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CALIFORNIA PENAL CODE SECTION 1027: BROADSWORD OR BUTTERKNIFE?

The frequent failure of party-called expert witnesses to enlighten the jury led the California Legislature to develop a system of court-appointed expert witnesses.¹ The need for an expert witness is felt most crucially in a criminal trial involving the sanity of the defendant. And yet in an area as esoteric as that of the workings of the human mind, the compass of those legally qualified to testify² presents a supermarket of such variety that parties doing their own shopping have little trouble finding "experts" whose polemic testimony can often reduce the issues to mere speculation in the minds of the jury.³

To avoid this "battle of the experts" by utilizing psychiatrists more likely to be free from bias⁴ and to provide an indigent defendant with a qualified psychiatrist,⁵ the legislature in 1929 adopted section 1027 of the Penal Code. This section provides for court-appointed psychiatrists to examine the defendant upon entry of a plea of not guilty by reason of insanity.⁶ The purpose of this note is to point out the substantial problems which section 1027 was designed to remedy, and to examine the extent to which its policy has failed to influence judicial construction.

The Battle of the Experts

The complexities attending a determination of psychiatric competency leave the lay jury ill equipped to properly resolve the issue.⁷ The jury's lack of famil-

¹ CAL. EVIDENCE CODE § 730 authorizes the court in its discretion to appoint an expert whenever one might be needed. CAL. PEN. CODE § 1027 provides for court appointment of psychiatrists when a defendant pleads not guilty by reason of insanity. Other statutes authorizing the court to appoint experts are CAL. EVIDENCE CODE §§ 460 (matters subject to judicial notice), 752 (interpreters), and 892 (blood tests in paternity cases).

² "Any reputable practicing physician is legally qualified to speak as an expert on insanity, even though he may never have had any instruction or experience in mental disease. As a result, it is usually possible to hunt up some quacks or eccentric 'experts' whose fantastic theories will permit them to testify as counsel wishes, even though no reputable psychiatrist would agree with them." Weihofen, *An Alternative to the Battle of the Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419, 420 (1935).

³ See *Estate of Dolbeer*, 149 Cal. 227, 243, 86 Pac. 695, 702 (1906) (dictum).

⁴ *People v. Strong*, 114 Cal. App. 522, 526, 300 Pac. 84, 85 (1931) (dictum); *People v. Wiley*, 111 Cal. App. 622, 626, 295 Pac. 1075, 1076 (1931) (dictum); CALIFORNIA CRIME COMM'N, REPORT 30 (1929).

⁵ *People v. French*, 12 Cal. 2d 720, 769, 87 P.2d 1014, 1039 (1939) (dictum); CALIFORNIA CRIME COMM'N, REPORT 30 (1929).

⁶ The plea of not guilty by reason of insanity is provided for by CAL. PEN. CODE § 1016. The defendant may also join a plea of not guilty. If he makes the dual plea, CAL. PEN. CODE § 1026 provides for a bifurcated trial: the defendant is tried first on the not guilty plea, at which trial he shall be conclusively presumed to be sane, and then on the issue of sanity.

⁷ "[I]t is erroneous policy to place twelve men, selected at random, in the position of independent judges of facts whose nature, legal significance, and psycho-biological effect they usually cannot comprehend.

rarity with psychiatric concepts in general is compounded by the narrowness of the legal definition of insanity in particular.⁸ Moreover, the concept of legal insanity might be quite incompatible with the personal experiences of the jurors. If the jury must determine the sanity issue, it is imperative that they receive the benefit of sound, unbiased expert testimony.

Although the practice of partisan selection of expert witnesses has not escaped plethoric criticism by writers,⁹ the inherent evils of the practice are most obvious in the selection of psychiatric witnesses.¹⁰ The range of opinion in the psychiatric profession is perhaps more diversified than in any other field in which an expert witness might be needed. Although a substantial weight of medical authority might agree on a particular issue, a self-serving party can usually find in a fringe segment of the profession someone who will testify as the party desires, and the jury does not know how many psychiatrists the party has consulted before coming into court. Since the jury usually has no knowledge of psychiatry, the highly theoretical basis of the science makes even a very radical theory difficult to disprove.¹¹ The unresolvable conflicting testimony always carries with it a real danger of compromise by the jury. Thus the juror may determine the sanity issue on a basis supported by neither expert opinion which was presented to him, but on his own preconceived ideas of insanity for lack of more reliable and certain evidence.

