two fundamental rights . . . the right to life and the right to choose whether to bear children.” The court reasoned, however, that the Therapeutic Abortion Act was “so imprecise that we would be compelled to conclude that [it is] impermissibly vague even were no areas of constitutional protection involved.” The court refused to discuss directly whether a woman has a constitutional right to an abortion, even though this was the defendant’s primary ground for attacking the statute.

97. 8 Cal. 3d at 333, 503 P.2d at 267, 105 Cal. Rptr. at 11.
98. Id. at 326, 503 P.2d at 261, 105 Cal. Rptr. at 5.
99. Id. at 327, 503 P.2d at 262, 105 Cal. Rptr. at 6.
100. Id. at 326-27, 503 P.2d at 261-62, 105 Cal. Rptr. at 5-6.
As the analysis here has shown, this effort to evade the substantive constitutional issue was unsuccessful. At several points the court's analysis can be sustained only by referring to the Belous finding that abortion laws infringe on independent constitutional interests. For example, the probability that no one could be convicted for violation of the Act suggests that a private interest other than that in fair criminal procedures must be involved. In addition, the doctor's right to raise the vagueness of the statutory standards must turn on the interest of the patient in an abortion.

The empirical evidence the court used to buttress its vagueness analysis also demonstrates that protection of constitutional rights had to be an underlying premise in Barksdale. The evidence shows that because the statute was applied loosely, it might have been difficult for a court to decide whether or not the statutory standards unconstitutionally abridge the rights of a woman desiring an abortion to life and to choose whether to bear children. As the court said in Belous, a woman can constitutionally be denied an abortion only if compelling state interests outweigh these rights.

A patient denied an abortion who desired to contest the denial as an unconstitutional infringement of her rights could bring an affirmative suit against the abortion committee for a writ of mandate, directing them to permit the abortion. If the woman decided, as in Bolton and Wade, to bring an affirmative action, the court would have to construe the statute in order to decide if it was an unconstitutional infringement of the woman's rights. It could, on the one hand, interpret the statute strictly, as originally intended by the legislature. Since the empirical evidence shows, however, that almost all abortion applications were approved, it is unlikely that this interpretation would have been the one applied by the committee that considered the woman's application. Thus, even if a strict interpretation of the statute would unconstitutionally infringe on the woman's rights, this would not determine whether the woman's rights had been compromised by the standard actually applied. Further, since the woman's claims would rest on assertions about the effect of the statute on the exercise of her rights, it would be hard for the court to assess what those effects would be under a strict interpretation of the statute, since that interpretation had been ignored in practice. A balancing of the woman's rights against the state's interests would therefore be very difficult.

interference with a privacy-based right was the ground for the court of appeals' decision. People v. Barksdale, 96 Cal. Rptr. 265, 272 (1st Dist. 1971), vacated, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

101. See text accompanying note 96 supra.
102. See text accompanying note 59 supra.
103. 71 Cal. 2d at 964, 458 P.2d at 200, 80 Cal. Rptr. at 360.
On the other hand, the court could adopt the liberal interpretation generally followed by abortion committees and then decide whether constitutional rights were impermissibly infringed. But this standard has never been articulated, and it does not represent a prior balancing of interests by the state legislature. At best, the legislature could be said to have later acquiesced in the liberal granting of abortion applications by committees. Thus, the state interests protected would be hard to determine. In addition, to adopt an interpretation of the statute probably at odds with the original legislative intent would undermine the legislative role in setting standards. To merely give the interpretation applied in practice enough credence to demonstrate confusion about the statute's meaning, as the Barksdale court did, is much less intrusive on the legislature's prerogatives; if the legislature were then to write an enforceable statute, the court need not ignore its intent.

Given this situation, the court chose to invalidate the statute. It thus protected whatever constitutional rights of the woman that might exist and seemed to preserve the ability of the legislature to regulate abortions if it did so in a way that would allow judicial review for substantive constitutional infirmities.

III. VAGUENESS VERSUS PRIVACY AS A BASIS FOR FINDING ABORTION LAWS UNCONSTITUTIONAL

Barksdale, then, turns most convincingly on the notion that the court will strike down a law that in operation may infringe upon constitutional rights but which is not drawn precisely enough to permit effective judicial control. A finding of vagueness under this approach is an admonition to the legislature to either write a reviewable law or withdraw from regulation of the area.

Bolton and Wade represent the opposite approach. Rather than leaving it to the legislature to draft an enforceable statute and reserving judicial review, the Supreme Court dealt with the ultimate constitutional question.

The Barksdale solution seems, on the surface, commendable because it promotes the legitimacy of the judicial process. It appears to recognize that the court as a nondemocratic institution can best maintain respect for its decisions if it defers to the legislative judgment whenever possible, withholding substantive constitutional review for those cases in which it is unavoidable.

But Barksdale illustrates that deference to the legislature is not always the best way to preserve an effective role for the court. In the first place, the purported deference may be illusory. The hearings before the Therapeutic Abortion Act was passed show a widespread con-
cern that the contemplated language left too much discretion to doctors, but a corresponding despair about how to make it more specific without undermining the purposes of the Act. The framers of the Act were primarily concerned with the problem of maternal deaths from illegal abortions, especially since it was primarily poor women who died from illegal abortions. A statute with specific standards and effective sanctions might have encouraged recourse to illegal abortions performed by untrained people, since doctors might not want to risk prosecution in marginal cases. The Barksdale vagueness analysis suggests that any abortion act establishing substantive criteria for abortions that maintained some flexibility would be struck down for vagueness.

Second, since Barksdale is likely to preclude legislative regulation, an analysis centered on the real issues at stake in abortion legislation would be preferable. Bolton and Wade demonstrate that a theory based on privacy is superior in this respect to the vagueness analysis in Barksdale. The Supreme Court carefully elaborated the interests that are compromised by the denial of an abortion: physical harm from an illegal abortion, an unhappy life for the woman, and the possible stigma of unwed motherhood. Further, the Court was aware that an unwanted child may suffer psychological and other harm. In addition, the Court in Wade carefully analyzed the history of abortion legislation and the reform movement, in order to better assess the state interests involved in abortion legislation. In Barksdale, on the other hand, except for the empirical statistics on the application of the Therapeutic Abortion Act, the discussion took place in a historical and sociological vacuum.

Thus, an effective privacy analysis requires attention to the underlying social issues, whereas a vagueness analysis does not. The

104. *Hearings*, supra note 37, at 73, 78.
106. Belous indicates that a statute with real sanctions for the doctor might, for that very reason, violate the Fourteenth Amendment, since the risk of prosecution would pressure the deciding party towards a negative decision in marginal cases. 71 Cal. 2d at 972-73, 458 P.2d at 206, 80 Cal. Rptr. at 366.
108. *Id.* Schwartz, *Abortion on Request: The Psychiatric Implications*, 23 CASE W. RES. L. REV. 840 (1972) presents an interesting psychiatric view that free abortion is necessary to solve burgeoning mental health problems of unwanted children.
judiciary should preclude legislative action only after a real consider-
ation of the interests on both sides, rather than ignoring those issues and basing a decision on niceties of language. Additionally, the privacy approach of Bolton at least gives the legislature clear notice about what it can and cannot do. The Barksdale approach, had it not been superseded by the Supreme Court, could have resulted in a continued recycling of abortion regulation from the legislature to the courts and back again.

The California Supreme Court had already, in Belous, accomplished the central part of the privacy analysis—finding that a right to choose whether to bear children did have a constitutional base, and that abortion in at least some situations came within that right. It is hard to see why it did not take the Barksdale case as an opportunity to follow through on the implications of Belous and find, as the Supreme Court did shortly afterward, a constitutional right to abortion subject only to compelling state interests.

Marsha S. Berzon

B. Practice of Law by Aliens

Raffaelli v. Committee of Bar Examiners.\(^1\) This case retells one of America's most cherished myths: that of the foreigner who forsakes his native shores for the United States and then, once here, uses his skills and abilities to scale the pinnacle of success. True to the myth, the immigrant's ascent is not without difficulty. Halfway up, his way is blocked by a bigoted and anachronistic law. But refusing to be daunted, he meets the obstacle head on: he goes straight to the California Supreme Court (where he appears on his own behalf)\(^2\) and convinces the justices to strike the law down. In the process, he strikes a real blow for all aliens—and creates the inevitability of further judicial inquiry into the extent of aliens' rights.

I. THE HOLDING

The plaintiff, Paolo Raffaelli, was born in Italy in the mid-1930's. While still in his twenties, he came to the United States and enrolled at San Jose State College. Upon finishing his undergraduate studies, in 1966, he went on to the University of Santa Clara Law School. Three years later, he passed the California bar examination and began work as a clerk for a San Francisco law firm. He also married an American

\(^1\) 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (Mosk, J.) (6-0 decision, Tobriner, J., not participating).
\(^2\) Id. at 290, 496 P.2d at 1266, 101 Cal. Rptr. at 898.
citizen, and by virtue of that marriage became a permanent resident alien in 1971.3

Raffaelli's plans went awry, however, when he sought admission to the California Bar. Section 6060 of the California Business and Professions Code then specified: "To be certified to the Supreme Court for admission and a license to practice law, a person [who has not been admitted to practice law outside California] shall: (a) Be a citizen of the United States ...."4 Raffaelli was not a citizen, and therefore, despite his triumph over the bar examination, he could not become an attorney. Determined to gain admission to his chosen profession, Raffaelli petitioned the California Supreme Court for direct relief.5 The reaction of the court was unanimous and favorable: California could not constitutionally require that lawyers be citizens.

Raffaelli was probably not surprised by the justices' response to his plea; he was, after all, a most attractive plaintiff for his particular suit. In addition, other states had already liberalized their rules on the practice of law by aliens,6 and he might have suspected that California would join the trend. But he may not have anticipated the breadth of the court's arguments. For in deciding his case, the justices gave special emphasis to the rights of noncitizens and also opened the door to further attempts to expand those rights.

The special emphasis that the court gave to aliens' rights was emphasis of a backhanded sort. What the court did in Raffaelli was not nearly so interesting as what the court chose not to do.

