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Criminal Law and Procedure

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Criminal Law and Procedure

by *Rex A. Collings, Jr.**

I should see the garden far better . . .
if I could get to the top of that hill: and
here's a path that leads straight to it . . .
But how curiously it twists! It's more like a
corkscrew than a path!

When one commences with a Lewis Carroll quotation,¹ it is customary to depart with a Cheshire grin. I propose to

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1. Cf. Dalbey, *Alice Would Have Questions Traveling in a Police Patrol Car*, 1 J.Cal.L.Enf. 139 (1967). The author suggests that if Lewis Carroll were writing about Alice today, he would put her in a patrol car instead of sending her down a rabbit hole. This way he could arrange for her to discover a topsy-turvy world more simply. Unfortunately, *Alice in Wonderland* was a dream. The patrol car is real. Take a ride with a patrol officer and see the topsy-turvy world, suggests Mr. Dalbey.

do otherwise. I propose to needle the California Supreme Court. It needs needling. Or is it a Holy of Holies that cannot stand having its veil rent in twain?

When I agreed to discuss the work of the courts during the period of October 1, 1966 to September 30, 1967, I did not realize the magnitude of the task. During that period there were 100 (my research assistant says 99) California Supreme Court decisions dealing with criminal law and procedure. During the same period there were only 91 noncriminal decisions. The proportions of courts of appeal decisions are comparable. Of the 100 California Supreme Court cases, 26 were death-penalty cases with automatic appeal under Penal Code section 1239(b).

It is frustrating to be faced with so many decisions. In the first place, one must neglect federal cases, particularly Supreme Court decisions binding the California courts. In the second place, one must give rather inadequate treatment even to the California Supreme Court decisions.² Finally, there is almost no time to devote to decisions in courts of appeal, although many of these decisions have important implications. Accordingly, the present treatment must of necessity be somewhat limited in scope.

Probably the single most important development of the year came from the Joint Committee for the Revision of the Penal Code.³ That committee, through its project director, Professor Arthur H. Sherry of the University of California, Berkeley, published its Tentative Draft No. 1. The draft deals with general principles of liability, defenses, kidnapping and related crimes, sex crimes and arson. Other drafts are expected in the near future. It is hoped that the ultimate result will be a modernization of the Penal Code of 1872,

2. For an excellent and thorough discussion of a few decisions, see Comment, *The Supreme Court of California 1966-1967*, 55 CAL.L.REV. 1059, 1123 (1967).

3. The background of the Joint Committee and the procedure being followed are outlined in its 1967 report to the

Governor and legislature. Copies of Tentative Draft No. 1 may be procured from the Project office, Joint Committee for the Revision of the Penal Code, School of Law, Boalt Hall, University of California, Berkeley. The Joint Committee and Project Director will be delighted to receive comments.

which is badly in need of clarification and revision. Since 1872, there has never been a continuing and coordinated effort to develop a coherent and comprehensive code.

Tentative Draft No. 1 consists of basic provisions which are largely uncontroversial. It should be read with Tentative Draft No. 2, which will include the basic sentencing provisions. The only proposal in the draft which may be controversial is the treatment of deviate sexual relations between consenting adults as noncriminal. Currently, a normal sexual relationship between consenting adults is deemed noncriminal, unless the relationship ripens into a pretended marriage.⁴ "Statutory rape" would be somewhat narrowed under the proposal. It would not be an offense unless the defendant is at least three years older than the "victim."⁵

Another important development is the new *Journal of California Law Enforcement*. The Journal, now in its second year, is published by the California Peace Officers' Association for its members, and contains articles on such problems as "black power," advising minors of their rights, the rights of arrested persons in general, some technical articles, as well as articles designed to improve police administration. Each issue includes a discussion of recent decisions. One issue contains a useful summary of 1967 legislation affecting criminal law. The editors should be complimented for a fine job. It is hoped that the journal is being distributed to judges, particularly those in the appellate courts who sometimes seem unaware of police problems.

I. Criminal Procedure

A. Pretrial Procedures

*Arrest, Search and Seizure*⁶

In 1967 the legislature established detailed provisions in Penal Code section 1538.5 for pretrial hearings to determine whether questioned items of evidence are a product of an

4. Cal. Penal Code § 269a.

5. The draft does not consider young males who are victimized by females.

6. For an interesting note see *Stop and Frisk in California*, 18 *Hastings L.J.* 623 (1967).

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unreasonable search and seizure. The defendant can move to return property or suppress evidence. The right to move for return or suppression at the trial is restricted to cases where prior opportunity to make the motion did not exist or where the defendant was unaware of the grounds. The prosecutor can seek review by a writ of mandate or prohibition if the motion is granted. The defendant may include denial of his motion as a ground for appeal upon conviction. The new statute will provide an orderly and efficient procedure for testing illegality of a search and seizure.

The problem of disclosure of the names of informers in narcotics cases has been very troublesome. Informers must be used if the law is to be enforced. If their names are disclosed they may be dead—perhaps physically or at least as informers. In 1958, in *Priestly v. Superior Court*,⁷ the California Supreme Court held that if communications from an informer are relied upon to show reasonable cause to make an arrest and a search incidental thereto, the identity of the informer must be disclosed at the defendant's request or testimony as to his communications must be stricken. In 1965 the legislature enacted Code of Civil Procedure section 1881.1⁸ to allow nondisclosure in narcotics prosecutions if the magistrate or trial judge is satisfied after a hearing that the informer is reliable. The court, in a per curiam decision in *Martin v. Superior Court*,⁹ followed *McCray v. Illinois*¹⁰ and held that section 1881.1 is constitutional. Perhaps *Martin* should be extended to types of criminal activity other than narcotics arrests.

It has been held that a peace officer's powers to arrest beyond his territorial jurisdiction are identical with those of any citizen.¹¹ His powers to search after such an arrest are also those of a private citizen, namely, to search for offensive weapons.¹² However, the California Supreme Court recently

7. 50 Cal.2d 812, 330 P.2d 39 (1958).

8. Former Cal. Code Civ. Proc. § 1881.1 is now Cal. Evid. Code § 1042.

9. 66 Cal.2d 257, 57 Cal. Rptr. 351, 424 P.2d 935 (1967).

10. 386 U.S. 300, 18 L. Ed.2d 62, 87 S. Ct. 1056 (1967).

11. *People v. Martin*, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924 (1964).

12. Cal. Penal Code § 846; see also

recognized that the doctrine of “fresh pursuit”¹³ is not limited by the historical application of “freshness.” Furthermore, the court seems ready to approve the 1965 amendment to Penal Code section 817, which seems to be an endeavor to overrule earlier decisions, and which extends the authority of a peace officer “to any place in the state . . . as to a public offense . . . [committed or] which there is probable cause to believe has been committed within the political subdivision that employs him.”¹⁴

The problem of impounded cars has also been troublesome. When an arrest is made in or around a motor vehicle under circumstances that require taking the defendant to the police station, the peace officers obviously cannot leave the car on the street; they therefore impound it. This means that it must be towed, either by their own tow car in a large jurisdiction, or by a contractor. The contents of the car have to be inventoried, lest questions arise as to whether someone has stolen some of its contents. Thus, if highway patrol officers make an arrest for driving under the influence of intoxicating liquors, the defendant must be taken to jail. While awaiting the tow truck, one officer makes out the “drunk” report, while the other inventories the contents of the vehicle and tries to get the defendant to sign the inventory.

Judicial decisions have tended to limit the right to search impounded vehicles. For example, in *Preston v. United States*,¹⁵ the defendants were arrested for vagrancy. One officer drove the car to the station and had it towed to a garage. After the defendants were booked, the glove compartment and trunk were searched without a search warrant. Articles were found which were used to convict the defendants on a charge of conspiracy to rob a bank. The convictions were reversed on the ground that the search was too remote in time and place to have been incidental to the arrest.

People v. Martin, 225 Cal. App.2d 91, 36 Cal. Rptr. 924 (1964).

13. People v. Sandoval, 65 Cal.2d 303, 54 Cal. Rptr. 123, 419 P.2d 187 (1966).

14. 65 Cal.2d at 313, n. 10, 54 Cal. Rptr. at 129, 419 P.2d at 193.

15. 376 U.S. 364, 11 L. Ed.2d 777, 84 S. Ct. 881 (1964).

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In *People v. Burke*,¹⁶ the California Supreme Court was faced with a similar problem. The defendant was arrested early in the morning on suspicion of burglary, apparently with reasonable cause. The officers could not open the trunk of the car with the keys provided, and towed the car to the impound lot. The car was not searched until 3:00 p.m. In the trunk were found articles taken in a burglary shortly before the arrest, which were later used in evidence. The court held that the search was too remote in time and place and the evidence obtained as a result was improperly admitted.

However, in *Cooper v. California*¹⁷ a result prevailed which seems to be inconsistent with *Preston* and *Burke*. In that case the United States Supreme Court, in a five-to-four decision, upheld a California court. Section 11611 of the Health and Safety Code provides that any officer making an arrest for a narcotics violation must seize the vehicle and turn it over to the Division of Narcotics "to be held as evidence" until a forfeiture has been declared or a release ordered. In *Cooper* the officers had reasonable cause to make the arrest. They then seized the car. A week later, a search was made of the impounded car without a warrant, and some of the fruits of that search were admitted in evidence at Cooper's trial for selling heroin. The court, quoting *United States v. Rabinowitz*,¹⁸ stated that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."¹⁹ In *Cooper* the court found a "reasonable" search even though the search had been made a week after the arrest.

This year the California Supreme Court also decided *People v. Webb*.²⁰ In *Webb*, the defendant was lawfully arrested, pursuant to an outstanding warrant, on a summer night in an Oakland area largely inhabited by Negroes. He tried to escape and shots were fired which resulted in a collision

16. 61 Cal.2d 575, 39 Cal. Rptr. 531, 394 P.2d 67 (1964).

17. 386 U.S. 58, 17 L. Ed.2d 730, 87 S. Ct. 788 (1967).

18. 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430 (1950).

19. 339 U.S. at 65, 94 L. Ed. at 660, 70 S. Ct. at 435 (1950).

