Criminal Law and Procedure

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V. Criminal Law and Procedure

A. Federal Arraignment and Entry of Plea—Zamora v. United States, 397 F.2d 254 (9th Cir. 1968); Castro v. United States, 396 F.2d 345 (9th Cir. 1968); Gomez v. United States, 396 F.2d 323 (9th Cir. 1968); Jones v. United States, 384 F.2d 916 (9th Cir. 1967).

Several recent decisions of the Ninth Circuit have served to interpret and further define the Heiden Rule, a rule of criminal procedure unique to the Ninth Circuit, based upon a construction of Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 requires that the presiding officer at a federal criminal arraignment, before he accepts the plea of guilty by the accused, determine that the plea was made voluntarily with an understanding of the nature of the charge and the consequences of the plea. The Heiden Rule grants to a prisoner an automatic vacation of the sentence imposed at his arraignment when he alleges at a subsequent proceeding that his plea was involuntarily entered and when the record of his arraignment shows noncompliance with Rule 11. This rule of procedure is to be contrasted with the “traditional view” and the “modified traditional view.” Both of these views grant an evidentiary hearing to the prisoner rather than vacate his sentence, with the different procedural consequence that the

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1 Heiden v. United States, 353 F.2d 53 (9th Cir. 1965).
2 FED. R. CRIM. P. 11. At the time of the Heiden decision, Rule 11 read, so far as is relevant, as follows: “The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. . . .” The rule was amended in 1966 to the effect that a positive duty was placed on the presiding judge to engage in a verbal colloquy with the accused so as to better understand the accused’s comprehension of the matter and thus to be in a better position to determine voluntariness. The amendment, however, is quite irrelevant to this discussion since the traditional view still exists that technical non-compliance with Rule 11 entitles the accused to no more than a hearing at which time the voluntariness of the plea can be determined.
3 The normal method is a motion under 28 U.S.C. § 2255, which provides for a hearing for a prisoner upon a motion which alleges that the sentence imposed was (i) in violation of the Constitution or laws of the United States; (ii) without jurisdiction; (iii) in excess of the maximum penalty; or (iv) otherwise subject to collateral attack, and whose record is not conclusive against him.
4 E.g., Kennedy v. United States, 397 F.2d 16 (6th Cir. 1968); Hallday v.
Subsequent cases have served to mold the Heiden Rule to its present form. The rule has become nonretroactive. One case has held that compliance with Rule 11 does not necessarily preclude a subsequent inquiry as to matters outside the record of the arraignment. On the other hand, in other situations, compliance with Rule 11 has been held to eliminate completely the necessity for future proceedings questioning the validity of the plea. In order to define the present application of the Heiden Rule, the background, development, and modifications will each, in turn, be explored.

Background

Before the implementation of the Heiden Rule, all circuits were in accord on the general proposition that technical noncompliance with Rule 11 was not fatal to the sentence imposed so long as the plea was in fact voluntarily entered with full knowledge of the nature of the charge and an understanding of its consequences. The procedure traditionally has been to grant a hearing, upon a proper motion, on the issue of whether or not the plea was in fact voluntarily entered. If the record were not conclusive, the majority of the circuits would place the burden of proof on the prisoner to show that his plea was involuntary. If he succeeded, his sentence would be vacated; if he failed, his sentence would continue. A minority of circuits, including the Ninth Circuit, placed the burden of proof on the issue of voluntariness on the government once noncompliance with Rule 11 was established. In either event, the procedure did not interrupt the

United States, 380 F.2d 270 (1st Cir. 1967); Stephens v. United States, 376 F.2d 23 (10th Cir.), cert. denied, 389 U.S. 881 (1967); Brokaw v. United States, 368 F.2d 508 (4th Cir.), cert. denied, 386 U.S. 996 (1967).

6 See, e.g., United States v. Lester, 247 F.2d 498, 501 (2d Cir. 1957).

6 Domenica v. United States, 292 F.2d 463 (1st Cir. 1961).

7 Zamora v. United States, 397 F.2d 254 (9th Cir. 1968); Gomez v. United States, 396 F.2d 323 (9th Cir. 1968); Castro v. United States, 396 F.2d 345 (9th Cir. 1968).

8 Jones v. United States, 384 F.2d 916 (9th Cir. 1967).

9 Compare McClure v. United States, 398 F.2d 279 (9th Cir. 1968), with Combs v. United States, 391 F.2d 1017 (9th Cir. 1968).

10 By "the general proposition" is meant only the question whether a hearing should be granted, rather than the Ninth Circuit's practice, under Heiden, of vacating the sentence.

11 E.g., Munich v. United States, 337 F.2d 356 (9th Cir. 1962) (overruled sub silentio by Heiden); United States v. Lester, 247 F.2d 496 (2d Cir. 1957).

12 See United States v. Lester, 247 F.2d 496, 501 (2d Cir. 1957) for a statement of the rule.

13 Domenica v. United States, 292 F.2d 483 (1st Cir. 1961), citing United
sentence imposed at the arraignment. Upon a finding against the prisoner, he returned to jail.

The procedure of merely granting a hearing, herein termed the traditional view, is presently the position of all circuits other than the Ninth Circuit. The difficulties encountered when the movant must show involuntariness under an incomplete or ambiguous record cannot be overemphasized. As a result of these difficulties, the reviewing courts' decisions are often interspersed with admonitions to the district court judges to the effect that they should comply with Rule 11 in the interest of clarity. These admonitions alone point to some basic dissatisfaction with the traditional view.

States v. Davis, 212 F.2d 264 (7th Cir. 1954). But note that the Davis case was very scanty authority at best. The only reference to burden of proof in the Davis case is the following statement: "Of course, a failure to make the determination required [by Rule 11] would of itself be reversible error only in the absence of a showing that in fact the defendant understood the nature of the charges to which his plea was entered." Id. at 267 (emphasis added). It would seem, then, that the view in the Seventh Circuit is as yet unsettled. Note that the Ninth Circuit had placed the burden of proof on the issue of voluntariness on the government upon a showing of noncompliance with Rule 11 even before the Heiden decision. Munich v. United States, 337 F.2d 356, 360 (9th Cir. 1962). Of course, the Ninth Circuit view here is moot, since Heiden dispensed with the hearing altogether. In a very real sense the government has been given a most difficult burden of proof. It must show the defendant guilty, beyond a reasonable doubt, at the trial of his case.

Four circuits have been urged to adopt the Heiden Rule and have refused. See Kennedy v. United States, 397 F.2d 16 (6th Cir. 1968); Halliday v. United States, 380 F.2d 270 (1st Cir. 1967); Stephens v. United States, 376 F.2d 23 (10th Cir.), cert. denied, 389 U.S. 881 (1967); Brokaw v. United States, 368 F.2d 508 (4th Cir.), cert. denied, 386 U.S. 996 (1967); cf. Bailey v. MacDougall, 392 F.2d 155 (4th Cir. 1968), where the court did vacate the sentence without a hearing, after reciting the normal procedure elucidated in the Brokaw case, on the basis that the record was conclusive in favor of the movant. Three other circuits have decided cases since Heiden and have followed the traditional view, Heiden apparently not being urged. See Manley v. United States, 396 F.2d 699 (5th Cir. 1968); United States v. Del Piano, 386 F.2d 436 (3d Cir. 1967); Dorrough v. United States, 385 F.2d 887 (5th Cir. 1967); Day v. United States, 357 F.2d 307 (7th Cir. 1966). Two circuits have apparently not touched on the issue since Heiden and still adhere to the traditional view. See United States v. Lester, 247 F.2d 496 (2d Cir. 1957); cf. Bone v. United States, 351 F.2d 11 (8th Cir. 1965) (Bone was decided one month prior to Heiden).

E.g., Stephens v. United States, 376 F.2d 23, 24 (10th Cir.), cert. denied, 389 U.S. 881 (1967) ("a sentencing judge should comply ... with ... Rule 11"); Brokaw v. United States, 368 F.2d 508, 510 (4th Cir.), cert. denied, 386 U.S. 996 (1967) ("[W]e underscore our direction to district court judges that voluntariness, as well as understanding, be fully explored before a plea is accepted").

Cases cited note 15 supra.
The Heiden Rule

The dissatisfaction with the traditional view ripened into decision on November 2, 1965, in the Ninth Circuit in *Heiden v. United States*.\(^{17}\) In *Heiden*, the court overruled *Long v. United States*,\(^ {18}\) which had utilized the traditional view, and *Munich v. United States*,\(^ {19}\) which had shifted the burden of proof on the issue of voluntariness to the Government. The *Heiden* court based its decision wholly upon its construction of Rule 11: "Rule 11 is mandatory . . . [T]he fact that a plea was intelligently entered . . . must be ascertained at the time of the arraignment . . . and not after the fact . . ."\(^ {20}\) Heiden alleged that the sentence imposed was greater than that which he had been informed was possible. Applying the traditional view, the district court granted him a hearing. At the hearing the court found that the accused had, in fact, voluntarily pleaded guilty and that he had had a full knowledge of the entire range of penalties and a complete understanding of the nature of the charge. The district court, therefore, refused to vacate the sentence.\(^ {21}\)

Even though this finding of fact was sustained by the Ninth Circuit, it reversed the judgment and vacated the sentence.\(^ {22}\) The court reasoned that prejudice is established when it is alleged that a specific and material lack of understanding existed which, if true, would render the plea invalid and which could have been discovered through proper inquiry at the arraignment.\(^ {23}\) "[Rule 11] thus contemplates that disputes as to the understanding of the defendant and the voluntariness of his actions are to be eliminated at the outset,\(^ {24}\) and that courts are thereby to be freed from the troublesome task of searching at a later date for the truth as to a defendant's then state of mind."\(^ {25}\) The Heiden Rule was thus promulgated. As a result,

\(^{17}\) 353 F.2d 53 (9th Cir. 1965).
\(^{18}\) 290 F.2d 606 (9th Cir. 1961).
\(^{19}\) 337 F.2d 356 (9th Cir. 1962) (overruled sub silentio).
\(^{20}\) 353 F.2d at 55.
\(^{21}\) Id.
\(^{22}\) The traditional view grants the hearing required by 28 U.S.C. § 2255 (1964), and hears the evidence on voluntariness. Heiden established that Rule 11 had not been complied with at his arraignment. The Government then sustained its burden of proof to the satisfaction of the district court. Heiden's sentence was ordered to continue.
\(^{23}\) 353 F.2d at 55.
\(^{24}\) Id.
\(^{25}\) The Court here analogizes to the old leading case of *Johnson v. Zerbst*, 304 U.S. 458, 465 (1937), which contained dicta to the effect that the defendant's voluntary waiver of counsel should appear of record. If the case seems "out-of-date," it is suggested that the basic principles elucidated therein have recently been reiterated in modern cases. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).
\(^{25}\) 353 F.2d at 55.
Heiden's sentence was vacated and he was given an opportunity to replead the indictment.

Obviously, a man in Heiden's position would plead not guilty. The Government, hence, is given a choice: It may either try the substantive crime or set the man free. The trial may come many months or years after the original arraignment. Witnesses and crucial evidence may no longer be available. If the case goes to trial, the Government must show guilt of the substantive offense beyond a reasonable doubt. Clearly, trying the substantive offense is a greater "burden" than merely attempting to show a voluntary plea at the evidentiary hearing which the traditional view would grant. Hence, as a practical matter, the step beyond existing law taken by the Ninth Circuit in Heiden is quite a substantial one.

Recent Modifications to the Heiden Rule

During the term of the court under review, the Ninth Circuit decided six cases further defining and clarifying the Heiden Rule. In Jones v. United States, the presiding officer at the arraignment had complied fully with Rule 11. After sentencing and imprisonment, Jones alleged in a Section 2255 motion that his plea had been induced by "coercive in-custody interrogation without counsel," by "threats" to Jones and his family, and by "promises of leniency." These allegations, it was conceded, were outside the scope of the record. The district court reasoned that the logical converse of Heiden was that compliance with Rule 11 necessarily precluded any subsequent inquiry into the validity of the plea. The Ninth Circuit reversed, holding that compliance with Rule 11 did not preclude an evidentiary hearing on issues wholly without the scope of the record. The court, however, did not vacate the sentence as it had done in Heiden. It would seem that Jones emphasizes the principle that the Heiden Rule was not intended to restrict the rights of the accused in any sense. While Heiden sets up a procedure which alleviates irregularities at the arraignment, other irregularities outside the record do not escape judicial scrutiny merely because the arraignment was proper.

The Ninth Circuit distinguished Heiden in the cases of McClure v. United States and Combs v. United States. In the former, while it was true that the arraigning judge had failed to warn the accused of

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26 384 F.2d 916 (9th Cir. 1967).
28 384 F.2d at 917.
29 Id.
30 389 F.2d 279 (9th Cir. 1968).
31 391 F.2d 1017 (9th Cir. 1968).
the possibility that he might be sentenced as a youthful offender, the court corrected its error and offered the accused the opportunity to withdraw his plea of guilty. The offer being refused, the court accepted the plea. The Ninth Circuit affirmed the district court's denial of relief under Section 2255\(^2\) on the theory that Rule 11 had been satisfied before the accused was committed to his plea.\(^3\) In the latter case, the allegations in the Section 2255\(^3\) motion were held insufficient to raise a disputable issue since the record was conclusive.\(^5\) Therefore, the Heiden Rule could not apply.

_Castro v. United States\(^6\) placed the first significant restriction on the application of the Heiden Rule: It was not to apply retroactively. Castro's allegations were sufficient to bring him squarely within the accepted doctrine of _Heiden_. The district court dismissed the motion to vacate (erroneously) without a hearing even though the record was inconclusive. The circuit court reversed, granted a hearing and followed the traditional view, but refused to vacate the sentence as dictated by the Heiden Rule.\(^7\) Its application would be prospective only,\(^8\) dating from the decision of _Heiden_, November 2, 1965.

The cases of _Gomez v. United States\(^9\) and _Zamora v. United States\(^10\)_ involved slight factual variations from _Castro_, each of which raised the same issue. In both decisions, the court refused to apply the Heiden Rule retroactively. It seems, therefore, to be settled within the Ninth Circuit that the Heiden Rule will have only a prospective application.

The present status of Rule 11 in the Ninth Circuit, as a result of these decisions, can be stated succinctly as follows: (1) the arraigning judge is obliged to make the record clear that the accused has been apprised of the charge against him, the facts necessary to constitute the charged offense, and the consequences flowing from a plea of guilty to that charge; (2) the record must clearly reflect that the plea has not been induced through the application of methods contrary to the policy of the law and the regulations of the circuit; (3) if either of the two above requisites are not met, there accrues to the accused the right to have his sentence automatically set aside (upon a proper


\(^3\) McClure v. United States, 389 F.2d 279 (9th Cir. 1968).


\(^5\) Combs v. United States, 391 F.2d 1017 (9th Cir. 1968).

\(^6\) 396 F.2d 345 (9th Cir. 1968).

\(^7\) Id.

\(^8\) Id. at 348. The court notes Johnson v. New Jersey, 384 U.S. 719 (1966), and Stovall v. Denno, 388 U.S. 293 (1967), on the refusal to apply a particular rule of criminal procedure retroactively.

\(^9\) 396 F.2d 323 (9th Cir. 1968).

\(^10\) 397 F.2d 254 (9th Cir. 1968).
motion) and the right to replead the indictment; and (4) the rights under the Heiden Rule do not accrue to an accused whose arraignment occurred prior to November 2, 1965.41

Analysis of the Procedures

There are two distinct views as to the treatment of the allegations of a prisoner in a proper motion that Rule 11 was incorrectly applied at his arraignment and that his plea was involuntary. The traditional view, which applies in all circuits other than the Ninth Circuit, demands only that an evidentiary hearing be granted on the issue of whether the plea was voluntary. The Ninth Circuit view, on the other hand, grants a summary vacation of sentence.

The question naturally arises, in the light of recent Supreme Court decisions concerning criminal procedure, whether the elements of due process are satisfied by either or both of the procedures outlined above. At the least, it seems clear that the Heiden Rule satisfies due process, for under this procedure the prisoner gets the benefit of any doubt. The Ninth Circuit in Heiden precluded a constitutional discussion by basing its decision wholly upon its construction of Rule 11, a rule of procedure, not of substance.42 The Supreme Court has not passed on the precise issue. The leading case of Machibroda v. United States43 is authority for the position that at least a hearing is required.44 At the time of Machibroda, Heiden had not been decided and the question of an immediate vacation of sentence did not arise. The Supreme Court has declined to hear two cases in which this issue was squarely presented.45 Hence, there is no direct authority on the constitutional issue.

The closest analogy to the constitutional considerations of the Heiden Rule, it would seem, is found in the voluntary confession cases. In Jackson v. Denno,46 the Supreme Court held that, notwithstanding the irregularity of the New York procedure, the defendant was not entitled to a new trial if, in fact, his confession was found to be voluntary at a subsequent evidentiary hearing.47 However, it

41 No provision is included for the situation presented in Jones v. United States, 384 F.2d 916 (9th Cir. 1967). It is submitted that Jones plays no part in the present status of the Heiden Rule. Rather it is an independent basis for relief designed to cover situations for which Heiden is insufficient.
42 353 F.2d at 55.
44 Id. at 496; see Sanders v. United States, 373 U.S. 1 (1963).
47 Id.
is to be noted that the decision was decided by a bare majority and that Justice Clark, in his dissent, specified that even were he to agree with the majority that the New York procedure was unconstitutional, he would nevertheless vacate the sentence rather than send it back for an evidentiary hearing on the issue of whether the confession was voluntary. The analogy is not perfect since the concepts are not identical. If it is conceded, however, that both the guilty plea and the confession are protected by fundamental due process, then, in the light of the similarities between the two, the analogy would seem to be quite persuasive. Consequently, if the analogy is sound, it seems clear that both the traditional view and the Heiden Rule are equally constitutional.

Assuming, then, that the constitutional issue is resolved, the question of policy becomes relevant. The policy of the Ninth Circuit view seems to be to eliminate questions of prejudice by eliminating hearings resulting from alleged violations of Rule 11 altogether. Although the Court's decision in Jones v. United States precludes the absolute disposal of the case upon compliance with Rule 11, the bulk of the cases in the future will be wholly disposed of by a proper inquiry at the arraignment. Of course, situations can be imagined in which disposing of the case in this manner would create problems. The obvious hypothetical situation which comes to mind is the accused who is not a "hardened criminal" and who is somewhat overawed by the whole arraignment. To this accused, the judge appears as a great symbol of power in whose hands rests the future of the accused himself. In such a situation, some writers have doubted the validity of the formalities of Rule 11 as a method of discovering the accused's state of mind. But on the other hand, it would seem that in the bulk of the cases in which a guilty plea is taken, such a plea will, in fact, be voluntary.

While refusing to adopt the Heiden Rule, the other ten circuits also have the goal of administering justice in a fair and impartial manner to each accused. The advantage of the traditional view of granting merely a hearing is that the justly convicted man is not set

48 Id. at 426.
49 In this regard, it should be noted that Congress, in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 3501(e) (June 19, 1968), defines "confessions" as follows: "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." (Emphasis added.) While this act may be under fire for other reasons, it would seem that the treatment of a plea of guilty as a confession of guilt is sound.
50 384 F.2d 916 (9th Cir. 1967).
51 See, e.g., 8 R. Cipes, Moore's Federal Practice—Cipes, Criminal Rules ¶ 11.03 (2d ed. 1965).
52 Jones v. United States, 384 F.2d 916 (9th Cir. 1967) is the obvious exception.
free due to some technicality in the record. Does this advantage, however, justify perpetuating a system in which district court judges are allowed to ignore the spirit of a rule of procedure? Rule 11 is conceded to be a good rule of procedure in all circuits. Lack of compliance with the rule at the arraignment may well cause difficulty of inquiry at any subsequent proceeding. The court must make a determination months and sometimes years after the time of the arraignment. Clearly it may be difficult to make the proper finding. The shifting of the burden of proof to the Government after non-compliance with Rule 11 has been shown, as is done in the First and possibly the Seventh Circuits, seems to be a movement in the right direction. However, it would seem that even such a procedure falls short of disposing of possible prejudice.

Conclusion

It is submitted that the procedure used in the Ninth Circuit comes closer to the common goal of serving the ends of justice in all cases. The traditional view, though not without merit, seems to give the district court judge a "second chance" at finding that a particular plea was voluntary. The modified traditional view, shifting the burden of proof on the issue of voluntariness to the Government, does not seem to be adequate. The argument of the Ninth Circuit—that prejudice inures of necessity to the prisoner who must face an inconclusive record at a subsequent hearing—seems difficult to answer.

Furthermore, it is submitted that the decision of the Ninth Circuit in Heiden and the modifications which have followed fit rather firmly into the tenor of the decisions of the Supreme Court on the subject of criminal procedure within the last few years. The decisions evidence the modern trend toward the greater protection of the accused. And while it would be a non sequitur to argue in absolute terms that there is a constitutional issue involved in the Heiden situation, it seems desirable, nevertheless, to eliminate whatever prejudice might be conceded in such a situation. Prejudice is established, the Heiden court argued, when the allegations of an involuntary plea are specific and material, the record is incomplete, and the problems could have been alleviated by a proper inquiry by the judge at the arraignment. It would seem that only after such prejudices are eliminated can a sound judicial system be assured.

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53 Cases cited note 15 supra.
54 Cases cited note 13 supra.
55 That is, as stated, the Heiden court based its decision on a construction of Rule 11 and thus avoided any constitutional overtones. Hence, to argue from Heiden to a constitutional issue would be a non sequitur.
56 353 F.2d at 55.
B. Right to Counsel

1. In-Custody Interrogation—Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968).

The Ninth Circuit in Coughlan v. United States\(^1\) was faced with the general problem of whether a confession was properly admitted into evidence under the sixth and fourteenth amendments. As in all such cases, the courts "are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement."\(^2\) This statement by Chief Justice Warren was made nearly a decade ago, prior to the landmark decisions on the right to counsel and the right against self-incrimination.\(^3\) But a balance has not yet been struck between those conflicting interests. While Miranda v. Arizona\(^4\) laid down in a very detailed manner the rules for securing an admissible confession,\(^5\) it left unanswered many questions concerning the conduct of in-custody interrogation.\(^6\)

In Coughlan\(^7\) the Ninth Circuit upheld a conviction that depended upon an in-custody oral confession. Coughlan had been convicted of aiding and abetting the robbery of a federally insured bank. At the time of his arrest the defendant was an indigent 19-year-old. Following his arrest he was interviewed by an agent of the Federal Bureau of Investigation, who advised him of his Miranda rights.\(^8\) Coughlan stated that he desired to make no statement and the interview was terminated. The following day he was arraigned before a United States Commissioner and provided with counsel. Three days after the arraignment the federal agent, accompanied by another agent and an officer of the Los Angeles Police Department, went to

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\(^{1}\) 391 F.2d 371 (9th Cir. 1968).


\(^{5}\) "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. at 444.

\(^{6}\) "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id.