What the court did was to use the equal protection guarantees of the federal and state constitutions7 to strike down the law against

3. Id. at 291, 496 P.2d at 1266, 101 Cal. Rptr. at 898.
4. CAL. BUS. & PROF. CODE § 6060 (West 1964). This provision was deleted after Raffaelli. See note 53 infra.
5. According to the California Rules of Court, that tribunal is empowered to review the decisions and proceedings of the State Bar. Civil and Criminal Court Rules, Rule 59 (West Supp. 1972).
6. In Application of Park, 484 P.2d 690 (1971), the Alaska Supreme Court struck down a requirement that lawyers be citizens, on the ground that citizenship bore no rational relationship to anyone's ability to practice law. The Park court also noted that Oregon and Washington had taken similar steps, by court rule or statute. Id. at 696, n.28.
7. U.S. CONST. amend. XIV; CALIF. CONST. art. I, §§ 11, 21. The California constitution does not adopt the equal protection formula of the Federal Constitution, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV. The state constitution does specify, however, that "All laws of a general nature shall have a uniform application" [Art. I, § 11], and that no citizen, or class of citizens, shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens" [Art. I, § 21]. In Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), the state supreme court noted that these two provisions were "substantially the equivalent" of the federal equal protection clause.
noncitizen lawyers. This was hardly a novel approach, since equal protection had long been used to attack discriminatory measures against aliens. Thus, as long ago as 1886, the United States Supreme Court used equal protection to strike down a San Francisco ordinance that deprived Chinese aliens of the right to operate laundries. The Court in that case, Yick Wo v. Hopkins,\(^8\) ruled unequivocally that the equal protection clause extends to aliens as well as to citizens\(^9\) and that the ordinance in question did, in fact, run afoul of the equal protection guarantees.\(^{10}\) Thirty-five years later, the state supreme court reached a similar result in Ex parte Kotta.\(^{11}\) There, the court considered a poll tax on aliens, which California's voters had sanctioned in 1920 through the initiative process.\(^{12}\) Kotta, a Mexican citizen, had refused to pay the tax and was taken into custody. When his case reached the state supreme court, Chief Justice Frank M. Angellotti thundered: "[T]he requirement is for equal protection and security for all, citizens and aliens alike, under like circumstances, in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc."\(^{13}\) The other justices joined the Chief Justice in striking down the alien poll tax.

Thus, equal protection has a long and honorable history in California\(^{14}\) as a weapon against inequitable restrictions on aliens. Consequently, it was not surprising that the supreme court used that doctrine in the Raffaelli case to strike down the restriction on alien lawyers. What the Raffaelli court failed to do, however, was to buttress its equal

8. 118 U.S. 356 (1886).
9. Id. at 369.
10. Id. at 371.
11. 187 Cal. 27, 200 P. 957 (1921).
12. See Ex parte Heikich Terui, 187 Cal. 20, 200 P. 954 (1921). In 1920, the voters added article 13, § 12, to the California Constitution; this provision compelled the legislature to levy an annual poll tax of four dollars or more on every male alien between the ages of twenty-one and sixty. The money was to go into county school funds, but the tax manifestly had nothing to do with polling, since aliens could not vote. Article 13, § 12, was amended in 1924 and the anti-alien provision removed; the poll tax itself was repealed in 1946. See annotation accompanying CALIF, CONST. art. 13, § 12 (West 1954).
14. Although the federal and state supreme courts have ruled that equal protection extends to aliens, the California courts have not enforced the doctrine consistently. Thus, in the 1946 case of People v. Oyama, 29 Cal. 2d 164, 173 P.2d 794, rev'd on other grounds, 332 U.S. 633 (1948), the California Supreme Court turned its back on the Kotta case and upheld the California Alien Land Law, a statute dating from 1920, which prohibited aliens from owning land unless they were eligible for United States citizenship. Since Asian immigrants were the primary group ineligible for citizenship, the discriminatory thrust of the statute was clear. But in 1952 the state supreme court had recovered its sense of proportion, and in Sei Fujii v. State of California, 38 Cal. 2d 718, 242 P.2d 617 (1952), it struck down the Alien Land Law, using equal protection as its vehicle.
protection rationale with the argument that federal immigration law is supreme over state law. This omission was striking, for it ran counter to a series of decisions in which the primacy of federal immigration policy has been coupled with equal protection to strike down restrictions on aliens.

The first case on aliens' rights to use this dual argument may have been *Truax v. Raich*, decided by the United States Supreme Court in 1915. In that case, an alien challenged an Arizona statute which specified that if a business had five or more employees, eighty percent of them had to be United States citizens. The Court held that a statute of this type was unconstitutional, not only because it denied aliens equal protection, but also because it conflicted impermissibly with federal immigration policy. The Court observed that the federal government had decided aliens should be admitted into the country, with rights and opportunities similar to those of citizens. But if Arizona, and the other states, restricted the employment of aliens, this federal policy would be thwarted: immigrants lawfully admitted to the country would be forced to reside only in states that did not restrict their employment opportunities. This conflict had to be resolved, and the Court solved the problem by upholding the immigration policy and invalidating the state statute.

Recent cases on aliens' rights have echoed the dual argument of *Truax v. Raich*. One such case, *Graham v. Richardson*, involved state laws that conditioned welfare payments on citizenship or long-time residency in the United States. As in *Truax*, the Supreme Court in *Graham* did not stop with equal protection in striking down these statutes. Instead, it ruled that the federal government had a policy against penalizing aliens who become indigent after entry into the country, and that the welfare statutes conflicted with this policy by preventing indigent aliens from residing wherever in the country they wanted. The Court's solution to the conflict was identical to the one it devised in *Truax*: the state laws had to yield to the federal immigration policy, and they were struck down.

The California Supreme Court used the same dual reasoning in the 1969 case of *Purdy & Fitzpatrick v. State of California*. Until that case was handed down, section 1850 of the California Labor Code prohibited Californians from employing aliens on public works. The principal plaintiff in *Purdy* was a landscape contractor who allegedly

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15. 239 U.S. 33 (1915).
16. *Id.* at 42; Hughes, J., for the majority, with only McReynolds, J., dissenting.
had violated section 1850—and who, as a result, was not being paid in full by his employer, the State. The supreme court agreed with the plaintiff that section 1850 was unconstitutional, because it interfered improperly with federal immigration policy. The court reasoned that by enacting the immigration laws, Congress had created a “comprehensive federal scheme” under which a certain number of aliens would be admitted to the country to perform skilled and unskilled work. But while Congress had approved the admission of alien workers, California, through section 1850, undermined this federal policy by depriving these workers of employment opportunities. This conflict had to be resolved, and the resolution was predictable: since the federal immigration laws were comprehensive, state statutes that interfered with them, or might potentially interfere with them, could not stand.

On its facts, Purdy & Fitzpatrick is quite similar to Raffaelli. Both cases involved attacks on California statutes that prohibited aliens from going into certain lines of work, and both were decided by the same court. But while the court in Purdy & Fitzpatrick emphasized section 1850's improper interference with federal law and policy, the court in Raffaelli said nothing about federal pre-emption.

Yet the argument in Raffaelli could easily have paralleled that of Purdy & Fitzpatrick. The court could have noted that under the federal immigration laws, the admission of alien lawyers has been provided for specifically, and that, in fact, Congress has indicated a bias in favor of the alien lawyer: if he wants to enter the United States as an immigrant, he can claim the status of a “professional,” and under that label, enjoy a priority for entrance purposes over many other groups. But even though Congress has sanctioned the admission of alien lawyers, California deters them from coming by denying them the opportu-

20. Purdy & Fitzpatrick was not heard by the District Court of Appeal; it went directly to the supreme court upon application of the defendant state agency “[b]ecause of the great importance of the issue involved and because of the immediate statewide significance of a decision in these cases . . . .” 71 Cal. 2d at 572, 456 P.2d at 649, 79 Cal. Rptr. at 81 (1969).

21. Its secondary argument was that the statute denied aliens equal protection. Id. at 573-77, 465 P.2d at 649,53, 79 Cal. Rptr. at 81-85.


26. See 8 U.S.C. § 1153(a)(3) (1970). If the alien lawyer wishes to enter the country as a nonimmigrant, he is still covered by a carefully worked-out scheme of federal statutes. He must establish “to the satisfaction of a consular officer” that he possesses “distinguished merit and ability” and is coming to the United States to perform exceptional services requiring those qualifications. 8 U.S.C. §§ 1184(b), 1101(a) (15)(H)(i) (1970).
nity to practice law. The court could have concluded that this interference was improper and that the California statute would have to fall.

Despite its availability, however, the *Raffaelli* court did not mention the federal pre-emption argument. Its silence on this point cannot have been accidental. The conflict between state statutes and the federal immigration law was a central theme in *Purdy & Fitzpatrick* and in *Graham v. Richardson*, and the court cited and quoted both opinions repeatedly in *Raffaelli*. Instead, the court must have felt that equal protection reasoning was strong enough to support the case by itself. That the court felt this way enabled it to give its holding a special kind of force. For by making equal protection the sole thrust of its argument, the court suggested that the real issue in the case was the individual rights of aliens—not the rights of the federal government over and against the states. This singleness of emphasis made the basic holding clear and incontrovertible: aliens have rights, and those rights will be enforced.

This holding, however, raises as many questions as it answers. If aliens do have rights, how far do those rights extend? The court did not go very far toward answering this question—but it created the likelihood that sooner or later, it would have to answer it in detail.

To explore this point, one must first take a closer look at the court’s equal protection reasoning. This reasoning was not new, but was based on the reasoning commonly used in modern equal protection cases. The key to this equal protection reasoning is a statute or other state action that places people in categories—that treats "some differently from others." A classification of this sort generally will be upheld as long as it meets two qualifications: it must be intended to serve a legitimate state interest, and it must, in fact, serve that interest in some rational way.

