The Supreme Court of California 1975-1976
Foreword: The Accidental Decision and How It Happens

Phillip E. Johnson

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38ZJ15
In 1972 the California Supreme Court, in *People v. Uhlemann*, temporarily created an important exception to the longstanding “rule in this state that a magistrate's dismissal of criminal charges following a preliminary examination does not bar the prosecution from either re-filing the same charges before another magistrate, or seeking an indictment based upon those charges.” Justice Burke, writing for a unanimous court, stated that the purpose of the preliminary hearing is to protect the accused from “needless harassment” by weeding out groundless charges and that that purpose would be “wholly undermined” if the prosecution were permitted to ignore a magistrate’s findings of fact by simply re-filing the same charges before another magistrate or seeking an indictment from the grand jury. Accordingly, the court held that a magistrate’s finding that the accused is innocent or has an absolute defense to a charge bars further prosecution on that charge in
the absence of a successful appeal from the finding.\textsuperscript{5} There were no concurring or dissenting opinions to indicate that any member of the court had reservations about the holding or the reasoning in Justice Burke’s opinion.

Despite this apparent consensus, the court decisively overruled itself 7 months later. After granting a rehearing it issued an entirely different opinion, again by Justice Burke, but with dissents by Justices Mosk and Tobriner.\textsuperscript{6} This time it held that a magistrate has no authority to make a final determination in a criminal case at a preliminary hearing, and therefore the prosecutor may either refile dismissed charges in a subsequent felony complaint or seek a grand jury indictment. The court gave two reasons for its new holding, one purely technical and the other related to policy. On the technical side the court stated that the magistrate at a preliminary hearing is limited to determining whether the evidence establishes “sufficient cause” to believe the defendant guilty of a crime charged in the complaint; he has no authority to make a finding as to guilt or innocence.\textsuperscript{7} At the policy

\begin{itemize}
\item[5.] The prosecution’s theoretical right to appeal the magistrate’s findings of fact is essentially hollow. As the court itself noted, “[N]either the superior court nor an appellate court may substitute its judgment on such matters for that of the magistrate. If the magistrate’s findings are based on substantial evidence, they should be upheld on appeal.” \textit{Id.} at 284 n.7, 105 Cal. Rptr. at 28 n.7 (citation omitted). The court left open the possibility that the People might be allowed to refile previously dismissed charges “for good cause shown, such as the discovery of new evidence, fraud, perjury, unavoidable accident or surprise.” \textit{Id.} at 284, 105 Cal. Rptr. at 28.
\item[7.] “[T]he proceeding is not a trial, and if the magistrate forms a personal opinion regarding the guilt or innocence of the accused, that opinion is of no legal significance whatever in view of the limited nature of the proceedings.” \textit{Id.} at 667, 511 P.2d at 612, 108 Cal. Rptr. at 660. This statement is difficult to reconcile with the court’s holding in Jones v. Superior Court, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971). In Jones the complaint charged the defendants with statutory rape, forcible rape, oral copulation, and sodomy. The defendants admitted having intercourse with the underaged victim, but claimed that it was with her consent and that no acts of sodomy or oral copulation occurred. The magistrate stated that because he believed the defendants and disbelieved the victim he would hold the defendants to answer only for statutory rape. Nevertheless, the prosecutor charged all four counts in the information, relying on Penal Code section 739, which permits the information to charge “either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.” \textit{Cal. Penal Code} § 739 (West 1970). The California Supreme Court issued a writ of prohibition against prosecution on the charges dismissed by the magistrate, holding that the district attorney may not “ignore the magistrate’s findings of fact [as opposed to conclusions of law] and charge the defendant with an offense or offenses which the magistrate has expressly found never took place.” 4 Cal. 3d at 666, 483 P.2d at 1245, 94 Cal. Rptr. at 293.
\end{itemize}
level the court noted that many California magistrates were not lawyers and presumably should not be trusted with the power to terminate a prosecution permanently.8

The abrupt flipflop in People v. Uhlemann is not easy to explain on any theory other than that some members of the court simply did not pay attention to the first opinion. The court's second opinion mentions no new consideration, raised in the petition for rehearing or elsewhere, that could account for the reversal. Surely the justices were aware at the time of the first decision that some California magistrates were not lawyers,9 and in any event this notorious fact could hardly account for the decision. The court did not attempt to explain why defendants should suffer because the state has failed to provide magistrates who are competent to decide questions of fact as well as law, or why lay magistrates are not as able as lay jurors to determine guilt or innocence.10

Moreover, the major controversy in the case—the finality of a magistrate's dismissal of a charge after a preliminary hearing—is a familiar one; it has been the subject of appellate court opinions in many states.11 The issue involves well-known practical considerations, ig-

8. Moreover, there would appear to be sound practical reasons for declining to extend the traditional role of the magistrate at preliminary hearings. Since a magistrate need not be a member of the bar to qualify for his position (see Pen. Code, § 808, subd. 5; Gov. Code, § 71601) there is some basis for reluctance to empower him with the authority to terminate forever proceedings against one accused of a criminal offense. Even assuming that the People might appeal from an adverse decision by the magistrate, nevertheless the magistrate's factual findings would remain unreviewable for all practical purposes (see De Mond v. Superior Court, 57 Cal. 2d 340, 345 [19 Cal. Rptr. 313, 368 P.2d 865]), especially in view of the magistrate's authority to weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses (Jones v. Superior Court, supra, 4 Cal. 3d 660, 667).


9. See note 8 supra.

10. It is likely that the court had in mind a broader point than the possible incompetence of nonlawyer magistrates. There are great disparities in competence and impartiality even among magistrates who are members of the bar. Since decisions at preliminary hearings are for the most part subjected to little public scrutiny, some magistrates might abuse the authority to make final and essentially unreviewable findings of fact. It is not only defendants who distrust the possible prejudices of judges and prefer the broader community perspective of a jury.

11. The cases are collected in MODEL CODE OF PRE-ARRAIGNMENT PROCEEDURE § 330.7 (1975 Draft) and Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 991-92 (4th ed. 1974). The weight of authority denies any formal limitation on the power of the prosecutor to refile charges dismissed at a preliminary hearing. Section 330.7 of the ALI Model Code would permit a prosecutor to reinstate a complaint and reopen a preliminary hearing within 60 days after the dismissal on the basis of affidavits establishing substantial new evidence.
nored in both of Justice Burke's opinions. Prosecutors often do not have time to prepare thoroughly for preliminary hearings; to save court-time and inconvenience to witnesses, they normally present only a minimum of evidence. If they feared that a preliminary hearing dismissal might permanently bar further prosecution, they would feel obliged to present (or at least be prepared to present) a complete case. Moreover, the prosecutor has the alternative of bypassing the preliminary hearing by seeking a grand jury indictment in the first place. A rule granting finality to preliminary hearing decisions might encourage increased use of the grand jury, a practice that would deprive defendants of the opportunity for cross-examination and discovery provided by the preliminary hearing. On the other hand, a strong argument for finality can be made on the principle that defendants should have some protection against a prosecutor who repeatedly files baseless charges.