\(^{7}\) 391 F.2d 371 (1968).

\(^{8}\) Note 5 supra.
The interview was commenced by giving Coughlan a full statement of his rights and having him read a written statement of those rights. Coughlan indicated a willingness to talk to the officers, but refused to sign the statement indicating a waiver of his rights. When asked if he had appointed counsel, Coughlan answered in the affirmative, but the interviewers proceeded with the interrogation without notifying Coughlan's counsel or arranging for his presence at the interrogation. During this interview Coughlan made the incriminating statement which was used against him at the trial.

The majority of the Ninth Circuit panel, in a per curiam opinion, held that there was a proper waiver of counsel. The court refused to hold that the defendant's statement was inadmissible on the ground that his attorney had not been timely advised of the interview. The court, however, did indicate the desirability of affording defendant's counsel the opportunity to be present at any custodial interrogation.

Judge Hamley, in a vigorous dissent, attacked the holding on two grounds: First, that Coughlan's waiver was not made knowingly and intelligently; second, that the conduct of the interrogators violated Canon 9 of the Canons of Professional Ethics. Relying primarily on *Miranda* and *Escobedo v. Illinois*, Judge Hamley built an impressive argument for the proposition that the conduct of the interrogating officers flouted "the spirit of the Fifth and Sixth Amendments and the rationale of *Miranda*.

The impact of this decision upon future Ninth Circuit cases involving in-custody confessions can best be evaluated by analyzing the two grounds on which Judge Hamley based his dissent. *Miranda* emphasized the desirability of having counsel present during custodial interrogation. It is not an absolute requirement, but dispels "the compelling atmosphere of the in-custody interrogation. . . ."

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9 There was evidence that this interview was conducted at the instigation of the defendant's father.

10 It is not necessary that the defendant sign such a waiver. "There is no requirement as to the precise manner in which police communicate the required warnings to one suspected of crime. The requirement is that the police fully advise such a person of his rights . . . ." *Bell v. United States*, 382 F.2d 985, 987 (9th Cir. 1967), cert. denied, 390 U.S. 965 (1968).

11 391 F.2d 374-75 (dissenting opinion).

12 Id. at 376.


14 391 F.2d at 374 (dissenting opinion).

15 The Court noted that there could be a valid waiver of the right to counsel but set stringent standards by which the validity of the waiver is to be judged. *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966).

16 Id. at 465; *United States v. Gibson*, 392 F.2d 373, 375 (4th Cir. 1968); see *United States v. Wade*, 388 U.S. 218, 224 (1967).
Hamley seems to have gone further. He viewed the failure of the questioners to notify Coughlan's counsel of the planned interrogation as such a deprivation of counsel that the resulting incriminating statement could not properly be said to have resulted from a valid waiver. He pointed to the fact that at the first interview, immediately following his arrest, the defendant refused to make a statement and also that at the time of the second interview he had court-appointed counsel. In his opinion these facts differentiated the case from others: "Where one accused of a federal offense has not already stated that he did not desire to talk, a request that he do so, made in full conformity with [Miranda] . . . and prior to the retention or appointment of counsel is unobjectionable." It would seem, however, that the defendant who does not have counsel, either retained or court appointed, is more in need of protection than one who has counsel, for one of the important safeguards to ensure the voluntariness of a confession is the necessity of shielding the defendant from the coercive effects of uncounseled in-custody interrogation. One who has at least had some opportunity to consult with counsel would be in a much better position to make a voluntary, knowing, and intelligent waiver of counsel than one who has not been afforded this opportunity.

If Judge Hamley's position were to prevail, could the court hold a waiver such as Coughlan's to be invalid, while holding a waiver by one who never had the assistance of counsel to be valid? This is not to say that Coughlan's waiver should have been recognized, but it is suggested that if Coughlan's waiver was invalid there is a strong presumption that a waiver made by one who never had counsel is also invalid.

An in depth consideration of what is essential to constitute an intelligent waiver is not within the purview of this note. It is

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17 Coughlan v. United States, 391 F.2d 371, 374 (9th Cir. 1968) (dissenting opinion).
18 Id.; see ALI, A Model Code of Pre-Arraignment Procedure § A5.08 (2) (e) & Note (Study Draft No. 1, 1968).
19 See cases cited note 16 supra.
20 Even with the detailed warnings required by Miranda, it is not assured that a defendant will understand the nature and scope of his rights. The standard warnings are not so clear and unambiguous that the possibility of misunderstanding is precluded. See Medalie, Zeitz, & Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347, 1372-75 (1968).
21 The defendant's waiver must be made knowingly and intelligently. Miranda v. Arizona, 384 U.S. 436, 479 (1966). One who has no opportunity to consult with an attorney is less likely to comprehend the protection afforded by his fifth and sixth amendment rights.
22 See Note, Waiver of Counsel infra at 965.
important, however, to recognize the trend to burden the government with the responsibility of demonstrating the validity of the waiver.\textsuperscript{23} The defendant is not required to have the knowledge of a lawyer\textsuperscript{24} to waive his right to counsel, but he must have more than the mere mental competence to stand trial.\textsuperscript{25} In view of the language of recent decisions,\textsuperscript{26} it can be argued that allowing the defendant to waive his right to counsel without the advice of an attorney is tantamount to permitting him to incriminate himself because of an ignorance of his legal and constitutional rights.\textsuperscript{27}

Judge Hamley's first basis for dissent implies a broader policy consideration than the narrow issue of the validity of a waiver. It suggests further safeguards for the defendant during custodial interrogations. Mr. Justice Douglas, concurring in \textit{Spano v. New York},\textsuperscript{28} explained the need for effective safeguards at the in-custody stage of the proceedings: "[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights."\textsuperscript{29}

Judge Hamley urged reversal on a second ground. He contended that the second interview of Coughlan violated Canon 9 of the Canons of Professional Ethics.\textsuperscript{30} This canon, in substance, prohibits counsel from communicating with a party represented by counsel, if the communication concerns the subject of controversy. It also places "a responsibility upon prosecuting lawyers not to sanction, or take advantage of, statements obtained by Government agents from a person represented by counsel, in the absence of such counsel."\textsuperscript{31} From a reading of the cases, it appears that the courts are not in harmony as to what constitutes a Canon 9 violation or as to the consequences of finding such a violation.\textsuperscript{32} This can be explained by the relatively

\textsuperscript{24} \textit{See} \textit{Adams v. United States ex rel. McCann}, 317 U.S. 269, 279 (1942).
\textsuperscript{25} \textit{Hodge v. United States}, No. 20,517 at 6 (9th Cir., March 5, 1968).
\textsuperscript{28} 360 U.S. 315 (1959).
\textsuperscript{29} Id. at 328 (concurring opinion); \textit{see} \textit{Powell v. Alabama}, 287 U.S. 45, 69 (1932).
\textsuperscript{30} \textit{ABA Canons of Professional Ethics} No. 9.
\textsuperscript{31} \textit{Coughlan v. United States}, 391 F.2d 371, 378 (9th Cir. 1968) (dissenting opinion); \textit{accord}, \textit{Lee v. United States}, 322 F.2d 770, 777 (5th Cir. 1963) (dictum); \textit{United States v. Massiah}, 307 F.2d 62, 66 (2d Cir. 1962) (dictum), rev'd \textit{on other grounds}, 377 U.S. 201 (1964).
\textsuperscript{32} \textit{Compare} \textit{Lee v. United States}, 322 F.2d 770, 777 (5th Cir. 1963), \textit{with}
recent use of this argument in urging reversal in criminal cases.\textsuperscript{33}

The dissent states that "Canon 9 is as applicable in criminal proceedings as in civil proceedings."\textsuperscript{34} The case law on this point is not extensive and there is some authority to the effect that custodial interrogation is an exception to the canon, and that even if the canon applies to prosecuting attorneys it should not be applied to law enforcement officers.\textsuperscript{35} These authorities support their position by pointing to the fact that in some jurisdictions it is accepted practice for the prosecution or its representatives to interview the defendant after indictment and appointment of counsel. They then conclude that if it is a common practice it is not a breach of Canon 9 and is not unethical.

Notwithstanding this argument, most federal courts that have considered the problem have held that the canon is applicable to criminal proceedings.\textsuperscript{36} These courts have held that a prosecuting attorney should not interview a represented defendant in the absence of his counsel. From this point Judge Hamley reasons to the position that prosecuting attorneys should not avail themselves of the product of an interview conducted by law enforcement officers in the absence of the defendant's counsel.\textsuperscript{37} This is a logical conclusion since the prosecution should not by indirection be permitted to obtain statements that it could not obtain directly.

As interpreted by the ABA's Committee on Professional Ethics and Grievances, Canon 9 prohibits opposing counsel from interviewing a represented defendant, in the absence of his counsel, even if he is willing to discuss the matter.\textsuperscript{38} If this is the case, and if criminal defendants are to be afforded the protection of counsel at every stage of the proceeding, is it ethical to allow the prosecution "to take advantage of an indigent prisoner without counsel . . . ."\textsuperscript{39} By the

\begin{footnotes}
\footnotetext[33]{Canon 9 violations have been urged as a basis for reversal in some recent cases. \textit{See}, e.g., cases cited note 31 \textit{supra}. However, no reported criminal case prior to 1963 has been found that discusses Canon 9 and its applicability to criminal prosecutions.}
\footnotetext[34]{Coughlan v. United States, 391 F.2d 371, 376 (9th Cir. 1968) (dissenting opinion) \textit{citing} H. Drinker, \textit{Legal Ethics} 202 (1953), and Broeder, \textit{Wong Sun v. United States: A Study in Faith and Hope}, 42 Neb. L. Rev. 483, 601 (1963).}
\footnotetext[36]{\textit{E.g.}, Ricks v. United States, 334 F.2d 964, 970 & n.18 (D.C. Cir. 1964); Lee v. United States, 322 F.2d 770, 777 (5th Cir. 1963) (dictum).}
\footnotetext[37]{Coughlan v. United States, 391 F.2d 371, 376 (9th Cir. 1968) (dissenting opinion).}
\footnotetext[38]{ABA \textit{Comm. on Professional Ethics, Opinions}, No. 108 (1934) (interpreting the application of the Canon to a civil proceeding).}
\footnotetext[39]{Lee v. United States, 322 F.2d 770, 777 (5th Cir. 1963).}
\end{footnotes}
terms of this canon if a represented defendant desired to waive his right to counsel, his counsel would have to be notified and given an opportunity to consult with him.\textsuperscript{40} Prior to consultation with his attorney it would be unethical for the prosecutor or his staff to interview the accused.\textsuperscript{41} Thus the nonconstitutional ground carries Judge Hamley to a bolder position than he was willing to endorse on the constitutional, sixth amendment ground. For, if opposing counsel cannot interview a willing defendant in the absence of his counsel, and if a defendant without counsel should be afforded the same protection as a counseled defendant, it must be concluded that any in-custody interrogation must be conducted in the presence of the defendant's attorney.\textsuperscript{42}

In view of the above it is surprising that the courts have not reversed criminal convictions when they have found a Canon 9 violation. Although there has been general disapproval of such practices,\textsuperscript{43} there has been no judicial disposition to upset convictions secured in violation of the canon. Even the two decisions relied upon by Judge Hamley in establishing the relevance of the Canon 9 violation were not reversed solely because of a violation of the Code of Ethics.\textsuperscript{44} Both cases grounded their holdings on violation of Rule 5 (a) of the Federal Rules of Criminal Procedure, which requires that an arrested person be taken before a magistrate without unnecessary delay.\textsuperscript{45}

The Coughlan case illustrates the general approach that the courts have taken to Canon 9 violations. The majority states: "We . . . do not want to be considered as lending our approval to the practice, if indeed a practice exists, of interviewing accused persons in jail in the absence of counsel."\textsuperscript{46} The court was reluctant to reverse on such a

\textsuperscript{40} ABA Comm. on Professional Ethics, Opinions, No. 108 (1934).
\textsuperscript{41} Id.; see Ricks v. United States, 334 F.2d 964, 970 (D.C. Cir. 1964); Lee v. United States, 322 F.2d 770, 777 (5th Cir. 1963) (dictum). But see United States v. Ferguson, 243 F. Supp. 237, 238 (D.D.C. 1965).
\textsuperscript{42} This, of course, assumes that there has not been a valid waiver. But, as suggested above, a strict enforcement of Canon 9 would require that the defendant receive the advice of counsel before his waiver could be accepted as constitutionally valid.
\textsuperscript{43} Coughlan v. United States, 391 F.2d 371, 372 (9th Cir. 1968); Mathies v. United States, 374 F.2d 312, 316 (D.C. Cir. 1967).
\textsuperscript{44} Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964); Lee v. United States, 322 F.2d 770 (5th Cir. 1963).
\textsuperscript{45} "Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. [Citations omitted.] This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance." Brown v. Allen, 344 U.S. 443, 476 (1953).
\textsuperscript{46} 391 F.2d at 372; accord, Mathies v. United States, 374 F.2d 312, 316 (D.C. Cir. 1967).
ground, but this practice which the majority will not sanction will continue to be employed unless some action is taken. The dissent indicates that confessions or admissions that are the product of Canon 9 violations should not be admitted into evidence.47

Since this area of the law is in a state of flux, policy considerations will have some influence in determining how far the court will go in excluding in-custody confessions.48 While some authorities place great stress on the importance of confessions to effective police enforcement,49 this argument is counterbalanced by the Supreme Court's stated preference for the traditional, in-court, adversary system of justice as opposed to trial by interrogation.50 The majority in Coughlan refused to place further restrictions on the conduct of custodial interrogation, but did recognize the trend toward affording criminal defendants maximum assistance of counsel from the time that rights attaches.61

It is doubtful that the Ninth Circuit will adopt the reasoning of the dissent in the near future. While the recent decisions of the Supreme Court lend support to arguments that counsel should be present during in-custody interrogation, they do not compel such a procedure. And it would appear from the rather terse majority opinion that the judges were in no mood for judicial trail blazing,

47 Coughlan v. United States, 391 F.2d 371, 372 (9th Cir. 1968) (dissenting opinion). See Gilbert v. California, 388 U.S. 263, 273 (1967), where the court, in discussing an illegal lineup, stated: "[T]he state is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup."

48 Congress has already made its influence felt in this area. The Omnibus Crime Control Act of 1968 (18 U.S.C. § 3501) overrules Escobedo and Miranda to the extent that the absence of the warnings, required by these cases, does not render a confession per se inadmissible. The statute reinstates the "totality-of-the-circumstances" test for determining the voluntariness of confessions.

The constitutionality of this law has yet to be challenged. But the strong language of Miranda makes it doubtful whether it will be able to withstand such a challenge.


51 The right to counsel attaches during custodial interrogation in order "to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." Id. at 469.
and thus that the next step in defining the sixth amendment right to counsel will have to come from the Supreme Court or Congress.

P. W. B.


In Hodge v. United States the Ninth Circuit was presented the question whether, at his trial for a violation of section 2312 of Title 18 of the United States Code, the petitioner had made a valid waiver of counsel.

At the commencement of the trial, Hodge's appointed counsel stated that because of a "difference of opinion" between himself and Hodge, Hodge had decided to represent himself. The court relieved counsel of responsibility other than being in attendance to aid in procedural matters, but only after admonishing Hodge that he would be at a "distinct disadvantage" in representing himself.

Having been found guilty by a jury, Hodge petitioned the Ninth Circuit for a writ of habeas corpus, contending that he had not made an intelligent waiver of counsel. The Ninth Circuit, reciting the requisites for such a waiver, held that the petitioner's waiver was not valid, despite the effort of the trial court to ensure that the petitioner's right to counsel was not violated.

In its statement of the requisites for a valid waiver, the court pronounced what appear to be new and more stringent requirements with which the trial court must comply. The court's argument was based on two principal grounds. First, the court relied heavily on the language of Justice Black in Von Moltke v. Gillies. Second, the court drew an analogy to Rule 11 of the Federal Rules of Criminal

1 No. 20,517 (9th Cir., Mar. 5, 1968).
4 Id. at 2 n.2. When the trial reconvened one week later, the original appointed attorney being unable to attend, a substitute attorney was present at the request of the head of the Indigent Panel. However, the second attorney did not appear after the noon recess, so the court appointed, for the same limited purpose, a third attorney. The original attorney arrived part way through the trial and resumed his advisory capacity. It does not appear that any of the attorneys performed "any significant service." Id. at 3-4.
5 Id. at 6-9.
6 Id. at 6.
7 332 U.S. 708 (1948).
Procedure which prescribes the requirements for a valid plea of guilty and the duty of the judge in accepting such a plea. The language of Rule 11 emphasizes the necessity for the accused to understand the consequences of his plea before the court accepts the plea. The court also indicated, by way of dictum, that, under certain circumstances, it might be necessary for the accused to have counsel appointed in order to ensure the validity of a subsequent waiver of counsel.

In order to appreciate the departure the Ninth Circuit has made from standard federal procedure, it will be necessary to inspect the historical background of waiver of counsel, including the Von Moltke decision.

Historical Development of Waiver of Counsel in Federal Courts

In the leading case of Johnson v. Zerbst, in which the right to counsel in federal criminal proceedings was initially recognized, the Supreme Court stated that a waiver of counsel to be valid must be "intelligent and competent," and placed the burden on the trial judge to determine if there had been a proper waiver of the right to counsel. Johnson was subsequently held applicable to cases in which the accused desired to plead guilty in addition to waiving counsel.

Following the Supreme Court's enunciation in Johnson of the
“intelligent and competent” rule, there followed many attacks upon convictions obtained prior to Johnson. These attacks were based upon a recognition that in order to make an “intelligent and competent” waiver of the right to counsel, the accused must of necessity know he possessed the right to counsel. The courts of appeals, in many cases, implemented this reasoning by recognizing, as a precondition to a finding of valid waiver, a duty on the part of the trial court to inform the accused of his right to counsel and to have counsel appointed if he could not obtain it. This duty was deemed satisfied in some cases by the submission of an affidavit by the trial court reciting its custom of advising all defendants appearing before it of their right to counsel, or more specifically reciting that the defendant in the particular case under consideration had been advised of his right to counsel. In other cases it was held unnecessary to inform the defendant of his right to counsel specifically if it was shown that he already knew he possessed such a right; it was also held that a waiver of the right to counsel could be implied from a defendant’s appearance without counsel and his failure then to request such assistance; in still other cases it was held that the defendant was presumed to know the law so that a waiver of counsel could be found from a defendant’s failure to overcome this presumption in habeas corpus proceedings. The overall implication of these cases negated the existence of any specific duty on the part of the trial judge to advise the accused of his right to counsel in order to find a valid waiver, notwithstanding the statement to the contrary in Johnson. At the very least, the cases indicated an extremely loose application of the principles of Johnson.

14 Lewis v Johnston, 112 F.2d 451 (9th Cir. 1940); Moore v Hudspeth, 110 F.2d 386 (10th Cir.), cert. denied, 310 U.S. 643 (1940); Towne v Hudspeth, 108 F.2d 676 (10th Cir. 1939).
15 E.g., De Jordan v Hunter, 145 F.2d 287 (10th Cir. 1944), cert. denied, 325 U.S. 853 (1945); Widmer v Johnston, 136 F.2d 416 (9th Cir.), cert. denied, 320 U.S. 780 (1943); Blood v Hudspeth, 113 F.2d 470 (10th Cir. 1940). See generally Annot., 3 A.L.R.2d 1003 (1949).
16 E.g., Michener v Johnston, 141 F.2d 171 (9th Cir. 1944); O'Keith v Johnston, 146 F.2d 231 (9th Cir. 1944), cert. denied, 324 U.S. 873 (1945), where it was stated: “If the court feels that he understands that he is waiving a right, it is not [jurisdictionally] imperative that he be... reminded of it... To inform him of the existence of a right which he knew and had intelligently waived would have been a useless act.” Id. at 232.
17 E.g., Cundiff v Nicholson, 107 F.2d 162 (4th Cir. 1939); McCoy v Hudspeth, 106 F.2d 810 (10th Cir. 1939); Buckner v Hudspeth, 105 F.2d 396 (10th Cir.), cert. denied, 308 U.S. 553 (1939).
18 E.g., Jorgensen v Swope, 114 F.2d 988 (9th Cir. 1940); Harpin v Johnston, 109 F.2d 434 (9th Cir.), cert. denied, 310 U.S. 624 (1940).
20 See Comment, Criminal Waiver: The Requirements of Personal Par-
In the attacks upon convictions obtained between the date of the Johnson decision and March 21, 1946, the effective date of Rule 44 of the Federal Rules of Criminal Procedure, most decisions involving waiver of counsel looked to the particular facts of the case to determine whether there had been a "knowing and intelligent" waiver. The cases of this period did not require absolutely that the trial court advise the defendant of his right to counsel as a precondition to finding a valid waiver. Rule 44 required specifically that the trial court advise a defendant of his right to counsel and assign counsel to the defendant if necessary. Congress purportedly had intended Rule 44 to be merely a codification of these decisions. As can be seen from the brief review of Johnson and cases subsequent to it, however, what actually was established by the federal decisions prior to the enactment of Rule 44 is open to some question.

**Von Moltke v. Gillies**

In 1948 the Supreme Court pronounced even more stringent guidelines for ascertaining the validity of a waiver of counsel than it had established in Johnson. In Von Moltke v. Gillies, the court held:

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to participation, Competence and Legitimate State Interest, 54 Calif. L. Rev. 1262, 1263 (1966).


22 "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Fed. R. Crim. P. 44, 18 U.S.C.A. Rule 44 (1964). As amended July 1, 1966, Rule 44 reads: "Every defendant who is unable to obtain counsel shall be entitled to have counsel represent him at every stage of the proceeding from his initial appearance before the commissioner . . . unless he waives such appointment." Fed. R. Crim. P. 44.


