



1-1-1979

A Gallery of Gardner

Santa Clara Law Review

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Santa Clara Law Review, *A Gallery of Gardner*, 19 SANTA CLARA L. REV. 925 (1979).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol19/iss4/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

A GALLERY OF GARDNER

Board of Editors Santa Clara Law Review*

INTRODUCTION

It is a curious misfortune that the bulk of legal literature is humorless and turgid in style. It is especially curious in light of the fact that the realm of legal ideas continues to be absorbing and provocative. Yet, when members of the legal profession, judges and lawyers alike, take up their pens, it is often with a singular lack of imagination. Their desire to be profound and dignified constrains their manner of expression to a stiff and lifeless form. Indeed, legal writing commands the attention of few: most commonly diligent academics or law students assigned the wearisome material.

This article focuses attention on a radiant exception to the tedium of most legal writing. His name is Justice Robert Gardner, Presiding Judge of the California Court of Appeal, 4th District. He combines flash of wit with unbridled candor of emotion, creating vibrant and readable opinions. It is not enough to simply eulogize Gardner's incomparable style. Rather, his own words uniquely demonstrate that legal writing can enliven the spirit of the law. The following is an anthology excerpted from some of Gardner's appellate decisions. It represents a vast array of topics that he has artfully explored with clever charm and wit. Since Justice Gardner's writing speaks eloquently for itself, the editor's comments will be minimal.

It seems fitting to introduce Gardner's buoyant style with some of his own lamentations concerning the uninspired word:

It is a sad commentary on contemporary culture to compare "Don't say a word, don't say a mother-fucking word" with "Stand and deliver," the famous salutation of Dick Turpin and other early English highwaymen. It is true that both salutations lead to robbery. However, there is a certain rich style to "Stand and deliver." On the other hand, "Don't say a word, don't say a mother-fucking word" conveys only dismal vulgarity.

© 1979 by the Board of Editors of the Santa Clara Law Review.

* This anthology was researched and written by dd Amantea, Associate Editor. Additional research and coordination by Donald Allen, Associate Editor.

The speech of the contemporary criminal culture has always been a rich source of color and vitality to any language. Yet, when one compares the "bawds," "strumpets," "trulls," "cutpurses," "knaves," and "rascals" of Fielding and Smollet to the "hookers," "pimps," "narcs," "junkies," and "snitches" of today's criminal argot, one wonders just which direction we are traveling civilization's ladder. "Hooker," at least, has traceable historical antecedents—although the descendants of General "Fighting Joe" Hooker would probably prefer that their famous ancestor be remembered for something other than his army's camp followers—such as the slaughter at Chancellorsville.¹

COMMENTARY ON LAW AND HUMANITY

Public Defenders Can Never Win

In *People v. Huffman*, Gardner takes a didactic hand in criminal defendant jargon. The defendant was convicted of forcible rape on the basis of overwhelming direct evidence. On appeal he contended that the public defender did not provide him with effective assistance of counsel. In his own words, defendant complained that the public defender "keeps claiming and trying to claim guilty. He keeps saying he can't get a defense going. I thought the man was a lawyer. I need a lawyer not a dump truck." At this juncture in the record, Gardner footnotes wryly:

For the benefit of the uninitiated, "dump truck" is a term commonly used by criminal defendants when complaining about the public defender. The origins of the phrase are somewhat obscure. However, it probably means that in the eyes of the defendant the public defender is simply trying to dump him rather than afford him a vigorous defense. It is an odd phenomenon familiar to all trial judges who handle arraignment calendars that some criminal defendants have a deep distrust for the public defender. This erupts from time to time in savage abuse to these long-suffering but dedicated lawyers. It is almost a truism that a criminal defendant would rather have the most inept private counsel than the most skilled and capable public defender. Often the arraigning judge appoints the public defender only to watch in silent horror as the

