GORDON v. JUSTICE COURT: DEFENDANT'S RIGHT TO A COMPETENT TRIBUNAL

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Introduction

> Trial courts of limited jurisdiction . . . have unlimited capacity to affect public attitudes toward law for better or worse. It is these courts, not the appellate courts, that the people generally know first hand. What they observe there of justice or injustice, of efficiency or bumbling, determines whether they will look upon courts with respect and pride or with cynicism.[1]

The quality of justice available in our lower courts should be a matter of first importance to everyone concerned with the quality of justice in our society. The abilities of the judges of the "popular courts" are often as crucial to the just determination of the rights of criminal defendants as are the abilities of defense counsel. Although the right to effective assistance of counsel has been established in the last decade as a right which is essential to the fair trial of criminal defendants in the United States,[2] the importance of an educated and experienced judge to the fairness of the trial has been undervalued. When the California Supreme Court was recently faced in *Gordon v. Justice Court*[3] with a challenge to the constitutionality of allowing a judge who was not an attorney to preside over a criminal trial, the court determined that the capability of a judge to deal with legal issues involving the rights of a criminal defendant was indeed crucial to the guaranty of a fair trial. In a unanimous decision the court held that denial of an attorney judge to an accused facing the possibility of incarceration on conviction is a denial of due process under the United States Constitution.[4] The decision may someday become a landmark in the due process area, as it marks the first time that a court has indicated

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1. Traynor, *Rising Standards of Courts and Judges*, 40 CAL. ST. B.J. 677, 688-89 (1965).

2. See text accompanying notes 92-101 *infra*.

3. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*. 420 U.S. 938 (1975).

4. *Id.* at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635.

that the "justice" guaranteed by the Constitution to those facing loss of liberty may comprehend the right to a competent judiciary.

This note will explore the basis and import of the *Gordon* decision and will contrast its judicially imposed requirement of bar admission with the solutions attempted by various state legislatures to guarantee the judicial competence of lower court judges.

I. Gordon v. Justice Court: A Synopsis

Lewis Gordon and Santiago Arguijo were charged with serious misdemeanor crimes and their cases were set for trial before lay judges. Lewis Gordon was charged wih disturbing the peace and failing to disperse.[5] Santiago Arguijo was charged with driving under the influence of alcohol.[6] Both Gordon and Arguijo moved to disqualify the justice court judges presiding over their cases[7] on the grounds that a nonattorney judge was *per se* unqualified to preside over a criminal case.

After their motions to disqualify for cause were denied, the petitioners sought extraordinary pretrial relief on behalf of themselves and all other defendants in criminal proceedings presided over by lay judges.[8] A general demurrer to the petition was sustained without leave to amend, and the lower court ruling was affirmed by the court of appeal.[9] By the time the appeal from denial of the extraordinary writ was heard in the California Supreme Court, both Gordon and Arguijo had pleaded guilty to lesser charges before attorney judges.[10]

Nevertheless, the California Supreme Court elected not to hold the case moot, since it raised an issue of "broad public interest that is likely to recur . . . ."[11] In a unanimous opinion written by Acting Chief Justice Burke, the court held that a lay judge may not preside over a trial where an accused faces a potential jail sentence, unless the defendant waives his or her right to an attorney judge.[12] The court based its decision on the right to a fair trial, which is protected under the due process clause of the Fourteenth Amendment to the United States Constitution.[13] The decision came after years of widespread

5. CAL. PENAL CODE §§ 415, 416 (West 1970).

6. CAL. VEH. CODE § 23102(a) (West 1971).

7. CAL. CIV. PRO. CODE § 170.8 (West Supp. 1975) (providing for disqualification of a judge for cause).

8. Gordon v. Justice Court, 12 Cal. 3d 323, 326, 525 P.2d 72, 74, 115 Cal. Rptr. 632, 634 (1974), *cert. denied*, 420 U.S. 938 (1975).

9. *Id.*

10. *Id.* n.1.

11. *Id.* at 326, 525 P.2d at 74, 115 Cal. Rptr. at 634, *quoting In re* William M., 3 Cal. 3d 16, 23, 473 P.2d 737, 741, 89 Cal. Rptr. 33, 37 (1970).

12. *Id.* at 327, 525 P.2d at 74, 115 Cal. Rptr. at 634.

13. *Id.* at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635.

criticism of the lay judge system and recognition of the need for reform of the lower court systems in general.[14] The United States Supreme Court denied certiorari on the question, however, and as a result California now recognizes a due process right that is unrecognized in all other states.

In its decision the court stressed that, although the office of lay judge had its roots in the early Anglo-Saxon judicial system, the lay judge system could not be permitted to continue if, when examined in a modern context, it effected a denial of constitutional rights.[15] According to the court's analysis, the justice of the peace system developed in different circumstances than those that exist today. Communications and transportation have improved and attorneys are more readily available. Such changes have relieved the state of the necessity of placing lay persons in judicial positions.[16] Moreover, criminal

14. *See, e.g.*, Note, *Constitutional Challenge to the Justice of the Peace Court in Mississippi*, 44 MISS. L.J. 996 (1973); Dolan & Fenton, *The Justice of the Peace in Nebraska*, 48 NEB. L. REV. 457 (1969); Uhlman, *Justifying Justice Courts*, 52 JUDICATURE 22 (1968); Note, *The Justice of the Peace: Constitutional Questions*, 69 W. VA. L. REV. 314 (1967); Note, *The Justice of the Peace in Virginia: A Neglected Aspect of the Judiciary*, 52 VA. L. REV. 151 (1966); Note, *The Justice of the Peace Court in Florida*, 18 U. FLA. L. REV. 109 (1965); Vanlandingham, *The Decline of the Justice of the Peace*, 12 U. KANS. L. REV. 389 (1964); Nordberg, *Farewell to Illinois J.P.'s*, 40 CHI.-KENT L. REV. 23 (1963); McDonald, *An Obituary Note on the Connecticut Justice of the Peace*, 35 CONN. B.J. 411 (1961); Banyon, *Justice Court on Trial*, 37 MICH. ST. B.J. 35 (1958); Giese, *Why Illinois Proposes to Abolish Justice of the Peace Courts*, 46 ILL. B. J. 754 (1958); Keebler, *Our Justice of the Peace Courts, A Problem in Justice*, 9 TENN. L. REV. 1 (1930); Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118 (1927). *See also* COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, *Standards Relating to Court Organization* 40 (Final Draft 1974), which recommends in pertinent part that all judges "should have a broad general and legal education and should have been admitted to the bar . . . . In addition to these qualifications:

(1) Trial judges. Persons selected as trial judges should have had substantial experience in the adversary system, preferably as judges or judicial officers in other trial courts, or as trial advocates, and in any event should have had experience in the preparation, presentation, or decision of legal argument and matters of proof." *Id.* at § 1.21(a).

15. 12 Cal. 3d at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635. The court relied on Wolf v. Colorado, 338 U.S. 25 (1949) for the proposition that "[d]ue process of law . . . conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." *Id.* at 27.

16. The *Gordon* court commended the various measures which have been adopted over the last 25 years to improve the justice court system, but pointed out that they have been inadequate to dispel the possibility that the nonattorney judge will not be able to

law and procedure have become extremely complex, making this body of law increasingly difficult for persons with no legal education to master.[17]

The court's holding, in effect, created a conclusive presumption that lack of admission to the California bar makes a judge incapable of administering criminal justice in the state. The logic of the holding turns on the court's factual finding that a judge's legal training is relevant to the "fairness" of an individual trial. Since the right to a fair trial is accepted as a right fundamental to our system of justice, it is made applicable to the states through the Fourteenth Amendment.[18] Once classified as "fundamental,"[19] the right to an attorney judge may be granted if there is a mere reasonable likelihood of prejudice resulting from its denial.[20] Finding that "the increasing complexity of criminal law and criminal procedure has greatly enhanced the probability that a layman will be unable to deal effectively with the complexities inherent in a criminal trial,"[21] the court concluded that, "the likelihood of such a [fair] trial would be substantially diminished," if a lay judge presided.[22] Accordingly, the court held that the use of lay judges to preside over criminal trials should be curtailed.

The rationale of the *Gordon* decision will be examined in more detail in Section III. But it will be helpful in the following discussion of the case to diverge briefly to examine the background and structure of the justice court system which existed in California at the time of the *Gordon* decision.

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afford the defendant a fair trial. 12 Cal. 3d at 333, 525 P.2d at 78-79, 115 Cal. Rptr. at 638-39.

17. *Id.* at 327-28, 525 P.2d at 74-75, 115 Cal. Rptr. at 635.

18. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955).

19. To be classified as such, a right must be among those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions," Powell v. Alabama, 287 U.S. 45, 67 (1932), *quoting* Herbert v. Louisiana, 272 U.S. 312, 316 (1926), and "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

This distinction between fundamental and nonfundamental rights should not be confused with the more narrow sense in which the United States Supreme Court has labeled some rights "fundamental" in the equal protection area in order to accord a strict scrutiny to any restrictions placed on them.

20. *See* Gordon v. Justice Court, 12 Cal. 3d 323, 329, 525 P.2d 72, 76, 115 Cal. Rptr. 632, 636 (1974), *cert. denied*, 420 U.S. 938 (1975). The court relied on Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Frazier v. Superior Court, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971); and Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968), in support of the reasonable likelihood test.