24 332 U.S. 708 (1948). On the facts, the alleged waiver would appear not to have met the standards of Johnson and thus could have been disposed of on the basis of the Johnson formula. The defendant, a German indicted for conspiracy to violate the Espionage Act, was held for over a month, during which time federal agents were with her daily, some of whom answered questions erroneously as to the charges against her and as to what she should do when she came to trial. She repeatedly asked for counsel but never obtained it. Finally she signed a waiver of counsel and pleaded guilty. Id. at 714-15; see Burch v. United States, 389 F.2d 68, 72 (9th Cir. 1967), describing the circumstances in Von Moltke as "aggravated" and thus inferring that the rule in Johnson would have sufficed to determine the invalidity of the waiver.
the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.\footnote{25}{222 U.S. at 724.}

The court indicated the standards it would require of the trial judge as to his determination that such a proper waiver had been made by stating:

[A] mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.\footnote{26}{Id.}

\textit{Von Moltke} has been interpreted differently by different courts.\footnote{27}{Hodge v. United States, No. 20,517 at 7 (9th Cir., Mar. 5, 1968).}

Some courts have diminished its importance while others have cited it as a correct formulation of the requirements for the determination of a valid waiver of counsel. The Eighth Circuit in \textit{Collins v. United States}\footnote{28}{206 F.2d 918 (8th Cir. 1953).} stated that \textit{Von Moltke} was not "required to be read . . . as an absolute rule of law that no waiver of counsel can or will be permitted . . . unless the trial court has expressly made [a] statement in the courtroom to a prisoner of his right to such assistance . . . ."\footnote{29}{Id. at 922.} The court stated that the rule of \textit{Johnson} was to be followed, and inferred that \textit{Von Moltke} was merely a reiteration of the principles of \textit{Johnson}.\footnote{30}{"Always the question seems to have been regarded as . . . one of appraising, on all the probative elements . . . of each particular situation, whether as a matter of knowledge and intent on the part of the prisoner, there existed in fact a competent and intelligent waiver by him of the assistance of counsel in what he did . . . ." Id. See also Moore v. Michigan, 355 U.S. 155 (1957); Burch v. United States, 359 F.2d 69 (8th Cir. 1966); United States v. Curtiss, 330 F.2d 278 (2d Cir. 1964).}

One recent district court decision dismissed the statements in \textit{Von Moltke} regarding waiver of counsel as dicta.\footnote{31}{Earley v. United States, 263 F. Supp. 522, 526 (C.D. Cal. 1966), aff'd, 381 F.2d 715 (9th Cir. 1967).}

Several decisions, some of them quite recent, have cited \textit{Von Moltke} with approval, adopting the express language of the case or language similar to it.\footnote{32}{Cranford v. Rodriguez, 373 F.2d 22, 23 (10th Cir. 1967). The Ninth Circuit stated that the district court in denying an application for habeas corpus from a conviction in a California state court "did not inquire as to whether [the defendant] was aware of the statutory offenses included within the charge, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof." Sessions v. Wilson, 372 F.2d 366, 370 (9th Cir. 1966). In a habeas corpus proceeding concerning a conviction in a state court, the Tenth Circuit stated: "The trial judge before whom an accused, charged with a felony, appears without counsel, must make a thorough inquiry to determine whether there is an understanding and in-}

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of Von Moltke was "[t]he governing principle for determining what constitutes a competent and valid waiver of the right to counsel and responsibility of the trial judge in accepting such a waiver. . . ."

The strongest case in support of Von Moltke, adopting the same interpretation given to it by the court in Hodge, is Day v. United States, in which the defendant, stating that he did not want counsel, pleaded guilty. The Seventh Circuit in Day made the same analogy between Von Moltke and Rule 11 as the Ninth Circuit made in the Hodge case. Ironically, Day seems to have been overlooked by the Ninth Circuit, as the case was not cited in the Hodge decision.

Hodge v. United States

In expressing a new and more rigorous test to be applied in determining the competence of a waiver of counsel, the Ninth Circuit adopted, at the least, the standards of Von Moltke. More probably, it went beyond the requirements of that case. Even if the Ninth Circuit intended simply to reiterate the requirements of Von Moltke, it still departed from the standard requirements for ascertaining the validity of waiver of counsel. A reading of the cases indicates that most courts ignored Von Moltke and continued to determine the validity of an alleged waiver of counsel on the basis of the standards instituted in Johnson, tempered by the cases which followed that holding. As Rule 44 was intended by Congress to be merely a codification of what had been established by the federal decisions up to the time of its enactment, the use of the expanded rule of Von Moltke as precedent is a departure from codified federal procedure enunciated by Rule 44. Hodge, in its reliance by analogy to the language of Rule 11—which establishes the requisites for a valid intelligent waiver of counsel. He must investigate to the end that there can be no question about the waiver, which should include an explanation of the charge, the punishment provided by law, any possible defenses to the charge or circumstances in mitigation thereof and explain all other facts . . . essential for the accused to have a complete understanding." Shawan v. Cox, 350 F.2d 909, 912 (10th Cir. 1965); accord, United States v. Wantland, 199 F.2d 237, 238 (7th Cir. 1952).

33 United States ex rel. Ackerman v. Russell, 388 F.2d 21, 23 (3rd Cir. 1968); see Meadows v. Maxwell, 371 F.2d 664, 668 (6th Cir. 1967).
34 357 F.2d 907 (7th Cir. 1966).
35 "In Von Moltke v. Gillies . . . the Supreme Court laid down certain requirements (now embodied in part by Rule 11) that a district judge must follow when a defendant endeavors to waive his right to counsel." Id. at 910; accord, United States v. Washington, 341 F.2d 277, 285 (3rd Cir. 1965), which cites Von Moltke as to the defendant's understanding of the range of allowable punishments and alludes to the requirements of Rule 11.
36 See text accompanying notes 19-24 supra.
guilty plea rather than for a valid waiver of counsel—thereby making it necessary for the accused to understand the consequences of a waiver, is a step beyond even those cases that adopt Von Moltke and differentiate Von Moltke from Johnson. Furthermore, Hodge is practically unprecedented in its implication that the assistance of counsel is a requisite to the effective waiver of one's right to counsel.\textsuperscript{38}

The Viability of the Use of Von Moltke As A Precedent and the Use of Rule 11 as Analogous to Waiver of Counsel:

The interpretation of the Von Moltke holding by the majority in Hodge was challenged by Judge Merrill in his dissenting opinion.\textsuperscript{39} Judge Merrill argued that the requirements expounded in Von Moltke were to be applied only to a situation in which a plea of guilty was made \textit{contemporaneously} with a waiver of counsel.\textsuperscript{40} As the Von Moltke decision does not differentiate between a waiver of counsel and a waiver of counsel made contemporaneously with a plea of guilty,\textsuperscript{41} however, the interpretation of the majority is to be preferred. Moreover, at a criminal trial the validity of a waiver of counsel is a preliminary issue which must be determined at the time of the alleged waiver on the basis of the evidence existing at that time.\textsuperscript{42} Thus, whether the defendant pleads guilty or presents a valid defense is of no significance to the decision as to the validity of a waiver. Since the word “contemporaneous” signifies occurrences at the same time,\textsuperscript{43} and, as issues concerning waiver of counsel must necessarily be resolved before the plea of guilty is received, it would appear that technically there never can be a waiver of counsel made “contemporaneously” with a plea of guilty.

The court’s reliance on Rule 11 as a basis for the requirements of a waiver of counsel is as viable as its reliance on Von Moltke. It is proper that the safeguards placed on “the crucial rights of one insisting upon his innocence” be equal to “the rights of one who seeks to confess a crime by a plea of guilty.”\textsuperscript{44} In fact, it would seem that even greater safeguards should be placed on a waiver of counsel than on a guilty plea since a guilty plea has the additional safeguard that

\textsuperscript{38} See Hodge v. United States, No. 20,517, at 8 (9th Cir., Mar. 5, 1968).
\textsuperscript{39} Id. at 12.
\textsuperscript{40} Id.
\textsuperscript{41} Although the fact situation did involve a waiver of counsel and a plea of guilty, the statements relied upon in Hodge were clearly directed at waiver of counsel. See Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948); Hodge v. United States, No. 20,517, at 7 n.5 (9th Cir., Mar. 5, 1968).
\textsuperscript{42} See Hodge v. United States, No. 20,517, at 6 (9th Cir., Mar. 5, 1968); Heiden v. United States, 353 F.2d 53, 55 (9th Cir. 1965).
\textsuperscript{43} \textit{WEBSTER’S NEW INTERNATIONAL DICTIONARY} 575 (2d ed. 1950).
\textsuperscript{44} Hodge v. United States, No. 20,517, at 8 (9th Cir., Mar. 5, 1968).
the court is not bound to accept it.\textsuperscript{45}

Since the \textit{Johnson} decision, a waiver has not been considered valid unless it has been an "intelligent" waiver.\textsuperscript{46} The Ninth Circuit, by imposing the necessity that the defendant understand the consequences of his waiver, did not deviate from that rule, but merely expanded upon the definition of "intelligent." Intelligence implies understanding, and one cannot understand the meaning of a given act without a knowledge of the possible consequences of that act.\textsuperscript{47} Thus, if a defendant is to make an "intelligent" waiver of counsel, he must understand the possible consequences inherent in his act of waiver.

The Right to Waive Counsel

As previously indicated, another important issue in \textit{Hodge} was the court's intimation by way of dicta that, under certain circumstances, no valid waiver of counsel could be made without the defendant first having the assistance of counsel to advise him of the propriety of such a waiver.\textsuperscript{48} Thus, two rights, the right to counsel and the right to proceed without counsel, come into conflict\textsuperscript{49} in a situation in which a defendant does not understand the consequences of his waiver but still insists upon his right to defend himself.

Although \textit{Johnson} established the right to counsel and the necessity of a valid waiver to relinquish that right, it was not until the case of \textit{Adams v. United States ex rel. McCann}\textsuperscript{50} that the Supreme Court declared the right of a defendant to waive his right to counsel. In \textit{Adams}, the Supreme Court spoke in terms of the constitutional right to counsel and the "correlative" right to proceed without counsel.\textsuperscript{51} The Court stated: "[T]he Constitution does not force a lawyer upon a defendant. He may waive his ... right to assistance of counsel if he knows what he is doing and his choice is made with his eyes open."\textsuperscript{52}

In \textit{Brown v. United States}\textsuperscript{53} the District of Columbia Circuit interpreted the \textit{Adams} case as stating that while the right to proceed

\textsuperscript{45} Fed. R. Crim. P. 11. Additionally, the right to counsel is a constitutional right, while the right to plead guilty cannot be so considered. Hodge v. United States, No. 20,517, at 9 n.8 (9th Cir., Mar. 5, 1968).

\textsuperscript{46} See text accompanying notes 24-26 supra.

\textsuperscript{47} See Note, \textit{The Right of an Accused to Proceed Without Counsel}, 49 Minn. L. Rev. 1133, 1141 (1965).

\textsuperscript{48} Hodge v. United States, No. 20,517, at 8 (9th Cir., Mar. 5, 1968).

\textsuperscript{49} See id. at 11 (concurring opinion).

\textsuperscript{50} 317 U.S. 269 (1942).

\textsuperscript{51} Id. at 279.

\textsuperscript{52} Id.

\textsuperscript{53} 264 F.2d 363 (D.C. Cir.), cert. denied, 360 U.S. 911 (1959).
pro se may be a correlative of the constitutional right to counsel, it is not itself a constitutional right. The court stated: "We find nothing in the Constitution which confers it, or from which a guaranty of such a right may be inferred. The truth is that the right is statutory in character, and does not rise to the dignity of one conferred . . . by the Constitution." The nature of the right to proceed pro se often comes into question in cases involving the defendant's wish to discharge counsel during the trial. It has been held that the court has the discretion to refuse to allow the defendant to discharge counsel under such circumstances.

Although the right to defend oneself, whether of constitutional or statutory derivation, may not ultimately be denied, the constitutional necessity of a valid waiver of counsel, under certain circumstances, might require that a defendant have counsel appointed whether he wants it or not, to assist him in making his ultimate decision. "[T]he right to act pro se . . . is a right arising out of the Federal Constitution and not the mere product of Legislation or of judicial decision".

The possible requirement that counsel be appointed for a defendant before a waiver of counsel can be accepted has been crystalized

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54 Id. at 365 n.2.
55 Id. at 365. The statute under which the right to proceed pro se is granted is 28 U.S.C. § 1654 (1964), which reads: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Contra, Bayless v. United States, 381 F.2d 67, 71 (9th Cir. 1967); United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964) ("[T]he right to act pro se . . . is a right arising out of the Federal Constitution and not the mere product of Legislation or of judicial decision").

56 See, e.g., Juelich v. United States, 342 F.2d 29, 32 (5th Cir. 1965); United States v. Bentvena, 319 F.2d 916, 938 (2d Cir.), cert. denied, 375 U.S. 940 (1963) (interpreting right to discharge counsel during trial as "qualified").

57 See State v. Martin, 102 Ariz. 142, 145, 426 F.2d 639, 642 (1967), where the court, discussing the matter of ensuring the validity of a waiver of counsel, states: "Under proper circumstances this may require the court to appoint counsel to conduct the defense despite the defendant's desire to defend for himself." The defendant's inability to defend himself is discussed in Potts, Right to Counsel in Criminal Cases: Legal Aid or Public Defender, 28 Texas L. Rev. 491, 500 (1950), where the author states: "Finally, it should be strongly emphasized that the ordinary indigent defendant is incompetent . . . to waive the assistance of counsel. He needs the assistance of counsel to enable him to know how great is his need of counsel." See also Note, The Right of an Accused to Proceed Without Counsel, 49 Minn. L. Rev. 1133, 1151 (1965).

in a tentative recommendation by an Advisory Committee to the American Bar Association. Section 7.3 provides: "No waiver of counsel should be accepted unless it is in writing and of record. If a person who has not seen a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with him. No waiver should be accepted unless he has at least once conferred with a lawyer." Thus, while the intimation in the Hodge case that consultation with counsel may be necessary to permit a finding of a valid waiver of counsel in certain circumstances is somewhat novel, there appears to be a movement in the direction of adopting such a requirement. The requirement of assistance of counsel would appear to be a logical adjunct to the Ninth Circuit's emphasis in Hodge on the understanding of the consequences of such a waiver. It will be necessary, however, to await further decisions of the Ninth Circuit to see whether it solidifies its pronouncements in Hodge and hastens the trend in this direction.

In light of the incorporation of the sixth amendment into the fourteenth so as to apply the sixth amendment to state criminal proceedings, and the extension of the sixth amendment's guarantee of the right to counsel to pre-trial stages of the criminal proceeding, the pronouncements of the Ninth Circuit could establish a new trend as to the proper means to be employed by the courts in determining the validity of a waiver of counsel, both at the trial and at other "critical" stages of the criminal proceeding, a trend which might soon pervade the courts of the nation.

J. B. M.

C. Nondisclosure of Evidence by the Prosecution—Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968).

In Lessard v. Dickson the Ninth Circuit was presented the issue of determining whether there existed prejudicial error in a California criminal proceeding because of nondisclosure of evidence by the prosecution. In deciding this issue in favor of the prosecution it would

60 Id. at 62-63.
* Hodge v. United States was reheard en banc on January 21, 1969. When this issue went to press, the decision had not yet come down.

1 394 F.2d 88 (9th Cir. 1968).
appear that the majority of the court did not avail itself of an excellent opportunity to establish a just and workable formula for determining the existence of prejudicial nondisclosure of evidence.

A San Francisco summer school teacher, having just cashed a pay check for $800, checked into a motel and crossed the street to a tavern where he met and drank with a stranger, Albert Lessard. Just after 6:00 p.m. Lessard purchased a knife, returned to the tavern, and he and the school teacher went to the latter's room. At 11:00 a.m. the following day the teacher's body was discovered in his room. Lessard's fingerprints were found in the room, as well as a blood stained shirt which was identified as the type that Lessard wore in the tavern and in the store where he purchased the knife.\(^2\)

An original coroner's report by a deputy coroner stated that the death had occurred 10 to 12 hours before the deceased's body was discovered.\(^3\) The coroner later testified that, while the report represented such judgment as had been formed at that time, it was merely an estimate, and that death could have occurred as much as 14 hours before the discovery of the body.\(^4\)

There existed substantial evidence to the effect that Lessard had left San Francisco on a bus for Seattle at 9:30 p.m. on the night of the murder.\(^5\)

The telephone operator of the motel told police that a man not fitting the description of Lessard asked for the deceased about 6:00 p.m., that she called the deceased's room, and that he said that he was expecting the visitor. The unidentified man then went to the deceased's room.\(^6\)

Two years after the murder, Lessard was found and brought to trial. At the trial, at which a jury found Lessard guilty of murder, testimony of the telephone operator was not introduced and defense counsel was not informed of the operator's statements until after the trial.\(^7\)

After his conviction was affirmed on appeal,\(^8\) Lessard instituted habeas corpus proceedings in the California Supreme Court. Lessard's claims were made the subject of an evidentiary hearing before a referee who found no merit in the claims.\(^9\) The California Supreme

\(^2\) Id. at 89.
\(^3\) Id. at 92.
\(^4\) Id.
\(^5\) Id. at 89-90.
\(^6\) In re Lessard, 62 Cal. 2d 497, 511-12, 399 P.2d 39, 48, 42 Cal. Rptr. 583, 592 (1965).
\(^7\) Lessard v. Dickson, 394 F.2d 88, 90 (9th Cir. 1968).
Court, in accordance with the referee's findings, denied the writ.10 The court stated that the police officers who had interviewed the telephone operator considered her testimony unreliable and that the prosecutor had likewise thought the testimony unreliable and, thus, had not pursued the matter further.11 In finding that there was no suppression of evidence such as to constitute a denial of due process, the California Supreme Court stated:

Due process does not require that officers, two years after the discovery of information, must remember facts that have become stale with time and that they must *sua sponte* disclose them to the petitioner or his attorneys. We cannot find that the prosecution “deliberately suppressed” evidence which long before they had considered to be unreliable or that failure to resuscitate such forgotten statements “was a material deception and that there was knowledge thereof on the part of the prosecuting officer. . . .”12

In a habeas corpus proceeding, the District Court for the Northern District of California decided in accord with the California Supreme Court.13 Lessard then petitioned the Ninth Circuit for a writ of habeas corpus. The Ninth Circuit followed the district court's treatment of the case as “one in which the 'state-court trier of fact has after a full hearing reliably found the relevant facts.'”14 The court concluded: “Mrs. Gustavson's testimony, if it had been brought out on the trial, would have *materiality*, but it could hardly be regarded as being able to have much force against the inexorable array of incriminating circumstances with which Lessard was surrounded.”15

Judge Ely dissented from the opinion of the majority.16 He reasoned that there was not a proper hearing in the state court on the issue of suppression,17 and that the state court could not properly have found that the evidence allegedly suppressed was “insufficiently material or substantial.”18 He further stated: “It seems to me that no judge or group of judges has such omniscience as to enable him or it, without a hearing and without having seen the witness, to reject positively the claim that the evidence might have operated in favor of the accused.”19 He concluded that the prosecutor's motive in the suppression is immaterial in determining whether the suppression was harmful.20

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10 Id.
11 Id. at 512, 399 F.2d at 49, 42 Cal. Rptr. at 593.
12 Id.
13 See Lessard v. Dickson, 394 F.2d 88, 89 (9th Cir. 1968).
14 Id.
15 Id. at 91 (emphasis added).
16 Id. at 93.
17 Id.
18 Id. at 94.
19 Id. at 95.
20 Id. at 93.
The problem posed by the Lessard case is a difficult one which goes to the basic theories of the nature of the adversary system. On the one hand, the prosecutor represents the state and is seeking to enforce its laws; and on the other hand, he has a duty to see that an accused receives a fair trial. The problem is to determine the amount of evidence the prosecutor can disclose without violating his duty to the state while, at the same time, not withholding such evidence as would violate the rights of the accused.

A discussion of recent developments concerning disclosure of evidence must begin with the case of Brady v. Maryland in which the Supreme Court stated: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." The statement of the Supreme Court in Brady, while directed at suppression of evidence following a request for disclosure by the defense, has been used as a guide by other courts to determine suppression questions even though no request for the particular evidence has been made.

The importance of Brady is that it makes the good or bad faith of the prosecution immaterial to a determination of whether there has been a wrongful suppression. Some cases involving suppression of evidence have distinguished between those instances in which there is bad faith on the part of the prosecution and those in which the prosecution has acted in good faith. These cases examine the prosecutor's error and apply different standards to determine the result according to the gravity of the prosecutor's act. If the prose-

21 See Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 COLUM. L. REV. 858 (1960).
22 See id. and authorities cited therein; Note, Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedure, 34 GEO. WASH. L. REV. 92 (1965) (see authorities cited therein).
23 For excellent discussions of prior history see Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 COLUM. L. REV. 858 (1960); Note, Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedure, 34 GEO. WASH. L. REV. 92 (1965); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 YALE L.J. 136 (1964).
25 Id. at 87.
26 E.g., United States ex rel. Meers v. Wilkins, 326 F.2d 135, 137 (2d Cir. 1964).
28 "[T]he standard of how serious the probable effect of an act or omis-
cutor has knowingly used perjured testimony or has in bad faith deliberately suppressed evidence, a reversal of conviction and a new trial is given without any actual showing of prejudice. 29 A showing of prejudice, however, is the central requisite in cases involving passive or negligent nondisclosure. 30

Other cases, better reasoned, point out that, even in cases of negligent or innocent nondisclosure, the motive or state of mind of the prosecutor should be immaterial. 31 "Failure . . . to reveal such material evidence . . . is equally harmful to a defendant whether the information is purposely, or negligently, withheld." 32 These cases emphasize the importance of a fair trial rather than of a guilt-free mind on the part of the prosecutor. 33 The Supreme Court has held that good faith on the part of the prosecution in the case of determining whether there has been a fair trial, when evidence had been erroneously admitted, is immaterial. 34 The same rule should apply to erroneous nondisclosure of evidence. 35

Irrespective of the reason for suppression, not all suppressed evidence will be found sufficient to warrant overturning the determination of the case. The courts have shown variation of language in determining the type of evidence which, if suppressed, would necessitate a new trial. The Supreme Court in Brady spoke in terms of "material" 36 evidence and other courts have used materiality as a criterion in cases of negligent suppression where no request for the evidence has been made by the defense. 37 Some courts have been more specific in defining the type of evidence which must be disclosed to ensure a fair trial. In Levin v. Katzenbach 38 the District of Columbia Circuit stated that "appellant would be entitled to relief . . . if the government failed to disclose evidence which . . . might have led the jury to entertain a reasonable doubt about appellant's guilt." 39

In order to obtain the reversal or, where other requirements are met, the vacating of a sentence, is in some degree a function of the gravity of the act or omission . . . ." Id. at 514.