1. *People v. Benton*, 77 Cal. App. 3d 322, 324 n.1, 142 Cal. Rptr. 545, 546 n.1 (1978).

defendant's family, having hocked the family jewels, hire a lawyer for him, sometimes a marginal misfit who is allowed to represent him only because of some ghastly mistake on the part of the Bar Examiners and the ruling of the Supreme Court in *Smith v. Superior Court* . . .²

Claims of Ineffective Assistance of Counsel

The complaint of ineffective assistance of counsel is frequently raised on appeal. Appellate counsel often present this issue at the insistence of the client irrespective of his or her own professional judgment and common sense. This practice is enormously disconcerting to Gardner:

[T]hese attacks on trial counsel continue with monotonous regularity. It is understandable that the individual defendant, faced with unpleasant consequences of his own irresponsible behavior and being affected with man's notorious reluctance to admit error or to face up to his own mistake, will strike out blindly at all who had anything to do with his predicament—witnesses, victims, judges, prosecutors, jurors, the whole law enforcement and judicial process—and, unfortunately, his own attorney. However, the frequency with which appellate counsel present this issue is distressing. After all, appellate counsel is blessed with the gift of hindsight as he leisurely picks over the carcass of a dead lawsuit. He is not confronted with the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle. There is nothing in *Smith* . . . or *Feggans* . . . which says that an appellate attorney should abdicate his responsibilities as a professional man and become the lackey of his client. It is the lawyer, not the client, who after a review of the record, chooses the issues. Doctors do not allow patients to diagnose their own ailments, and self-help brain surgery is quite rare. Just because a convicted defendant is unhappy with his trial representation does not mean that counsel on appeal must maintain a full scale attack of trial counsel. If, in his study of the record, it is appellate counsel's professional opinion that trial counsel did all that could reasonably be expected and that his representation did not deprive a defendant of a viable defense or reduce the trial to a farce or a sham, there is no compulsion on appellate counsel to carry out his

2. *People v. Huffman*, 71 Cal. App. 3d 63, 70 n.2, 139 Cal. Rptr. 264, 267 n.2 (1977).

client's perhaps capricious whims by presenting issues which to him, from an objective professional viewpoint, lack merit.³

Later in the same opinion, Gardner highlights the deceptive impact that hindsight may have on a trial court record:

Turning to the instant case, we observe that while trial lawyers come in all shapes and sizes and no two trial lawyers are identical in style, they fall, generally, into two categories.

The first category files every conceivable motion and presents issues ad nauseam. This attorney slows down the wheels of the administration of justice, exasperates trial judges, and bores and often succeeds in confusing juries. He does everything "by the book" and his win-loss ratio usually leaves much to be desired. On appeal, it must be conceded that he has made a good record. No stone has been left unturned. Of course, he lost his case but he has made a dandy record. It would appear from the contents of the brief filed in this case that appellate counsel is an admirer of this school of trial attorneys.

The second category of trial attorneys is usually much more effective. He has the capacity for reducing issues to simple terms. He is as miserly with motions, objections and issues as an Ernest Hemingway with words or a Louis Armstrong with musical notes. He has an instinct for the jugular, an ability to explore the meritorious and to ignore the trivial, a capacity for keeping issues understandable, a high respect for the intelligence of the jury, and by reason of all this is usually as effective as the attorney in the first category is ineffective. Of course, to the nitpicker, his record on appeal leaves much to be desired since he has not pressed every motion or made every possible objection, nor has he presented issues which in his professional judgment were a waste of time.⁴

So perturbed is Gardner by the regularity of attacks on trial counsel that he includes in the opinion this ominous caveat:

History tells us that for years Cato ended every speech on every subject with *Delenda est Carthago*—"Carthage must be destroyed." Eventually, Carthage was destroyed, and since Cato was quite an active speaker one wonders

3. *People v. Eckstrom*, 43 Cal. App. 3d 996, 1001-02, 118 Cal. Rptr. 391, 394-95 (1974).