Complications arise, however, if the classification is based on race, alienage, nationality, or the length of time one has lived in a state. Criteria such as these have been labelled by the courts as "inherently suspect." And similar difficulties arise if the classification de-

27. See, e.g., 7 Cal. 3d at 292, 293, 295, 298, 300, 301, 303; 496 P.2d at 1267, 1268, 1269, 1271, 1272, 1273, 1275, 101 Cal. Rptr. at 899, 900, 901, 903, 904, 905, 907.
29. Id. at 1081.
30. This is the so-called "rational relationship" test. See *id.* at 1082; Shapiro v Thompson, 394 U.S. 618, 634, 638 n.20 (1969).
prives a person of a "fundamental right," such as the right to vote or the right to travel from state to state. If the classification is based upon "inherently suspect" criteria, or if it violates fundamental rights, then, in order to be constitutional, it must be designed to serve a "compelling state interest." Moreover, the classification must be "necessary" for the advancement of the interest—that is, if the state can advance its interest in some way that is less burdensome to individual rights, it must do so.

With this schema in mind, the Raffaelli court conducted its equal protection analysis of the law against alien lawyers. The court was quick to note that the statute in Raffaelli classified people according to whether or not they were citizens and that such a classification was inherently suspect. As a result, said the court, the statute had to pass the reasonable relationship test, and the state also had to show that the classification was necessary for the promotion of a compelling state interest.

To parry the claims of Raffaelli, the Committee of Bar Examiners advanced five rationales in defense of the ban on alien lawyers. The first of these was that "a lawyer must 'appreciate the spirit of American institutions.'" In the court's view, this rationale could mean one of two things. It could mean that lawyers were required to hold orthodox political views. But if that were the case, the ban on alien lawyers was invalid, for a lawyer's political beliefs are not a legitimate area of state concern under the first amendment. Instead, the court reasoned, the rationale had to mean that lawyers must have a general understanding of the American political and social system. Such a requirement was indeed a valid one—but it was not rationally related to the ban on alien lawyers. In the court's view, no one had ever shown that a person had to be a citizen to understand and "appreciate" American institutions, nor had anyone shown that a person must reside in the United States for a given number of years before he gained that understanding. As the court noted, Alexis de Tocqueville, who lived in the United States for less than a year and never became a citizen, was able to author the classic Democracy in America.

34. Id. at 634, 638; Loving v. Virginia, 388 U.S. 1, 11 (1968).
36. 7 Cal. 3d at 295-96, 496 P.2d at 1269, 101 Cal. Rptr. at 901.
38. 7 Cal. 3d at 295-96, 496 P.2d at 1269, 101 Cal. Rptr. at 901.
39. Id. at 296, 496 P.2d at 1269, 101 Cal. Rptr. at 901.
40. Id.
41. Id., 496 P.2d at 1270, 101 Cal. Rptr. at 902.
The second rationale that the court considered in support of the ban on alien lawyers was that “a lawyer must take an oath to support the Constitutions of the United States and California.” What this rationale boiled down to, the court said, was that since an alien “remains a national of his native land . . . he cannot be loyal to the United States.” The court rejected this contention outright, noting that “[i]t is common knowledge that several million aliens are living in this country and that the vast majority are peaceful and law-abiding.” Many aliens, the court noted, had served in the American armed forces, paid taxes, and contributed much to the growth and development of the state. In short, the court said, “[t]here are no rational grounds for believing that all residents who are not also citizens are ipso facto lacking in loyalty or commitment to abide by the laws of the land.”

The third justification for banning alien lawyers received equally sharp treatment from the court. The Bar Committee argued that aliens would be more likely than citizens to become inaccessible to their clients and inaccessible to the control of the state bar. The court found this contention without rational foundation and noted, in the process, that an alien lawyer was no more likely to return to his native land than a citizen lawyer was to move to a different jurisdiction. In addition, the court noted that while an alien lawyer might be interned or deported in case of war (and thereby rendered inaccessible to his client), the risks were even greater that he would be rendered inaccessible through death, disability, disbarment, or conscription—risks that he shared with lawyers who were citizens. Furthermore, aliens did not enjoy, by virtue of their alienage, diplomatic immunity; they thus would be “no less liable to discipline or disbarment than any citizen lawyer.” Recognizing, therefore, that no connection existed between one’s alienage and his degree of accessibility to his clients and the bar, the court rejected accessibility as a ground for California’s disallowing alien lawyers.

The fourth rationale that was advanced in support of the prohibition on alien lawyers was that the practice of law is a privilege, not a right. The court dismissed this contention with the remark that “the
'right-privilege' dichotomy is no longer relevant to the kind of constitutional inquiry in which we are here engaged. The court added that, even if the dichotomy were relevant, the original assertion was probably wrong: the practice of law probably was a right and not a privilege.

Finally, the court was not convinced by the Bar Committee's fifth contention, that "[a] lawyer is an 'officer of the court' and therefore 'should be a citizen.'" The court was not sure what was meant by the phrase "officer of the court," but, in any event, it felt that such officers need only be able "to appreciate the spirit of American institutions, subscribe to an oath to support the Constitution, remain accessible to his clients and subject to the control of the bar, and meet similar responsibilities." Since the court had just concluded that aliens could meet all of those qualifications, the belief that a lawyer is an officer of the court did not provide a rational basis on which to deny aliens the right to become such officers.

Thus, the court could not find a valid state interest that was advanced, in any meaningful and rational way, by prohibiting aliens from becoming lawyers. Since the state's classification bore no rational relationship to any of the interests it was alleged to advance, it was bad on its face—and the court never had to decide whether any of those interests were "compelling." Thus, without even considering the secondary issue of compelling state interests, the court was able to permit aliens to become lawyers in California.

II. IMPLICATIONS

By reaching this result, the Raffaelli court did at least two things. First, it hinted broadly that all occupational restrictions on aliens would henceforth be suspect in California. The California legislature did not miss the hint, and moved swiftly to abolish citizenship requirements for many, if not all, of the occupations that still possessed them.

50. Id. at 299-300, 496 P.2d at 1272, 101 Cal. Rptr. at 904.
51. Id. at 300, 496 P.2d at 1273, 101 Cal. Rptr. at 905.
52. Id. at 301, 496 P.2d at 1273, 101 Cal. Rptr. at 905.
53. Specifically, the legislature amended state statutes to eliminate citizenship requirements for the following professions: pharmacists; psychiatric technicians; attorneys; collection agents; private investigators; registered and clinical social workers; cemetery brokers; mineral, oil, and gas brokers; educational psychologists; pilots for San Francisco, San Pablo, and Suisun Bays; insurance agents; and specially-certified foreign-language teachers. Stats. 1972, ch. 1285, p. 742 (Deering's Advance Leg. Serv.). Even after this legislation, however, aliens are still foreclosed from being government officers. Thus, no alien can be governor of California [CALIF. CONST. art. V, § 2 (West Supp. 1972); CAL. GOV'T CODE §§ 1001, 1020 (West Supp. 1972)], or lieutenant governor [CALIF. CONST. art. V, § 9 (West Supp. 1972); CAL. GOV'T CODE §§ 1001, 1020 (West Supp. 1972)], or serve in the state legislature [CALIF. CONST. art. IV, § 2
The other thing the Raffaelli court did was to insure further judicial consideration of aliens' rights. This result follows from the opinion's sweeping pronouncements about noncitizens—pronouncements that an astute alien could use to attack the remaining legal restrictions upon him. If such an attack were mounted, it could be framed in ways that might be legally persuasive: and this result means that sooner or later the courts will have to decide if they have meant everything they have said in Raffaelli and related equal protection cases.

It is not too difficult to imagine the sorts of arguments that could spring from Raffaelli. The most telling of these would be an attack in the area of voting rights—rights which the citizen alone now possesses. After Raffaelli, it is possible to argue that a restriction of this type is unconstitutional—that resident aliens should also be permitted to vote. And after Raffaelli, an argument of this sort might be somewhat difficult for the courts to counter.

If one were to use Raffaelli to construct an alien voting-rights argument, he would begin by noting that the right to vote is a "fundamental right." He would also note that to permit citizens but not aliens to vote, is to classify people on the basis of alienage—and alienage, under standard equal-protection reasoning, is an "inherently suspect" basis for classification. These two arguments would mean that the ban on alien voting could only be justified by a compelling state interest.

Where Raffaelli might become important would be in countering those interests that the state could posit as "compelling." Thus, the state could argue that it has a compelling interest in restricting the suffrage to individuals who "appreciate American institutions." But the

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(c) (West Supp. 1972)). In addition, an alien cannot be a department head, division chief, or deputy in any of the state's executive departments [CAL. Gov't Code §§ 1001, 1020 (West Supp. 1972)]; nor can he hold many county offices, including those of fish and game warden and county librarian [CAL. Gov't Code §§ 24000-01, and see id., §§ 241-42 (West 1968)].

Through a strange fluke, however, non-citizens can become judges. Up until 1966, the Government Code [§§ 69500, 68804 (West 1964)] required that superior court judges and supreme court justices be citizens. These provisions, however, were repealed in 1967 [Stats. 1967, ch. 17, pps. 841, 845, §§ 61, 87]. As a result, the principal remaining restriction on becoming a judge is membership in the state bar for a certain number of years. CALIF. CONST. art. VI, § 15 (West Supp. 1972). Now that aliens can be admitted to the bar, they can become judges.

54. CALIF. CONST. art. II, § 1 (West 1954).

The federal constitution does not deny resident aliens the vote. It does list various grounds on which citizens shall not be prohibited from voting [see amends. XV, XIX, XXIV, XXVII], but these provisions do not require that citizens, and only citizens, shall be permitted to vote.


Raffaelli opinion could be authority for a counter-argument to the effect that the crucial factor in one’s “appreciation of American institutions” is not his political beliefs, but his general knowledge of the governmental and social systems of the United States.\textsuperscript{57} This counter-argument could concede that some aliens are ignorant of American institutions, but it would point to aliens like Paolo Raffaelli who have a basic and, in some cases, a deep understanding of the American system. The argument could further contend that some sort of oral or written test could be devised to single out those aliens who are familiar enough with America to be suitable voters. The conclusion would be that no rational reason exists to disfranchise all aliens on the ground that they, as a group, lack an understanding of American institutions.

