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GARDNER: THE SECOND GALLERY

Judge Rothwell B. Mason*

In all this Cuban business there is one man who stands out on the horizon of my memory like Mars at perihelion.¹

In the business of published opinions, one name that stands out for me is Gardner, P.J.

We at bench and bar spend a good portion of our waking hours—and perchance some dozing hours—paying court to our jealous mistress the Law by wading through her legal literature.

I, for one, have suffered the dunking of more than one brief or Advance Sheet in the bathtub at midnight, when massive doses of pomp and cant, cloaked in verbosity, proved more soporific than spellbinding.

But, like the donkey trotting after the dangled carrot, we continue to turn those pages. On too-rare occasions, we are rewarded by a glittering jewel in the dross—an opinion by Justice Robert Gardner. Odds are good that it contains a neatly-turned phrase; a droll observation on some sorry human state or another; a lightning strike of uncommon horse sense—or all of the above.

Worse luck for us, the good gentleman has won a change of venue from our Fourth District Court of Appeal to a South Pacific atoll. Indeed, unless they amend section 976 of the Rules of Court to require publication of High Court of American Samoa opinions in the California Advance Sheets, his wit and wisdom will be, for all intents and purposes, lost among those gems

[o]f purest ray serene
The dark unfathomed caves of ocean bear.²

Six years ago the Board of Editors of this journal did us readers a favor by putting together a sampler of his best. They called it “A

© 1985 by Judge Rothwell B. Mason, Judge of the Superior Court of Sacramento County, State of California.

1. HUBBARD, *A Message to Garcia*, A TREASURY OF THE FAMILIAR 537 (R.L. Woods ed. 1946).

2. GRAY, *Elegy Written in a Country Church-yard*, A TREASURY OF THE FAMILIAR 44 (R.L. Woods ed. 1946).

Gallery of Gardner."³

This is an update—The Second Gallery—culled from his more recent opinions, and presented here in defiance of that sage old philosopher, Anon, who opined, "To borrow from one is plagiarism; to borrow from many is research."

GARDNER CONCURS WITH GARDNER

The Fourth Amendment

On several occasions Gardner gritted his teeth and wrote, for a unanimous panel, the opinion he felt a Supreme Court precedent compelled. But then he added his own concurring opinion to voice his personal disagreement with the result.

Once, on the subject of vicarious application of fourth amendment protections to a malefactor, he concluded the lead opinion: "Under the compulsion of [*People v.*] *Dalton*, we reverse the conviction of possession of marijuana for sale,"⁴ but he followed that, in his concurring opinion, with:

People v. Dalton (citations omitted) which compelled a reversal in this case has a significant flaw. It is wrong.

I fully recognize that under the doctrine of stare decisis, I must follow the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below.

I think that if the authors of the Fourth Amendment were aware of *Dalton*, they would be turning over in their graves.

I was recently the victim of a burglary. The burglar, Billy Bell, a well known local professional, was apprehended under some bushes in the backyard. He was handcuffed and taken to the police car. The officers then returned to the bushes and in that area they found Billy's loot scattered around. But what if Billy had put his loot in a box, perhaps in a box with the label "Private property of Billy Bell, a professional burglar. Keep out." Would the police have had to get a search warrant to open that box? To me, the idea is downright silly. . . . To me the idea of giving car thieves or burglars Fourth Amendment rights over closed containers in burgled houses or stolen cars is simply preposterous. Nevertheless, that is the result compelled by

3. *A Gallery of Gardner*, 19 SANTA CLARA L. REV. 925 (1979).

4. *People v. Musante*, 102 Cal. App. 3d 156, 160-63, 162 Cal. Rptr. 158, 160-62 (1980) (Gardner, J., concurring).