The Court-Appointed Expert

As early as the 14th century the common law recognized a power in the courts to call experts at their own discretion.¹² California has recognized the

"The assumption that the jurors, because they are jurors, are capable of conceiving the intricate elements of psychic disorders—is an arbitrary inference and a legalistic atavism. The continued adherence to this backward theory is neither justified by science nor vindicated by the present-day confusion, arising from the whole problem of criminal responsibility in cases where insanity is pleaded." BRASOL, *THE ELEMENTS OF CRIME* 330 (1927).

⁸ California determines insanity at the time an offense was committed by a rule based on the M'Naughten rule, but which broadly interprets the M'Naughten "knowledge" test: "Insanity means a diseased and deranged condition of mind which renders a person incapable of knowing or understanding the nature and quality of his act, or to distinguish right from wrong in relation to that act." *People v. Wolff*, 61 Cal. 2d 795, 801, 40 Cal. Rptr. 271, 274, 394 P.2d 959, 962 (1964).

⁹ See, e.g., 2 WIGMORE, *EVIDENCE* § 563 (3d ed. 1940).

¹⁰ It has been suggested that "the practice, peculiar to Anglo-Saxon jurisprudence, of allowing experts in criminal trials to be called on behalf of the parties, lies at the root of some of the gravest evils of which such trials are productive." WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 419 (1933).

¹¹ The converse is also true. Even a sound psychiatric opinion is difficult to prove. A psychiatrist cannot produce empirical demonstrative evidence to the jury to support his opinion. His opinion is the result of his perception of many manifestations of the mind, and the intricate relationship of those manifestations, which sometimes defy explanation to the jury. For the tactics of a skillful cross-examiner in superficially breaking down even the soundest psychiatric opinion, see LIND, *Cross-Examination of the Alienist*, 13 J. CRIM. L., C. & P.S. 228 (1922).

¹² Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403, 407 (1935).

power by several statutes.¹³ Section 1027 of the Penal Code was designed specifically for the situation where a defendant pleads not guilty by reason of insanity. The section provides that the court must¹⁴ appoint at least two psychiatrists, and may appoint three.

It is the duty of the psychiatrists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question.¹⁵

California law permits the fact that the appointment was by the court to be revealed to the jury.¹⁶ Presumably this fact will weigh heavily in the jurors' minds. They know that neither party paid the witness, and so they should impute no bias or sense of obligation on his part toward either side.

On its face section 1027 appears to solve several problems of the partisan selection of experts. First, the psychiatrists are selected before they have examined the defendant, so that their selection is based on their qualifications rather than their conclusions in a given case. Second, since the jury knows that the psychiatrists were not selected or paid by the parties, presumably they will not infer bias on the part of the psychiatrists, and will give their testimony great weight. The danger of speculation or compromise by the jury is then *pro tanto* reduced.

Furthermore, agreement among the psychiatrists that the defendant is legally sane may lead him to abandon an ill-advised or sham plea of insanity before trial,¹⁷ thus saving the expense and time of the sanity trial. On the other hand, section 1027 is even more important to a defendant whose insanity plea has merit. Since the defendant has the burden of proving insanity by a preponderance of the evidence,¹⁸ section 1027 provides him with a means of producing reliable and convincing evidence to the jury.

Construction of Section 1027

Shortly after its adoption, section 1027 was attacked in *People v. Strong*¹⁹ as a violation of the privilege against self-incrimination.²⁰ There was no claim

¹³ Statutes cited note 1 *supra*.

