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Administration of Criminal Justice

I. Introduction

What follows is an effort to focus attention on certain problem areas in the day-to-day administration of justice. They are problems not so much because of their complexity, but rather because uncertainty persists despite considerable discussion of the rules governing each area. I have selected preliminary hearings, bail, appointment of counsel, *sua sponte* judicial dismissals, and reasonable doubt as appropriate topics for this chapter. There are, of course, numerous others entitled to treatment, but each of those selected relates to a subject over which the trial judge may exercise an extremely broad discretion. The exercise of this discretion may alter the course of a criminal proceeding, and once exercised, is often beyond the reach of an appellate court.

Since the exercise of discretion seems to infuriate those who would attribute worsening crime statistics to judicial leniency, it must be noted at the outset that the entire system, from the beat-patrolman through the prosecutor's office and on to the governor's pardoning power, is replete with discretion. This

is by design and merely signifies that no system of justice is infallible. That is not to say that, in some instances, discretion is not exercised arbitrarily. Many of these are correctable at the reviewing court level. To the extent that they are not, the value of reposing discretion in our executive and judicial officers charged wtih the responsibility of enforcing criminal laws exceeds the harm done by a bad decision.

In actuality, the discretion exercised by the courts pales into insignificance when compared with the discretion exercised by police officers in the field, who, for one reason or another, often despite probable cause, will decline to make an arrest, or that exercised by prosecutors, who, upon evaluating a police report, will decide that the evidence is insufficient to justify a prosecution and will decline to file a complaint. The difference lies in the accessibility of these discretionary decisions to the public view. The judge's statements are recorded by a court reporter and are frequently observed by the press. Except for those rare cases attracting public attention, little is known and less is said about the manner in which the police and district attorney carry out their responsibilities on a case-to-case or incident-to-incident basis.

The fact that a prosecutor's office has an 85 percent conviction rate is not an accurate measure of its effectiveness, since evaluation procedures have sifted out many of the tougher cases. Consequently, complaints are filed in those cases in which conviction is the foreseeable result. Even then, should further analysis suggest that the chances of conviction are less than first anticipated, the way is open to recommend a lesser plea or move for dismissal. Thus, conviction rates remain intact despite rising crime statistics. Crime clearance rates collected by local police departments may be just as misleading. This unreliability springs from the manner in which the original statistic is arrived at and the criteria for declaring a crime solved.

In short, it is naive to assume that a system providing for as much discretion as ours can expect to dispense "equal justice under law." Approximate justice, perhaps, but never equal. The disparate results are sometimes shocking to be-

hold, although our reviewing courts and, particularly, the Supreme Courts of California and the United States have insisted on the imposition of minimum constitutional standards, thereby assuring relatively equivalent treatment. In recent years, the Fourth, Fifth, and Sixth Amendments of the Bill of Rights have been made applicable to the states, thereby closing a gap that had created some horrifying differences in the kind of due process a citizen of the United States could expect, depending on his geographical location at the time he was charged with a crime.

The discussion that follows is not intended to imply that "equal justice under law" is an unworthy goal, or that judicial discretion in any of the areas referred to should be curtailed. The better conclusion is that a judge's failure to exercise discretion in an appropriate case undermines the independence of the judiciary and weakens the sinew of a free society by relinquishing judicial power to the executive. Concededly, judicial discretion must be exercised wisely and cautiously, keeping in mind that both protection of the community and justice for the individual are legitimate goals that provide an ethical basis for the administration of justice in a democracy.

II. Appointment of Counsel

A. *Objections to Appointment of Counsel*

Infrequently—but on occasion—a district attorney will object to the appointment of a public defender to represent a purportedly indigent accused. The danger of proceeding with a *pro per* defendant who has requested counsel is manifest, and the legal pitfalls are so numerous that the objection is a curious one. The prosecutor should be concerned with insulating a potential conviction from any constitutional defect, but his objection to court-appointed counsel has the opposite effect. Moreover, the district attorney's standing to raise such an objection is doubtful, although he clearly has the right to present any information that is pertinent to a determination of indigency.

Government Code Section 27706(a), provides that ". . . [u]pon request of the defendant [*or*] upon order of court [the public defender] shall defend, without expense to the defendant, any person who is not financially able to employ counsel. . . ." A defendant may apply to the court, the public defender, or both for such services, and a determination by one that the defendant is ineligible is not binding on the other. Furthermore, a determination of eligibility by one is not reversible by the other.[1] Accordingly, the public defender is in a position to supersede a trial judge on this question, providing he does so in favor of representation.

Intervention of the trial judge into an attorney-client relationship is so unpalatable to the California Supreme Court that it would seem to follow that a district attorney's interference would be considered even more undesirable. The nature of the attorney-client relationship is such that "once counsel is appointed or undertakes to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused."[2]

B. *Determination of Indigency*

There is no precise formula for determining the financial eligiblity of a defendant for court-appointed counsel, and the California Supreme Court has recognized that a reviewing court should not prescribe a specific maximum amount of net liquid assets as a cutoff point. The appropriate test is "whether or not a private attorney would be interested in representing the defendant in his present economic circumstances."[3] A

1. Ingram v. Justice Court, 69 Cal.2d 832, 73 Cal. Rptr. 410, 447 P.2d 650 (1968).

2. Smith v. Superior Court, 68 Cal.2d 547, 562, 68 Cal. Rptr. 1, 10, 440 P.2d 65, 74 (1968); People v. Ferry, 237 Cal. App.2d 880, 890, 47 Cal. Rptr. 324, 332 (1965); Ingram v. Justice Court, 69 Cal.2d 832, 840–841, 73 Cal. Rptr. 410, 414–415, 447 P.2d 650, 654, 655 (1968).

3. In re Smiley, 66 Cal.2d 606, 620, 58 Cal. Rptr. 579, 587, 427 P.2d 179, 187 (1967), citing 13 Stanford L. Rev. 522.

determination of indigency is based on the defendant's over-all financial situation. Indebtedness must be weighed against assets, and the complexity of the case as well as the cost of legal representation in the community must be considered. In *In re Smiley,* the Court recognized that the inquiry of trial judges will normally "be a cursory one," and that as a practical matter, judges will be required to accept the defendant's own evaluation of his ability to retain private counsel. Should a judge's ambivalence on the subject lead to a hearing, a failure to consider outstanding indebtedness such as encumbrances on the home and automobile, number and age of defendants, child support and alimony, etc., would be error.[4] Since contingent fees are unethical, and few attorneys will accept employment on a credit basis in a criminal case, the ability of an accused to post bail or to resume his employment is not determinative of eligibility for court-appointed counsel.[5]

C. *Discharge of Appointed Counsel by Court*

Determinations of indigency aside, it is beyond the inherent power of a trial court to interfere with the attorney-client relationship by discharging a defendant's court-appointed counsel of record, over the attorney's and defendant's objections, on the ground of the judge's subjective opinion that the attorney is incompetent. Although a defendant has a constitutional right to the effective aid of counsel, the trial court must neither infringe on the defendant's right to counsel of his choice nor compromise the independence of the Bar. The admission of an attorney to the Bar establishes his competence to practice in all state courts.[6] While the California Supreme Court acknowledges situations in which the trial judge could act *sua sponte,* such as illness, intoxication, or a nervous breakdown, such action "should be taken with great circumspection

4. In re Smiley, 66 Cal.2d 606, 619, 58 Cal. Rptr. 579, 587, 427 P.2d 179, 187.

5. People v. Ferry, 237 Cal. App. 2d 880, 47 Cal. Rptr. 324 (1965); Williams v. Superior Court, 226 Cal. App. 2d 666, 38 Cal. Rptr. 291 (1964), citing 13 Stanford L. Rev. 522.

6. Smith v. Superior Court, 68 Cal. 2d 547, 68 Cal. Rptr. 1, 440 P.2d 65 (1968).

and only after all reasonable alternatives such as the granting of a continuance have been exhausted."[7]

The supervening consideration in all such cases is "the State's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command."[8] "Incompetence," the Court holds, is not a legitimate basis for a trial judge to, on his own motion, relieve counsel, and "the recognition of such an authority would involve the surrender of a substantial amount of the independence of the Bar and in many instances would deprive litigants of a fair hearing."[9]

D. *Waiver of Counsel*

Extreme caution must be exercised in accepting a waiver of counsel from a defendant. As the above discussion would indicate, the trial judge has an obligation to determine whether indigency is the catalyst for the purported waiver. If so, the trial court must appoint counsel. The trial court's obligation exists even if the defendant is an attorney; the rights of individuals are not to be gauged by their professions or occupations.[10]

Doubts with respect to the right of a defendant to court-appointed counsel in all misdemeanor cases (including traffic offenses denominated misdemeanor) were set aside in the cases of *In re Johnson*[11] and *Blake v. Municipal Court.*[12] Article I, Section 13 of the California Constitution provides that in a criminal prosecution *in any court whatsoever,* defendants are guaranteed the right to counsel. In *Johnson,* the California Supreme Court emphasized that in determining whether a

7. Smith v. Superior Court, 68 Cal. 2d 547, 559, 68 Cal. Rptr. 1, 9, 440 P. 2d 65, 72–73.

8. Smith v. Superior Court, 68 Cal. 2d 547, 559, 68 Cal. Rptr. 1, 9, 440 P.2d 65, 73, quoting from People v. Crovedi, 65 Cal.2d 199, 206, 53 Cal. Rptr. 284, 289, 417 P.2d 868, 873.

