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Notes and Abstracts

NOTES AND ABSTRACTS

Suggested Reforms in California Criminal Law and Procedure—Submitted by C. G. Vernier, Stanford University.

To the California Crime Commission:

The following changes in the criminal law and procedure of California are suggested because they are believed to be desirable and without regard to present constitutionality or political expediency.

1. ASSAULT

Amend P. C. 240 to omit from definition of assault "coupled with a present ability."

Actual present ability not needed at common law, nor by statute in most states. Should be omitted because it has nothing to do with the intent of defendant or harm to the victim or the state.

See 2 Bish. New Crim. Law (9th ed.), sec. 32.

2. ASSAULT

Even if P. C. 240 is not changed P. C. 417 should be amended to punish threatening use of an unloaded gun. At present punishment is provided only for threatening use of "deadly weapon . . . in the presence of two or more persons."

3. BIGAMY

Amend P. C. 282 to make bona fide and reasonable mistake of fact or law a defense.

This is the English rule and should be the rule in all cases of felony.

References:

1 Bish. New Crim. Law (9th ed.), sec. 291b.
13 Harv. L. Rev. 50.
3 Harv. L. Rev. 180.
3 Calif. L. Rev., at 452.
27 L. R. A. (N. S.) 1097.
7 Calif. L. Rev. 1.

4. JEOPARDY

Jeopardy should not apply until final verdict on the merits.

Present rule too favorable to the accused and favors the release of guilty parties on technicalities. Properly construed jeopardy rule forbids being *tried* twice for same offense. There has been no trial until verdict rendered. Suggested rule is already followed in some states and adopted by the Miss. Constn. of 1890.

References:

11 Jour. Crim. Law 344, at 360 (Millar on *"Modernization of Criminal Procedure")*.
9 J. Am. Jud. Soc. 136 (same article).

Contra argument:

1 Bish. New Crim. Law (8th ed.), sec. 1019.

5. JEOPARDY—Effect of grant of new trial

Where verdict is set aside on motion for new trial or appeal by defendant entire case should be reopened: e. g.—on trial for murder and conviction of manslaughter, entire question of guilt should be open on new trial.

Reference:

Calif. B. A. Proc., 1926, p. 248 and p. 192. Approved by Calif. Bar Assn.

6. MURDER

Amend P. C. 187 to eliminate malice aforethought in murder.

This has been done in Dakota, Florida and New York and in New Indian Penal Code. See excellent argument in 167 Kentucky 365. Term is misleading, technical and confusing. Murder is in reality the killing of a human being without legal justification or excuse, and under circumstances insufficient to reduce the crime to manslaughter. See 2 Stephens, *"History of Crim. Law of Eng.,"* 119.

7. MURDER

P. C. 188—should be amended to eliminate the suggestion of implied malice "when the circumstances attending the killing show an abandoned and malignant heart." See No. 6.

S. v. *McGuire*, 38 L. R. A. (N. S.) 1045, and note.

Turner v. *Comw.*, 167 Ky. 365.

10 U. of Illinois Bul. No. 34 (Prof. Green).

(Professor Green: "It has been said that legislatures and trial judges may no longer torture prisoners, but they keep on torturing the English language.")

8. SOLICITATION

A section should be added to Penal Code making solicitation to commit crime (at least in case of felonies) criminal. At present solicitation seems to be criminal only in certain specific cases, leaving uncovered certain more important ones. California seems to be unique in this regard.

9. SELF-DEFENSE

Amend P. C. 197, cl. 3, by substitution of mutual for mortal. See commissioners' note. Term "mortal combat" as there used is a misprint and makes a rule unknown to common law of any other state.

10. LARCENY—of goods rescued

P. C. 500—amend to eliminate "in the city and county of San Francisco." If conversion of goods rescued is to be criminal it should apply to state generally. Section as it stands is of doubtful constitutionality.

11. PROCEDURE—Stay of execution

There should be no stay of execution on appeal except in capital cases or unless ordered by court to which appeal is taken.

Calif. B. A. Proc., 1926, p. 248 and 192. Approved by Bar Assn.

12. VERDICT

Allow ¾ (or ⅚ or 11/12) verdict except in case of death penalty or life imprisonment. Arguments on this are too well known to need repetition.