20. 66 Cal.2d 107, 56 Cal. Rptr. 902, 424 P.2d 342 (1967).

between the defendant's car and a parked car. The defendant was wounded. In the interval before the arrival of an ambulance, a red balloon was observed on the floor in the front seat of the car. A crowd gathered and it was decided that the car should not be further searched at the scene. It was towed to a police parking lot and searched when the arresting officer, who had accompanied the defendant to the hospital, had an opportunity to make the search. Other balloons were found, all of which contained heroin. (The facts do not show whether there were more red balloons; at least one was orange.) Justice Mosk, writing for the majority, upheld the search. He distinguished *Preston* and *Burke*, and swept *Cooper* under the rug. However, he wrote what to law professors will be a very useful opinion discussing numerous decisions. [A number of the Mosk decisions of the past year are going to find their way into my criminal procedure course-book. They are sound opinions, whether you agree with them or not.] Justice Peters concurred, in a brief opinion, but thought that the search was proper under *Cooper* and that *Cooper* overruled *Preston*. Although I agree with the result in *Webb*, I have some difficulty in understanding why the California courts should be bound by *Cooper* even if it did overrule *Preston*, as suggested by Justice Peters. Can we not, under our state Constitution, have more restrictive rules than those proclaimed by the United States Supreme Court under the Fourteenth Amendment?

There were several other arrest, search and seizure decisions which are worthy of brief mention. Evidence resulting from illegal searches and seizures by private persons continues to be admissible. Thus, in *People v. Botts*,¹ a service station attendant observed narcotics activity through a hole in the wall of a restroom and reported his observations to peace officers. This led to arrest and conviction of the defendant for possession of heroin. The court distinguished cases involving such searches by peace officers² or their agents,³ and affirmed the conviction. Its ground seemingly was that a

1. 250 Cal. App.2d 478, 58 Cal. Rptr. 412 (1967).

2. See, e.g., *Bielicki v. Superior Court*, 57 Cal.2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962).

private citizen cannot be assumed to be aware of the exclusionary rule. It did recognize, however, that "It may well be that the bathroom is becoming the last sanctuary of privacy in an increasingly Orwellian society."⁴

It is also legal to search a baby's diaper and seize heroin, provided, of course, that there is reasonable cause to believe that a crime is being committed on the premises.⁵ Apparently under such circumstances a baby wearing a diaper is the equivalent of a house, a garage, or a car. Incidentally, the baby was not arrested for possession of heroin.

The right of Alcoholic Beverage Control officers to search a bar without a warrant under applicable statutes⁶ was upheld in *People v. Lisner*.⁷ The court felt that the guarantee against unreasonable search and seizure is less limited in searches of bars than in searches of "businesses standing higher in the public esteem"⁸ or dwellings. There was no discussion of probable cause (receiving stolen property), although it appeared to be present.

In *People v. Williams*,⁹ the court upheld a search under what appears to be a rather novel fact situation. Officers approached a store at 5:30 a.m. to investigate a ringing burglar alarm. At a point a block and a half from the store, the officers observed the headlights of an approaching automobile. There were no other moving cars on the street. The officers made a U-turn and followed the suspect vehicle, which made a number of turns in the course of a few blocks. The officers then activated the red light and siren and followed at high speed. The defendant ultimately got out of the car and fled on foot. The key remained in the ignition. When the officers reached the auto they opened the trunk and observed a stack of men's suits on hangers. They arrested the

3. See, e.g., *People v. Tarantino*, 45 Cal.2d 590, 290 P.2d 505 (1955).

4. 250 Cal. App.2d at 483, 58 Cal. Rptr. at 416.

5. *People v. Garavito*, 65 Cal.2d 761, 56 Cal. Rptr. 289, 423 P.2d 217 (1967). The court found other grounds for reversal by a 4-to-3 decision.

6. Cal. Bus. & Prof. Code §§ 25753, 25755.

7. 249 Cal. App.2d 637, 57 Cal. Rptr. 674 (1967).

8. 249 Cal. App.2d at 641, 57 Cal. Rptr. at 677 (1967).

9. 67 Cal.2d 167, 60 Cal. Rptr. 472, 430 P.2d 30 (1967).

defendant in a vacant building a block away, and towed the car to a police storage garage where its contents were inventoried without a warrant. In addition to 29 suits previously observed, the trunk contained burglary tools. The court upheld both searches as incident to the arrest and as analogous to the situation in *Webb*.

In *People v. Hohensee*,¹⁰ the court considered the surreptitious recording of a public lecture. The defendant held lectures in a rented hotel conference room. He represented that Mercurochrome causes cancer, that the white of an egg cures burns without scarring, that the American Medical Association is the American Murder Association, and that Salk and Sabin vaccines cause more polio than they cure, and represented that his "Elixir of the Gods" (honey) would eliminate arthritis. The modus operandi was to hold lectures representing that the "elixir" could cure diseases, to give it away, and then to collect substantial sums of money as donations from the gullible audience. A food and drug inspector entered a loft above the meeting room with permission of the hotel, and placed a microphone three feet from the loudspeaker in the ceiling to record the lectures.

Distinguishing *Silverman v. United States*,¹¹ the court held that placing a microphone three feet from the loudspeaker was not an unauthorized physical intrusion into a private area. The officer did not spy on the defendant through holes bored or other openings made for spying into a private area. The lectures were public. Therefore hearing what the audience heard was not a search.

In *Flack v. Municipal Court*,¹² there was a seizure of an allegedly lewd film without a warrant. Petitioner Flack was the owner of a theatre showing the film "Sexus," which had been showing for two weeks. Local officers viewed the film and believed it to be obscene. They arrested petitioner and at the same time seized the film. The court noted that the

10. 251 Cal. App.2d 193, 59 Cal. Rptr. 234 (1967).

12. 66 Cal.2d 981, 59 Cal. Rptr. 872, 429 P.2d 192 (1967).

11. 365 U.S. 505, 5 L. Ed.2d 734, 81 S. Ct. 679, 97 A.L.R.2d 1277 (1961).

film had been showing for two weeks and, even if the search had been contemporaneous with the arrest, a search warrant should have been secured prior to any search or seizure of the material. It distinguished this set of facts from the situation where there is a high probability of the evidence being lost, destroyed, or spirited away. The court issued a writ of mandate compelling the return of the film. Justice McComb dissented.¹³

In *People v. Mills*,¹⁴ a search warrant was properly sought. In issuing the warrant, the magistrate used a mimeographed form which adopts for Los Angeles County the form of warrant prescribed by Penal Code section 1529. This form commands that the search be made "in the daytime (at any time of the day or night, good cause being shown therefor)." The court felt that, pursuant to Penal Code section 1533, the failure of the magistrate to strike out the phrase "in the daytime" invalidated a nighttime search. It appears that Penal Code section 1533 expressly requires an affirmative act on the part of the magistrate if night search is to be authorized.¹⁵

In a shocking decision, the California Supreme Court reversed a death penalty following a conviction in a brutal murder case, in *People v. Spencer*.¹⁶ The defendant made an extrajudicial confession uncoerced by pre-*Escobedo* standards. He confirmed his confession at trial, but claimed that the killing was unintentional. Since it was a robbery-murder, this was, of course, irrelevant. His codefendant testified that the defendant had told him of his intention to kill. The surviving witness testified to the facts. The court applied the

13. In his dissent, Justice McComb incorporated by reference the lower court opinion in 56 Cal. Rptr. 162 (1967), which seems to make more sense. There is nothing in the facts to suggest that this was more than a seizure incident to a search without a warrant, or that the officers had time to obtain a warrant.

14. 251 Cal. App. 2d 420, 59 Cal. Rptr. 489 (1967).

15. Cal. Penal Code § 1533. **Insertion of direction to serve warrant at any time of day or night.**

On a showing of good cause therefor, the magistrate may, in his discretion, insert a direction in the warrant that it may be served at any time of the day or night; in the absence of such a direction, the warrant may be served only in the daytime.

16. 66 Cal.2d 158, 57 Cal. Rptr. 163, 424 P.2d 715 (1967).

principles established by *Escobedo v. Illinois*¹⁷ and *People v. Dorado*,¹⁸ to conclude that the trial court had committed reversible error in admitting the defendant's confession in evidence. The court stated:

Under the circumstances . . . we cannot realistically ignore the possibility that defendant's extrajudicial confession *might* have impelled his subsequent confession in court. . . . In this sense, a later confession may always be viewed in part as fruit of the first.¹⁹

The court felt that its rule of reversible error per se compelled reversal of the conviction. Since the trial was pre-*Escobedo*, the defendant could not have known that the confession should have been excluded. Had he known this, he might have taken the stand to explain it or emphasize extenuating circumstances. The pre-*Escobedo* defendant must be given all the advantages of *Escobedo*.

What is custody under *Escobedo* and *Miranda*?²⁰ Early in 1963, the court stated that "Arrest is not essential to the maturing of the accusatory stage." In *People v. Kelley*,¹ Kelley, a serviceman, was interrogated by an officer of the San Diego Police Department at the San Diego Naval Station regarding his wife's allegation that he had sexually molested his eight-year-old step-son, in violation of sections 288 and 288a of the California Penal Code. The police officer had informed Kelley of his rights, including his right to counsel. At the conclusion of this interrogation, Kelley was told to "hang around." Kelley was later interrogated by an employee of the San Diego Naval Station. He was again informed of his rights, except that nothing was said of his right to counsel. The poor Navy investigator should have known about *Escobedo* (which was not to be decided until six months after the interview). At a pretrial hearing the Navy investigator

17. 378 U.S. 478, 12 L. Ed.2d 977, 84 S. Ct. 1758 (1964).

18. 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965).

19. 66 Cal.2d at 167, 57 Cal. Rptr. at 170, 424 P.2d at 722 (1967).

20. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).

1. 66 Cal.2d 232, 57 Cal. Rptr. 363, 424 P.2d 947 (1967).

testified that Kelley had been free to leave, although he had not informed him that he was free to leave. Justice Peters, writing for the majority, declared:

The existence of custody as an element of the accusatory stage does not depend on the subjective intent of the interrogator . . . [Rather it depends] upon whether defendant is placed in a situation in which he reasonably believes that his freedom of movement is restricted by pressures of official authority.²

The court has for some time used the vague expression “custody” rather than “arrest.” This court stated: “The rule is that a confession is inadmissible when at the time it is obtained . . . the suspect is in custody.”³ Peace officers have been puzzled about the difference between arrest and custody. Now they know. Or do they?