4. *Id.* at 1002-03, 118 Cal. Rptr. at 395.

just how much credit must be afforded him for his mind-numbing, metronome-like program of hate. More recently, an unsavory creature named Joseph Goebbels conceived the Big Lie—a concept by which an untruth repeated often enough and loud enough becomes, in the mind of the listener, the truth. So, too, a program of persistent and consistent attacks on the competency of trial counsel, even though such attacks are usually unwarranted, cannot but have a deleterious effect on the legal profession.⁵

The Role of the Jury in the Judicial System

As should already be obvious, Gardner tackles every subject with refreshing candor and high-principled spirit. He never balks at the hard dilemma nor cowers from an unpopular position. Indeed, he has made a strong commitment to the promotion of active intelligence in the judicial process. His most salient comments in this regard are directed to the role of the jury.

Gardner holds the jury in the highest esteem as a vital cog in the wheel of justice. He is disturbed by the paternalistic and condescending posture taken by the legal profession as well as by the outmoded rules of evidence that together demean the integrity of the jury. The following excerpts provide some trenchant remarks:

This case represents a classic reflection of an attitude of the courts toward the rules of evidence which I find to be completely out of step with the facts of life as they exist today.

Too much of the law of evidence has its roots in an era when jurors were ignorant peasants and an elite group (the lawyers and judges) carefully hand fed them such information as they (the elite) felt the peasants could safely absorb. At the beginning of the Nineteenth Century, De Tocqueville observed that lawyers had become, in their eyes at least, a sort of intellectual aristocracy in American society. At the risk of ruffling the feathers of other members of my chosen profession, I would point out that that happy social arrangement no longer exists. It is now the latter portion of the Twentieth Century and while many, and perhaps most, lawyers and judges still consider themselves an elite corps, any substantial experience on the trial court level should persuade all but the most barnacle-encrusted traditionalist that the average juror today enjoys

5. *Id.* at 1000-01, 118 Cal. Rptr. at 394.

a knowledge, an awareness, a sophistication and in many cases an education comparable to or superior to that of law school graduates. It is high time that lawyers and judges accept the fact that the rest of society is entitled to the respect and consideration of equals. The mere possession of an LL.B. or J.D. does not anoint the holder with powers of discernment not vested in ordinary mortals. Today it takes a certain effrontery, a certain intellectual arrogance, a certain intellectual snobbery, to say to a juror, "You cannot hear this evidence because you are not capable of effectively evaluating it." Because of a lack of appreciation of the stability and integrity of the jury system, too much emphasis is still being put on the danger of prejudicing the jury by the admission of allegedly improper evidence.⁶

In the next case, appellants allege prejudicial error due to the admittance of factually gruesome evidence which they contend "unnecessarily inflame[d] the passion of the jurors."⁷ Gardner boldly retorts:

[T]wo observations might be made: (1) murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant; and (2) many attorneys tend to underestimate the stability of the jury. A juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. There is nothing magic about being a member of the bench or bar which makes these individuals capable of dispassionately evaluating gruesome testimony which, it is often contended, will throw jurors into a paroxysm of hysteria. Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees. The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. The supposed influence on jurors of allegedly gruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.⁸

In *Carr v. Pacific Telephone Company*, Gardner vehemently dissents from the majority's decision to keep out two items of evidence in a wrongful death action. The first item concerns the time that defendant spent in jail and the second

6. *People v. Johnson*, 32 Cal. App. 3d 988, 1003, 109 Cal. Rptr. 118, 127-28 (1973) (Gardner, P.J., dissenting).

7. *People v. Long*, 38 Cal. App. 3d 680, 689, 113 Cal. Rptr. 530, 537 (1974).

8. *Id.* at 689, 113 Cal. Rptr. at 536-37.

relates to instances of the decedent's derelict behavior as it affects the measure of damages in the wrongful death action. Gardner addresses both rulings:

The majority suggests that the jury merely be advised that the defendant was missing for the years he was in custody. (On a secret peace mission for the United Nations? Exploring the upper regions of the Amazon? A medical missionary in the jungles of New Guinea? A prisoner of war?)