See:

Calif. B. A. Proc., 1910, p. 16-18.
Calif. B. A. Proc., 1911, p. 14-28.
Calif. B. A. Proc., 1912, p. 27-38.
Calif. B. A. Proc., 1913, p. 141-2.
Calif. B. A. Proc., 1921, p. 133-5. Approved by Calif. Bar Assn.
2 Jour. Am. Jud. Soc. 177 (Favored).
1 J. C. L. 465-6 (note).
13 J. C. L. 298-300 (note).
13 Univ. of Ill. Bul. No. 34 (Judge Harker).
11 J. C. L. 355 (Prof. Millar).

13. PROCEDURE—Rules of Court

Authorize Judicial Council to make rules of procedure in criminal cases (even to extent of changing present statutory rules).

See 55 S. F. Rec. 10, Jan. 23, 1928 (editorial and references).

14. PROCEDURE—Comment on defendant's failure to testify.

Both court and counsel should be permitted to do this.

Allowed Ohio Constn., 1914.

Jury is bound to consider this and properly restrained argument should be permitted.

See:

11 Journ. Crim. Law 351 (Millar).
5 Journ. Crim. Law 923-5 (note).
Calif. B. A. Proc., 1910—p. 17-21.
Calif. B. A. Proc., 1911—p. 162- 6.
Calif. B. A. Proc., 1916—p. 297- 8.
Calif. B. A. Proc., 1919—p. 92- 3, 194.
Calif. B. A. Proc., 1921—p. 210.
Calif. B. A. Proc., 1926—p. 247 and p. 185. Approved by Bar Assn.

15. PROCEDURE—Waiver of Jury Trial

Permit waiver of jury trial where both defense and prosecution so desire.

Calif. B. A. Proc., 1926, p. 185, 247 (Approved by Bar Assn.).

16. VENUE

People should have right to change of venue.

Calif. B. A. Proc., 1919, p. 195 and p. 93 (Approved by Bar Assn.).

17. PROCEDURE—Comment by trial judge on evidence.

This should be permitted as at common law.

Permitted in Mich. in 1927. (See S. F. Recorder, Oct. 13, 1927.)

See also:

2 Marquette Law Rev. 67-72 (Hoyt, 1927).
Calif. B. A. Proc., 1910, p. 22, 3.
Calif. B. A. Proc., 1911, p. 38- 51.
Calif. B. A. Proc., 1913, p. 26- 7 (contra).
Calif. B. A. Proc., 1917, p. 231- 43.
Calif. B. A. Proc., 1919, p. 85-103.
Calif. B. A. Proc., 1924, p. 224- 40 (Bledsoe).
Calif. B. A. Proc., 1926, p. 185, 162 to 185, 247.
13 Journ. Crim. Law 507-13 (Meyers).

Calif. Bar Assn. has both approved and disapproved. Latest action favors this change in law.

18. JUDGES

Should be appointed, not elected.

Terms and salaries should be adequate. Not a popular proposal but a very important one in my opinion.

See:

10 Jour. Am. Jud. Soc. 177-83.

19. PROCEDURE—Alibi

Require defendant to give reasonable notice of alibi to be relied on.

Such is practice in Scotland.

This much abused defense needs to be checked in interest of truth and justice.

See:

Calif. B. A. Proc., 1926, p. 190 and 248. Approved by Bar Assn.

And see:

9 Jour. Am. Jud. Soc. 139.

20. POLICE

Provide for state police or constabulary.

The arguments for this are generally known. Those opposed are mostly political and based on fear.

See:

14 Journ. Crim. L. 544-55 (Bibliography of articles on State Police).
15 Am. Pol. Sci. Rev. 82-93 (Conover).
Fosdick—*"American Police Systems"* (1920).
Bruce Smith—*"The State Police"* (1926).
Calif. B. A. Proc., 1919, p. 86-95.
Calif. B. A. Proc., 1920, p. 118, 315-18.

21. STATISTICS

Provision should be made for a central state bureau for collection of statistics—with power to suggest forms of report and with penalties for failure to make required reports.

The need of more adequate statistics has long been felt. More statistics of a reliable sort are a fundamental requirement for a further study of causes and repression of crime. References are legion. Here are a few:

Koren—*"Things We Don't Know about Crime,"* 13 Jour. Crim. Law 446-52.
Robinson—*"History and Organization of Criminal Statistics in U. S."*
Gault—*"First Steps in Developing a System of Criminal Statistics,"* 10 Jour. Crim. Law 485-9.
"The Proposed Illinois Bureau of Criminal Records and Statistics," 12 Jour. Crim. Law 518-28.
1927—U. S. Census Bureau Pamphlet—*"Instructions for Compiling Criminal Statistics."*
Calif. B. A. Proc., 1923, p. 68 and 225 (Approved by Bar Assn.).