9. Smith v. Superior Court, 68 Cal. 2d 547, 562, 68 Cal. Rptr. 1, 11, 440 P.2d 65, 75 (1968), quoting Gallagher v. Municipal Court, 31 Cal.2d 784, 797, 192 P.2d 905, 914 (1948).

10. Bogart v. Superior Court, 60 Cal. 2d 436, 34 Cal. Rptr. 850, 386 P.2d 474 (1963).

11. 62 Cal.2d 325, 42 Cal. Rptr. 228, 398 P.2d 420 (1965).

12. 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966).

defendant has effectively waived his right to an attorney, the usual presumptions against waiver of a constitutional right apply. The record must reflect an express and personal waiver by the defendant demonstrating his full knowledge and recognition of the significance of his acts. Whether a trial judge permits a defendant to waive counsel is discretionary, but the trial court must perform its duty in a manner calculated "to promote rather than defeat the constitutional intent."[13]

A determination of whether to accept a waiver hinges on the facts and circumstances of a particular case, the background, experience, and conduct of the defendant, and his understanding of the nature and effect of the waiver, the charge against him, and the pleas and defenses that may be available to him as well as the punishment that may be exacted.[14]

The *Johnson* opinion by Justice Mosk does not ignore the actuality of mass arraignments, such as in traffic court, where individually advising each defendant of his constitutional rights would hopelessly ensnarl the court calendar, but states that "although there may be a choice of valid ways to implement these rights," there can be no impairment thereof, however minor the crime.[15] The clear conclusion to be drawn from the *Johnson* and *Smiley* cases is that, on appeal, reviewing courts are apt to be result-oriented and will scrupulously examine purported waivers of constitutional rights whenever the defendant has been sentenced to a period of confinement, however short.

This is borne out by the reasoning of *Blake v. Municipal Court,* wherein the defendant was convicted of violating Section 22350 of the Vehicle Code for operating a vehicle at 53 miles per hour in a 25-mile zone. A group of defendants, including Blake, had been advised collectively of their rights, including the right to court-appointed counsel if indigent. Blake pleaded guilty and was sentenced to one day in the

13. 62 Cal.2d 325, 330, 42 Cal. Rptr. 228, 231, 398 P.2d 420, 423 (1965).

14. In re Johnson, 62 Cal.2d 325, 42 Cal. Rptr. 228, 398 P.2d 420.

15. 62 Cal.2d 325, 336, 42 Cal. Rptr. 228, 235, 398 P.2d 420, 427.

county jail. Holding the waiver ineffective, the Court of Appeals emphasized that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request. Accordingly, neither the defendant's failure to make a request nor his entry of a guilty plea was determinative of waiver. Where a loss of liberty results from conviction, even for a a misdemeanor traffic offense, the record must affirmatively show that the defendant was notified of the right to counsel and that he expressly waived that right. A petition for hearing was subsequently denied by the California Supreme Court.[16]

E. *The Right to Self-Representation*

"A defendant in a criminal case has a constitutional right to waive counsel and represent himself if he knowingly and intelligently elects to do so."[17] The determination of whether a defendant is competent to represent himself is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion.[18] Although the defendant's right to represent himself may not be denied on the sole basis that he is unable to "demonstrate either the acumen or the learning of a skilled lawyer," he must have a meaningful understanding of the nature of the offense charged against him, available pleas and defenses, potential punishments, and the consequences of a waiver.

In the final analysis, a reading of the cases compels the conclusion that it is unwise for a trial judge, except in the case of an unusually intelligent and articulate defendant, to permit an accused charged with a serious crime to represent himself. As the California Supreme Court said in *People v. Floyd*, "Had the defendant like Milton . . . represented himself in a death penalty case, this court would have been required

16. 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966).

17. People v. Floyd, 1 Cal.3d 694, 702, 83 Cal. Rptr. 608, 612, 464 P.2d 64, 68 (1970); People v Redmond, 71 Cal.2d —, —, 79 Cal. Rptr. 529, 536, 457 P.2d 321, 328 (1969); People v. Maddox, 67 Cal.2d 647, 651, 63 Cal. Rptr. 371, 374, 433 P.2d 163, 166.

18. 1 Cal.3d 694, 83 Cal. Rptr. 608, 464 P.2d 64 (1970).

to reverse any conviction resulting from those proceedings, based on a fundamental denial of due process."[19]

A trial judge having concluded that a defendant is competent to appear in *propria persona* should not hesitate to reverse himself if, after observing the defendant in action, he becomes convinced that his original judgment was wrong. Not only would the continuation of the proceedings under such circumstances result in a denial of due process, but it would be disruptive of the judicial process. The California Supreme Court has stated that "the right to counsel may not be used to subvert the orderly and efficient administration of justice and that its utilization as a tool for dilatory purposes may not be permitted. It is equally true that the right to represent oneself may not be used for such purposes."[20]

Thus, a defendant has a right to represent himself subject to the trial court's constant duty to protect the judicial process from subversion, and the trial court possesses broad discretion not only in relation to the appointment of counsel to supersede the defendant in the conduct of his defense but also for advisory or other limited purposes. "The right of an accused to represent himself with or without the assistance of counsel is not so absolute that it must be recognized when to do so would disrupt the business of the court or jeopardize a fair trial of the issues."[1]

The reviewing courts view the intervention of a trial court in a self-representation situation differently from interference of the trial court in an existing attorney-client relationship. In the former situation, a determination of the defendant's competence requires an assessment of his ability to conduct his own defense; in the latter, the attorney's competence is presumed by virtue of the fact he is licensed to practice in the State of California.

If a defendant is deemed competent to represent himself,

19. 1 Cal.3d 694, 704, 83 Cal. Rptr. 608, 613, 464 P.2d 64, 69.

20. People v. Powers, 256 Cal. App. 2d 904, 914, 64 Cal. Rptr. 450, 457 (1967).

1. People v. Powers, 256 Cal. App. 2d 904, 915, 64 Cal. Rptr. 450, 458, quoting State v. White, 86 N.J. Super. 410, 418–419, 207 A.2d 178, 183 (1965).

he accepts the responsibilities "inherent in the role which he has undertaken," and a judge is not required to assist or advise the defendant on matters of law, evidence, or trial practice.[2]

Nevertheless, in *People v. Redmond,* the California Supreme Court strongly urges trial judges to assist persons appearing *in pro per:*

> The primary goal of the effective administration of justice in this country is to assure that legal controversies are determined on the merits, and this goal is not furthered if a determination is based, not on the merits, but on the inabilities of a litigant, untrained in the law, who has chosen, perhaps unwisely, to represent himself and who is not fully conversant with legal procedures. It is in the highest tradition of American jurisprudence for the trial judge to assist a person who represents himself as to the presentation of evidence, the rules of substantive law, and legal procedure, and judges who undertake to assist, in order to assure that there is no miscarriage of justice due to litigants' shortcomings in representing themselves are to be highly commended.[3]

The California Supreme Court acknowledges that, while endeavoring to assist a defendant, there may be cases in which a trial judge, acting in good faith, will give erroneous or misleading advice. Such pitfalls are outweighed by the benefits to the administration of justice derived from assisting *pro per* defendants. The possibility of reversal "should not deter a trial judge from undertaking to assist those defendants to make sure that their innocence or guilt will be based on the merits and not on their inability to understand legal procedure."[4] The clear implication of *Redmond* is that should a judge stand by and permit a defendant's ignorance of the law to interfere with a fair trial, a judgment of conviction will be reversed. (See also, *People v. Marsden,* 2 Cal.3d 118, 84 Cal. Rptr. 156, 465

2. People v. Redmond 71 Cal.2d —, —, 79 Cal. Rptr. 529, 536, 457 P.2d 321, 328 (1969).

3. 71 Cal.2d —, —, 79 Cal. Rptr. 529, 536, 457 P.2d 321, 328.

4. 71 Cal.2d —, —, 79 Cal. Rptr. 529, 537, 457 P.2d 321, 329.

P.2d 44 (1970), decided by the Supreme Court after preparation of this article.)

The trial court's inquiries on the subject of competency need not be prolonged, and a few questions may be enough to indicate the defendant's inability to represent himself. "[T]he sufficiency of such an inquiry cannot be judged in a vacuum, without regard to the circumstances of the particular case."[5] In *People v. Daniels,* the accused, finding himself unable to effect a timely substitution of attorneys for his court-appointed counsel, was denied an alternative request to appear *in propria persona.* In his examination on competency, the trial judge inquired about the defendant's understanding of hearsay testimony, exceptions to the hearsay rule, and peremptory challenges, and then expressed the opinion that since the defendant was not competent to represent himself a miscarriage of justice might result if he were permitted to do so. The California Supreme Court noted that a defendant's ignorance of important rules of procedure or evidence will support an order denying permission to appear *in pro per,* and noted that a defendant's right to counsel of his choice may not be abused by him for the purpose of delay. In *Daniels,* the defendant's request to represent himself was provoked by the trial court's refusal to delay proceedings while awaiting the arrival of an attorney selected by the defendant's father. The Supreme Court emphasized that the right to counsel must be protected against hasty and improvident waiver.