21. 12 Cal. 3d at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635.

22. *Id.* at 329, 525 P.2d at 76, 115 Cal. Rptr. at 636.

II. The California Justice Court System

Lay judges have played an important role in the California judicial system. The California Constitution of 1849 created the office of justice of the peace,[23] but no provision of the early constitution required that the justices be attorneys. Justice courts themselves were first established in 1880 with jurisdiction over a wide variety of civil actions involving amounts up to $300,[24] and over petty larceny, assault and battery, breaches of the peace and all misdemeanors punishable by a fine not in excess of $500.[25] No minimum educational requirements for justice court judges were specified.[26] The expansive California lower court system as we know it today, comprised of both municipal and justice courts, evolved from these modest beginnings.[27] As early as 1930, however, well-informed and concerned groups recognized the inadequacies of the justice court system in California and pressed for changes in the lower courts, including filling the need for properly trained and educated justice court judges.[28]

The California Legislature has responded to much of the criticism aimed at the state court system and has attempted periodically to upgrade the quality of justice available in the state. The most significant changes which the system has undergone were brought about by the 1950 Court Reorganization Plan, which established the basic structure of the present lower court system. The court reorganization was stimulated by a 1947 study undertaken by the California Judicial Council, which found that the California lower court system was complicated, inefficient and uneconomical.[29] The study showed that the absence of

23. CAL. CONST. art. 6, § 1 (1849).

24. Act of March 11, 1872, ch. 5, § 112, [1880] CAL. CIV. PRO. CODE 63-64 (1880).

25. *Id.* § 115 at 65.

26. *See id.* § 85 at 55; *Cal. Const.* art. 6, § 11 (1879).

27. Hennessey, *Qualifications of California Justice Court Judges: A Dual System*, 3 PAC. L.J. 439-43 (1972).

Inferior courts in California are currently comprised of municipal and justice courts. At the end of the 1972-73 fiscal year, there were 76 municipal courts with 380 authorized judgeships handling a total of 4,591,842 nonparking filings and 6,666,645 parking filings. Two hundred twenty-one justice courts, almost all of which were single-judge courts, handled 871,223 nonparking and 317,894 parking filings. JUDICIAL COUNCIL OF CALIFORNIA, 1974 ANN. REP. 139, 145.

28. *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA THIRD BIENNIAL REP. 40 (1930); *Report of Committee to Survey Inferior Court Structure of California*, 19 CAL. ST. B.J. 236 (1944); *Report of Committee on County Courts*, 21 CAL. ST. B.J. 244 (1946); *Report of Court Survey Group*, 7 JUSTICE AND CONSTABLE, no. 8 at 11 (1947); JUDICIAL COUNCIL OF CALIFORNIA FOURTEENTH BIENNIAL REP. 22-23 (1953); S.B. 979, 1967 Regular Session; STAFF REPORT OF CALIFORNIA SENATE COMMITTEE ON GOVERNMENTAL EFFICIENCY, *Choosing Justice Court Judges* 3 (Dec. 1967).

29. *See* JUDICIAL COUNCIL OF CALIFORNIA TWELFTH BIENNIAL REP. 15 (1948). At

minimum qualifications for many judges resulted in a great number of judges who had no legal training and who devoted much of their time to other occupations.[30]

In accordance with its findings, the Judicial Council submitted recommendations for legislation to remedy the defects in the courts and to replace them with only two types—municipal courts in judicial districts with populations of 40,000 or more, and justice courts in districts of less than 40,000.[31] The state bar and other concerned groups favored requiring full-time attorney judges in all courts.[32] However, rural county legislators, lay judges and constables opposed curtailing the use of lay judges.[33] Because of this, the Justices' and Constables' Association proposed a qualifying examination as an alternative prerequisite to a judgeship, and this proposal won out as a compromise measure.[34]

Under the system developed in 1950 and still in use at the time of the *Gordon* decision, a candidate could qualify for election or appointment to a justice court judgeship by admission to the state bar, by successful completion of the qualifying examination administered by the Judicial Council or by being blanketed in by a grandfather clause.[35] The California Constitution gives the legislature complete authority to determine the organization and jurisdiction of the justice courts.[36] The legislature had delegated to the county boards of supervisors the authority to establish the boundaries of judicial districts within their counties,

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the time there were 767 inferior courts of six different types, operating under a variety of constitutional, statutory, municipal and county provisions. This resulted in an overlapping of functions and jurisdictions in many geographical areas and in a lack of uniformity in judicial procedure and the selection of judges. The large number of low-volume courts necessitated an inefficient distribution of financial resources. The amount of funds available for court operations varied according to the number and types of courts in an area and the attitude of local governing boards toward court financing. *Id.*

30. *Id.*

31. *Id.* at 17.

32. BOOZ, ALLEN & HAMILTON INC., CALIFORNIA LOWER COURT STUDY 3 (1971) [hereinafter cited as LOWER COURT STUDY].

33. *Id.*

34. *See* JUDICIAL COUNCIL OF CALIFORNIA TWELFTH BIENNIAL REP. 16, 18 (1948); LOWER COURT STUDY 4.

35. CALIFORNIA GOVERNMENT CODE § 71601 (West 1964) provides: "[n]o person is eligible to the office of judge of a justice court unless he either has been admitted to practice before the State Supreme Court or has within four years preceding his election or appointment passed a qualifying examination under regulations prescribed by the Judicial Council. So long as a person who qualifies for the office of judge by passing such examination remains an incumbent of such office, he shall be eligible to election or re-election to such office. This section does not apply to the incumbent of a superseded inferior court who succeeds to the office of judge of a justice court or is elected to such office at the first election of judges pursuant to the Municipal and Justice Court Act of 1949 or the provisions of law succeeding that act, or who seeks re-election to such office."

36. CAL. CONST. art. 6, § 5.

the salaries of justice court personnel, the location and type of justice court facilities and the authority to fill vacancies which arose between elections.[37] Before the *Gordon* decision, the legislature had given justice courts jurisdiction over misdemeanors punishable by a maximum fine of $1000, a year's imprisonment in the county jail, or both.[38] Although the *Gordon* holding now precludes lay judges from presiding over criminal cases where imprisonment may result, they may still act as magistrates[39] with authority to preside over preliminary hearings.[40]

Critics continued to attack the inadequacies of justice courts, despite the reforms promulgated in 1950. In 1971, the Judicial Council of California instituted a new study of the California lower court system. The study, called the California Lower Court Study, found the lower court system inefficient, nonuniform, expensive and unresponsive to a variety of needs.[41] It especially failed to meet the need for judges with criminal law experience.[42] In addition, the system was found to be deficient in opportunities for the continuing training and professional development of judges.[43] The failure to provide training for judges once in office particularly affected the quality of justice dispensed by lay judges, many of whom lacked the opportunity to readily consult with attorney judges.[44] Even in those counties where attorney judges were available for consultation, the California court organizational system failed to give attorney judges the formal authority or responsibility to advise a lay judge on legal questions.[45] Moreover, the low volume of cases of many part-time justice court judges virtually assured that the lay judges would not have an opportunity to learn through experience, since low-volume courts did not expose the judges to a wide range of judicial assignments and cases. Furthermore, these part-time judgeships could only justify a limited salary, so that many part-time judges were forced to engage in concurrent occupations.[46] As a result,

37. CAL. GOV'T CODE § 71180.3 (West Supp. 1975).
38. CAL. PENAL CODE § 1425 (West Supp. 1975).
39. CAL. PENAL CODE § 808 (West 1970).
40. CAL. PENAL CODE § 858 (West 1970).
41. *See generally* LOWER COURT STUDY.
42. *Id.* at 9, 27-28.
43. *Id.* at 28.
44. *Id.*
45. *Id.*
46. The Lower Court Study found that "[s]ince these part-time judgeships can only justify a limited salary, they generally tend to attract either: (1) retired persons using the judicial salary to supplement their retirement income, or (2) persons already engaged in a business or professional occupation who desire the judicial position for either supplementary income or its prestige value. Neither of these two conditions are particularly desirable in the recruitment of high-caliber judicial personnel. It should be noted that some judges now holding part-time positions oppose making their judicial role full-time because it would restrict their ability to carry on their other business or occupation." *Id.* at 27.

they did not have the time or incentive to keep abreast of changes in the law and court procedure or to pursue professional training.[47]

The study concluded that, "[t]he use of lay judges to handle cases requiring legal background and training, insights and attitudes . . . can create problems in the adjudication of cases."[48] It recommended that the state establish a county court system to replace the present municipal/justice court system.[49] The proposed system would have one judicial officer, a county court judge having the qualifications of the present municipal court judge.[50] One subordinate judicial officer, the county commissioner, would be appointed by the county court judge and would be required to be a licensed attorney, unless no attorneys were available.[51]

The study also recommended that the number of judicial districts be reduced to one for each county and that, if the counties were not large enough to justify full-time judicial staffing, they be consolidated into multicounty organizations.[52] The new lower court system would be state financed and supervised.[53]