Again, in *People v. Arnold*,⁴ the court held that custody occurs when the “suspect is physically deprived of his freedom . . . in any significant way or is led to believe, as a reasonable person, that he is so deprived.”⁵ The defendant was notified by a deputy district attorney to come to his office to discuss the death of her child. Because of her religious beliefs, the defendant had not obtained medical assistance for her daughter during the child’s terminal illness. Instead, members of defendant’s church had immersed the child in the river several hours before her death. The autopsy showed a wad of human hair, 2-1/2 inches long, jammed into the small intestine as the cause of death, with another larger hair ball lodged in the stomach for a period of several months. The doctor who performed the autopsy testified that such obstructions would cause fever, pain, weakness, vomiting and other indications of serious illness, and that an operation performed up to twelve hours before the daughter’s death probably would have saved her life.

2. 66 Cal.2d at 246, 57 Cal. Rptr. at 375, 424 P.2d at 959 (1967).

3. 66 Cal.2d at 245, 57 Cal. Rptr. at 374, 424 P.2d at 958 (1967).

4. 66 Cal.2d 438, 58 Cal. Rptr. 115, 426 P.2d 515 (1967).

5. 66 Cal.2d at 448, 58 Cal. Rptr. at 121, 426 P.2d at 521 (1967).

The defendant testified that she did not know that she did not have to comply with the district attorney's request to visit his office. She made a damaging statement which was admitted into evidence. The court, relying upon *Kelley*, reversed, holding that this was "custody"; the accusatory stage had been reached. Therefore the defendant was entitled to advice of her rights under *Escobedo* and *Dorado*. She reasonably could have believed that she could not leave the interrogation chamber. Again the court spoke of "custody" by a circularity of definition. Three justices dissented in an opinion by Justice Mosk. He felt that the defendant had not been in custody; she had come by invitation. The deputy district attorney had made it clear that he was only investigating. Indeed, interviews of this type are a familiar and reasonable aspect of preliminary law enforcement investigations into unusual occurrences and have no such sinister significance as the majority attribute to them. The defendant could have left at any time, and did leave after the interview without being arrested. She was not charged with the crime until forty days after the interview. The minority would have rejected the subjective test for determining whether defendant had been in custody, stating that such a subjective concept excluded statements not because she had *been* in custody but because she later testified she had *thought* she was in custody. Approval of this mere declaration of her thought process is a giant departure from all accepted concepts of police restraint. Although the minority takes the preferable approach, the decision should caution busy young deputy district attorneys who perhaps sometimes abruptly summon possible suspects for interviews. They should make it quite clear that compliance with such summons is voluntary. And what of the citation procedures used by many district attorneys?⁶ Such hearings undoubtedly serve a useful purpose. However, they should be carefully hedged with procedural safeguards. Some of the forms now in use could certainly cause some persons to think that compliance is compulsory.

6. See Hederman and Dahlinger, *Citation Hearing System*, 12 HASTINGS L.J. 275 (1961).

Chief Justice Traynor, writing for the majority, delivered a surprising decision in *People v. Varnum*,⁷ upholding the right of the police to interrogate a suspect without warning him of his constitutional rights as long as no physical or psychological coercion is used and the testimony is not used in court against the defendant interrogated, even if the evidence elicited by such interrogation is used against a codefendant. The alleged murder weapon, a gun, was introduced at the trial as a most important piece of evidence for the prosecution. The gun had been discovered by the police as a direct result of the improper interrogation of a codefendant. The majority opinion frankly admitted that the interrogation of the codefendant was at the accusatory stage, but reasoned that the defendant, Varnum, had no standing to object. The court stated that:

Non-coercive questioning is not in itself unlawful, however, and the Fifth and Sixth Amendment rights protected by *Escobedo*, *Dorado*, and *Miranda* are violated only when evidence obtained without the required warnings and waiver is introduced against the person whose questioning produced the evidence. . . . Accordingly, in the absence of such coercive tactics, there is no basis for excluding physical or other nonhearsay evidence acquired as a result of questioning a suspect in disregard of his Fifth and Sixth Amendment rights when such evidence is offered at the trial of another person.⁸

The court did not use the term “fruits of the poisonous tree,” or discuss *People v. Ditson*,⁹ where it assumed that the fruits of a codefendant’s confession could not be used against the other defendant.

Justice Peters wrote a strong dissent emphasizing the crystal-clear mandate of *Escobedo* and *Miranda*, making it unlawful

7. 66 Cal.2d 808, 59 Cal. Rptr. 108, 427 P.2d 772 (1967).

8. 66 Cal. 2d at 812-813, 59 Cal. Rptr. at 111-112, 427 P.2d at 775 (1967).

9. 57 Cal.2d 415, 20 Cal. Rptr. 165, 369 P.2d 714 (1962); vacated, 371 U.S. 541, 9 L. Ed.2d 508, 83 S.Ct. 519 (1962).

to interrogate without giving the required warnings. “Insofar as we permit the fruits of an interrogation in violation of those cases to be introduced into evidence we are encouraging not deterring unlawful police activity.”¹⁰

*People v. Gonzales*¹¹ also involved the admissibility of a codefendant’s extrajudicial statements, but is distinguished from *Varnum* inasmuch as the extrajudicial statements in *Gonzales* were used in a joint trial. The California Supreme Court reversed, basing its decision on *People v. Aranda*,¹² even though the trial judge carefully instructed the jury as to the limited effect of the statements. The court, relying on *People v. Charles*,¹³ applied *Aranda* retroactively. The *Aranda* rule is available to defendants whose judgments of conviction are still on appeal, even though they were tried before the date of the *Aranda* decision, November 12, 1965.

In *People v. Hines*,¹⁴ the court, for a change, reached a realistic result on a confession problem. This case involved a “walk-in” confession of a robbery-murder, in which the defendant had walked into the Venice police substation, surrendered the murder gun and ammunition, and confessed to the police. He was questioned for 55 minutes, with the conversation being tape recorded. However, the court felt that the questioning was necessary, since there was a possibility that he was mentally disturbed or a fraud, reminiscent of the “Black Dahlia” case where the “walk-in” confessions ran to several hundred. Justice Peters dissented at some length, reasoning that at some point during the 55-minute period of questioning the stage ceases to be “investigatory” and becomes “accusatory.”

*Right to Counsel*¹⁵

There were a number of important right-to-counsel decisions. Perhaps the most important was *People v. Car-*

10. 66 Cal.2d at 819, 59 Cal. Rptr. at 115–116, 427 P.2d at 779–780 (1967).

11. 66 Cal.2d 482, 58 Cal. Rptr. 361, 426 P.2d 929 (1967).

12. 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965), discussed infra under *Retroactivity*.

13. 66 Cal.2d 330, 57 Cal. Rptr. 745, 425 P.2d 545 (1967).

14. 66 Cal.2d 348, 57 Cal. Rptr. 757, 425 P.2d 557 (1967).

15. See an interesting article, Graham, *What is Custodial Interrogation?: California's Anticipatory Application of*

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*ter.*¹⁶ Can a defendant conditionally waive his right to counsel and, when his condition is refused, obtain a reversal? The California Supreme Court answered this question in the affirmative. The defendant's condition was use of the law library. The court felt that, at least under the facts shown, a defendant who wishes to represent himself should be allowed as a minimum to avail himself of the legal materials available where he is confined. It noted that, in many cases, the minimum may be insufficient. Hopefully, the court will not create a constitutional right to visit the law library. Letting prisoners use the law library poses serious escape problems. It is expensive to provide guards. The right to counsel may include some right of a prisoner to use some of the facilities of the law library—in his cell. It should not include the right to go to the library. If a prisoner wants to do that he should be permitted to do it—through his counsel.

Penal Code section 3042 provides that at least thirty days before a meeting to consider a granting of a parole, the Adult Authority shall send written notice to the Director of Corrections, to the person requesting parole, and to the attorney for that person. But this requirement is held to be a general notice statute which does not evince an intent of the legislature to require the appointment of counsel at public expense for all indigent prisoners scheduled for parole consideration. The California Supreme Court, in *In re Schoengarth*,¹⁷ denied that a prisoner seeking a parole and the fixing of his indeterminate sentence has a right to counsel. This, it said, is an administrative proceeding, and there is no right to counsel in such a proceeding.

*In re Smiley*¹⁸ points to the importance of carefully maintaining an adequate docket showing advice of right to coun-

Miranda v. Arizona, 14 UCLAL.Rev. 59 (1966).

16. 66 Cal.2d 666, 58 Cal. Rptr. 614, 427 P.2d 214 (1967).

17. 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967). See also *In re Allison*, 66 Cal.2d 282, 57 Cal. Rptr. 593, 425 P.2d 193 (1967) con-

cerning the problem of adequate communication by a prisoner with his counsel and use of law books by a prisoner. These two decisions by Justice Mosk contain very useful discussions of the problems involved.

18. 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

sel, even in misdemeanor cases. It is not enough to show that the defendant was “duly arraigned.” The clerk must go through the rigmarole of showing advice as to right to counsel, the right to court-appointed counsel if defendant is indigent, and the fact that there was a knowing and intelligently expressed waiver. The docket entries must be prepared for the particular case before the court; that requirement will not be satisfied by the use of forms. This decision points for the need of removing many types of offenses from the misdemeanor category and denominating them civil offenses or violations. Hopefully, the right to counsel as well as the right to trial by jury could be removed in such instances.

The right to be informed of the right to assistance of counsel under *Escobedo* is not unlimited. Thus, in *People v. Arguello*,¹⁹ the defendant, in a gruesome murder, used a hammer which he tied to his 82-year-old victim’s neck by a cord, using an unusual knot. A district attorney’s investigator requested an officer at the jail to have defendant tie a bunch of clothing. In doing so defendant used the same type of knot as was used to tie the hammer to the victim’s neck. Evidence of this was used at the trial. The jail officer had failed to inform defendant of his right to an attorney and to remain silent before letting him tie the knot. The court rejected defendant’s contention that his rights had been violated, reasoning that deception alone does not render incriminating statements inadmissible if it was not of a type reasonably likely to procure an untrue statement. Similarly, the deception employed in getting the defendant to tie the knot did not render the evidence inadmissible. The moral of the story is that usually, but not always, the inhabitants of death row can tie the court in knots.