¹⁴ Although the provision is mandatory, it is not jurisdictional, and failure of the defendant to request their appointment if none is made, is a waiver. *People v. Wiley*, 111 Cal. App. 622, 625-26, 295 Pac. 1075, 1076-77 (1931).

¹⁵ CAL. PEN. CODE § 1027. This section allows the psychiatrists so appointed to "be called by either party to the action or by the court subject to all legal objections as to competency and bias and as to qualifications as an expert."

¹⁶ CAL. EVIDENCE CODE § 722. The comment by the Law Revision Commission says this provision codifies existing law.

¹⁷ See Weihofen, *An Alternative to the Battle of the Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419, 422 (1935).

¹⁸ *People v. French*, 12 Cal. 2d 720, 733-34, 87 P.2d 1014, 1021 (1939); CAL. EVIDENCE CODE §§ 115, 522.

¹⁹ 114 Cal. App. 522, 300 Pac. 84 (1931).

²⁰ The defendant claimed also that the statute denied him an impartial trial, due process, and violated the separation of powers doctrine. Pointing out the large body of criticism of partisan selection of experts, the court held that without a showing that the psychiatrist was unqualified or not impartial, the defendant could not be prejudiced. *Id.* at 524-30, 300 Pac. at 85-87.

that any statement made by the defendant during the psychiatric examination had been used against him at the *guilt* phase of the trial. The defendant's only objection was that using the court-appointed psychiatrist's conclusion which was obtained in a compulsory psychiatric examination violated his privilege against self-incrimination when used at the *sanity* phase of the trial.

In answering this objection, the court could have taken either of two approaches. First, it could have answered the question in the form which the defendant asked it: Is a *compulsory* mental examination of a criminal defendant a violation of the privilege against self-incrimination? Since the privilege extends only to testimonial compulsion,²¹ the issue the court would have to determine is whether a mental examination is testimonial, within the privilege, or physical exhibition,²² not within the privilege. The second approach would be to construe the statute as making submission to the psychiatrist *voluntary* on the part of the defendant. If he were not required to submit to the psychiatrist, he cannot complain that he was *compelled* to incriminate himself.

The first approach was not mentioned by the court. The court stated broadly that it did not

see any merit in the contention that under section 1027 a defendant is compelled to be a witness against himself. *Nothing in the section compels him to submit to an examination.* If he does so the action is purely voluntary. To assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion.²³

Broadly construing section 1027 to make submission to the psychiatrist purely voluntary permitted the court to affirm the conviction and sustain the validity of the statute, but at the same time the decision substantially weakened the statute's effectiveness. If a defendant could find a psychiatrist who would testify that he was legally insane, should he take a chance on what the court psychiatrists would diagnose? Unless the defendant knew he had a very strong case he would have little inducement to submit to the psychiatric examination, especially since if he did submit, and the court psychiatrists' testimony was unfavorable, it would probably be extremely influential with the jury.

In *People v. French*²⁴ the defendant refused to submit to any examination by the court-appointed psychiatrist. A special proceeding was conducted out of the presence of the jury, in which the prosecution requested that the defendant be required to submit to an examination. Defendant and his counsel both refused to permit any examination. Later during the course of the trial the court permitted the prosecution to enter the record of the special proceedings into evidence against the defendant.

On appeal the supreme court recognized the constructional problem whether submission under section 1027 was voluntary or mandatory, and the constitutional problem whether compulsory submission would violate the privilege against self-incrimination.²⁵ But the court expressly refused to consider those problems

²¹ See *Holt v. United States*, 218 U.S. 245, 252 (1910).

²² See text at note 59 *infra*.

²³ *People v. Strong*, 114 Cal. App. 522, 530, 300 Pac. 84, 87 (1931). (Emphasis added.)

²⁴ 12 Cal. 2d 720, 87 P.2d 1014 (1939).

