, the county was in transition, from a predominantly agricultural social order to California suburbia. The massive orchards, with their apricots, plums, and the cherry blossoms everywhere in the spring, did battle with the military in the form of the service base at Moffet Field in Mountain View and the Ames Research Center in Sunnyvale and the defense industry in the form of Lockheed. Hewlett-Packard occupied comparatively small headquarters in Palo Alto back then. In an inconspicuous corner of Mountain View, William Shockley and Robert Noyce were discussing the practical uses of the transistor at Fairchild Semiconductor. (My father was ophthalmologist to Noyce's first wife.) Everyone knows how the battle turned out. The massive orchards have long since been plowed under concrete. The whole world now knows as Silicon Valley the county that once called itself the Orchard Capital of the World.

The implications of this war of infrastructures were naturally beyond me as I grew up. But I do remember the orchards. The first home my parents rented was a tiny house that had been carved out of a small apricot orchard. There were four fruit trees in our small back yard. Urban folk, we hadn't the slightest ideas what to do with the apricots as they ripened in the summer. Unpicked, they dropped and rotted and spread gooily into the grass. The experience of stepping on one was like a cow patty squared. An experience with a consequence - I have never eaten an apricot in my life. Later on, during junior high, my brother and I tried to hold summer jobs halving the cots for drying on the huge drying boards. We never could. Even the least efficient farm worker was infinitely more adept than we were.

All that began to change in the mid-60's, when the great freeway expansion began through the western part of the county. The major development occurred in the fall of 1964, at the same time I left for college in Southern California – one of those coincidences that can make a solipsist out of the most hardened realist. By 1974, the war of the infrastructures was over. The information revolution was well under way, and the freeways had opened up areas of the county that had been rustic and isolated only a few years before. There were still pockets of agriculture and serious farmers, but the value of good land for residential development was huge and growing exponentially. Cherry blossoms in June were the stuff of history.

I was that year in my third year in the Public Defender's Office of Santa Clara County. I had gone to law school at Berkeley in 1968 with the intention of becoming a prosecutor, not out of any particular moral leaning one way or another, but calculating (correctly) that the prosecution had all the options. Living for three years in a cauldron of radical politics and political madness, aided and abetted by a strong case of unrequited love, had left me too demoralized even to apply for jobs in my final year in school. I took the first thing that came along,

which happened to be a clerkship with the Arizona Supreme Court, on a special committee organized to re-write the rules of criminal procedure of that State. It was a confidence-building job. I returned home to California a year later, eager to find out what the practice of law was all about. As it happened, the Santa Clara County Public Defender's Office, with an affiliation with the Stanford Law School, had a national reputation. As it also happened, the office had an opening. So much for the plans for a prosecutorial career – random chance had spoken first, as it so often does. I accepted the offer and started work there in September of 1972.

In 1974, the California gubernatorial election rolled around and the then Secretary of State, Jerry Brown, announced his intention to run for the office. One of his old college chums, Rose Bird, worked in the Public Defender's Office, assigned to the writing of motions and appeals. Hearing the knock of opportunity at the door, she resigned her position and went on to fame, then infamy, as California's first woman and most controversial Chief Justice. (More of that anon.) This left the office in need of someone to do motions and appeals. I was the deputy public defender appointed to succeed her. Although the choice was somewhat flattering – I was only 28 at the time, the choice implied a high estimate of my legal ability, and I was chosen over a fair number of people who actually wanted the job – I was not at all pleased. Trial work was what pleased me. The constant flow of human events in court was what drew me to the practice. Whether or not I was suited for the post, it wasn't what I wanted to do.

However, there was a silver lining in the cloud. In addition to writing and arguing motions to suppress motions to dismiss, and all manner of business in the court of appeals, I was also expected to handle anything that came along that was difficult and unusual. All of the other deputies had specific assignments – the municipal courts in Sunnyvale, Palo Alto, or Los Gatos, preliminary hearings, juvenile court,

and so forth. The motions-and-appeals deputy, the guy in my position, in addition to the regular duties, generally took up anything that fell through the cracks, that didn't seem to fit in any defined niche. A small, but significant trickle of cases and situations well off the beaten track did come my way – and that was fun.

I was in my office one day that summer, working on some motion or another, listening to the Watergate hearings with one ear, when one of the senior felony deputies appeared at my door and announced he had encountered a real weirdie. Generally speaking, public defender cases began with an initial interview with the client. When he was out of custody, the judge would direct the client over to the office. But those who had been arrested and held in jail obviously could not make appointments in that manner. So one of the duties of the staff was go over to the jail and do the intake interviews with those in custody. It was a duty everyone hated – slow and boring, since these interviews were done before the police reports were received and often it was impossible from the defendant's account to make sense of why he had been arrested. The intake interview assignments were made on a rotation basis.