Dalton.⁵

Having gotten that off his chest, Gardner went on, in a bit of a *jeu d'esprit*, to say:

When someone is driving my stolen car, I think the police have a right to arrest him and to search him and all closed containers therein. I do not want that thief to have any of my Fourth Amendment rights. He is not legally on the premises to be searched and has no standing to complain But then, of course, *Dalton* says he has and that, to coin a phrase, is that.⁶

And finally,

As I survey the 400 to 500 cases collected in Mr. Bell's splendid Compendium on Search and Seizure, I cannot but observe that the rules which have evolved constitute a kind of encrusted ritual of rigid etiquette which is almost Byzantine in its frozen formality and labyrinthine protocol. *Dalton* simply adds, erroneously I submit, to this ever-thickening layer of legalisms and adds one more barren technicality to this already bloated and amorphous field.⁷

Justice and the Mentally Retarded

Emmett Shay was arrested for arson. Upon discovery of his mental retardation, civil commitment proceedings under the Welfare & Institutions Code were instituted in lieu of criminal prosecution. Gardner had to decide the admissibility of Emmett's confession under these circumstances.

Emmett Shay is a thirty-year-old mentally retarded person with an I.Q. of fifty-seven and the emotional age of a five- or six-year-old. Unfortunately, Emmett has incendiary proclivities. He has set at least three fires, two residences and a car—all belonging to people at whom Emmett was angry.⁸

Here Gardner footnotes:

Counsel's argument that Emmett is not really dangerous because he has only set three fires and these occurred about a year apart, falls on deaf ears. One fire is enough. A mentally retarded person who sets fire to the house of those at whom he is angry is a walking time bomb.⁹

5. *Id.* at 159-62, 162 Cal. Rptr. at 161 (Gardner, J., concurring).

6. *Id.* at 162, 162 Cal. Rptr. at 161.

7. *Id.* at 163, 162 Cal. Rptr. at 162.

8. *Crammer v. Shay*, 94 Cal. App. 3d 242, 156 Cal. Rptr. 303 (1979).

9. *Id.* at 244 n.2, 156 Cal. Rptr. at 304 n.2.

He continues:

Since the turn of the century, a new category of laws has emerged which does not fit comfortably into either the civil or criminal field. These have to do with society's efforts to handle the problems of those who cannot compete in life's open market. . . . This case falls squarely in this gray area.¹⁰ . . . It is our conclusion that under the mandate of *Tyars*, the judge should have held a *Jackson v. Denno* hearing as codified in Evidence Code section 405 and the failure to hold such a hearing was error of constitutional proportions¹¹

Again concurring with himself, he adds:

I wrote the majority opinion and feel that its results are compelled by controlling authority. However, I am deeply troubled by it. Correct it may be; right it is not. Ominous consequences necessarily flow from it which are highly detrimental to society and of precious little benefit to the mentally retarded.

. . .

Thus, under the ruling we have made today, if proper objection is made, there is no way that the jury is ever going to find out that Emmett is an arsonist unless he is caught in the act.

. . .

I am concerned with the picture of Emmett Shay "adrift in the community" with a pocket full of matches.¹²

In the next example, Gardner, writing for the full court, affirmed a conviction that had involved testimony from a previously hypnotized witness, relying on the proposition that *People v. Shirley* was not retroactive.¹³ Again sending his message through a self-concurring opinion, he voiced these concerns:

Shirley is really more of a polemic than an opinion. As a polemic it makes interesting reading. The protagonists are so clearly defined.

The prohypnosis expert is a lowly police psychologist, wretchedly educated ("Ed. E"), who is, of all things, a director of a "proprietary school" in Los Angeles. (Just what that has to

10. *Id.* at 245, 156 Cal. Rptr. at 305.

11. *Id.* at 247, 156 Cal. Rptr. at 306.

12. *Id.* at 249, 156 Cal. Rptr. at 307.

13. See *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

do with this case escapes me.) This police psychologist is so dumb that he accepts "at face value" and "without question" the "somewhat extravagant conclusions" of a neurosurgeon who is apparently pretty much of a dummkopf himself.

On the other hand, the antihypnosis experts are "highly experienced," nationally known, "pioneers" and "respected authorities" who present the "generally accepted view" which is set forth in "scholarly articles" and "leading scientific studies." Thus, the guys in the white hats and those in the black hats are clearly defined and appropriately labeled.

The authorities suffer the same treatment.

Somehow lost in the shuffle, is the fact that the majority rule in this country is that hypnotically induced testimony is admissible (citations omitted).¹⁴

According to *Shirley*, cases following that rule rely on an authority which "summarily disposed" of this issue with "little or no analysis." The part I really like is the classification of all contra authorities as "moribund." Somehow I visualize a huge stack of dying opinions, which, to borrow from John Randolph of Roanoke, "shine and stink like rotten mackerel in the moonlight."