Yet, the realities of the situation are such that "hasty and improvident waivers" are frequently accepted where minor or petty crimes, particularly traffic offenses, are charged. In *In re Johnson,* the California Supreme Court recognized that in traffic cases, the convenience of citizens, as well as the court, is served by mass arraignments:

> The vast majority of citizens haled into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconven-

5. People v. Daniels 71 Cal.2d —, —, 80 Cal. Rptr. 897, 911–912, 459 P.2d 225, 239–240 (1969).

> ienced by having to make personal appearances in the first place. To require the judge to orally examine each such defendant at length for the purpose of determining his capability to defend himself would seem to be an idle and time-wasting ritual. Compliance with the spirit of the constitutional mandate that an intelligent waiver of counsel must affirmatively appear on the record may be officially achieved in such cases in a variety of acceptable ways.[6]

But, as noted above, a caveat to the *Johnson* dictum is that the "variety of acceptable ways" is reduced by the imposition of a jail sentence.

In *Johnson,* the California Supreme Court approved the procedure followed by the trial court in *In re Sheridan,* wherein the defendants were informed by the trial court that even if they expressly waived counsel, "the court will then consider the nature of the charge, the facts and circumstances of the case . . . , [defendants'] apparent education, experience, mental competency and conduct to determine whether this is a proper waiver of [the] right to counsel. If, after consideration of these matters, the court finds [a defendant competent] . . . , it will permit [him] to proceed without counsel."[7]

The underlying rationale for all trial judges to keep in mind when ruling on questions relating to the appointment of counsel is well expressed by the Supreme Court of the United States in *Glasser v. U.S.:* "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial,"[8] and, as Justice Stewart asserted in a concurring opinion in *Chapman v. California,* "[t]hat, indeed, was the whole point in *Gideon v. Wainwright.*"[9]

6. 62 Cal.2d 325, 336, 42 Cal. Rptr. 228, 235, 398 P.2d 420, 427 (1965).

7. 230 Cal. App.2d 365, 369, 40 Cal. Rptr. 894, 895 (1964).

8. 315 U.S. 60, 76, 86 L.Ed. 680, 702, 62 S.Ct. 457 (1942).

9. 386 U.S. 18, 42, 17 L.Ed.2d 705, 721, 87 S.Ct. 824, 24 A.L.R.3d 1065, 1083 (1967).

F. *Responsibilities of Court-Appointed Counsel*

It is well established that court-appointed counsel, just as an attorney privately retained, has the power to control court proceedings on behalf of this client. He is an officer of the court and not a subservient helper of the defendant, and such an attorney must be permitted to act within the traditional and statutory status of his office. The California Supreme Court has repeatedly indorsed the proposition that the constitutional right to counsel does not include the right to an attorney who will conduct the defense of a case in accordance with the defendant's whim. A difference of opinion over trial tactics does not entitle an indigent defendant to new counsel.[10] In *People v. Floyd,* the California Supreme Court distinguished *People v. Moss,* wherein the Court of Appeals recognized a right to appointment of new counsel where "a legitimate difference of opinion develops between a defendant and his court-appointed counsel as to a *fundamental trial tactic.*"[11] The Court declined to rule on this point, since the request for new counsel in *Floyd* resulted from lack of confidence in his appointed counsel and not from a disagreement with trial tactics.

Any attorney who represents a criminal defendant "owes to his client a duty to investigate carefully crucial defenses of fact that may be available, [and] the attorney's inexcusable failure to do so constitutes a denial of effective assistance of counsel and therefore a fair trial."[12] Conversely, an attorney has no duty to offer testimony that is untrue, and counsel who knowingly offers perjured testimony is subject to criminal prosecution and disbarment.[13]

A public defender who advises a client to enter a plea of

10. People v. Floyd, 1 Cal.3d 694, 83 Cal. Rptr. 608, 464 P.2d 64 (1970); People v. Mattson, 51 Cal.2d 777, 336 P.2d 937 (1959); People v. Nailor, 240 Cal. App.2d 489, 49 Cal. Rptr. 616, (1967) cert. den., 385 U.S. 1030, 17 L.Ed.2d 678, 87 S.Ct. 763; People v. Hill, 67 Cal.2d 105, 60 Cal. Rptr. 234, 429 P.2d 586 (1967) cert. den., 389 U.S. 1009, 19 L.Ed.2d 607, 88 S.Ct. 572.

11. 253 Cal. App.2d 248, 250, 61 Cal. Rptr. 107, 110 (1967).

12. In re Branch, 70 Cal.2d 200, 210, 74 Cal. Rptr. 238, 245, 449 P.2d 174, 181 (1968); People v. Ibarra, 60 Cal.2d 460, 464, 34 Cal. Rptr. 863, 386 P.2d 487, 490 (1963).

13. In re Branch, 70 Cal.2d 200, 74 Cal. Rptr. 238, 449 P.2d 174 (1968).

guilty to forgery, despite appellate decisions precluding prosecution of credit-card offenses under the general forgery statute, is guilty of inexcusable neglect, and a conviction based on such a plea cannot stand. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing more remains but to give judgment and determine punishment."[14] By allowing his client to plead guilty, an attorney does not shift or avoid responsibility for conscientiously researching the facts and the law. "Deprivation of the right to counsel at the pleading stage because of incompetence can well constitute a deprivation of due process."[15]

G. *Mental Health Act*

The new Mental Health Act (Welfare and Institutions Code Sections 5000 et seq.) provides inter alia for a 14-day involuntary commitment, if, after examination by the professional staff of a designated mental health facility, a person is found as a result of mental disorder, to be dangerous or gravely disabled, and he has been advised of and has refused treatment. Along with a notice of certification, the person must be informed of his legal right to judicial review by habeas corpus. He must be provided with an explanation of the meaning of habeas corpus and of his right to counsel, including court-appointed counsel. To implement these legal requirements, the Superior Court of San Diego County ordered the designated mental health facility in that county to admit the staff of a privately operated legal service for indigent persons to such facility to advise persons detained there of their legal rights.

The San Diego Court, in its order, appointed the staff of "Defenders Inc." to visit all such patients, and to advise them of their rights. It also provided that if the facility did not comply, the court would automatically issue a writ of habeas

14. In re Williams, 1 Cal.3d 168, 175, 81 Cal. Rptr. 784, 789, 460 P.2d 984, 989 (1969), quoting Boykin v. Alabama, 395 U.S. 238, —, 23 L.Ed.2d 274, 279, 89 S.Ct. 1709 (1969).

15. In re Williams, 1 Cal.3d 168, 175, 81 Cal. Rptr. 784, 789, 460 P.2d 984, 989 (1969); In re Hawley, 67 Cal. 2d 824, 828, 63 Cal. Rptr. 831, 834, 433 P.2d 919, 922 (1967).

corpus to require all such persons being treated to be brought before the court. Representatives of the mental health facility sought prohibition, which was denied by the California Supreme Court. In upholding the order of the Superior Court, Justice Burke wrote that the trial court had acted within its jurisdiction in issuing the order, and he strongly implied that due process required it or an equivalent procedure:

> What is due process depends on circumstances. It varies with the subject matter and the necessities of the situation. Its content is a function of many variables, including the nature of the right affected, the degree of danger caused by the proscribed condition or activity and the availability of prompt remedial measures.[16]

III. Preliminary Hearings.

A. *In General*

It is a common complaint, despite pronouncements of reviewing courts to the contrary, that preliminary hearings are highly routine affairs in which the magistrate rubber-stamps the wishes of the district attorney. From time to time, there is talk of amending Article 1, Section 8 of the California Constitution to eliminate the necessity for a preliminary hearing and permit the filing of complaints in the Superior Court in the same manner as complaints are lodged in the Municipal Court. The strongest argument in favor of this approach is that preliminary hearings are extra-baggage, conducted in perfunctory fashion by court and counsel. To the extent that this argument has validity, it is a product of the misuse or nonuse of the preliminary hearing to satisfy its two recognized objectives: sifting the evidence and perpetuating testimony, or to satisfy a third purpose, which is judicially unrecognized, though important: pretrial discovery.

For those intimately associated with the day-to-day administration of justice, the passage of time has no meaning.

16. Thorn v. Superior Court, 1 Cal. 3d 666, 673, 83 Cal. Rptr. 600, 605, 464 P.2d 56, 61 (1970), quoting Sokol v. P.U.C., 65 Cal.2d 247, 254, 53 Cal. Rptr. 673, 678, 418 P.2d 265, 270 (1966).

With an increasing volume of cases, it makes little difference to the judge or prosecutor or the busy defense lawyer whether a case is tried in 30 days, six months, or a year. Matters are usually forgotten until they appear on the calendar; forgotten, that is, by all except the defendant and his family, and perhaps the victim.

The preliminary hearing represents a technique whereby a defendant may, at an early date after the filing of a complaint against him, have a kind of "mini-trial" that can result in dismissal or, at the very least, provide some insight respecting the substantiality of the charges, and permit him, if he wishes, to completely dispose of the matter at an early date by plea. The California Constitution and Penal Code mandate that the hearing be held promptly, and, excepting special circumstances such as physical incapacity of a witness, a prosecutor should not file unless he is prepared to proceed to a preliminary hearing. Penal Code Section 860, provides that "[t]he magistrate must, *immediately,* after the appearance of counsel, or if, after waiting a reasonable time therefore, none appears, proceed to examine the case. . . ." It should be noted that it is the magistrate who is given the power to "examine the case," and the sound administration of justice requires that he do so at the earliest possible date.