The deputy who appeared at my door had just come back from his turn at the jail. The weirdie he had interviewed was named Harley Valentine H.[1] Harley H. was an inmate at San Quentin who had been returned to court for resentencing. By itself, that was unusual, but hardly unprecedented. Prison inmates could be and were returned to the local court for resentencing due to some procedural error in the pronouncement of judgment, an action by the appellate court, or the like. It wasn't a frequent occurrence, but it happened.

What made Harley Valentine's case a weirdie was the length of time that had elapsed between the trial and the return. He had been

[1] Most of the names involved in these pages are public record, and few, if any, of them are innocent. But none of them are public figures, either. As there is no point in causing needless embarrassment, I have generally omitted the surnames throughout.

convicted of the crime in question in 1948, twenty-six years before. He had spent the entire intervening time in prison, in San Quentin. Now he was to be sentenced again for the offense, as if no time had elapsed, as if the crime and trial had all happened the day before yesterday, as if Harley Valentine was the same man now he had been way back then.

It was a case way, WAY off the beaten path. So it was assigned to me.

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I drove over to the jail to meet Harley Valentine. Anyone who has had any thought that criminals are coddled while in custody would have had his illusions rudely shattered by a few minutes in the main holding facility in Santa Clara in 1974. It was actually a good jail, as jails go – not like the Tombs in New York or Santa Rita up in Alameda County. But there was no natural light, anywhere inside the five floors, just dim florescent lighting that made the walls look a bilious green. The smell of stale food clung to everything. I would have been carried out on a stretcher if I'd been there three days.

The building had been designed so that the inmate population as a whole had no access to any of the `public' thoroughfares. A lawyer visiting an inmate signed in at the front desk, ascertained in which unit he was housed, then went through two huge barred metal gate to a creaking elevator that rode slowly up to the fourth floor conference area. There he'd identify the person he'd come to see, a trustee would streak off, and a quarter of an hour or so later - on a good day - the inmate would appear. The interview would be conducted in one of a half-dozen or so small windowed conference rooms that aligned the hall.

Harley Valentine turned out to be a small, wizened man in his late fifties, balding and extremely pale. He spoke rapidly with a thick

Ozark twang. Based on the date of the offense, it was a pretty good guess he'd come out to California during the great migration from the Dust Bowl during the 30's – Grapes of Wrath stuff for sure. He was not mentally retarded, but from the first it was obvious he was on the dull side of normal.

He was not able to provide much in the way of information. Facts came in splatters of two or three, without being connected with each other, as if I were already aware of all the background I'd come to acquire. What I was able to glean is that he'd been tried for a violation of Penal C. §209, convicted, sent to San Quentin, and been there ever since. Why had he been returned to Santa Clara County? Evidently, back in 1948, on the day of sentencing, his lawyer had been late to court, and the sentencing went forward without him. That didn't mean much in 1948, but the Warren Court had decided twenty years later that the sentencing hearing was a critical stage of the proceedings, at which a defendant had an absolute right to be represented by counsel. Harley Valentine hadn't had counsel; and he hadn't waived that right, either – which meant that the first sentencing hearing didn't count. So Harley H. was back in Santa Clara County to be sentenced for his offense – twenty-eight years and some change after he had committed it.

I asked Harley Valentine how he'd found out about the error, since he was transparently no jailhouse lawyer. What had happened was that he was sweeping out the lunchroom at the Q one day while the real jailhouse types were confabbing about whatever. The subject of sentencing came up. Harley caught a shred of the discussion, and volunteered that his lawyer hadn't been present at his sentencing. Some kind soul – I never found out who – steered him to inmate's counsel, a writ of habeas corpus was filed in the Superior Court in Marin County (San Quentin is in Marin), granted automatically as it had to be, and Harley Valentine shipped back to Santa Clara County. The

Warren Court decision was already five years old then, so Harley had already been at San Quentin five years longer than he had to be. He would still have been there had his work assignment not chanced to coincide with an inmate bull session.

Harley Valentine couldn't - or wouldn't, he wasn't *that* dumb – tell me too much about the underlying offense, the reason he was in San Quentin in the first place. But he did remember the name of the lawyer who'd represented him and who hadn't been there when he'd been sentenced. The name was Arvid Robb, which was the first solid lead I had in the case. Arvid Robb was still very much alive and a presence in the County. In the intervening years, he had become a judge in the San Jose Municipal Court.