The subsequent Unified Trial Court Feasibility Study,[54] also sponsored by the Judicial Council, grew out of the Lower Court Study. It explored the possibility of converting the lower courts of general jurisdiction into a uniform system. Due to the findings of the Lower Court Study, the Unified Trial Court Feasibility Study recommended that lay judges be phased out of the lower courts as quickly as possible.[55] It concluded that a single-level trial court with one type of judge was the most desirable form of organization for the lower courts, but recommended achievement of this goal through a three-step process.[56] The first step would be the enactment of legislation and a proposed constitutional amendment in 1972 to create an administrative structure for unification of the lower courts.[57] The actual unification of the lower courts would take place gradually. Stage two would accommodate the implementation of detailed legislation and planning so that the unified court system could be phased in gradually in the third stage on an indi-

47. *Id.* at 7.
48. *Id.* at 27-28.
49. *Id.* at 50.
50. *Id.* at 81.
51. *Id.* at 82.
52. *Id.* at 52.
53. *Id.* at 96.
54. BOOZ, ALLEN & HAMILTON, INC., CALIFORNIA UNIFIED TRIAL COURT FEASIBILITY STUDY (1971) [hereinafter cited as UNIFIED TRIAL COURT STUDY].
55. *See id.* at A 41.
56. *Id.* at A 41-43.
57. *Id.* at A 43-49.

vidual county basis beginning in January of 1975.[58] The Judicial Council suggested that the state assume the costs of salaries and fringe benefits of all judicial personnel.[59]

Accordingly, Senate Constitutional Amendment 15 and Senate Bills 296 and 297 were introduced in 1972 to effectuate the Judicial Council's recommendations.[60] A number of other measures and constitutional amendments were proposed in the same year containing similar proposals in both the senate and the assembly.[61] However, none of these measures received favorable action by the legislature and none of the proposed constitutional amendments were submitted to the voters in the general election. Since that time all attempts to implement the recommendations of the Unified Trial Court Feasibility Study have similarly failed.

Thus, when *Gordon* was decided in 1974, the inadequacies of the lay judge system had been extensively examined and the case for reform had been adequately presented, but the California Legislature had been unable to effectuate the necessary changes. Since the legislature had failed to act, it remained for the California Supreme Court to find that the lay judge system contained an inadequacy of constitutional dimension.

III. Gordon's Implications: An Emerging Right to a Competent Tribunal

Gordon v. Justice Court explicitly holds only that a defendant charged with a crime that carries a possible prison sentence has the right to be tried before an attorney judge.[62] Implicit in the rationale underlying the *Gordon* opinion, however, is the notion that due process requires a competent tribunal.

The Inadequacy of the Lay Judge to Meet the Demands of the Modern Judicial System

In *Gordon*, the California Supreme Court examined the present state of the law and found that, due to the recent expansion of the rights of the accused, presiding over a criminal trial has become very complex and difficult.[63] The court determined that the issues to be dealt with in a criminal trial may well be beyond the lay judge's training and ex-

58. *Id.* at A 50-61.

59. JUDICIAL COUNCIL OF CALIFORNIA, 1972 ANN. REP. 21.

60. S.B. 296 and S.B. 297 (1972 Regular Session); Senate Constitutional Amendment 15 (1972 Regular Session).

61. Senate Constitutional Amendments 41, 57 (1972 Regular Session); S.B. 852, 1152 (1972 Regular Session); A.B. 159, 160 (1972 Regular Session).

62. 12 Cal. 3d at 327, 525 P.2d at 74, 115 Cal. Rptr. at 634.

63. *Id.* at 330-31, 525 P.2d at 77, 115 Cal. Rptr. at 636-37.

perience.[64] It concluded that, because of the complexity and difficulty of the present state of the criminal law, a reasonable probability exists that a judge who has not been trained in the law would not be able to understand the substance and import of the law to be used and would not be adept at the process of applying this law to specific instances.[65] Although the court did not premise its decision merely on an analogy between the right to an attorney and the right to an attorney judge, the opinion suggests that the problems of law involved in criminal trials are as difficult for a judge to understand and deal with as they are for one acting in the capacity of counsel.[66]

The court's findings are supported by the vast number of recent United States Supreme Court decisions in the criminal procedure area which have both expanded the rights of the accused and complicated their protection.[67] Nearly all of the guarantees of the Fourth, Fifth and Sixth Amendments have been made applicable to the states in recent years through the due process clause of the Fourteenth Amendment, while other decisions have strengthened these same guarantees. Dramatic changes have taken place in the past fifteen years under federal precedents affecting such interests as the right to be free from unreasonable search and seizure,[68] the privilege against self-incrimination,[69] the inadmissibility of certain confessions,[70] the right to

64. *See id.* at 332-33, 525 P.2d at 78, 115 Cal. Rptr. at 638.

65. *See id.* at 329-33, 525 P.2d at 76-79, 115 Cal. Rptr. at 636-39.

66. *See id.* at 332-33, 525 P.2d at 78, 115 Cal. Rptr. at 638.

67. *See generally*, THE BUREAU OF NATIONAL AFFAIRS, THE CRIMINAL REVOLUTION AND ITS AFTERMATH (1972). *See* notes 68-77 *infra*.

68. *See, e.g.*, United States v. Brignoni-Ponce, 43 U.S.L.W. 5028 (U.S. June 30, 1975) (reasonable suspicion required prior to questioning person about his citizenship); United States v. Ortiz, 43 U.S.L.W. 5026 (U.S. June 30, 1975) (probable cause required for fixed checkpoint searches); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (probable cause required for roving border searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view of objects inside house furnishes probable cause but does not authorize entry to seize without a warrant); Chimel v. California, 395 U.S. 752 (1969) (scope of search incident to arrest); Spinelli v. United States, 393 U.S. 410 (1969) (search warrant affidavits); Terry v. Ohio, 392 U.S. 1 (1968) (limitations of exclusionary rule); Sibron v. New York, 392 U.S. 40 (1968) (search not justified by what it produces); Katz v. United States, 389 U.S. 347 (1967) (4th Amendment protects people not places); Aguilar v. Texas, 378 U.S. 108 (1964) (content of affidavit required for probable cause); Wong Sun v. United States, 371 U.S. 471 (1963) (the "fruit of the poisonous tree" doctrine); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applied to states).

69. *See, e.g.*, United States v. Nobles, 43 U.S.L.W. 4815 (U.S. June 23, 1975) (5th Amendment does not extend to statements elicited by investigator on behalf of defendant); Kastigar v. United States, 406 U.S. 441 (1972) and Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972) (scope of immunity required); Griffin v. California, 380 U.S. 609 (1965) (barring comment on failure to testify); Malloy v. Hogan, 378 U.S. 1 (1964) (full privilege against self-incrimination must be accorded

a fair[71] and speedy trial,[72] the right to a trial by jury,[73] the right to counsel,[74] the right to confrontation of witnesses,[75] the right to fair treatment in sentencing,[76] and freedom from double jeopardy.[77] A

by states); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (intergovernmental immunity).

70. *See, e.g.*, United States v. Hale, 43 U.S.L.W. 4806 (U.S. June 23, 1975) (respondent's silence during custodial interrogation inadmissible as "prior inconsistent statement"); Harris v. New York, 401 U.S. 222 (1971) (statements inadmissible against defendant in case in chief may be admissible to impeach); Orozco v. Texas, 394 U.S. 324 (1969) ("in custody" interrogations include those in defendant's home); Miranda v. Arizona, 384 U.S. 436 (1966) (procedural protections afforded during custodial interrogations); Jackson v. Denno, 378 U.S. 368 (1964) (determination of "voluntariness" of confessions); Escobedo v. Illinois, 378 U.S. 478 (1964) (confession excluded when made after denial of counsel).

71. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (proof beyond reasonable doubt constitutionally required); Sheppard v. Maxwell, 384 U.S. 333 (1966) (failure to control news coverage to protect jury's impartiality is denial of fair trial); Estes v. Texas, 381 U.S. 532 (1965) (televising of a notorious trial is denial of fair trial).

72. *See, e.g.*, Moore v. Arizona, 414 U.S. 25 (1973) (prejudice to defendant not necessary); Barker v. Wingo, 407 U.S. 514 (1972) (no inflexible test—a variety of relevant factors); Dickey v. Florida, 398 U.S. 30 (1970) (8 years to trial was not speedy trial); Smith v. Hooey, 393 U.S. 374 (1969) (state's duty to make "good faith effort"); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial applicable to states as a fundamental right).

73. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972) (unanimous verdict not required in state court cases); Baldwin v. New York, 399 U.S. 66 (1970) (potential sentence of 6 months makes offense "serious"); Williams v. Florida, 399 U.S. 78 (1970) (six-person jury upheld); Duncan v. Louisiana, 391 U.S. 145 (1968) (fundamental nature of right to jury trial makes it applicable to states); United States v. Jackson, 390 U.S. 570 (1968) and Singer v. United States, 380 U.S. 24 (1965) (no constitutional right *not* to be tried by a jury).

74. *See, e.g.*, Faretta v. California, 43 U.S.L.W. 5004 (June 30, 1975) (there is a constitutional right *not* to have counsel); United States v. Ash, 413 U.S. 300 (1973) (right to counsel does not apply to photographic displays); Humphrey v. Cady, 405 U.S. 504 (1972) (waiver of counsel must be intelligent and understandingly made); Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel does not apply to pre-indictment lineups); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel extended to misdemeanor defendants); Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel applied to preliminary hearings); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel applied to post-indictment lineups); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to appointed counsel extended to defendants in state felony prosecutions).