Seemingly, a confession made to a nurse is admissible even without a warning as to constitutional rights, at least if “made voluntarily, without any questioning . . . no police officers [being] present.”²⁰ Small wonder that the public loses its respect for the courts when something so obvious has to

¹⁹. 65 Cal.2d 768, 56 Cal. Rptr. 274, 423 P.2d 202 (1967).

²⁰. *People v. Nicolaus*, 65 Cal.2d at 870, 56 Cal. Rptr. at 638, 423 P.2d at 790 (1967).

be expressed in a judicial decision. Perhaps the result would have been different had the events taken place in a county hospital.

Apparently, admissions blurted out when the suspect is surprised while sitting on a toilet are admissible, despite lack of *Miranda* warnings. It was so held in *People v. Tahl*.¹

In *People v. Lara*,² it was contended that the *Dorado* warnings are insufficient in a case involving minors, and that the waiver must be consented to either by an attorney or a parent. The court, over vigorous dissent by Justice Peters, rejected this contention, stating that whether a minor knowingly and intelligently waived his rights is a question of fact. The court said, "mere failure of the authorities to seek the additional consent of an adult cannot be held to outweigh, in any given instance, an evidentially-supported finding that such a waiver was actually made."³

*Bail*⁴

Failure to make much use of "own-recognition releases" continues in some jurisdictions. Many inferior courts fail to use the procedure at all in Vehicle Code and other minor misdemeanor cases, despite a clear direction that they have discretion to do so.⁵ Similarly, use of own-recognition releases in felony cases varies from county to county. Yet the various bail studies⁶ demonstrate that the use of this procedure has been successful with remarkably few exceptions. Failure to appear on a felony own-recognition release is itself a felony, and on a misdemeanor release a misdemeanor.⁷ I might add that these offenses should be very easy to prove. The California Supreme Court in *In re Smiley*⁸ nudged the courts in a mild way to make greater use

1. 65 Cal.2d 719, 56 Cal. Rptr. 318, 423 P.2d 246 (1967).

2. 67 Cal.2d 367, 62 Cal. Rptr. 586, 432 P.2d 202 (1967).

3. 67 Cal.2d at 381, 62 Cal. Rptr. at 596, 432 P.2d at 212.

4. See Note, *An Alternative to the Bail System*, 18 HASTINGS L.J. 643 (1966).

5. Cal. Penal Code § 1318.

6. See citations in *In re Smiley*, 66 Cal.2d 606 at n. 3, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

7. Cal. Penal Code §§ 1319.4, 1319.6.

8. 66 Cal. 2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

of the own-recognition release. Consider the problems of crowded and ancient jails, welfare costs for the families of those who cannot raise bail, loss of employment, and even equal protection of the laws. Perhaps it is time for more than a mild nudge. Doubtless the bail bond brokers' lobby will disagree.

Preliminary Hearing

The presenting of defenses in preliminary hearings is a troublesome problem. Anyone who has watched Perry Mason is aware of this. Perry seems invariably to win his case at the preliminary hearing. Or did he lose one once? Yet it is clear from Penal Code section 866⁹ that the defendant has a right to put on witnesses.

*Jennings v. Superior Court*¹⁰ is practically a text on preliminary hearings. In that case the defendant wanted to prove a defense of entrapment. He was unable to subpoena a key witness in his alleged defense and asked for a continuance. The magistrate concluded that the only issue was probable cause to hold the accused to answer, denied a continuance, and held the defendant to answer a charge of possession of narcotics. A motion under Penal Code section 995,¹¹ on the ground of illegal commitment, was denied by the Superior Court. For this and other errors the court issued a writ of prohibition to prevent the trial, stating that the right of a defendant to reasonably prepare for trial is as fundamental

9. Cal. Penal Code § 866. Examination of defendant's witnesses.

When the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined.

10. 66 Cal.2d 867, 59 Cal. Rptr. 440, 428 P.2d 304 (1967).

11. Cal. Penal Code § 995. When indictment or information must be set aside.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.
2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.
2. That the defendant had been committed without reasonable or probable cause.

as the right to counsel, and the absence of a material witness for the defense, under appropriate conditions, is a ground for continuance. Justice McComb dissented without opinion. Ordinarily an attorney for a defendant will not want to put on his case at the preliminary hearing. However, he may want to pin down prosecution witnesses by cross-examination. He may even want to call some obviously prospective prosecution witnesses for discovery purposes. He will seldom call his own witnesses. *Jennings* should be no great burden on the courts—as long as we can keep out Perry Mason.

Speedy Trial

The legislature as well as the courts have had a great deal of trouble with the problem of the right to speedy trial in misdemeanor cases. At present, section 1382 of the Penal Code provides that the defendant must be brought to trial within thirty days after the arraignment if he is in custody, or within forty-five days after his arraignment if he is not. If he has no counsel, the court is supposed to explain his rights under this section. The section is very unfair. If an arrest is made for a misdemeanor not in the presence of the peace officer, a complaint is filed and a warrant issued. The busy sheriff's office may not get around to serving the warrant for months. The defendant may not even know that the peace officer intended to file a complaint. In fact, the peace officer probably did not know this until after he discussed the matter with his superiors. Section 1382 thus permits the trial of very stale misdemeanors. The case of *In re Smiley*¹² provides a great deal of useful background on the problem. It also points to the importance of carefully advising the unrepresented defendant of his rights under that section and making clear docket entries showing the details of the advice given.

B. Retroactivity

One of the most important developments in criminal procedure is limitation on the retroactive effect of recent changes

¹² 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

in criminal procedure. The California Supreme Court wants to increase the rights of criminals, though there is at the same time some awareness of the problems of retroactivity. Twenty years ago, John Hood held up a Mom-and-Pop liquor store. He shot Pop in cold blood. Mom was the only eyewitness. Now Mom is dead. Unfortunately, Hood was not accorded his then nonexistent due process rights. He was not informed of his then nonexistent right to remain silent and to counsel, including a right to counsel during any interrogation and while he was in a police lineup. He confessed. Under today's standards his confession would be inadmissible. If on habeas corpus we gave him a new trial, he would go free.

We—or some of us—would hate to see John Hood go free, whether or not we agree with the new rules. Giving Supreme Court decisions prospective effect only is one way out. Once we turn to such a doctrine, the problem becomes to determine the date beyond which there will be no retroactivity. Should it be the date of the decision? Should it apply only to crimes which take place after the decision? What of pending appeals? What of trials which have not yet taken place?

One of the games the California Supreme Court plays is called “anticipating the United States Supreme Court.” If we can beat that Court to some new extension of the Fourteenth Amendment, we, rather than they, become the leaders.

In *Escobedo* and *Dorado*, the United States Supreme Court and the California Supreme Court, respectively, developed new rules for questioning suspects. This was done under the guise of the Fourteenth Amendment. In the case of *In re Lopez*,¹³ the California court delivered one of its anticipatory decisions. It held that *Escobedo* and *Dorado* would apply only to judgments of conviction not final before June 22, 1964, the date of *Escobedo*. In other words, *Escobedo* and *Dorado* would apply retroactively only to decisions still in the courts as of that date—*cases which had not been tried or which were pending on appeal*. They would not be applied to collateral attacks such as habeas corpus proceedings. This,

13. 62 Cal.2d 368, 42 Cal. Rptr. 188, 398 P.2d 380 (1965).

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of course, was a rather strange way to give a decision “prospective effect.” But as Alice said: “[H]ow curiously it twists! It’s more like a corkscrew than a path!”

The United States Supreme Court proceeded to disturb this result in *Johnson v. New Jersey*.¹⁴ The Court held that application of *Escobedo* and *Miranda* would be required only where the *trial* took place after the respective dates of those decisions. In a way, this is just as strange a doctrine of retroactivity as that of California in *Lopez*. Logically, if we are going to apply such a doctrine, the key date should be the date of the event to which the new interpretation of the Fourteenth Amendment is to be applied. Thus, logically, *Escobedo* should apply *only to confessions* which are procured *after the date of that decision*. In fact, logically, it should not even apply to Danny Escobedo’s confession, although perhaps we can be kind and give Danny a break, since he was the guinea pig who started it all.

So the California court found itself in a dilemma when faced with *People v. Rollins*,¹⁵ probably its most important decision of the year. Should it blushing admit that it made a mistake in *Lopez*? Should it apply the *Lopez* rule to *Miranda*? Or should it take some compromise position, such as retaining *Lopez* for *Escobedo* and *Dorado*, and follow *Johnson* in *Miranda*-type decisions? The court chose to take the last-mentioned position. In a rather unconvincing opinion, the court followed *Johnson* in limiting *Miranda* to *trials* which began after the date of that decision (June 13, 1966), but will continue to follow *Lopez* and apply *Escobedo* and *Dorado* to all cases *not final* before June 22, 1964, the date of *Escobedo*. What was it that Mr. Bumble said? “If the law supposes that . . . the law is a ass, a idiot.”

Justice Peters correctly pointed out that whatever rule California is to follow, it should be the same both with *Escobedo* and with *Miranda*. However, he preferred the *Lopez* rule.

14. 384 U.S. 719, 16 L. Ed.2d 882, 86 S. Ct. 1772 (1966).

15. 65 Cal.2d 681, 56 Cal. Rptr. 293, 423 P.2d 221 (1967).

There were other important retroactivity decisions. In *People v. Jackson*,¹⁶ the defendant testified at his pre-*Escobedo* penalty trial. Portions of the evidence, including seriously damaging statements which were admitted during his trial on the issue of guilt and during his first penalty trial, were admitted in evidence at his second penalty trial. The court held that *Escobedo* was applicable to the second penalty trial, which occurred after the magic date, June 22, 1964. Justice Peters dissented to a portion of the opinion which refused to apply *Escobedo* to the pre-*Escobedo* trial on issue of guilt. Justice McComb would have affirmed the death penalty.