The issue presents a difficult problem, in the sense that reasonable and informed persons are likely to differ over the correct solution, but the arguments on both sides are so well known that one would expect the justices of the California Supreme Court to know their own minds on the matter.

The evident inattention manifested in Uhlemann is not unique. People v. Hitch is another case in which the court issued an important, groundbreaking first opinion apparently without being aware of the consequences. In Hitch the trial court ordered the suppression of the results of a “breathalyzer” examination in a drunk driving prosecution. When a drunk driving suspect blows into the breathalyzer, the breath sample passes through a “test ampoule” containing chemicals that indicate, by a color change, the amount of alcohol in the sample. In the Hitch case county authorities, pursuant to “standard practice,” had destroyed the ampoule after making the test. The defendant was thus


13. California defendants now do have a degree of protection from harassment. As amended in 1975, Penal Code section 1387 provides that

An order for the dismissal of an action pursuant to this chapter is a bar to any other prosecution for the same offense if it is a felony and the action has been previously dismissed pursuant to this chapter, or if it is a misdemeanor; except in those felony cases where subsequent to the dismissal of the felony the court finds that substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at or prior to the time of dismissal.


15. For a more complete description of the breathalyzer test, see 12 Cal. 3d at 644, 527 P.2d at 363, 117 Cal. Rptr. at 11.
prevented from having his own expert reanalyze its contents. After an evidentiary hearing the trial court concluded that preservation of the test ampoule would have provided evidence of value to the defense, and that the intentional but nonmalicious destruction of this evidence deprived the defendant of due process of law.\(^{16}\)

The court affirmed the suppression order in a unanimous opinion by Justice McComb.\(^{17}\) The opinion held that since a retest of the ampoule might have assisted the defense, due process requires that the test ampoule be preserved or the results of the test suppressed, absent a showing by the prosecution that the destroyed items could not have been preserved without unreasonable effort.

Although the court indicated its awareness of the widespread use of breathalyzer tests and the routine destruction of test ampoules,\(^{18}\) it said nothing about whether its decision would be enforced retroactively in the thousands of pending drunk driving cases. For all that appears in the opinion, it did not appear to any justice that the Hitch rule would have nearly the effect of a general amnesty for drunk drivers if applied retroactively. The court also seemed unaware that its reasoning could have an incalculable effect outside the area of drunk driving prosecutions and breathalyzer test ampoules. The police often dispose of some physical item that conceivably might have led to evidence useful to the defense had it been preserved for defense inspection and testing. For example, by returning stolen property to the owner the police deprive the alleged thief of the opportunity to have his own criminalist examine the property for fingerprints that might incriminate someone else. The point here is not that the decision in People v. Hitch was necessarily incorrect. It may be desirable to place the police and prosecution under a wide-ranging duty to preserve potential evidence, and the courts are capable of devising suitable limitations on such a duty to take account of practical necessities. What is disturbing is that the court's opinion showed no awareness of the problems it was creating.

But that awareness was not long in dawning. The court granted a rehearing and reassigned the opinion to Justice Sullivan. His new opinion for the court\(^{19}\) held that the duty to preserve potentially helpful evidence was to apply only prospectively. The court thus reversed the

---

\(^{16}\) The trial court not only ordered the suppression of the breathalyzer test evidence, but also dismissed the complaint. Although Justice McComb's opinion affirmed the suppression order, it reversed the order dismissing the complaint on the ground that evidence of a breathalyzer or other chemical test of blood alcohol content is not a necessary element of a prosecution for drunk driving. 520 P.2d at 978, 113 Cal. Rptr. at 162.

\(^{17}\) Id. at 974, 113 Cal. Rptr. at 158.

\(^{18}\) Id. at 976, 978 n.1, 113 Cal. Rptr. at 160, 162 n.1.

\(^{19}\) 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974)
suppression order that it had affirmed in Justice McComb's opinion.\(^{20}\) Justice Sullivan's opinion gave a much more elaborate justification for the rule and attempted to give the lower courts and law enforcement agencies some guidance in dealing with the many problems that the court had belatedly realized it was creating.\(^{21}\) Whether this second opinion correctly resolved the competing interests at stake is not the issue here. In Hitch, as in Uhlemann, what is troubling is not the merits of the ultimate decision, but the manner in which the court handled the case. A major innovative decision of far-reaching practical effect in criminal law administration had slipped through the California Supreme Court without the justices giving it more than the most superficial consideration.

*People v. Uhlemann* and *People v. Hitch* are of course extreme examples, selected to make a point. No claim is made here that the California Supreme Court ordinarily or usually gives important decisions such scant attention. Yet the Hitch and Uhlemann cases cannot fairly be described as aberrant. Readers of the advance sheets are well aware that the California Supreme Court grants rehearings—or denies rehearing but uses the occasion to modify its opinion—in an extraordinary number of cases.\(^{22}\) Some of the rehearings and modifications,

\(^{20}\) Justice Mosk agreed with the doctrine announced in the majority opinion, but dissented from the decision only to apply it prospectively. He argued that new court-made procedural rules should be applied to benefit the aggrieved party responsible for bringing the issue to judicial attention, and thereafter prospectively. Id. at 655, 527 P.2d at 371, 117 Cal. Rptr. at 19 (Mosk, J., dissenting). Justice Mosk's approach to prospectivity is consistent with the approach of the United States Supreme Court. See *Desist v. United States*, 394 U.S. 244 (1969).

\(^{21}\) Ironically, the Hitch rule has had little effect upon drunk-driving prosecutions, because at the time of the decision the breathalyzer was in the process of being replaced by the "Omicron Intoxilyzer," a supposedly superior breath testing device that does not employ a test ampoule or other preservable sample. An argument that use of the intoxilyzer unfairly deprives the accused of the right granted him in *Hitch* was rejected in *People v. Miller*, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1st Dist. 1975). A great deal of litigation has occurred since Hitch concerning the applicability of its doctrine where the police have lost or destroyed items that arguably might have provided the defense with helpful evidence. A few cases have resulted in published appellate court opinions. See, e.g., *People v. James*, 56 Cal. App. 3d 876, 128 Cal. Rptr. 733 (2d Dist. 1976); *People v. Vera*, 56 Cal. App. 3d 893, 128 Cal. Rptr. 824 (5th Dist. 1976). Both cases distinguished Hitch and denied relief.