²⁵ *Id.* at 769, 87 P.2d at 1039 (by implication).

since the case could be disposed of on other grounds.²⁶ Assuming that the defendant was correct in his contention that submission to the psychiatric examination is voluntary, the court held that the defendant's active participation in the refusal to submit was in any event admissible as relevant to the issue of his mental condition.²⁷ Had French himself not participated in the refusal, the only inference that could be drawn, without further evidence, would be that his *counsel* thought that submission was unwise, which would not be relevant to the mental condition of the defendant himself. Then the court would have been confronted with questions of more substance: Was the District Court of Appeals in *Strong* correct in holding that submission to the examination under section 1027 is voluntary, and would compulsory submission be constitutional?

In *People v. Combes*²⁸ the defendant submitted to examination by the court-appointed psychiatrist. At the guilt phase of the trial he took the stand in his own behalf. To impeach his testimony the prosecution called the court-appointed psychiatrist who testified to prior inconsistent statements made during the psychiatric examination. On appeal the defendant contended that the admission of the psychiatrist's testimony, not on the issue of sanity, but on the issue of guilt by relating incriminating statements made during the examination, violated his privilege against self-incrimination.²⁹ The supreme court, without comment, quoted the *Strong* holding that submission to examination by the court-appointed psychiatrist is voluntary,³⁰ and therefore the defendant could claim no compulsory self-incrimination.³¹ The fact that section 1027

provides that it is the *affirmative* duty of an alienist to testify whenever summoned in a sanity proceeding does not mean or even imply that he is *prohibited* from testifying in other proceedings where information that he may have is relevant and material.³²

As long as the supreme court committed itself to the proposition that submission to examination by the psychiatrist is voluntary, and therefore no statement made during the examination is privileged, it would seem to follow that admissions made to the psychiatrist could be used only as prior inconsistent statements, but also as part of the prosecution's case in chief under an exception to the hearsay rule.³³ One year after *Combes* the supreme court, relying on that case, upheld a first degree murder conviction which was based partly on admissions to the psychiatrist during an examination.³⁴

²⁶ *Id.* at 769, 87 P.2d at 1039.

²⁷ "It cannot be questioned that anything done or said in the proceedings if relevant to his mental state would be admissible. The proceedings disclose that he was conscious that his mental responsibility was under investigation and that he was acting in concert with his counsel who were directing his defense and therefore constituted evidence as to his mental condition." *Id.* at 769-70, 87 P.2d at 1039.

²⁸ 56 Cal. 2d 135, 14 Cal. Rptr. 4, 363 P.2d 4 (1961).

²⁹ *Id.* at 149, 14 Cal. Rptr. at 12, 363 P.2d at 12.

³⁰ *Id.* at 149-50, 14 Cal. Rptr. at 12, 363 P.2d at 12.

³¹ *Ibid.*

³² *Id.* at 149, 14 Cal. Rptr. at 12, 363 P.2d at 12.

³³ The California hearsay rule is codified in CAL. EVIDENCE CODE § 1200. CAL. EVIDENCE CODE § 1220 makes out-of-court statements of a party admissible against him as an exception to the hearsay rule.

³⁴ *People v. Ditson*, 57 Cal. 2d 415, 20 Cal. Rptr. 165, 369 P.2d 714, *cert. denied*, 371 U.S. 852, *petition for cert. dismissed*, 371 U.S. 937 (1962).

The supreme court's solemnizing of the *Strong* holding that submission to the psychiatric examination is voluntary put the efficacy of section 1027 in serious jeopardy. If the defendant were to submit to the examination, it might often mean sacrificing either his not guilty or his insanity plea. Since the psychiatrist's principal concern is the mental condition of the defendant *at the time the offense was committed*, he will certainly question the defendant about the crime itself. If the defendant talks freely about the crime, he risks having all his statements used against him at the *guilt* phase of the trial; if he refuses to talk about the crime, his active refusal could be used as evidence against him at the *sanity* phase of the trial under the rule of *French*,³⁵ and the court loses the benefit of the best possible psychiatric analysis.

Not only would the defendant have every reason not to submit, but if his attorney were to hire a psychiatrist to testify for him, statements made during the examination would have been privileged under the attorney-client privilege.³⁶ The defendant's attorney could then refuse, without active participation by the defendant in the refusal, to permit any examination by a court-appointed psychiatrist, and both pleas would be protected since no inference of the state of mind of the defendant could be drawn.