*Douglas v. California*¹⁷ created a right to counsel on appeal for indigent defendants. This right has been applied retroactively to cases prior to *Douglas*. In cases where appointment of counsel was denied, the appeal is reinstated and counsel appointed. However, the court in *People v. Rivers*¹⁸ determined that *Escobedo* and *Dorado* would only apply to cases pending on direct appeal at the time of the *Escobedo* decision. *Douglas* created a retroactive right to counsel on appeal. But counsel appointed pursuant to *Douglas* could not raise an *Escobedo* problem. The court in *Rivers* stated:

To apply *Escobedo* at a reinstated appeal and to review police conduct that occurred years before that decision would not promote equality. To the contrary, "the indigent defendant deprived of counsel anomalously would find himself possessed of more shafts in his quiver than would have been the case had he been able to afford to properly arm himself in the first instance."¹⁹

*People v. Aranda*²⁰ established the notion that under most circumstances a defendant is entitled to a separate trial when his codefendant's confession is to be used at the trial. In

16. 67 Cal.2d 91, 60 Cal. Rptr. 248, 429 P.2d 600 (1967). For another outrageous application of the retroactivity doctrine in the *Escobedo* situation, see *People v. Powell*, 67 Cal.2d 25, 59 Cal. Rptr. 817, 429 P.2d 137 (1967).

17. 372 U.S. 353, 9 L. Ed.2d 811, 83 S. Ct. 814 (1963).

18. 66 Cal.2d 1000, 59 Cal. Rptr. 851, 429 P.2d 171 (1967).

19. 66 Cal. 2d at 1004, 59 Cal. Rptr. at 854, 429 P.2d at 174 (1967).

20. 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).

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People v. Charles,¹ the California Supreme Court decided that the *Aranda* rule would be retroactive except as to cases where the attack was collateral. In other words, *Aranda* governs as to all cases still pending on direct review. This is so despite the fact that the court feels that *Aranda* is not constitutionally impelled but merely procedural. The court stubbornly ignores the more appropriate rule laid down in the *Johnson* decision. Justices Mosk, Burke, and McComb felt that *Aranda* should not govern cases tried before the decision was rendered in that case. Justice Mosk felt that *Aranda* was a rule of practice. Such a rule, if adopted by the legislature, would govern from the date it took effect. Why should there be a difference in a judicially created rule of practice? To apply it to cases prior to the decision, he said, "makes rare prescience a requisite in prosecutors and trial judges."² One of the most amazing things about *Charles* is that the court applied *Aranda* although the case was tried before a trial judge without a jury on the transcript of the preliminary hearing. Each defendant confessed. Whatever the *Aranda* rule may be, it surely should not be applied in such circumstances. This is, to say the least, "anomalous," as is stated in the opinion of Justice Burke. I could use stronger language but will resist in this case, since I have plenty of support from the minority.

C. Trial

Present Insanity

In *Pate v. Robinson*,³ the United States Supreme Court held that where there is substantial evidence that a defendant is insane at the time of trial, there is a constitutional right to a hearing on that issue regardless of defendant's failure to demand a sanity hearing. The court's failure to make such an inquiry on its own motion is ground for reversal. The court stated, "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently

1. 66 Cal.2d 330, 57 Cal. Rptr. 745, 425 P.2d 545 (1967).

2. 66 Cal. 2d at 345, 57 Cal. Rptr. at 755, 425 P.2d at 555 (1967).

3. 383 U.S. 375, 15 L. Ed.2d 815, 86 S. Ct. 836 (1966).

‘waive’ his right to have the court determine his capacity to stand trial.”⁴

What is “substantial evidence”? The California Supreme Court, in *People v. Pennington*,⁵ thought that the testimony of one psychologist who was neither an M.D. nor a Ph.D. sufficed to constitute substantial evidence. Although the psychologist had treated the defendant in the past, his testimony was based on brief courtroom observations and a fifteen-minute interview. The trial judge had before him the reports of four psychiatrists, as well as his own observations of the defendant’s actions in the courtroom. Two Justices dissented in an opinion by Justice Mosk. He pointed out the dissimilarity of *Pate*, since there the testimony of four witnesses for the defense was uncontradicted. Shades of Mr. Bumble!

*People v. Laudermilk*⁶ is inconsistent with *Pennington*. The defendant’s own statements concerning psychiatric examinations in two Colorado hospitals, plus his attorney’s statement to the effect that in his opinion defendant was incapable of assisting in his defense, were considered to be insufficient to require a hearing under Penal Code section 1368.⁷ The psychiatric reports were apparently available to the four psychiatrists who examined defendant and were of the opinion he was competent to stand trial. Justice Peters vigorously dissented. Of course, *Pennington* was a capital case and *Laudermilk* was not. Perhaps this explains the rather obvious inconsistency between the two decisions.

4. 383 U.S. at 384, 15 L. Ed.2d at 821, 86 S. Ct. at 841 (1966).

5. 66 Cal.2d 508, 58 Cal. Rptr. 374, 426 P.2d 942 (1967).

6. 67 Cal.2d 269, 61 Cal. Rptr. 644, 431 P.2d 228 (1967).

7. Cal. Penal Code § 1368. **Question of sanity to be submitted when doubt arises prior to judgment: Suspension of proceedings: Discharge or retention of trial jury.**

If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the

defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity.

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Jury Trial

In *People v. Ray*,⁸ the defendant in a murder case (a life sentence for first-degree murder of his daughter) tried to avoid the application of Penal Code section 1074, subdivision 8. That subdivision, as interpreted in the decision, allows a challenge for implied bias in death penalty cases where a prospective juror does not believe in the death penalty. The defendant's rather interesting contention was to the effect that such challenges should not be allowed as to the *trial* jury, but only to the *penalty* jury. In other words, he should be allowed two juries. One jury would try the issue of guilt and degree, and this jury could properly include jurors who oppose the death penalty. The other jury would try the issue of sentence, and jurors who opposed the death penalty could be challenged. The defendant presented the "evidence" of two psychologists to the effect that jurors who do not oppose the death sentence are more apt to convict than jurors who do. The evidence consisted of opinions based on general knowledge and experience without any research basis. The court rejected the defendant's contention.

How does a borderline psychopath waive a jury trial? Apparently his lawyer cannot waive it for him. If he is really insane, he cannot intelligently waive his rights. The United States Supreme Court, in *Lynch v. Overholser*,⁹ established the defendant's right, at least in the District of Columbia, not to have the trial court or the prosecutor raise the insanity issue. This question was raised in *People v. Lookadoo*.¹⁰ The court held that on the facts the defendant was competent to waive a jury trial. Suppose he was not? *Lynch* seems to leave this question open. Article I, section 7 of the California Constitution requires that a jury trial cannot be waived in criminal cases unless both defendant and his counsel concur. This provision has been very strictly construed.¹¹ In

8. 252 Cal. App.2d, 1002, 61 Cal. Rptr. 1 (1967).

9. 369 U.S. 705, 8 L. Ed.2d 211, 82 S. Ct. 1063 (1962).

10. 66 Cal. 2d 307, 57 Cal. Rptr. 608, 425 P.2d 208 (1967).

11. See, e.g., *People v. Holmes*, 54 Cal.2d 442, 5 Cal. Rptr. 871, 353 P.2d 583 (1960).

People v. Hill,¹² some doubt having arisen as to the defendant's sanity at the time of trial, experts were appointed and a hearing held, after which he was found presently sane within the meaning of Penal Code section 1368. Apparently he was not informed of his right to a jury trial, either by court or by counsel. He claimed he had been denied his rights under Article I, section 7 of the state constitution. The court held that section 1368 requires a "special proceeding" collateral to the criminal trial and that Article I, section 7 is inapplicable to such proceedings. The only right to a jury trial in such cases is that imposed by statute. The defendant was represented by counsel and there was no duty on the court to inform him of the right.

Argument and Instruction

In *Griffin v. California*,¹³ the Supreme Court of the United States overturned California's long-standing and earlier approved¹⁴ constitutional provision permitting comment on the failure of a defendant to testify. *Griffin* was decided in 1965 and, as might be expected, there were California decisions construing that decision this past year.

In *People v. Sudduth*,¹⁵ the defendant was convicted of misdemeanor drunk driving. On his arrest he refused to take any of the physical tests, such as walking a straight line. He refused a Breathalyzer test. His refusal to take the tests was commented on by the prosecutor and the jury was instructed upon the significance of such refusal. The conviction was upheld in a unanimous opinion over self-incrimination contentions. The court relied upon *Schmerber v. California*¹⁶ and pointed to the need for fair and efficient detection and enforcement of the drunk driving laws in a day of excessive loss of life and property caused by inebriated drivers.

^{12.} 67 Cal.2d 100, 60 Cal. Rptr. 234, 429 P.2d 586 (1967).

^{13.} 380 U.S. 609, 14 L. Ed.2d 106, 85 S. Ct. 1229 (1965).

^{14.} *Adamson v. California*, 332 U.S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A.L.R. 1223 (1947).

^{15.} 65 Cal.2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1966).

^{16.} 384 U.S. 757, 16 L. Ed.2d 908, 86 S. Ct. 1826 (1966).

In *People v. Ellis*,¹⁷ the defendant was charged with assault with intent to commit rape. He was asked by the police to repeat certain phrases to assist the victim in identifying him. The court, in a much less satisfactory and inconsistent opinion than *Sudduth*,¹⁸ held, over two dissents, that the prosecution's comment on defendant's failure to repeat the phrases was a violation of his privilege against self-incrimination. The court stated that, after giving the usual Fifth Amendment warning, "[D]efendant's refusal to speak might well have been the direct result of the police warning and cannot be used against him."¹⁹ Pity the poor peace officer. He is damned if he warns and damned if he doesn't. The opinion did suggest, however, that as a prerequisite to the use of the defendant's refusal to participate in a voice identification, the police must advise him that the right to remain silent does not include the right to refuse to participate in such a test.

In *People v. Ing*,²⁰ there was comment by the prosecutor and instructions by the trial judge after the defendant charged with rape took the witness stand but failed to testify concerning other evidence of similar rapes, introduced to show a common scheme and design. Defendant's modus operandi was to drug girls who came to him for abortions and thereafter have sexual intercourse with them. The California Supreme Court distinguished *Griffin*.¹ Here the defendant had testified. Considering the broad scope of permissible cross-examination of a defendant who chooses to testify on his own behalf, the examination was proper. By taking the stand he waived any constitutional privilege against self-incrimination with respect to the collateral offenses.

Another application of *Griffin* occurred in *People v. Ross*.² There, after an armed robbery and attempted murder with

17. 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966).

18. *People v. Sudduth*, 65 Cal.2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1966).