I had often appeared before Robb and I liked him a lot. He was a lean man, with a mid-Western skeletal face straight out of American Gothic, and thick, black horn-rimmed glasses. He was conscientious and intelligent, not at all flamboyant – ideal qualities in a trial judge. If Robb hadn't been available, I suppose I would have had to pull the ancient files out of whatever warehouse they was gathering dust in and done my best to glean whatever feel I could from them. Maybe I would have looked up old newspaper files, although there was no guarantee Harley's case had received any special coverage. Most don't. In any case, having his old trial counsel immediately available was an incredibly lucky break. I made an appointment to see the judge a day or two later.

Robb not only remembered the case, he remembered it vividly. Had I had to resort to old newspaper files, I would have done quite well, for it turned out I was representing THE most notorious criminal in Santa Clara County of year 1948 (or 1947 or 1949), for that matter. What Harley Valentine H. had done was perpetrate a home invasion of the home of John Rickey, at that time the leading hotelier on the mid-Peninsula. (A few years later, sometime during the 50's, Rickey sold

out to the Hyatt chain, and his hotel became known as Rickey's Hyatt House, which was still the most prestigious hotel in Palo Alto in 1974. It remains in operation as I write, and it is still very prestigious.)

Harley Valentine had hired on as a busboy at the hotel restaurant. While working there and observing Rickey, he had schemed himself a little scheme. He had taken over the home with two co-participants, looking for a safe in which Rickey was rumored to keep large amounts of cash. When he refused to divulge its whereabouts, Harley Valentine had tortured him to get the information, running a knife under his fingernails and other such stuff. At some point in time, the trio had moved him a short distance (Rickey evidently either lived on the premises of the hotel or nearby), to the business office of the hotel, still in search of the cash. They finally took some money, not nearly as much as they thought they'd get, then fled. But the police got good descriptions and arrested Harley Valentine and his two friends in short order. Like most crimes of this sort, it had been exceptionally poorly planned – three parts fantasy to one part reality, if the ratio was even that high.

Rickey had been victimized on the night in question, but he was normally a vigorous and aggressive man. After the arrest, the police brought Rickey down for a line-up to establish an absolutely positive identification. These days, line-ups are rather sanitized, sterile affairs, with the lineup participants on one side of one way glass and the victim on the other. But this one was done 1940's style, with the candidates being led onto a stage, and the victim in the audience, exactly like pictured in a lot of film noir movies. When Harley appeared on stage, Rickey did not wait to be asked, but jumped up on the stage, and belted him right in the mouth. I have always thought this was the most positive victim identification of which I have ever heard.

Harley Valentine was charged with a violation of Penal C. § 209, kidnapping for the purpose of ransom or robbery, California's famous

`Little Lindbergh' law. Even though he hadn't killed anyone, he was subject to the death penalty. That was no idle threat. A year after his trial, Caryll Chessman would be tried and convicted under the same statute for a series of rapes and sexual assaults perpetrated in Los Angeles and executed some 12 years later in the face of world-wide protests. At the time, both Chessman's friends and foes decried the length of time he spent on Death Row. These days he'd be a short timer.

Harley's luck didn't get any better. The judge to whom the case was assigned was William F. James, who was notorious himself, and with good reason. For years earlier, in 1944, a farm worker who by odd coincidence also was named James, had appeared before him on a charge of homicide. The victim, named Thomas, had stolen fifty-five cents from James; when James demanded it back, Thomas cut his head open with a broken beer bottle. A fight broke out, and Thomas was killed. All this was witnessed by a number of other workers. Farm worker James appeared before Judge James without a lawyer and pled guilty to the charge of homicide, with as little formality as you or I would plead guilty to a speeding ticket. He probably had a good claim of self-defense and was certainly guilty of no worse than voluntary manslaughter. Judge James took the plea on the spot, and found the homicide to be as first degree murder. One week later he sentenced now Convict James – still without counsel - to life imprisonment, then presumably went home to a good dinner. The California Supreme Court ultimately tossed the conviction out in an opinion that is still valid as one of the seminal `right to counsel' holdings in California law. But that was not until 1952, after Prisoner James had served eight years.