75. *See, e.g.*, Bruton v. United States, 391 U.S. 123 (1968) (out-of-court confession by codefendant inadmissible in joint trial); Pointer v. Texas, 380 U.S. 400 (1965) (use of prior testimony without opportunity for cross-examination invalidated).

76. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971) (invalidating imprisonment as alternative to paying fine); Boykin v. Alabama, 395 U.S. 238 (1969) (judge must determine that guilty plea is voluntary and intelligent before acceptance); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at deferred sentencing-probation revocation proceeding).

77. *See, e.g.*, Illinois v. Somerville, 410 U.S. 458 (1973) (no jeopardy attaches when mistrial declared after jury was impaneled and sworn but before any evidence was

similar expansion of the rights of the criminal defendant has taken place in the California courts under California precedents.[78] As a result, greater demands have been placed on lower court judges who must implement these decisions. It is now essential, therefore, that the judge presiding at a criminal trial understand and be able to apply a highly complex, constantly evolving body of law.

The responsibilities of the judge presiding over a misdemeanor trial are numerous and weighty. They begin at voir dire examination and continue through determination of guilt. In addition to resolving complex constitutional issues, the judge must determine the acceptability of guilty pleas and must make proper sentencing decisions. In California, justice court judges may be called upon to preside over jury trials.[79] One of their most important functions in this respect is to shield the jury from misleading arguments and improper evidence.[80] When making such evidentiary determinations, the trial judge must weigh the legal merits of the arguments of opposing counsel, both of whom are often convincing and trained advocates. Both the defendant and the state face the possibility of being prejudiced by a determination

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taken); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (rendition of a higher sentence upon retrial following reversal of a conviction does not constitute double jeopardy); Ashe v. Swenson, 397 U.S. 436 (1970) (the constitutional guarantee against double jeopardy embodies collateral estoppel); Price v. Georgia, 398 U.S. 323 (1970) (jeopardy is risk of conviction, not punishment itself); United States v. Jorn, 400 U.S. 470 (1971) (reprosecution after trial judge discharged jury and declared mistrial without defendant's consent is double jeopardy); Waller v. Florida, 397 U.S. 387 (1970) (state and municipality may not be treated as separate sovereigns for purposes of double jeopardy); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy provision applies to states through the 14th Amendment); Cichos v. Indiana, 385 U.S. 76 (1966) (trial for greater offense bars prosecution for lesser offense); Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959) (successive prosecutions by separate sovereigns does not constitute double jeopardy).

78. *See, e.g.*, People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970) (required disclosure of plea bargain); *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969) (protections afforded during guilty pleas); People v. Rosales, 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968); People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967) (prohibition against no-knock entry); *In re* Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967) (elements necessary for effective waiver of counsel); People v. Coffey, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967); *In re* Woods, 64 Cal. 2d 3, 409 P.2d 913, 48 Cal. Rptr. 689 (1966) (illegally obtained prior conviction is inadmissible for impeachment); People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965) (statement of codefendant in joint trial is inadmissible).

79. CAL. CIV. PRO. CODE § 231 (West Supp. 1975).

80. "The Court is no longer confined, if such ever was the rule, to the role of sitting as a mere arbitrator between opposing counsel. It is the function of the court to see that errors or extraneous matters are not brought into the case, which might have the effect of clouding the issue or confusing the jury." Fortner v. Bruhn, 217 Cal. App. 2d 184, 191, 31 Cal. Rptr. 503, 507 (1963).

of the trial judge which is based on criteria other than the legal merits.[81]

In *Gideon v. Wainwright*[82] it was established that a lay person cannot be expected to be capable of determining whether the evidence offered in a trial is legally admissible or whether it is legally sufficient to establish the crime charged.[83] Yet these are the very determinations that it is the responsibility of the trial judge to make. At times a judge must also make determinations of fact and law under situations requiring him to disregard the truthfulness and probative value of illegally obtained evidence which he has heard in its full and potentially incriminating detail. Yet it has been held unconstitutional to entrust to a lay person determinations requiring the segregation of the issue of admissibility from the issues of truthfulness and guilt.[84] There is no reason to believe that a judge with little more legal knowledge and training than the average juror can separate these issues any more skillfully than could the juror. The intricacies and vagaries of legal concepts are not capable of being grasped instantly or facilely. Although some lay judges may have acquired expertise with the law through years of experience, only the most diligent and conscientious would acquire such knowledge and keep abreast of continuing changes in return for the insufficient financial remuneration which was provided by the office at the time of the *Gordon* decision.[85]

A judge must be capable of making the judicial determinations entrusted to him by applying relevant law. It is obviously impossible for a judge to discharge an obligation to apply the law if he does not have the legal education to ensure a basic understanding of the law that must be applied. Even though the lay judge may have the best intentions and try diligently to decide the issues fairly, without knowledge of the law he has virtually nothing but his subjective impressions to guide him. Dean Pound observed the importance of legal education:

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81. The defendant's interest in a determination based on the legal merits is basic, since his right to liberty is at stake. But the state's interest in obtaining a just determination based on the law is no less important, since it has only a limited right to appeal the verdict in a criminal case. *See* CAL. PENAL CODE § 1466 (West 1970).

82. 372 U.S. 335 (1963).

83. *Id.* at 345, *quoting* Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

84. Jackson v. Denno, 378 U.S. 368 (1964) (procedure that leaves the preliminary legal determination of the voluntariness of a confession to the jury is invalid in view of the inability of the jury to disregard the substance of the confession in determining admissibility and in determining guilt); Bruton v. United States, 391 U.S. 123 (1968) (codefendant's confession inculpating the defendant cannot be used in a joint trial even if jury is instructed that confession was admissible only against the declarant).

85. Salaries for justice court positions were very low at the time of the *Gordon* decision—significantly lower than those of municipal court judges exercising the same functions. *See* JUDICIAL COUNCIL OF CALIFORNIA, 1974 ANNUAL REP. 67-68. See also text accompanying notes 43-47 *supra*.

> Administration of justice according to law has six advantages: (1) Law makes it possible to predict the course which the administration of justice will take; (2) law secures against errors of individual judgment; (3) law secures against improper motives on the part of those who administer justice; (4) law provides the magistrate with standards in which the ethical ideas of the community are formulated; (5) law gives the magistrate the benefit of all the experience of his predecessors; (6) law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty, immediate interests.[86]

In one of the earliest critical commentaries of the justice of the peace system, Chester H. Smith observed the harmful consequences of a lack of legal training, even where the judge is intelligent, impartial and sincerely attempts to further justice:

> With no training in the law, no training in the process of judicial thought, no mental habit of mind which is acquired only by constant experience in legal reasoning, it would indeed be strange if a [lay judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him, the [lay judge] is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the experience of the ages to assist him but is helpless to do any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the system] . . . . Such justice in not justice at all. It is "unequal, uncertain and capricious."[87]

A law degree and bar admission may not be an infallible test of competency, but it at least guarantees a minimum level of exposure to the law and to legal concepts which most laypersons lack.

In *In re Gault*[88] the Supreme Court pointed out the effects of a judicial system lacking in substantive standards and noted that "[u]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[89] In *Gault* the Court addressed the problem of the nonattorney status of many juvenile court judges, and observed that "good will, compassion and similar virtues

86. Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 709 (1913).

87. Smith, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118, 127-28 (1927), *quoting* R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 75 (3d ed. 1920).

88. 387 U.S. 1 (1967).

89. *Id.* at 18.

are . . . admirably prevalent throughout the system," but that "expertise, the keystone of the whole venture, is lacking."[90] The Court's observations in *Gault* are equally applicable to the lay judge system as a whole. Regardless of how "benevolently motivated," the lay judge's innate sense of fairness cannot substitute for the consistent application of legal principles that due process demands. The defendant will have been denied due process if, despite having counsel appointed and his case skillfully presented, the legal import of counsel's arguments is overlooked or misunderstood by the judge.[91]

Unarticulated Constitutional Considerations

The *Gordon* holding is clearly and narrowly delimited to the proposition that due process requires that an accused facing the possibility of incarceration upon conviction be given the opportunity to have his case tried before an attorney judge. The decision suggests two interesting ideas, however, that were not developed by the court: (1) that the right to counsel may itself require a judge who can comprehend counsel's arguments, and (2) that, given the duties and responsibilities of the trial judge in light of the present complexity of criminal law and procedure, due process may require that a judge be held to certain additional standards of competency.

The right to counsel has been consistently extended since its original application to state court prosecutions for capital offenses in *Powell v. Alabama.*[92] In 1963 the United States Supreme Court's decision in *Gideon v. Wainright* made the right to appointment of counsel for an indigent criminal defendant "a fundamental right, essential to a fair trial."[93] Although the Court had unequivocally declared in *Powell* that "the right to the aid of counsel is of this fundamental character,"[94] it was not until the *Gideon* decision that the right was extended to all felony defendants. *Gideon* held, in effect, that the law is too complicated to consider it fair to incarcerate someone without offering him the opportunity to be represented by an attorney. The court based its holding on a presumption that a layperson is incapable of defending himself or of adequately preparing a case for adjudication.