One reason for public dissatisfaction with the administration of our criminal laws is the prolonged delay between arrest and ultimate disposition of the case. A promptly held, properly conducted, preliminary hearing can in many instances serve as a catalyst for an early and final disposition either by dismissal or plea. The judiciary has an affirmative duty to see that criminal proceedings are expedited with due regard for the rights of a defendant to prepare his defense.[17] In this connection, the magistrate must allow a reasonable time (at least two days) for a defendant to obtain counsel or for assigned counsel to familiarize himself with the case. However, the indisposition of an essential witness, such as an unconscious victim in a felonious assault case, might require a postponement. Thus, "immediately," as used in Penal Code

17. Penal Code § 1050.

Section 860, means "as soon as practicable," having due regard for the nature and circumstances of the particular case. In setting a case for preliminary hearing, a court may consider the time required to subpoena witnesses, the incapacity of witnesses to attend, and the availability of court time.[18]

There is little justification for protracted delays in the holding of a preliminary hearing because if probable cause is lacking, a defendant should not continue under the shadow of a criminal charge, and if probable cause is present, both the public interest and the rights of the defendant require a speedy trial. Judges and lawyers who are interested in improving the image of the profession and the courts will see to it that criminal matters are expeditiously processed without sacrificing any essential right of a defendant. Delay, for the purpose of obstructing justice, is not a permissible tactic for either the prosecution or the defense; from the judicial standpoint, it is intolerable.

B. *The Purpose of a Preliminary Hearing*

The California Supreme Court has stated that a preliminary hearing is designed "to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed."[19]

In *Jennings v. Superior Court,* the California Supreme Court held that "to effectuate this constitutional and statutory purpose, the defendant must be permitted, if he chooses, to elicit testimony or introduce testimony tending to overcome the prosecution's case or establish an affirmative defense."[20] Accordingly, though pretrial discovery is not a recognized purpose of the preliminary hearing, the effect of giving a defend-

18. People v. Maddox, 67 Cal.2d 647, 63 Cal. Rptr. 371, 433 P2d 163; Ops. Atty Gen. 62–135, July 12, 1962 (1967).

19. Jaffe v. Stone, 18 Cal.2d 146, 150, 114 P.2d 335, 338, 135 A.L.R. 775, 778 (1941); People v. Elliot, 54 Cal.2d 498, 504, 6 Cal. Rptr. 753, 757, 354 P.2d 225, 229 (1960).

20. 66 Cal.2d 867, 880, 59 Cal. Rptr. 440, 449, 428 P.2d 304, 313 (1967).

ant the right to call witnesses on his own behalf, to cross-examine prosecution witnesses, and to establish an affirmative defense is to provide a discovery procedure. Although the reviewing courts will occasionally reject the theory that discovery plays a role in a preliminary hearing, the magistrate cannot effectively curtail it, providing timely motions are made in advance of a hearing.[1]

Often overlooked is the fact that the preliminary hearing is structured to allow for one of two possible results, a holding *or* a dismissal; and it is for the magistrate, not the district attorney, to determine which is appropriate. Therefore, the magistrate *must* consider and weigh conflicts in testimony. He must judge the credibility of witnesses and consider the merits of an offered defense to determine whether it should operate to eliminate probable cause that might otherwise be present.

C. *Probable Cause*

The reviewing Courts have repeatedly held that reasonable or probable cause means: "Such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused."[2] Later cases have added the word "conscientious" and have held that the magistrate must "conscientiously entertain a strong suspicion of the accused's guilt."[3] The tendency of some trial courts, however, is to rely on the word "suspicion" and to disregard the qualifying language. The distinction between a "suspicion" and a "strong suspicion" may be a subtle one, but, nonetheless, it can and must be measured in order to make the preliminary examination something more than a formality. If an accused can be committed on mere suspicion, then the preliminary examination might as well be

1. People v. Superior Court, 264 Cal. App.2d 694, 699, 70 Cal. Rptr. 480, 483 (1968). "There is no reason . . . to turn a preliminary examination into a discovery proceeding where the defendant neither shows that he asked for statements made by him nor was refused them."

2. People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344, 347 (1944).

3. Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250, 254 (1955).

dispensed with, since, as Justice Holmes wrote in *United States v. Clark,* "[w]hen suspicion is suggested, it is easily entertained."[4]

In *Davis v. Superior Court,* the Court of Appeal reviewed the applicable standard for determining whether there was reasonable or probable cause, and stated that:

> The term "probable" has been defined to mean having *more evidence for than against;* supported by evidence which inclines the mind to believe, but leaves some room for doubt. . . . Such a *state of facts* as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.[5]

In *Garabedian v. Superior Court,*[6] the California Supreme Court reviewed the evidence adduced at a preliminary hearing for felony hit-and-run, and found that proof of *mens rea* was lacking:

> From the record, it appears that there was no evidence of an essential element of the crime with which petitioner was charged, to wit, knowledge on his part that an accident had occurred resulting in injury to another.[7]

In *Malleck v. Superior Court,* the Court of Appeal issued a writ of prohibition restraining proceedings on an information charging an assault with a deadly weapon. After reviewing the preliminary hearing transcript, the Court held that:

> From the evidence at the preliminary examination, it is still as probable that the petitioner did not commit the crime as that he did. The term "probable" has been defined as meaning having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt. . . . Applying the law to the facts adduced by the preliminary

4. 200 U.S. 601, 609, 50 L.Ed 613, 617, 26 S.Ct. 340 (1906).

5. 175 Cal. App.2d 8, 22, 345 P.2d 513, 522 (1959).

6. 59 Cal.2d 124, 127, 28 Cal. Rptr. 318, 320, 378 P.2d 590, 592 (1963).

7. Garabedian v. Superior Court, 59 Cal.2d 124, 126, 28 Cal. Rptr. 318, 320, 378 P.2d 590, 592.

> hearing, it is clear that there is no reasonable or probable cause to believe that the petitioner has committed the crime charged. Speculation and conjecture would have to be indulged in to connect the petitioner with the crime.[8]

In *Murphy v. Superior Court*,[9] the Court of Appeal reviewed the evidence adduced at the preliminary hearing at which the defendant was charged with assault with intent to commit murder, and granted a writ of prohibition holding that after disregarding extrajudicial statements of the accused, it could not find reasonable or probable cause to hold the defendant to answer. The Court pointed out:

> . . . the extra-judicial statements of the accused cannot be considered where there is no showing whatever that the victim incurred his injury by the act of a criminal agency sufficient to constitute a *prima facie corpus delecti*. . . . As pointed out in *People v. Shuber*, and as should have been abundantly evident here, conjecture and surmise alone are no substitutes for competent evidence.[10] (Emphasis added.)

In *Jennings v. Superior Court*, the attorney general urged that the magistrate has only a perfunctory role at a preliminary hearing and that although cross-examination had been curtailed and the opportunity to establish an affirmative defense denied, the evidence was nonetheless sufficient for a holding. The California Supreme Court replied:

> In this [contention], the People share a misconception of the trial court which pervaded the entire proceedings below, i.e., that as long as the prosecution's evidence showed probable cause to hold petitioner to answer it was irrelevant at that stage 'whether the man was, in fact, framed. . . .' If this view were correct, of course, any cross-examination or testimony on behalf of the defend-

8. 142 Cal. App.2d 396, 399, 298 P.2d 115, 117–118 (1956).

9. 188 Cal. App.2d 185, 10 Cal. Rptr. 176 (1961).

10. Murphy v. Superior Court, 188 Cal. App.2d 185, 188, 10 Cal. Rptr. 176, 177–178.

> ant would become superfluous. To accept the people's argument would be in effect to erase sections 865 and 866 from the books and reduce the preliminary hearing to an *ex parte* proceeding at which the defendant's presence would be a meaningless gesture.[11]

Much of the confusion over the magistrate's function at a preliminary hearing arises from the oft-repeated statement that the prosecution need not produce proof beyond a reasonable doubt, but must only establish sufficient cause, that is, such evidence as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.[12] But this does not mean that a magistrate should conclude the inquiry when the prosecution's proof achieves the level of probable cause. To the contrary, his function at the preliminary hearing is to judge the credibility of witnesses and weigh the evidence:

> In conducting a preliminary hearing, the magistrate is required to pass upon the weight of the evidence and the credibility of witnesses in determining whether "sufficient cause" has been established.[13]

Thus, the rule requiring less evidence at a preliminary hearing than at trial does not suggest that the court should consider only one side of the case, but rather that if, *after* weighing the evidence, the court has probable cause to believe that a felony has been committed *and* that the defendant committed it, then the defendant should be held to answer. Questions of competency, relevancy, and character of the evidence are *not* extraneous to a preliminary hearing.[14]

Moreover, probable cause must be based on *legal and competent* evidence, and a magistrate cannot perform his function

11. Jennings v. Superior Court, 66 Cal.2d 867, 880, 59 Cal. Rptr. 440, 448, 428 P.2d 304, 312 (1967).

12. Robison v. Superior Court, 49 Cal.2d 186, 316 P.2d 1 (1957).

13. People v. Akard, 215 Cal. App.2d 182, 185, 30 Cal. Rptr. 69, 70 (1963); Perry v. Superior Court, 57 Cal.2d 276, 283, 19 Cal. Rptr. 1, 5, 368 P.2d 529, 533 (1962).