30 Kyle v. United States, 297 F.2d 507, 513 (2d Cir. 1961).
31 Jackson v. Wainwright, 390 F.2d 288, 299 (5th Cir. 1968); Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).
33 Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966).
35 See Barbee v. Warden, 331 F.2d 842, 847 (4th Cir. 1964).
37 E.g., Thomas v. United States, 343 F.2d 49, 53 (9th Cir. 1965).
38 363 F.2d 287 (D.C. Cir. 1966).
39 Id. at 291.
Ingram v. Peyton\textsuperscript{40} the Fourth Circuit held that if the evidence “is of a character to raise a substantial likelihood that it would have affected the result if known at the trial, its nondisclosure cannot be ignored.”\textsuperscript{41} A 1950 District of Columbia case\textsuperscript{42} emphasizes “the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense.”\textsuperscript{43}

These cases support the proposition that it is not necessary that the petitioner prove that disclosure of the undisclosed evidence absolutely would have changed the outcome of his trial, but rather that it is only necessary that he prove the evidence might have had some effect on the outcome, that it “might” have been instrumental. The point is that it is not for the prosecutor to speculate as to the admissibility or usefulness of the evidence,\textsuperscript{44} but instead, as the Ninth Circuit itself has pointed out, the prosecutor is “required to present ‘all the material evidence’ within [his] knowledge, irrespective of the source, even though there appears to be sound reason to doubt its accuracy.”\textsuperscript{45} Furthermore, when the evidence is exculpatory even to the slightest degree, it is not for the appellate court to “speculate as to the effect this testimony would have had on the jury if it had an opportunity to hear it.”\textsuperscript{46} Instead, the case should be remanded for a new trial.\textsuperscript{47}

One fact evident in Lessard which is not mentioned either by the majority or by Judge Ely is that the defense, as well as the prosecution, apparently had access to the undisclosed evidence. That is, the defense could have, and perhaps should have, questioned the telephone operator at the motel. It has been held that “while the prosecution has the duty to disclose, on its own initiative, exculpatory facts within its exclusive control . . . it has no such burden when the facts are readily available to a diligent defender.”\textsuperscript{48} It is argued that

\textsuperscript{40} 367 F.2d 933 (4th Cir. 1966).
\textsuperscript{41} Id. at 936.
\textsuperscript{42} Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950).
\textsuperscript{43} Id. at 993; accord, Link v. United States, 352 F.2d 207, 212 (8th Cir. 1965), cert. denied, 383 U.S. 915 (1966); Ellis v. United States, 345 F.2d 961, 963 (D.C. Cir. 1965) (concurring opinion).
\textsuperscript{46} United States ex rel. Meers v. Wilkins, 326 F.2d 135, 140 (2d Cir. 1964).
\textsuperscript{47} See id.
if a remedy is allowed by means of an allegation of suppression of evidence which was also accessible to the defense, it will allow the defense to be less than diligent in attempting to uncover relevant facts.\footnote{49 Levin v. Katzenbach, 363 F.2d 287, 292 (D.C. Cir. 1966) (dissenting opinion).}

In opposition to the cases which hold that there can be no suppression of evidence available to a diligent defense attorney, it has been stated that “the possibility that appellant might have developed this information without recourse to Government files or witnesses . . . would not necessarily relieve the Government of its duty to disclose exculpatory evidence.”\footnote{50 Ellis v. United States, 345 F.2d 961, 963 (D.C. Cir. 1965) (concurring opinion); accord, United States v. Poole, 379 F.2d 645, 649 (7th Cir. 1967). See also Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968); Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966).} This latter view is to be preferred, as the trial should not be viewed as a contest where the state, with its manifold resources, is pitted against a defendant with admittedly fewer, and sometimes meager, resources.\footnote{51 See Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962).} It is not too great a burden to place on the prosecution the duty of disclosing exculpatory evidence.\footnote{52 Id. “A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense . . . the State is obliged to bring it to the attention of the court and the defense.” Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J.) (concurring opinion).}

The evidence upon which Lessard was convicted did tend to incriminate him rather persuasively. However, as Judge Ely points out, the original deputy coroner's report stated that death occurred after the time that Lessard allegedly boarded a bus for Seattle.\footnote{53 Lessard v. Dickson, 394 F.2d 88, 95 (9th Cir. 1968) (dissenting opinion).} In light of the discrepancy between the original report and the coroner's subsequent interpretation, there was some doubt as to the exact time of death. It cannot be determined how much doubt this discrepancy placed in the minds of the jurors, but it must have instilled some doubt. The evidence which was not disclosed would definitely bolster Lessard's claim of innocence, and \textit{might} reasonably have instilled a reasonable doubt in the minds of the jurors as to his guilt. As Judge Ely states:

\begin{quote}
Had this evidence been believed by the jury, [evidence of Lessard's departure time for Seattle] and had there been acceptance of the validity of the deputy coroner's original report as to the time of death, the appellant could not logically have been held to have committed the homicide. In these circumstances, I must conclude that
\end{quote}
evidence that "an unidentified stranger," one other than the appellant, had been allowed by the motel's telephone operator to proceed to the victim's room during the crucial time period was significantly material in support of the defense which was offered.54

Judge Ely attacks the adequacy of the state evidentiary hearing,55 but states that even if it is conceded that there was an adequate hearing, he does not believe the California Supreme Court properly could have come to the conclusion it did.56 This error on the part of the state court would, under Townsen v. Sain,57 require a federal evidentiary hearing,58 at which hearing seemingly the position of Judge Ely should prevail. Thus, Albert Lessard would obtain a new trial at which all the evidence, both inculpatory and exculpatory, would be presented.

In view of the cases reviewed that emphasize the effect which undisclosed evidence might have had on the defendant's case, rather than the manner in which the evidence was suppressed, it would appear that the dissent by Judge Ely is the more just position. In view of the facts of this case, the position of Judge Ely is certainly more logical. It appears that the majority of the court sitting in Lessard did not take advantage of the opportunity to establish a sound and just formula for determining what constitutes a prejudicial non-disclosure of evidence, thereby aligning itself with a growing number of courts which have done so.59

J. B. M.

D. Definition of Insanity—Ramer v. United States, 390 F.2d 564 (9th Cir. 1968).

It has been said that no issue in criminal law has attracted more attention1 or been more controversial2 than the defense of insanity. The Ninth Circuit met en banc in Ramer v. United States3 for the purpose of considering this important problem. The insanity test used by the Ninth Circuit is based on the one it approved in Judge

54 Id.
55 Id. at 93.
56 Id. at 94.
58 The federal court must grant an evidentiary hearing if "the state factual determination is not fairly supported by the record as a whole . . . ." Id. at 313.
59 See cases cited note 31 supra.

1 A. Goldstein, The Insanity Defense 3 (1967).
2 H. Weisfen, Insanity as a Defense in Criminal Law 1 (1933).
3 390 F.2d 564 (9th Cir. 1968).
Barnes' decision in *Sauer v. United States*. The instruction approved there is not quoted in the *Sauer* case, but it is similar to the instruction approved by the United States Supreme Court in *Davis v. United States*:

The term 'insanity,' as used in this defence, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing; or where though conscious of the nature of the act and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control.

In essence, this is the M'Naghten Rule as embellished by the "irresistible impulse" test. The Ninth Circuit has adhered to the *Sauer* test since the case was decided in 1957. The issues presented in the cases of *Ramer v. United States* and *Church v. United States*, however, were considered sufficiently important that the Ninth Circuit was called en banc to hear the cases together on March 25, 1968 and to reconsider its definition of insanity.

Ramer committed a robbery of two Los Angeles banks on a

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4 241 F.2d 640 (9th Cir.), cert. denied, 354 U.S. 940 (1957).
5 Id.; Ramer v. United States, 390 F.2d 564, 581 n.5 (9th Cir. 1968).
6 160 U.S. 469 (1895).
7 Id. at 476-77.
8 M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843): "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."
9 The widely adopted embellishment of the M'Naghten Rule is referred to here as the test of "irresistible impulse" only because that is the name by which it is most generally recognized. It should be noted that the choice of words is perhaps unfortunate and misleading. The phrase has been criticized on the basis that it is limited to a description of spontaneous, sudden feeling and does not take into consideration the type of impulse resulting from brooding and reflection. United States v. Freeman, 387 F.2d 606, 620-21 (2d Cir. 1966); Sauer v. United States, 241 F.2d 640, 650 (9th Cir.), cert. denied, 354 U.S. 940 (1957); Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954). See generally A. Goldstein, *The Insanity Defense* 67-79 (1967). Furthermore, the term has grown up as a popular phrase and was not used in the test appearing in the important early American case of Parsons v. State, 81 Ala. 577, 596-97, 2 So. 864, 866-67 (1887), or in the test approved by the Supreme Court in *Davis v. United States*, 160 U.S. 469, 476-77 (1895). The so-called test of "irresistible impulse" is included in the *Davis* instruction, quoted in the text accompanying notes 5 and 6 supra.
10 See *Ramer v. United States*, 390 F.2d 564, 566 (9th Cir. 1968); *Kilpatrick v. United States*, 372 F.2d 93 (9th Cir.), cert. denied, 387 U.S. 922 (1967); *Smith v. United States*, 342 F.2d 725, 727 (9th Cir. 1965).
single afternoon. He had been drinking before the robberies and went to a bar after he committed them, where he was found and arrested by police. The trial resulting from these incidents marked the third time Ramer had been tried for bank robbery. His defense here was insanity. The testimony of Ramer's wife and mother, together with that of two expert witnesses, clearly indicated a history of emotional instability.\footnote{Ramer v. United States, 390 F.2d 564, 567 (9th Cir. 1968).} One expert, a clinical psychologist, had administered tests to Ramer that indicated mental illness and probably schizophrenia.\footnote{Id.} The other expert witness was Dr. Erric Marcus, a psychiatrist, who said he thought Ramer knew the difference between right and wrong but probably could not control his will at the time of the robberies. He said that Ramer was acting under "a compulsion, a medical concept, which differs from an irresistible impulse."\footnote{Id. at 567 n.3.}

In rebuttal the prosecution introduced the testimonies of three FBI agents and Dr. Carl Von Hagen, a neurologist and psychiatrist. Dr. Von Hagen testified that the information given him by Ramer indicated the possibility that Ramer was in a fugue state at the time of the robberies, which would have caused him to lose control of his activities, as well as his conscious faculties. Due to Ramer's ability to remember what had happened, though, Dr. Von Hagen indicated that he doubted such a state existed at the time of the commission of the robberies. He also testified that Ramer knew the difference between right and wrong, that he was not acting under an irresistible impulse, and that the robberies were not significantly related to compulsive behavior.

In deciding the case, the trial court, sitting without a jury, felt bound by the \textit{Sauer} test and that, under the test, most of the defense evidence was irrelevant. The judge also said, "I will take Dr. Von Hagen's testimony and then I would have to find the defendant guilty."\footnote{Id. at 569.}

Church, in the second case, was found guilty in the lower court of aiding and abetting\footnote{18 U.S.C. § 2 (1964).} another in the violation of a federal narcotics law\footnote{21 U.S.C. § 174 (1964).} by illegally importing and concealing heroin. He was also found guilty of violating a federal statute\footnote{18 U.S.C. § 1407 (1964).} for failing to surrender a narcotics certificate upon entering the country. He and three others drove to Tijuana, Mexico, to procure the heroin. They were all

\begin{footnotes}
\item[11] Ramer v. United States, 390 F.2d 564, 567 (9th Cir. 1968).
\item[12] Id.
\item[13] Id. at 567 n.3.
\item[14] Id. at 569.
\end{footnotes}
arrested when they were caught with the heroin while crossing the border to re-enter the United States. Church was tried and convicted, but after the conviction the court ordered Church to be examined, and upon examination he was found to be insane and was committed for treatment. He was found later to be sane, was retried, and again found guilty. As in Ramer's case, there was considerable evidence to indicate that Church was mentally unstable. He felt some "hero worship" toward his older brother, and the defense's theory was that he was acting under compulsion in obtaining the heroin, in the deluded belief that he was somehow helping his brother. Two medical experts testified in the Church case. One expressed no opinion as to Church's insanity. The other, Dr. George Hollinger, performed a series of tests on Church, which indicated schizophrenia and a high manic reaction, showing a tendency toward impulsivity. On the basis of these tests, it was Dr. Hollinger's opinion that Church had a schizophrenic reaction in remission at the time of trial and that on the day he committed the criminal acts he was not acting in a rational manner but in response to a deluded pattern of thinking that he was accomplishing goals having little basis in reality.

In both cases the lower courts used the insanity test approved earlier in Sauer. On appeal counsel for both defendants objected to the Sauer test and suggested the adoption of various tests used in other circuits for the determination of insanity. After hearing both appeals, however, the majority, through Judge Duniway, concluded that neither case was appropriate for reconsideration of the test used in Sauer. The majority explained that the lower court in Ramer's case accepted the testimony of Dr. Von Hagen, who indicated that Ramer was probably not in a fugue state at the time of the robberies. Since no other basis was advanced by Dr. Von Hagen upon which Ramer could have been found insane, Ramer would have been convicted under any insanity test, so the test used could not have harmed him. The majority did not consider Church's case appropriate for reconsideration of the Sauer test for the reason that the formulation used there allowed for consideration of all evidence relating to the defendant's sanity, and defense counsel at the trial expressly stated that he had no objection to the instruction given.

Four members of the court disagreed with the majority position and stated their views in two dissenting opinions. One of the dissents, written by Judge Hamley and joined by Judges Merrill and Browning,
urged that the hearings en banc provided an excellent opportunity for the court to reconsider the merits of its test for determining insanity. This dissent explained that both the lower courts felt bound by the *Sauer* test. In Ramer's case this adherence apparently was responsible for the trial court's rejection, in reaching its judgment, of the defense's expert testimony as to Ramer's insanity. Dr. Marcus' testimony that Ramer was acting under a compulsion different from irresistible impulse was irrelevant as to the issue of insanity under the *Sauer* rule. The minority felt that the evidence might have been admissible if another test had been used, however, and such evidence could have justified a finding of insanity under another test.

As to the facts of Church's case, Hamley's dissent went on to say that a jury using the *Sauer* test of the M'Naghten Rule and irresistible impulse would not have been justified in finding insanity. Under some other tests, however, the trial court could have used the testimony of Dr. Hollinger as a basis for finding Church to be insane. Church's counsel stated at the trial that he had no objection to the instructions given on insanity, but for him to object and seek different instructions at trial would have been futile, in the minority's view. Under the circumstances the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure should have been invoked so as not to preclude counsel from objecting on appeal to the instructions given.

Both dissents agreed that the *Sauer* test was outmoded and should be replaced. The point of difference between the two opinions was that one, written by Judge Ely alone, withheld recommendation of any test for the present, while Hamley's dissent urged adoption of the insanity test formulated by the American Law Institute:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.25

*Ramer v. United States* has some significance for what it did not decide. In refusing to adopt a new definition of insanity and overthrow the tests of M'Naghten and irresistible impulse, the Ninth Circuit continues to follow *Sauer* and the Supreme Court case of *Davis*.

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24 Fed. R. Crim. P. 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Probably the greatest significance of the case, though, lies in its indications of an attitude of change, an attitude that has been reflected in the federal court system generally in recent years.

In 1957, when the *Sauer* decision was written, only one of the eleven circuits had broken away from the test approved by the Supreme Court in *Davis*. This was the District of Columbia Circuit, which had rejected the M'Naghten and irresistible impulse tests and substituted a new test in *Durham v. United States*: "It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." This break from the older rule presented few problems to the court in *Sauer*, though, and it was able to dismiss the *Durham* test on its merits. Since *Sauer*, the *Durham* rule also has been subjected to severe criticism by other circuits. Furthermore, the District of Columbia Circuit's failure to follow the formulation approved by the Supreme Court could be explained on the ground that the District of Columbia Circuit possessed greater autonomy than the other circuits.

At the time of the *Sauer* decision only the Fifth Circuit had considered the insanity issue since *Durham*, and it had reached the same conclusions as did the *Sauer* court. By the time the appeals of Ramer and Church came under the Ninth Circuit's consideration, however, many important changes had occurred. The test of M'Naghten and irresistible impulse had been discarded by the Third Circuit in 1961 in *United States v. Currens*. The court there substituted another test for insanity similar to the test of the American Law Institute: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the require-

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26 160 U.S. 469 (1895).
27 214 F.2d 862 (D.C. Cir. 1954).
28 Id. at 874-75.
29 241 F.2d 640, 646-49 (9th Cir.), cert. denied, 354 U.S. 940 (1957).
31 Fisher v. United States, 328 U.S. 463 (1946), where the Supreme Court said: "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." Id. at 476; Sauer v. United States, 241 F.2d 840, 844 (9th Cir.), cert. denied, 354 U.S. 940 (1957).
33 See Howard v. United States, 232 F.2d 274, 275 (5th Cir. 1956).
34 290 F.2d 751 (3d Cir. 1961).
ments of the law which he is alleged to have violated."\(^{35}\)

This rejection of the test of M'Naghten and irresistible impulse was followed by the Tenth Circuit in 1963;\(^{36}\) by the Second Circuit in 1966;\(^{37}\) and by the Seventh Circuit in 1967.\(^{38}\) When the Ramer case came up on appeal, then, the M'Naghten-irresistible impulse test had been rejected by four circuits other than the District of Columbia, including two since 1966. Of the remaining circuits, two had no recent decisions on the issue,\(^{39}\) and at least one other circuit recommended a broad approach to the problem and adopted no single test.\(^{40}\) Only the Fifth Circuit had taken a position as strong as that of the Ninth Circuit in supporting the M'Naghten-irresistible impulse test,\(^{41}\) and even that circuit came within one vote of rejecting this test in 1963, when it reaffirmed its former position by an evenly divided court.\(^{42}\) The Ninth Circuit itself indicated some willingness to reconsider the M'Naghten-irresistible impulse test by its language in the case of Maxwell v. United States,\(^{43}\) decided in 1966: "It may be that, sooner or later, this court will again wish to review this general problem, last examined at length in the Sauer case, decided in 1957. However, we do not believe this should be done in a case such as this, where the evidence as to any insanity was extremely meager . . . ."\(^{44}\) It was amidst this atmosphere of change and reconsideration that Ramer was heard.

An attitude of re-examination was reflected by the court in several distinct ways. The most obvious was the calling of the court

\(^{35}\) Id. at 774.
\(^{36}\) See Wion v. United States, 325 F.2d 420, 430 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964).
\(^{37}\) See United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966).
\(^{38}\) United States v. Shapiro, 383 F.2d 680, 686 (7th Cir. 1967). The courts in both Shapiro and Freeman, 357 F.2d 606 (2d Cir. 1966), chose the alternative word "wrongfulness" for "criminality" in the ALI definition. United States v. Shapiro, supra at 686; United States v. Freeman, supra at 622 n.52.
\(^{39}\) These were the First and Fourth Circuits, as stated in Pope v. United States, 372 F.2d 710, 737 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968).
\(^{40}\) Pope v. United States, 372 F.2d 710, 736 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968); Feguer v. United States, 302 F.2d 214, 244-45 (8th Cir.), cert. denied, 371 U.S. 872 (1962); Dusky v. United States, 295 F.2d 743, 759 (8th Cir. 1961), cert. denied, 368 U.S. 998 (1962).
\(^{41}\) See Merrill v. United States, 338 F.2d 763, 766 (5th Cir. 1964); Kittrell v. United States, 334 F.2d 242 (5th Cir. 1964); Carter v. United States, 325 F.2d 697 (5th Cir. 1963), cert. denied, 377 U.S. 946 (1964), cert. denied, 381 U.S. 927 (1965); Howard v. United States, 232 F.2d 274, 275 (5th Cir. 1956).
\(^{43}\) 368 F.2d 735 (9th Cir. 1966).
\(^{44}\) Id. at 743.
en banc for the express purpose of reconsidering the definition of insanity previously accepted by the court. Another obvious indication of the court's attitude was the fact that four of its members urged rejection of the Sauer test. This case was the fourth occasion since Sauer that the issue of insanity had been raised on appeal in the Ninth Circuit, but it was the first time that any of the members of the court had voiced a desire to reject the test formulated there.

The court's willingness to reconsider its position on an insanity definition was also reflected in more subtle ways. The court in Sauer found that the Davis decisions, where the Supreme Court declared that an instruction on insanity embodying essentially the M'Naghten Rule and a test of irresistible impulse was not error, was binding on the federal courts so as to preclude them from formulating their own tests for determining insanity. The Sauer court stated in regard to this point: "If change there is to be, it must come from a higher judicial authority, or from the Congress." There is some support for the view that circuit courts are not free to formulate their own tests on insanity, principally from the Fifth and Ninth Circuits, but this had been disputed by other circuit courts, and statements from the Supreme Court decisions seem to imply that no single test of insanity is required. For example, the instruction approved by the Supreme Court in Davis used no "irresistible impulse" language, but later, in Hotema v. United States, the Supreme Court approved an instruction using the words "irresistible impulse."

The issue of a criminal definition of insanity was last passed on

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45 See Kilpatrick v. United States, 372 F.2d 93 (9th Cir.), cert. denied, 387 U.S. 922 (1967); Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966); Smith v. United States, 342 F.2d 725 (9th Cir. 1965).
46 See cases cited note 45 supra.
47 160 U.S. 469 (1895), 165 U.S. 373 (1897).
49 241 F.2d at 652.
50 Smith v. United States, 342 F.2d 725, 727 (9th Cir. 1965); Pope v. United States, 298 F.2d 507, 510 (5th Cir. 1962), cert. denied, 381 U.S. 941 (1965); Howard v. United States, 232 F.2d 274, 275 (5th Cir. 1956).
51 Pope v. United States, 372 F.2d 710, 736 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968); United States v. Freeman, 357 F.2d 606, 613-15 (2d Cir. 1966); United States v. Currence, 290 F.2d 751, 767-71 (3d Cir. 1961); see Wion v. United States, 325 F.2d 420, 425 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964).

In Pope the court said: "[W]e do not read the Supreme Court opinions as holding that M'Naghten and irresistible impulse is the only permissible approach to criminal responsibility. Nowhere do we detect such exclusiveness in the Court's approval."
52 186 U.S. 413 (1902).
53 Id. at 417, 420.
by the Supreme Court in *Leland v. Oregon*,\(^5\) decided in 1952. In that case the lower court put the burden of proving insanity beyond a reasonable doubt on the defendant, pursuant to Oregon statute.\(^6\) This was held not to be a violation of due process\(^7\) even though the *Davis* instruction put the burden on the prosecution to disprove insanity.\(^8\) Further doubt was cast on the view that the *Davis* instruction was to be strictly followed by the Supreme Court's language that it did not require the instruction to include a test of irresistible impulse, as the *Davis* instruction did. The Court in *Leland* said:

> [C]hoice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.'\(^9\)

The view of the *Sauer* court that the *Davis* instruction must be followed, then, is tenuous, and it is noteworthy that the court in *Ramer* did not reiterate the view that the instruction approved in *Davis* was binding. Furthermore, three members of the court expressly considered that *Davis* did not preclude the circuit courts from adopting some other test of criminal responsibility.\(^10\)

Another noteworthy aspect of the case was the court's refusal to reach a conclusion on the issue of an insanity definition. The majority opinion did not reach the point of reconsideration of the *Sauer* test but instead affirmed the convictions of both defendants on the grounds that the instruction given were not prejudicial and that the facts of the cases did not present an appropriate occasion for reconsideration of the court's previous position. For the present, it must remain a matter of conjecture what the view of the court would have been had the definition of insanity been reconsidered. All that can be said, on the basis of the court's conclusions, is that four members of the court expressed the opinion that consideration of a new insanity test was appropriate in this case, these four proposed rejection of the rule in *Sauer*, and three of these four favored


\(^{56}\) Leland v. Oregon, 343 U.S. 790, 800-01 (1952).

\(^{57}\) 160 U.S. 469, 486-88 (1895).

\(^{58}\) 343 U.S. at 801.

\(^{59}\) 390 F.2d at 582.
adoption of the test of the Model Penal Code as the appropriate standard for determining insanity.