\(^{22}\) Complete documentation of the statement in the text is hampered because vacated or subsequently modified opinions are not printed in the bound volumes of the official California Reports, and sometimes do not reach the advance sheets. Frequently, but not always, superseded opinions can be found in the bound volumes of West's California Reporter. The following is a partial list of cases from 1973 to the present in which the outcome was changed upon rehearing or in which very substantial modifications were made in the opinion; many other cases in which relatively minor or technical modifications were made are omitted. People v. Uhlemann, 503 P.2d 277, 105 Cal. Rptr. 21 (1972), *vacated on rehearing*, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973); *Metz v. Universal Underwriters Ins. Co.*, 507 P.2d 83, 106 Cal. Rptr. 779,
to be sure, involve a change in membership of the court between the original decision and the rehearing. Such changes in personnel are frequent because justices of the courts of appeal often sit temporarily on the supreme court in place of a supreme court justice who is on vacation or otherwise unavailable. If the deciding vote is cast by such a temporary justice, a rehearing may be necessary when the regularly appointed justice returns to his seat on the bench. Other rehearings and modifications, however, are attributable to a change of mind on the part of one or more of the justices, or to a realization that an opinion contains errors or omissions or otherwise fails to deal adequately with the issue before the court.

*Uhlemann* and *Hitch* are two of the more exemplary cases in which the court itself impliedly acknowledged that its original unanimous opinions were poorly considered. For the court to grant a re-

---

24. See the cases cited in note 22 *supra*. Systematic research into the incidence of substantially modified or vacated opinions before 1973 is made impractical by the fact that the opinions appear in the reports as corrected. The author has obtained documentation of one notable instance, however. In *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967), the California Supreme Court held that an amendment to the state constitution, popularly known as Proposition 14, violated the equal protection clause of the federal Constitution. Proposition 14 purported to repeal "fair housing" legislation previously enacted by the California legislature and to prohibit any further state laws or regulations that would abridge the right of any person to refuse to sell, lease, or rent his property to any person for any reason whatsoever. The court may well have decided the basic issue of constitutional law correctly (the United States Supreme Court affirmed in a 5 to 4 decision), but the opinion by Justice Peek was riddled with embarrassing errors and inconsistencies. Among other errors, the opinion cited language from the argument of counsel in *Buchanan v. Warley*, 245 U.S. 60, 62 (1917), as if it were a holding of the Court, and overlooked that the act of discrimination alleged in the complaint in one of the companion cases was not illegal under the fair housing legislation even assuming the invalidity of Proposition 14. (The corrected decision in the companion case is *Hill v. Miller*, 64 Cal. 2d 757, 415 P.2d 33, 51 Cal. Rptr. 689 (1966).) Losing counsel in the *Mulkey* case filed a scathing petition for rehearing that did not persuade the court to change its decision but did force major revisions in the opinions.
hearing after a unanimous decision and then reverse itself or substitute an entirely different opinion is unimpeachable evidence that it initially mishandled the case. On the other hand, an occasional careless decision does no permanent damage, provided that the court does grant a rehearing and does finally produce a decision that benefits from consideration by all the justices. If one could be confident that major errors and inadequacies were always corrected at the rehearing stage, it would be of little consequence that the justices occasionally allowed their minds to wander when reviewing the original opinion. What is disturbing, however, is the possibility that Uhlemann, Hitch, and other cases in which opinions had to be withdrawn or substantially modified are merely the most visible examples of a flaw in the California Supreme Court's decisionmaking processes—a flaw that may have led to other less visible but far more damaging consequences in cases in which the errors were not corrected at the rehearing stage.

During my past 10 years as a law professor teaching criminal law and procedure, I have many times had the impression while reading an opinion of the California Supreme Court that some of the justices who signed it simply could not have understood what it was holding. Sometimes a decision will introduce an important and unprecedented innovation in the criminal law without dissent or without any indication that the court appreciated the novelty of its approach. Sometimes, as in People v. Uhlemann, the court's resolution of a highly controversial issue would seem certain to have provoked dissenting and concurring opinions, but none appears. The impression that the justices sometimes sign opinions that they either do not agree with or do not understand is not one that I have had while reading opinions of the United States Supreme Court. This is not to say that opinions of the United States Supreme Court are necessarily superior in quality to those of the California Supreme Court. An opinion can be very bad indeed and yet still reflect the real views of the justices who signed it. The majority opinion by Chief Justice Warren Burger in Harris v. New York, for example, has been described by respected scholars as not only illogical but downright dishonest. Even assuming that such harsh criticism is justified, there is every reason to believe that the decision in Harris reflects the considered view of the Justices who joined in the opinion that the Miranda doctrine should be severely limited. Moreover, the Justices whom one would have expected to dissent did so, and for the reasons one would have expected them to give.

Burke's first opinion for the California Supreme Court in *Uhlemann* is probably a better piece of judicial craftsmanship than Chief Justice Burger's opinion in *Harris*. The point is that the justices whom one would have expected to dissent, including perhaps Justice Burke himself, signed it anyway and realized their mistake only after the decision was announced.

The following pages will discuss two important doctrines of California criminal law that appear to owe their existence to the judicial inattention just described. The subject of the Foreword is not criminal law, however, but the process by which the court decides cases. The reader who is not a criminal law specialist is entitled to a warning at this point. Some of the discussion that follows may seem confusing or even incoherent. If one has this impression it is due, in my judgment, neither to my limitations as a writer nor to the reader's limitations as a critic. The opinions to be discussed are confusing and, ultimately, incomprehensible. To clarify them beyond a certain point would be to distort them.

An example is *People v. Conley*, a seminal decision that has caused immeasurable confusion in California murder prosecutions. Defendant Conley had been having an affair with a married woman who decided to leave him and return to her husband. Three days later, after drinking a great deal of alcohol, Conley shot and killed both his lover and her husband. Conley testified that he remembered nothing about the killings, and a defense psychologist testified that in his opinion "defendant was in a dissociative state at the time of the killings and because of personality fragmentation did not function with his normal personality." The trial judge correctly instructed the jury on the elements of first and second degree murder, but refused to give a manslaughter instruction because the killing was committed several days after the last conceivable act of provocation. The jury returned a verdict of first degree murder.

The supreme court ordered a new trial because of the failure to give a manslaughter instruction. The opinion by Chief Justice Roger Traynor explained that a "heat of passion" caused by "legally sufficient provocation" is not the only circumstance that can reduce a homicide to voluntary manslaughter. A homicide that would otherwise be murder is voluntary manslaughter if committed in a heat of passion in response to provocation that could cause a reasonable person to lose his self-control. If the provocation occurred so long before the homicide that the hypothetical reasonable person would have regained his self-control, however, the killing is murder. See W. LaFave & A. Scott, *Criminal Law* 579 (1972).