22. PSYCHOPATHIC LABORATORIES

Provision should be made in increasing measure for expert study of crime and criminals. There should be a state bureau with assignment of services to

places where most needed, especially larger cities and penal institutions. There should be no probation or parole without expert examination and report. If criminology is a science, provision must be made for expert study. Recent developments point to an increasing use of this proposal.

See:

O'Neill—*"A Plea for the Complete Medical, Psychological and Psychiatric Examination of All Persons Accused of Crime."*
1927, Proc., Int. Assn. Chiefs of Police, p. 156-61.
36 Yale Law Jour. 632-48 (Glueck).
47 Am. B. A. Rep. 629-33 (Adler).
13 Journ. Crim. Law 74-81 (Healy).
16 Journ. Crim. Law 602- 6—Bibliography.
Calif. Bar A. Proc., p. 224.
10 Journ. Crim. Law 143-4 (San Quentin).
8 Journ. Crim. Law 113-5.
8 Journ. Crim. Law 362-4 (Adler).
2 Journ. Am. Jud. Soc. 67 (Editorial).
5 Journ. Crim. Law 840-50 (Anderson).
7 Journ. Crim. Law 21- 5 (Jacoby).
4 Jour. Am. Jud. Soc. 24-31 (Olson).
9 Journ. Crim. Law 279-82 *("Report of San Francisco Com. for the Advancement of Medico-psychological Examinations of Adult and Juvenile Delinquents").*
13 Journ. Crim. Law 485-93 (Shepherd).
36 Har. L. Rev. 333-7 (note).

23. JAILS—Penal Farms

Provide that all persons now sentenced to jails for more than 30, 60, or 90 days shall be sent to central penal farms. It is hard to find any one who will say a good word for jails today. Their use should be confined to temporary detention.

See:

17 Journ. Crim. Law 626-39, Selected Bibliography on Farm Colonies for Misdemeanants.
Queen—*"The Passing of the County Jail"* (1920).
1916, Report of State Board of Charities and Corrections on Calif. Jails.
"The County Jail Must Go," 14 Jour. Crim. Law 151-4.
7 Journ. Crim. Law 379-92 (Cross).
3 Journ. Crim. Law 299 *("Movement for Industrial Farm in Calif.").*

24. INSANITY

Provide for routine examination of certain arrested persons prior to trial with Mass. law of 1921 as model. For comment and suggested improvements see:

16 Ill. Instn. Quarterly, p. 10 (June, 1924).
14 Journ. Crim. Law 573.
7 Journ. Crim. Law 573-88 (Glueck).
7 Journ. Crim. Law 614- 6.
1 Journ. Crim. Law 858-67 (Kinberg on *"Swedish Practice").*

25. INDEMNIFICATION

Provide indemnification under proper safeguards for persons erroneously convicted. Justice requires that some effort be made to compensate the innocent victims of our defective system of justice. The need for this becomes greater as the enforcement of the criminal law is strengthened and rights of the accused diminished.

See:

Borchard—*"European Systems of Indemnification,"* 3 Jour. Crim. Law 648-718.
3 Jour. Crim. Law 665- 7 (Editorial—Wigmore).
4 Jour. Crim. Law 589-70 (note).
2 Jour. Crim. Law 767- 8 (note).
3 Jour. Crim. Law 108 (note).
2 Jour. Crim. Law 912 (note).
39 Am. Bar Assn. Rep. 1121-2.

26. COURTS—Municipal vs. Police

Provide for mandatory abolition of police courts and substitution of municipal courts in larger cities. Have worked well in Chicago, Cleveland and New York. Advantage of better qualified judges, more dignity, higher jurisdiction and better salaries. Also chance for central organization and specialization.

See:

Calif. B. A. Proc., 1924, 157-64.
Calif. B. A. Proc., 1924, 251- 6 (Approved by Bar Assn.).

27. COURTS. Family Courts or Courts of Domestic Relations

Should be branch of Mun. Ct. if No. 26 adopted. See No. 26. Special courts should be provided in large cities. Needed to relieve congested court calendars. More efficient in handling divorce and juvenile cases. Have worked well elsewhere.