In conclusion, it cannot be said that the case of *Ramer v. United States* is a landmark decision, for its principal effect is to reaffirm the insanity test of the M'Naghten Rule and irresistible impulse, a test well established in the Ninth Circuit. The case is important, though, for its indication of what the Ninth Circuit may do at a future time. As a result of the case it is no longer a foregone conclusion that the court will continue to adhere to its established position on the definition of insanity in criminal law. If *Ramer*, with its strong dissents and a majority opinion declining to reconsider the definition of insanity, has added anything to the antecedent law, it has been to weaken the firm position of the M'Naghten-irresistible impulse test as the exclusive standard for determining criminal responsibility in the Ninth Circuit.

M. S. C.

E. The Exclusionary Rule and the Identity of the Searcher—Wolf Low v. United States, 391 F.2d 61 (9th Cir. 1968); Brulay v. United States, 383 F.2d 345 (9th Cir. 1967).

The 1914 decision of the Supreme Court in *Weeks v. United States* to exclude from the federal courts evidence seized by federal officers in violation of the defendant's rights under the fourth amendment was a pronounced change from the prior common law. The most recent authoritative Supreme Court decision on the exclusionary rule is *Mapp v. Ohio* in which the Court held not only that the exclusionary rule applies to searches made by state officers but also that it is mandatory state court procedure. This apparently represents the ultimate expansion of the rule. However, as two recent

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60 See Kilpatrick v. United States, 372 F.2d 93 (9th Cir.), cert. denied, 387 U.S. 922 (1967); Smith v. United States, 342 F.2d 725 (9th Cir. 1965); Sauer v. United States, 341 F.2d 640, 642 (9th Cir.), cert. denied, 354 U.S. 940 (1957); Andersen v. United States, 237 F.2d 118, 127 (9th Cir. 1956).

1 232 U.S. 383 (1914).
2 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV.
5 Id. at 655.
Ninth Circuit cases, *Brulay v. United States*\(^6\) and *Wolf Low v. United States*,\(^7\) suggest, some question may remain as to the admissibility of evidence seized by either foreign officers or private individuals.

In affirming the conviction of the defendant in *Brulay*, Judge Russell Smith, speaking for the Ninth Circuit, refused to expand the rule to exclude evidence illegally seized by Mexican police. *Brulay* was arrested in Tijuana, because his car was "heavy in the rear" and he appeared nervous when questioned.\(^8\) At the request of the police, he opened the trunk of his car, thereby revealing 298 pounds of amphetamine tablets. Although possession of amphetamines was not at that time a crime in Mexico,\(^9\) the defendant was held and the evidence turned over to United States officials. At the trial the defendant sought to suppress this evidence on the ground that it was the result of an "unreasonable"\(^10\) search and seizure. The Ninth Circuit's affirmance of the admissibility of the evidence had two bases. First, the function of the exclusionary rule is to alter future police practices. Since the Tijuana police practices would be unaffected by the exclusion of the evidence, suppression would not serve its intended purpose.\(^11\) Second, even though the court recognized that a confession obtained by foreign officers in violation of the fifth amendment would be inadmissible,\(^12\) they felt there was a valid basis for distinguishing between fourth (unreasonable search and seizure) and fifth (self-incrimination) amendment violations.\(^13\)

The opinion in *Wolf Low*, written by Judge J. Warren Madden, reached the same result as *Brulay*, ostensibly by *stare decisis*.\(^14\) In this case the incriminating evidence was obtained by the Government from an airline employee who became suspicious as he was checking

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\(^6\) 383 F.2d 345 (9th Cir.), cert. denied, 389 U.S. 967 (1967).
\(^8\) *Brulay v. United States*, 383 F.2d 345, 347 (9th Cir. 1967).
\(^9\) Appellant's Opening Brief at 8, 19, Brief for Appellant at 8, 19, *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967).
\(^10\) The search would be classified as unreasonable because it had been conducted without a warrant or without "probable cause." *Carroll v. United States*, 267 U.S. 132, 155 (1924).
\(^11\) *Brulay v. United States*, 383 F.2d 345, 349 (9th Cir. 1967).
\(^12\) Id.
\(^13\) Id. at 349 n.5.
\(^14\) "As an explanation we suggest that the law is violated in the Fourth Amendment cases when the illegal search takes place. At that moment the violation of the Constitution is complete. The fruits of the illegal search are rejected not because the Constitution expressly requires it, but because it is inappropriate to sanction the previous violations . . . . It is not until the statement is received in evidence that the violation of the Fifth Amendment becomes complete." *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967).
the defendant's baggage. Employees later searched the bags but were unable to identify the contents. Customs officials were notified and they identified the contents of the bags as contraband and seized it when the defendant later claimed his baggage. The defendant's motion to suppress this evidence as resulting from an unreasonable search and seizure was denied, and the ruling was affirmed by the Ninth Circuit. This decision was based on the doctrine of a 1921 case, Burdeau v. McDowell, which held admissible evidence obtained by private parties acting without official sanction regardless of the legality of the action whereby the evidence was acquired. The significance of Wolf Low is its implicit holding that the doctrine upholding private party searches established in Burdeau is unaffected by the later decisions of Elkins v. United States and Mapp.

A short historical examination of the federal exclusionary rule is necessary to determine not only whether Brulay and Wolf Low reflect the modern basis for exclusion but also whether they are even consistent with early exclusionary rule cases.

History of the Exclusionary Rule

The history of the federal exclusionary rule can be divided into three periods. During the first period, from Weeks in 1914 until Wolf v. Colorado in 1949, only evidence unconstitutionally seized by federal officers was excluded. The fourth amendment protections were held not to be applicable through the due process clause to the actions of state officers. The emphasis during this period was on who made the search, and the decisions enumerated three situations in which the necessary "federal involvement" was found to justify the exclusion of the evidence seized: (1) the state and federal officers had a "general understanding" that the federal officers will use the evidence; (2) the federal and state officers acted "in cooperation"; and (3) the state officer's search was not made under any pretense of enforcing state law but "solely on behalf" of the United States. The

15 See Wolf Low v. United States, 391 F.2d 61, 63 (9th Cir. 1968).
16 256 U.S. 465 (1921).
19 Lowrey v. United States, 128 F.2d 477 (8th Cir. 1942); Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937); Fowler v. United States, 62 F.2d 656 (7th Cir. 1932).
21 Gambino v. United States, 275 U.S. 310 (1927); Edgman v. United States, 87 F.2d 13, 15 (10th Cir. 1936) (dictum); Aldridge v. United States, 67 F.2d 956, 957 (10th Cir. 1933) (dictum); Hall v. United States, 41 F.2d 54 (9th Cir. 1930). See also Marsh v. United States, 29 F.2d 172 (2nd Cir. 1928) (Learned Hand, J.) (state police allowed to enforce federal law); United
admission of evidence obtained independently by a state officer in both the state and federal courts was a logical necessity because the state officer was incapable of making a search that violated the federal Constitution.

The rule during the second period lacked such strong logical justification. In *Wolf* the Court held that state officers were bound to respect the guarantees of the fourth amendment because of the due process clause. This holding, however, did not require state courts to exclude evidence seized in such an unconstitutional search. Nor did the extension of the fourth amendment to searches by state officers require exclusion in the federal courts of evidence seized independently by them. *Wolf* and *Lustig v. United States* established the period of the "silver platter" doctrine under which both state and federal officers were bound to respect the fourth amendment. If, however, federal and state officers used the same methods to obtain evidence, only in the case of seizure by the federal authorities would the evidence be excluded.

The illogicalness of this position and the manifest inadequacies of the other remedies available to the person aggrieved by an unlawful search led to the rejection of this doctrine and established the modern rule. *Elkins* overruled this doctrine by name. The "imperative of judicial integrity" required that evidence unconstitutionally obtained, even by state officers, be inadmissible in the federal courts. *Mapp v. Ohio* set the present bounds of the exclusionary rule holding it to be part of "due process" and as such applicable to state court procedure. This modification of *Wolf* was necessary, the Court felt, to prevent the courts from becoming "accomplices to the

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24 See *Lustig v. United States*, 338 U.S. 74, 78-79 (1949) (dictum) (decided the same day as *Wolf*).
25 *Id.*
27 California was "compelled to reach that conclusion [that exclusion was necessary] because other remedies have completely failed to secure compliance . . . ." *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). This language in *Cahan* has been quoted elsewhere. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961); *Elkins v. United States*, 364 U.S. 206, 220 (1960).
29 *Id.* at 222. This phrase is used to express what Holmes had earlier expressed, dissenting in *Olmstead v. United States*, 277 U.S. 438, 470 (1928). Consideration of the "imperative of judicial integrity" occurred as well in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).
illegal act.\textsuperscript{31}

Elkins and Mapp articulate the contemporary exclusionary rule as it applies to governmental officers. The question then becomes what persuasion these two holdings—and in fact the whole history of the rule—should have in determining the applicability of the exclusionary rule to searches by persons other than governmental officers.\textsuperscript{32}

"Private" and "International" Silver Platters

An immediately apparent criticism of the restriction of the exclusionary rule in Bruay and Wolf Low is that it establishes a "silver platter" doctrine with respect to seizures by foreign officers and private individuals. Since the silver platter doctrine has been repudiated as applied to actions by federal and state officers, it ought not to be reestablished for application to acts by foreign officers and private individuals. This silver platter argument as applied to Bruay and Wolf Low may be unsound in and of itself, however, since it ignores the fact that Elkins and Mapp were decided on three bases, only two of which are applicable to Bruay and Wolf Low.

The first ground of the Elkins case, the logical inconsistency\textsuperscript{33} created by the silver platter doctrine of Lustig, would be unpersuasive in arguing for exclusion in Bruay and Wolf Low because a sound argument can be made that the prohibitions of the fourth amendment do not extend either to foreign officers or to private individuals. If the searching officers are not bound to respect the fourth amendment, the inconsistency disappears.\textsuperscript{34} This would make Bruay and Wolf Low more analogous to the cases decided before Wolf v. Colorado, in that the distinctions drawn in those cases\textsuperscript{35} establishing "federal involvement" would still be applicable today in searches by either private individuals or foreign authorities. The result is that the evidence would have been excluded under these older authorities if the defendant could prove, for instance, that the federal customs officials and the Mexican police or private parties had acted "in cooperation."

\textsuperscript{31} McNabb v. United States, 318 U.S. 332, 345 (1942).
\textsuperscript{32} "Justification for excluding privately seized evidence would appear to parallel the reasons for applying the exclusionary rule to government." Note, A Comment on the Exclusion of Evidence Wrongfully Obtained by Private Persons, 1966 Utah L. Rev. 271, 275.
\textsuperscript{33} See text accompanying note 25 supra.
\textsuperscript{34} That the officers are bound by the fourth amendment may be irrelevant. As Cardozo observes, "We exalt form above substance when we hold that the use [of the evidence] is made lawful because the intruder is without a badge of office." People v. Defore, 242 N.Y. 13, 23, 150 N.E. 585, 588 (1926).
\textsuperscript{35} See notes 19-21 supra and accompanying text.
The court in Wolf Low found, as a fact, that the requisite federal involvement was not present. In Brulay this issue was not discussed although it would seem to be clearly presented by the facts. Almost directly analogous to Brulay is Gambino v. United States, the leading case establishing sufficient federal involvement if the search is made “solely on behalf” of the United States. In Gambino the defendant's car was stopped and searched by New York officers without probable cause, and the liquor found therein was confiscated. At that time New York had repealed its state prohibition law, so the evidence was offered in a federal prosecution. The Supreme Court in a unanimous opinion ruled that the evidence must be excluded. For the Ninth Circuit to ignore such a clear analogy is plainly error.

The second basis of the decisions in Elkins and Mapp was the inadequacy of the remedies other than exclusion available to protect fourth amendment rights. The most prominent of these “other” remedies is a civil suit for either trespass or invasion of privacy or a criminal prosecution of the searcher. The Court found in Elkins and Mapp, as had been pointed out by many writers, that the civil remedy is generally limited to nominal damages. The emphasis which the legal system places on large monetary judgments precludes most of these cases from coming to court, and thus the searcher need

30 275 U.S. 310 (1927).
37 Id. at 319.
38 The Ninth Circuit seems persistent in its refusal to recognize the application of Gambino in this situation. In a very recent case, Stonehill v. United States, No. 22,346 (9th Cir., Dec. 9, 1968), the court affirmed a tax lien foreclosure based on evidence seized in a raid. The Supreme Court of the Philippines, prior to the federal prosecution, held that this raid violated a constitutional provision exactly like the fourth amendment of the United States Constitution. Though the facts clearly showed Gambino in point, the majority failed to distinguish that case but instead quoted Brulay approvingly. In a meticulous dissent Judge Browning outlines what is the better rule on this point.

40 For a complete list of all “other remedies,” both existent and proposed, see J. MAQUIE, EVIDENCE OF GUILT 177-80 (1959).
41 Criminal prosecution similar to that under 18 U.S.C. § 2236 (1964).
42 The obstacles are the same against private parties as against public officials. Paulsen, Safeguards in the Law of Search and Seizure, 52 NW. U.L. Rev. 65, 72 (1957); Note, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 151 (1948).
not fear civil litigation. Further, as to the possible criminal remedy, there is a genuine reluctance on the part of the district attorney to prosecute one who has helped his case. The other remedies would certainly be no more adequate against a foreign officer than the Court found they were against a state officer.

The other remedies are not so obviously inadequate as against a private individual. There is no apparent reason to believe that the district attorney would hesitate to prosecute a private person who broke into another's house or car and thereby acquired the challenged evidence. However, one must keep in mind that the "private person" most often connected with this type of case is the store detective, the private investigator, or the campus policeman. These "institutional private searchers" are more than mere wrongdoers to the district attorney; they are sources of evidence. His reluctance to prosecute these people will be a practical reality. As for the civil remedy, it would appear that the criminal defendant would have a much greater chance of actual recovery against the department store than against the generally "judgment-proof" police officer. However, this fact does not negate the general cumbersome nature of the legal system. The only conclusion is that the other remedies are as inadequate against the foreign officer or private person as they are inadequate against the state police officer. This aspect of Elkins and Mapp—inadequacy of alternative remedies—provides a strong argument for extending the protections of the exclusionary rule to the defendants in Brulay and Wolf Low, thereby providing the effective remedy necessary to protect their fourth amendment rights.

The Ninth Circuit avoided this argument in Brulay by construing the Elkins case as establishing a "court-created prophylaxis" designed to deter future unconstitutional police practices rather than to provide the defendant with a remedy. Since the admissibility of the evidence in the United States courts would not affect the search practices of foreign officials (or by analogy private persons), the court concluded that the exclusionary rule should not apply. Since the

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43 Paulsen, Safeguards in the Law of Search and Seizure, 52 Nw. U.L. Rev. 65, 72 (1957); Note, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 151 (1948).
44 Cf. Note, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 152 (1948).
47 See Note, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 151 (1948).
48 Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967).
object of any search is to gain information, the use that could be made of the information gained would seem to be, for the searcher, a very relevant consideration in establishing search procedures. Thus, the court’s assertion that there would be no effect upon the Mexican police practices resulting from an extension of the exclusionary rule in the United States is at least questionable, and the argument, without this assertion, becomes unpersuasive.

In all cases where the search is made by other than domestic government officials, there is some degree of government cooperation, even if this cooperation amounts to nothing more than the acceptance of the evidence by the prosecutor. Does not allowing this evidence to be used in court provide an incentive for the searcher to ignore the Constitution? If the exclusionary rule were expanded to exclude evidence seized in violation of constitutional standards by private persons and foreign officials, this incentive would be removed. While this conclusion may be overstated, it is undeniable that the United States Government should be in the position of encouraging the observance of fourth amendment rights rather than in the reverse position.

Brulay and Wolf Low Fail to Recognize “Judicial Integrity”

The third ground of the Elkins and Mapp decisions was the “raising” of the exclusionary rule from a rule of evidence to one of constitutional law. Exclusion of evidence unreasonably seized is an inherent part of the fourth amendment, as exclusion of a coerced confession is an inherent part of the fifth amendment. The language of Mapp strongly supports such an interpretation:

Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon...

We find that... the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an “intimate relation”...

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40 One of the chief reasons stated in Elkins for overruling the silver platter doctrine was to remove the “incentive” to violate the Constitution. Elkins v. United States, 364 U.S. 206, 217 (1960).

50 This proposition is not flatly stated in Elkins, but it is clearly suggested as the underlying rationale of the opinion. See id. at 222.


53 Id. at 655-57.
If the rule were this expansive, the prosecutor would have to prove, prior to admission of the evidence, that each piece of evidence was not obtained by an illegal search and seizure. Clearly the rule is not this broad.\textsuperscript{54} However, limiting, as the courts do, the application of exclusion to the single criterion that the searcher be a government employee, ignores the basic justifications for the exclusionary rule as shown above. The question turns then to the proper criteria which should be utilized for determining when a search falls within the Mapp exclusionary rule.

Criteria for Determining the "Status" of the Searcher

For determining the admissibility of evidence sought to be excluded by the defendant, a procedure could be established whereby the defendant would be required to prove four facts: First, that the other remedies available to the defendant against the searcher have an inadequate deterrent effect; second, that the application of the exclusionary rule in the particular case will have some proscriptive effect upon future unreasonable searches; third, that the searcher is an agent of the government or someone acting in place of the government; fourth, that the interests of the defendant are adverse to those of the searcher.

The first criterion, requiring that remedies available to the de-
fendant be inadequate, comes directly from Elkins. From the finding in that case one might assume this criterion would be met in all unconstitutional searches. Under present law this is probably true. However, as has been suggested by at least one of the writers,\textsuperscript{55} statutory removal of the obstacles to an effective civil remedy would strip the exclusionary rule of its most convincing justification.\textsuperscript{56} Such a statute which provided for a large fine, recovery of attorney's fees, and barred impeachment of the defendant as a witness on the basis of his conviction through the use of the seized evidence, might provide the defendant satisfactory compensation. But the question would remain for judicial determination whether this remedy was \textit{sufficient} to deter fourth amendment violations. If the remedy was found lacking in this respect, exclusion should be allowed in spite of the statute.

The second criterion, that exclusion must deter future violations, is really the other side of the first criterion. If exclusion would serve no such useful social purpose, its use cannot be supported solely as a remedy. Conversely to the first criterion, the second would appear to be met only in the case of search by domestic government officers. However, when a closer examination is made of the actual searchers, it is seen that they generally have an interest in the conviction of the defendant.\textsuperscript{57} Further, they are usually institutional searchers,\textsuperscript{58} conducting many searches, and hence are quite cognizant of the rules of evidence. This criterion, like the first, would leave substantial questions of fact for proof by the defendant.

The third criterion, that the searcher be serving a "governmental function," is the \textit{only} criterion presently applied by the courts. Even in doing so the courts have taken a very strict interpretation limiting it to actual government agents. Logic\textsuperscript{59} and good public policy would seem to call for an expansion of this category to include parties acting in place of the government. When the searcher has taken over the functions of the state and is, in fact, acting in a quasi-public capacity,\textsuperscript{60} he should be bound by the fourth amendment. Some authority for this view is found in \textit{Marsh v. Alabama}.\textsuperscript{61} There the Supreme Court held that when a corporation owned all the property in a town and ran the functions of the town, the corporation is bound to respect

\textsuperscript{55} J. MAGuire, \textit{EVIDENCE OF GUILT} 167-68, 177-80 (1959).
\textsuperscript{56} Id. at 167-68.
\textsuperscript{58} Id. at 617.
\textsuperscript{59} See note 34 supra.
\textsuperscript{61} 326 U.S. 501 (1946).
the first amendment as is any public entity. Although the town in that case had assumed a wide variety of public functions, the underlying rationale in *Marsh* seems applicable to the present discussion.\(^6\)

In attempting to show that this third criterion was satisfied, the defendant would have to prove that the searcher had taken over one or more functions of the government. In the typical case of evidence seized by a store detective, campus policeman or foreign official, the defendant would have to show that the reason for the search was not simply to recover the item stolen or to enforce some company or campus policy, but rather to bring formal criminal charges.\(^6\)

The fourth criterion, that the interests of the searcher be adverse to that of the defendant, may seem specious on its face. It can be said with certainty that courts would not under the present rules exclude the challenged evidence if it was shown that the defendant hired the searcher to get the evidence illegally and thereby "taint" it. The purpose of making this a criterion is to make its proof a matter for the defendant. In the majority of cases this proof would easily be made by showing a basis, independent of agreement, for the searcher's actions. Only in cases where the prosecutor could show some business or personal relationship between the defendant and the searcher would this be a relevant consideration, but in such a case it would be very relevant.

**Conclusion**

When these four criteria for exclusion are applied to the common cases of unreasonable search and seizure it is easily seen that evidence obtained by private persons acting on their own initiative without governmental direction would nearly always fail to meet the criteria and hence would be admitted. Conversely, evidence obtained by government agents would almost invariably be excluded because such searches would satisfy all of the criteria. Thus, use of these criteria would not alter existing settled law.

It is the cases between these two extremes, such as *Brulay* and *Wolf Low*, which require the use of the criteria discussed in the preceding section of this note to determine the extent of the exclusionary rule. Since, as established, these criteria are to serve the trial judge in the determination of the prior facts bearing on admissibility, an attempt to generalize as to foreign officers or private parties would be self-defeating. It is possible to say, however, that *Brulay* and *Wolf Low* represent a sidestepping by the Ninth Circuit of a very unsettled issue.

G. R. H.

63 See id. at 614–15.
F. Self-Incrimination in Tax Investigation Cases—
United States v. Cohen, 388 F.2d 464
(9th Cir. 1967).

In United States v. Cohen the Ninth Circuit was faced with new questions concerning the extent of the fifth amendment privilege against self-incrimination in tax investigation cases. Cohen had given all his tax records to his accountant, who drew up working papers incorporating information taken from the records. Faced with an impending tax investigation, Cohen obtained both the tax records and the working papers from his accountant. A special agent of the Internal Revenue Service requested the accountant to ask Cohen for the records, and the accountant complied. When Cohen declined to return the papers, the agent summoned him to appear with his records, and when Cohen refused to produce them, the agent filed a petition with the district court to enforce the summons. The district court quashed the summons, and the Government appealed. The attorney for the United States did not contest Cohen's right to withhold his own tax records, but sought to force Cohen to produce the accountant's working papers. Affirming the district court, the Ninth Circuit declared that "as a general rule the Fifth Amendment privilege against self-incrimination permits a person in possession of

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1 388 F.2d 464 (9th Cir. 1967), aff'g 250 F. Supp. 472 (D. Nev. 1965).
2 Id. at 465.
3 Id.
4 Id.
5 Id. at 465-66 & n.1.
6 The petition was filed pursuant to Int. Rev. Code of 1954, § 7604(a).
8 Brief for Appellant at 32, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967). On the basis of Shapiro v. United States, 335 U.S. 1 (1948), the Government could have argued that Cohen had no privilege even for his own tax records. In Shapiro the Supreme Court denied the privilege for records required to be kept by the Emergency Price Control Act. The Court stated that these records were required by law to be kept, and, therefore, the defendant could not withhold them merely because they were incriminating. Id. at 7, 34. Taxpayers, however, are required to "keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe." 26 U.S.C. § 6001 (1964). As "required records," taxpayers' records would seem to fall within the Shapiro doctrine. As various legal writers have noted, however, the Government has been following a policy of allowing taxpayers to assert the fifth amendment privilege for their own records. Redlich, Searches, Seizures, and Self-Incrimination in Tax Cases, 10 Tax L. Rev. 191, 194 (1954); Weiss, Self Incrimination and Income Tax Investigations, 42 Taxes 706, 707-08 (1964).
9 Brief for Appellant at 32, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).
potentially incriminating papers to decline to produce them in response to a summons . . . .”