A defendant, even a rich, soulless corporation, is entitled to show the disposition of the decedent to contribute financially to support his heirs and to show his earning capacity and his habits of industry and thrift since all have a bearing on the value of his life to his wife and family. If the decedent had been a hard-working, law-abiding citizen and a paragon of all the virtues of honesty, thrift and probity who supported his wife and children and afforded them a stable home, the plaintiff would be entitled to so prove. If, in the other hand, he was an irresponsible, philandering, check-kiting jailbird, the jury would be entitled to so know. The jury is entitled to the whole picture—warts, wrinkles and all—not a sterilized, unreal, retouched portrait which amounts only to a shadowy silhouette of the real man.⁹

Sensitivity to Human Concerns

Throughout his opinions, Gardner exhibits more than just a gift for articulate speech. The speech is compelling because it flows from a compassionate soul. Gardner's pathos for his fellow human being is the endearing quality that underscores his wit and candor. The following passages exemplify his sensitive concern:

While the speedy disposition of cases is desirable, speed is not always compatible with justice. Actually, in its use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner. One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of profes-

9. Carr v. Pacific Tel. Co., 26 Cal. App. 3d 537, 547, 103 Cal. Rptr. 120, 127-28 (1972) (Gardner, P.J., dissenting).

sional medical witnesses expound to a jury on just how devastating or just how trivial a personal injury may be, all to the personal enrichment of the trial lawyers involved, yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field—the breakup of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved. The handling of this case, which involved the breakup of a 25-year marriage, the custody of 2 teenage girls, the disposition of all of the property accumulated during that marriage, and the plotting of the fiscal future of the entire family, is illustrative. Judged by the brevity of the record, not more than 15 minutes of the court's time on a busy Friday afternoon short-cause calendar were involved.¹⁰

In the same opinion, Gardner discusses the plight of the “displaced homemaker.”

The new Family Law Act, and particularly Civil Code, section 4801, has been heralded as a bill of rights for harried former husbands who have been suffering under prolonged and unreasonable alimony awards. However, the act may not be used as a handy vehicle for the summary disposal of old and used wives. A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime. If a woman is able to do so, she certainly should support herself. If, however, she has spent her productive years as a housewife and mother and has missed the opportunity to compete in the job market and improve her job skills, quite often she becomes, when divorced, simply a “displaced homemaker.”

* * *

A marriage license is not a ticket to a perpetual pension and, as women approach equality in the job market, the burden on the husband will be lessened in those cases in which, by agreement of both parties, the wife has remained employed or at least has had the opportunity to maintain and refresh her job skills during marriage. However, in those cases in which it is the decision of the parties that the woman becomes the homemaker, the marriage is of

10. *In re Marriage of Branter*, 67 Cal. App. 3d 416, 422, 136 Cal. Rptr. 635, 638-39 (1977).

substantial duration and at separation the wife is to all intents and purposes unemployable, the husband simply has to face up to the fact that his support responsibilities are going to be of extended duration—perhaps for life. This has nothing to do with feminism, sexism, male chauvinism or any other trendy social ideology. It is ordinary common sense, basic decency and simple justice.¹¹

In the next excerpt, Gardner ventilates his misgivings about rehabilitation in the prisons:

For several decades, the Legislature and the courts operated on the shaky principle that a person could be put into a cage and there force-fed psychiatrically oriented rehabilitative and therapeutic programs and emerge from that cage “cured” of his antisocial proclivities. Experience has finally persuaded us that this is pure balderdash. Nevertheless, mesmerized by this concept, judges throughout the years have imposed some perfectly ghastly prison sentences on the assumption that rehabilitative programs in the prison were going to cure or rehabilitate the prisoners. That philosophy was the basis for the Indeterminate Sentence Law. Under that law, prisoners were sentenced until “cured.”