19. *People v. Ellis*, 65 Cal.2d at 539, 55 Cal. Rptr. at 390, 421 P.2d at 398 (1966).

20. 65 Cal.2d 603, 55 Cal. Rptr. 902, 422 P.2d 590 (1967).

1. 380 U.S. 609, 14 L. Ed.2d 106, 85 S. Ct. 1229 (1965).

2. 67 Cal.2d 58, 60 Cal. Rptr. 254, 429 P.2d 606 (1967).

a shotgun with tape around it, the police were given a description of the escape vehicle and the robber. They attempted to stop a car answering the description. The driver immediately accelerated. Shots were fired at the car and returned. The driver was ultimately apprehended after flight on foot. A sawed-off shotgun with white tape on the barrel was found 100 feet from the car. The prosecutor commented and the court instructed on the failure of the accused to testify. The court thought that the statements were inconsequential under the facts. Chief Justice Traynor and Justice Peters dissented.

In *Garrity v. New Jersey*,³ the United States Supreme Court was faced with the problem of whether incriminating statements made by a government employee could be used against him in a criminal prosecution based on those statements. The court held that they could not be so used. The choice given him was either to forfeit his job or to pay the penalty of self-incrimination. One might ask why not, especially under the facts of the case. The defendants were police officers who allegedly were fixing traffic tickets. They were warned of their rights, but also told that they would be subject to removal if they refused to answer. This was another of the familiar five-to-four decisions.

In *People v. Genser*,⁴ a California court of appeal was faced with a related problem. The defendant was charged with perjury for making false statements under oath in the course of an investigation of Department of Motor Vehicles personnel. The court of appeal showed good judgment in distinguishing *Garrity* and affirming the conviction. It felt that *Garrity* did not furnish a license to commit perjury.

Death Penalty Trial

The court continues to narrow in on death penalty cases. If one carefully scans the reports, he may have a feeling that it does little else. It is rumored that there are clerks who do nothing but look for possibilities of reversing death penal-

3. 385 U.S. 493, 17 L. Ed.2d 562, 87 S. Ct. 616 (1967).

4. 250 Cal. App.2d 351, 58 Cal. Rptr. 290 (1967).

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ties. Consider, for example, *People v. Bandhauer*.⁵ There the court, using one of its common ploys, scanned the prosecutor's argument and found what it thought were objectionable remarks, although no objection had been made. Then it went on by way of dictum to overrule numerous decisions, some of which had resulted in executions. No longer will the prosecutor have the closing argument in a proceeding to determine sentence for murder under Penal Code section 190.1. Mr. Bumble could star on nearly every page of this article. Meanwhile, the public defenders continue to exhaust their meager budgets on death penalty cases. They complain, usually privately, that they don't have enough left to do a proper job on their other cases.

And then there was *People v. Griffin*.⁶

Yes, this is the Griffin who was able to persuade the Supreme Court of the United States that the long-standing provision of the California Constitution allowing comment on the failure of the defendant to take the stand should be held invalid.⁷ This year the results of his third trial arrived at the California Supreme Court. As might be expected, the court found a technical ground on which to reverse his death penalty conviction. Evidence was admitted concerning an attempted rape in Mexico, a charge on which the defendant had been acquitted. Evidence of the acquittal was excluded. This minor error was held to be prejudicial and the conviction was reversed. Justices Burke and McComb dissented. Hopefully the prosecutor will try again. Meanwhile "waiting justice sleeps," as does Griffin's victim of seven years ago.

The California Supreme Court again upheld the separate proceeding to determine sentence for murder provided for in Penal Code section 190.1. It again rejected the contention that the section is unconstitutional because no guidelines are specified to assist the jury in determining whether the penalty should be death or life imprisonment.⁸ One may doubt that

5. 66 Cal.2d 524, 58 Cal. Rptr. 332, 426 P.2d 900 (1967).

6. 66 Cal.2d 459, 58 Cal. Rptr. 107, 426 P.2d 507 (1967).

7. *Griffin v. California*, 380 U.S. 609, 14 L. Ed.2d 106, 85 S. Ct. 1229 (1965).

8. *People v. Seiterle*, 65 Cal.2d 333, 54 Cal. Rptr. 745, 420 P.2d 217 (1966).

any guidelines would have helped this defendant who apparently unnecessarily strangled a husband and wife in the course of a \$200 robbery. This is defendant Seiterle's fourth appearance before the court.⁹ What a waste of judicial effort on an admitted first-degree murder. Can there be no finality in a California death penalty case? Seiterle's victims were murdered nearly eight years ago—quite finally.

Evidence, to be admissible in the Penal Code section 190.1 proceeding to determine whether capital punishment should be assessed, must meet the standards of Penal Code section 1111 (the corroboration-of-accomplice section). In other words, other robberies cannot be proven as aggravating circumstances by the uncorroborated testimony of an accomplice in those robberies.^{9a} Another death penalty goes back for retrial.

D. Post-Trial Proceedings

Motions after Trial

Sections 1118,¹⁰ 1118.1¹¹ and 1118.2¹² have been added to the Penal Code to provide that the defendant can move for a judgment of acquittal after the prosecution rests or at the close of the evidence. The court can also acquit on its own motion. Acquittal is a bar to further prosecution. The former anomalous provision for an advised verdict is replaced by the new procedure.

Sentencing

The Health and Safety Code, under certain of the narcotics sections, requires denial of probation to a second-felony offender. The defendant in *In re Sanchez*¹³ was convicted the first time of possession of certain narcotics at a time when

9. *People v. Seiterle*, 56 Cal. 2d 320, 14 Cal. Rptr. 681, 363 P.2d 913 (1961); 59 Cal.2d 703, 31 Cal. Rptr. 67, 381 P.2d 947 (1963); *In re Seiterle*, 61 Cal. 2d 651, 39 Cal. Rptr. 716, 394 P.2d 556 (1964).

9a. *People v. Varnum*, 66 Cal.2d 808, 59 Cal. Rptr. 108, 427 P.2d 772 (1967).

10. Judgment of acquittal: Nonjury case.

11. Same: Jury case.

12. Same: Appealability of judgment.

13. 65 Cal.2d 556, 55 Cal. Rptr. 422, 421 P.2d 430 (1966).

the offense could be either a felony or a misdemeanor in the discretion of the court. However, no "sentence" was ever imposed, since he was committed to the Youth Authority. The Supreme Court held that, under the statutes, as it then interpreted them, the trial judge had no alternative but to commit the defendant to a state prison upon his second conviction.

The problem of double punishment under Penal Code section 654 continued to be troublesome. That section provides that an act punishable under different provisions of the Penal Code can only be punished under one of those provisions. It is worded in terms of double jeopardy and should not require reversal of a judgment where concurrent sentences are imposed for the same act. However, the court rejected this notion in *Neal v. California*,¹⁴ and the resulting morass of litigation has caused much trouble.

In the case of *In re Wright*,¹⁵ the Supreme Court made it quite clear that no longer can concurrent sentences violating Penal Code section 654 be upheld as working no prejudice. A number of court of appeal decisions to the contrary were disapproved. A suggestion by the Attorney General that one sentence be suspended was rejected.

Where defendant kidnaps A, B, and C for the purposes of robbery, and also steals a safe, he can be convicted of three kidnappings and the robbery. However, the concurrent burglary sentence could not be sustained. The court "directed" the Adult Authority "to exclude the burglary sentence from its consideration."¹⁶

Another such case, *In re McGrew*,¹⁷ involved a burglary after which the defendant raped the victim three times and forced her into an act of oral copulation. He was convicted on two counts of rape, one count under section 288 of the Penal Code, and the burglary. The California Supreme Court noted that on his entry he had told the victim he was

^{14.} 55 Cal.2d 11, 9 Cal. Rptr. 607, 357 P.2d 839 (1960).

^{15.} 65 Cal.2d 650, 56 Cal. Rptr. 110, 422 P.2d 998 (1967).

^{16.} *In re Ford*, 66 Cal.2d at 184, 57 Cal. Rptr. at 129, 424 P.2d at 681 (1967).

^{17.} 66 Cal.2d 685, 58 Cal. Rptr. 561, 427 P.2d 161 (1967).

going to “have her in every way possible.”¹⁸ It held that under section 654 only the burglary conviction could stand.

Or consider the rather ridiculous decision in *In re Johnson*,¹⁹ where the court held that two sales of heroin to one customer, one at 9:00 p.m. and one at 11:00 p.m., constituted one act. The court calls it a “single transaction.” But section 654 speaks only in terms of the “same act,” not transactions, and the court extends this to what it recognizes as a “series of acts.”²⁰

Of course, all of the facts are before the Adult Authority anyway when it fixes the sentences. Isn't the court dreaming when it “orders” the Authority to ignore an assault with a deadly weapon on A (shooting and pistol whipping) in the course of an armed robbery of B?¹ The Authority is going to determine the sentence on the basis of the facts in the file. Would it not be remiss in its statutory duties if it failed to consider such facts as more serious than a less complicated armed robbery where only one victim is involved? Perhaps the defendant in *Neal* may not be adjudged guilty of both arson and attempted murder when he throws gasoline into an occupied bedroom and ignites it. Surely the Adult Authority is going to consider the heinousness of the facts surrounding the crime in determining sentence. One hopes that the Adult Authority is adult enough to ignore this attempt of the California Supreme Court to interfere with its prerogatives. Surely there should be something left of the doctrine of separation of powers.

Perhaps the most pleasant aspect of the *Neal* problem is that the court is basing the decision on a statute. So far it is not based on constitutional law. The legislature still can correct this judicial meandering.

Appeal

Where a defendant is convicted of three offenses and given concurrent sentences, can he be retried and given consecutive

18. 66 Cal.2d at 687, 58 Cal. Rptr. at 562, 427 P.2d at 162 (1967).

19. 65 Cal.2d 393, 54 Cal. Rptr. 873, 420 P.2d 393 (1966).

20. 65 Cal.2d at 394–395, 54 Cal. Rptr. at 874, 420 P.2d at 394 (1966).

1. *In re Henry*, 65 Cal.2d 330, 54 Cal. Rptr. 633, 420 P.2d 97 (1966).

sentences if the conviction is reversed? This apparently novel question was posed in *People v. Ali*.² The court answered it in the negative, modifying the judgment to make the sentences run concurrently. The court analogized its facts with those in *People v. Henderson*.³ In that case the court held that a defendant who is given a life sentence is not required to risk his life when he appeals what turns out to have been an erroneous judgment. Both decisions seem clearly correct.