The progeny of *Gideon* clarified and extended the right to counsel still further. In 1972 the Supreme Court made clear that indigent defendants must be appointed counsel even in misdemeanor trials and in fact whenever the defendant faces the possibility of impris-

90. *Id.* at 14-15 n.14, *quoting* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 809 (1966).

91. 12 Cal. 3d at 325-26, 525 P.2d at 73, 115 Cal. Rptr. at 633.

92. 287 U.S. 45 (1932).

93. *See* 372 U.S. 335, 340 (1963).

94. 287 U.S. at 68.

onment upon conviction.[95] The Court's decision in *Coleman v. Alabama*[96] determined that counsel must be offered the defendant "at every step in the proceedings against him," including preliminary examinations.[97]

Since *Gideon*, the right to counsel in state courts has been expanded substantively as well as procedurally. Subsequent decisions have begun the formulation of certain standards for counsel, which are necessary for "adequate" or "effective" representation.[98] Even before *Gideon* it was established that the requirement of the right to counsel in criminal cases cannot be met merely by appointing counsel "at such time or under such circumstances as to preclude the giving of effective aid . . . ."[99] Moreover, courts have not required inadequacy or mismanagement on an attorney's part before finding a deprivation of an accused's right to effective representation. Defendants have been found to have been deprived of effective counsel due to extrinsic factors beyond counsel's control. For example, where attorneys were appointed without being given sufficient time to adequately prepare their cases[100] or

95. Argersinger v. Hamlin, 407 U.S. 25 (1972). In *Argersinger* the right to appointed counsel was extended to indigents charged with misdemeanors. The Court reasoned that the concepts involved in a misdemeanor trial were frequently as difficult and weighty as those involved in felony proceedings. Therefore, a layperson could no more be expected to effectively prepare a defense against misdemeanor than against felony charges. Although the Court did not use equal protection as a rationale for extending the Sixth Amendment right to misdemeanants, it did imply that where there was no rational reason to differentiate between classifications of crimes, due process should be extended equally in all cases. *See id.* at 32-36.

A similar argument may be made in favor of offering attorney judges equally to all defendants facing loss of liberty, irrespective of geography. Thus, whether a person must be tried by a nonattorney judge should not depend on whether the crime with which the accused is charged was committed in a judicial district of over 40,000, which would require its judges to be members of the bar, or just across the boundary line in an adjacent judicial district of less than 40,000, which would allow a layperson to be the defendant's judge. Such classifications based on geography should not in themselves furnish a sufficient reason to justify unequal treatment of persons where loss of liberty is threatened.

96. 399 U.S. 1 (1970).

97. *Id.* at 7, *quoting* Powell v. Alabama, 287 U.S. 45, 69 (1932). The Court held in *Coleman* that the Alabama preliminary hearing was a "critical stage" of the state's criminal process and that the defendant was as much entitled to counsel's aid at this stage as at the trial itself. 399 U.S. at 10. *See also* United States v. Wade, 388 U.S. 218 (1967). There are, however, some pretrial proceedings to which the right need not be extended. *See, e.g.*, United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972).

98. *See* Finer, *Ineffective Assistance of Counsel*, 58 CORN. L. REV. 1077 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

99. Powell v. Alabama, 287 U.S. 45, 71 (1932).

100. United States v. Helwig, 159 F.2d 616 (3d Cir. 1947); United States v. Berg-

where an excessive number of attorneys were appointed,[101] courts have held that the defendants were denied effective representation.

The *Gordon* opinion noted an "inherent inconsistency in guaranteeing a defendant an attorney to represent him without providing an attorney judge to preside at the proceedings."[102] The court stopped short of holding that the requirement of an attorney judge is actually necessary for the effective assistance of counsel. Instead it perceived the right to counsel and the right to an attorney judge as parallel rights contained under the due process clause of the Fourteenth Amendment: "since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process."[103]

Having found that the right to an attorney judge is itself an essential element of due process, the court probably felt no need to broach the question of whether an educated judge capable of understanding counsel's arguments is necessarily incident to the right to effective assistance of counsel. However, its reasoning does suggest acceptance of the proposition that the right to counsel is nullified if counsel's arguments fall on deaf ears.

A second aspect of the court's reasoning also warrants closer examination. A substantial factor leading to the court's conclusion is apparently the duties and responsibilities of the trial judge in determining and ruling on the rights of the accused. The opinion mentions, for instance, that a lay judge may fail to recognize relevant constitutional issues pertaining to a defendant's rights and may be unable to determine whether an individual has engaged in constitutionally protected activities.[104] It also suggests that a lay judge may be unable to rule properly on the admissibility of evidence, or to preside properly over jury trials, which require "[s]ophisticated determinations regarding the *voir dire* of jurors, the prejudicial effect of evidence and argument, and the submission of proper jury instructions . . . ."[105] Additionally, the opinion shows the court's concern over the lay judge's ability to determine the acceptability of guilty pleas and to arrive at proper sentencing decisions.[106] In stressing the active role that the trial

amo, 154 F.2d 31 (3d Cir. 1946); United States v. Vasilick, 206 F. Supp. 195 (M.D. Pa. 1962); *cf.* Jones v. Cunningham, 313 F.2d 347 (4th Cir.), *cert. denied*, 375 U.S. 832 (1963). *But cf.* Chambers v. Maroney, 399 U.S. 42, 54 (1970).

101. Powell v. Alabama, 287 U.S. 45 (1932); McKenzie v. Mississippi, 233 Miss. 216, 101 So. 2d 651 (1958).

102. 12 Cal. 3d at 333, 525 P.2d at 78, 115 Cal. Rptr. at 638.

103. *Id.* at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638.

104. *Id.* at 330, 525 P.2d at 76-77, 115 Cal. Rptr. at 636-37.

105. *Id.* at 331, 525 P.2d at 77, 115 Cal. Rptr. at 637.

106. *See id.*

judge must now play in a complex legal system, the opinion may forecast an emerging recognition of the importance of a judge, albeit as a fair and impartial arbiter, to insure that the defendant's rights are not abridged in the courtroom. If such is the case, the criminal defendant may have a greater stake in the quality and competence of the judge than a law degree can insure, and the requirement that a judge be an attorney should be only a minimal requirement of due process. Thus, the question in issue is really the competence of the judge to fulfill these responsibilities. The *Gordon* decision may, then, signal the recognition of the importance of a judge to the protection of the rights of an accused, and the evolution of the notion of judicial competence as an integral element of due process.

Gordon is, of course, not the first case to hold that due process guarantees that certain standards be applied to judges. In *Tumey v. Ohio*[107] the Supreme Court of the United States examined a statute allowing the judge of a mayor's court to share in fees and costs only in cases where the defendant was convicted. The court held that where the judge had a "direct, personal, substantial, pecuniary interest" in reaching a conclusion against the defendant, the resulting trial could not be regarded as affording due process.[108] In *Ward v. Village of Monroeville*[109] the Supreme Court held that the requirements of due process prohibited a judge who was also mayor from presiding in a criminal trial where the defendant's conviction would be of financial benefit to his town.[110] The test enunciated in *Tumey* was whether the presiding official's situation was one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . ."[111] In *Ward* the mayor who presided also had responsibilities for revenue production and law enforcement in the town.[112] The Court determined that this was a denial of the disinterested and impartial tribunal guaranteed under the due process clause and enunciated in *Tumey*.[113] Both *Tumey* and *Ward* hold only that a tribunal must be disinterested and unbiased. The decisions indicate, however, that the attitudes and attributes of a judge are at least relevant to the fairness of a trial. The principles inherent in these decisions need not be extended very far to require that the judge also be held to a certain

107. 273 U.S. 510 (1927).
108. *Id.* at 523.
109. 409 U.S. 57 (1972).
110. *Id.* at 60.
111. Tumey v. Ohio, 273 U.S. 510, 532 (1927).
112. 409 U.S. at 58-59.
113. *Id.* at 60.

standard of competence as well, since both a biased judge and an incompetent judge would make rulings and decisions which might prejudice the defendant. *Gordon* is the first decision to hold that a judge must not only be impartial, but also must be held to a standard of competence.

In summation, the *Gordon* opinion raises two very persuasive reasons for holding that an attorney judge is essential to the fair trial of a criminal defendant: (1) the defendant's right to the effective assistance of counsel demands that his judge be capable of comprehending and utilizing counsel's legal arguments, and (2) the defendant's right to a fair trial includes the right to a judge who is competent to be the active courtroom participant in determining and protecting the rights of the accused that the complex, modern legal system demands. Under either analysis of the court's opinion, the "right to an attorney judge" is merely a shorthand way of expressing the right to a competent judge. If the California Supreme Court's reasoning is adopted, then its holding that a judge presiding over a criminal trial must be an attorney should be established as only a *minimal* standard of competence.

IV. Legislatively Imposed Standards of Judicial Competence

The lay judge is still being used in most states of the United States. A dozen states have abolished the office[114] and at least eight more (including California) have substantially restricted the lay judge's criminal jurisdiction,[115] but the remaining states still allow the lay judge considerable authority to determine the rights of criminal defendants. It is likely, therefore, that the issues of the Gordon case will be relitigated in other forums in the future.[116]

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114. States which have abolished lay judges entirely are Connecticut, District of Columbia. Illinois, Iowa, Maryland, Maine, Michigan, Missouri, New Jersey, Oklahoma and Virginia. See text accompanying notes 133-51 *infra*.