This is not to say that all of the rehabilitative programs in prison are a waste of time. Far from it. There are excellent academic programs by which prisoners are exposed to at least the basic tools of education. So, too, are training programs by which prisoners learn a craft or trade so that on release they may at least secure and, hopefully, hold a job.¹²

To which he footnotes:

This court had before it recently a case in which a normal, run-of-the-mill burglar had been sent to prison. While in prison, he took a course in welding and learned how to handle an acetylene torch. On his release, he became a safe burglar.¹³

Juvenile Justice

As a trial judge, Gardner served on the juvenile court bench for a considerable period of time. He gained many in-

11. *Id.* at 419-20, 136 Cal. Rptr. at 637.

12. *People v. Johnson*, 82 Cal. App. 3d 183, 186, 147 Cal. Rptr. 55, 57 (1978).

13. *Id.* at 186 n.3, 147 Cal. Rptr. at 57 n.3.

sights from his experience with young people which he has had occasion to share on the appellate court. In the following opinion, Gardner explains how chronological age does not necessarily coincide with a juvenile's capacity for criminal activity:

As a trial judge, I served six highly educational years in the juvenile court. One of the first things I learned was that chronological age is seldom an indication of sophistication nor the experience factor. One 16-year-old may be callow, unsophisticated, immature. Another may be sophisticated, knowledgeable, savvy and mature. I do not mean that we should go back to the ancient concept that children are merely small adults and hold them to the same standards as adults. (If I had my druthers I would choose the concept that adults are merely large children.) But any assumption that the appellant was some kind of a frightened child by reason of the comparatively short time that had elapsed between birth and the time he kicked this two-year-old child to death is simply unrealistic.¹⁴

In another juvenile case, Gardner discusses the competing social philosophies that have generated a checker-board of inconsistent and unworkable juvenile court legislation:

The Juvenile Court Law is, and has been, a battleground of divergent and often warring social and legal philosophies. On the one hand, we find those who believe thoroughly in the *parens patriae* philosophy of the original juvenile court law. On the other hand, we find those who believe that blind obedience to that philosophy and its resulting disregard of constitutional rights of young people has, in many respects, reduced the juvenile court to little more than a kangaroo court for young people. We also have a battle to the death between those who, at the risk of oversimplification, believe in the lock-the-kids-up-and-throw-the-key-away philosophy and those who, again at the same risk of oversimplification, insist that every underage criminal, no matter how vicious, is but a misguided child and is to be treated as such. These conflicts have, from time to time, resulted in a hodge-podge of legislation.¹⁵

Gardner agonizes over one of the more problematic juvenile

14. *In re Garth D.*, 55 Cal. App. 3d 986, 1004, 127 Cal. Rptr. 881, 892 (1976) (Gardner, P.J., dissenting).

15. *In re Ronald S.*, 69 Cal. App. 3d 866, 868, 138 Cal. Rptr. 387, 389 (1977).

statutes that has subsequently been amended by the Legislature. The "601" that he refers to is a juvenile status offender who Gardner defines as "one whose only offense against society is doing something that would not be legally prohibited if done by an adult."¹⁶ Then he lists examples of those juveniles that are classified within this section:

- (1) The incorrigible
- (2) The truant.
- (3) The curfew violator.
- (4) And that greatest of all catchalls ". . . one who for any cause is in danger of leading an idle, dissolute, lewd or immoral life." Judicial history does not record that anyone ever beat that rap. A saint would have difficulty avoiding jeopardy under that provision during any given 24-hour period.

As a result of all of this overbreadth, the juvenile court often found itself acting as a glorified babysitter, a woefully inadequate substitute parent, a frustrated judicial truant officer, a reluctant enforcer of curfew laws which were often of doubtful validity, the involuntary warden of institutions crammed with fleet-footed but unsuccessful runaways and the guardian of the sexual mores of a large group of uncooperative young ladies who allegedly were in danger of leading idle, lewd, dissolute or immoral lives when they came into court and were not much better off when they left.