As silly and obnoxious as appellate law can become - and it can be silly and obnoxious to an astonishing degree – one should never lose sight of the origins of the basic doctrines, or the depths to which the criminal justice system can sink when it's left entirely in the hands

of the professionals. The wisdom of the California Supreme Court was not necessary to perceive the unfairness in what Judge James had done. Anyone with a basic sense of fair play could have seen that. In fact, it takes a law school education and a couple of decades or so on the bench, with all your friends and acquaintances calling you `judge' and deferring to your every word, to destroy that sense of fair play, and induce the kind of megalomania that could make lordly Judge James believe that he'd done justice to lowly Farm Worker James.

Back to Harley Valentine. His string had apparently run out. He was to stand trial for his life, and there was little doubt of the sentence that William F. James would impose, given the chance. As a matter of plain, prosaic legal reality, Harley Valentine was guilty of a violation of the Little Lindbergh law. The statute punished the *movement* of the victim for any distance, no matter how short (the `little' of the Lindbergh phrase refers to the movement, not to the age of the victim). Chessman, known as the Red Light Bandit, accosted his victims as they parked with boyfriends, on Mulholland Drive, back in 1948 a popular lovers' lane in Los Angeles, then forcibly raped or orally copulated them. Pretty obnoxious stuff, but technically he was not executed for the sexual indignities he had perpetrated on the women – those crimes were not punishable by death - but for moving them a few yards away from the parked cars that they occupied. Harley Valentine and his cohorts had moved John Richey a far more substantial space for a criminal purpose. The fact that the crime he had in mind was robbery rather than rape made not the slightest difference to the statute. The odds that he was going to end his career, and then his life, on Death Row up in San Quentin were extremely long.

But it was at exactly this point in the process that his luck began to change. Santa Clara County was a small county back then, and the reputation James as a hanging judge was well-known to all the jurors.

Even though the law was clear and the evidence overwhelming, they did not return a verdict of guilty on the Little Lindbergh count, but on the lesser charge of simple kidnapping, and also of robbery. Robb talked to them afterwards. They were fully aware of what the law implied, and they were horrified by the crime. They had no sympathy at all for Harley Valentine H. But they did not believe that the crime, however heinous, should cost him his life, and they were fully aware that Judge James would impose the death penalty, given an open shot. So they deprived the judge of the shot by returning the lesser verdict. James doubtless gnashed his teeth when cheated out of his prey – er, that is, his opportunity to administer harsh, but righteous justice. But there was nothing he could do.

This is of course an instance of jury nullification, about which I will have more to say later on. Here I want to comment on the matter more informally. One of the hidden strengths of our system is the sheer number of personalities who are involved in it. Many a potential criminal prosecution dies still born because the beat cop doesn't believe the act justifies arrest – or if he does, his sergeant doesn't. After that, there's review by a district attorney, and then further review by a magistrate, this time with attack by defense counsel, and then finally trial, before a judge and the all-important jury. The weight of opinion, from various sources, various viewpoints, all by itself tends to moderate results – an excessively harsh cop is countered by an excessively soft D.A. In this case, a hanging judge runs head long into a lenient jury. If there is a destiny that shapes the ends of American criminal justice, it is in this way it makes its presence felt.

That was not the end of Harley Valentine's good luck. Arvid Robb was a conscientious lawyer. He did not miss the sentencing hearing out of negligence or inadvertence. He had been briefly detained in another court, then slowed down in traffic. Impatient, James went right ahead without him. In 1948, an attorney was not required at sentencing, in

addition to which – this is the point – what was going to happen at sentencing was a foregone conclusion. Nothing that Robb could have said or done would have made then slightest difference to the outcome. Harley Valentine was going to receive maximum sentences permissible under law. As a practical matter, Robb's appearance at the hearing would have been entirely superfluous, a reality known to both Robb and James. That was the reason for the nonchalance.

But the omission was of enormous theoretical importance to him by 1974. As insignificant as it seemed at the time, that `error' was what provided Harley Valentine with a second chance, an opportunity for a second court – more personalities - to revisit the issue of his sentence, 26 years after the first.

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Thus I had obtained the history of the case. It was obvious that there was some room to maneuver. Although the crime was major and aggravated (the criminal scheme had a disturbing resemblance to the slaughter of the Clutter family in Iowa some dozen years later that Truman Capote made famous in the book `In Cold Blood'), it had not resulted in any death or permanent physical injury. It was not part of a larger crime spree. There were no lurking, uncharged offenses that might factor, directly or indirectly, into the sentencing equation. And the wizened little man now sitting in the Santa Clara County jail clearly was no present threat to anyone.