The recent United States Supreme Court decision in *Massiah v. United States*³⁷ compelled a re-examination of the previous construction of section 1027. In *In re Spencer*,³⁸ on a writ of habeas corpus, Spencer, who had been convicted partly on the basis of admissions made to the court-appointed psychiatrist,³⁹ claimed that he had been denied his constitutional right to counsel, since incriminating statements were elicited out of the presence of his attorney and he had not waived that right. The California Supreme Court agreed that "if defendant's statements to the psychiatrist may be introduced at the guilt trial, defendant's need of counsel is as acute during the psychiatric interview as during police interrogation."⁴⁰ But the court realized that such "presence and participa-

³⁵ *People v. French*, 12 Cal. 2d 720, 87 P.2d 1014 (1939).

³⁶ *Jones v. Superior Court*, 58 Cal. 2d 56, 60-61, 22 Cal. Rptr. 879, 881-82, 372 P.2d 919, 921-22 (1962); *In re Ochse*, 38 Cal. 2d 230, 231-32, 238 P.2d 561-62 (1952). See also CAL. EVIDENCE CODE §§ 952, 954.

California does not recognize a physician-patient privilege in criminal cases. CAL. EVIDENCE CODE §§ 994, 998. *But cf.* CAL. EVIDENCE CODE § 1014. This section creates a new psychotherapist-patient privilege which is broader than the physician-patient privilege. However, whenever the mental condition of a criminal defendant is in issue, the privilege is quite limited in its scope by CAL. EVIDENCE CODE §§ 1016 and 1023. Moreover, the privilege does not include examination by a court-appointed psychiatrist unless the appointment is at the request of a criminal defendant's attorney in order to prepare a defense. CAL. EVIDENCE CODE § 1017. The privilege is lost though if the defendant pleads not guilty by reason of insanity, or otherwise tenders the issue of his mental state. See CAL. EVIDENCE CODE § 1017, comment.

³⁷ 377 U.S. 201 (1964). The court held that statements by the accused elicited by an agent of the government without the presence of the accused's counsel were inadmissible as evidence against him. *Id.* at 206-07.

³⁸ 63 Cal. 2d 400, 46 Cal. Rptr. 753, 406 P.2d 33 (1965).

³⁹ Spencer's conviction had been affirmed in *People v. Spencer*, 60 Cal. 2d 64, 31 Cal. Rptr. 782, 383 P.2d 134 (1963), *cert. denied*, 377 U.S. 1007 (1964) even though he had dropped his insanity plea before trial.

⁴⁰ *In re Spencer*, 63 Cal. 2d 400, 410, 46 Cal. Rptr. 753, 760, 406 P.2d 33, 40 (1965).

tion of counsel would hinder the establishment of the rapport that is so necessary in a psychiatric examination."⁴¹ To preserve some effectiveness of section 1027 the court established four rules: (1) Before submission to the examination the defendant must be represented by counsel, or intelligently and knowingly have waived that right.⁴² (2) If the defendant submits, the psychiatrist may not be called at the guilt phase, unless the defendant puts his mental state in issue.⁴³ (3) If the defendant puts his mental state in issue at the guilt trial, the psychiatrist may then be called on that issue, but statements of the defendant in the course of the examination may not be used to prove their truth, but only as the basis for the opinion of the psychiatrist.⁴⁴ (4) The defendant may not have counsel present at the examination, since if he does not put his mental state in issue, the incriminating statements will not be used against him on the issue of guilt.⁴⁵ If he does put his mental state in issue, he cannot complain, since he voluntarily submitted, and he should not be able to "preclude expert testimony on a subject that he has himself injected into the trial."⁴⁶