Where an information is dismissed by the court in a Penal Code section 995 motion, the people can appeal.⁴ Can they simultaneously file a new indictment or information? In *Anderson v. Superior Court*,⁵ the court was faced with a contention that this practice was unfair to the defendant, since he would have to defend the appeal on the first information and simultaneously prepare for trial on the second pleading. The court took a middle ground. The prosecutor can take both courses. However, he must elect between them as soon as feasible. This election should be no later than the time when the new pleading withstands a section 995 motion or at the time of arraignment under it, whichever first occurs.

Parole

In the case of *In re Schoengarth*,⁶ the defendant asked if he could be sent to Colorado to be tried under charges outstanding there. The Adult Authority fixed his sentence at below the maximum on the condition that he go to Colorado to stand trial. He then refused to accept the condition. The Authority then reinstated his indeterminate sentence. The California Supreme Court upheld the exclusive jurisdiction of the Authority in fixing and redetermining indeterminate sentences. Defendant's refusal to accept the condition of parole constituted cause to refix his sentence.

2. 66 Cal.2d 277, 57 Cal. Rptr. 348, 424 P.2d 932 (1967).

3. 60 Cal.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

4. See Cal. Penal Code § 1238.

5. 66 Cal.2d 863, 59 Cal. Rptr. 426, 428 P.2d 290 (1967).

6. 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967).

Habeas Corpus

Is habeas corpus available to a defendant at large under his own recognizance? The California Supreme Court was faced with this issue in *In re Smiley*.⁷ Smiley applied to the California Supreme Court for a writ of habeas corpus on the grounds, principally, that he had not been advised of his right to counsel or his right to a speedy trial. He was released on his own recognizance by the court pending final disposition. The Superior Court of Imperial County, at a later hearing, denied habeas corpus and remanded defendant to the custody of the sheriff. Defendant then applied for habeas corpus to the Federal District Court, which ordered him released on his own recognizance pending hearing on the merits. The Federal District Court later ruled that the defendant had not exhausted his state remedies, and denied his application, but ordered that the defendant remain at liberty on his own recognizance pending rehearing by the California Supreme Court.

Justice Mosk, in a very informative opinion, stated that it is settled that the use of habeas corpus has not been restricted to situations in which the applicant is in actual physical custody.

II. Criminal Law

Major crimes in California rose 8.7 percent in 1966 as compared with 1965. During the same period the population increased 1.7 percent. Crime is increasing more than five times as fast as the population. The rate of major crimes during the same period rose from 2643.5 to 2825.7 per 100,000 persons. If the same rate of increase continues, we can predict that the 1967 report will show one serious crime for every 33 persons, including infants.⁸

Crime, whether on or off the streets, is the result of many things. It has been my contention that one, if not the primary, cause lies with the supreme courts.⁹ In their efforts to protect

7. 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

8. These figures are based on FBI, *Uniform Crime Reports—1966*, p. 64.

9. See, e.g., address, *Are the Courts Creating the Crime Problem?*, Commonwealth Club of California, July 16, 1965.

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criminals they too often overlook the needs of the public and its police. As has been seen, our California Supreme Court has even developed a reputation of trying to anticipate the United States Supreme Court.

What are some of the possible solutions to the problem? One obviously is less tender loving care for the criminals. More and more the police are being handcuffed. Our Supreme Court is somewhat handicapped because it is often bound by United States Supreme Court decisions. But it could use some restraint—if it wanted to. Another possible solution might be to create a court of criminal appeal composed of experienced trial lawyers. Such a court has been quite successful in England. Furthermore, this would give the obviously overworked California Supreme Court more time for civil cases. Alternately, we might limit its jurisdiction by requiring certification by the California Court of Appeal before a case goes to the California Supreme Court, perhaps allowing that court to take a case on its own motion on the basis of a reported California Court of Appeal opinion.

The Supreme Court should not be required to hear stale and meaningless habeas corpus cases which can be left to the lower courts of appeal. An example is the multiple punishment problem, where the court spends countless hours reviewing ancient claims based on records which will still be considered by the Adult Authority despite directions to the contrary from the California Supreme Court, and rightly so.

It would also be helpful if our Governor and President showed concern for crime on the streets in their judicial appointments, particularly to the supreme courts. One hopes that Governor Reagan's and the President's future appointments show such concern.

Diminished Responsibility

The California doctrine of diminished responsibility continues to be increased in application. There seems to be a growing tendency on the part of the California Supreme Court in considering whether there is diminished responsibility to

examine the personal turpitude of the defendant. In its previous consideration of this doctrine, in *People v. Wolff*,¹⁰ the court felt that the defendant had ample time to deliberate and premeditate. It felt that he knew the difference between right and wrong. However, it also felt that his ability to reflect upon the consequences of his act and to appraise his moral turpitude was vague and detached. Citing *People v. Holt*,¹¹ the court emphasized the importance of the turpitude of the offender as a distinguishing factor between first and second-degree murder.

In two recent cases, the Supreme Court, citing *Wolff*, again reduced convictions of first-degree murder to second-degree murder. Thus in *People v. Goedecke*,¹² where the defendant was found guilty of the first-degree murder of his father, and not guilty by reason of insanity of the murders of his mother, brother, and sister, the conviction was reduced to second-degree murder, despite ample evidence that the crime was studiously planned and executed and conflicting evidence by experts that his mental capacity was diminished. As in *Wolff*, the court found that although the defendant knew the difference between right and wrong and that the intended act was wrong, the extent of his understanding, his reflection on it and its consequences, with realization of the enormity of the evil, was materially vague and detached and fell short of the minimum requirements of first-degree murder, especially with respect to the quantum of reflection, comprehension, and turpitude of the offender.

In *People v. Nicolaus*,¹³ the defendant murdered his three children and was found guilty of first-degree murder. Once again there were defense psychiatrists willing to testify that his responsibility was diminished. Others testified to the contrary. In both cases, the court, with two dissenting Justices, reduced the degree of the crime to second-degree murder. Justice Burke, writing for the majority in *Goedecke*, took pains to emphasize the “turpitude of the offender” language

10. 61 Cal.2d 795, 40 Cal. Rptr. 271, 394 P.2d 959 (1964).

11. 25 Cal.2d 59, 153 P.2d 21 (1944).

12. 65 Cal.2d 850, 56 Cal. Rptr. 625, 423 P.2d 777 (1967).

13. 65 Cal.2d 866, 56 Cal. Rptr. 635, 423 P.2d 787 (1967).

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of *Wolff*. He said: “[T]he controlling issue as to degree depends not alone on the character of the killing but also on the question of personal turpitude of the actor.”¹⁴ Justice Mosk, McComb concurring, wrote a strong and well-reasoned dissent in both *Goedecke* and *Nicolaus*. One may disagree with the application of the “personal turpitude” measure to the facts. However, perhaps one can agree that this is a much more logical distinction between first and second-degree murder than is the present terminology “wilful, deliberate, and premeditated.”

The court seemingly has no statutory method available to it to change a death penalty to life imprisonment in the case of first-degree murder. Penal Code section 1260¹⁵ would seem to allow modification of the sentence, but the court has reached the contrary result in several decisions.¹⁶ In theory at least, the death penalty and life imprisonment are equivalents. Section 1181(6)¹⁷ allows reduction of degree where the evidence shows the defendant to be not guilty of that degree. The court has refused to reduce the degree in first-degree murder cases unless the evidence, insufficient to show first-degree murder, did show second-degree murder.¹⁸

I am not alone in finding the diminished responsibility doctrine perplexing.¹⁹ Perhaps what the court is doing is finding a method of circumventing sections 1181(6) and

14. 65 Cal.2d at 857, 56 Cal. Rptr. at 630, 423 P.2d at 782.

15. Cal. Penal Code § 1260. **Determination of appeal.**

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial.

16. See *People v. Byrd*, 42 Cal.2d 200, 213, 266 P.2d 505, 512 (1954) and cases therein cited.

17. Cal. Penal Code § 1181(6) provides that when a verdict has been

rendered or a finding made against a defendant, the court may grant a new trial when “the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed; . . .”

18. Cf. *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8 (1945).

19. See, e.g., *People v. Hoxie*, 252 Cal. App.2d 967, 61 Cal. Rptr. 37 (1967).

1260. It is rather obvious from its actions that the majority of the court opposes the death penalty. One way or another it has prevented executions since January 1963, with one exception. The court has accomplished what the legislature refused to do. It has placed a moratorium on capital punishment, except for one scapegoat.²⁰

The court is very ingenious in its efforts to circumvent executions as required by law of California. Its decisions are subject to sudden about-faces. Precedents mean nothing. One deputy district attorney said not long ago: "We are supposed to play by the rules of the game. The trouble is that they change the rules after the game is over." Consider, for example, *People v. Morse*.¹ *Morse* involved the practice of permitting the prosecutor to comment on and the court to instruct on the fact that life imprisonment does not mean life imprisonment, since there is eligibility for parole, often in seven years. This practice dates back to at least 1931. Numerous persons have been executed where there was comment and instruction on the possibility of parole. Isn't it obvious that a jury has a right to know about the possibility of parole and consider this in determining whether or not to give a death penalty? The Adult Authority is far from infallible. However, the court in *Morse*, groping for ways to cut down or postpone death penalties, chose to overrule this longtime practice. This, of course, is a head-in-the-sand approach. Surely at least one member of every jury knows of the possibility of parole and will communicate it to his fellows. But changing the practice is a device to postpone executions.