But there remained some important, unanswered questions. If anyone could see that Harley Valentine was no longer a menace, why hadn't he been released on parole at some point, particularly in the last few years ? At that time, and during all the time he had been in prison after the first three years, he had been eligible for parole. Hearings by law would have been relatively frequent, at least every

three years, sometimes annually. But no release had ever been granted. Why not ?

I already had my suspicions, but it was important to be certain. It is a big mistake to think that bureaucracies, even bureaucracies as large and unopposed as California's Adult Authority (the agency responsible for inmate paroles) do anything irrationally. They are indeed unimaginative, their rationales may be frustratingly hackneyed or trivial, or just plain dumb, but there is *always* a reason. Although they may not be creative – come to think of it, the notion of a creative bureaucracy is truly frightening – they are not random. There was reasoning of some kind behind Harley Valentine's extended term. It wouldn't do him any good at all to speculate about it or belittle it. I had to know what it was.

So I obtained a court order allowing me to inspect my client's prison file. The Adult Authority was perfectly willing to open the file, but unwilling to transmit it down to Santa Clara County, and also unwilling to furnish a duplicate. The upshot was that on a rainy day in January, I took a break from my normal responsibilities and drove up to the California Medical Facility at Vacaville, near Sacramento. At that time, Vacaville served as the central hub of the entire men's prison system. Any man sentenced to prison was first shipped to Vacaville, where he was evaluated and assigned to a particular institution. (The women went directly to Frontera.)  Even though Harley H. had done most of his time at San Quentin, his file was kept at Vacaville.

I was greeted with the numb impersonality typical of prisons and other custodial facilities and ushered into one of the visiting rooms. The file had already been pulled, which came as a small, pleasant surprise. Prisons are not exactly noted for their cordial hospitality. They are the most non-responsive bureaucracies in the world. I had expected to spend most of the day just waiting around until someone bothered to look for the authorization. But there it was, two tomishly

thick manila folders, the summary of the twenty-seven years my client had spent behind bars.

Like most, it had been compiled in reverse chronological order, with the most recent additions on top, with an exasperating number of duplicates and multiple entries. I had to burrow deep to understand the history. It made for exceptionally informative, exceptionally sad reading. The records chronicled the entire docket and thus included Harley V.'s crime partners. Both of them had been paroled at their first hearing, after they'd completed one-third of the minimum term, and been discharged completely when the minimum term had been completed. That had been in 1954, over twenty years earlier. Neither one of them had ever been heard of again.

In the criminal justice system, that counts as a huge success. Generally, persons who commit felonies as serious as these had been are fairly well committed to a criminal life style and nearly always re-offend. But there was a lot of dislocation after World War II and much atypical behavior – and misbehavior. The two confederates were apparently the type who had made a single mistake, paid for it, and moved on – a rare pattern these days.

Harley had charted a different course. He had been turned down flat for parole on the same dates his partners had been granted theirs, hardly surprising since he'd been the ringleader. He'd also had all sorts of incident reports in the late 40's and through out the 50's – scuffles and food-line quarrels, that sort of thing, nothing serious enough to warrant another prosecution, but hardly the profile of a model prisoner. He'd been photographed about every five years or so. In the earliest ones, he'd had all his hair and looked out at the camera with a small, crooked sneering smile. I didn't know whether he'd ever seen a movie with the actor Elisha Cook, Jr., and I'm certain he wouldn't have known the name. But he'd had the same cheap hood look down to perfection. It matched exactly the pattern of the incident reports. The younger

Harley V. had been a typical small-time punk, prison fodder from the word go. That man could not have been more different than the bald, wizened little midget then residing in the Santa Clara County jail.

Beginning in the late 50's, and continuing into the 60's, the pictures changed. So did the behavior. He began to look quizzical, puzzled – the sneer disappeared. The incident reports stopped at about the same time. He did the perfunctory, somewhat menial, work he was assigned without complaint. It was not that he had redefined or rehabilitated himself – there was no record of enrollment in any educational courses, general or vocational, or any plans, large or small, for a life outside of prison. The sense was more of a complete acceptance of institutional life, a docility that I suppose was what the prison was supposed to produce.

That transformation should have resulted in his release. Whatever his normal shortcomings, he was no longer a threat to society, which was what the object of the game is supposed to be. And yet he had not been paroled. The records of the annual hearings indicated an awareness that his personality had changed, and no disagreement that he was no longer a menace to society. The reasons for the annual denials lay elsewhere, in a recognition that a change of a different sort had also taken place

What had happened was that some time during the 1950's, during the long, lonely years at San Quentin, Harley V. had, in a very quiet, Nineteenth century sort of way, gone completely mad.