29. *Id.* at 315, 411 P.2d at 914, 49 Cal. Rptr. at 818.
30. *Id.* at 315-16, 411 P.2d at 914, 49 Cal. Rptr. at 818. A homicide that would otherwise be murder is voluntary manslaughter if committed in a heat of passion in response to provocation that could cause a reasonable person to lose his self-control. If the provocation occurred so long before the homicide that the hypothetical reasonable person would have regained his self-control, however, the killing is murder.
from murder to manslaughter under California law. In its historic 1959 decision in *People v. Gorshen*, the court had held that even in the absence of provocation, evidence of a defendant's abnormal mental condition may rebut malice aforethought where the prosecution evidence shows infliction of a mortal wound for the purpose of killing. In *Gorshen*, however, the court went on to affirm the conviction of second degree murder without explaining precisely how such evidence of “diminished mental capacity” could negate malice aforethought once the prosecution has shown “infliction of a mortal wound for the purpose of killing.” Under traditional doctrine an intentional criminal homicide, unless committed in response to legally sufficient provocation, is inherently malicious. The *Gorshen* opinion seem to imply that malice aforethought contained some undisclosed element beyond intent to kill to which psychiatric evidence could relate.

To fill this analytic gap in the law, Chief Justice Traynor's opinion in *Conley* gave the following definition of malice aforethought:

The mental state constituting malice aforethought does not presuppose or require any ill will or hatred of the particular victim. When a defendant “with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death,” he acts with malice aforethought. This mental state must be distinguished from that state of mind described as “wilful, deliberate, and premeditated,” however. The latter phrase encompasses the mental state of one who carefully weighs the course of action he is about to take and chooses to kill his victim after considering the reasons for and against it. A person capable of achieving such a mental state is normally capable also of comprehending the duty society places on all persons to act within the law. If, despite such awareness, he does an act that is likely to cause serious injury or death to another, he exhibits that wanton disregard for human life or antisocial motivation that constitutes malice aforethought.

An intentional act that is highly dangerous to human life, done in disregard of the actor's awareness that society requires him to conform his conduct to the law, is done with malice regardless of the fact that the actor acts without ill will toward his victim or believes that his conduct is justified. In this respect it is immaterial that he does not know that his specific conduct is unlawful, for all persons are presumed to know the law including that which prohibits causing injury or death to another. An awareness of the obligation to act within the general body of laws regulating society, however, is included in the statutory definition of implied malice in terms of an

32. Id. at 731, 336 P.2d at 501.
abandoned and malignant heart and in the definition of express
malice as the deliberate intention unlawfully to take life.33

The nearly impenetrable paragraphs just quoted have added a
novel, unprecedented element to the definition of malice aforethought:
the requirement that the prosecution prove not only that the defendant
intended to kill or to commit an inherently dangerous act, but also that
he was aware of the “obligation to act within the general body of laws
regulating society.” This additional element greatly affects the impor-
tance of psychiatric evidence in a murder case. When a defendant
points a gun at someone and pulls the trigger, it is difficult to convince
a jury that he did not intend to kill or to commit a dangerous act, no
matter how many expert witnesses are prepared to swear to the con-
trary. Addition of such an extremely subjective element as an aware-
ness of one’s legal duties, however, gives the doctors a much greater
opportunity to affect the result.34

Since the jury convicted Conley of first degree murder and thus
(in the court’s words) found that he had carefully weighed the course
of action he was about to take and chose to kill his victim after con-
sidering the reasons for and against it, the state argued that the failure
to give a manslaughter instruction was a harmless error. The court,
however, thought it possible that a jury might believe that the defendant
carefully weighed the pro and con arguments for killing without being
aware of his duty to obey society’s laws: in that event, the killing would
not be murder at all because of the absence of malice
aforethought.35

In any court except the California Supreme Court, one would ex-
pect such an innovation to spark extensive and sharp debate in the form
of dissenting or concurring opinions. Justice Mosk concurred sepa-
rately and Justice McComb dissented, but their brief and uninformative
opinions appear to have been concerned only with the sleight-of-hand
fashion in which the court handled the issue of harmless error.36 No

33. 64 Cal. 2d at 321-22, 411 P.2d at 918, 49 Cal. Rptr. at 822 (citations
omitted).

34. California law also permits the introduction of psychiatric evidence on whether
the defendant had the “premeditation” necessary for a conviction of murder in the first
degree. Mentally disturbed persons charged with murder are frequently proved to have
planned and prepared the fatal act in advance. The definition of premeditation is thus
crucial since psychiatric testimony would be of little importance if the statutory term
connoted nothing more than advance preparation. The California Supreme Court has
held, however, that to premeditate a killing the defendant must have the capacity to
“maturely and meaningfully reflect upon the gravity of his contemplated act.” People v.
Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). It is this subjective
element in the definition that gives the psychiatric defense such great importance.

35. 64 Cal. 2d at 320-23, 411 P.2d at 917-19, 49 Cal. Rptr. at 821-23.

36. Justice Mosk concurred separately “under the compulsion of the first Modesto
decision.” Id. at 326, 411 P.2d at 921, 49 Cal. Rptr. at 825. People v. Modesto, 59 Cal.
2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963), held that failure to give a required
member of the court objected to Chief Justice Traynor's redefinition of malice aforethought or indicated awareness of any problems with it. Yet surely the decision to adopt a definition of malice aforethought that permits a murder defendant to litigate whether he was aware of his obligations to society cries out for searching policy analysis.

What the court did was to incorporate a concept practically identical to the traditional standard for legal insanity into the definition of malice aforethought. Only a medieval scholastic theologian could discover any substantial difference between a defendant incapable of comprehending his duty to obey the law and a defendant incapable of understanding the wrongfulness of his act. When this mental incapacity is asserted under the heading of legal insanity, California law requires not only that the defense enter a special plea of "not guilty by reason of insanity," but also that it prove insanity by a preponderance of the evidence at a separate trial on that issue. If the defendant succeeds, he is found "not guilty by reason of insanity" and committed to a mental institution for treatment and for the protection of society. If, on the other hand, virtually the same mental incapacity is asserted under the Conley doctrine, the defendant need give no advance notice by special plea of his psychiatric defense, and the prosecution must prove beyond a reasonable doubt that he had the capacity to comprehend his legal duties. A reasonable doubt on this issue reduces a conviction to manslaughter, and the defendant is sent to prison for a term limited by law.

Manslaughter is the category of homicide that provides rela-

mansion instruction is reversible error even if the jury convicts of first degree murder. Justice McComb dissented on the ground that the error was harmless. 64 Cal. 2d at 326, 411 P.2d at 921, 49 Cal. Rptr. at 825.