A second interest that the state might raise to justify its disfranchisement of aliens is that the vote must be limited to those who are loyal to the United States. Here too, the Raffaelli opinion suggests a counter-argument. Particularly important might be the statement in the opinion to the effect that alienage and loyalty are unrelated concepts—the passage which describes how millions of aliens have demonstrated their loyalty by serving in the military, paying taxes, and abiding peaceably by the laws of the land.\textsuperscript{58} The state could respond by arguing that even though disloyal aliens may be few, the danger is too great that some individuals will vote in favor of their native lands, rather than in favor of the interests of the United States. Even if this argument were accepted, however, one could still argue that citizens may cast their ballots however they choose—including to support a foreign regime—and that noncitizens should not be treated any differently in this regard.

In addition, the state could argue that only those people should vote who have a personal stake in the society whose political decisions they would attempt to influence. The reply to this argument might be that aliens, no less than citizens, can have such an interest—that in fact, the mere residence of an alien within the country should normally give him the requisite personal stake. This argument would contend that once an individual becomes a bona fide resident of the United States, the actions of the government (federal, state, and local) will have a direct and personal impact upon him—and that he consequently will acquire a real interest in shaping those actions. One could also argue that an alien need not have been a resident of the country for any fixed period in order to acquire this interest—and that therefore, no rational basis exists for putting a lengthy residence requirement on alien voters.

The state’s response to all of this might be that it has a com-

\textsuperscript{57} 7 Cal. 3d at 296-97, 496 P.2d at 1270, 101 Cal. Rptr. at 902.
\textsuperscript{58} Id. at 298, 496 P.2d at 1271, 101 Cal. Rptr. at 903.
pelling interest in having an informed electorate, and that aliens are less likely than citizens to be knowledgeable about candidates and issues. This argument could be countered, however, with Dunn v. Blumstein, a 1972 decision of the United States Supreme Court. In Dunn, the Court ruled that a person cannot be presumed ignorant of local issues just because he has recently moved to a state—he may be well-informed, or he may not be. An analogous argument could be advanced for aliens: any one individual may be well-informed or ignorant of candidates and issues, and this uncertainty renders impermissible the broad disfranchisement of all aliens. A more basic argument, à la Dunn, would be that citizens are never compelled to prove their knowledgeability before being permitted to vote—and that in fact, the states guarantee that some voters will be uninformed by permitting absentee balloting. This argument would challenge the state's contention that its interest in an informed electorate was, in fact, compelling.

As a last resort, the state could concede that resident aliens should, perhaps, be allowed to vote—but that it is far too difficult to distinguish resident aliens from non-resident ones. This argument could be answered with the contention that the states can rely on the federal immigration service for this determination, or on the alien's own showing that he has established local roots. It could also be noted that the states have little trouble, when enrolling voters, in distinguishing their own citizens from those of other states. As a result, it could be argued that the states will not be overburdened if they have to decide which aliens are qualified to be voters.

CONCLUSION

Thus one can manipulate Raffaelli and its equal protection reasoning to argue that resident aliens should be permitted to vote. One reaction to such an argument is that it goes too far toward erasing the line between alienage and citizenship. And in fact, it is not at all clear that the courts have had such a result in mind in handing down opinions like Raffaelli. But since they have, in fact, released such opinions, they will ultimately have to decide whether the dichotomy of alienage and citizenship retains any validity. Regardless of how they decide, the Raffaelli opinion may well be a central feature in their decisions—although it is unclear at this time whether they will rely upon it or distinguish it.

David M. Glass

60. Id. at 358.
61. Id. at 358-59.
C. Right of Self-Representation

People v. Sharp.\textsuperscript{1} This case undermines the criminal defendant's right to a pro se defense. In the past 200 years the right to counsel has been gradually expanded at the expense of the original right to defend in person, and this unanimous decision by the California Supreme Court merely completes this trend. Before the adoption of the sixth amendment, there was no right in Anglo-American courts to professional representation by retained counsel. After Sharp, however, the right to counsel may have become so important that it precludes self-representation by criminal defendants in California.

The California Supreme Court is not entirely responsible for the demise of the pro se defense, but its decision in Sharp goes farther than any other in eliminating this right. Most federal courts of appeals still regard self-representation as the original right and the assistance of counsel as a subsidiary right established for the benefit of the defendant.\textsuperscript{2} The court in Sharp implies that the subsidiary right has now so superseded its parent that self-representation is no longer a right, but a privilege.

The facts in Sharp are similar to many of the less publicized cases involving a motion to proceed in propria persona. Jerome Sharp was given two diamond rings for cleaning by an acquaintance, Helen Zastrow. After he returned the rings, Mrs. Zastrow noticed the two diamonds had been replaced with fake stones. When the police questioned Sharp he denied any knowledge of the rings but later, admitted that he was lying, possibly to protect his fiancee. Because of these incriminating circumstances and his evasive response to police questioning he was arrested and charged with grand theft.

At the trial the defendant claimed he could present "overwhelming evidence" of his innocence if he was allowed to question certain witnesses. This request to appear in his own defense was based on his personal knowledge of the witnesses rather than dissatisfaction with the public defender system. In addressing the court, Jerome Sharp acknowledged the superior ability of an attorney: "What I would like to do is have an attorney sit beside me and give me a little advice, if it is possible, in regard to certain questions that I may ask."\textsuperscript{3} But this admission prompted the court to ignore his request for advisory counsel and deny his motion to appear in his own defense.\textsuperscript{4} The court ap-

\textsuperscript{1} 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972) (Wright, C.J.) (unanimous decision).
\textsuperscript{2} See text accompanying notes 41-65 infra.
\textsuperscript{3} 7 Cal. 3d at 453, 499 P.2d at 491, 103 Cal. Rptr. at 235.
\textsuperscript{4} Id. Neither the trial court nor the opinion in Sharp discusses the defendant's
pointed counsel for Sharp and, after a trial which included vocal disagreements between Sharp and his lawyer, Sharp was convicted of the charges.

Traditionally, a simple factual defense by the defendant has been encouraged by English and American courts. Early English courts adopted the following position: "Generally everyone of a common understanding may as properly speak to a matter of fact, as if he were the best lawyer . . . it requires no matter of skill to make a plain and honest defense, which [in some cases] is always the best." Moreover, English courts were so convinced of the importance of self-representation that they did not allow defendants to have professional representation until 1837. Even after this date defendants were still permitted to conduct their own defense "as to matters of fact" with defense counsel arguing points of law.

The right to counsel appeared much earlier in the United States than it did in England, but American courts also encouraged the defendant to participate in his own defense. Early decisions pointed out that the sixth amendment only provided for the assistance of counsel, and even after the turn of the century one state supreme court observed: "An argument by a man whose liberty is hanging in the balance may well appeal to an American jury with greater force than the argument of a skilful [sic] lawyer." While modern decisions have not discussed this issue at length, many decisions recognize that a strong factual argument by the defendant is still a legitimate trial tactic.

The purpose of this note is to examine the reasoning of the Sharp decision and its implications for the future role of the defendant. Section I will explore California's experience with the pro se defense and its possible influence on the court's decision in Sharp. Section II will analyze the reasoning behind the unprecedented constitutional construction adopted by the court. And, finally, Section III will examine the implications of this decision and suggest an alternative which does not deprive defendants of their rights to self-representation.

I. OPINIONS AND EVENTS PRIOR TO SHARP

If there is a single explanation for the unanimity of the Sharp decision, it may well be the frustrating California experience with the request for advisory counsel. The statement of facts in the opinion, however, suggests that the defendant's request for advisory counsel was explicit.

6. M. Radin, Handbook of Anglo-American Legal History 229-30 (1936);
pro se defense. Ever since Caryl Chessman first requested self-representation, the pro se defense has been regarded with skepticism by lawyers, judges, and the public. Chessman was the first defendant to gain notoriety with the now familiar technique of alternating requests for self-representation with requests for representation by counsel, but more recently defendants have found self-representation equally useful in politically controversial trials. The motion to proceed in propria persona is an almost foolproof method of guaranteeing constitutional grounds for appeal. If the trial court grants the motion, the unsuccessful defendant will claim that he has been denied his right to the assistance of counsel; if the trial court denies the motion, the same defendant will claim he has been denied the right to defend in person.

Although the California Supreme Court has done little to discourage this procedure directly, its increasing impatience is evident in the opinions preceding Sharp. In Sharp the court continues to treat the pro se defense as a constitutional loophole that needs to be remedied. The opinion refers to "cunning criminals" for whom a motion to proceed in propria persona becomes a "heads I win tails you lose proposition."

Although Sharp does not discuss the abuse of self-representation at length, these abuses were the subject of public concern at the very time this opinion was announced. Articles in major California newspapers criticized the unseemly presentation and abusive language of the pro se defendants as well as the large expenditures required for their trials.