The 601 was a judicial nightmare. He resented being in court. He had violated no law. He usually just did not get along with his parents and when one met the parents, this was often completely understandable. He was often severely maladjusted presenting bleak hope of effective treatment. Just as often he was a time-consuming minor nuisance some inadequate parent was trying to fob off on the court. While service in the juvenile court is one of the most challenging and rewarding of judicial services, it is often a most frustrating experience—particularly with 601's.¹⁷

The Judicial Opinion

Gardner does not restrict his criticism to drafting mishaps of the Legislature. He has some disquieting moments with the judicial opinion as well:

16. *Id.* at 867 n.1, 138 Cal. Rptr. at 388 n.1.

17. *Id.* at 869-70, 138 Cal. Rptr. at 390.

The format our judicial system uses in the creation of legal principles—the so-called reasoned opinion—lends itself to nitpicking. An opinion, particularly one which represents a departure from established principles, tends to become prolix as the court attempts to vindicate or rationalize its new position. Such an opinion becomes a treasure trove of polemic minutiae embellished with mountains of friendly but sometimes redundant authorities. By a careful and restrictive selection of choice phrases, the opinion can be used as authority for, and will give aid and comfort to, almost any given set of facts remotely resembling those on which the original opinion was based. Theoretically such an opinion gives us fixed and stable legal principles around which we can build our lives in what we choose to call an orderly system. Actually, in the subsequent application we give to these opinions, we often find ourselves with capricious, erratic, almost whimsical results. Thus, it sometimes becomes necessary to step back from an artful and microscopic study of the words and phrases in an opinion in its broad aspect—what was the problem? What was the solution?¹⁸

Guidance from the Appellate Court

In *People v. Lopez*, Gardner had occasion to display his pedagogical talents. The case presented the issue of whether a defendant on a *Faretta* motion¹⁹ had freely and knowingly chosen self-representation. In response, Gardner set out clear and concise guidelines which have endeared him to every trial court judge ever faced with a *Faretta* motion. Gardner elucidates the problem:

In addressing the problem of just what a court should do in ascertaining that the defendant's election is voluntary and intelligent, we do not wish to appear pedantic. Neither do we intend to establish any horrendously complex or rigid standards . . . Rather, in the somewhat wistful hope that some trial judges may read this opinion, we will set forth certain suggestions on how to protect the record when a defendant chooses to go it alone. After all, in spite of the lofty historical and intellectual approach of *Faretta*, those with trial experience are quite aware that every prospective pro. per. is not necessarily sincerely convinced that his decision to represent himself is going to

18. *In re Moore*, 45 Cal. App. 3d 285, 287, 119 Cal. Rptr. 356, 357 (1975).

19. *See Faretta v. California*, 422 U.S. 806 (1975).

assure him of a trial more fair than if he were represented by a skilled, and experienced professional. Whether the prospective pro. per. is a naive character who sincerely believes he can represent himself better than can a lawyer, a cagey loser who is going to try to reduce the trial to a shambles in the hope that somehow reversible error will creep in, a free soul with a touch of ham, or simply someone who wants to have some fun with the judicial establishment, the trial judge must recognize that the first ground on appeal is probably going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision. Such are the facts of life.²⁰

COMIC RELIEF

Poking Fun in Dissent

There are roguish moments when Gardner is struck by the folly of his colleagues' legal analysis and results. Under these circumstances his quips are more often found in the dissent:

It is clear that the thing that really sticks in the craw of the majority is that the defendant has been convicted of first degree murder for simply pushing an old lady. I must admit that Mrs. Smith, at age 79, probably did not have too many years to live and that the defendant is probably a normal, well-adjusted, well-intentioned, strong arm robber who had no intention of hurting the old lady, let alone kill her. I'll further admit that the vagaries of our law are such that some odd legal results come from some similar physical acts. Leaving out the robbery, but assuming the death resulted from the pushing, if the defendant knocked Mrs. Smith down because he did not like her, that would, generally speaking, be murder. If he knocked her down just for the hell of it, that would, generally speaking, be manslaughter. If he knocked her down accidentally, that would, generally speaking, be no crime at all. But whatever the courts may think of any extension of the felony-murder rule, the Legislature had made one thing very clear in Penal Code, section 187. One may rob, burgle, rape, burn, maim or molest and only suffer the consequences of that crime as set forth in the particular code section. If, however, during the perpetration of one of those offenses, the victim dies, then, to quote a recent deathless

20. *People v. Lopez*, 71 Cal. App. 3d 568, 571-72, 138 Cal. Rptr. 36, 38 (1977).

line from Telly Savalas in *Kojak*, "That's murder one, baby."²¹

Gardner's dissent in *Wheeler v. St. Joseph Hospital* takes aim at his brethren for misconstruing a California Supreme Court holding:

Here, I pause to express an admiration amounting almost to awe at the remarkable job that the majority has done on *Madden*. From my lowly place in the judicial pecking order, I have chafed from time to time at some of the opinions of our Supreme Court. Nevertheless, I never had the intestinal fortitude, let alone the skill or ability, to completely emasculate one. This, the majority has done to *Madden*. As it turns out, dissenting Justice Mosk (with a leg up from Professor Henderson) won this race going away and the majority were simply left at the starting gate. Justice Tobriner who wrote the majority opinion might just as well have stayed home that day.²²

In *Filitti v. Superior Court*, Gardner chides the majority for their decision to overrule the trial court on a search and seizure issue:

I cannot accept as reasonable the majority's holding that the activities of the defendant were so consistent with innocence as to overrule the trial court's finding that the officer reasonably had a strong suspicion of criminal activity. The majority suggests that the bundle put into the engine compartment could have contained rags, tools or a battery. In the first place, the storage compartment of a Volkswagen (and a Karmann Ghia) is in the other end of the vehicle. There is no place in the engine compartment of a Volkswagen product to store rags, tools, or a battery. A battery is kept under the seat in a Karmann Ghia. Insofar as the battery is concerned, it weighs between 35 and 40 pounds as contrasted with the approximately 4 pounds of a kilo of marijuana. The difference in appearance between a man carrying a battery and a man carrying two kilos of marijuana is a difference between a man carrying a fifth of bourbon and a case of bourbon. And, in addition, I would point out that few people keep rags, tools or batteries buried in their backyard.

21. *People v. Morales*, 49 Cal. App. 3d 134, 148-49, 122 Cal. Rptr. 157, 166 (1975) (Gardner, P.J., dissenting).

22. *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 376, 133 Cal. Rptr. 775, 795 (1976) (Gardner, P.J., dissenting).

Of course, the package *could* have contained something else than kilos of marijuana. It could have contained powdered rhinoceros horn, dried cow bezoar, Howard Hughes' Autobiography—or Mr. Justice Peters' famous cookies . . . Frankly, between these choices, I would vote for the latter. After all what better place to keep cookies warm than in the engine compartment?²³

Skill at "One-Liners"

A short Gardner remark, often placed in a footnote, causes a reader to chuckle and give at least brief thought to how adroitly the legal community can make a relatively simple situation seem ponderous and of insurmountable proportions.