37. The California test of legal insanity is a variation of the M'Naughton formula. California juries are told that insanity means a diseased and deranged condition of mind which renders a person incapable of knowing or understanding the nature and quality of his act, or to distinguish right from wrong in relation to that act.

The test of sanity is this: First, did the defendant have sufficient mental capacity to know and understand what he was doing, and second, did he know and understand that it was wrong and a violation of the rights of another?


40. At the time of the Conley decision, the punishment for manslaughter in California was a prison term of not more than 15 years (CAL. PENAL CODE § 193 (West 1970)), while the punishment for second degree murder was a term of from 5 years to life. Ch. 1968, § 1, 1957 Cal. Stats. 3509 (current version at CAL. PENAL CODE § 190 (West Supp. 1976)). Amendments to these Penal Code sections, which become effective July 1, 1977, change the penalty for second degree murder to 5, 6, or 7 years
tively light punishment for persons who have killed only in response to the kind of provocation that could cause an ordinary, reasonable person to lose his self-control. Such persons do not require psychiatric treatment or indefinite confinement for the protection of society. The court gave no reasons for holding that the same legal category is the appropriate one for homicidal maniacs; surely at least one justice ought to have asked if it had any reasons.

Although three justices voted for a rehearing, the court denied the petition for rehearing in Conley after the customary modifications of the opinion. The Conley rule has survived to be the source of profound confusion for trial courts. One is tempted to surmise, not altogether facetiously, that the other justices refrained from objecting to Chief Justice Traynor’s opinion because they did not understand it. I am in my tenth year of teaching substantive criminal law to some of the brightest students in the country, and I have found very few who did not think the Conley opinion incomprehensible. What a jury must think of the complicated instructions that the case requires can only be imagined. Yet Conley is the virtual cornerstone of the California law of murder.

Another doctrine peculiar to California criminal law concerns the problem, familiar to every law student, of the felon’s liability for the death of his cofelon in the course of the felony. Sometimes a victim

and the penalty for manslaughter to 2, 3, or 4 years. Ch. 1139, §§ 133-134, 1976 Cal. Legis. Serv. These new penalties are meant to reflect the average terms that persons convicted of these crimes actually served under the prior law.

41. 64 Cal. 2d at 326, 411 P.2d at 921, 49 Cal. Rptr. at 825.
42. See People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974); People v. Cantrell, 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973); People v. Castillo, 70 Cal. 2d 264, 449 P.2d 449, 74 Cal. Rptr. 385 (1969).
43. Penal Code section 189 provides in pertinent part that

All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, [which deals with sexual assaults upon children] is murder of the first degree; and all other kinds of murders are of the second degree.

CAL. PENAL CODE § 189 (West Supp. 1976). A 1970 amendment substituted “destructive device or explosive” for “bomb.” Ch. 771, § 3, 1970 Cal. Stats. 1456 (amending ch. 16, § 1, 1949 Cal. Stats. 30). Read literally, this section deals only with degrees of murder and does not make a killing committed in the course of one of the listed felonies first degree murder unless it would be murder in any event. Throughout the state’s history, however, the courts of California have held that commission of one of the six listed felonies both supplies the malice aforethought needed to make the killing murder and classifies the murder as one of the first degree. See, e.g., People v. Sears, 2 Cal. 3d 180, 185-86, 465 P.2d 847, 850, 84 Cal. Rptr. 711, 714 (1970). In effect, the courts have interpreted the statute as if it began “All homicide” instead of “All murder.” Had they done otherwise, the legislature would undoubtedly have amended the statute to
or policeman shoots and kills a member of a gang of robbers in an attempt to resist the robbery or make an arrest. It then becomes necessary to decide whether the felony murder rule, which makes every participant in certain felonies liable for first degree murder if any killing is committed “in the perpetration of” the felony, imposes liability in this situation. The California Supreme Court, consistent with the weight of authority in other jurisdictions, has held that the felony murder rule does not apply here, because killings committed to thwart or resist the felony are not committed “in the perpetration of” it. This result is not surprising; the court on many occasions has expressed reservations about the felony murder rule and wishes to confine it strictly to its proper sphere, whatever that may be.

What the court has taken away from the prosecutor with one hand, however, it has restored with the other. The felony murder rule does not impose liability for first degree murder on the robber whose accomplice is killed by the victim or policeman, but another judicially created rule—which I can only describe as “quasi-felony murder”—does. This peculiar doctrine stems from two cases: People v. Washington and People v. Gilbert. The defendant in Washington was a party to a robbery in which his accomplice had been shot and killed by the victim. The opinion by Chief Justice Traynor reversed his conviction for the felony murder of his accomplice, reasoning that “section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony.” In explaining this holding, however, the chief justice went on to say that in some cases a robber might be liable for murder for a killing justifiably com-

replace the word “murder” with “homicide,” as was done in other states. See, e.g., State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932).


46. The following is a typical statement of the court’s usual attitude toward the felony murder rule:

We have thus recognized that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed, the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism.


47. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

48. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

49. 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.
mitted by a victim, under independent doctrines of accessorial liability and causation, even though the felony murder rule did not apply. He explained that

Defendants who initiate gun battles may . . . be found guilty of murder if their victims resist and kill. Under such circumstances, "the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death" . . . . To invoke the felony-murder doctrine to imply malice in such a case is unnecessary and overlooks the principles of criminal liability that should govern the responsibility of one person for a killing committed by another.50

This dictum suggests that malice could be found in such situations, but says nothing of premeditation. Therefore, one is led to assume, the killing would be murder in the second degree.51

If one takes what Professor Herbert Packer has termed "a very relaxed view of the necessary causal connection between the defendant's act and the victim's death,"52 then Chief Justice Traynor's dictum is theoretically correct.53 Retaliatory fire is such a predictable response to the defendant's reckless act of initiating a gun battle that holding the defendant responsible for any resulting death is justified. In People v. Gilbert,54 however, the Washington dictum underwent a bizarre mutation. Gilbert and Weaver planned a bank robbery with the assistance of King. In the course of the robbery, at which King was not present, Gilbert killed a policeman. As he and Weaver fled, another policeman mortally wounded Weaver. Gilbert and King were convicted of a number of crimes, including the felony murder of their confederate Weaver. The California Supreme Court in another opinion by Chief Justice Traynor reversed the felony murder convic-

50.  Id. at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446 (citations omitted).
51.  See note 43 supra.
53.  If one looks at the practical consequences, however, it is questionable whether this refined analysis added anything but an unnecessary complication to California law. At the time of the Washington decision, the penalties for armed robbery and second degree murder were identical: 5 years to life in prison. CAL. PENAL CODE §§ 190, 213 (West 1976). Because CAL. PENAL CODE § 654 (West 1970) prohibits multiple punishment for a single criminal transaction, one who commits a homicide in the course of a robbery can be punished for murder or for robbery but not for both. People v. Teale, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965). Charging robbers with second degree murder when a policeman or victim kills a member of the gang in a gun battle is thus unlikely to affect the length of the prison term anywhere near as much as it affects the length and complexity of the proceedings. See generally Johnson, Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine, 58 CALIF. L. REV. 357 (1970).
54.  63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).
tion, citing *People v. Washington.* The opinion went on to state, however, that the evidence would have supported a conviction of both Gilbert and King for *first degree* murder, a conclusion far beyond the reasoning of *Washington.* The court explained its conclusion as follows:

> When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. . . .