See:

Calif. B. A. Proc., 1924, p. 248-64.
Waite, *"Proc., Nat. Prob. Assn.,"* 1921.
Smith, *"Justice and the Poor,"* p. 73-83.
3 Jour. Am. Jud. Soc. 19-21.
9 Jour. Crim. Law 187-92.
1 Jour. Crim. Law 928.
8 Jour. Crim. Law 745- 8.
10 Jour. Crim. Law 409- 22.
3 Jour. Crim. Law 400-406.
8 Jour. Crim. Law 273.
3 Jour. Am. Jud. Soc. 3.
1919, Proc., Nat. Prob. Assn. *("Report of Com. on Courts of Domestic Relations").*

28. DIVORCE PROCTOR

Should not some provision be made to put an end to the orgy of collusion and perjury in divorce cases?

29. WITNESSES—Non-resident

Suggest a study of the law to secure compulsory attendance of non-resident witnesses—drafted by the Commissioners on Uniform State Laws.

See:

1927, Handbook, p. 913-18 (copy of final draft).
1920, Calif. B. A. Proc., 105-18, 311, 241-44.

30. COMPROMISE OF CRIME

Should be regulated.

See: Excellent article by Justin Miller—1 So. Calif. L. Rev. 1-31.

31. PUBLIC TORTS—Reclassification of Crimes

With the immense growth of minor statutory regulations, the number of criminal misdemeanants has become so large as to include most of the population. The proper administration of the law is impeded thereby. It seems hopeless to advocate repeal of these laws. In my opinion they will increase in number rather than diminish.

In order to divide the population more clearly into a criminal and non-criminal class, would it not be advisable to drop from the criminal classification, many of these minor statutory regulations, not involving moral turpitude and classify them as public torts and provide for a separate system of enforcement. To do this would be a big undertaking but it seems to me one that might be worth while.

32. RECOVERY OF CIVIL DAMAGES IN CRIMINAL PROSECUTION

Suggest a study be made of the system by which this is done in France, the Philippines, and various foreign countries.

See:

Millar—*"The Modernization of Criminal Procedure,"* 11 Jour. of Crim. Law 347-50.

79 Cen. Law J. 68, note.

25 Yale Law Jour. 282.

33. EMBEZZLEMENT

Amend P. C. 514 to provide it shall be a felony to embezzle a series of sums in one employment less than $200 each but amounting to that in total.

Calif. B. A. Proc., 1915, p. 154-7.

34. REASONABLE DOUBT

P. C. 1096-7. Should not this section be reworded to make it clearer to a jury?

Calif. B. A. Proc., 1912, p. 255-6.

Calif. B. A. Proc., 1912, p. 265-7.

35. JUVENILE COURT—Jurisdiction.

Amend Juvenile Court Law (Gen. Laws, 1925, Act No. 3966) to make it conform on the question of jurisdiction to the recommendation of the National Probation Association and the Children's Bureau—viz., to make the jurisdiction of the Juvenile Court exclusive, without power in the juvenile or the court to waive jurisdiction.

See Children's Bur. Pub. No. 121.

Letter of C. B. Wutries.

February 13, 1928.

The California Crime Commission,
Mr. Chris B. Fox, Secretary,
Tribune Tower,
Oakland, California.

Gentlemen:

In reply to your request that I offer some suggestions concerning measures that would improve the administration of criminal justice and reduce crime in California, I am submitting certain proposals concerning the law of evidence as applied in criminal cases which I believe would be of value. As to other phases of the subject, I prefer to let others who are better qualified to speak do so.

I

There should be a constitutional amendment authorizing the trial judge to give the jury his judgment on the weight of the evidence and the facts that it proves.

I realize that this is not a new suggestion and that the last legislature would not accede to it. However, I believe it so important that it should be continually pressed for adoption.

The arguments have been so recently before us that I do not intend to make any elaborate presentation of them. The following references are valuable: *"The Inefficiency of the Jury,"* 13 Mich. Law Rev. 302; *"Judicial Discretion,"* 90 Central Law Jour. 355, 356-8; Discussion, 43 Amer. Bar Assn. Rep. 344-356; *"Law of Evidence,"* by E. M. Morgan and others, Yale U. Press, 1927, pp. 9-21.