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11. A description of this technique is found in T. Hayden, Trial 99 (1970): "Without risking needless time in jail, we must risk 'contempt of court' when the court is brazenly in contempt of our rights. We should experiment with acting as our own lawyers as a way to place our identity directly before the jury and the larger public."
12. See People v. Mattson, 51 Cal. 2d 777, 793-94, 797-98, 336 P.2d 949-50, 952 (1959); People v. Carter, 66 Cal. 2d 666, 667, 427 P.2d 214, 216, 58 Cal. Rptr. 614, 616 (1967). In Carter the court began its opinion with the following observation: Once again the failure of a trial court to navigate adroitly between the Scylla of denying a defendant the right to determine his own fate and the Charybdis of violating his right to counsel by acceptance of an ineffectual waiver has brought a prosecution to grief. 66 Cal. 2d at 667, 427 P.2d at 216, 58 Cal. Rptr. at 616.
13. 7 Cal. 3d at 462 n.12, 499 P.2d at 498 n.12, 103 Cal. Rptr. at 242 n.12, quoting People v. Addison, 256 Cal. App. 2d 18, 23-24, 63 Cal. Rptr. 626, 629 (2d Dist. 1967).
14. Although disruptive pro se defendants should not be permitted to continue their defense, their conduct does not justify depriving all defendants of the right to self-representation. See text accompanying notes 122-27 infra.
15. An article in the San Francisco Chronicle urging voters to pass an amendment
particularly burdensome because it forced the trial judge to risk reversal at the very outset of the trial. Following a brief colloquy—the so-called mini-bar—the judge had to decide whether each defendant was competent to defend himself. The judge’s sympathy with these requests was no doubt greatly tempered by previous defendants who had eloquently pleaded for self-representation at the trial only to vigorously attack the wisdom of granting their request on appeal. Therefore, in determining the defendant’s competence, judges were constantly aware that the defendant might be deliberately inviting reversal and that the waiver of the right to counsel would be closely scrutinized on appeal. As a result, one commentator flatly stated that most trial judges welcomed mandatory counsel for all defendants.\textsuperscript{16}

In response to this growing sentiment the voters in California amended the state constitution to effectively eliminate any state constitutional right to self-representation.\textsuperscript{17} The adoption of this amendment in the seven months between oral argument and the announcement of the \textit{Sharp} decision undoubtedly had some influence on the court’s decision. Aside from a reference to the dilemma faced by the trial judge and an appendix discussing the amendment,\textsuperscript{18} the opinion does not refer to the generally hostile climate of opinion surrounding the pro se defense. Such a factor, however, may be of decisive significance where, as here, the court adopts an interpretation of the federal constitution which is contrary to the decisions of most federal courts of appeal.

\section{II. ANALYSIS OF THE STATE AND FEDERAL CONSTITUTIONS}

The right to self-representation has been so fundamental in American legal thinking that until recently no one has even thought to challenge it.\textsuperscript{19} This is the major problem confronting the court in \textit{Sharp}. The opinion points out that English and colonial courts allowed defendants to present their own defense without questioning whether or not they had this right.\textsuperscript{20} The court never explicitly states why it is neces-

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\textsuperscript{17} \textit{See} note 24 \textit{infra}. The \textit{Sharp} decision takes note of this amendment in an appendix. 7 Cal. 3d at 463-64, 499 P.2d 498-99, 103 Cal. Rptr. 242-43.

\textsuperscript{18} 7 Cal. 3d at 463-64, 499 P.2d at 498-99, 103 Cal. Rptr. at 242-43.

\textsuperscript{19} In many ways the right to determine one's own fate seemed as fundamental as the constitution itself. The attitude toward self-representation is very similar to that expressed by the Supreme Court toward allocution. In McGautha v. California, 402 U.S. 183, 217 (1971), Justice Harlan speaking for the Court referred to this right as a “right of immemorial origin.”

\textsuperscript{20} 7 Cal. 3d at 453, 499 P.2d at 492, 103 Cal. Rptr. at 236.
sary to question this right now but two reasons are implied: (1) the abuse of this right, and (2) the availability of court appointed counsel, which eliminates the practical necessity for self-representation.

The analysis in Sharp begins by noting that the right to self-representation is not expressly granted by the federal constitution. By emphasizing the constitution's failure to mention this right expressly, the court then tries to dismiss those federal opinions that have found the right to self-representation implied in the sixth amendment. This emphasis on the express wording of the federal constitution, however, also draws attention to the literal wording of Article I section 13 of the state constitution. Prior to the recent amendment, this provision expressly granted criminal defendants the right "to appear and defend in person and with counsel." Although the court's discussion of Article I section 13 is now mooted by the recent amendment to that provision, the court's interpretation of the state constitution provides an illuminating introduction to the problems the court encounters in severely restricting the right to self-representation.

a. State constitution

It is interesting to note that at the same time the court was deciding the state constitution did not protect self-representation, many prominent public officials were attempting to amend the state constitution on the assumption that it did. Against this background, the opinion's assertion that "no rational reading of the state constitution" would protect self-representation leaves the embarrassing impression that the state attorney general, several state legislators, and other public figures supported an expensive state-wide campaign based on an irra-

21. See note 14 supra.
22. 7 Cal. 3d at 455, 499 P.2d at 493, 103 Cal. Rptr. at 237.
23. The Second Circuit has held that the right to defend pro se is constitutionally protected. United States v. Plattner, 330 F.2d 271 (2d Cir. 1964). A large number of federal decisions have cited Plattner with approval. See notes 40-55 infra and accompanying text.
24. Article I, section 13 prior to its amendment provided:
In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel, Cal. Const. art. I, § 13 (1849) (the words in italics were deleted by the amendment).
Section 13 now provides:
In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial and to have the assistance of counsel for his defense; to have the process of the court to compel the attendance of witnesses in his behalf and to be personally present with counsel.... The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel. Cal Const. art. I, § 13 (the words in italics were added by the amendment).
25. 7 Cal. 3d at 457, 499 P.2d at 495, 103 Cal. Rptr. at 239.
tional reading of the state constitution. This embarrassment is compounded by several California Supreme Court opinions which have specifically stated that the right to appear and defend in person is protected by the state constitution. Nevertheless, the court dismisses these statements as dicta without offering any explanation of their asserted irrationality.

A literal reading of the state constitutional right "to appear and defend in person and with counsel" seems to grant the defendant three separate rights: (1) the right to defend in person with advisory counsel; (2) the right to defend in person without counsel; and (3) the right to full representation by counsel. In 1959 in People v. Mattson the court concluded that advisory counsel was not included in these rights. But Mattson reaffirmed the right to self-representation by stating: "a court cannot force a competent defendant to be represented by an attorney." In spite of the conjunctive wording of article I, section 13, Mattson held that the right to defend "in person and with counsel" does not include the right to self-representation with advisory counsel. One commentator has since concluded that the court actually interpreted the phrase "in person and with counsel" to mean "in person or with counsel."

Sharp dismisses the reasoning of Mattson sub silentio but at the same time fails to reinstate the right to advisory counsel:

By no rational reading of the constitutional provision can we ascertain an intent that an accused is to be afforded the right to personally appear and defend, or, in the alternative, to appear and defend with counsel. To so interpret the language we would be required to read the phrase "in person and with counsel" as "in person or with counsel."

So while in Sharp the court rejects the disjunctive interpretation as a misreading of the constitution, it fails to explain its apparent adherence to this same disjunctive interpretation in Mattson. The court tries to avoid this inconsistency by approving the holding in Mattson and dismissing its reasoning, but article I, section 13 of the state constitution

27. 7 Cal. 3d at 458-59, 499 P.2d at 495-96, 103 Cal. Rptr. at 239-240.
29. Id. at 788-89, 336 P.2d at 946.
30. Id. at 788-89, 336 P.2d at 945-46.
31. Comment, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 59 CALIF. L. REV. 1479, 1495 (1971). The author argues that the court read "and" to mean "or" in order to preserve orderly courtroom procedure and decorum. Id.
32. 7 Cal. 3d at 457, 499 P.2d at 495, 103 Cal. Rptr. at 239.
33. 7 Cal. 3d at 459, 499 P.2d at 495-96, 103 Cal. Rptr. at 239-40.
cannot be interpreted both ways. Either the state constitution grants the defendant the right to defend "in person and with counsel," and hence the right to advisory counsel, or it grants him the right to defend "in person or with counsel" and, therefore, the right to self-representation.

The irony of the court's reliance on the phrase "in person and with counsel" is that this is exactly what Jerome Sharp requested at the trial. Furthermore, it is only by ignoring Sharp's request to defend in person and with counsel that the court can assume that he is not fully within his constitutional rights.

b. Federal Constitution

The greatest obstacle to the position taken in Sharp is the series of federal decisions asserting that the right to self-representation is protected by the federal constitution. The origin of this federal opinion is based on a judicial aside in Adams v. United States ex rel McCann. In Adams, a pro se defendant waived his right to jury trial and in affirming this waiver the court said, the constitution "does not purport to force a lawyer upon the defendant." Subsequent Supreme Court decisions cited Adams for this proposition and federal courts of appeals assumed that the constitutional status of this proposition was a settled issue. The California Supreme Court seemed to go even one step further in Mattson by stating that a court cannot force counsel upon a defendant.

In Sharp, however, the court dismisses these federal precedents, by reading the line of decisions following Adams as establishing only that the sixth amendment does not prohibit self-representation. The only other court to make this distinction is the Federal District Court for the Eastern District of Tennessee.

In contrast to Sharp, the leading federal case of Plattner v. United States held that self-representation is a federal constitutional right.

35. Id. at 279.
37. See Woolard v. United States, 178 F.2d 84, 87 (5th Cir. 1949).
38. People v. Mattson, 51 Cal. 2d 777, 788-89, 336 P.2d 937, 946 (1969). In contrast to Adams, Mattson asserts that a court, not just the constitution, cannot force counsel upon a defendant. Thus, in light of the court's own distinction in Sharp, the California court seems to have taken an even stronger position than the Supreme Court. See text accompanying notes 39-40 infra.
39. 7 Cal. 3d at 455-56, 499 P.2d at 293-94, 103 Cal. Rptr. 237-38.
41. 330 F.2d 271 (2d Cir. 1964).
Plattner adds that denial of this right provides sufficient grounds for reversal without any showing of prejudice.\textsuperscript{42} The accused was denied the right to self-representation because "he was not schooled in the law" and, in reversing in Plattner, the Second Circuit affirmed both the constitutional status and historical basis of this right.\textsuperscript{43} In a subsequent decision, the Second Circuit extended the right to state criminal proceedings by way of the fourteenth amendment.\textsuperscript{44} These two holdings from the Second Circuit pose the initial question: is the holding of Sharp even permissible under the federal constitution?

Because of the federal statutory right to the pro se defense,\textsuperscript{45} federal courts rarely confront the constitutional issue directly. But since Plattner the Courts of Appeals in the Third,\textsuperscript{46} Fourth,\textsuperscript{47} Fifth,\textsuperscript{48} Sixth,\textsuperscript{49} Seventh,\textsuperscript{50} Ninth,\textsuperscript{51} and Tenth\textsuperscript{52} Circuits have joined the Second in cit-

\textsuperscript{42} Id. at 273-75 (alternative holding). At the end of the opinion, the court concludes that prejudice in fact resulted from denial of the right to self-representation in the particular case under review.