> . . . Under the rules defining principals and criminal conspiracies, the defendant may be guilty of murder for a killing attributable to the act of his accomplice. To be so guilty, however, the accomplice must cause the death of another human being by an act committed in furtherance of the common design. . . .

> . . . When murder is established under Penal Code sections 187 and 188 pursuant to the principles defined above, section 189 may properly be invoked to determine the degree of that murder. Thus, even though malice aforethought may not be implied under section 189 to make a killing murder unless the defendant or his accomplice commits the killing in the perpetration of an inherently dangerous felony . . ., when murder is otherwise established section 189 may be invoked to determine its degree.

But how does section 189 determine that the murder is in the first degree? At the time of the *Gilbert* decision section 189 provided that

> All murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

When a defendant, in the words of the court, “‘for a base antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death’” (e.g., initiating a gun battle), he acts with malice aforethought but the killing is not “willful, deliberate and premeditated.” The latter phrase, according to the court, “encompasses the mental state of one who carefully weighs the course of action he is about to take and chooses to

---

55. *Id.* at 703, 408 P.2d at 373, 47 Cal. Rptr. at 917.
56. See text accompanying notes 49-51 *supra.*
57. 63 Cal. 2d at 704-05, 408 P.2d at 373-74, 47 Cal. Rptr. at 917-18.
58. Ch. 16, § 1, 1949 Cal. Stats. 30 (current version at *CAL. PENAL CODE* § 189 (West Supp. 1976)).
kill his victim after considering the reasons for and against it." In short, a reckless killing cannot be a premeditated killing.

When the court said that section 189 might be invoked to determine the degree of murder, it could only have been referring to the phrase that makes murder committed “in the perpetration of, or attempt to perpetrate” the enumerated dangerous felonies first degree murder. But in Washington the court held that a killing is not “in the perpetration of” a robbery unless it is committed by one of the robbers in furtherance of the criminal enterprise. After Gilbert, then, the court’s logic seems to be the following:

(1) When a victim or a policeman kills one of the robbers to resist a robbery or to prevent escape, the felony murder rule of section 189 is not applicable because the killing was not committed in the perpetration of the robbery.

(2) Nevertheless, if one of the robbers commits an inherently dangerous act likely to cause death, such as initiating a gun battle, and the victim or a policeman returns the fire, then all the robbers are liable for murder in the resulting death of a robber or bystander. The result follows from the definition of malice aforethought and from principles of causation and accessorial liability, not from the felony murder rule.

(3) Once liability for murder is established pursuant to the principles stated in the preceding paragraph, the murder is in the first degree because it was committed in the perpetration of the robbery.

No member of the court took issue with this chain of self-contradiction. The Gilbert rule has survived to be applied in subsequent cases with predictably harsh and irrational results.


61. 62 Cal. 2d at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446. See text accompanying note 50 supra. Despite the use of the term “murder” in section 189, any homicide committed in the perpetration of a listed felony is first degree murder, whether or not that homicide would otherwise be murder. See note 43 supra.

62. Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970), provides an outstanding example of the perversity of the Gilbert doctrine. Smith and Daniels attempted to rob a liquor store operated by Mr. and Mrs. West, while Taylor waited outside in a getaway car. Mrs. West testified at the preliminary hearing that Daniels “chattered insanely” during the holdup, repeatedly threatening to shoot if his orders were not obeyed. At the same time Smith, who was pointing a gun at Mr. West, looked “intent” and “apprehensive” as if “waiting for something to happen.” Mrs. West drew a pistol from under her clothing and opened fire, wounding Daniels and killing Smith. The District Attorney filed an information charging Taylor and Daniels with the murder of Smith. Taylor obtained a hearing in the California Supreme Court on his application for a writ of prohibition against further prosecution on the murder charge. The court's opinion by Justice Burke held that Mrs. West's testimony at the preliminary hearing disclosed acts of Smith and Daniels from which a trier of fact could infer malice,
People v. Conley promulgated an innovation in criminal law helpful to the defense; People v. Gilbert created a doctrine that benefits the prosecution. What both cases have in common with each other, and with the soon-repudiated first opinions in People v. Uhlemann and People v. Hitch, is that in each case the attention of some of the justices seems to have been directed elsewhere. It is nearly inconceivable that all seven justices could have independently analyzed the portions of those opinions discussed above and found that they were in complete agreement with what the author had written. One would have expected those justices who are known to disfavor the felony murder rule to protest the invention of a quasi-felony murder doctrine in People v. Gilbert. One would have expected those justices who are relatively sympathetic to prosecutorial interests to take issue with importing an element akin to a legal insanity defense into the definition of malice aforethought in People v. Conley. One would have expected at least one justice to question People v. Uhlemann's holding that a magistrate's dismissal of a felony prosecution prevents renewed prosecution, before receiving a petition for rehearing. One would also have expected at least one justice to recognize the inadequacies in Justice McComb's opinion in People v. Hitch before it was published. The question must be faced: Why did none of these things occur?

Two factors may help to account for an occasional poorly considered decision and for the many instances in which the court has had to modify or revise its opinions after issuing them. First, the workload of the court is undeniably heavy. But if the court is burdened with

"including Daniels' coercive conduct toward Mr. West and his repeated threats of 'execution,' and Smith's intent and nervous apprehension as he held Mr. West at gunpoint." Id. at 584, 477 P.2d at 135, 91 Cal. Rptr. at 279. The court said, "The foregoing conduct was sufficiently provocative of lethal resistance to lead a man of ordinary caution and prudence to conclude that Daniels and Smith 'initiated' the gun battle, or that such conduct was done with conscious disregard for human life and with consequences dangerous to life." Id. As an accomplice to the robbery, Taylor was held liable for these acts of provocation, and thus for murder in the resulting death of his accomplice Smith. The court therefore denied the writ of prohibition, with Justice Peters, Tobriner and Mosk dissenting.