For many years the court has insisted that the jury must have absolute discretion in its death penalty decision. It has made continuous efforts to contain the People's argument for the death penalty. Perhaps we are now due for another about-face. Perhaps the court will soon say that Penal Code section 190.1 is unconstitutional since it provides the jury with no standards. This would not be unexpected. The court

20. Cf. *Leviticus XVI*.

1. 60 Cal.2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 12 A.L.R.3d 810 (1964).

may even put on its blinders and declare that the death penalty is a cruel and unusual punishment, ignoring the fact that capital punishment is obviously within the contemplation of both the Federal and State Constitutions. Both provide for the deprivation of life with due process of law.²

Intoxication

A defendant charged with assault with a deadly weapon³ is entitled to a jury instruction on simple assault under Penal Code section 240 if he claims he was too drunk to know that uniformed officers in a patrol car were peace officers. In *People v. Garcia*,⁴ the defendant, on being questioned by uniformed police officers, was unable to identify himself, and appeared to be intoxicated. The officers decided to arrest him, but the defendant broke away. Defendant found a stick and struck the officers, finally being subdued after a struggle. He later testified he was too drunk to recognize the officers and had assumed the patrol wagon to be a truck. The court found that when a defendant is on trial for assault with a deadly weapon, if there is evidence to justify a charge of simple assault, an instruction on the latter is mandatory, at least where the defendant requests such an instruction. The court recognized that voluntary intoxication is not a defense to a crime, but stated that the jury may consider the fact of intoxication whenever the actual existence of a particular purpose, motive, or intent is a necessary element.⁵

Mistake

The California Supreme Court, in a five-to-two decision in *People v. Butler*,⁶ reaffirmed the doctrine⁷ that claim of right

2. See, e.g., *People v. Bandhauer*, 66 Cal.2d 524, 58 Cal. Rptr. 332, 426 P.2d 900 (1967), where the court selects a few isolated remarks of the prosecutor and finds reversible error, and then goes on to render a gratuitous dictum to the effect that the prosecutor can no longer have a right to close in a Penal Code § 190.1 proceeding.

3. See Cal. Penal Code § 245(b).

4. 250 Cal. App.2d 15, 58 Cal. Rptr. 186 (1967).

5. See Cal. Penal Code § 22.

6. 65 Cal.2d 569, 55 Cal. Rptr. 511, 421 P.2d 703 (1967).

7. See *People v. Rosen*, 11 Cal.2d 147, 78 P.2d 727, 116 A.L.R. 991 (1938).

is a defense to a charge of armed robbery, even where the robbery results in a homicide. The defendant claimed he only intended to collect money due him for wages and that his gun went off accidentally. The prosecutor was permitted, over objection, to argue that it is still robbery even if one's intention is only to recover money he claims to be owed him. The majority expressed the view that the defendant's objection was well taken, reasoning that robbery requires that the taking be felonious and thus a bona fide belief of the defendant, even if mistaken, that he had the right to the property is a valid defense since it negates the felonious intent. Justice Mosk, dissenting, felt that in "a bucolic western scene or in the woolly atmosphere of the frontier in the nineteenth century, the six-shooter may have been an acceptable device for do-it-yourself debt collection," but that "a might-makes-right doctrine . . . is of dubious adaptability to urban society in this final third of the twentieth century."⁸ He quite properly pointed out that Penal Code section 211, on robbery upon which the felony-murder prosecution was based, raises no issue of ownership of the property taken. It requires only that it be taken forcibly from the "possession" of another. Justice McComb concurred. Both dissenters also felt that there was no prejudicial error, and certainly none was shown by the facts as stated in the majority opinion. However, the majority felt that there was prejudicial error per se because the prosecutor's argument deprived the defendant of his right to have all "significant" issues determined by a jury.

Homicide

Can a parent be convicted of manslaughter for failing to obtain medical assistance when needed by a child? In *People v. Arnold*,⁹ the defendant belonged to the Church of the First Born, which believes in faith healing. Her daughter was painfully ill over a number of days as the result of a blocked small intestine. The medical evidence was to the effect that she could have been saved until very close to the time she

⁸. 65 Cal.2d at 577, 55 Cal. Rptr. at 517, 421 P.2d at 709.

⁹. 66 Cal.2d 438, 58 Cal. Rptr. 115, 426 P.2d 515 (1967).

died. The theory of the prosecution was that a conviction could be obtained if defendant violated Penal Code section 270 (omission to furnish necessary medical assistance) or section 272 (failure to provide necessities), if the defendant knew or "should have known" of the danger of death. Although the court reversed on procedural grounds, in no way did it object to the theory of the prosecution's case. The question of culpability of a person who believes in faith healing is a very fascinating philosophical problem.¹⁰ Such a person is negligent if a reasonable person would not have held such a belief. But one may question whether such a person is culpable and whether the purposes of the criminal law are served by confining her to the county jail for one year. For that matter, one may raise the question whether any person should be punished for negligent homicide. In this case, without convicting her of manslaughter, she could easily be convicted of violations of Penal Code section 270 or 272 and still be sent to the county jail for one year. Perhaps the latter procedure is more rational.

Assault

In *People v. Hoxie*,¹¹ the court of appeal held that an assault with intent to commit murder could be an assault with "intent" to commit second-degree murder. However, it seemingly limited this doctrine to murders involving an intent to kill. One defense was diminished responsibility. The court was troubled by the distinctions drawn between first and second-degree murder by the California Supreme Court. (Aren't we all?) However, it held that even here, absent evidence of diminished responsibility, the defendant could have been found guilty of second-degree murder had the assault been successful. The conviction was affirmed.

10. See, e.g., Trescher and O'Neill, *Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist*, 109 PA. L. REV. 203 (1960).

11. 252 Cal. App.2d 967, 61 Cal. Rptr. 37 (1967).

Conspiracy

Penal Code section 182(5) makes it a crime to conspire to “commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.” One may question the need for this provision since the cases, except possibly for the obstruction of justice portion, seem invariably to include the commission of or conspiracy to commit crimes. In *People v. Rehman*,¹² the constitutionality of the provision was questioned on the “void for vagueness” doctrine. The essence of the charge was conspiracy to practice medicine without a license—including such things as surgery, delivering babies, and similar matters. Judge Kincaid, a retired California Superior Court judge sitting *pro tempore*, wrote a very fine opinion upholding the constitutionality of the statute.

Obstructing an Officer

The defendant in *People v. Cooks*¹³ was charged with a violation of Penal Code section 148, obstructing an officer in the discharge of his duties. The officer was trying to question a robbery suspect in a bar. The defendant bartender repeatedly told the suspect not to answer any questions and not to show identification. The suspect followed defendant’s advice despite the officer’s repeated verbal attempts to quiet the defendant. The trial court, at the close of the evidence, dismissed the charge on the ground that the facts showed constitutionally protected speech. The State successfully appealed. The Appellate Department of the San Diego Superior Court said that the defendant had deliberately set out to obstruct a police officer and had succeeded in his purpose, and that such speech-conduct is not constitutionally protected.

12. 253 Cal. App.2d 117, 61 Cal. Rptr. 550 (case subsequently transferred to Court of Appeals and certified for Rptr. 65 (1967)).

13. 250 Cal. App.2d —, 58 Cal. nonpublication July 13, 1967).

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Perjury

In *People v. Walker*,¹⁴ the defendant, an aluminum siding contractor, was convicted of perjury growing out of sworn statements before a notary. He would swear before the notary that he had witnessed signatures when in fact he had not. The conviction was affirmed. It is a well-known fact that many notaries are rather lax about formalities. All of us have experienced such laxity. What the solution is, I am not sure. One possibility might be to do away with notaries.

Trespass; Disorderly Conduct

In *People v. Wilkinson*,¹⁵ four persons went through a fence onto private property without consent and made their way to a beach. There they improvised a tarp campsite complete with sleeping bags and fire over which they were preparing their breakfast when arrested. They were convicted of a violation of Penal Code section 602 (1), which makes "entering and occupying" real property without the consent of the owner a misdemeanor. The court reversed, holding that the section applies only to nontransient continuous occupation. It suggested that section 602.5 would not apply either, since no structure was employed. Perhaps it was because of this decision and the hippie invasion generally that Penal Code section 647(h) was adopted in 1967. That subsection makes it disorderly conduct, a misdemeanor, to lodge in "any building, structure or place, whether public or private" without permission.

*Abortion*¹⁶

The legislature enacted a so-called Therapeutic Abortion Act,¹⁷ which became effective November 8, 1967, after the period covered by this article. The Act permits a physician to perform an abortion in a hospital when approved by a

14. 247 Cal. App.2d 554, 55 Cal. Rptr. 726 (1967), cert. denied — U.S. —, 19 L. Ed.2d 77, 88 S. Ct. 60 (1967).

15. 248 Cal. App.2d Supp. 906, 56 Cal. Rptr. 261 (1967).

16. See Leavy, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 UCLA L. REV. 1 (1967).

17. Cal. Health & Safety Code §§ 25950-25954.

hospital committee if there is a risk to the physical or mental health of the mother, or if the pregnancy resulted from rape or incest. Provisions are made for prosecutor opinions and court hearings on the matter of rape or incest. Statutory rape is excluded from the definition of rape, unless the girl is under the age of fifteen.

Penal Code section 274 is unchanged. Thus, a physician still has a defense that the abortion was necessary to preserve life. One may doubt that the Act is more than a token approach to the problem, which involves healthy women, married or unmarried, who want abortions, as well as victims of rapes and incest. They still may be forced to go to the Tijuana butchers. One may predict that the law will be stretched to take care of some of their problems.¹⁸ It will be interesting to see how it works in practice.

Indecent Exposure

*People v. Merriam*¹⁹ is worthy of note largely because of a very brave victim, a Mrs. Alyce Wolf. She discovered the defendant exposing himself in a basement storeroom and ordered him to leave. When he would not, she attempted to move him by force. She finally succeeded after calling police, who arrived shortly after his departure.

There is also a point of law in the *Merriam* decision. Although indecent exposure is not like some sex crimes where fabrication is a danger, the shocking nature of the acts might lead to hasty identification. Therefore a cautionary instruction must be given to the effect that in prosecutions for sex offenses, including indecent exposure, accusations are easy to make and difficult to prove. The jury should be told that the testimony of complaining witnesses should be viewed with caution. Failure to give such an instruction, whether requested or not, is error.

¹⁸. Doubtless the word will get around that a woman who can convince her physician or psychiatrist that she contemplates suicide can obtain a therapeutic abortion. Of course, if

she can't afford a physician or psychiatrist, she can go ahead and have her unwanted baby.

¹⁹. 66 Cal.2d 390, 58 Cal. Rptr. 1, 426 P.2d 161 (1967).

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Fortunately, in *Merriam* the evidence was solid. The identification by Mrs. Wolf was quite positive. The court for once applied Article VI, section 13 and held that the error was harmless.

Bravo Mrs. Wolf! God Bless You.