\textsuperscript{43} Id.

\textsuperscript{44} United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966). Sharp itself does not question the applicability of a federal constitutional right to a pro se defense to state criminal proceedings, but only disputes the existence of such a right in the first place. 7 Cal. 3d at 356-57, 499 P.2d at 493-94, 103 Cal. Rptr. at 237-38.


\textsuperscript{46} In United States v. Washington, 341 F.2d 277, 285 (3d Cir. 1965) the court cites several waiver decisions and states in dictum:

A Court cannot force the services of an attorney upon a defendant against his wishes . . . and the right to counsel does not justify forcing counsel upon an accused who wants none.

\textsuperscript{47} Townes v. United States, 371 F.2d 930, 934 (4th Cir. 1966) (dictum) (approving the guidelines in Plattner for waiver of right to counsel), cert. denied 387 U.S. 947 (1967).

\textsuperscript{48} In Juelich v. United States, 342 F.2d 29, 31 (5th Cir. 1965) the court cites Adams and subsequent Supreme Court cases and then states in dictum:

From that indication, this and other Courts of Appeal have deduced that in a criminal prosecution the right to defend pro se is a constitutionally protected right.

\textsuperscript{49} United States v. Sternman, 415 F.2d 1165, 1169-70 (6th Cir. 1969) (dictum), cert. denied, 397 U.S. 907 (1970). The court cites Adams for the following propositions: "[A] court may not compel a defendant to have services of counsel . . . a defendant has a constitutional right to represent himself."

\textsuperscript{50} Lowe v. United States, 418 F.2d 100, 103 (1969) (alternative holding) after citing other federal decisions the court states:

[T]o compel a criminal defendant to be represented by counsel in all cases would conflict with his statutory and constitutional right to conduct and manage his own defense.

\textsuperscript{51} In Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969) the court cites Adams and Plattner and states, in dictum:

A defendant in a criminal case not only has a constitutional right to the assistance of counsel, he has a correlative constitutional right to refuse the ad-
ing Adams and subsequent federal cases with approval. Relying on
decisions from three circuits Sharp asserts that all federal courts do not
agree that self-representation is federal constitutional right.\textsuperscript{53} The
court, therefore, asserts that these three decisions—from the District
of Columbia,\textsuperscript{54} Eighth\textsuperscript{55} and Tenth\textsuperscript{56} Circuits—do not recognize the
constitutional status of self-representation. None of these decisions,
however, is reliable authority for this proposition. A case from the
District of Columbia, subsequent to the case from that circuit cited in
Sharp, states in dictum that mandatory appointment of counsel would
raise a serious constitutional problem.\textsuperscript{57}

In the case cited from the Eighth Circuit, Butler v. United States,\textsuperscript{58}
the defendant sought to discharge his lawyer and conduct his own de-
fense after the trial had been in progress for over two weeks.\textsuperscript{59} Even
when self-representation was the rule rather than the exception courts
would not allow a criminal defendant to discharge his attorney and
conduct his defense himself once the trial had begun.\textsuperscript{60} Moreover,
circuits holding that self-representation is a federal constitutional right,
still adhere to this position.\textsuperscript{61} Hence the Eighth Circuit’s refusal to
permit discharge of counsel in Butler does not indicate any division of
opinion among the federal circuits.

On the contrary, the most recent case from the Tenth Circuit\textsuperscript{62}

\textsuperscript{52} See text accompanying notes 62-63 infra.
\textsuperscript{53} 7 Cal. 3d at 456-57, 499 P.2d at 494, 103 Cal. Rptr. at 238. Implicit in
this argument is the assumption that a state court can decide federal constitutional
issues without the constraints of persuasive federal authority if it can show that the lower
federal courts are divided on this issue.
\textsuperscript{54} Brown v. United States, 264 F.2d 363, 365-66 (D.C. Cir. 1959) (en bane)
(dictum in plurality opinion), cert. denied, 360 U.S. 911 (1961).
\textsuperscript{55} Butler v. United States, 317 F.2d 249, 258 (8th Cir. 1963), cert. denied,
\textsuperscript{56} Van Nattan v. United States, 357 F.2d 161, 163-64 (10th Cir. 1966) (dic-
tum).
\textsuperscript{57} Blue v. United States, 342 F.2d 894, 897 n.4 (D.C. Cir. 1965), cert. denied,
\textsuperscript{58} 317 F.2d 249 (8th Cir. 1963), cert. denied, 375 U.S. 838 (1963).
\textsuperscript{59} Id. at 257.
\textsuperscript{60} See Roberts v. State, 14 Ga. 18, 20-21 (1853); Annot., 77 A.L.R.2d 1233,
\textsuperscript{61} See United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir.
\textsuperscript{62} United States v. Depugh, 452 F.2d 915 (10th Cir. 1971), cert. denied, 407
U.S. 920 (1972). As the Court summarized:
The circuits have recognized the principle that to compel a criminal defendant
to be represented by counsel in all cases would conflict with his statutory and
constitutional right to conduct and manage his own defense. (emphasis added).
Id. at 919.
suggests that there is complete unanimity on this issue. The Tenth Circuit decision cited in Sharp has been superseded by a more recent decision in that circuit which states that the right to self-representation is protected by the Constitution. A recent Sixth Circuit case also suggests a growing consensus among the circuits. Thus, contrary to Sharp, every circuit court of appeals that has recently examined the issue has found a constitutional right to self-representation. Since the most recent decisions recognize apparent unanimity among the federal circuits, this federal consensus should not be treated lightly by a state court ruling on a federal constitutional issue.

An additional argument in Sharp relies upon a single sentence in Singer v. United States. In Singer, the Supreme Court upheld the constitutionality of Rule 23(a) of the Federal Rules of Criminal Procedure which conditions waiver of jury trial upon the consent of the government. In holding that criminal defendants do not have a constitutional right to a non-jury trial, the court reasoned "the ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right." In Sharp the court reasons that if the right to jury trial does not entail the right to trial before a judge, then the right to counsel does not entail the right to a pro se defense.

This extension of Singer is unwarranted. As one commentator points out, the opinion in Singer itself distinguishes waiver of the right to counsel from waiver of the right to jury trial. While the right to jury trial and the right to trial before a judge are mutually exclusive the right to counsel and the right to self-representation are not. Indeed, the very wording of the sixth amendment—"assistance of counsel"—appears to contemplate advisory counsel. Thus the reasoning in Singer cannot be applied to the pro se defense.

This interpretation of Singer only suggests that the court should have given more consideration to advisory counsel in Sharp. In Mattson the court implied that a defendant can be forced to choose between the right to self-representation and counsel but this does not mean that the two rights are mutually exclusive. Even Mattson does not make

63. Id.
64. United States v. Conder, 423 F.2d 904, 907-08 (6th Cir. 1970), cert. denied, 400 U.S. 958 (1970). The court concluded: "While not as often the subject of litigation the right to self-representation is as well established as the right to counsel."
66. Id. at 34-35.
67. 7 Cal. 3d at 455, 499 P.2d at 493, 103 Cal. Rptr. at 237.
69. U.S. CONST. amend. VI.
this assumption and the court’s failure to reconsider advisory counsel not only undermines its analysis of Singer but the entire opinion itself.\footnote{70}

The \textit{Sharp} court also concluded that due process does not require a general constitutional right to self-representation. In 1932 Justice Sutherland introduced the line of authority culminating in \textit{Gideon v. Wainwright}\footnote{71} when he observed that a defendant often needs a “guiding hand” to establish his own innocence.\footnote{72} Relying on this line of authority the court argues that the increased availability of court-appointed counsel obviates any need for the criminal defendant to accept the risks of self-representation.\footnote{73}

The court’s belief that effective counsel has become widely available is not universally accepted however.\footnote{74} Many defense attorneys believe that defendants are often sold out by the public defender’s office.\footnote{75} Sociologists confirm this observation by describing the practice of many defense attorneys as a “confidence game”.\footnote{76} The Third Circuit has also commented on the tendency to subordinate the interests of the individual defendant “to the larger interests of the public defender’s office.”\footnote{77} And in complete candor, one California appellate court observed that while some court-appointed attorneys are exceptionally diligent, others “are only saved from disaster by the care of the court and its research staff.”\footnote{78} Even Chief Justice Burger has claimed that 75 per cent of the lawyers who appear in court are seriously deficient in areas ranging from poor preparation to basic skills and ethics.\footnote{79} Thus, Jerome Sharp’s concerns may not have been unreasonable.

\footnote{70. See text accompanying notes 28-31 supra. Mattson does not contend that the right to self-representation and the right to counsel are mutually exclusive, but only that it is impractical to allow the exercise of both rights by permitting the use of advisory counsel. 51 Cal. 2d at 792-93, 797, 236 P.2d at 948-49, 951-52. The reconsideration of the right to advisory counsel appears all the more necessary in \textit{Sharp} because that is precisely what Sharp requested. See note 5 supra and accompanying text.}

\footnote{71. 372 U.S. 335 (1963).}

\footnote{72. Powell v. Alabama, 287 U.S. 45, 71 (1932).}

\footnote{73. 7 Cal. 3d at 461, 499 P.2d at 497, 103 Cal. Rptr. at 241.}

\footnote{74. Id.}


\footnote{77. Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc).}

\footnote{78. In re Greenfield, 11 Cal. App. 3d 536, 544, 89 Cal. Rptr. 847, 851 (3d Dist. 1970).}

\footnote{79. Burger, C.J., \textit{A Sick Profession}, \textit{Wis. Bar Bull.}, Oct. 1969, at 7, 8: On the most favorable view expressed, 75 per cent of the lawyers appearing in the courtroom were deficient by reason of poor preparation, inability to frame questions properly, lack of ability to conduct a proper cross examination, lack of ability to present expert testimony, lack of ability in the handling and presentation of documents and letters, lack of ability to frame objections adequately, lack of basic analytic ability in the framing of issues, lack of ability}
Sharp, however, is not insensitive to the dangers inherent in the public defender system. The court recalled its opinion in People v. Ibarra, in which it reversed a conviction because the incompetence of the public defender reduced the trial to a "farce and a sham." Chief Justice Traynor, writing for the court in Ibarra reasoned that if the defendant is deprived of a crucial defense through no fault of his own, he should receive a new trial.