. . .

The inevitability of the conclusion to be reached is revealed in the court's reliance on an Arizona Supreme Court opinion which said that this type of testimony was to be inadmissible from "the time of the hypnosis session *forward*." There is something terribly final about that phrase. It is reminiscent of Chief Joseph's statement on his surrender to General Howard — 'From where the sun sets, I will fight no more, *forever*.'

Tom Paine would have loved *Shirley*. However, much as I admire the writing style of *Shirley*, I am troubled by the concept What next? What about witnesses who have been brain-washed, coached, coerced, bribed or intimidated? Are we going to reject all this testimony because it is suspect? The same is true of the so-called truth serums, hallucinogenic drugs or other exotic drugs only hinted at in C.I.A. suspense fiction.

I am firmly of the belief that jurors are quite capable of seeing through flaky testimony and pseudoscientific claptrap. I quite agree that we should not waste our valuable court time watching witch doctors, voodoo practitioners or *brujas go*

14. *People v. Williams*, 132 Cal. App. 3d 920, 183 Cal. Rptr. 498 (1982) (Gardner, J., concurring).

through the entrails of dead chickens in a fruitless search for the truth. However, this is only because the practice is too time consuming and its probative value is zilch. In other words I am a great believer in Evidence Code 352. However, the idea that an eyeball witness to a transaction be denied the opportunity to tell a jury his recollections of what he saw is disturbing to me whether that recollection has been refreshed by hypnosis, truth serum, drugs, intimidation, coercion, coaching, brainwashing or impaired by the plain old passage of time.

Another aspect of *Shirley* disturbs me even more. In its modification *Shirley* determined that a defendant who submits to pretrial hypnosis may nevertheless testify. (citation omitted) The idea that the predator may testify and yet his victim may not offends my sense of justice. It appears to me that the scales of justice are tilted—dangerously.¹⁵

TOWARD A MORE PICTURESQUE SPEECH. . .

On Appellate Review

But our Quixote doesn't always keep his lance sheathed until the concurring opinion.

Speaking his piece on the subject of the *People v. Wende*¹⁶ requirement on appellate courts to undertake a review of the entire record in cases where even appellate counsel have confessed inability to find arguable issues, Gardner bows, in a footnote early in the opinion, to Ed Lascher—no mean slouch as a wordsmith himself—to set the stage:

Ed Lascher in commenting on *Wende* in the December 1979 issue of the California State Bar Journal made the following observation: “[I]t seems to me somebody has the algebra way out of shape when a court has an obligation to become advocate. I somehow have this interesting vision of a dialogue at the weekly conference on whether to affirm or reverse a conviction: ‘Although the appellant and his counsel weren’t able to come up with any plausible argument I, Justice Jones, in my capacity as para-advocate, have come up with Argument 23(b) and, would you believe it, I find myself persuaded by my argument.’”

Taking the baton, Gardner proceeds down the track:

This whole process of appellate review is not some kind of a WPA project for the continued employment of judges, lawyers,

15. *Id.* at 928, 183 Cal. Rptr. at 502.

16. *See People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979).

secretaries, clerks, book sellers and office equipment salesmen. Hopefully, we do not engage in a process of setting up straw men and then knocking them down in a search for "arguable" issues.

After enumerating seven specific concerns about *Wende*, he romps through literary clover with this:

Reviewing this record is probably one of the silliest projects ever undertaken by an appellate court. Whatever the legislative or judicial grumblings have been about the office of the State Public Defender, no one has ever accused that office of a lack of thoroughness, enthusiasm or scholarship. Their work is outstanding. After the State Public Defender has said there are no arguable issues, our subsequent review in this case might be compared to touching up a Rembrandt, proofreading Shakespeare or editing a speech by Winston Churchill.¹⁷

I submit that metaphorical potpourri matches his earlier description of a truly effective trial attorney: "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."¹⁸

Adept as he is with the rapier, as in those similes, Gardner can also make his point with the broadax:

[W]hen an effort is made to establish insanity due to alcohol, it must be shown that there exists a "settled insanity" and not the type of a temporary mental condition produced by current use of alcohol. In other words, your friendly local lush cannot get sloshed, commit a horrendous crime and slip into a state hospital free from criminal sanctions.¹⁹

In another case Gardner grapples with the dilemma of the prisoner mistakenly released who seeks credit against his term when returned to custody. He sets up hypotheticals to demonstrate the rehabilitated type whose case cries for relief, contrasted with the unregenerate who is not so deserving. The latter he paints:

Prisoner two when mistakenly released, sets out on a one-man reign of terror. He robs, cheats, steals, burgles, rapes, and molests young children. When he is finally apprehended, he is the kingpin of a network furnishing heroin to school children.

17. *People v. Von Staich*, 101 Cal. App. 3d 172, 174-77, 161 Cal. Rptr. 448, 450-51 (1980).

18. *People v. Eckstrom*, 43 Cal. App. 3d 996, 1002, 118 Cal. Rptr. 391, 395 (1974).

19. *People v. McCarthy*, 110 Cal. App. 3d 296, 299, 169 Cal. Rptr. 772, 774 (1980).

As to this prisoner, there is obviously nothing fundamentally unfair in denying him dead time credit for time spent on his one-man crime wave.

He draws parallels between that hypothetical and the continuing criminal conduct of the actual petitioner, and concludes:

Rather obviously, there is no denial of due process in denying this petitioner credit against his remaining prison term for those 203 days of freedom. Actually, it takes more than a touch ofchutzpah to demand this relief. The only surprising thing about this case is that petitioner does not ask for good time/work time credit for the time he was at large.²⁰

Considering the propriety of the American Law Institute test for insanity in *People v. Drew*,²¹ he packs a graphic treatise on sociopaths into just one paragraph of a footnote:

The nomenclature changes from time to time. Once these individuals were known as psychopaths, then as psychopathic personalities, then as sociopaths, then as sociopathic personalities, then sociopathic behavior problems. Regardless of label, they are well known to the administration of criminal justice, forming the reluctant fodder of that system—impulsive, selfish, irresponsible, seemingly having no sense of right or wrong, incapable of any real emotional relationship with others, always in trouble, never profiting from experience, sharing none of life's usual loyalties and totally lacking in respect for the rights of others. Since they are incapable of learning from experience, they constitute an uncomfortably high percentage of our criminal defendants—the recidivists.²²

Offroad Racing

He often brightens up an otherwise mundane subject with just one bit of crackling imagery. Discussing whether a local ordinance regulating offroad racing was preempted by trespass sections of the Penal Code, he wrote:

Although the parties argued at length as to whether requests for written permission as to any races have actually been made, realistically the ordinance precludes offroad motorcycle racing on private land since the owners of such private land

20. In re Messerschmidt, 104 Cal. App. 3d 514, 516-17, 163 Cal. Rptr. 580, 581-82 (1980).

21. See *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

22. *People v. Martin*, 114 Cal. App. 3d 739, 744, 170 Cal. Rptr. 840, 842 (1981).

probably look upon the onslaught of several hundred motorcycles and dune buggies over their property with about the same amount of enthusiasm as did French farmers when German Panzer divisions crossed their land.²³

Sentencing

By way of encore, the very next case in the official reports presents Gardner on the Determinate Sentencing Law.

When, in 1976, the Legislature ended its 60-year-old romance with the Indeterminate Sentence Law, few tears were shed at the demise of that highly visionary, but woefully unsuccessful, effort at effective penology.