14. In re Schuber, 68 Cal. App.2d 424, 156 P.2d 944 (1945); People v. Schuber, 71 Cal. App.2d 773, 163 P.2d 498 (1945).

properly if he permits the record to be cluttered with inadmissible evidence. In order to justify a holding, competent evidence respecting each element of the offense charged must be produced at the preliminary hearing, and the rule requiring prima facie evidence of corpus delecti before admitting extrajudicial statements of the accused is applicable at preliminary hearing as well as at trial.[15]

D. *Perpetuation of Testimony*

It has long been recognized that the testimony of a witness at a preliminary hearing may, in the event of his unavailability at time of trial, be offered in evidence at the trial itself. Thus, counsel, in conducting a cross-examination, must keep in mind this possibility. Should the magistrate curtail cross-examination, the offer of a preliminary hearing transcript will probably be denied on Sixth Amendment grounds. In *People v. Benjamin,*[16] the sole witness against a defendant charged with strong-arm robbery was "unavailable" for trial. A transcript of this witness' preliminary hearing testimony was admitted against the defendant at the latter's jury trial, and he was convicted. The Court of Appeal upheld the conviction, pointing out that defense counsel at the preliminary hearing was on notice that the witness might not be available for trial because of military service in Vietnam, and the defendant had "extensively cross-examined" the witness at the preliminary hearing.[17]

The reasoning of the Court of Appeal in *People v. Benjamin* seems to conflict with both the rationale of the California Supreme Court in *People v. Green*[18] and considerations of fundamental fairness. The "unavailable" witness in *Benjamin* was the sole identification witness, and there was no corrobora-

15. People v. Davidson, 227 Cal. App.2d 331, 38 Cal. Rptr. 660 (1964); Garabedian v. Superior Court, 59 Cal. 2d 124, 28 Cal. Rptr. 318, 378 P.2d 590 (1963); People v. Allison, 249 Cal. App.2d 653, 57 Cal. Rptr. 635 (1967); People v. Beasley, 250 Cal. App.2d 71, 58 Cal. Rptr. 485 (1967).

16. 3 Cal. App.3d 687, 83 Cal. Rptr. 764 (1970).

17. People v. Benjamin, 3 Cal. App. 3d 687, 695, 83 Cal. Rptr. 764, 767.

18. 70 Cal.2d 654, 75 Cal. Rptr. 782, 451 P.2d 422 (1969).

tion for his testimony other than the defendant's acknowledgment that he had been at the scene, a diner, at the time of the alleged robbery. The defendant was arrested approximately 15 minutes later, and none of the stolen property was found on his person. (See *People v. Fortman,* 4 Cal. App.3d 495, — Cal. Rptr. — (1970), decided after preparation of this article, holding that an out-of-state witness subject to process under the Uniform Act is not "unavailable.")

Barber v. Page,[19] emphasizes the defendant's right to cross-examine a witness in the presence of the trier of fact and recognizes the difference, in nature and purpose, between preliminary hearings and trial proceedings, a difference that is bound to affect the quality of cross-examination. In *Green,* the California Supreme Court asserted that:

> [E]ven given the opportunity, neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings (the preliminary hearing), for considerations both of time and efficacy. Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in-depth direct or cross-examination.[20]

While "the right to confrontation is basically a trial right, it includes both the opportunity to cross-examine and the occasion for the jury to view the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial."[1] The result in *Benjamin* should, however, serve to remind counsel of what can happen and that Evidence Code Section 1291 (a)(2) and Penal Code Section 686 permit the use of a preliminary hearing transcript at trial in "unavailability" situations. Thus, the opportunity for cross-examination at the preliminary hearing may be the final one.

19. 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968).

20. 70 Cal.2d 654, 663, 75 Cal. Rptr. 782, 788, 451 P.2d 422, 428 (1969).

1. People v. Green, 70 Cal.2d 654, 660, 75 Cal. Rptr. 782, 786, 451 P.2d 422, 426.

IV. Bail

A. *In General*

It is ironic that the legal profession and legislators are in the midst of a debate on the subject of "preventive detention," after having so recently become accustomed to the proposition that, whenever possible, defendants should be released without bail and upon their own recognizance. The policy favoring release is well stated by the American Bar Association Project on Minimum Standards for Criminal Justice:

> "The law favors the release of defendants pending determination of guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents major public expense."[2]

Yet, the advocates of "preventive detention" legislation contend that existing *O.R.* and bail procedures release into the community hard-core criminals who will commit other crimes while awaiting trial on pending charges.

Their argument is bolstered by the fact that there is, in most jurisdictions, a prolonged delay between arrest and trial, particularly in those cases in which the defendant is not in custody. Proposed preventive detention laws commonly authorize confinement of unconvicted persons based upon their propensity to commit other offenses. Opponents of such legislation assert that defendants are presumed to be innocent and that the effect of the presumption is destroyed by permitting judges and prosecutors, prior to conviction, to engage in a hearing calculated to predict whether a defendant, once released, will commit other crimes. They argue, among other things, that the art of accurately predicting human behavior has not been mastered. Moreover, if the defendant is sub-

2. Standards Relating to Pre-trial Release, Tentative Draft, Institute of Judicial Administration, March 1968, p. 9.

sequently acquitted or the charges are dismissed, he will have been punished unjustly, and, if convicted, he will have been denied opportunities of participation in his own defense that are available to other defendants at liberty on bail or on their own recognizance.[3]

B. *Release on Bail*

In California, pretrial release on bail is governed by the provisions of Article I, Section 6 of the California Constitution and by several Penal Code sections that implement the constitutional requirements.[4] Prior to conviction, all persons are entitled to bail as a matter of right,[5] unless charged with a capital offense, in which event, a defendant "cannot be admitted to bail, when the proof of his guilt is evident or the presumption thereof great."[6] Bail on appeal is discretionary if the defendant is convicted of a felony,[7] but continues as a matter of right when the appeal is from a judgment imposing a fine or imprisonment in misdemeanor cases.[8] During the period between conviction (that is, a finding of guilt) and the filing of a notice of appeal, the defendant is subject to remand at the court's discretion in both felony and misdemeanor cases, and no right to bail exists during that period of time.[9]

In setting bail, the court "shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or the hearing of the case."[10] Since the sole purpose of bail is to assure the presence of the accused at time of trial (and not to protect the community from future harm), California judges must not consider questions beyond those set forth in Penal Code section 1275. However, the amount

3. For an excellent discussion of the subject see Alan Dershowitz, "Preventive Detention," The New York Review, March 13, 1969.

4. See Penal Code §§ 1270–1276.

5. Penal Code § 1271.

6. Penal Code § 1270.

7. Penal Code § 1272(3).

8. Penal Code § 1272 (1) and (2).

9. Penal Code § 1129; Fricke and Alarcon, *California Criminal Procedure,* 7th Ed. (1967) p. 68.

10. Penal Code § 1275.

set after considering such factors is wholly discretionary. There is no reported decision holding that bail is excessive, although there are cases sustaining the bail set and holding that a defendant's inability to post bail is not, in itself, controlling on the issue of excessiveness.[11]

Conscientious application of the requirements set forth in Penal Code section 1275, produce countless situations in which defendants are financially unable to post bail and thus must remain in custody. Consequently, some critics have suggested that our bail system hypocritically permits a form of "preventive detention," enabling the trial judge to employ a degree of sophistry in the setting of bail. It must be conceded that there can be found, without difficulty, a plethora of cases in which the judge must have realized that he had set bail so high that the defendant would be unable to post it. Accordingly, the critics argue, let us drop the pose and adopt "preventive detention" legislation that will enable judges to do lawfully what they are now doing extra-legally.

The argument is seductive, but probably without merit, unless inability to post bail is equivalent to unreasonable bail. For example, a judge arraigning a defendant charged with armed robbery must, in setting bail, presume the guilt of the defendant.[12] Penal Code section 1275 requires that the court take into consideration "the seriousness of the offense charged." The charge of armed robbery is serious and the penalties grave. Secondly, the trial court must consider "the previous criminal record of the defendant." It is frequently true that persons charged with a serious offense possess aggravated criminal records. Finally, the trial court must consider "the probability of his appearing at the trial or hearing of the case," and, here, the judge must balance the defendant's roots in the community, including his emotional stability, against the seriousness of the charge and his prior criminal record. Thus, by adhering to the requirements of Penal Code section 1275, the trial court may, without regard for the de-

11. In re Duncan, 54 Cal. 75 (1879); In re Smiley, 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

12. In re Ryan, 44 Cal. 555 (1872).

fendant's potential to commit other crimes, conclude that high bail is required.

Consequently, many persons charged with serious crimes, usually crimes of violence, find themselves held on such high bail that they are unable to post it, and the objectives of "preventive detention" are attained in a circuitous fashion. Thus, existing laws are accomplishing, in many of the more serious cases, what the advocates of "preventive detention" legislation argue is essential for the protection of the community. Whether the constitutional right to "reasonable bail" is compromised thereby is a separate question, but there is no California case that so holds. In any event, the need for such unique and potentially repressive legislation, even if constitutional, is not as apparent as the advocates suggest.

