

7/28/66

## Memorandum 66-50

Subject: Study 63(L) - The Evidence Code (Penal Code Revisions)

Attached are two copies of a Recommendation on the Penal Code Revisions needed to conform that code to the Evidence Code. We submit this for your approval for printing. The two sections of the proposed legislation were approved at the July meeting and the Commission approved making this a separate publication at that meeting.

If you have any changes you believe should be made, please mark them on one copy. If we can have the changes before the meeting, we will reproduce them before the meeting so that the members of the Commission will have an opportunity to see the material as it will be published.

In connection with the recommendation, we again call your attention to People v. Ing, 242 A.C.A. 261, 272-273 (1966). In that case the defendant in a criminal action took the stand and testified. The court stated, "Hence, the court may instruct the jury concerning the failure of the accused to explain acts of an incriminatory nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence. Moreover, the defendant who takes the stand and fails to explain evidence against him may properly be the subject of comment by the prosecution." [Citations omitted.] We do not believe that the deletion of the language we propose to delete from the two Penal Code sections will have any effect on this case.

We have attempted to obtain comments from the Association of District Attorneys concerning our recommendation on Evidence Code revisions. If we obtain any comments concerning the two Penal Code sections, we will forward them to you in a supplement to this memorandum.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

#63(L)

July 28, 1966

STATE OF CALIFORNIA

CALIFORNIA LAW  
REVISION COMMISSION

RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 4 -- Penal Code Revisions

September 1966

California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

**LETTER OF TRANSMITTAL**

September, 1966

To HIS EXCELLENCY, EDMUND G. BROWN  
Governor of California and  
THE LEGISLATURE OF CALIFORNIA

Upon recommendation of the California Law Revision Commission, the Legislature at the 1965 legislative session enacted the Evidence Code. Resolution Chapter 130 of the Statutes of 1965 directed the Commission to continue its study of the newly enacted code.

The legislation that enacted the Evidence Code also amended and repealed a substantial number of sections in other codes to harmonize those codes with the Evidence Code. One aspect of the continuing study of the Evidence Code is the determination of what additional changes, if any, are needed in other codes. The Commission has studied the Penal Code for this purpose and submits this recommendation relating to changes that should be made in the Penal Code to conform that code to the Evidence Code.

Respectfully submitted,

RICHARD H. KEATINGE

Chairman

RECOMMENDATION  
of the  
CALIFORNIA LAW REVISION COMMISSION  
relating to  
THE EVIDENCE CODE  
Number 4 -- Penal Code Revisions

Upon recommendation of the California Law Revision Commission, the Legislature at the 1965 legislative session enacted the Evidence Code. At the same time, the Legislature directed the Commission to continue its study of the newly enacted code.

The legislation that enacted the Evidence Code also amended and repealed a substantial number of sections in other codes to harmonize those codes with the Evidence Code. One aspect of the continuing study of the Evidence Code is the determination of what additional changes, if any, are needed in other codes. The Commission has studied the Penal Code for this purpose and has concluded that two sections in that code should be amended.

Penal Code Sections 1093 and 1127 provide that the court may comment on the failure of a criminal defendant to explain or deny by his testimony any evidence or facts in the case against him, whether the defendant testifies or not. In Griffin v. California, 381 U.S. 763 (1965), the United States Supreme Court held that such comment is a violation of a criminal defendant's rights under the 14th Amendment to the United States Constitution when the defendant's failure or refusal to testify is in the exercise of his privilege not to testify against himself. In order that no one may be misled by the language of Sections 1093 and 1127, the Commission recommends that the language

permitting unconstitutional comment on the defendant's exercise of his right to refuse to testify against himself be deleted from those sections.

There may be other provisions in the Penal Code that should be adjusted to conform to the Evidence Code. However, the Commission does not recommend that any other revisions of the Penal Code be made at this time because the 1963 session of the Legislature established a joint legislative committee for the purpose of revising the Penal Code and that committee is now engaged in that task.

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The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Sections 1093 and 1127 of the Penal Code, relating to the right of the court to comment in a criminal action.

The people of the State of California do enact as follows:

SECTION 1. Section 1093 of the Penal Code is amended to read:

1093. The jury having been impaneled and sworn, unless waived, the trial must proceed in the following order, unless otherwise directed by the court:

1. If the accusatory pleading be for a felony, the clerk must read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with.

2. The district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the charge.

3. The defendant or his counsel may then open the defense, and offer his evidence in support thereof.

4. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

5. When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.

6. The judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party; and he may state the testimony, and may ~~comment on the failure of the defendant to~~

~~explain-or-deny-by-his-testimony-any-evidence-or-facts-in-the-case~~  
~~against-him,-whether-the-defendant-testifies-or-not,-and-he-may~~  
make such comment on the evidence and the testimony and credibility  
of any witness as in his opinion is necessary for the proper deter-  
mination of the case and he may declare the law. At the beginning of the  
trial or from time to time during the trial, and without any request  
from either party, the trial judge may give the jury such instructions  
on the law applicable to the case as he may deem necessary for their  
guidance on hearing the case. The trial judge may cause copies of  
instructions so given to be delivered to the jurors at the time they  
are given.

Comment. The deleted language authorizes unconstitutional comment  
upon a criminal defendant's exercise of his right to refuse to testify  
against himself. See Griffin v. California, 381 U.S. 763 (1965); People  
v. Bostick, 62 Cal.2d 820, 44 Cal. Rptr. 649, 402 P.2d 529 (1965).

SEC. 2. Section 1127 of the Penal Code is amended to read:

1127. All instructions given shall be in writing, unless there is a phonographic reporter present and he takes them down, in which case they may be given orally; provided however, that in all misdemeanor cases oral instructions may be given pursuant to stipulation of the prosecuting attorney and counsel for the defendant. In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case ~~and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court~~. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. Either party may present to the court any written charge on the law, but not with respect to matters of fact, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must endorse and sign its decision and a statement showing which party requested it. If part be given and part refused, the court must distinguish, showing by the endorsement what part of the charge was given and what part refused.

Comment. The deleted language authorizes unconstitutional comment upon a criminal defendant's exercise of his right to refuse to testify against himself. See Griffin v. California, 381 U.S. 763 (1965); People v. Bostick, 62 Cal.2d 820, 44 Cal. Rptr. 649, 402 P.2d 529 (1965).