Alas, few hosannas have been heard in the judicial system for its successor, the so-called determinate sentence law, Penal Code section 1170 et seq., a legislative monstrosity, which is bewildering in its complexity. Superimposed on Penal Code 1170 et seq. are the sentencing rules (Cal. Rules of Court, rule 401 et seq.) promulgated under the aegis of Penal Code section 1170.3. Here, the already perplexing provisions of Penal Code 1170 et seq. are further refined into a kind of labyrinthine formalism under which trial judges carefully pick their way in a kind of ceremonial ritual during the sentencing process.²⁴

At this point, he adds a footnote:

Whether all of this results in any uniformity of sentencing is doubtful. Tough judges still sentence severely, easy judges leniently—all within the rules. One result is crystal clear—sentencing today affords a rich field of appellate litigation. It has long since passed that old standby, inadequacy of counsel, and is neck and neck with Penal Code section 1538.5 in Shepard's citations.²⁵

In an earlier threnody on the same subject, he had written:

As a sentencing judge wends his way through the labyrinthine procedures of section 1170 of the Penal Code, he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offer-

23. Sports Committee Dist. 37 A.M.A., Inc. v. County of San Bernadino, 113 Cal. App. 3d 155, 157, 169 Cal. Rptr. 652, 653-54 (1980).

24. People v. Sutton, 113 Cal. App. 3d 162, 164, 169 Cal. Rptr. 656, 657 (1980).

25. *Id.* at 164, n.1, 169 Cal. Rptr. at 657 n.1.

ings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys.²⁶

On another occasion, Gardner made short shrift of the "Harvey lid."²⁷ "In short, we reject defendant's claim that *People v. Harvey* means all armed robberies after the first six are on the house."²⁸

With engaging frankness, Gardner once footnoted:

The author of this opinion must admit with some embarrassment that he has in several unpublished opinions taken a diametrically opposite position to that taken in this case. Cowardly recourse is had in two hoary maxims:

(a) A foolish consistency is the hobgoblin of little minds; and

(b) Wisdom too often never comes, and so one ought not to reject it because it comes too late.²⁹

First Amendment Protection of Political Comment

Gardner weaves some little-known historical vignettes into his discussion of the law of libel *vis-a-vis* first amendment protection of political comment:

In *New York Times v. Sullivan* (citation omitted), the Supreme Court observed that this country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

This "profound national commitment" encompasses the constitutionally protected right not only to make responsible, but also to make irresponsible charges against those in or seeking public office. It is an essential part of our national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office. At such times the line between liberty and license blurs. However, our dedication to basic principles of liberty and freedom of expression will tolerate nothing less. The alternative is censorship and tyranny.

Our political history reeks of unfair, intemperate, scurri-

26. *Community Release Bd. v. Superior Court*, 91 Cal. App. 3d 814, 815-16, 154 Cal. Rptr. 383, 384 (1979).

27. *See People v. Harvey*, 25 Cal. 3d 754, 602 P.2d 396, 159 Cal. Rptr. 696 (1979).

28. *People v. Borunda*, 124 Cal. App. 3d 355, 357, 177 Cal. Rptr. 274, 275 (1981).

29. *People v. Myers*, 125 Cal. App. 3d 735, 744, 178 Cal. Rptr. 259, 263 (1981).

lous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a black-guard, a knave and insane (Mad Tom), Henry Clay a pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghou. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy.

Perhaps the low point in irresponsible political vilification occurred in the Cleveland-Blaine contest where an entire presidential campaign was waged on two deathless bits of doggerel based on allegations that Mr. Blaine was dishonest, and Mr. Cleveland had sired an illegitimate child—"Blaine, Blaine, James G. Blaine, the continental liar from the State of Maine," versus "Ma, Ma, where's my Pa? Gone to the White House. Ha! Ha! Ha!"³⁰

This he embellishes with a footnote:

All of which prompted George W. Curtis of civil service reform fame to observe, "We are told that Mr. Blaine has been delinquent in office but blameless in private life whereas Mr. Cleveland has been a model of official integrity, but culpable in his personal relations. We should therefore elect Mr. Cleveland to the public office which he is so well qualified to fill and remand Mr. Blaine to the private status which he is admirably fitted to adorn."³¹

Returning to his main text, Gardner notes:

Obviously, no rational person can approve any of the above. We merely note them as an unpleasant fact of our political background—a history of rough, crude, brawling, mudslinging, muckraking, name-calling attacks upon those in or seeking political office. In America, one who seeks or holds public office may not be thin of skin. One planning to engage in politics, American style, should remember the words credited to Harry S. Truman—"If you can't stand the heat, get out of the kitchen."³²

30. Desert Sun Publishing Co. v. Superior Court, 97 Cal. App. 3d 49, 51-52, 158 Cal. Rptr. 519, 520-21 (1979).

31. *Id.* at 52 n.2, 158 Cal. Rptr. at 521 n.2.