One or two things I cannot refrain from saying. The change in California would be, of course, simply a return to the orthodox English and federal practice. One argument against the use of the orthodox practice in American courts is that our trial judges are either too unbalanced or too corrupt to be trusted to give sound advice. That libel on the trial judges of the United States, I believe to be almost entirely untrue. If it were true, they now have too much power. Efforts to raise the present high standard of the bench are being made everywhere. All improvement may be stifled if we listen to the argument that any suggested reform must wait the adoption of some other improvement.

Shall we obtain sound verdicts through the supervision and advice of the judge, or shall we obtain unsound verdicts which must be set aside as often as need be until the verdict which should have been given in the first place is after much time and expense at last returned? The answer seems obvious. When you add that unsound acquittals cannot be set aside, the situation becomes compelling.

II

According to the Calif. Penal Code, sec. 1322, neither husband nor wife is a competent witness, if one spouse is a party to the case, except with the consent of both. There are some exceptions, principally for wrongs by one to the other, which narrow the operation of the rule. The question is, should not the rule itself be abolished? Let us assume that the husband is a party to the case with the wife offered as a witness and notice the results.

Under the rule the wife is incompetent to testify *for* the husband unless both consent. The husband will naturally consent in all but most unusual cases. If the wife consents the rule ceases to apply. It is then in the case of a wife unwilling to testify for her husband that she is shielded by a privilege. Does she need it? Why should she carry a quarrel with her husband to the point of injuring him by withholding truth in a criminal case? Surely no basis for retaining that phase of the rule exists. Obviously her evidence under such circumstances will not be too favorable to the husband.

Next, by the rule, the wife is incompetent to testify against her husband without joint consent. Naturally the husband will here usually object. Is there any sound ground for giving him such a privilege? There seems to be none. To give the wife a privilege sounds more plausible. There is perhaps a sentimental objection on her part: there is the more substantial objection that her husband, if and when freed, may mistreat her. The sentimental objection surely should not be considered and the danger of revenge is common to every witness that testifies against an accused. The intimate relationship may increase the danger here. However, when we consider that testimony by a wife which is the truth and which she is compelled to give should not anger the husband and probably would not except in rare cases and that the suppression of truth involved may be serious and prevent conviction, the balance seems heavily against the privilege.

According to *People* v. *Warner,* 117 Calif. 637 (1897), and *People* v. *Loper,* 159 Calif. 7 (1910), the provision of the Calif. Code of Crim. Proc., sec. 1881, that husband and wife are incompetent to testify to communications by one to the other without the consent of the other applies in criminal cases. Is this privilege a wise one? I doubt it. Often crimes are committed by the husband with the wife as accessory. In such a case it is simply protecting a criminal conspiracy when the present privilege is allowed. Often, though the wife is not a party to the crime, statements by the husband to her are most satisfactory evidence of his guilt. The protection of marital confidence seems a comparatively unimportant matter here. Marital confidence will probably continue about as it now exists even if there is no privilege. Few but lawyers ever heard of the privilege.

In the result I would suggest an entire abolition of any incompetency or privilege in criminal cases arising out of the marital relation. Other relationships survive without any such privilege: so will marriage.

See 2 Calif. Law Rev. 148; Wigmore, *"Evidence,"* 2nd ed., secs. 601-2, 2228, 2245, 2332-4. With regard to testimony to confidential communications between husband and wife, I am so far as I know alone in thinking the loss from the privilege greater than the gain in criminal cases. Its retention in civil cases is less objectionable. The two have seldom been separated in discussion.

III

The privilege of the defendant in a criminal case against self-incrimination is another with which I have little sympathy. Mr. Wigmore *("Evidence,"* 2nd ed., sec. 2251) has discussed it ably. References to other discussions are there given. They have been many. Mr. Wigmore's conclusion that it should be retained in order to keep prosecuting officers from relying on evidence forced from the defendant, I do not follow. This evidence is to be given in court and

it may be taken that, at this day, no torture or improper methods will there be used. At present many of the evils which Mr. Wigmore fears, actually flourish under sweat-box and third degree methods of pumping the accused. Much better to substitute for the latter his evidence in a public court under the eye of the judge.

It is difficult to say how far California can go without a constitutional amendment. Perhaps a constitutional amendment would carry in the present awakened state of public opinion. Possibly a statute permitting counsel to comment on the defendant's failure to testify and requiring the court to charge the jury that such failure raises an inference against him would be held constitutional. Ohio's experience seems to have proved that such a statute would drive substantially every defendant into the witness box. See 33 Law Quar. Rev. 54; 26 Yale Law Jour. 464.