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His delusion took the form that he had discovered the secret of immortality, that by using `replacement atoms' for the ones that were wearing out inside his body he could cheat death and live forever. He spoke freely enough about it to the parole board and the psychiatrists

who prepared evaluations for them. But no one ever pursued the issue far enough to ask him just exactly what the mechanism of the replacement was, so I don't know myself. (The one time I asked him, he became quite excited in a happy way and rambled on about his confidence that he'd outlive his sentence. But he never did say exactly how.)

I used the word `mad' above, rather than `insane' or `mentally ill', because it was also fairly clear to everyone involved that this was not a deeply rooted psychosis. Harley V. went on functioning as he had before. There was not the deeply rooted, elaborately rationalized delusional system you find in the true paranoid schizophrenia. (Criminal lawyers live side by side with the darker areas of psychiatry. Any not cursed with a tin ear pick up not only the jargon, but also the a little of the art (not science) that lies behind it.) The only difference was that he had found a delusion by which he was able to rationalize cheerfully the loss of the precious time that was slipping away, day by day, year by year.

But it did create a problem for the parole board from the standpoint of simple humanity. If they did release him, just where was he supposed to go? What exactly was he supposed to do? He no longer possessed the potential for violence he did when he had first come to the Q, but that didn't mean he wouldn't revert if he fell completely through a crack in the social floor. There was also a basic concern for his welfare. Manumission was actually a crime in ancient Rome with respect to a slave who had lived beyond a certain age, the rationale even in those benighted times being that it was a monstrous cynicism to co-opt another human being's best years, then kick him out into the streets when he was too old or infirm to care for himself on the pretense of `freeing' him. Harley V. hardly had the same moral standing that a victim of slavery did – for one thing, he'd gotten

himself into the mess by his own act – but the unstated thinking of the Parole Board had run along exactly the same lines.

I went back over the file one last time before I returned it. Then as now, California law permitted the prosecutor and judge to provide their comments and opinions about the inmate. At the very base of the file, buried under all the paper that had been generated afterward, I found them – old, yellowed, documents, dated July of 1948 – about two weeks before my second birthday - hand typed on an Underwood or Royal typewriter. Judge William James had had no kind words for anyone, but about Harley he was next to rabid. Harley V. was an animal, not fit to be in human company, not fit to live. He was fully aware of what the jury had done and why – he made it quite clear that he would have sentenced Harley V. to death if he had had the power. As it was, justice demanded that Harley be caged like a beast for the remainder of his days. The pages were old and curled, as relevant to the situation at hand as Elizabethan foolscap or Egyptian papyrus. They said nothing at all that applied to Harley V. in the year 1974. But they said a great deal about Judge William James.

So I had the answers to my basic questions, which were – truth be told – pretty much the answers I had expected. For purposes of resentencing, the critical point was that the rationale for Harley V.'s extended imprisonment did not have to do with any question of public safety. It had been based on an entirely different, more practical problem – what to do with him. I now had real hope that I could do something. What the trial court was going to require of me was not a showing that he was no longer dangerous – that was obvious – but rather some sort of plan to reintegrate him into society. What was necessary was some reassurance to the responsible parties that Harley Valentine wouldn't descend immediately in the gutter (figuratively speaking) or end up as one of the perpetual drunk-in-public types that populate the Monday arraignment calendars in misdemeanor courts.

Providing that sort of reassurance was a task I was certain I could manage.

In fact, even before I had finished the drive home, I had a plan.

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The procedure by which the civil commitment of mentally-ill persons was accomplished under California law at that time was commonly known as the `LPS', an abbreviation for the Lanterman-Petris-Shore Act. The act was a little less than a decade old at that time. It was civil libertarian at its core, establishing an ascending order of constraints and showings that had to occur to obtain a civil commitment. At the outset, an individual could be detained for up to seventy-two hours if he or she posed an immediate danger to self or others. At the end of that period, upon an appropriate showing, the detention could be stretched to 30 days – and at the end of *that* period, up to one year, at a fully adversarial hearing at which the inmate was represented by counsel, entitled to a jury trial, and the State had to prevail by a preponderance of evidence. The public defender's office, which in California is charged with responsibility for every miserable, thankless job that no other lawyer wants to do, was responsible for the representation of the inmates at these final hearings. The result was that there was a good deal of knowledge around the office about the ins and outs of the mental health system. It was that wisdom I hoped to utilize.