Bail is sometimes too high because the magistrate does not have sufficient facts presented to him at the arraignment to make an intelligent determination. Although the inability of a defendant to post the bail set is not a legal basis for automatic reduction, it represents a relevant factor for a court to consider on an application to reduce bail.[13] Similarly, the court is able to correct any initial misjudgments in the setting of low bail through its inherent power to increase bail when circumstances justifying such action are brought to its attention.[14]

A 1962 Court of Appeal decision, *Evans v. Municipal Court*,[15] has been cited for the proposition that "preventive detention" is approved under California law.[16] *Evans* should be limited to its facts; a defendant had been denied bail for a period of $5\frac{1}{2}$ hours after his arrest on a drunk driving charge because he was too intoxicated during that period to care for himself or the safety of others. The case stands for the proposition that a defendant need not be released from custody

13. Penal Code § 1289 requires notification to the district attorney in the event such a motion is made.

14. This may be done without notice to a defendant. Frankfort v. Superior Court, 71 Cal. App. 357, 235 P. 60 (1925).

15. 207 Cal. App.2d 633, 24 Cal. Rptr. 633 (1962).

16. See Witkin, Cal. Crim. Proc. pp. 143–144.

in an intoxicated condition, and he may be detained "either for the safety of the individual or for the protection of society."[17] A statement of the California Supreme Court in 1879 on the subject of bail is nevertheless controlling:

> The sole purpose which should guide the Court or judge in fixing the amount of bail in any case in which bail is allowed should always be to secure the personal appearance of the accused to answer the charge against him. It is not the intention of the law to punish an accused person by imprisoning him in advance of his trial. Such inhumanity or injustice as inflicting punishment upon him before his guilt has been ascertained by legal means, is not to be imputed to the system of law under which we live, and the provisions found in the American Constitution, establishing the writ of *habeas corpus,* securing to accused persons imprisoned for felonies less than capital in degree the absolute right to be admitted to bail, and declaring that such bail should not be excessive, strikingly indicate the extreme jealousy with which the common law guards the personal liberty of the citizen from unwarrantable or unnecessary restraint.[18]

If bail is used for any other purpose, such as "preventive detention," it has, in the words of the President's Commission on Law Enforcement and the Administration of Justice, "dubious legality."[19]

C. *Release on Own Recognizance (O.R.)*

The excellent experience of California courts with O.R. releases provides some indication of how unwise it would be to focus on the danger-potentiality of a defendant rather than upon the likelihood that he will appear for trial. Penal Code section 1318 authorizes "any court or magistrate who could release a defendant from custody upon his giving bail" to

17. 207 Cal. App.2d 633, 636, 24 Cal. Rptr. 633, 635 (1962).

18. In re Duncan, 54 Cal. 75, 77 (1879).

19. *The Challenge of Crime in a Free Society,* p. 131.

release a defendant upon his own recognizance. The only consistent opposition to release without bail has come from the bail bondsmen and their lobbyists. Meanwhile, those directly connected with law enforcement and the administration of justice agree that the public interest is best served when a defendant with roots in the community is permitted to use his funds to pay legal fees and/or to support his family rather than to pay a bail bondsman. To set bail where the court is otherwise reasonably assured that the defendant will make his appearance is essentially punitive, and provides a subsidy for an industry that is not subject to the inhibitions and discipline ordinarily felt by those who participate in the administration of justice as officers of the court. As the California Supreme Court has pointed out:

> It cannot be argued that release on recognizance lacks meaningful sanctions: The statute requires the defendant to file an agreement in writing promising to appear at all times and places ordered and waiving extradition if he fails to do so and is apprehended outside California . . . and makes willful failure to appear punishable as an independent crime. . . . Such an individual is not free to go where he will but is subject to "restraints not shared by the public generally."[20]

O.R. procedures authorizing a police officer at his discretion to release an arrested person either by having that person sign an O.R. agreement[1] or by issuing a citation accompanied by defendant's written promise to appear[2] also greatly reduces the humiliation of the suspect and the cost to the state of housing him.

Now that our criminal courts have become a clinic for the cure of most of society's ills, including all types of self-destructive behavior as well as so-called victimless crimes, we can no longer distinguish between serious and minor offenses

20. In re Smiley, 66 Cal.2d 606, 613, 58 Cal. Rptr. 579, 583, 427 P.2d 179, 183 (1967); Penal Code §§ 1318, 1319.4, 1319.6.

1. Penal Code § 849(b)(3).

2. Penal Code § 853.6. The operation of citation procedures in California is discussed in "An Alternative to the Bail System; Penal Code § 853.6," 18 Hast. L.J. 463 (1967).

by virtue of their classification as a felony or a misdemeanor. Numerous misdemeanor cases—battery, resisting arrest, failure to disperse, reckless driving, drunk driving, and sometimes even disorderly conduct—take on more serious manifestations vis-à-vis society than, for example, the ordinary drug possession case. Likewise, many "bad check" cases, including most forgeries, rate as minor offenses when compared to certain crimes of violence now classified as misdemeanors.

Thus, the mere labeling of a crime as a felony does not, in itself, justify the setting of high bail or a denial of an O.R. release. Countless alleged felony offenders are excellent candidates for the O.R. program, while some persons charged with misdemeanors are not. Here again, the prime object of "preventive detention," keeping dangerous persons off the street, may be indirectly served by courts giving a literal construction to section 1275, without regard to legislative classification of the offense charged.

D. *Conclusion*

In light of the broad discretion possessed by California judges and the reluctance of reviewing courts to tamper with bail set in the trial courts, it would be shortsighted to undermine existing constitutional requirements by enacting "preventive detention" legislation.[3]

Most important, the California experience with O.R. releases is too good to suffer the setback that would result from unnecessary emphasis on "preventive detention." Serious offenders are frequently held on high bail anyway, simply by applying the standards set forth in the Penal Code for the setting of bail, and those charged with capital offenses are not entitled to bail. On the other hand, a large percentage of persons arraigned for the first time are charged with mis-

3. In an early opinion the Supreme Court said: "In order to constitute it 'excessive' it must be per se unreasonably great, and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case." In re Ryan, 44 Cal. 555, 558 (1872). According to Witkin, "This statement has been repeated in later decisions which invariably uphold the discretion of the lower court." Witkin, Cal. Crim. Proc., p. 150.

demeanor offenses, and of the remaining charged with a felony, a substantial number will have their charges reduced to a misdemeanor. A study conducted in San Francisco disclosed that 90 percent of arrested persons are charged with misdemeanors and, of the remaining 10 percent, 70 percent have charges either dropped completely or reduced to a misdemeanor. Applying this statistic statewide, it would seem that well over 90 percent of those who appear before a magistrate are accused misdemeanants, and most of these are arrested for drunkenness, disturbing the peace, and other petty offenses.[4]

A finding of the President's Commission on Law Enforcement and the Administration of Justice is that one out of every three arrests in the United States is for public drunkenness, and in over 50 percent of all arrests, intoxication is a major factor.[5] Thus, when we talk about dangerous offenders committing serious crimes while other cases are pending against them, we are talking about a very small percentage. It would be a mistake to build into our administration of justice a mechanism such as "preventive detention," which must inevitably affect minor as well as major offenders, and unnecessarily detain persons who represent, if anything, only a minimal threat to the community.

To the extent that defendants afforded pretrial release are generating a lack of public confidence in our judicial system by committing additional offenses before their trial on the original charge, a cure should be found that is not worse than the disease. The most obvious solution is to revise our methods of calendar control and shorten the time between arrest and trial. In our society, crimes of violence must be given priority, and we should, in the words of the Presidential Commission, "provide an accelerated trial process for presumably high-risk defendants."[6]

4. See 18 Hast, L.J. 643, 652, supra, for data.

5. *Challenge of Crime in a Free Society*, p. 233.

6. *Challenge of Crime in a Free Society*, p. 131. F.B.I. uniform crime statistics for 1969 show crime of violence up 11% over 1968. San Francisco Recorder 3/23/70.

This is certainly preferable to the exercise in prophecy required by the adoption of "preventive detention" legislation. The judicial time and investigative personnel required to process "preventive detention" hearings would be better utilized by bringing such defendants to an early trial and, if convicted, remanding them into custody. In this way, our judicial system could meet the legitimate criticism that has brought it into disrepute in recent years, and do so in a manner that would not prejudice a defendant's right to pretrial release. Effective implementation of the constitutional requirement of a speedy trial should satisfy the community's need for protection, and will eliminate the delay that both the prosecution and the defense so often strive to achieve.

V. The Power of the Court To Dismiss a Criminal Case on Its Own Motion in Furtherance of Justice

Penal Code section 1385, permits the court "either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, [to] order an action to be dismissed." Although the language of the statute is unmistakably clear, it has suffered from judicial atrophy for two principal reasons: First, trial judges frequently lack sufficient facts upon which to base a *sua sponte* order for dismissal, and, second, when enough facts are available, reviewing courts, by permitting appeals in the guise of petition for writs of prohibition, and prosecutors by opposing such dismissals, have inhibited trial judges from acting on their own motion to dismiss criminal cases.