32. *Id.* at 52, 158 Cal. Rptr. at 521.

Fair Trial v. Right to Privacy

In another case, Gardner briefly set out the issue, and then had a bit of fun with the facts:

The defendant is charged with having shot the victim, not once but several times. Unhappily for all concerned, the bullets remain in the victim's body. The defendant says that in order to secure a fair trial he wants an order that a doctor chop out these bullets for ballistic examination. No way, says the victim. I have my rights too—Fourth Amendment rights against intrusions into my body. Just because he is a defendant and I am a victim, doesn't mean that I must further endanger my life by major surgery just so he can receive a fair trial.

This in a few words tells the whole story. However, since legal and judicial tradition demand specificity, we proceed to the details:

The Shoot-Out At The Long Branch Saloon

The prosecution version:

One night the defendant and Mr. Killen became engaged in a brawl over a pool game in the Long Branch Saloon—the Indio version, not the Dodge City original. Mr. Smith, the bartender, broke it up. Defendant went to his car, obtained a pistol, returned to the Long Branch and promptly shot Mr. Smith—right through the heart. Then, he turned his attention to Mr. Killen. First, he shot Mr. Killen in the leg. As Mr. Killen attempted to crawl away, defendant pursued him and, in the idiom of the day, said, "You ain't dead yet, you motherfucker."³³ He then pumped four more rounds into Mr. Killen's body. . . .³⁴

Recounting the different version offered by defendant, Gardner continues: "It is obvious by this time from either or both versions that neither the bartender nor Mr. Killen was any Matt Dillon. The jury was unimpressed with defendant's version. He was convicted

33. Here Gardner makes footnote reference to his colorful thoughts in an earlier case, *People v. Benton*, 77 Cal. App. 3d 322, 324, 142 Cal. Rptr. 545, 546 (1978):

It is a sad commentary on contemporary culture to compare "Don't say a word, don't say a motherfucking 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 motherfucking word" conveys only dismal vulgarity"

This passage, and a following paragraph of Gardner at his best, were reported in *A Gallery of Gardner*, *supra* note 3 at pp. 925-26.

34. *People v. Browning*, 108 Cal. App. 3d 117, 119-20, 166 Cal. Rptr. 293, 294 (1980).

... 35

Weighing defendant's fair-trial right against victim's right to privacy, he notes:

[W]hen the courts have been faced with the problems of intrusion into the body or privacy of witnesses or victims to crime, there seems to have developed an attitude resting uncomfortably somewhere between studied indifference and benign neglect.³⁵

He cites the example of the *Ballard v. Superior Court*³⁷ motion for psychiatric examination of a complaining witness in a sex case. In a droll aside, he observes:

Admittedly, *Ballard* does not involve any bodily intrusion but one would think that a psychiatric examination which delves into the innermost secrets of a person's life would involve invasions into "personal dignity and privacy" comparable to if not greater than the prostate massage proscribed in *Scott*. This must be a matter of some concern to the women of the State of California. If a woman who has been raped has to submit to a psychiatric examination, why not a man who has been robbed. Fantasies are not limited to the female sex. Walter Mitty was no lady.³⁸

He concludes, on balance, that the victim

... may go his way with no further inconvenience from the presence of these bullets in his body other than the likelihood that he will encounter considerable embarrassment if he attempts to pass through the metal detection devices at airports which will undoubtedly light up like Fourth of July celebrations when he passes through.³⁹

GARDNER BEGS TO DIFFER—SUCCINCTLY

In the two offerings which follow, Gardner parts ways with his brethren—by a few degrees in a concurrence, and by a full 180 degrees in a dissent:

I concur.

35. *Id.* at 120, 166 Cal. Rptr. at 295.

36. *Id.* at 122, 166 Cal. Rptr. at 296.

37. See *Ballard v. Superior Court*, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966), then controlling as Penal Code section 1112 had not yet become effective to block such examinations.

38. *People v. Browning*, 108 Cal. App. 3d 117, 123, 166 Cal. Rptr. at 293, 296 (1980).