While the Taylor case was pending in the California Supreme Court, Daniels was tried separately and convicted of robbery but acquitted of murder, presumably because the jury diluted the letter of the law with a little common sense. Another jury convicted Taylor of both the robbery and the murder, however. This inequity was too much for the California Supreme Court, which improvised a doctrine of collateral estoppel and held that the prosecution could not re-litigate the issue of Smith's and Daniels' malice at the trial of Taylor after having failed to prove this element at the trial of Daniels. People v. Taylor, 12 Cal. 3d 686, 527 P.2d 622, 117 Cal. Rptr. 70 (1974).

63. Statistics on the court's workload are included in the 1976 Report of the Judicial Council of California and the Administrative Office of the California Courts. In 1974-75 the court decided a total of 5,646 matters, including petitions for hearing, appeals, habeas corpus applications, petitions for rehearing, motions, orders, and execu-
a heavy workload, it is also blessed with a large and able staff, including permanent career law clerks, recent graduates with outstanding law school records, and high-ranking law students working as externs.\textsuperscript{64} Besides, the California Supreme Court prides itself—with considerable justification—upon being an innovative and progressive court. On a number of occasions it has anticipated the United States Supreme Court in promulgating important new constitutional doctrines. This is the record of a highly confident court, not of a court which feels that overwork severely limits its own ability to give careful and searching consideration to its decisions and opinions. Second, some errors or inadequacies attributed here to the court may in part be the fault of counsel. No doubt many briefs and arguments omit important points, but this fact hardly suffices to account for the unsatisfactory opinions under discussion here. The court relies on counsel much less than many other courts, precisely because it has such a large staff. More importantly, one would expect the justices themselves to be alert to such matters as the serious practical problems arising from the original opinions in \textit{People v. Uhlemann} and \textit{People v. Hitch}. If there is any field in which the California Supreme Court can claim expert knowledge, gained through long and intensive experience in deciding cases, it is criminal law and procedure.

It is likely that the court's own decisionmaking procedures are responsible for the occasional poorly considered decision. When the court receives a petition for hearing in a case, the petition is assigned to one of the justices, who has a law clerk prepare a "conference memorandum" for the entire court. This memorandum analyzes the case and recommends whether the court should grant a hearing. If the court grants a hearing, the chief justice assigns responsibility for the case at that time to one of the justices who voted in favor of the

\textsuperscript{64} The Chief Justice, whose office is responsible for all petitions for hearing in criminal cases and all habeas corpus petitions, has 14 regular staff clerks (or "research attorneys," as they are officially titled). Each of the other justices has three regular clerks. Each office also has up to three law students working full or part time as junior law clerks. Finally, one very respected senior staff member has been designated as the principal research attorney for the entire court. Use of the familiar term "law clerk" to describe the members of the court's research staff should not mislead the reader into supposing that the clerks are all recent law graduates beginning their professional careers. Some of them have worked at the court for over 20 years.
ing. That justice in turn assigns the case to a law clerk, who studies the briefs and record, performs whatever additional research is necessary, and writes a "calendar memorandum." The calendar memorandum is circulated among the justices before oral argument, but it is not made available to anyone outside the court. The term "memorandum" is somewhat misleading: in fact, the law clerk produces a draft opinion. This memorandum does not dispassionately review the arguments pro and con on each issue to assist the justices in arriving at their own individual decisions on the merits. Instead, it normally resolves the issues and states the arguments in support of its positions. In some cases the memorandum is almost entirely a staff product; in others, the justice may take an active role in editing and revising the staff drafts. An experienced law clerk commonly has a great degree of independence in writing the memorandum, provided, of course, that the result and the general line of reasoning are acceptable to the justice who signs it.

This heavy reliance on staff research and analysis by the court tends to make oral argument largely ceremonial. Individual justices have been known to remark privately that oral argument seldom changes the result in a case. Oral arguments may be ineffective because they are frequently low in quality. Yet the court's own procedure does nothing to encourage effective oral argument. The well-informed advocate knows that a tentative opinion for the court exists, but does not know what is in it. As a result he may spend the available time arguing points that the court considers irrelevant or has already decided.

After oral argument the justices confer to vote on the decision in each argued case. Occasionally, a majority votes against the recommendations in the calendar memorandum; in that event, unless the responsible justice is persuaded to change his mind, the case is reassigned, and the calendar memorandum may be reworked into a dissenting opinion. Such repudiations are reportedly quite rare. In most cases the author of the calendar memorandum becomes the author of the opinion for the court, and the reasoning of the opinion closely tracks the reasoning of the memorandum.

As the importance of advocacy by counsel has declined, the importance of the court's professional staff has increased. Although the research attorneys are nominally attached to the staff of a single justice, they write for the court as a whole and hence influence the court as a whole. Career staff members as well as justices may gain a reputation for competence and reliability over the years, and the court may come to rely upon them. As a result considerable deference may be
accorded a calendar memorandum that comes from a justice or senior staff member who is held in high regard within the court.

Reliance upon staff work is by no means inherently undesirable. One way of making the best use of the justices' limited time is to have assistants digest complicated briefs and prepare draft opinions. The manner in which the California Supreme Court uses its staff, however, contrasts sharply with the practice at the United States Supreme Court, which faces many of the same constraints. There is nothing comparable to the calendar memorandum at the United States Supreme Court. Each Justice receives memoranda or other assistance from his own law clerks according to his own practice. Nothing resembling a tentative decision circulates until after oral argument and the vote on the merits. Each of the nine offices gives independent consideration to each case before decision, although there may be informal conversation and interchange among the Justices. Moreover, law clerks at the United States Supreme Court, with a few recent exceptions, stay at the Court for only a year or two. Clerks who come and go every year cannot have as much influence with justices as clerks who make their careers at the court.

The published opinions of the two courts clearly reflect the different approaches to decisionmaking procedure. Opinions of the California Supreme Court are frequently unanimous, even on controversial subjects. Dissenting opinions are not uncommon, but a separate concurring opinion or two is something of an event. The Justices of the United States Supreme Court, on the other hand, frequently feel compelled to file separate concurring opinions. One example, typical of many, will suffice to make the point. When the California Supreme Court held the death penalty unconstitutional, it published a single opinion for the six justices in the majority with only a brief dissent by

---

65. According to figures compiled by the California Law Review, the California Supreme Court decided 129 cases by written opinions in the calendar year 1975, excluding per curiam decisions. In these 129 cases there were 45 dissenting opinions, including 5 conclusory dissents, and 16 concurring opinions. In only three cases were there two concurring opinions. (Opinions concurring in part and dissenting in part are counted as dissents.) According to the Harvard Law Review, the United States Supreme Court in the 1974 Term (from October 1974 through June 1975) disposed of 137 cases with full opinions on the merits, including 14 per curiam decisions long enough to be considered full opinions. In these 137 cases there were a total of 101 dissents and 51 concurrences. These figures also include conclusory dissents, and count opinions that both concur and dissent as dissents. The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 275 (1975). Having obtained this rough statistical comparison, I include it here for the information of the reader, but only with the caveat that such comparisons may be misleading. The period covered is only a single year (and not precisely the same year), and there is no evidence that the cases were of comparable difficulty or controversiality. In addition, the United States Supreme Court has nine Justices and the California Supreme Court seven.
Justice McComb.\textsuperscript{66} Deciding the same question the following year, the nine Justices of the United States Supreme Court produced nine separate opinions.\textsuperscript{67}

The contrast is not made to praise one court at the expense of the other. Individualized consideration by each Justice of each issue in every case is desirable, but there is also something to be said for a process of compromise and accommodation that results in a single authoritative opinion. The United States Supreme Court has implicitly acknowledged as much in two important decisions, in which the Justices put aside what must have been substantial individual differences of opinion so that the Court could speak with the force of unanimity.\textsuperscript{68} At its best such agreement reflects a process of collective deliberation, rather than a passive acceptance of the views of the Justice writing the opinion.