Conclusion

The formulation by the California Supreme Court of the rules governing the use of the psychiatrist's testimony is not only an obvious retreat from their previous decisions, but also an attempt to save section 1027 from being a complete nullity. It would be impossible to reconcile a policy of providing a psychiatric examination which is conducive to full disclosure by the accused thus leading to a proper diagnosis with a policy of allowing the psychiatrist to testify against the accused at both the guilt and sanity phases of the trial. If the policy of *Combes*⁴⁷ and *Ditson*⁴⁸ were followed, no attorney would allow his client to submit to the examination if he also had pleaded not guilty, and the client could afford to hire his own psychiatrist. Since the overriding purpose of section 1027 was to provide a sound, unbiased inquiry into the sanity of the defendant, the parasitic corollary that "voluntary" statements of the accused during the psychiatric examination could be used against him was rightly cut off before it destroyed the statute.

*Spencer*⁴⁹ created a privilege for the defendant, that nothing in the examination could be used against him on the issue of guilt, at least as long as he does not raise the issue of his mental condition at the guilt phase. However, since insanity is raised as a defense most often in murder cases, if the defendant pleads not guilty and not guilty by reason of insanity, the not guilty plea is often based at least partly on the ground that the defendant lacked a special mental element

⁴¹ *Id.* at 411, 46 Cal. Rptr. at 761, 406 P.2d at 41.

⁴² *Id.* at 412, 46 Cal. Rptr. at 761, 406 P.2d at 41.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Id.* at 412-13, 46 Cal. Rptr. at 761-62, 406 P.2d at 41-42. But the court added that defendant's counsel could be present at the examination as an observer, not as a participant, with the permission of the examining psychiatrist, or the trial judge. *Id.* at 413, 46 Cal. Rptr. at 762, 406 P.2d at 42.

⁴⁶ *Id.* at 413, 46 Cal. Rptr. at 761-62, 406 P.2d at 41-42.

⁴⁷ *People v. Combes*, 56 Cal. 2d 135, 14 Cal. Rptr. 4, 363 P.2d 4 (1961).

⁴⁸ *People v. Ditson*, 57 Cal. 2d 415, 20 Cal. Rptr. 165, 369 P.2d 714 (1962).

⁴⁹ *In re Spencer*, 63 Cal. 2d 400, 46 Cal. Rptr. 753, 406 P.2d 33 (1965).

of the crime.⁵⁰ The defendant has then raised the issue of his mental condition during the guilt phase, and the psychiatrist can be called.⁵¹ Although the statements of the defendant are then admissible to show the basis on which the psychiatrist has formed his opinion, under the *Spencer* rule they may not be used to prove the truth of the statements as in *Ditson*. The court held that the defendant is entitled to a limiting instruction that the statements may not be considered by the jury to prove their truth,⁵² and if it is given, the defendant is not deprived of any of his rights.⁵³

Undoubtedly the prosecutor will tailor his examination of the psychiatrist to reveal as many possible "bases" of the psychiatrist's opinion as he can, and thereby get incriminating statements to the jury. Since it is usually psychologically impossible for the jury to disregard the statements as tending to prove their truth, the defendant is in much the same position as before *Spencer*. Since he must be represented by counsel before he submits to the psychiatrist, he will probably be advised not to submit. In the case where the court probably has the most need of the opinion of the court-appointed psychiatrist, the issue will be thrust back into the hands of the partisan experts. Furthermore, even if the defendant does not plan to raise the issue of his mental state at the guilt phase, he has nothing to lose by not submitting if his attorney makes the refusal for him without his own active participation. He still has the privilege of finding his own psychiatrist. The weaker the case for the defendant, the more reason he has to shop for his own expert, but yet the more reason the jury should have the benefit of an unbiased expert.

The apparent lack of inducement for the defendant to submit to the court-appointed psychiatrist, and the substantial possibility that section 1027 will be ignored in the situations where the abuses it was designed to correct are most rampant, compels a re-examination of *People v. Strong*.⁵⁴ Had the court then addressed itself to the narrow question of whether a compulsory psychiatric examination would violate any constitutional right, and had a compulsory examination been found constitutional, the purpose of section 1027 would have been realized. The problems emanating from the holding that submission is voluntary and the obvious retreat in *Spencer* would have been unnecessary.