115. These states are California, Georgia, Louisiana, Minnesota, Rhode Island, Tennessee, Vermont and Wyoming. See text accompanying notes 152-65 *infra*.

116. Three cases involving similar issues have already come before the courts of other jurisdictions. The Court of Appeals of Arizona in *Crouch v. Justice of the Peace Court*, 7 Ariz. App. 460, 440 P.2d 1000 (1968), cursorily dismissed the appellant's contentions that he was entitled to an attorney judge as a matter of due process. The Court of Appeals of Kentucky in *Ditty v. Hampton*, 490 S.W.2d 772 (1972), however, discussed the issues of due process, equal protection and trial de novo as they relate to the lay judge, and came to conclusions directly contrary to those found in *Gordon*. The Kentucky Court of Appeals found that the Kentucky lay judge system did not deprive the defendant of due process or of equal protection of the law, and its procedure of de novo review would probably save the system even if found to be lacking in due process in the first instance. In March of this year the Kentucky Court of Appeals affirmed a denial of state habeas corpus relief to a petitioner who claimed the judgment was void because the judge who convicted him was not an attorney. The judgment was affirmed in light of the court's previous decision in *Ditty v. Hampton*, and probable jurisdiction

Most of the criticisms of the lay judge have been addressed to justice of the peace courts.[117] The office of justice of the peace has traditionally been the repository of the lay judge's power. However, nonattorney judges are also found in municipal, police, village, city, mayors' and magistrates' courts. Constitutional challenges could be raised against their use in any of these courts. Convictions for violations of city ordinances, for example, often involve the possibility of imprisonment, even though the violations are not always classified as misdemeanors. A village court judge may be depriving the defendant of due process by presiding over a prosecution for such a violation, even though this may be his only criminal law function.

It may be that the lay judge cannot realistically or beneficially be retired from office overnight. Overcrowded courts are a problem in many states and the lay judge probably takes some of the strain off an already overtaxed professional judiciary. The convenience of many small-volume courts cannot be doubted in areas of low population density.[118] Moreover, there may be a very real lack of attorneys in

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has been noted by the United States Supreme Court. 43 U.S.L.W. 3676 (U.S. June 24, 1975).

Most of the cases which have considered the lay judge status of lower court judges have not even considered the constitutional issues. *See* State v. Peck, 88 Conn. 447, 91 A. 274 (1914) (since probate judge need not be attorney, disbarment does not affect official status); State *ex rel.* Sellars v. Parker, 87 Fla. 181, 100 So. 260 (1924) (official acts of judge not illegal because state laws do not explicitly require municipal court judge to be attorney); *In re* Hudson County, 106 N.J.L. 62, 144 A. 169 (1928) (nothing in state constitution requires judge of Court of Errors and Appeals to be lawyer); City of Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969) (absent constitutional or statutory requirement, judges or magistrates need not be attorneys).

Other state courts have invalidated state statutes establishing the requirement that judges be attorneys because the state constitutions involved did not state such a requirement. *See* Attorney Gen. *ex rel.* Cook v. O'Neill, 280 Mich. 649, 274 N.W. 445 (1937) (legislature has no power to annex qualifications for circuit court judges which are not found in state constitution); Mississippi County v. Green, 200 Ark. 204, 138 S.W.2d 377 (1940) (unconstitutional for legislature to add requirements for judgeships in county, probate and common pleas courts to those enumerated in constitution); Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913) (statute creating additional qualifications invalid since constitution provides that all voters are eligible for office).

As the *Gordon* opinion mentions, however, none of these opinions have satisfactorily resolved the inconsistency of requiring that the accused be represented by counsel and yet allowing an untrained and sometimes uneducated judge to preside. 12 Cal. 3d at 333, 525 P.2d at 78, 115 Cal. Rptr. at 638.

117. *See* note 14 *supra.*

118. The increasing complexity of the justice system, however, may be making even the convenience of local courts obsolete. The California Lower Court Study reported that a major defect in the justice court system in California was the "[u]nproductive and often heavy travel time requirements of persons who serve the court, such as prosecutors, defense counsel, reporters and transporters of defendants in custody" due to the inconvenient locations of the justice courts, many of which have no other reason for existence

many areas of the country that necessitates the use of nonattorney judges to a greater extent.

Even if it is determined that lay judges are needed in some states, however, it is necessary to question whether they are needed to preside over criminal trials. It may be possible to formulate systems which would guarantee the defendant the right to be heard before a judge who is an attorney when the defendant's liberty is threatened, without abolishing lay judges entirely.

In California the *Gordon* decision left lay judges with authority to preside over all civil cases within their statutory jurisdiction and with authority to preside over any criminal case which does not involve the possibility of imprisonment. The court was careful to point out that a waiver of the right to an attorney judge by the defendant is permissible.[119] The *Gordon* opinion also suggested two possible means of implementing the decision: (1) a cause of action which gives rise to the right to an attorney judge might be transferred to another judicial district in the same county, or (2) the Judicial Council could assign an attorney judge from another area to the cause of action.[120] Each of these alternatives would seem to be a relatively unburdensome way in which to guarantee the defendant a competent and learned tribunal.

Although each of the suggested alternatives would have made use of a procedure already available under the existing system,[121] shortly after *Gordon* was handed down California passed new legislation implementing the decision. The legislature added Government Code sections 71700 - 71704,[122] which provide for temporary justice court circuit judgeships financed out of the state treasury. Each judge appointed to a circuit judgeship will be the presiding judge in the judicial district in which the judgeship is created.[123] The judgeships will be filled by attorneys who have been members of the state bar for five years, become inactive members of the bar at the time of appointment, and are certified by the Judicial Council to be acceptable for judicial assignment

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than their historical locations. BOOZ, ALLEN & HAMILTON, INC., CALIFORNIA LOWER COURT STUDY 24 (1971).

119. Gordon v. Justice Court, 12 Cal. 3d 323, 333-34, 525 P.2d 72, 79, 115 Cal. Rptr. 632, 639 (1974). The court did not discuss the question of whether a knowing and intelligent waiver of the right to an attorney judge would be necessary or, if such waiver is necessary, whether the lay judge could be capable of determining that the waiver was intelligently made.

120. *Id.*

121. CAL. PENAL CODE § 1035 authorizes transfer of cases and California Constitution, article 6, § 6 provides for assignment of judges.

122. CAL. GOV'T CODE §§ 71700-04 (West Supp. 1975).

123. *Id.* § 71700(c).

to other courts.[124] The salaries of the justice court attorney judges will be $30,000 per year, and the salaries of all attorney judges already holding justice court judgeships will be raised to the same figure.[125] The state will reimburse the counties for this increase in compensation.[126] The legislation provides additionally that every justice court vacancy occurring after January 7, 1975, must be filled by an attorney judge.[127]

The new legislation goes beyond the holding in the *Gordon* decision, implementing recommendations made by the California Lower Court Study in 1971. The Lower Court Study found, for example, that the lack of legal knowledge in the justice court system was compounded by the absence of attorney judges with whom lay judges could consult on legal issues.[128] The provision in the new legislation which makes attorney judges presiding judges of their judicial district should provide a higher quality of justice for defendants who are *not* faced with imprisonment, by offering nonattorney judges a trained attorney in a position of authority with whom to consult. The salary of the full-time judgeships created will be sufficient to attract lawyers to these positions. The phasing out of all nonattorney justices upon expiration of their terms is not necessitated by the *Gordon* decision, but will result in a more efficient and learned tribunal for all parties, regardless of whether loss of liberty is threatened. It seems safe to predict that this legislation will facilitate a changeover to a unified trial court system in the near future.

The legislatures of many other states have registered their concern with the quality of justice administered by lay judges, and their attempts at reforming antiquated and overly complex court systems have often included restrictions on the powers of lay judges. States other than California have attempted to deal with the problem of the nonattorney judge and the constitutional questions that it presents through a variety of devices. Twelve jurisdictions have eliminated lay judges entirely.[129] The majority of the remaining states which have dealt with the problem have used one or more of the following measures: (a) restricting the criminal jurisdiction of the lay judge;[130] (b) providing for transfer of proceedings at the defendant's request or requiring the defendant's

124. *Id.* § 71702(a).
125. *Id.*
126. *Id.* § 71702(b).
127. *Id.* § 71701.
128. BOOZ, ALLEN & HAMILTON, INC., CALIFORNIA LOWER COURT STUDY 9 (1971).
129. They are Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Maine, Michigan, Missouri, New Jersey, Oklahoma and Virginia. See text accompanying notes 133-51 *infra*.
130. See text accompanying notes 152-65 *infra*.

consent to trial by a lay judge;[131] (c) providing for trial de novo before an attorney judge on appeal.[132] Unlike California, these states have proceeded entirely through legislative channels.