While Ibarra continues to provide an appellate remedy for inadequate pre-trial preparation, however, it cannot guarantee quality representation at the trial level. For this reason the court has been extremely reluctant to extend Ibarra to appellate review of the defense attorney's trial tactics. In the last ten years the court has only once relied on Ibarra to reverse a conviction for an error which is arguably limited to the conduct of the defense. Even in this case the court limited itself to a review of defense counsel's pretrial preparation, deliberately avoiding a review of counsel's trial tactics. The court's principal

to make an adequate argument to a jury. Also very high on the list of deficiencies was the lack of an understanding of basic courtroom manners and etiquette, and a seeming unawareness of many of the fundamental ethics of the profession.

80. 7 Cal. 3d at 461, 499 P.2d at 497, 103 Cal. Rptr. at 241.
82. Id. at 464, 386 P.2d at 490, 34 Cal. Rptr. at 866.
83. Id. The court also stated that for inadequacy of counsel to be a ground for reversal, "an extreme case must be disclosed." Id. See People v. Reeves, 64 Cal. 2d 766, 774, 415 P.2d 35, 39, 51 Cal. Rptr. 691, 695 (1966), cert. denied, 385 U.S. 952 (1966). The court has avoided any specific formulation of the "crucial defense" test announced in Ibarra, but instead has applied the test first to blatant errors of counsel and only hesitantly extended it to less obvious mistakes. The end result has been that the court has reversed for obvious errors of research but at the same time has been unusually lenient in the area of trial strategy. Compare People v. Shells, 4 Cal. 3d 626, 629-30, 483 P.2d 1227, 1229, 94 Cal. Rptr. 275, 277 (1971) with People v. Brooks, 64 Cal. 2d 130, 140, 410 P.2d 383, 389, 43 Cal. Rptr. 879, 885 (1966) (dictum). But obviously, an error in trial strategy can be just as damaging as an error in research. See text accompanying notes 85-92 infra.
84. See Comment, Standards to Guarantee Effective Assistance of Counsel, 8 SANTA CLARA LAW. 108 (1967).
86. In Saunders, the court-appointed attorney failed to advance the defense of diminished capacity. Before the trial, defendant's mother sent defense counsel a letter explaining that defendant had suffered a fractured skull and two brain concussions, that the doctor who treated him indicated that he would occasionally not know the difference between right and wrong, and that hospital records showed he had a type of epilepsy. One commentator has since concluded that counsel's failure to argue diminished capacity under these circumstances might not only have been deliberate but intelligent trial strategy. See, Note, The Diminished Capacity Defense to Felony-Murder, 23 STAN. L. REV. 799, 808-09 (1971). Nevertheless, the court characterized counsel's omission as an error in preparation rather than an error in judgment. See People v. Shells, 4 Cal. 3d 626, 483 P.2d 1221, 84 Cal. Rptr. 275 (1971). In Shells, court-appointed defense counsel failed to corroborate an inaccurate and informal report that defendant had been convicted of a felony. Using this inaccurate in-
reason for failing to review trial tactics has been its refusal to "second
guess" the defense attorney's trial strategy. As the court stated: "In
the heat of trial, defendant's counsel is best able to determine proper
tactics in light of the jury's apparent reaction to the proceedings." 87

While this deference to the trial attorney's judgment is undis-
tedly justified, it nevertheless severely restricts the scope of judicial re-
view of the adequacy of counsel. In California, the defense attorney's
choice of available witnesses, 88 his selection of statements and ques-
tions, 89 and even the admission of potentially damaging evidence 90 are
not within the scope of judicial review.

The limitations of Ibarra are all the more pronounced because it
places appellate judges in the awkward position of labeling another
member of their profession totally incompetent. Whenever a defendant
relies on Ibarra, he must convince several judges that his attorney was so
inept in his conduct of the trial that he reduced the proceedings to a
"farce and a sham." The defendant's burden of proof is further com-
pounded because judicial reluctance to condemn the work of another
attorney need not be attributed to professional bias but rather to the
judges' appreciation of many factors which influence a trial attorney's
decision.

Because very few of these factors are ever apparent in the record,
the appellate court has only a limited ability to review alleged errors
related to the conduct of the trial. These limitations effectively preclude

87. People v. Brooks, 64 Cal. 2d 130, 140, 410 P.2d 383, 389, 43 Cal. Rptr. 879,
885 (1966) (dictum).
88. People v. Floyd, 1 Cal. 3d 694, 709-10, 464 P.2d 64, 73, 83 Cal. Rptr. 608, 617
(1970), cert. denied, 406 U.S. 972 (1972). This point is all the more significant in
light of Sharp's fear that an attorney might not call the proper witnesses or ask them
the proper questions. 7 Cal. 3d at 452-53, 499 P.2d at 491, 103 Cal. Rptr. at 235.
89. The defense counsel in People v. McGautha, 70 Cal. 2d 770, 783-84, 452
his clients as "slob-type defendants" and made other statements which "beclouded
his position" in front of the jury. But the California Supreme Court held that even
such "debatable trial tactics" did not deprive the defendants of adequate trial repre-
sentation. In other cases the court assumed that the public defender's failure to ask
certain questions of key witnesses was prompted by uncertainty as to the answers he
might receive. Consequently an appellate court is reluctant to conclude that the mere
omission of questions or statements is based on oversight alone. See, e.g., People v.
Zuccaro, 47 Cal. App. 2d 414, 416-17, 118 P.2d 40, 42 (1st Dist. 1941); See also,
People v. Durham, 70 Cal. 2d 171, 191-92, 449 P.2d 198, 211-12, 74 Cal. Rptr. 262,
90. In re Mosley, 1 Cal. 3d 913, 927, 464 P.2d 473, 481, 83 Cal. Rptr. 809,
817 (1970), cert. denied, 400 U.S. 905 (1970). See also, People v. Brooks, 64 Cal. 2d
review of trial tactics and undermine the court’s argument that the availability of effective assistance of counsel renders the right to self-representation superfluous. On the contrary, judicial unwillingness and inability to thoroughly evaluate the adequacy of counsel argue that the defendant himself should choose whether to exercise his right to counsel. The court can hardly justify forcing an attorney on an unwilling defendant if, on appeal, it will respond to complaints about inadequate trial representation only by asserting its inability to decide the issue.

III. IMPLICATIONS

Unlike the federal decisions stating that the constitution protects the right to self-representation, Sharp expressly limits the pro se defense to cases the trial court considers “proper.” The court, however, offers no standards to determine a “proper case,” thereby investing the trial judge with broad discretion. But since trial judges may be uncomfortable with the procedural irregularity of the pro se defense, the court’s willingness to review trial court decisions is still important if self-representation is to remain a realistic option for most defendants.

Such review, however, may be infrequent since Sharp asserts that an erroneous refusal to allow a pro se defense—presumably a refusal which constitutes an abuse of discretion—is only grounds for reversal in those “rare circumstances where the denial may truly offend the concept of ordered liberty.” This holding in Sharp ensures that trial judges will no longer be caught between what Justice Mosk once called “the Scylla of denying a defendant the right to determine his own fate and the Charybdis of violating his right to counsel.” But by removing Scylla the court has only made Charybdis more formidable.

Sharp provides the trial court with very little reason to grant a motion to defend pro se and every reason to deny it. Denying the motion will rarely result in reversal but granting it will subject any

91. See text accompanying notes 73-74 supra.
92. If competent and diligent trial counsel is so widely available then it should not be necessary to force it upon the defendant. The increase in the number of defendants requesting lawyers under the Criminal Justice Act of 1964 indicates that the number of defendants requesting a pro se defense is declining anyway. See Comment, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 59 Calif. L. Rev. 1479 n.5 (1971).
93. See notes 41-65 supra and accompanying text.
94. 7 Cal. 3d at 461-62, 499 P.2d at 497-98, 103 Cal. Rptr. at 241-42.
95. See note 16 supra.
96. 7 Cal. 3d at 460, 499 P.2d at 497, 103 Cal. Rptr. at 241.
97. See note 12 supra. Justice Mosk referred to this illustration from Greek mythology to describe the trial judge's dilemma in ruling on a pro se defense.
subsequent conviction to sixth amendment attack. Therefore, a judge who is afraid that disorder and disruption may result from a pro se defense is given nearly complete discretion to impose counsel upon the defendant. The recent amendment to the state constitution provides additional support for trial judges who do not favor the pro se defense. Although a defendant in a non-capital case may still appeal the trial court's denial of his motion to defend pro se, his chances of showing prejudice, let alone a denial of due process, are remote.

In People v. Ruiz, a California court of appeal decision prior to Sharp, the court asserts that it "nears if not reaches the unimaginable" to say that a defendant is prejudiced by professional representation. Nevertheless, the court reversed the defendant's conviction in Ruiz without such a showing of prejudice. In words attributed to Lord Hershell, the court concluded: "Important as it [is] that people should get justice, it [is] even more important that they should be made to feel and see that they [are] getting it." The emphasis in Ruiz upon maintaining the confidence of pro se defendants contrasts markedly with the paternalism of Sharp, which is predicated on the view that a lay defendant lacks the ability to understand or control his defense regardless of his familiarity with the facts of his case.

This premise, however, has not always been accepted. The importance of the right to self-representation is reflected in the earliest accounts of the criminal process. Early American decisions also app-

98. See note 24 supra. In addition a recent resolution from the state legislature disapproves of pro se defense. Ch. 1800, § 6 (1971) Cal. Stats. 3898. A part of this resolution is quoted in the appendix to Sharp, 7 Cal. 3d at 463, 499 P.2d at 499, 103 Cal. Rptr. at 243.