The present privilege is seldom if ever availed of by the innocent. It simply screens the guilty. It also leads to much wasted breath at trials and much wasted effort in appellate courts. It is a source of delay as well as an obstacle to conviction. I have watched the operation of the French examination of the accused at the trial: it seemed to me both sensible and just. I saw nothing cruel or unreasonably harsh about it. But the abolition of this privilege by no means carries us to the continental procedure in criminal cases. It only means that the defendant may be called as a witness by the prosecution. That is substantially the situation now in those jurisdictions where his failure to take the stand is held to justify an inference against him (New Jersey, Maine, Ohio, England and perhaps others). He seldom dares to exercise his privilege. Perhaps that form of remedy is more likely of adoption and so should be proposed. I would provide that counsel may comment on the accused's failure to testify and that the judge on request of the prosecution must charge the jury that such an inference against the defendant is legitimate.

I have suggested the destruction of this privilege against self-incrimination, either directly or indirectly as may be most possible. But I agree with Mr. Wigmore that it should not be touched in its application to witnesses other than the accused or as protecting the accused at a preliminary hearing. Witnesses must not be driven to avoid witness-duty by making the witness box an inquisition. The accused at a preliminary hearing should be protected in order to avoid blackmail by petty officers or by persons with political power over such officers. See further: 2 Journal of Criminal Law and Criminology 870; 15 Yale Law Jour. 127; 38 Amer. Bar Assn. Rep. 1091, 1097-1104; 11 Journal of Criminal Law and Criminology 351; 12 Journal of Criminal Law and Criminology 383; 13 Journal of Criminal Law and Criminology 292; 35 Harv. Law Rev. 682; 1 Calif. State Bar Jour. 31.

Even if the commission should feel that the above suggestions about self-incrimination are unwise or impossible of achievement in California at this time, it may find it possible to advocate the enlargement of the waiver of the privilege which the accused makes by taking the stand. California is very considerate of the accused in this matter: he waives his privilege only as to matters which he voluntarily testifies to in his direct examination. Penal Code, sec. 1323. In England on the other hand the waiver is absolute—if he takes the stand no shred of this privilege remains. *Rex* v. *Chitson* (1909) 2 K. B. 945; *Rex* v. *Kennaway* (1917) 1 K. B. 25; *Rex* v. *Paul* (1920) 2 K. B. 183. Probably the

prevailing rule in the United States is that he waives the privilege as to the crime in question and all relevant crimes but does not waive it as to crimes proof of which is important only for impeachment or other collateral purposes. Wigmore, *"Evidence,"* 2nd ed., sec. 2276. Certainly the prevailing rule is none too broad from the standpoint of fairness or wisdom.

IV

While looking for means to make the conviction of the guilty more certain, we might consider one change which would be just to the defendant. I refer to the present inadmissibility of declarations of another person that he is guilty of the crime for which defendant is being tried. See *People* v. *McLaughlin,* 44 Calif. 435, 437; *People* v. *Hall,* 94 Calif. 595, 599. Such declarations should not be admissible if the person making them is available for testimony. But if due to death or insanity such person is no longer available the declarations should be admitted. They fall logically and reasonably in the exception to hearsay for declarations against interest. True that exception is confined according to the authorities to declarations against pecuniary or proprietary interest. But the interest one has to be free from punishment for crime is more obvious and compelling than perhaps any other and the guaranty of the truth of such declarations is therefore greater than of others based on lesser interests. If one in possession of land states that he has a lease on it for ten years at some rather low rental the declaration is admissible as cutting down his prima facie claim to a fee. It is admissible, moreover, to prove the tenancy. The "against interest" element in the declaration is not obvious and usually would never be thought of. How much more then should an admission of guilt come in as a declaration against interest! No doubt its admission should be limited to cases where the trial court finds that it was made bona fide and not for the purpose of making evidence for the present accused or any other. See *Hincs* v. *Commonwealth,* 136 Va. 728, 732; *Blocker* v. *State,* 55 Tex. Cr. 30; dissenting opinion in *Donnelly* v. *U. S.,* 228 U. S. 243; Wigmore, *"Evidence,"* 2nd ed., secs. 1476, 1477.