A. States Which Have Eliminated Lay Judges Entirely

The trend toward the abolition of the lay judge is of recent development. When New Jersey began eliminating lay judges in 1947,[133] it stood alone in its transition to a totally professional judiciary. Connecticut, following New Jersey's example in 1960, repealed the enabling legislation of justice of the peace courts and transferred their jurisdiction to newly created circuit courts,[134] whose judges were required to be admitted to the Connecticut bar.[135] In 1964 Maine adopted a new judicial article[136] and eliminated various courts of limited jurisdiction,[137] retaining justices of the peace in ministerial capacities only.[138]

Most of the states which limit lay judge criminal jurisdiction have converted to the use of attorney judges within the past six years. Michigan and Oklahoma abolished their courts of limited jurisdiction in 1969 and replaced them with district courts whose judges must be attorneys.[139] And since 1970, all judges in the states of Illinois[140] and Missouri[141] and in the District of Columbia[142] have been required to be licensed to practice law. In 1970 Hawaii replaced its magistrate's courts with district courts.[143] The judges of the new district courts are required to be attorneys who have been "licensed to practice in all the courts of the State for at least five years."[144]

The Maryland Constitution was revised in 1971 to require that all judges in the state must first be admitted to the practice of law,[145] and the district court of Maryland was created to supplant all other courts of limited jurisdiction.[146] In 1973 Iowa abolished all lay courts[147] and

131. See text accompanying notes 166-75 *infra*.
132. See text accompanying notes 176-86 *infra*.
133. *See* N.J. STAT. ANN. § 2A:8-12 (1952).
134. CONN. GEN. STAT. REV. § 51-273 (1958).
135. CONN. CONST. art. 5, § 6 (1965).
136. *See generally* ME. CONST. art. 6.
137. ME. REV. STAT. ANN. tit. 4, § 152 (1964).
138. ME. REV. STAT. ANN. tit. 4, § 1001 (1964).
139. MICH. COMP. LAWS §§ 600.8201, 600.9921 (Supp. 1975); OKLA. STAT. ANN. tit. 20, § 91.1 (Supp. 1974); OKLA. CONST. art. 7, § 8.
140. ILL. CONST. art. 6, § 11.
141. MO. CONST. art. 5, § 25.
142. D.C. CODE ANN. § 11-1501(b) (Cum. Supp. 1970).
143. *See* HAWAII REV. STAT. § 604-1 (Supp. 1974).
144. *Id.* § 604-2.
145. MD. CONST. art. 4, § 2.
146. *Id.* § 41-I(h).

converted to a uniform trial court system,[148] completing the final stage in its court reform process.

Justices of the peace and other inferior court offices were abolished in Virginia in 1974[149] and were replaced by the general district court.[150] All full-time judges of the district court of Virginia must now be attorneys.[151]

B. States Which Have Curtailed Lay Judges' Criminal Jurisdiction Significantly

The statutes of some states permit lay judges to hold office, but either give them no criminal jurisdiction at all or permit them to mete out fines alone as punishment. Georgia and Louisiana both have retained justices of the peace,[152] but limit them to issuing arrest warrants, acting as conservators of the peace, and acting as committing magistrates.[153] They do not have any jurisdiction over misdemeanors.[154] Similarly, Rhode Island limits the criminal authority of justices of the peace who are not lawyers to the issuance of arrest warrants.[155] Justices of the peace who are members of the bar, however, may be appointed to "take bail" as well.[156]

Justices of the peace have been substantially eliminated in Minnesota. Since 1971, justices have been required to step down from their offices upon expiration of their terms in every municipality where the county court holds regular sessions.[157] Only one justice of the peace per county court district may be appointed or elected[158] and the justices' authority in criminal cases is limited to accepting guilty pleas, imposing fines, and releasing defendants with or without bail in misdemeanor cases.[159] Justices who are members of the bar may issue war-

147. IOWA CODE ANN. § 602.36 (Supp. 1975).
148. *Id.* § 602.1.
149. VA. CODE ANN. § 19.1-378 (Cum. Supp. 1975).
150. *Id.* § 16.1-69.7.
151. *Id.* § 16.1-69.9(c).
152. GA. CODE ANN. § 24-402 (1935); LA. CONST. art. 7, § 47.
153. GA. CODE ANN. § 24-1501 (1935); LA. CONST. art. 7, § 48. *See also* LA. CODE CRIM. PRO. art. 161 (1967) (abolishes authority of justices of the peace to issue search warrants except in cases where such authority is otherwise specially conferred by law).
154. *See* LA. CONST. art. 7, § 48; GA. CODE ANN. § 24-1501 (1935).
155. R.I. GEN. LAWS ANN. § 12-6-4 (Supp. 1974). *See also* R.I. GEN. LAWS ANN. § 12-10-2 (Supp. 1974) (providing that justices of the peace may not issue search warrants).
156. R.I. GEN. LAWS ANN. § 12-10-2 (Supp. 1974).
157. MINN. STAT. ANN. § 487.35(1) (Supp. 1975).
158. *Id.* § 487.35(2).
159. *Id.*

rants and other criminal processes, but lay justices do not have this authority.[160]

The judicial authority of justices of the peace has been reduced in most counties in Tennessee to accepting appearance bonds and performing other minor acts.[161] Even where justices still are permitted jurisdiction over misdemeanor offenses, they are limited to issuing fines of up to $50, and only in cases where the defendant pleads guilty.[162] Wyoming gives justices of the peace no authority to preside over misdemeanors[163] but authorizes them to issue warrants.[164] It provides, nevertheless, that vacancies in the office must be filled by attorneys, unless none are available.[165]

C. States Which Require Defendant's Consent or Provide for the Right to Transfer

A few states have confronted the constitutional issue presented by the use of lay judges by giving the accused an alternative forum in which to defend. This is a seemingly fair solution and a workable procedure for states which depend on lay judges to administer justice. It might be a workable alternative for those states, for example, which still have a scarcity of attorneys in rural areas or for those states which do not have the funds needed to provide salaries attractive to attorneys.

Alaska's statutes provide that the magistrate's office may be filled by a layperson.[166] Although the magistrate's jurisdiction extends to all misdemeanors and violations of ordinances the magistrate may not preside over a defendant's trial unless the defendant consents in writing to trial by the magistrate or unless he pleads guilty.[167]

In South Dakota and Wisconsin an accused in a criminal case is given the right to have his case transferred to a court where he will be guaranteed an attorney judge.[168] South Dakota magistrates are not required to be lawyers;[169] yet, they have misdemeanor jurisdiction over offenses committed within their counties where punishment is not greater than a $100 fine and/or 30 days imprisonment.[170] However,

160. *Id.*

161. TENN. CODE ANN. § 19-312 (Cum. Supp. 1974), § 19-202 (1955).

162. *Id.* § 40-407 (1955).

163. WYO. CONST. art. 5, § 22, giving misdemeanor jurisdiction to justices of the peace, was repealed as of January 17, 1967 (Supp. 1975).

164. WYO. STAT. ANN. § 7-413 (1957) (justices may issue arrest warrants only).

165. *Id.* § 5-99.1, 5-99.2 (Supp. 1975).

166. ALASKA STAT. ANN. § 22.15.160(b) (1962), as amended by 117 S.L.A. 1967, ch. 117, § 1.

167. *Id.* § 22.15.120(4), (6), (7).

168. S.D. CODE § 16-12A-17 (Supp. 1974); WIS. STAT. ANN. § 253.055 (1971).

169. S.D. CODE § 16-12A-6 (Supp. 1974).

170. *Id.* § 16-12A-16.

defendants in any criminal, quasi-criminal or civil action pending in a magistrate's court may upon oral or written request, have their cases transferred to a court presided over by a law-trained magistrate or circuit judge assigned by the presiding judge.[171]

Wisconsin municipal court justices have jurisdiction over violations of ordinances of cities, towns or villages in the county where the municipal court is located.[172] Although the justices are not required to have any legal education,[173] Wisconsin statutory law prohibits them from presiding over jury trials.[174] The defendant is informed of his right to a jury trial and if he elects to exercise this right, his case is transferred to the county court for trial before an attorney judge.[175]

D. States Offering a Trial de Novo in an Appellate Court

In many states, appeals from justice of the peace and other informal courts involve a trial de novo to a court presided over by an attorney judge, either automatically on appeal or at the defendant's request. Although it causes the defendant greater hardships and inconvenience than would providing an attorney judge in the first instance, this procedure certainly comes far closer to meeting the demands of due process than does the failure to provide an attorney judge altogether. If the possibility of the lay judge's incompetence exists, it is better to offer a trial in an assuredly competent tribunal in a de novo hearing than to deny this right completely.

Accordingly, of the states which give lay judges original criminal jurisdiction, many provide for a trial de novo before an attorney judge upon appeal.[176] Thus, if the defendant is dissatisfied with the decision of the lay judge, he may, in effect, try again in another tribunal with an attorney judge. The right to a de novo trial is not exercised without cost, however. Two trials cost more in terms of time and money than does one, and the chance of a longer sentence on retrial may chill the defendant's exercise of his right to appeal.[177]

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171. *Id.* § 16-12A-17.

172. WIS. STAT. ANN. § 254.045 (1971).

173. *See Id.* § 254.01.

174. *Id.* § 300.04 (Supp. 1975).

175. *Id. See also* WIS. STAT. ANN. § 253.055 (1971) (county judges must be licensed to practice law). It should be noted, however, that Wisconsin statutes offer no relief to the defendant who is threatened with less than a six-month imprisonment.