The situation: a habeas corpus petition where the Attorney General contended that petitioner had been unduly dilatory in presenting his claim of error. Gardner's comment:

Petitioner's delay has kept him in the penitentiary for an extra two years. It is difficult to conceive where the rights of the People have been harmed by his lack of diligence—unless they intend to sue him for the reasonable cost of his room and board during that time.²⁴

Regarding a remand to the trial court for what Gardner considers a moot hearing on the issue of prejudice, the Justice footnotes:

Certain pragmatic considerations militate against this action. Petitioner has now been paroled. It would be an unconscionable waste of time of everyone—the petitioner (who has returned to his normal pursuits and, hopefully some kind of steady employment, assuming he has not skipped again), the trial court, the district attorney, the Attorney General, the Adult Authority and this court should another appeal ensue. We feel that everyone involved could make more productive use of his time than debating the possibility of prejudice in the life of Edward M. Morales by the unexplained delay of five months in prison. The idea of such a hearing in this case smacks too much of the alleged practice of medieval monks sitting around their cells endlessly debating how many angels could sit on the head of a pin.²⁵

23. *Filitti v. Superior Court*, 23 Cal. App. 3d 930, 939, 100 Cal. Rptr. 583, 589 (1972) (Gardner, P.J., dissenting).

24. *In re Bartlett*, 15 Cal. App. 3d 176, 186, 93 Cal. Rptr. 96, 103 (1971).

25. *In re Morales*, 43 Cal. App. 3d 243, 252 n.5, 117 Cal. Rptr. 645, 651 n.5 (1974).

In a footnoted commentary on standardized, mass-produced, and adhesive contracts, Gardner laments that in spite of judicial concern,

[C]ontracts of adhesion, most of which are editorial nightmares, proliferate. There is a dark suspicion that the same people who prepare these prepare income tax forms and directions as to how to put together packaged Christmas toys.²⁶

Justice Gardner describes a criminal fact situation with apparent glee:

Officer Hamann of the Santa Ana Police Department heard the broadcast and responded to the apartment complex on South Fairview Street. He was briefed on the direction the suspects had taken. He was told by a security guard that he, the security guard, had chased one of the suspects along the building and saw someone leaping the fence at the southwest corner of the building. He, the security guard, stayed there and did not see anyone leave. Officer Hamann then peeked over that fence into an apartment backyard. He saw that a screen door had been torn away from a sliding glass door of an apartment. Officer Hamann went over the fence, approached the sliding glass door and opened it two or three inches to establish that it was not locked. He looked through the kitchen window and saw the defendant and another black man sitting on a sofa watching television. He opined that this was somewhat unusual in light of the fact that shots had been fired, sirens were wailing, a large number of officers were in the area yelling back and forth and patting-down individuals in the apartment complex. Still, these two were watching TV. They were either stone deaf or it was a remarkably absorbing television program.²⁷

An evidentiary issue prompts Justice Gardner to footnote a tongue-in-cheek eulogy for the doctrine of *res gestae*:

However, the new Evidence Code, modern writers and modern courts have abandoned the use of this rather ill-defined phrase. *Res gestae* has now gone the way of the great auk, the passenger pigeon and high button shoes. It was, in its time, a handy gadget. When an attorney could

26. *Spence v. Omnibus Indus.*, 44 Cal. App. 3d 970, 974 n.1, 119 Cal. Rptr. 171, 173 n.1 (1975).

27. *People v. Benton*, 77 Cal. App. 3d 322, 325, 142 Cal. Rptr. 545, 547 (1978).

think of no other reason for the introduction of hearsay, he would simply utter the magic words "res gestae" and, often as not, get the testimony in.²⁸

CONCLUSION

Justice Gardner's importance transcends his humor and his ability to turn a good phrase. There is a warm-hearted spirit and high-principled purpose directing the words he writes. The cynical edge that can be detected in his frank and open manner reflects his frustration when bad laws engender hardship. Yet, Gardner braves the constellation of human inequities that besiege the judiciary with courage and conviction. His deep respect for the intelligence of the jury, his sensitive performance of difficult judicial tasks, and his strong sense of common decency and simple justice reflect his faith in the intrinsic worth of humankind.

28. *People v. Orduno*, 80 Cal. App. 3d 738, 744 n.1, 145 Cal. Rptr. 806, 809 n.1 (1978).