Following this proposition, the court allowed Cohen to retain the papers.

It was clearly established early in American judicial history\(^\text{11}\) that the privilege against self-incrimination included not only the privilege to refuse to admit to a crime,\(^\text{12}\) but also the privilege to refuse to give any information that would furnish a link in the proof of that crime.\(^\text{13}\) The Supreme Court later extended the privilege to include the compulsory production of personal papers, stating, “[W]e have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.”\(^\text{14}\)

The policies behind the fifth amendment privilege were recently expounded in *Murphy v. Waterfront Commission*:\(^\text{15}\)

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses . . . .\(^\text{16}\)

The controversy in *Cohen* centered around the fact that an accountant had drawn up the working papers for his own use. Cohen, one step ahead of the special agent, obtained possession of them.\(^\text{17}\) Relying heavily on a California statute,\(^\text{18}\) the government contended that the papers belonged to the accountant and that Cohen held them subject to the duty to surrender them to the accountant.\(^\text{19}\)

\(^{10}\) United States v. Cohen, 388 F.2d 464, 472 (9th Cir. 1967).


\(^{12}\) The counsel for the United States was attempting to limit the privilege against self-incrimination to answers which would in themselves constitute confession of a crime. See *id.* at 40.

\(^{13}\) Chief Justice Marshall stated: “Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself.” *Id.*


\(^{15}\) 378 U.S. 52 (1964).

\(^{16}\) *Id.* at 55.

\(^{17}\) United States v. Cohen, 388 F.2d 464, 465 (9th Cir. 1967).

\(^{18}\) *Cal. Bus. & Prof. Code* § 5037, which states that in the absence of an express agreement to the contrary, the working papers are the property of the accountant. The Government argued that the statute required an agreement expressed either verbally or in writing, both of which were missing in this case. Brief for Appellant at 41-46, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).

\(^{19}\) Brief for Appellant at 43, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).
more, the accountant had requested Cohen to return the papers. The Government argued, Cohen could not claim the privilege against self-incrimination. The district court found that Cohen had "rightful and indefinite possession in a purely personal capacity" and, considering this sufficient to invoke the privilege, decided that it was not necessary to determine the question of ownership. The Ninth Circuit affirmed the district court in even broader terms. The court reasoned that the policy of the Fifth Amendment is to prevent the accused from being subjected to the "'cruel trilemma' of perjury, contempt, or self-incrimination." Since possession of incriminating documents sets the stage for this trilemma, whether or not the possessor has title, the court concluded that possession alone is "the necessary and sufficient condition of the privilege."

The broad language which the Ninth Circuit uses in Cohen seems to indicate that possession alone, even wrongful possession, is sufficient to invoke the privilege and resist a summons by the Internal Revenue Service. As authority for this position, the court cites three district court cases: Application of House; Application of Daniels; and United States v. Foster. The holdings in these cases, however, do not seem to support a position as broad as that taken in Cohen. In House the district court stated:

The argument of the government is therefore reduced to the proposition that the application of the privilege against self-incrimination turns on the difference between rightful indefinite possession and legal title. Nothing in the cases substantiates this notion that a narrow concept of property law should determine the availability of Constitutional guarantees against self-incrimination.

Reviewing the Supreme Court cases dealing with the Fifth Amendment and corporate records, the district court in Daniels held: "These decisions make it clear that the privilege of the Fifth Amendment does not rest upon an individual's absolute title to the documents in question; rather it rests on his legitimate and personal ownership and his demeanor in the face of governmental demands."
In Foster, the district court quashed an order issued pursuant to section 7604(a) of the Internal Revenue Code, stating that at the time the summons was issued, "the rightful, indefinite and legitimate possession of such work papers was in the taxpayers in a purely personal capacity . . . ." These cases stand for the proposition that one need not have legal title to incriminating documents in order to claim the privilege against self-incrimination as long as one has rightful possession in a personal—rather than a representative—capacity. House, Daniels and Foster do not support a position that possession alone, particularly if asserted in defiance of the claims of the true owner, will support a claim of privilege.

Decisions by the Supreme Court indicate that as a matter of public policy this broad view of the fifth amendment privilege would not be followed. Discussing the policy behind the decisions that a bankrupt person cannot refuse to produce incriminating business records, Justice Brandeis indicated in McCarthy v. Arndstein that allowing the privilege would destroy a property right, and the constitutional privilege "does not relieve one from compliance with the substantive obligation to surrender property." In a 1933 Supreme Court case, a juror claimed a privilege analogous to the fifth amendment privilege. The juror had committed perjury in order to obtain a seat on the jury. The court stated: "Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued." These decisions reflect a policy that one cannot commit fraud or theft in order to put oneself in a position to invoke a constitutional privilege. The language of the court in Cohen seems to be contrary to this policy.

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34 INT. REV. CODE OF 1954, § 7604 (a).
36 266 U.S. 34 (1924).
37 Id. at 41.
38 Clark v. United States, 289 U.S. 1 (1933).
39 Id. at 13-14.
40 The Ninth Circuit in the Cohen case does not explicitly reject the test of rightful and indefinite possession in a purely personal capacity. In fact, the court recognizes that Cohen's possession is rightful. See United States v. Cohen, 388 F.2d 464, 470 (9th Cir. 1967). However, the court does not limit its holding to cases involving rightful and indefinite possession, but holds that "a person in possession of potentially incriminating papers" can claim the fifth amendment privilege, and then qualifies the holding by saying that regardless of whatever exceptions exist, none would bar the claim by a person "in possession, with the consent of the accountant, of work papers created by the accountant . . . ." Id. at 472.
Other circuits, in cases similar to *Cohen*, have not allowed a person in possession of his accountant's working papers to claim the privilege against self-incrimination for those papers.\textsuperscript{41} The Sixth Circuit decided\textsuperscript{42} that if the accountant who had previously given the papers to his client authorized the client to surrender the records to the Internal Revenue Service, the client could not invoke the fifth amendment privilege.\textsuperscript{43} Likewise the District of Columbia Circuit ruled\textsuperscript{44} that if the accountant demanded the return of the working papers, the client could not retain them even though they were incriminating.\textsuperscript{45} The court stated that "'one who holds papers against the owner's demand for their return cannot resist production by claiming the privilege against self-incrimination.'"\textsuperscript{46} These cases from the District of Columbia and Sixth Circuits are distinguishable from *Cohen*, because in both of these cases the accountant considered that he had some property interest in the working papers, whereas in *Cohen* the accountant testified that he considered his interest in the papers to have terminated when they left his possession.\textsuperscript{47} The broad language used by the Ninth Circuit in *Cohen*, however, erases this distinction. In all three cases the defendants had actual possession of the incriminating papers. Using the test of bare possession, all three defendants would have been able to assert the fifth amendment privilege. Since this was not the case, these decisions of the District of Columbia and Sixth Circuits can be considered to be flatly contrary to the Ninth Circuit's broad interpretation of the fifth amendment privilege.

The peculiar twist to the *Cohen* case is that the facts, as they appear in the decisions of the district court\textsuperscript{48} and the Ninth Circuit,\textsuperscript{49} seem to fall well within the test propounded in *House*, *Foster* and *Daniels*. Cohen's accountant at all times disclaimed any property interest in the working papers.\textsuperscript{50} He stated that he had surrendered them to Cohen with no expectation that they would be returned.\textsuperscript{51}

\textsuperscript{41} *In re Fahey*, 300 F.2d 383 (6th Cir. 1961).
\textsuperscript{42} Id. at 385.
\textsuperscript{44} Id. at 740-41.
\textsuperscript{45} Id. at 741.
\textsuperscript{47} Id. at 473-74.
\textsuperscript{48} United States v. Cohen, 388 F.2d 464, 465, 470 (9th Cir. 1967).
\textsuperscript{49} Id. at 470 n.18.
\textsuperscript{50} Id. at 470.
\textsuperscript{51} Id. at 470 n.18.
He had not demanded them from Cohen; he had merely passed along the request of the special agent.\textsuperscript{52} From these facts it would appear that Cohen had rightful, indefinite possession in a purely personal capacity, if not actual ownership.\textsuperscript{53}

In this light the Cohen case is quite ambiguous. On its facts, the case seems to be in line with other federal decisions which have refused to limit the application of the privilege against self-incrimination to the person having both possession and ownership of incriminating documents. There is language in the case, however, which indicates that the Ninth Circuit is attempting to formulate a new, broader interpretation of the fifth amendment.\textsuperscript{54} If the court is declaring that possession alone is sufficient to invoke the fifth amendment privilege, then the ramifications of this new interpretation have not been thoroughly considered. It would encourage one faced with criminal charges to obtain possession of any documents which might incriminate him, even if this necessitates stealing them. The government would be unable to force the production of these documents, and the owner might not want to go through a lengthy civil suit to regain them.\textsuperscript{55} The protection of the fifth amendment should not be extended to the point that law enforcement becomes crippled without giving any legitimate benefit to the individual. Future courts examining Cohen should limit the case to its facts rather than accept an interpretation of the fifth amendment that does not reflect the policies behind it.

\textit{B. C. A.}

\textbf{G. The Exclusionary Rule in Post-Conviction Proceedings—Verdugo v. United States, No. 20,803 (9th Cir., Oct. 7, 1968).}

In \textit{Verdugo v. United States}\textsuperscript{1} the Ninth Circuit was faced with the problem of illegal search and seizure in a novel form. In July

\textsuperscript{52} The Government did not contest these facts, but argued instead that they did not change the effect of the California statute. \textit{See} Brief for Appellant at 49, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).

\textsuperscript{53} This was the line of argument used by appellee Cohen. Brief for Appellee at 18-19, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).

\textsuperscript{54} \textit{See} United States v. Cohen, 388 F.2d 464, 468, 469-70 & n.17 (9th Cir. 1967).

\textsuperscript{55} Nor, apparently, could the owner be forced to undertake a civil suit to regain possession of such papers. \textit{Cf.} Munroe v. United States, 216 F. 107, 112 (1st Cir. 1914). \textit{See also} United States v. Fleischman, 339 U.S. 349, 366 (1950) (Black, J.) (dissenting opinion).

\textsuperscript{1} No. 20,803 (9th Cir., Oct. 7, 1968 (amended opinion). The original
of 1964 Verdugo and his accomplice made an illegal sale of narcotics and were later arrested. In October, however, federal agents made an illegal raid on Verdugo’s home, seizing a large quantity of heroin and substantial sums of money. At a special hearing the district court suppressed the evidence thus obtained, but the probation officer made it part of his presentence investigation report. Based on that evidence, he concluded that Verdugo was a major supplier of narcotics and should be given “a substantial term of incarceration, in excess of the minimum five year sentence required.” Accordingly, the trial judge gave Verdugo a 15-year sentence, whereas his accomplice was given only five years. Affirming the conviction but remanding the case for resentencing, Judge Browning declared, in the majority opinion for the court, that the fourth amendment sanction against illegal search and seizure and the exclusionary rule propounded in Mapp v. Ohio apply not only to trial proceedings, but also to post-conviction procedure. In a separate opinion, Judge Browning discussed the trial court’s failure to disclose to Verdugo or his counsel any part of the presentence investigation report. Although not part of the majority opinion, his discussion is closely related to the problem of search and seize and may foreshadow the course of future Ninth Circuit decisions.

Due Process and Post-Conviction Procedure

Traditionally, appellate courts have been reluctant to review the sentence given to a convicted defendant, since this stage of a criminal trial has been thought to be within the discretion of the trial judge. These discretionary powers of the trial judge en-

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2 Id. at 1-3.
3 Id. at 14-16.
6 Id. at 13.
7 Id., quoting the probation officer’s report.
8 Id. at 12.
9 See id. at 20.
12 Id. at 21-28.
13 Id. at 21-25.
14 George v. United States, 266 F.2d 343, 344 (9th Cir. 1953), cert. denied, 364 U.S. 923 (1960); see Williams v. New York, 337 U.S. 241, 246 (1949); In re Hodge, 262 F.2d 778, 782 (9th Cir. 1958); Note, Appellate Review of Sentencing Procedure, 74 YALE L.J. 379 (1964).
compass both the length of a sentence and the procedure used to determine it. He may consider evidence which would be inadmissible in open court, hear witnesses whom the defendant is not allowed to cross-examine, and give the convicted defendant a sentence substantially longer than that given another defendant for the identical crime. As one federal judge stated, "The lack of constitutional and evidentiary safeguards thrown around a convicted offender is in striking contrast to those surrounding him before he is found guilty."

Although the discretionary powers of the trial judge are broad, both the Supreme Court and the appellate courts have reviewed, and sometimes reversed sentences in situations in which the trial judge abused his discretion. In one case, the trial judge misread the defendant's record and consequently gave him an unusually severe sentence. Reversing the conviction as well as the sentence, the Supreme Court stated, "it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." In another case the Supreme Court explicitly emphasized that a convicted defendant has a right to speak on his own behalf at sentencing although it affirmed the conviction and sentence on the ground that the defendant had apparently been given these rights. The Fifth Circuit remanded a case for resentencing because the defendant had been prejudiced at sentencing by his election to plead innocent at trial. In a recent First Circuit case, a defendant who had secured a new trial on appeal was given a longer sentence on retrial. Re-

15 See, e.g., George v. United States, 266 F.2d 343, 344 (9th Cir. 1958), cert. denied, 364 U.S. 923 (1960), where the only limits that the appellate court places on the trial judge is that the sentence be within statutory bounds.
17 See id. at 246.
18 The Ninth Circuit in Verdugo stated that this argument did not even merit separate discussion. Verdugo v. United States, No. 20,803, at 12 n.13 (9th Cir., Oct. 7, 1968).
19 Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955).
21 Id. at 741.
23 Id. at 304 (dictum). The Court stated that Rule 32(a) of the Federal Rules of Criminal Procedure was based on the common law right of allocution. Id. The Court also specifically rejected the contention that having defendant's counsel speak for him fulfilled this function. Id.
24 Id. at 305.
25 Thomas v. United States, 363 F.2d 941 (5th Cir. 1966); accord, United States v. Wiley, 267 F.2d 453 (7th Cir. 1959).
26 Marano v. United States, 374 F.2d 583 (1st Cir. 1967).
viewing a second appeal, the appellate court stated, "[i]n the exceptional situation, where it is evident that the district court has given substantial consideration to legally impermissible factors, correction must be possible." 27 Remanding the case, the court required the trial judge to show "substantial justification" for the increase. 28

Finally, in a case in which the defendant's plea for medical and psychiatric examinations was ignored by the trial judge, the District of Columbia Circuit declared, "[w]e do not question the general rule that an appellate court will not ordinarily review sentences that are within the statutory maximum. We hold only that the sentencing judge should use some of the resources which Congress has provided and that he may not arbitrarily ignore the data properly obtained thereby." 29 Taken together, these decisions indicate certain due process requirements for post-conviction procedure which appellate courts may review on appeal.

Verdugo adds an important constitutional safeguard to post-conviction procedure by limiting not only the type of evidence the trial judge may consider, but also the manner of its acquisition. 30 Prior decisions struck down sentences based upon substantively improper considerations, such as false or misinterpreted information 31 or a defendant's election to plead innocent at trial. 32 In Verdugo, however, there was nothing unacceptable with the evidence itself; rather, the manner in which it was acquired was held to have violated due process. This decision seems to be a definite break with the traditional view that a trial judge is free to consider any evidence he may be presented in order to arrive at a sentence which best fills the needs of both the defendant and society.

The exclusionary rule on which the Ninth Circuit relied in Verdugo 33 has been developed gradually by the Supreme Court over the last 50 years. First used as a sanction against federal officers in federal courts, 34 it has been extended to state officers in state criminal trials, 35 to state forfeiture proceedings, 36 and apparently even to ad-

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27 Id. at 586.
28 See id. at 585.
29 Leach v. United States, 334 F.2d 945, 951 (D.C. Cir. 1964) (emphasis added).
32 Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); accord, United States v. Wiley, 267 F.2d 453 (7th Cir. 1959).
administrative proceedings under municipal housing codes. The Supreme Court's reaffirmance in *Mapp v. Ohio* of the proposition that the exclusionary rule is of constitutional origin and not merely a rule of evidence was of particular importance to the *Verdugo* decision. If it were merely a rule of evidence, the Supreme Court's decision in *Williams v. New York* that the formal rules of evidence do not apply to sentencing procedure would have called for the opposite result in *Verdugo*. As a doctrine of constitutional origin, however, the exclusionary rule applies equally to both trial and post-conviction procedure.

The primary rationale behind the exclusionary rule is that the suppression of evidence illegally obtained will operate as a deterrent to police officers by removing the incentive to make such illegal searches and seizures. The Supreme Court, recognizing the necessity of such a deterrent, has stated: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures..."

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39 Id. at 649.
40 *See Verdugo v. United States*, No. 20,803, at 17 (9th Cir., Oct. 7, 1968).
41 337 U.S. 241 (1949).
42 Id. at 247.
43 The majority in *Verdugo* relied solely on this deterrent effect rationale, concluding "where... the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures, that evidence should be disregarded by the sentencing judge." *Verdugo* v. United States, No. 20,803, at 20 (9th Cir., Oct. 7, 1968). The implication is that where there is no such incentive the evidence may be used. Many cases follow this narrow interpretation of the exclusionary rule. See United States v. Fay, 333 F.2d 12, 10-20 (2d Cir. 1964), aff'd sub nom., Anglet v. Fay, 381 U.S. 654 (1965) (exclusionary rule not retroactive since incentive unaffected); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961); United States v. Frank, 225 F. Supp. 573 (D.D.C. 1964) (rule not applicable to private persons where police incentive unaffected). However, Judge Browning in his separate opinion argues for a broader interpretation of the exclusionary rule as a protection for individual privacy and as a part of the fifth amendment privilege against self-incrimination. *Verdugo* v. United States, supra at 25-28. See Cipres v. United States, 343 F.2d 95, 97-98 (9th Cir. 1965). The Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), did not specify the exact basis for the exclusionary rule, although Justice Black's concurring opinion supports the broader view. Id. at 662. An earlier case refers to the exclusionary rule as a protection of privacy. *Jones v. United States*, 382 U.S. 257, 261 (1960). The distinction may become important in deciding whether or not other constitutional safeguards will be extended to post-conviction procedure.
is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." As the court observed in *Verdugo*, however, it is not adequate to exclude evidence from the trial alone. Once the police have secured by legal methods sufficient evidence to convict the defendant, they have nothing to lose by conducting a further illegal raid. If the evidence is not suppressed, they may be able to convict the defendant on more than one count. If it is suppressed, it can still be used in the presentence investigation report to ensure that the defendant will be given a long sentence. To carry out the policy of the exclusionary rule the courts must exclude illegally obtained evidence from both the trial and the sentencing stages.

From a practical standpoint, the exclusionary rule is even more important at sentencing than at trial. A study by the Administrative Office of the United States Courts indicates that in fiscal 1966, of all those defendants arrested and brought before federal courts, 75.5 percent entered pleas of guilty or nolo contendere. These defendants were concerned only with the post-conviction procedure and not with the rules of evidence in criminal trials. Furthermore, in many areas of federal criminal law and especially in narcotics violations, there is a high rate of recidivism. In such a situation, there is a great incentive for police to secure evidence ensuring long prison terms for these defendants, since hasty release merely increases police workloads. If the exclusionary rule is not to apply to sentencing proceedings, then for three-fourths of all defendants in federal courts, the fourth amendment has no meaning, since it applies only to a stage of criminal proceedings which they have bypassed.

**Verdugo and the Disclosure Controversy**

The application of the exclusionary rule to post-conviction procedure raises new questions on the issue of disclosure of the presentence investigation report. If the defendant has the right to exclude illegally seized evidence from the presentence investigation report, it would seem to follow that he has the right to see at least parts of the report in order to assert this exclusionary rule. Rule 32 of the Federal Rules of Criminal Procedure, however, allows the

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47 ADMIN. OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS (1966).
48 Id. at chart 1.
49 Id. at 19 (9th Cir., Oct. 7, 1968).
50 Id. at 19-20.
judge to withhold the report at his discretion from the defendant or his counsel. Furthermore, the Supreme Court has twice held that due process does not require the trial judge to allow the defendant to cross-examine witnesses and rebut allegations contained in the report. As a result, many federal judges do not allow any disclosure of the presentence investigation report to either the defendant or his counsel. A study conducted in 1964 indicates that about 57 percent of the federal district judges permit no disclosure, 35 percent regularly permit it, and the remainder do so only rarely. In the Northern District of California where Verdugo was tried, the general pattern is one of non-disclosure.

At present there are three steps in presentence investigation. First, the probation officer assigned to the case makes his investigation and writes his report, based on the defendant’s file and material obtained by investigation. This is done either after the defendant has been convicted or has entered a plea of guilty, or after the probation department has been notified that the defendant intends to plead guilty and has signed a waiver requesting the probation officer to conduct his investigation. Then a supervisor who also has the defendant’s file reviews the probation report. Finally, the re-

51 In 1964 when Verdugo was sentenced, Rule 32 did not mention disclosure. Fed. R. Crim. P. 32(c)(2), 18 U.S.C. Appendix, at 3759 (1964). In that same year the Committee on Rules of Practice and Procedure offered an amendment which read in part: “If the defendant is represented by counsel and so requests, the court before imposing sentence shall permit counsel for the defendant to read the report of the presentence investigation (from which the sources of confidential information may be excluded) and shall afford such counsel an opportunity to comment thereon.” Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to Rules of Criminal Procedure for the United States District Courts 39 (Preliminary Draft No. 2, 1964). The Amendment was rejected, and the present rule, as amended in 1966, states that the court “may disclose to the defendant or his counsel all or part of the material contained in the report . . . .” Fed. R. Crim. P. 32(c)(2).


54 Higgins, Confidentiality of Presentence Reports, 28 Albany L. Rev. 12 (1964).

55 Id. at 15.


57 Id.

58 Id.

59 Id.

60 Id. Mr. Scott indicates that in a large, well-staffed probation department, especially in a big city, this is an effective review. However, in
port is turned over to the trial judge who examines it before sentencing the defendant. The judge may discuss some of the information with the defendant, or show the defendant parts of the report, or merely ask the defendant and his counsel if they have anything to say before sentence is passed. As stated before, in many cases the judge does not disclose any of the report to the defendant.