V

Dying declarations are now strictly limited to homicide cases and to declarations concerning the circumstances of death. See Code of Civil Proc., sec. 1870 (4); *People* v. *Hall,* 94 Calif. 595, 599; *Thrasher* v. *Board,* 44 Calif. App. 26, 29; *People* v. *Cipolla,* 155 Calif. 224, 227. Would the innocent suffer if the declaration of a deceased person, who knew he was in a dying condition and who presumably had personal knowledge of the facts declared, were admissible in any criminal case and as to any matter? I, for one, do not think so. The person is obviously unavailable and the guaranty of truth remains the same whether the crime be homicide or something else. True homicides are usually privately committed and so there is danger that without the dying declaration there may be no evidence to convict. But neither does one choose the main street at noon for robbery, burglary, arson, or rape. The need is approximately the same. The less the crime the less the injury that will result should the admission of dying declarations ever cause an erroneous conviction. The famous case for an extension of the dying declaration exception is, of course, *Thurston* v. *Fritz,* 91 Kan. 468. But see also Wigmore, *"Evidence,"* 2nd ed., secs. 1431-2. Without raising any question as to their utility in civil cases, is it not time to extend their availability in criminal cases?

VI

I have expressed my belief that the privilege concerning self-incrimination is unwise. But it is merely a hollow mockery as long as we permit peace-officers and prosecuting attorneys to torture accused persons into incriminating admissions. Of course confessions obtained by duress, threats or promises are inadmissible. But does that stop the practice of putting pressure on the accused? We know it does not. The clues obtained by such admissions are too valuable to zealous officials to permit of squeamishness about methods of obtaining them. We ought to have a statute providing punishment for any attorney or peace-officer, or his deputy or agent, who procures or attempts to procure a confession or admission from an accused person in custody by subjecting him to physical discomfort beyond that reasonably incident to his imprisonment or to mental agony caused by abusive language or false statements. Such conduct should be a misdemeanor punishable by a fine of $100 to $500 or by imprisonment from one to six months or both. Any superior, appellate, or supreme judge should have power on presentation of a sworn complaint to issue a bench warrant for the arrest of a person complained against, to appoint a special police officer to arrest him, a special deputy district attorney to prosecute him and to summon immediately a special grand jury to consider the finding of an indictment against him. This extraordinary power of course would not be exercised if the regular officers were willing to act. The tyranny and cruelty of many petty officials is well known. See *Wan* v. *U. S.*, 45 Sup. Ct. Rep. 1; *People* v. *Clark*, 55 Calif. App. 42. A plain remedy for such abuses should be available.

VII

Finally I am adding some suggestions to which I have given no special study but which seem to me worth study.

First, can not the time spent in preliminary hearings with a view to holding for trial be strictly limited. This is of course apropos of the *Amy Semple McPherson* case. That days should be spent on such a hearing seems absurd. It is not the trial. If the prosecution cannot in four hours make out a sufficient prima facie showing to warrant the judge in holding for trial the case is too weak to waste time on. The defense might then be given four hours to make its showing. The accused should be held if there is a reasonable likelihood of guilt.

Secondly, would it not be salutary to refuse bail in all cases of felony after conviction and despite appeal? This should lessen the number of criminal appeals considerably. It would protect society against the further criminal acts of those found guilty of crime. It would bring punishment a long step closer to the offense. Imprisonment pending appeal might count as part of the sentence if the convict elects to serve it as a convict, otherwise he is to be kept in the county jail and the time is not to count on his sentence.

Thirdly, I read with great interest Dean Justin Miller's article in the Southern California Law Review on *"Compromise with Crime."* His suggestions seemed sound and useful. Behind the reasonably honest compromise of which he speaks, there is, according to report, police protection for crime which, so far as real, is the worst feature of the present situation. The interference of politics with the administration of justice, especially in our large cities, makes me wonder whether the highest service your Commission could perform would not

be to segregate the two so far as humanly possible. Get the judges, *especially the lower judges,* out of politics. They should not be elected. Get the district attorneys out of politics. They should be appointed by the Chief Justice of the State and not necessarily from the county where they are to serve. Get the sheriff and his deputies out of politics. He should not be elected. He might be appointed by the judge or judges of the Superior Court. These are unconsidered suggestions merely to indicate what I have in mind. The police of the cities of course should be taken out of politics also. If you can devise some plan for removing the present reliance of so many of these agencies upon the politicians of the community, you will be hitting in my judgment one of the chief sources of the mal-administration of the criminal law and of the prevalence of crime in the United States.