If the examination were compulsory, admissions or confessions of the accused during the examination would apparently be constitutionally protected from dis-

⁵⁰ E.g., *People v. Anderson*, 63 Cal. 2d 351, 46 Cal. Rptr. 763, 406 P.2d 43 (1965); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

"[C]ourts have held that evidence of any mental condition, whether it be caused by a mental disease of defendant or by intoxication or by drugs is relevant to prove that the defendant was incapable of harboring the particular mental state constituting an element of the offense." *People v. Anderson*, *supra* at 365-66, 46 Cal. Rptr. at 772-73, 406 P.2d at 52-53.

⁵¹ *People v. Anderson*, 63 Cal. 2d 351, 367, 46 Cal. Rptr. 763, 774, 406 P.2d 43, 54 (1965).

⁵² Failure to give the limiting instruction was held to be reversible error in *People v. Price*, 63 Cal. 2d 370, 380, 46 Cal. Rptr. 775, 781-82, 406 P.2d 55, 61-62 (1965).

⁵³ *People v. Anderson*, 63 Cal. 2d 351, 367, 46 Cal. Rptr. 763, 774, 406 P.2d 43, 54 (1965).

⁵⁴ 114 Cal. App. 522, 300 Pac. 84 (1931).

closure by the privilege against self-incrimination.⁵⁵ The secondary use of the psychiatrist in *Combes*⁵⁶ and *Ditson*⁵⁷ to incriminate the defendant at the guilt trial would have been rightly refused in light of the main purpose of section 1027 from its first construction, rather than after thirty-five years of confusing construction which resulted in a court-made privilege to keep the psychiatrist out of the guilt phase of the trial.

The only states that have squarely considered the question have held that a compulsory submission of the accused to a mental examination upon a plea of not guilty by reason of insanity does not violate the constitutional right against self-incrimination.⁵⁸ The privilege protects only testimonial compulsion, and "does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted."⁵⁹ A psychiatric examination does not

depend on his [the defendant's] testimonial responsibility. The personal characteristics of an accused which are commonly open and observable to all are not of that secret nature which the constitutional privilege against self-incrimination was designed to protect.⁶⁰

The formulation of the rules governing section 1027 in *Spencer* did much to save the statute from dropping into obscurity. A requirement of submission⁶¹ would not only nearly eliminate lapses into the battle of experts, but would seem fundamentally fair by harmonizing the rights of the accused with the purpose of the law to make the best possible determination of the truth.

Vernon James Jackl*

⁵⁵ There seems to be no case directly holding that statements compelled in an examination by a state psychiatrist fall within the privilege against self-incrimination. In *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506 (1951) which sustained the validity of a compulsory mental examination, the court added by way of *dicta* that the examiners "will not be permitted, over the protest of the accused, to reveal any confession made by him in the course of such examination, or any declarations implicating him in the crime charged." *Id.* at 313, 67 S.E.2d at 508.

⁵⁶ *People v. Combes*, 56 Cal. 2d 135, 14 Cal. Rptr. 4, 363 P.2d 4 (1961).

⁵⁷ *People v. Ditson*, 57 Cal. 2d 415, 20 Cal. Rptr. 165, 369 P.2d 714 (1962).

⁵⁸ *E.g.*, *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506 (1951); *State v. Riggle*, 76 Wyo. 1, 298 P.2d 349 (1956). See also Annot., 32 A.L.R.2d 434 (1953).

⁵⁹ *People v. One 1941 Mercury Sedan*, 74 Cal. App. 2d 199, 213, 168 P.2d 443, 451 (1946).

⁶⁰ *State v. Myers*, 220 S.C. 309, 312, 67 S.E.2d 506, 507 (1951).

⁶¹ MODEL CODE OF EVIDENCE rule 205 (1942) recommends: "No person has a privilege to refuse to submit his body to examination for the purpose of discovering or recording his corporeal features and other identifying characteristics, or his physical or mental condition"

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