(Digressing for a moment, the LPS Act is a perfect example of exactly how tough it is to deal with the problems of the mentally ill in a strictly legal context. It was actually the product of a startlingly unusual alliance, the aforementioned civil libertarians, who did not like the prospect of unnecessary confinement of the mentally ill, with the Reagan conservatives, who did not like the mentally ill, period, and in particular the prospect of spending money on their institutionalization.

Underlying it all was the typical hubris of the psychiatrists, who were convinced that they had finally found the resources to cope with mental illness in the form of the wonder drugs, the phenothiazines and other wonder drugs, that had found their way into widespread use in the preceding decade.

The result was the one-size-fits-all Proscrustean bed that the automatic application of dogmatic principles of law so often produces. On the one hand, there were people whose behavior was unmanageable – say, making forty or fifty nuisance calls a night to a former spouse or lover – who could not be held even for 72 hours because they were not a `danger to self or others' – all that they ever did was phone. (The victim would end up calling the police, because there are criminal punishments for such things, with the result that the disturbed individual ended up in jail, not exactly an improvement from a civil libertarian point of view.

On the other hand, there were people whose conduct did fall marginally into the right category, who became so angry by the confinement that they became truly dangerous, thereby justifying the smug and supercilious judgments that began the whole mess. And the hubris of the psychiatrists proved to be exactly that – the wonder drugs had such uncomfortable side effects that many of the patients refuse to take them except when confined, which, of course, defeats the whole purpose of not confining them.

The main problem was not quantifiable. The one essential ingredient in the commitment process is sensitive, informed judgment, and that could not co-exist side by side with all the quantification required by law. Good judgment isn't computable like that. So out the window it went. An anecdote – the colleague of mine assigned to the LPS calendar took up the cause of a client facing his third or fourth recommit for a year. The treating psychiatrist, one of the more astute ones, was convinced he was suicidal. The client claimed he was not,

that the psychiatrist was committed to that prognosis to justify the earlier commitments. My colleague took up the cause in earnest, first professionally, then with the full moral weight of her being. A knock-down, drag-out trial ensued, at which she was successful. The client was freed. There were shouts and whoops to high heaven, all of which died abruptly four days later when the client hung himself. My friend and colleague was shattered, unable to continue; you can win ten thousand cases, but losing one like that is all that matters.

I don't know how bad the old system was, but I doubt the new one was much of an improvement. End of digression.)

The basic plan was simplicity itself. Harley V. had been kept in prison because the Parole Board had no place to put him. He happened to have become delusional in the interim, either the effect or the cause of the Parole Board's decision, actually, in the complex patterns of the world as it really is, both at once. The treatment facilities and services available to persons conserved under the LPS Act were ideally adapted to provide a place to put him. Placing Harley V. on a conservatorship would give the judge resentencing him some confidence that he would not end up wandering around the streets if he were released. He would still be on probation. If it turned out that he was utterly incapable of living in the world as a free man, his probation could be revoked and he could be returned to jail or prison. (I had no worry that he'd commit another violent crime. The worry was that he'd become a derelict, a street bum, or a criminal victim himself.)

There was only one small problem with my plan. The Lanterman-Petris-Shore Act did not apply to the mentally ill generally, but only those mentally ill persons who constituted a danger to themselves or to others. (That the limitation was inherently absurd, that as a practical matter any one seriously disturbed enough to come to the attention of the authorities with regard to a commitment was by definition a danger to self on the basis of an incapacity to take care of themselves,

had evidently not occurred to anyone when the statute was enacted. Practical matters were not a big concern of the California legislature in the late ‘60’s.) Harley V. was no threat to anyone, and he was certainly no danger to himself where he was presently held. In fact, his major problem in life lay exactly in how well he had adjusted to the endless term he had spent in prison. He was not statutorily eligible for conservatorship under the law, and it was actually not even a close question.

At that time, I had only been practicing law for a couple of years, but even so, I had long since lost all interest in legal theory, let alone niceties of legal theory. Ethics and morality mattered a great deal to me (still do), but – as everyone knows – these matters were hardly defined by statute. In fact, the moral imperative seemed to me to run directly counter to the statutory scheme. If I could see an opportunity to right what had become a fairly significant wrong, by means that were neither criminal nor fraudulent – all right, not *excessively* fraudulent - I would be acting immorally if I ignored it. Omission is no different than commission, once the existence of the right alternative is identified.