In practical application, section 1385 has restored to the district attorney, *de facto,* the power of *nolle prosequi* that was presumably eliminated when section 1385 was enacted into law.[7] A prosecutor's motion to dismiss an action in furtherance of justice on the grounds of "insufficiency of the evidence," "the unavailability of witnesses," or for a myriad

7. See People v. Superior Court, 69 Cal.2d 491, 72 Cal. Rptr. 330, 446 P.2d 138 (1968).

of other reasons too numerous to list is usually controlling. Such a motion is most often made during the calling of a crowded criminal calendar, and the court routinely acquiesces without making independent inquiry into the facts. The procedure virtually eliminates any semblance of the judicial control and supervision over dismissal of pending criminal cases that must have been contemplated by the legislature when the statute was enacted, understandable in view of the large volume of criminal cases pending in the courts and the practical consequences of denying such a motion.[8]

As early as 1887, the California Supreme Court defined the purpose of section 1385 as follows:

> The power under which the order was made is substantially the same as that held by the attorney general in England, and by the prosecuting officer in many of the American states, to enter a *nolle prosequi.* The court, for the purposes of the order of dismissal, takes charge of the prosecution, and acts for the people. It holds the power to dismiss, as the attorney general in England holds the power to enter a *nolle prosequi,* by virtue of the office and the law; and it is exercised upon official responsibility. The court having acted for the people, and under express power granted by them to so act in their criminal prosecutions, there is no appeal on their part for such action.[9]

In reviewing the scope of the common-law power of *nolle prosequi,* the California Supreme Court has noted that it "included dismissal of the prosecution entirely or any separable part thereof," and that such an order could be entered by the Court on its own motion or that of the district attorney "before the jury was impanelled, while the case was before the jury, or after verdict."[10] The California Supreme Court has, on

8. See Penal Code § 1386.

9. People v. More, 71 Cal. 546, 547, 12 P. 631, 631–632 (1887).

10. People v. Sidener, 58 Cal.2d 645, 649, 25 Cal. Rptr. 697, 699, 375 P.2d 641, 643 (1962) app. dismd. 374 US 494, 10 L.Ed.2d 1048, 83 S.Ct. 1912.

several occasions, asserted that an order of dismissal pursuant to section 1385 may be entered even after the commencement of trial.[11]

Penal Code section 1238, defining the people's right of appeal in criminal cases, was recently amended to authorize an appeal from an order of dismissal under section 1385, whenever such order is based on a defendant's motion to suppress, from an order of dismissal terminating the action before the defendant has been placed in jeopardy, or where the defendant has waived jeopardy.[12] Such an order is nonappealable when the dismissal occurs after commencement of trial, and mandate is also unavailable.[13]

In *People v. Superior Court,* supra, the defendant was convicted by a jury of armed robbery, whereupon the trial court, in lieu of granting defendant's motion for new trial, ordered the action dismissed pursuant to section 1385. The People petitioned for a writ of mandate to compel the Superior Court to vacate its order, and the State Supreme Court denied the petition, holding, inter alia, that "to permit the People to resort to an extraordinary writ to review where there is no right to appeal would be to give the People the very appeal which the legislature has denied to them."[14] Noting that the People's right of appeal had been broadened recently by amendment of Penal Code section 1238, the Court stated that neither subdivision would have been applicable, since the order of dismissal was not based on a motion to

11. People v. Alverson, 60 Cal.2d 803, 807, 36 Cal. Rptr. 479, 482, 388 P.2d 711, 714 (1964), "At any time during the trial, even after the defense has started;" People v. Polk, 61 Cal.2d 217, 228, 37 Cal. Rptr. 753, 759, 390 P.2d 641, 647 (1964), not subject to the limitation that the motion must be made before commencement of the defense; People v. Holbrook, 45 Cal.2d 228, 233, 288 P.2d 1, 3 (1955), dismissal after granting of a motion for new trial approved.

12. Penal Code § 1238(7)(8).

13. People v. Superior Court, 69 Cal.2d 491, 497–498, 501, 72 Cal. Rptr. 330, 334–335, 337, 446 P.2d 138, 142–143, 145 (1968); see also People v. Valenti, 49 Cal.2d 199, 207–208, 316 P.2d 633, 637–638 (1957) overruled in 58 Cal.2d 645, 647, 25 Cal. Rptr. 697, 698, 375 P.2d 641, 642 (1962) app. dismd. 374 US 494, 10 L.Ed.2d 1048, 83 S.Ct. 1912.

14. 69 Cal.2d 491, 499, 72 Cal. Rptr. 330, 336, 446 P.2d 138, 144 (1968).

suppress, and because the defendant had been placed in jeopardy and had not waived it.[15]

The Court rejected the attorney general's argument that section 1385 does not confer power on the Court to dismiss over objection of the prosecution, and points out that such a contention "flies in the face of the very language of the section."[16] With respect to the power of the Court to dismiss after a jury verdict of guilty, it was held that "the discretion of the judge (to dismiss under 1385) is absolute except where the legislature has specifically curtailed it."[17]

> If anything, a court should have broader discretion to dismiss in furtherance of justice after the verdict than it should have during trial. After the verdict, the judge has heard the evidence of the prosecution; whereas prior to the conclusion of the trial there is always the possibility that in the absence of dismissal more evidence may be received.[18]

Finally, the high Court revealed its own philosophy respecting court-ordered dismissals and declined to restrict trial judges to cases in which the evidence was insufficient as a matter of law:

> If a trial judge is convinced that the only purpose to be served by a trial or a retrial is harrassment of the defendant, he should be permitted to dismiss, notwithstanding the fact that there is sufficient evidence of guilt, however weak, to sustain a conviction on appeal. The trial judge who has heard the evidence as in the instant case is in an excellent position to determine whether a retrial would further the interest of justice. The legislature has given the trial court the power to dismiss under the broad standard of justice, and in view of the high caliber of our trial judges and their responsibility to the electorate, we believe that recognition of such

15. 69 Cal.2d 491, 498, 72 Cal. Rptr. 330, 335, 446 P.2d 138, 143 Fn. 5.

16. 69 Cal.2d 491, 501, 72 Cal. Rptr. 330, 337, 446 P.2d 138, 145.

17. 69 Cal.2d 491, 502, 72 Cal. Rptr. 330, 337, 446 P.2d 138, 145.

18. 69 Cal.2d 491, 503, 72 Cal. Rptr. 330, 338, 446 P.2d 138, 146.

> power in cases of conflicting evidence will not result in abuse but, to the contrary, believe that the due exercise of the power to dismiss in proper cases of conflicting evidence will further justice.[19]

Appropriate considerations for the trial court in determining whether to, on its own motion, order a dismissal pursuant to section 1385 after a guilty verdict are: a weighing of the evidence; the nature of the crime involved; the fact that the defendant has or has not been incarcerated while awaiting trial; the length of such incarceration; the possible harrassment and burdens imposed on the defendant by a retrial; and the likelihood, if any, that additional evidence will be presented on a retrial. "When the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted to him by the legislature and grant a dismissal in the interest of justice."[20]

VI. Reasonable Doubt

The concept of "reasonable doubt" in a criminal case is an elusive one, difficult to define in meaningful terms or to distinguish from the "preponderance of evidence" rule applicable in civil cases. Mr. Justice Black has written that the term "reasonable" is "that irrepressible, vague and delusive standard which at times threatens to engulf the entire law, including the Constitution itself, in a sea of judicial discretion."[1] It is paradoxical that our jurisprudence has seized upon "reasonable doubt" as the concept most likely to assure near certainty in the fixing of criminal responsibility.

Jury arguments on the subject are often futile, particularly since the Court's charge is rendered relatively inflexible by virtue of the provisions of Penal Code sections 1096 and 1096a. In 1964, this writer observed, in an article prepared for the Continuing Education of the Bar, that "whether the 'reasonable doubt' requirement affords a criminal accused a

19. 69 Cal.2d 491, 504, 72 Cal. Rptr. 330, 339, 446 P.2d 138, 147.

20. 69 Cal.2d 491, 505, 72 Cal. Rptr. 330, 340, 446 P.2d 138, 148.

1. Green v. United States, 356 U.S. 165, 197, 2 L.Ed.2d 672, 695–696, 78 S.Ct. 632 (1958).

real advantage over a defendant in a civil case is an enigma. It is a mistake, indeed, for the defense lawyer in a criminal case to assume that it does."[2] Since writing that article, six years have passed, almost five of which have been spent on the bench, but the enigma remains, and I question whether judges in their jury instructions or counsel during final argument meaningfully communicate to jurors the essence of the reasonable doubt requirement.

Conversations with jurors suggest to me that many analyze the evidence and reach conclusions based on what amounts to a preponderance of the evidence and are satisfied to resolve evidentiary conflicts by asking whether there is more evidence *for* than *against* the proposition that a defendant is guilty. The "reasonable doubt" instructions most often resorted to by California judges create the visual impression of a slight "tilting of the scales," one way or the other.

The distinction between the two burden-of-proof requirements can be clarified by an instruction that is given by some California judges, which expressly tells the jury that a preponderance of the evidence is insufficient to justify a conviction:

> The rule of law in civil cases is different than the rule in criminal cases in this: In civil actions a jury may be authorized to find a verdict in accordance with a mere preponderance of the evidence but such is not the law in criminal cases. A bare preponderance of the evidence against the defendant which does not eliminate reasonable doubt is not sufficient to warrant his conviction but on the trial of this and all criminal cases the guilt of the defendant must be established to the satisfaction of the jury to a moral certainty and beyond a reasonable doubt or he should be acquitted.[3]

The shortcoming of this instruction is that much remains for the imagination, and, while implying that something more

2. Goldstein, "Rules of Evidence In Criminal Cases," California Criminal Law Practice, continuing Education of the Bar, p. 461 (1964).