39. *Id.* at 126, 166 Cal. Rptr. at 298.

I join in this opinion because it is a step, albeit a short step, in the direction of breaking down the artificial distinction between emotional distress accompanied by physical manifestation and such discomfort without that handy little gadget.

If I throw up as a result of my emotional distress, I can recover. However, if I am blessed with a strong stomach, then no matter how acute my mental anguish may be, I cannot recover. This distinction is not only gossamer, it is whimsical. Nevertheless, it is firmly embedded in our law and from my place in the judicial pecking order, I can do nothing but grumble about it.

. . .

I would like to see the Supreme Court take a sharp knife and cut this whole cockamamie distinction out of the law. Then we could avoid such pure sophistry as that found in *Fuentes v. Perez* We could also jettison . . . the current distinction between recovery for "shock to the nervous system" and "damages for emotional distress unaccompanied by physical injury." For too many years I cringed when reading such an instruction to the jury. Somehow it always conjured up a ghoulish version of jurors surgically severing the brain from the rest of the body in an attempt to apply that rule. It seems to me that the law should drag itself into the 20th century and face up to the fact that mental anguish standing by itself is as real as such anguish accompanied by some kind of a physical manifestation.⁴⁰

He bluntly dissented from the opinion of his brethren that the owner of a condominium could convert his single unit into a mini-time-share venture, noting that a greedy occupant could bring in 52 or even 365 renters. He laments: "If as an occupant of a condominium I must anticipate that my neighbors are going to change with clocklike regularity I might just as well move into a hotel—and get room service."⁴¹

SOMEWHERE BEYOND THE SEA

As wistfully noted at the outset, Gardner has now left us for service as Chief Justice of the High Court of American Samoa. Herewith, in his new role, but in his familiar style, he introduces the

40. *Allen v. Jones*, 104 Cal. App. 3d 207, 216-18, 163 Cal. Rptr. 445, 451-52 (1980) (Gardner, J., concurring).

41. *Laguna Royale Owners Assn. v. Darger*, 119 Cal. App. 3d 670, 689, 174 Cal. Rptr. 136, 148 (1981) (Gardner, J., dissenting).

saga of the severe dog bites inflicted on Jason Savage, age five, by a stray dog named Tweeter.

There are few places on this earth which suffer more than American Samoa from an oversupply of man's so-called friend, the dog. Untold thousands of dogs roam the territory. Some are strays, some have a vague claim to ownership by a human being, a tiny fraction are actually licensed and registered. Almost without exception they are mongrels—scrawny, emaciated, mangy, in-bred, flea-bitten, diseased. Sophisticated world travelers usually refer to the dogs of Mexico and China as the worst looking dogs in the world. Compared to the dogs of American Samoa, the dogs of Mexico and China could qualify as best of their class at Madison Square Garden.

The territory has no leash law. It has a singularly ineffective and widely ignored license law and a peculiar stray dog control law (citations omitted) of which more later. As a result, . . . large numbers of dogs, usually in groups or packs, roam the territory at will, fighting, frolicking, fornicating, barking, snarling, and during a full moon, howling in either unison or singly. All of this, standing by itself, is a nuisance. However, a more ominous result of this bulging canine population is an awesome number of attacks by dogs on human beings, usually small children

Tweeter was a stray dog inhabiting the A.S.G./F.A.A. Governmental housing enclaves. In November 1981 Tweeter attacked and severely mauled the small child of Lieutenant Mike Morris Then, approximately three months later, Tweeter attacked Jason Savage, biting him severely in the head, ear, and hand. A report was made but nothing was done by officialdom. Instead, frustrated with official inactivity, a vigilante spirit prevailed and some unidentified person prevailed upon a couple of Tongans to beat Tweeter to death with clubs. It wasn't pretty and the S.P.C.A. would undoubtedly have disapproved but it was effective. So much for Tweeter.⁴²

With that parting thought, I'll end this pleasant exercise of mining with just some of the nuggets from the rich Gardnerlode. As the earlier survey concluded,

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,

42. *Savage v. Government of American Samoa*, 1 ASR (2d) 102, at 102-04 (1983).

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.⁴³

43. *A Gallery of Gardner*, *supra* note 3 at 941.