The position of the Division of Probation and of various legal writers is that the report is strictly confidential and should never be disclosed to the defendant. Much of the information received by the probation officer is given in confidence from sources such as the defendant's family, his doctor, numerous welfare agencies, past employers and law enforcement agencies. The arguments are that disclosure would dry up sources of information, provoke retaliation by the defendant's associates against informants, disturb the defendant psychologically, hindering the rehabilitation process and finally, clog the courts with a deluge of frivolous appeals from trial court sentences. The end result would be that the post-conviction procedure would become another complete trial.

Proponents of disclosure argue that the present system tends to insulate the presentence investigation report from any really critical or effective review. As a result, it is possible for errors in the report which may substantially affect the sentence to go unnoticed. Areas with a high turnover among staff, especially in rural areas, there may be either a perfunctory review or none at all.

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64 Id. at 5.

65 Id.


Furthermore, without some idea of the contents of the presentence investigation report, the defendant's counsel is seriously hindered in representing the defendant at sentencing. Finally, the probation officer may be biased against the defendant and write an unfairly prejudicial report. Although the vast majority of probation officers are dedicated professional people, isolated cases of bias do occur.

The present system of nondisclosure has made the federal decisions dealing with due process requirements in post-conviction procedure confusing and contradictory. Some of these decisions give the defendant the right to have counsel present at sentencing, the right to be sentenced on the basis of an error-free record, without regard to the plea he entered, and, by the Verdugo decision, the right to have illegally seized evidence excluded from consideration at sentencing. Other decisions, however, deny the defendant the right to see the contents of the presentence investigation report and to know what factors the judge considered in passing sentence. The result is that the federal courts have given the defendant certain rights at sentencing but have withheld from him the means to protect these rights and make them effective. This situation is clearly unsatisfactory.

Proposals

One proposal to reform the present state of post-conviction procedure is to amend Rule 32(c) (1) to make the presentence investigation mandatory in all federal felony cases. This is not actually such a significant change. Discounting the special offenses of immigration law violations, wagering tax violations, and violations of federal regulatory statutes (which could perhaps be made exceptions to the...
mandatory report rule), presentence investigation reports are made in about 89 percent of all federal convictions.79 Mandatory presentence investigations would not substantially increase the workload of the probation departments, and they would put an end to much of the controversy80 that has raged during the last few years over the disparity in sentences given different defendants who have been convicted of identical offenses. Since most differences in sentences are undoubtedly justified,81 making these reports mandatory would dispel much undeserved criticism directed at federal judges, while providing a method for reviewing those sentences that are unduly severe or arbitrary.

Another proposal is for some form of mandatory disclosure of the presentence investigation report. A trial judge should be allowed to keep medical and psychiatric reports confidential, and also withhold from the defendant the sources of various confidential reports and the probation officer's recommendations. However, the defendant and his counsel should be allowed to see the record of the defendant's prior arrests and convictions, evidence gathered by the police and reported to the probation officer, and the substance of any derogatory reports. In this manner the presentence investigation report will be given a critical evaluation which is much more effective than any administrative review.

One district judge who does use a system of disclosure similar to that outlined above indicates that none of the disastrous consequences predicted by the opponents of disclosure have occurred.82 There has been no evaporation of sources of information in his district in retaliation against informants, and no deluge of frivolous appeals.83 In the Northern District of California, where Verdugo was convicted and sentenced, the Deputy Chief Probation Officer doubts that a system of limited disclosure of this type would hamper the operation of his department to any significant degree.84 Thus, what little empirical

81 Judge Brewster suggests that differences in lengths of sentences may be due to personality traits of the different defendants which are not reflected in their records. Brewster, Appellate Review of Sentences, 40 F.R.D. 79, 84–85 (1965).
82 Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 FED. PROB. 8, 9 (1964). Judge Thomsen is the Chief Judge of the United States District Court for the District of Maryland.
83 Id.
information is available indicates that the fears of the opponents of disclosure are quite ill-founded.

The use of the presentence investigation report has been a great improvement over the system which placed the responsibility for sentencing entirely on the trial judge. The presentence report provides the judge with carefully gathered information upon which he may base a sentence best fitting the needs of both society and the defendant. As with any administrative procedure affecting personal rights, though, it is subject to abuses unless properly controlled. A system of mandatory disclosure provides this control and promotes the fundamental concept of fairness inherent in our judicial process.

If a system of mandatory disclosure were established, the rights granted to defendants by Verdugo could effectively be utilized. Until then, the impact of Verdugo upon post-conviction proceedings will vary with the resourcefulness and the effectiveness of counsel in ascertaining the methods used in obtaining the evidence upon which the presentence investigation report is based.

B. C. A.

H. Due Process in Post-Conviction Sentencing and Parole—Padilla v. Lynch, 398 F.2d 481 (9th Cir. 1968); Sturm v. California Adult Authority, 395 F.2d 446 (9th Cir. 1967); Eason v. Dickson, 390 F.2d 585 (9th Cir. 1968).

Although persons convicted of crimes lose many of the rights and privileges of law abiding citizens, it is established by now that they do not lose all of their civil rights, and that the Due Process and Equal Protection Clauses of the 14th Amendment follow them into the prison and protect them there from unconstitutional administrative action on the part of prison authorities carried out under color of State law, custom, or usage. More specifically, prison authorities are not permitted to inflict upon convicts cruel and unusual punishments for violations of prison rules; they may not discriminate invidiously against a prisoner or class of prisoners . . . 1

In 1968, the Ninth Circuit Court of Appeals decided three cases in which prisoners contended that adherence to these maxims was lacking. The "prison authorities" involved in each case was the California Adult Authority, and the "administrative action" involved was of three types: redetermination of sentence,2 denial of parole,3 and revocation of parole.4 To establish the judicial climate in which these

2 Sturm v. California Adult Authority, 395 F.2d 446 (9th Cir. 1967).
3 Padilla v. Lynch, 398 F.2d 481 (9th Cir. 1968).
4 Eason v. Dickson, 390 F.2d 585 (9th Cir. 1968).
cases were decided, a review of the law concerning these three administrative actions is in order.

Redetermination of Sentence

The power to redetermine a prisoner's sentence is part of the broader power given to an administrative agency to determine a sentence under an indeterminate sentence scheme.\(^5\) Under such a scheme, the sentencing judge merely pronounces the minimum and maximum terms fixed by the statute which the defendant has been convicted of violating;\(^6\) thereafter, the court's jurisdiction has ended, and the administrative agency has sole authority over the execution of sentence.\(^7\) Until the administrative agency fixes a definite term, the sentence is deemed to be the maximum possible,\(^8\) and no prisoner has the right to have his sentence determined at anything less than the maximum.\(^9\) This is so even if the sentencing judge and prosecuting attorney recommend a lighter sentence.\(^10\) Once the administrative agency has fixed a prisoner's term at less than the maximum, this action is only tentative,\(^11\) and may be redetermined by the agency "for cause,"\(^12\) or "as conditions require,"\(^13\) and the absence of notice and a hearing before such redetermination does not violate due process.\(^14\)

A definitive statement on what constitutes sufficient "cause" for, or what "conditions require," redetermination of sentence cannot be found in the cases. In fact, a search of the cases for a holding that "cause" was not sufficient is likewise futile.\(^15\) Gainey v. Turner\(^16\) held that upon successful appeal of a conviction, a prisoner's rights to


\(^6\) Id.


\(^8\) Id.

\(^9\) United States ex rel. Palmer v. Ragen, 159 F.2d 356, 357 (7th Cir.), cert. denied, 331 U.S. 823 (1947); Ex parte Jordan, 190 Cal. 416, 212 P. 913 (1923).

\(^10\) United States ex rel. Rasmussen v. Ragen, 146 F.2d 516, 517 (7th Cir. 1945); In re Schoengarth, 66 Cal. 2d 293, 302, 425 P.2d 200, 204, 57 Cal. Rptr. 600, 604 (1967).


\(^12\) In re Costello, 262 F.2d 214, 215 (9th Cir. 1958).


\(^14\) In re Schoengarth, 66 Cal. 2d 293, 302, 425 P.2d 200, 204, 57 Cal. Rptr. 600, 604 (1967).


\(^16\) See, e.g., In re Smith, 33 Cal. 2d 797, 205 P.2d 662 (1949).
due process and equal protection are violated if credit for time served on the invalid conviction is denied on a sentence following a subsequent, valid conviction for the same crime. Although Gainey involved sentencing by a judge, by analogy the same rule should apply to an administrative agency vested with sentencing powers (e.g., the California Adult Authority). Thus, where a prisoner's conviction had been overturned, and he was subsequently validly convicted, the sentencing agency should be precluded from assigning any sentence other than that originally assigned under the invalid conviction, minus the time which the prisoner served under that first conviction. Such a result would be consistent with the rationale of the Gainey case, that a prisoner cannot be punished for successfully appealing his conviction.

It bears repeating that no case has been discovered in which a redetermination of a prisoner's sentence under an indeterminate sentence scheme has subsequently been overturned by the courts. It was against this judicial background that the following case was decided by the Ninth Circuit Court of Appeals.

Sturm v. California Adult Authority

Sturm and a co-defendant were convicted of first degree robbery and sentenced to five years to life under the California indeterminate sentence law. The Adult Authority thereafter fixed their terms at six years. This determination was rescinded after Sturm had violated prison rules, and after Sturm had once more broken prison rules, the Adult Authority fixed his term at 10½ years. He is now serving the remainder of that 10½-year term, while his co-defendant was released upon the completion of his six-year term. This case was an appeal from an order of the United States District Court denying Sturm's petition for habeas corpus.

Sturm's petition for habeas corpus was based on three contentions. The first was that he was denied due process because the Adult Authority, by redetermining his sentence after it had once been fixed, acted outside its statutory authority under sections 3020 and 5077 of the California Penal Code. The court met this contention by quoting the decision of the California Supreme Court in In re McLain:

395 F.2d 446 (9th Cir. 1967).

An examination of the complete record of the case fails to disclose the specific prison rules that Sturm violated. The only description was the assertion that the violations did not amount to felonies under the California Penal Code.

vided for the crime in question. When the Authority reduces a maximum sentence, its action, in the nature of things, is tentative and may be changed for cause.  

The court went on to say that the California court has clearly recognized the statutory authorization for the Adult Authority to redetermine a sentence, and a state court's interpretation of its statute does not raise a federal question.

Sturm's other two contentions did raise a federal question. The first was that the redetermination of his sentence at 10½ years constituted, in reality, a consecutive sentence of 4½ years for violation of prison rules. Sturm urged that this penalty was excessive and constituted cruel and unusual punishment under the eighth amendment. The court met this contention by saying that the basic premise of Sturm's argument, that his sentence for the original conviction was permanently determined at six years, was incorrect. In addition, as noted previously, all indeterminate sentences are for the maximum, and any determination by the Adult Authority is only tentative. Therefore, it is not accurate to characterize the redetermination of the appellant's sentence as an imposition of any penalty for the infractions, when the redetermined sentence was within the limits of the penalty for his conviction.

Sturm's second contention presenting a federal question was that since his co-defendant had been released, his continued imprisonment violated equal protection. The court met this contention by noting that a major purpose of the indeterminate sentence law is to permit individual treatment of offenders, and equal protection requires only that state laws be applied uniformly to situations that cannot reasonably be distinguished. Sturm's two violations of prison rules made his situation reasonably distinguishable from that of his co-defendant.

Judge Browning wrote an opinion in which he concurred with the denial of Sturm's petition for habeas corpus, but criticized the reasoning of the court. He agreed with the court's opinion that the two violations of prison rules were an adequate answer to the contention that Sturm's continued imprisonment after the release of his co-defendant denied Sturm equal protection. But then to answer Sturm's due process argument by saying that the redetermination of sen-

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21 395 F.2d at 448, citing In re Costello, 262 F.2d 214 (9th Cir. 1958).
22 To use the expression of the court, as noted previously in text accompanying note 20 supra, the rule included the phrase "and may be changed for cause." It is omitted here.
23 395 F.2d at 448.
24 Sturm contended that the addition of 4½ years to his sentence for prison rule violations was an excessive penalty and constituted cruel and unusual punishment. Judge Browning preferred to characterize Sturm's ar-
tence was not an imposition of a penalty for the infractions "seems inconsistent at the least." 25

It was Browning's contention that the indeterminate sentencing law and the provision that all sentences are to be regarded as for the maximum should be considered as no more than a device for retaining jurisdiction over the person of the defendant while transferring the sentencing function from the judiciary to the administrative agency. In any event, Browning went on to say, the indeterminate sentencing law cannot be used "to validate whatever action the administrative agency might subsequently choose to take, no matter how seriously the appellant might be injured, and without regard to whether the agency's action was arbitrary, basically unfair, or invidiously discriminatory." 26 Browning proposed the following example: If Sturm had alleged that the Adult Authority had increased the time he must serve from six to 60 years for a trivial infraction or for no reason at all, and granting that Sturm's original sentence had been five years to life, it would be no answer to a due process challenge to say that since all indeterminate sentences are for the maximum, and since 60 years is less than life, the Adult Authority's action could not be questioned. He continued: "Appellant may have no 'right' to be imprisoned for less than his whole life; but he is entitled to have the time he must serve determined in a manner consistent with the Constitution." 27 Browning concluded by saying that since Sturm revealed none of the facts about the prison rules he violated, nor any of the circumstances surrounding those violations, which would be essential to a review of the Adult Authority's actions, even after being given an opportunity to amend his petition to correct this omission, a denial of his petition for habeas corpus was correct.

Judge Browning's opinion eloquently pointed out the fallacies involved in the court's reasoning. In effect, the court met the contention that an administrative agency has exercised its powers in denial of the rights of the prisoner by simply reaffirming the powers of the agency, ignoring the possibility that such powers could be exercised in an unconstitutional manner. There is implicit in the court's opinion a denial of the validity of the principles announced by the United States District Court in the quotation at the beginning of this note. 28

argument as contending that the 4½ year addition to his sentence was "a result so irrational and arbitrary as to violate substantive due process." Id. at 449.

25 Id. at 450.
26 Id. at 449.
This implicit denial leads to the conclusion that the court is avoiding issues. This conclusion is reinforced by what seems to be a deliberate misinterpretation of the appellant's arguments by the court in this case. First of all, the court answered Sturm's contention that the Adult Authority exceeded its statutory authority (by redetermining Sturm's sentence) with the quote: "When the Authority reduces a maximum sentence, its action, in the nature of things, is tentative and may be changed for cause." But then, in using the same argument and authority to meet the more important due process contention, the second half of the formula, "and may be changed for cause," is omitted. This is significant because the court states that the basic premise of Sturm's argument, that his sentence was permanently determined at six years, is incorrect. But this is not the basic premise of Sturm's argument. The basic premise of Sturm's argument is the requirement of "cause" before the Adult Authority may redetermine a sentence, as declared by In re McLain. The omission of the second half of the rule stated in McLain, when that part of the rule was in point, is, at least, strong evidence for the conclusion that both its omission and the misinterpretation of Sturm's basic premise was deliberate.

Denial of Parole

In 1968 the Ninth Circuit decided Padilla v. Lynch, in which a prisoner challenged the right of a parole board to deny him a parole. The cases concerning the granting or denial of parole to a prisoner are uniform in declaring that parole is a matter of legislative clemency and grace. Denial of parole is not a violation of a prisoner's rights, and does not raise a federal question. A major purpose of parole acts, like indeterminate sentence acts, is to permit individual treatment of offenders according to the best judgment of the paroling authority, so the fact that other prisoners have been granted parole affords no basis for a complaint by a prisoner when parole is denied to him.

35 F.2d at 448.
398 F.2d 481 (9th Cir. 1968).
Richardson v. Rivers, 335 F.2d 996, 999 (D.C. Cir. 1964).
Padilla v. Lynch\textsuperscript{37}

Padilla and his co-defendant received identical sentences of six to ten years. After 31/2 years of imprisonment, the co-defendant was granted parole, whereas after 71/2 years Padilla remained in prison. Padilla alleged that the reason he was denied parole was because he refused to divulge information about criminal activities of other prisoners. He brought this action under the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgments Act, 28 U.S.C. § 2201, contending that by the action of the Adult Authority in denying him parole, he was denied equal protection of the laws, contrary to the fourteenth amendment, and asking for declaratory and injunctive relief.

The court of appeals affirmed the judgment of the district court that Padilla failed to state a claim upon which relief could be granted and dismissed his petition. The reasoning of the court was that since parole is a form of custody, citing Jones v. Cunningham,\textsuperscript{38} Padilla's complaint was that the Adult Authority had refused to transfer him from one form of custody to another. The court, citing Stiltner v. Rhay,\textsuperscript{39} continued, "This is not sufficient to state a claim under the Civil Rights Act, because it does not allege a violation of a right secured by the Constitution or statutes of the United States."\textsuperscript{40}

Judge Browning wrote a dissenting opinion in which he criticized the position of the court as to the relation of parole and incarceration. He said,

The reasoning appears to be that since parole like incarceration "is a form of custody," nothing of significance occurs when a change from one to the other is granted or refused, and therefore the denial of parole to plaintiff in this case could not have violated any of his constitutional rights thereby giving rise to a claim under the Civil Rights Act.

In the real world incarceration and parole are vastly different conditions. The parolee's status, whatever its limitations, has far more in common with liberty than with imprisonment. When the State grants, denies, or revokes parole it takes action which directly and significantly affects the personal freedom of the accused, and the State violates the Fourteenth Amendment whenever this action is arbitrary, basically unfair, or invidiously discriminatory.\textsuperscript{41}

Browning's opinion in this case, like his opinion in Sturm, points

\textsuperscript{37} 398 F.2d 481 (9th Cir. 1968).
\textsuperscript{38} 371 U.S. 236 (1967). The question involved in this case was whether a parolee was "in custody" so as to be qualified to petition for a writ of habeas corpus.
\textsuperscript{39} 322 F.2d 314 (9th Cir. 1963). This case held that the Civil Rights Act protects only rights secured by the Constitution and statutes of the United States, but did not involve parole.
\textsuperscript{40} 398 F.2d at 482.
\textsuperscript{41} Id. at 483.
out that the court is answering a contention by the prisoner that an administrative agency has violated his constitutional rights in the exercise of its powers by simply reaffirming the agency's powers, ignoring the possibility that the agency could carry out its functions in an unconstitutional manner. Again, there is implicit in the court's opinion a denial of the validity of the principles announced in Talley v. Stephens in its refusal to consider the main issue: Was there an unconstitutional abuse of discretion on the part of the Adult Authority? Furthermore, the court's position that parole and incarceration are simply two different forms of custody is considerably weakened, and Browning's position is conversely strengthened, in light of the rule that upon revocation of parole, credit for time spent on parole need not be employed to diminish the length of the remaining term.

Obviously, there is quite a difference between parole and incarceration.

Revocation of Parole

The cases involving revocation of parole are less consistent than those involving the other two administrative actions under consideration. It is generally stated that a parole board has wide discretion as to parole revocation, that judicial review with respect to a finding of parole violation is narrow and limited, that official revocation of a parole is presumptively legal, that questions concerning the existence of parole violations and the sufficiency or reliability of information upon which revocation of parole was based are matters within the informed judgment and discretion of the parole board, and that a court may not determine these matters anew or substitute its judgment for that of the parole board. Perhaps the most commonly used phrase is that revocation of parole is within the discretion of the parole board as long as the members of the board are not acting capriciously. Although there are cases to the contrary, the

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43 Postelwait v. Willingham, 365 F.2d 759, 760 (10th Cir. 1966); Doherty v. United States, 280 F.2d 35, 37 (9th Cir. 1960).
45 Richardson v. Markley, 339 F.2d 967, 970 (7th Cir.), cert. denied, 382 U.S. 851 (1965).
48 Freedman v. Looney, 210 F.2d 56, 57 (10th Cir. 1954); see Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946) (board cannot exercise uncontrolled dis-
weight of authority seems to be that parole revocation must be based on evidence of a violation of conditions of parole or the commission of a new crime, and the mere conclusion that the parolee is no longer a good parole risk is insufficient. However, acquittal by a court of the new crime is not binding upon the parole board, and revocation may, nonetheless, be based on evidence of the commission of that crime. It must be remembered that parole is statutory in that parole has neither existence nor incidents except as statutes creating it provide, and the conflict among the cases is to some degree a reflection of the differences among the parole statutes.

This consequence is especially apparent in the area of procedural safeguards which are deemed necessary to protect the rights of a parolee in the revocation of his parole. The most important difference is between those statutes which require that the parolee be given “an opportunity to appear,” generally before the board, a member thereof, or a designated representative, before his parole is revoked, and those statutes which have no such provisions. It is generally accepted that a court hearing is not required for parole revocation, nor is confrontation of the parole board’s witnesses or sources of information required. It is also generally accepted that assigned counsel and compulsory process for witnesses need not be provided for the parolee at a parole revocation hearing. Where the parolee disregarding facts or refusing to hear arguments); cf. United States ex rel. Howard v. Ragen, 59 F. Supp. 374, 378 (N.D. Ill. 1943) (capricious exercise of power by parole officer violated due process).


52 Wright v. Settle, 293 F.2d 317, 318 (8th Cir. 1961).


statute does not require “an opportunity to appear” it has been held that parole revocation without notice or a hearing is constitutional.\textsuperscript{57} although notice, hearing, and reasonable opportunity to rebut charges are recommended to decrease the burden of judicial review.\textsuperscript{58} Even where a hearing is guaranteed by the parole act, it has been held that the right thereto is purely statutory, and not constitutional.\textsuperscript{59} But when “an opportunity to appear” has been guaranteed by statute, the better-reasoned cases hold that this includes the right to have retained counsel at the parole revocation hearing,\textsuperscript{60} to present voluntary witnesses,\textsuperscript{61} and to have a hearing take place within a reasonable time\textsuperscript{62} and in the district of the alleged violation\textsuperscript{63} to ensure availability and competency of sources of information. Within the context of this judicial history, the Ninth Circuit Court of Appeals decided \textit{Eason v. Dickson}.\textsuperscript{64}

\textbf{Eason v. Dickson}

Eason was convicted of robbery and received the indeterminate sentence of five years to life. He was paroled seven years later by the Adult Authority. After two years his parole was suspended, he was returned to prison, and his term was refixed to life. Within a year a parole violation hearing was held. Eason pleaded not guilty but was not allowed by the Adult Authority to give evidence, to call witnesses, or to have an attorney. The Adult Authority found that he had violated the conditions of parole, and revoked it. Eason then brought suit under the Federal Civil Rights Act,\textsuperscript{65} seeking damages and injunctive relief, contending that the California state statutes which govern parole revocation are unconstitutional because they do

\textsuperscript{57} Curtis v Bennett, 351 F.2d 931, 933 (8th Cir. 1965); \textit{In re McLain}, 55 Cal. 2d 78, 85, 357 P.2d 1080, 1085, 9 Cal. Rptr. 824, 829 (1960), cert. denied, 366 U.S. 10 (1961).
\textsuperscript{58} \textit{In re Gomez}, 64 Cal. 2d 591, 594 n.1, 414 P.2d 33, 35 n.1, 51 Cal. Rptr. 97, 99 n.1 (1966).
\textsuperscript{59} \textit{United States ex rel. Harris v. Ragen}, 177 F.2d 303, 304 (7th Cir. 1949).
\textsuperscript{61} \textit{Boddie v Weakley}, 356 F.2d 242, 244 (4th Cir. 1966); \textit{Fleming v. Tate}, 156 F.2d 848, 849-50 (D.C. Cir. 1946).
\textsuperscript{64} 390 F.2d 585 (9th Cir. 1968) (Chambers, Hamlin, Koelsch, J.J.).
not provide for a court hearing. Eason also contended that the
redetermination of his sentence to life imprisonment constituted
"multiple punishment."