176. *See* ARIZ. REV. STAT. ANN. § 22-374 (Supp. 1974); DEL. CONST. art. 4, § 28; KY. REV. STAT. ANN. § 25.070 (1970); NEV. REV. STAT. § 189.050 (1957); N.M. STAT. ANN. §§ 36-15-1, 36-15-3, 38-1-13 (1953); N.D.R. CRIM. PRO. 37(g) (1974 REPL. VOL.); UTAH CODE ANN. § 77-57-43 (1953); WASH. REV. CODE § 3.50.410 (Supp. 1974); WIS. STAT. § 300.10(5) (Supp. 1975).

177. *But see* Chaffin v. Stynchcomb, 412 U.S. 17, 33 (1973).

Although the California system contained a limited de novo procedure,[178] the California Supreme Court did not address this issue in *Gordon v. Justice Court*, implying by omission that it considers de novo review an insufficient protection.[179] The United States Supreme Court's position on de novo appeal is unclear. In *Ward v. Village of Monroeville*,[180] it stated that the denial of an impartial judge could not be cured by trial de novo in another court, since the defendant is entitled to a neutral and detached judge in the first instance.[181] In *Colten v. Kentucky*,[182] however, the Supreme Court described Kentucky's procedure of de novo trial appeal in this way:

> In reality the defendant's choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court.[183]

The dual-trial system outlined above hardly seems to comport with notions of the right to a fair trial in the first instance, but this *de minimis* attitude toward the original trial is reflected in the opinions of state courts as well. The Arkansas Supreme Court, for example, has held that even denial of counsel is not a deprivation of due process where the case is tried de novo on appeal with counsel.[184]

The "voluntary" nature of the defendant's exercise of his right to appeal has been used to justify the relaxation of certain constitutional protections on appeal. For example, the double jeopardy clause is not

178. California statutes provide for a limited trial de novo on appeal from a justice court to a county superior court upon a final judgment of conviction. Appeals from questions of fact or from questions of both law and fact are tried anew in the superior court. CAL. CIV. PRO. CODE §§ 904.4, 910 (West Supp. 1975). Appeals on questions of law alone are heard by the superior court acting in a regular appellate proceeding. *Id.* § 910. Thus, important questions of law, which a lay judge would have the most difficult time deciding, would go up on appeal based solely upon a statement of the case prepared by the nonattorney judge himself. If, however, the reviewing court orders a new trial on an appeal on a question of law, the new trial is heard in the superior court to which the appeal was taken. *Id.*

179. The court did discuss the attorney general's argument that the right to *appeal* from a justice court judgment is a sufficient guarantee of due process, dismissing it as having no merit. The court found that "an appeal from a justice court judgment is particularly inadequate to guarantee a fair trial since justice courts are not courts of record, CAL. CONST., art. 6, § 1, and thus no transcript is ordinarily made of the original proceeding." Gordon v. Justice Court, 12 Cal. 3d 323, 332, 525 P.2d 72, 77-78, 115 Cal. Rptr. 632, 637-38 (1974).

180. 409 U.S. 57 (1972).

181. *Id.* at 61-62.

182. 407 U.S. 104 (1972).

183. *Id.* at 105.

184. Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967). *See also* Doss v. State, 252 F. Supp. 298, 305 (M.D.N.C. 1966); Spriggs v. State, 243 F. Supp. 57, 60 (M.D.N.C. 1965).

applicable to a defendant's appeal from conviction.[185] However, the existence of the defendant's right to a de novo appeal should not be used as a rationale for the refusal of the state to offer the defendant a fair trial in the first instance.

E. Other Alternatives Suggested by State Statutes

Many states have attempted to assure the lay judge's ability to deal with judicial duties by establishing either mandatory training seminars or qualifying examinations or both. California was one of the first states to institute a qualifying examination, which tested aspiring justice court judges on selected concepts of law and procedure.[186] Pennsylvania and Washington require prospective lay judges to pass similar examinations on the duties and functions of their prospective offices.[187] The *Gordon* opinion, however, found the California qualifying examination to be far inferior to the California Bar Examination and an insufficient guaranty of a lay judge's ability to fulfill the responsibilities of the office.[188]

At least eleven states require that lay judges attend training institutes or educational courses on court procedure and substantive law.[189] However, none of the courses offered last more than a few days and most do not even involve a formal testing of the lay judge on the materials taught.

Many legislatures recognize the desirability of having attorney judges whenever and wherever possible. These states have tried to limit the extent to which their courts depend on lay judges by providing that only the smaller of a certain class of political subdivision may have a lay judge presiding or by providing that a lay judge may not take office unless there are no attorneys available for the position.[190]

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185. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 23 (1973); North Carolina v. Pearce, 395 U.S. 711, 720 (1969); Stroud v. United States, 251 U.S. 15, 18 (1919).

186. Hennessey, *supra* note 25 at 470.

187. PA. CONST. art. 5, § 12(b) (1969); WASH. REV. CODE § 3.34.060 (Supp. 1974) (districts of less than 10,000 only).

188. Gordon v. Justice Court, 12 Cal. 3d 323, 329, 525 P.2d 72, 76, 115 Cal. Rptr. 632, 636 (1974).

189. *See* COLO. REV. STAT. ANN. § 13-6-203(5) (1973); IDAHO CODE § 1-2206(3) (Cum. Supp. 1975); MISS. CODE ANN. § 9-11-3 (1972); MONT. REV. CODES ANN. § 93-401 (Supp. 1974); NEB. REV. STAT. § 24-508(3) (Cum. Supp. 1974); NEV. REV. STAT. §§ 4.035, 4.036, 5.025, 5.026 (1971); N.M. STAT. ANN. § 36-204 (1953), § 37-1-10 (Supp. 1973); N.Y. CONST. art. 6, § 20(c); N.Y. U.J.C.A. § 105 (Supp. 1974); PA. CONST. art. 5, § 12(b); PA. STAT. tit. 42, § 1214 (Supp. 1975); S.D. CODE §§ 16-12-6.1, 16-12A-8, 16-12A-9 (Supp. 1974); UTAH CODE ANN. § 78-5-27 (Supp. 1975).

190. *See, e.g.*, COLO. REV. STAT. ANN. § 13-6-203(2), (3) (1973); KAN. STAT. ANN. § 12-4105 (Cum. Supp. 1974); N.H. REV. STAT. ANN. § 502-A:3 (1968); N.M. STAT. ANN. § 36-2-1 (1972); N.D. CENT. CODE § 40-18-01 (Supp. 1973); WASH. REV. CODE § 3.34.060 (Supp. 1974).

A few legislatures have been thwarted in their efforts to assure an adequate judiciary by state courts which have held that their state legislatures have no authority to add qualifications to those enumerated in their state constitutions.[191]

It can be concluded from this brief survey of state statutes that many state legislatures have shown serious concern over the inability of lay judges to handle difficult problems of substantive law and procedure. Legislative attempts to assure a competent judiciary evidence a recognition of the necessity of well-trained and learned judges to assure defendants the fair trial which due process demands. State legislatures have attempted such solutions to the problem as examinations, training courses, the right to transfer, and the right to de novo trial on appeal.

However laudable these attempts at raising the standards of justice may be, most of the attempted solutions cannot meet the requirements of due process if the ability of a judge is recognized as relevant to the fairness of a defendant's trial. Only those states which have abolished lay judge criminal jurisdiction altogether have court systems which are not vulnerable to constitutional attack. Qualifying examinations and training institutes which are short in length and superficial in nature cannot be deemed a sufficient guaranty of a judge's competence. Providing qualified judges only to defendants in larger political subdivisions results in unequal systems of justice within the same state. Although the latter alternative may evidence a good faith attempt to raise the standard of justice, it does nothing for the individual forced to stand trial before a judge who is unversed in legal principle. Providing a right to transfer may be a practical solution for less populated states, but the right should be unqualified and even the lay judge's ability to accept guilty pleas must be scrutinized carefully. Whether denial of a competent judge can be remedied by de novo trial in a forum presided over by an attorney is questionable at best, and cannot even be justified as being an efficient means of providing this element of due process. Judicial economy will not be served by requiring a criminal defendant to litigate his case twice in order to obtain a competent judge.

In the area of judicial competence, court reform, which is traditionally a subject for state legislatures, overlaps the right to a fair trial, a constitutional right which it is the duty of courts to protect. Although court reform is tending in the direction of greater protection of the individual, it has not yet reached the degree of protection in most states which has been mandated in California by the *Gordon* decision. By their very nature, legislative reforms tend more to compromise than do

191. *See* note 113 *supra.*

court-imposed standards respecting personal rights. Furthermore, legislatively imposed court reform trends change, and judicial qualifications may be removed as well as imposed at the will of the legislature. It is time to recognize the importance of the judge's competence to the protection of a defendant's constitutional rights. The constitutional rights of the individual should not be left unprotected in the hands of the legislature, to be granted at its discretion.

Conclusion

A comptetent judiciary is necessary to a fair trial. Legislative measures have stopped short of guaranteeing the defendant the competent tribunal which fairness requires. The *Gordon* decision, by establishing the defendant's right to an attorney judge in California when loss of liberty is threatened, has taken the first step toward constitutionally requiring a responsible judiciary. Hopefully, other courts will confront these issues and will impose this minimal requirement of competence on the judiciary itself.