99. Since the adoption of the recent amendment to the state constitution, a defendant in a capital case must be represented by counsel at all stages of the preliminary and trial proceedings. CAL. PENAL CODE §§ 686, 859, 787 (West Supp. 1972).


101. Id. at 226, 69 Cal. Rptr. at 479.


103. Individuals who are incapable of adequately representing themselves because of age, ignorance, or mental incapacity may not exercise their right to a pro se defense. Wade v. Mayo, 334 U.S. 672, 684 (1942). Sharp, however, was a mature adult with apparently average intelligence and some "general knowledge of the law." Therefore recognition of the right to self-representation should not entail any reduction in the availability of counsel for the accused. See Plattner v. United States, 330 F.2d 271, 274 (2d Cir. 1964). Defendants are not always detached enough from the trial to make rational decisions, and undoubtedly a moderately prepared lawyer can present a better defense than the average layman. The difficulty with Sharp is its refusal to defer to the decision of even an informed and capable defendant.

104. At common law, there was no right to full representation by counsel in a crim-
preciated the value of a factual pro se defense and even recognized its superiority over professional representation in situations which are arguably similar to Sharp's predicament.\textsuperscript{108} Recent decisions which have questioned the competence of defense counsel have also recognized that a defendant who knows the facts is sometimes better off without a lawyer.\textsuperscript{109} Even decisions which concede the premise in \textit{Sharp} refuse to force counsel on a defendant arguing that respect for the autonomy of the individual accords the defendant the right to speak in his own behalf.\textsuperscript{110} These courts reason that because the defendant will suffer the consequences of an unsuccessful defense his wishes should be respected in order to preserve his faith in the fairness of the judicial proceedings.

Since each defendant brings different motivations, problems, and abilities into the courtroom, no one can assume all defendants are incapable of adequately representing themselves. Despite the possible abuses of the right to self-representation by some politically controversial defendants, their attempt to confront the jury with the underlying reasons for their conduct cannot be condemned as an illegitimate trial tactic.\textsuperscript{111} Self-representation is a dramatic defense and many defendants view it as a constructive opportunity for self-expression and social change. The defense of justification, for instance, provides a vehicle for expression of political views.\textsuperscript{112}

\textsuperscript{105} Wilson v. State, 50 Heisk. 232, 241-42 (Tenn. 1871). In Wilson the defendant was involved in a fact situation as incriminating as the events surrounding Sharp's arrest. Wilson, however, asserts: "An innocent person is sometimes entangled in a web of suspicion by a curious combination of facts which no one else can explain but himself. . . . The skill or eloquence of his counsel cannot reconcile the facts . . . [and the defendant] alone may be able by a simple factual explanation of the circumstances . . . or by putting this and that fact together, to remove every shadow of suspicion from himself." (Id.)

\textsuperscript{106} United States ex rel. Davis McMann, 386 F.2d 611, 620 (2d Cir. 1967) (dictum), cert. denied, 350 U.S. 958 (1968).

\textsuperscript{107} United States ex rel. Maldonaldo v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966). Here the court asserts that a defendant even has a "right to go to jail under his own banner." See, Laub, supra note 16, at 256. See also J.S. Mill, \textit{On Liberty} 14 (1929).

\textsuperscript{108} Much of the concern about the pro se defense involves the introduction of defenses which are not legally recognized and would not be presented by a lawyer. While trial judges are uncomfortable with such unorthodox tactics, they may serve a legitimate purpose in forcing the jury to confront what the defendant believes to be the central issue in the trial. See note 109 infra. So long as the defendant's behavior does not disrupt the judicial process it may be wise to maintain his faith in the proceedings by permitting such presentations. See notes 122-28 infra and accompanying text.

\textsuperscript{109} For an account of a "political trial" in which the defendants employed legally
Allowing defendants more control over their defense may also facilitate their acceptance of court-appointed advisory counsel as a helpful spokesman to protect their interests. Moreover, courts customarily assume that the defendant controls the defense, even though the court may allow the attorney exclusive control over trial proceedings. On this assumption California courts have sometimes imputed errors of court-appointed counsel to the defendant because he is presumed to have participated in the planning of his defense.

In Sharp, however, the court suggests that a defendant has no right “to expect proceedings which are planned and conducted by him.” As a result the defendant is held accountable for a defense presented by an attorney he does not want and over whom he has no significant control. Under these circumstances the defendant may regard his attorney as a representative of his accusers rather than as his personal advocate. This, in turn, only reinforces the skepticism and mistrust that prompts defendants to request self-representation in the first place.

The court’s failure to discuss the consequences of this distrust in Sharp also contrasts with those federal courts that are now examining the need to “make people feel they are getting justice.” The Ninth Circuit, for example, has recently criticized a Los Angeles trial court for failing “to ease the distrust and concern” of a defendant who refused to cooperate with his court-appointed counsel. The Ninth Circuit added that this defendant might not have been convicted if the court had provided him with counsel “in which he had confidence.”

But the often troubled relationship between assigned counsel and his unwilling client is not likely to improve now that each is forced...
upon the other; and it seems improbable that this action is in either's best interest.\textsuperscript{110}

If all courts undertake the task of refereeing this unhappy marriage as outlined by the recent decision in the Ninth Circuit, a defendant will be able to cause as much disruption by refusing to cooperate with his lawyer as he once caused by conducting his own defense. Thus, mandatory counsel may still result in delay and disruption yet it will not provide the defendant with any constructive opportunity to participate in his own defense. This rule may also invite public expressions of resentment. In recent months, for instance, defendants have not only refused to cooperate with their court-appointed attorneys, but have even physically attacked their attorneys in the courtroom.\textsuperscript{120} Even if this violent reaction to mandatory court-appointments is relatively rare, however, it still presents a pathetic picture of Justice Sutherland's original concept of the "guiding hand."\textsuperscript{121}

IV. AN ALTERNATIVE—ADVISORY COUNSEL

In contrast to the paternalistic view expressed in \textit{Sharp}, other courts advocate a more sociological approach to the pro se defense. \textit{Sharp} suggests that regardless of the defendant's wishes the court should provide each defendant with the most competent legal defense available. The court reasons that in this way the accused will receive a superior defense and unnecessary reversals, disruption, and delay will be eliminated.

On the other hand, those courts adopting a more sociological approach reason that society has no right to infringe on the autonomy of each defendant or on his right to speak in his own behalf. Courts advocating this position argue that it is only after a court has made every effort to respect the rights of the defendant that a court can, in return, demand respect for the judicial process. Therefore, if nothing else,
protecting the defendant's right to self-representation and advisory counsel enables the court to allow the defendant to prepare the defense of his choice. Although this effort to accommodate the system to each individual is an appealing intellectual concept, these authorities rarely discuss how such a system would remedy abuse of the right to self-representation. Therefore, it is important to examine Sharp's request for advisory counsel and self-representation in light of the three problems squarely confronting the court in Sharp—unnecessary reversal, disruption and delay.

In response to the difficult problem of reversal, Chief Justice Burger argues that a trial judge is always well-advised to appoint advisory counsel for every pro se defendant.\footnote{122} By automatically granting the defendant his right to counsel along with his right to self-representation the Chief Justice implies that many trial judges have been able to "blunt [the defendant's] sixth amendment claims."\footnote{123} Since the defendant has been given both rights at the trial, he is unable to appeal on the grounds that he has been deprived of his right to either self-representation or counsel. In California, Mattson may have prevented many courts from considering this alternative by disapproving requests for advisory counsel. But since the reasoning in Mattson is inconsistent with Sharp, it is still relatively easy to limit Mattson to the unique facts upon which that opinion is based.\footnote{124} Because the court did not consider the problems of reversal in Mattson, the court did not discuss the possibility that widespread use of advisory counsel might be advantageous to the court as well as to the defendant.

The problem of disruption cannot be entirely remedied by any procedural device, but the practice of advisory counsel at least gives the court added flexibility in responding to uncooperative defendants. Dual representation may reduce the defendant's antagonism and encourage trust in advisory counsel,\footnote{125} but nothing can effectively deter those defendants who deliberately set out to create a spectacle of their trial. In Illinois v. Allen,\footnote{126} however, the Supreme Court held that a criminal defendant forfeits his right to remain in the courtroom by...
"conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on."\textsuperscript{127} It is implicit in this holding that a defendant can also forfeit his right to self-representation. While no court has ever held that a disruptive pro se defendant cannot be replaced by counsel the process of bringing in new counsel only subjects the court to further delay and disruption. The flexibility permitted by advisory counsel allows the court to replace the defendant with counsel at any time without waiting for an attorney to familiarize himself with the record.

Advisory counsel may also prevent delay during the initial colloquy with the defendant. In the past this pre-trial examination by the trial judge has been scrutinized closely on appeal, and the assignment of advisory counsel may relieve the trial judge of the burden of irrevocably determining, before the trial has even begun, whether the defendant is competent to represent himself. Instead, the judge is able to permit every apparently competent pro se defendant to proceed.\textsuperscript{128} If the defendant later proves unable to represent himself, the judge can order his advisory counsel to take his place. These efforts to accommodate the pro se defendant will not always guarantee his complete cooperation, but they at least provide the trial judge with a flexible set of responses for each defendant. More important, dual representation allows the defendant to participate without depriving him of counsel or a defense which is a credit to the defendant and to the court.

The availability of the alternative of advisory counsel suggests that it is not necessary to eliminate the right to self-representation in order to prevent its abuse. Since Jerome Sharp requested advisory counsel, it is, perhaps, unfortunate that he was not allowed to present the factual defense he had prepared. But this seems even more unfortunate when advisory counsel may also have protected the court from the very procedural problems that might have motivated the denial of his request.

CONCLUSION

California's frustrating experience with the pro se defense and present availability of court-appointed counsel evidently prompted the California Supreme Court to severely restrict the criminal defendant's traditional right to self-representation. A state referendum which eliminated the state constitutional right to self-representation and a generally hostile public reaction to the pro se defense undoubtedly influenced the court to hold that self-representation could be limited to "proper cases" to be determined by the trial judge.

\begin{footnotes}
\item[127.] Id. at 343.
\item[128.] See note 103 supra.
\end{footnotes}