If the procedures of the United States Supreme Court tend to encourage the fragmentation of majorities and proliferation of concurring opinions, the procedures of the California Supreme Court tend to encourage the opposite failing of excessive reliance upon staff opinions, or excessive deference to the views of the justice to whom the case has been assigned. To say this is not to accuse the justices of neglecting their duties or of rubberstamping staff memoranda. There is an important psychological difference, however, between coming to a decision alone and deciding whether another's decision is correct. There is an inevitable tendency to defer to the views of the person who has been assigned primary responsibility for the case.

In each of the cases discussed in the text of this Foreword, the court decided an issue of general importance in criminal law or criminal procedure, and decided it (at least before rehearing) in an unorthodox and innovative way. Each of the opinions was seriously defective, and the defects appear to reflect underlying problems with the manner in which the California Supreme Court handles its caseload. The court is often praised as one of the very best in the country, doubtless with considerable justification. Even occasional lapses from a high standard of performance can have very serious consequences, however, in the case of a prestigious court with a tradition of self-confident judicial activism. Those who write about the court have a responsibility to remind it of its deficiencies as well as its virtues.

The California Supreme Court is now in a state of transition, with at least two new justices joining the court. A thorough review of the

\textsuperscript{66} People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
\textsuperscript{67} Furman v. Georgia, 408 U.S. 238 (1972).
manner in which the court conducts its business is overdue. If the court undertakes such a process of review and self-analysis, one area that merits reexamination is whether it is making the most effective use of its staff by having it prepare a single calendar memorandum for the entire court. Because of this procedure six of the seven justices normally see a tentative opinion before they have thoroughly considered the case. Granted that practical considerations demand that the justices rely heavily on the summaries and recommendations of their law clerks, there is much to be said for seven independent staff recommendations rather than one. On the other hand, the court has presumably decided that the current practice gives it the benefit of a thorough and well-researched calendar memorandum. If the law clerk had to write seven memoranda in the time it presently takes to produce one, the resulting product might be relatively sketchy and unpolished, assuming that the staff now works at or near full capacity. The virtues of time for thorough research and reflection have to be balanced against the virtues of independent consideration.

If the court feels after reconsideration that the virtues of assignment to a single office before argument outweigh the defects, then a more neutral and dispassionate type of analysis than the present calendar memorandum might be appropriate. The memorandum could thoroughly review the arguments and considerations on both sides of each issue in the case, without trying to steer the court to a particular decision. Law clerks at the United States Supreme Court have for years taken pride in writing memoranda that state the arguments for each side succinctly and persuasively, without disclosing their own opinions. Such a memorandum is far more helpful to a justice who wishes to make up his own mind than a draft opinion, which inevitably argues only one side of the case.

The only apparent advantage in writing the calendar memorandum as a draft opinion is that it may permit the court to issue its decisions more rapidly. Getting a "head start" on the opinion seems of slight value compared to maximizing the justices' opportunities for complete and independent consideration of the issues in a case. If the court were to decide, however, that it prefers the traditional calendar memorandum to a more neutral and dispassionate analysis, then it might consider circulating the memorandum to counsel as well as to the justices before oral argument. At present, counsel's first opportunity to reply to the conclusions in the calendar memorandum is after the decision, in a petition for rehearing. As this Foreword has attempted to demonstrate, it is not unusual for serious errors to be uncovered at this belated stage of the proceedings. The quality of oral arguments and the opinions of the court might be substantially im-
proved by giving counsel an opportunity to respond to the conclusions and analysis advanced by the calendar memorandum.69

The decisionmaking procedures of the California Supreme Court encourage a feeling within it that responsibility for deciding cases is delegated, first to the justice assigned the calendar memorandum and then to the law clerk or clerks who actually prepare it, subject only to the approval of the court after seeing the tentative decision and opinion. In many cases a justice or law clerk undoubtedly perceives some flaw in a calendar memorandum, and necessary changes are made or a dissenting or concurring opinion is added. At other times, however, the court has issued opinions that apparently have not attracted the attention of several justices. Such incidents ought not to occur. That they do is cause enough for the justices to ask themselves whether the court's procedures need to be reformed to maintain the high standards that have been the court's tradition.

69. Justice Robert S. Thompson of the California Court of Appeal, Second Appellate District, has proposed that the state's intermediate appellate courts, which also employ career staff attorneys who prepare tentative opinions for the court before oral argument, make those opinions available to counsel for criticism and response. See Thompson, Mitigating the Damage—One Judge and No Judge Appellate Decisions, 50 Cal. St. B.J. 476, 516-19 (1975). Justice Thompson's article provides an exceptionally candid and perceptive account of the dangers of excessive reliance upon a court's career staff. He concedes that "[t]he increase in appellate productivity incident to precalendar-tentative opinion preparation, selective publication, limitation of argument, and use of career staff is absolutely necessary to the case load of urban area appellate courts." Id. at 516. He also charges, however, that "[u]nless measures are taken to assure accountability, the staff bureaucracy, central and personal to the judge, can become a shadow court in which the unqualified or lazy judge can hide until retirement." Id. "Every judge has sometimes failed to devote the attention to a case that it merits, and with a few judges the lack is more frequent." Id. at 516-17. Justice Thompson makes a persuasive case for disclosing tentative staff opinions to counsel as a means of making both the staff and the justices more accountable to the bar and to the public. He also observes that judicial resistance to precalendar circulation of tentative opinions is based, among other considerations, upon a "vaguely articulated fear that were it made aware of it the public would not stand for the present dependence of appellate courts and individual judges upon staff." Id. at 519. One supposes that these and other forthright comments, unusual coming from the pen of a sitting justice dealing with such a sensitive topic, did little to enhance Justice Thompson's personal popularity with some of his colleagues.