The court met the second contention by reaffirming the power
of the Adult Authority to redetermine a prisoner's sentence within
the limits of the original indeterminate sentence, and by stating that
such redetermination does not constitute a penalty, citing the Sturm
case. The objections to this line of reasoning have been covered in
the discussion of the Sturm case.

The court met Eason's contention that a court hearing is required
in order to revoke parole by saying:

This court was asked recently to pass on the constitutionality of the
California parole revocation procedure and the court concluded that:
"the appellant's contention has been tested in many litigated cases
and has always been rejected . . . ."

When a search through the cases is made to determine the original
time on which a court hearing is not required for parole revocation,
it turns up the following:

If the appellant's contentions were valid, the use by the states and
federal government of the beneficient practice of releasing prisoners
from the confines of the prison to the custody and supervision of pa-
role officers would be impracticable and would have to be abandoned.
The release from the confines of the prison would become substanc-
tially equivalent to the discharge of the prisoner from his sentence,
and if, as in the instant case, the parolee denied either the fact of the
violation or the legal sufficiency of the act alleged to be a violation of
parole, the prison authorities would be required, in a hearing before
a judge, with all the concomitants of a non-jury criminal trial, to jus-
tify their resumption of in-prison custody of their prisoner.

The argument of the court is based on practical rather than on
constitutional considerations. The theory seems to be that a court
hearing for parole revocation would take too long, that the parole sys-
tem would be so overburdened as to nullify its effectiveness. The
argument is one of expediency, and carries considerable force, since
the proposed effect of a requirement of a court hearing would result
in a drastic cutback in the number of prisoners being paroled. The
validity of this argument is further reinforced by the near unanimity
of the courts in rejecting the requirement of a court hearing for
revocation of parole, even in those jurisdictions which require an
opportunity to be heard. What is involved in a court hearing? Is

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66 CAL. PEN. CODE § 3060 grants the Adult Authority "full power to sus-
pend, cancel or revoke any parole without notice."
67 Eason v. Dickson, 390 F.2d 585, 587 (9th Cir. 1968).
68 See text accompanying notes 17-31 supra.
69 390 F.2d at 588, quoting Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir.
1967).
70 Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir. 1967).
71 See note 53 and text accompanying note 53 supra.
it possible to cut out the time-consuming elements and still come up with a procedure that will adequately protect the rights of the prisoner?

There seems to be no objection on the basis of expediency to the requirement of a hearing before the revoking authority, i.e., the parole board. The federal parole board holds such hearings and there is no evidence that they have been unduly overburdened. For the same reasons, there seems to be no objection to affording the parolee notice of the charges against him prior to the hearing. Besides a hearing and notice, the District of Columbia Circuit requires that the parolee be allowed to have retained counsel and to present voluntary witnesses at a parole revocation hearing, and such hearing must be held within a reasonable time and in the district of the alleged violation. An informal hearing of this kind, unfettered by technical rules of evidence (which seem to be the real basis for the rejection of a court hearing on the basis of expediency), nevertheless affords the parolee a great deal of protection and lends considerable aid to the parole board by ensuring a more complete, more accurate picture of the factors it must consider to reach its decision on whether or not to revoke. Furthermore, the requirement of such a hearing is not open to attack on the basis of expediency, because it is in operation in the District of Columbia with no evidence of an imminent breakdown in the parole system.

What, then, is the explanation for the general reluctance of the courts to require even a hearing for parole revocation, to say nothing of holding such a hearing within a reasonable length of time, and in the district of the alleged violation, with the assistance of counsel and the right to present evidence? The objections to such requirements must be based on the reluctance of the courts to abridge the discretion of the parole boards. The attitude seems to be that the legislature has set up panels of experts to administer the parole system; any interference with the discretion of these experts would constitute judicial interference with legislative and executive (i.e., administrative) functions. With respect to this attitude of the courts, the following is enlightening:

By the term “administrative discretion” is meant that the acts or things required to be done may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof and at times which, considering the circumstances and the subject matter, cannot be supplied by the Legislature itself. A statute is said to confer such discretion when it refers the commission or officer for the exercise of the power to beliefs, expectations, tendencies instead of facts, the commission or officer being usually instructed to act, or to do the things required when deemed “fit”, “proper”, “appro-

appropriate", "practicable", "necessary", "reasonable", or like terms. This
discretion includes all matters or things in which the ascertainment of
a fact is legitimately left to administrative discretion, which enlarges
as the element of future probability preponderates over that of pre-
sent condition . . . .

Given this explanation of the proper area for . . . administrative
discretion, the opinion of Chief Judge Bazelon in *Hyser v. Reed*
74 presents an appropriate resolution to the conflict between, on
the one hand, the principles announced in *Talley v. Stephens*,
75 and the appropriate procedural safeguards designed to assure adherence
to those principles, and on the other hand, the principle of adminis-
trative discretion. In that opinion Chief Judge Bazelon said that a
parole board performs two functions with regard to parole revoca-
tion: The first is the determination of whether or not there has been
a parole violation; the second is the determination of what to do about
it, once a violation has been found. In the performance of the second
function, the determination of what to do about a parole violation
once it is found, the exercise of discretion by the parole board is
particularly appropriate. It is at this stage that "the element of
future probability preponderates over that of present conditions,"
that decisions must be made "upon the basis of considerations not
entirely susceptible of proof or disproof," that the parole board must
refer to "beliefs, expectations, tenencies . . . to do the things re-
quired when deemed 'fit', 'proper', [or] 'appropriate'. . . ."

On the other hand, in the performance of the first function, the
determination of whether or not there has been a parole violation,
the exercise of discretion by the parole board is *not* particularly
appropriate. The "element of future probability" is not relevant.
The parole board must refer not to "beliefs, expectations, tendencies,"
but to evidence, to determine a fact which is as "susceptible of proof
or disproof" as any other fact sought to be established. It is in this
area that the procedural safeguards of a hearing with notice of the
charges, and the presence of counsel and voluntary witnesses, held
in the district of the alleged violation within a reasonable time, are
particularly appropriate, both for the protection of the prisoner's rights
and to aid the parole board in this determination.

Conclusion

Generalizations regarding the three cases do not come easily,
since the administrative action under attack is different in each case.
However, it is obvious that each case serves the same function in the
development of the law, that is, each reaffirms the earlier cases, the

old law. Aside from this, the only readily apparent similarity is that each case involves what Kadish calls "the deliberate abandonment of the legal norm after conviction";\textsuperscript{76} that is, the elimination of substantive and procedural standards to control the disposition of a person after he has been convicted of a crime. In other words, each one of these cases denies to some degree the principles in \textit{Talley v. Stephens}\textsuperscript{77} that the requirements of due process and equal protection follow persons convicted of crime into prison.

Kadish lists two reasons for this abandonment of the legal norm. One concerns the doctrine of administrative discretion, previously explored in the discussion of the \textit{Eason} case.\textsuperscript{78} The other is the conception that the discretion exercised (in redetermining sentence, in granting or denying parole, in revoking parole) consists merely of whether the administrative agency will extend leniency to the prisoner, which he may receive as a matter of grace, as a privilege, but never as a matter of right.\textsuperscript{79}

Perhaps the most important reason why the courts have adopted this position is to counter the argument that the exercise of discretion by an administrative agency in the three functions under consideration is unconstitutional because the prisoner's sentence is uncertain, or because such exercise of discretion is an invalid delegation of the power to punish. That is, the courts counter such arguments by asserting that, for example, an indeterminate sentence is really for the maximum, and that any reduction is a matter of grace or leniency, that such reductions are a privilege, not a right. But it must be recognized that whether the grant of parole or the reduction of sentence is a right or a privilege is irrelevant. The purpose of parole and indeterminate sentences is to permit individual treatment of the offender.\textsuperscript{80} This purpose "rests principally not upon the sentiments of grace and charity, but upon the premise that the treatment of individuals and the prevention of crime through the use of the criminal law can better be accomplished through accommodation of the kind and duration of authoritative disposition to the relevant characteristics of the offender."\textsuperscript{81}

Thus the courts are caught in a dilemma. Because of the con-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Azeria v. California Adult Authority, 193 Cal. App. 2d 1, 5, 113 Cal. Rptr. 839, 842 (1961).
\end{enumerate}
\end{footnotesize}
institutional requirements of definiteness of sentence, they are bound by the concept of parole and reduction of an indeterminate sentence as a privilege, a matter of grace. But this obscures the real purpose of parole and indeterminate sentencing, and blocks any advancement in the law to a full realization of the principles in *Talley v. Stephens*.\(^8\)

The only solution seems to be a case which presents something close to Judge Browning's hypothetical. That is, presented with an obvious abuse of discretion on the part of a parole board, the courts would be forced to abandon the right-privilege facade, and face the issue of what standards are necessary for the protection of the rights of the prisoner against the abuse of administrative discretion.

*J. P. M.*

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I. Discrimination in Prison—Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967).

An action was brought by a Negro inmate of a federal penitentiary in Washington to enjoin practices of prison officials which resulted in "segregation in the housing of inmates and discrimination in work and other program assignments."\(^1\) According to prison policy, an inmate was permitted to request an assignment to a specific cell, but before he could be transferred there the assignment had to be consented to by all the inmates of the cell requested. This policy created a situation whereby a Negro prisoner could be subjected to racial prejudice by white inmates of the cell to which the Negro had requested transfer. It was alleged that this policy resulted in de facto segregation of prisoners. On these facts the federal district court rendered summary judgment for the defendants, and the plaintiff prisoner appealed.

After the filing of the action in the lower court, a policy statement was issued by the Associate Warden of the prison:

POLICY:—With due consideration and respect for the rights and privileges of all, irrespective of race, religion, or national origin, there shall be no distinction made when assignment is made to housing, work, and other program areas.\(^2\)

After the issuance of this statement, the plaintiff was given an integrated job assignment. The practice as to housing, though, continued as before. Taking into consideration the changes that had

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\(^1\) Toles v. Katzenbach, 385 F.2d 107, 108 (9th Cir. 1967).

\(^2\) Id.
come about since the filing of the complaint, the Ninth Circuit in an opinion written by Judge Merrill and joined by Judge Pope, affirmed the decision of the lower court. The court concluded that the policy statement rendered moot any claims made prior thereto and provided the plaintiff with the remedy he sought. If the statement was not adhered to, a new claim might arise. The court recognized, however, that segregation was not ended by the policy statement alone, for the prison officials continued to adhere to the housing policy of deferring to the wishes of inmates already quartered in a specific cell. It said, in addressing itself to this problem:

The question is presented whether this practice is to be tolerated. The answer depends not on whether segregation results, but whether there is acceptable reason for the practice.3

It determined that there was acceptable reason for segregation in housing, since the practice was founded on interests of harmony, security, and compatibility.

Judge Browning dissented from the decision of the other two judges and concluded that the district court was wrong in rendering summary judgment for the defendants. He stated that there was no indication that racial segregation was required to meet the needs of prison security and discipline and that more justification was needed than the policy statement of the Associate Warden. Whether the practices which preserved segregated cells were justifiable was a question that could only be determined by a hearing by the trial court.

It is clear that prisoners are not entitled to all the rights accorded ordinary citizens. An often quoted statement4 on this issue is that written by Justice Murphy in the Supreme Court case of Price v. Johnston:5 "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.6 In the interest of promoting prison discipline and security, prisoners are denied rights or limited in their exercise of rights which they would have outside of prison as a matter of course under the Constitution. Among the rights and privileges that are recognized to be subject to restriction by prison authorities are the right to use the mails,7 the

3 Id. at 110.
5 334 U.S. 266 (1948).
6 Id. at 285.
7 E.g., Schack v. Wainwright, 391 F.2d 608 (5th Cir.), cert. denied, 390
right of access to materials for the preparation of legal petitions, and the right to exercise freedom of religion. Courts have said that they do not have the power to investigate and supervise matters of internal prison discipline but that such matters are within the discretion of prison authorities. This view has been criticized, but it seems generally agreed that, except in extreme situations, courts will not interfere with prison supervision and that they will give


great weight to the discretion of prison officials on these matters.\textsuperscript{13}

On the other hand, it is also well settled that rights and protections under the law are not entirely lost by imprisonment.\textsuperscript{14} Incarceration does not require the forfeiture of all rights, and included in the rights retained by a prisoner are the constitutional rights of due process and equal protection.\textsuperscript{15} Some courts have emphasized the rights of prisoners and have adopted the view that prisoners retain all the rights of citizenship except those expressly or impliedly taken by law.\textsuperscript{16} In spite of the "hands-off"\textsuperscript{17} attitude of courts generally where prison administration is concerned, courts will intervene to remedy extreme situations where the rights of prisoners are violated.\textsuperscript{18} The court in \textit{Toles v. Katzenback}, then, had to weigh the merits of two opposing attitudes—one urging abstention by the courts in matters of prison supervision and the other urging intervention where the rights of prisoners are violated.

Complexity was added to the problem before the court by the fact that the right alleged to be violated was the right of freedom from racial segregation. Since the Supreme Court handed down the case of \textit{Brown v. Board of Education},\textsuperscript{19} in which it declared segregation in public schools to be unconstitutional, the spirit of that case has been applied to various situations involving public facilities.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{17} \textit{See Comment, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts}, 72 Yale L.J. 506 n.4 (1963).
\item \textsuperscript{19} 347 U.S. 483 (1954).
\end{itemize}
The law is now settled that racial discrimination in the operation of any public facility is unconstitutional. The unconstitutionality of racial discrimination applies to the operation of prisons just as it does to other public facilities. The problem remains, however, whether racial separation is permissible in prisons where it furthers security and does not amount to racial discrimination.

The importance of distinguishing between racial discrimination, which is clearly unconstitutional, and racial separation, which is not necessarily unconstitutional under certain circumstances, was shown most recently by the Supreme Court case of Lee v. Washington. In that case an action was brought, as in the Toles case, by a prison inmate to enjoin alleged racial discrimination by prison authorities in the administration of the prison where the plaintiff was incarcerated. Alabama statutes required segregation of prison facilities, and the federal district court declared that these statutes were unconstitutional and set up a time schedule for desegregation of the prison. On appeal to the Supreme Court the order of the lower court was unanimously affirmed. It was claimed that the order did not allow for necessities of prison discipline, but this claim was found to be without merit. In a concurring opinion, however, Justices Black, Harlan, and Stewart indicated that racial separation would not necessarily be a violation of the Constitution in every situation. They stated, "[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."

It is evident that the problem before the court in Toles v. Katzenbach was an extremely difficult one, to be determined on the facts of (parks); Holmes v. Atlanta, 350 U.S. 879, rev'd 223 F.2d 93 (5th Cir. 1955) (golf courses); Mayor & City Council v. Dawson, 350 U.S. 877, aff'd 220 F.2d 386 (4th Cir. 1955) (beaches).


each individual case. Prison officials are obviously in the best position to determine what measures are necessary for the maintenance of prison security and discipline. Despite the superior knowledge of prison officials, though, courts should not tolerate the denial of basic rights to prisoners where that denial is not grounded on considerations of prison security and the necessities of the execution of sentence. The court in *Toles* was confronted with the problem of weighing the desirability of these two attitudes and thereby determining how far courts should inquire into matters of prison maintenance and discipline to determine whether a condition which limits or denies rights to prisoners is capricious and discriminatory or justifiable in the light of conditions of the prison community.\(^\text{28}\) The basis for making this determination is indicated by the case of *Edwards v. Sard*,\(^\text{29}\) a case closely analogous to the *Toles* case. There, Negro inmates at Lorton Reformatory in Virginia brought an action for injunctive relief on a claim of racial discrimination in dormitory assignments. The federal district court said that racial discrimination by public authority could not be tolerated but, nevertheless, refused to enjoin racial imbalance. The court relied heavily on the fact that, in the opinion of reformatory officials, integration of all the housing facilities would be highly dangerous.\(^\text{30}\) Segregation, then, was permissible where it was required under the facts for the maintenance of prison security.

The grounds for the decision in *Edwards v. Sard* indicate the criterion for determining whether segregation in a given prison situation is permissible. In order to avoid an unconstitutional infringe-

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\(^\text{28}\) The problem before the court was summed up well in United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 12 (E.D. Pa. 1965): “Prison discipline is essential and certain rights must be curtailed in order to achieve it. But somewhere alone [sic] the line there exists a still finer line that separates mere matters of discipline from arbitrary and capricious disregard of human rights. It is this line for which federal courts must diligently search while treading about in the twilight zone that separates interference with a state’s autonomy in policing its own penal system [autonomy of federal officials in *Toles*] from the enforcement of federally guaranteed rights.”


\(^\text{30}\) The court stated: “Although the race of an inmate is a factor—in some cases the determinative factor—in making dormitory assignments, this is so only because prison officials believe that anything approaching total numerical integration would be highly dangerous, given the conditions of racial unrest which exist at Lorton . . . . The dangers of prison life, the extreme complexity of the factors which must be considered in making dormitory assignments, and the consequent difficulties in handing down any decree favoring the plaintiffs in this case confirm the Court’s belief that safety and sound administrative practice demand that the opinions of conscientious prison supervisors be given great respect when challenges of this kind are made to them.” *Id.* at 981–82.
ment on a convict's rights, racial separation must be reasonably necessary for preserving prison security.\textsuperscript{31} It is recognized by courts that rights may be curtailed for the sake of maintaining order, but rights cannot be capriciously disregarded, and their curtailment must always reasonably relate to prison discipline.\textsuperscript{32}

Whether the Toles decision is a correct one depends on whether prison practices resulting in segregation were reasonably necessary in maintaining order. The Ninth Circuit stressed the justification for the practices complained of. It said:

The practice is founded on interests of harmony, security, and the compatibility of prisoners confined for long terms—all matters of vital concern in prison operation. The practice in our judgment is a reasonable means of furthering these interests. Under this practice the fact that the interests are directly involved in a particular case is not left to assumption based upon experience gained in other cases, but is assured by inquiry in each individual case.\textsuperscript{33}

In deciding whether practices complained of were acceptable in the circumstances of the case, the court concluded, "The record answers this decisively."\textsuperscript{34} As Judge Browning pointed out in his dissent, however, all that was shown by the record was the promulgation of the policy statement to the effect that assignments would be made in housing and work without regard to race. This statement, though, did not solve the problem complained of by itself. It did nothing to alleviate the segregation problem caused by deferring to the wishes of prisoners already living in specific cells before other prisoners could be transferred there, and it disclosed no evidentiary basis for concluding that the necessities of prison life demanded segregation under the particular circumstances of the case.

The appellant prisoner alleged that in the three years he had been in prison there had been no integrated cellhouses and that he had been in a segregated cell since that time, although racially allocated assignments were to continue only for the first three months of imprisonment.\textsuperscript{35} Despite these allegations the district court found for the defendants in a summary judgment. From the evidence disclosed by the opinion of the circuit court, it would seem that there

\textsuperscript{31} The criterion of necessity was offered by the American Law Institute in its Model Penal Code § 306.1(1) (a) (Proposed Official Draft, 1962): "(1) No person shall suffer any legal disqualification or disability because of his conviction of a crime or his sentence on such conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is:
(a) necessarily incident to execution of the sentence of the Court . . . ."


\textsuperscript{33} Toles v. Katzenbach, 385 F.2d 107, 110 (9th Cir. 1967).

\textsuperscript{34} Id.

\textsuperscript{35} Id. at 110-11 (dissenting opinion).
was not proper justification for the practices complained of. As Judge Browning indicated, the proper course of action would have been to grant a hearing to determine whether practices giving rise to segregation were reasonably necessary to maintain order and security at the penitentiary. In such a hearing the opinions of prison officials should be entitled to great weight, and convincing proof of the necessity of segregation should not be required of them. Some justification, however, should be required. The evidence disclosed by the written opinion seems insufficient to justify a denial of the rights alleged to have been violated by the position of the prison authorities.

The decision in *Toles v. Katzenbach* is in accord with the attitudes expressed by the Ninth Circuit in prior decisions. Past decisions have recognized that prisoners have at least some constitutional rights and that among these are the rights of due process and equal protection. At the same time, though, the Ninth Circuit has also recognized the wide discretion to be accorded prison authorities in limiting convicts' rights in the interests of proper prison administration. The most commonly recurring attitude on this intricate problem is the assertion that it is not the function of courts to supervise the treatment and discipline of prisoners. Such a reluctance to intervene where matters of prison discipline and security are concerned indicates that in the future the Ninth Circuit will be likely to continue to be willing, except in extreme cases, to leave matters of

30 See cases cited note 14 supra.
37 The requirement of convincing proof from prison officials was advocated by a note on *Toles v. Katzenbach* in 46 Tex. L. Rev. 800, 804 (1968).
38 Comment, *The Rights of Prisoners While Incarcerated*, 15 Buff. L. Rev. 397, 417-18 (1965), where the author stated: “It must be recognized that segregation of prisoners, when based upon actual probabilities of violence or breach of prison discipline, are [sic] valid and necessary. But segregation for its own sake is suspect, and reasons for such treatment should be required of prison officials.”
39 Mason v. Cranor, 227 F.2d 557, 560 (9th Cir. 1955).
40 DeWitt v. Pail, 366 F.2d 682, 685-86 (9th Cir. 1966); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert. denied, 376 U.S. 920 (1964); Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir.), cert. denied, 368 U.S. 862 (1961).
41 Egan v. Teets, 251 F.2d 571, 576 (9th Cir. 1957).
42 Snow v. Gladden, 338 F.2d 999, 1001 (9th Cir. 1964); Weller v. Dickson, 314 F.2d 598, 602 (9th Cir.) (concurring opinion), cert. denied, 375 U.S. 845 (1963).
43 Hatfield v. Bailleaux, 290 F.2d 632, 640 (9th Cir.), cert. denied, 368 U.S. 862 (1961); Oregon ex rel. Sherwood v. Gladden, 240 F.2d 910, 911 (9th Cir. 1957); *In re Taylor*, 187 F.2d 852, 853 (9th Cir.), cert. denied, 341 U.S. 955 (1951); Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.), cert. denied, 342 U.S. 829 (1951); Taylor v. United States, 179 F.2d 640, 643 (9th Cir. 1950). See generally Fleming v. Klinger, 363 F.2d 378 (9th Cir. 1966); United States v. Marchese, 341 F.2d 782, 789 (9th Cir.), cert. denied, 382 U.S. 817 (1965).
prison administration to prison officials, despite the possibility of unreasonable restrictions on the rights of prisoners by such a policy of abstention.

M. S. C.