3. Instruction given in Contra Costa county.

than "a tipping of the scales" is required, it does not define that "something more" in quantitative terms that are useful to a jury in applying the definition of reasonable doubt set forth in Penal Code section 1096.

The Third Circuit recently touched on the essential difference between the "preponderance of evidence" rule and the "reasonable doubt" requirement by pointing out that finding a defendant guilty beyond a reasonable doubt envisions a subjective standard.[4] While the key to implementation of the preponderance of evidence rule is a mere weighing of the evidence, proof beyond a reasonable doubt and to a moral certainty requires not only a weighing of the evidence, but also employment of a value system [" . . . an abiding conviction to a moral certainty of the truth of the charge"[5]]. Thus, the significance of the reasonable doubt requirement to individual jurors and judges must necessarily depend on experience factors as related to and integrated with the ethical concepts of the individual trier of fact.

Accordingly, opposite results—on the same facts—are possible, depending on the kind of jury selected or the personality and philosophy of the trial judge. "Reasonable doubt" is premised upon the proposition that evidence may preponderate in favor of guilt and yet be insufficient to compel a conviction. Although a weighing of the evidence may demonstrate the probability that a defendant is guilty, a juror, heeding the implications of moral certainty, might well have doubts that are founded upon reason.

Even experienced appellate judges find the distinction a difficult one to make:

> When preponderance of the evidence of guilt is conceded, it seems to us difficult to say that the proof nonetheless falls short of the faint, fine and wavy line on one side of which the proof is beyond a reasonable doubt and to a moral certainty.[6]

4. U.S. v. Fioravanti, 412 F.2d 407 (1969) cert. den.

5. See Penal Code § 1096.

6. People v. Superior Court, 257 A.C.A. 47, 50, 64 Cal. Rptr. 572, 574 (1967) hearing in Supreme Court granted, 69 Cal.2d 491, 72 Cal. Rptr. 330, 446 P.2d 138 (1968), see also In re Winship, — U.S. —, 25 L. Ed. 2d

Yet, the difference is distinct, and the "faint, fine and wavy line" results from a legitimate effort to define "reasonable doubt" in such a way as to preclude jurors from believing it to be an insurmountable obstacle to conviction.

Proof beyond a reasonable doubt requires "moral certainity," and one acts "morally" when he conducts himself rightly or virtuously. When the word "moral" is used as an adjective to define a mental state such as "certainty," it suggests that there are ethical considerations implicit in a state of moral certainty. Thus, to be morally certain of something, one must have excluded all reasonable possibility of error. But, we do not instruct a jury in such terms. Instead, we say:

> The law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Moral certainty only is required, which is that degree of proof which produces conviction in an unprejudiced mind.[7]

Why is it that we do not tell a jury affirmatively that to be morally certain it must exclude all reasonable possibility of error, rather than employ a semantic trick that states negatively the most positive aspect of our criminal justice system and qualifies "reasonable doubt" to a point that makes it nearly indistinguishable from the "preponderance of evidence" rule? Since Penal Code section 1096 (set forth in CALJIC 21 (Rev.)) provides that reasonable doubt "is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt," it is unnecessary to instruct

368, 377, 90 S. Ct. — (1970) wherein the U. S. Supreme Court rejects the suggestion of the New York Court of Appeal that there is only a "tenuous difference" between the two rules.

7. CALJIC 22 (Rev.). Since the preparation of this article the third edition of CALJIC has been published. Although CALJIC 21 revised is set forth in the new volume as CALJIC 2.90, CALJIC 22 revised has been dropped. The Chairman of the CALJIC Committee, Superior Court Judge Arthur Alarcon, states the instruction was considered by the Committee to be argumentative and unnecessary.

juries that "moral certainty only is required"[8] (emphasis added) *unless* our purpose is to dilute the impact and reduce the sobering effect that the "reasonable doubt" instruction was calculated to have on persons—be they judge or jury—entrusted with the life, liberty, and reputation of individuals accused of crime.

It is this observer's view that CALJIC 22 (Rev.), which purports to elaborate upon Penal Code section 1096, does the very thing that the "note" in CALJIC claims it does not do. That is, it curtails the quantum of proof required by Penal Code section 1096. Moreover, it undermines the ethical basis on which the term "moral certainty" is founded. Coming as it does on the heels of a statement that reasonable doubt is not an "imaginary doubt," CALJIC 22 implies, in rather strong terms, that the reasonable doubt requirement is not the high hurdle or "heavy burden" that our system of criminal justice intends it to be. Although a similar argument was made in *People v. Kennelly,*[9] it was rejected by the Court of Appeals. Nevertheless, it does not appear that the Court considered the psychological impact of such qualifying language upon a lay jury. (See footnote 7, supra.)

The California Supreme Court has equated "moral certainty" with a "near certainty,"[10] and has employed this quantitative standard to review convictions wherein it was contended on appeal that the evidence was insufficient as a matter of law. In *People v. Redmond,*[11] the Supreme Court reversed a conviction based on the "identification" testimony of a victim who said only that the defendant's voice resembled her assailant's voice and that the expression in his eyes was similar. "Evidence," said the Court, "which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an

8. CALJIC 22 (Rev.), dropped in CALJIC 3rd edition.

9. People v. Kennelly, 166 Cal. App.2d 261, 332 P.2d 733 (1958).

10. People v. Hall, 62 Cal.2d 104, 41 Cal. Rptr. 284, 396 P.2d 700 (1964).

11. People v. Redmond, 71 Cal.2d —, 79 Cal. Rptr. 529, 457 P.2d 321 (1969).

inference of fact."[12] Reaffirming principles announced earlier in *People v. Bassett*,[13] the Court stated that in a criminal case, "the prosecution's burden is a heavy one; to justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. *The trier must, therefore, have reasonably rejected all that undermines confidence.*"[14] (Emphasis added.) In reviewing the trial record *Redmond,* the Supreme Court gave credit only to "substantial" evidence, that is, evidence reasonably inspiring confidence and of solid value. In *People v. Bassett*,[15] the Supreme Court catalogued cases in which the "substantial evidence" test had been applied by reviewing courts to justify reversal based on legally insufficient evidence. A reading of these cases and the reviewing courts' explanation for reversal provides a useful exercise for those seeking to appreciate the distinction between the reasonable doubt and preponderance of the evidence rules.[16]

The potentially misleading effect of CALJIC 22 (Rev.) on jurors suggests that reevaluation is required. Future revisions should substantially incorporate the language of the California Supreme Court in *Bassett*. Phrases such as "near certainty" and emphasis on the necessity for rejecting "all that undermines confidence" more nearly comport with our claim that the state assumes a "heavy burden" when it undertakes the prosecution of one of its citizens. (See footnote 7, supra).

Although miscarriages of justice can result from even the

12. 71 Cal.2d —, —, 79 Cal. Rptr. 529, 534, 457 P.2d 321, 326.

13. 69 Cal.2d 122, 139, 70 Cal. Rptr. 193, 204, 443 P.2d 777, 788 (1968).

14. 71 Cal.2d —, —, 79 Cal. Rptr. 529, 534–535, 457 P.2d 321, 326–327 (1969).

15. 69 Cal.2d 122, 70 Cal. Rptr. 193, 443 P.2d 777 (1968).

16. See in addition to Redmond, 71 Cal.2d —, 79 Cal. Rptr. 529, 457 P.2d 321 (1969) and Bassett, 69 Cal.2d 122, 70 Cal. Rptr. 193, 443 P.2d 777 (1968), People v. Hall, 62 Cal.2d 104, 41 Cal. Rptr. 284, 396 P.2d 700 (1964); People v. Gould, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960); People v. Jackson, 238 Cal. App.2d 477, 47 Cal. Rptr. 860 (1965); People v. Singh, 11 Cal. App.2d 24, 53 P.2d 403 (1936); People v. Jackson, 44 Cal.2d 511, 282 P.2d 898 (1955); People v. Rodriquez, 186 Cal. App.2d 433, 8 Cal. Rptr. 863 (1960); People v. Tatge, 219 Cal. App.2d 430, 33 Cal. Rptr. 323 (1963); People v. Tidmore, 218 Cal. App.2d 716, 32 Cal. Rptr. 444 (1963); People v. Ravel, 122 Cal. App.2d 312, 264 P.2d 610 (1953); People v. Alkow, 97 Cal. App.2d 797, 218 P.2d 607 (1950).

most scrupulous adherence to the burden of proof requirement, "reasonable doubt" remains the doctrine that, more than any other, assures that innocent persons will not be wrongly convicted.[17]

17. The United States Supreme Court, in a decision handed down this term, has held that due process of law requires proof beyond a reasonable doubt, in that the delinquency of a juvenile must be ascertained according to this standard, not by the preponderance of evidence rule. Proof beyond a reasonable doubt, says the Court, is "basic in our law and rightly one of the boasts of a free society." Its purpose is "to safeguard men from dubious and unjust convictions" and "recognizes the fundamental principles that are deemed essential for the protection of life and liberty. The reasonable doubt standard plays a vital role in the American system of criminal procedure. It is a prime instrument for reducing the risk of conviction resting on factual error. . . . The standard provides concrete substance for the presumption of innocence—that bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. . . . Due process requires that no man shall lose his liberty unless the government has borne the burden of . . . (proving his guilt and) therefore to this end the reasonable doubt standard is indispensable for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." In re Winship, supra, 25 L. Ed. 2d 368, 374–375.

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