So I went ahead. I did not want a fair hearing, I wanted a result, and to the best of my ability, I wired it. I spoke to our LPS deputy and had the conservatorship proceeding initiated. I then contacted the two examining psychiatrists involved and filled them in completely as to just what was at stake here. They were sympathetic, of course – who wouldn’t be? – and the legal definitions were broad and soft-focused enough for them to come up with opinions that would do fine for my purposes without infringing overmuch their professional integrity. Nor was I content to let the matter rest there; I also contacted various of the prison psychiatrists who had diagnosed or treated Harley V. over the years, and obtained their input as well, as to the lack of harm Harley V. would pose to the community if he were released.

The goal was to put before the Court a complete plan as to how Harley V. could be re-integrated into society, with assurances from all manner of professionals that the plan made some sense. Harley V. would already be conserved, with a treatment plan in place calling for his release to a group home center, and gradually enlarged out-time and visits. Little by little, one step at a time, I set everything up. The plan was falling perfectly into place.

Unfortunately, three days before the hearing on the conservatorship was to be held, the major cornerstone of the scheme, a major obstacle developed, one that could have crashed the whole thing into ruins.

The obstacle was Harley V. himself. He wanted nothing whatever to do with it.

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All the while I had been assembling information and making plans concerning Harley V. , he had been quite contentedly making himself at home in the county jail. I went to visit him every four or five days or so. He was thoroughly institutionalized; his only complaint was that his rather extensive collection of pornography back in San Quentin was not available to him in the jail. He had met cheerfully with the psychiatrists and psychologists I had sent into the jail. He was used to those kind of interviews. I am not sure he full understood the implications.

But to my considerable surprise, when the time came to actually draw up a petition and have him conserved, he wanted nothing to do with it. The choice was between the evil he knew and the evil he did not. To him, conservatorship meant an old-fashioned insane asylum, in which he would be confined for an indefinite period of time and all sorts of unspeakable things would be done to him. I explained to him

over and over that times had changed, that resources were so scarce that it was a virtual certainty that he would be kept for only a few months, more likely weeks, and released – gradually – into the community. It was largely in vain. I could not give him any hard guarantee, and without that he was skeptical and terrified.

But gradually I wore him down. This was his one and only chance for freedom; if the sentencing court returned him to prison, it would be back to the merry-go-round, with the strong probability he would die there. I was not about to let him let that chance go, for reasons I knew were nonsense. The year he had been imprisoned, `The Snake Pit', a film starring Olivia De Havilland as a mental patient who goes through all the tortures of hell in the institution, won the Academy Award. That was the image he had in mind; I knew it simply wasn't so; and I was not about to see him do enormous real damage to himself put of fear of the Bogeyman.

It was not so much sweet reason, but persistence and my obvious interest in his welfare that finally brought him around to an extremely reluctant consent. I would have had little use for the punk he had once been, but I rather liked the little gnome he had become – and he sensed that. The most difficult aspect of public defender practice is winning the trust of the client. It's absolutely essential in the more normal case, where often the prospects of winning at trial have to be discussed with a defendant who absolutely does not want to hear a professional evaluation of the evidence. I hadn't thought trust would be critical with Harley V, but it was.

However, that was not the end of this particular chapter. Within a day or two of obtaining his grudging consent, the most unexpected event in the entire case occurred, one that knocked all of my plans into a cocked hat. Friends Outside was the name of a charitable organization that performed all sorts of minor services for inmates – arranging weddings, setting up visits, that sort of thing. It was highly

regarded by both the sheriff and the public defender's office, as the work it did considerably eased the administrative burden. Harley V. had asked Friends Outside to find his long-missing family. To my utter astonishment, they succeeded.

It turned out that Harley's family had never left the San Jose area. His mother, one brother, and a cousin or two lived locally. I was completely astonished for a practical reason. The prison file, the long record of parole hearings and psychological evaluations, was absolutely devoid of reference to any family connections. Awareness of that resource would have made an enormous difference to parole board thinking. Harley V. might have been a fre man years earlier if anyone had known. But they had never come forward and he had never mentioned them.

Some of the reasons became apparent when I met the mother and brother. They were very much the same as Harley – same twang, same roots, same borderline functioning. It would not be correct to say they were retarded, but the word did come to mind in their presence. Their most striking characteristic was their passivity. When the Man came and took you away for reasons of his own, there wasn't much you could do, until the Man came and brought you back for equally mysterious reasons. Ol' Harley had been gone for a while, which was bad, and now he was back, which was good.

This might have been touching if not exactly Norman Rockwell, but irrelevant, had it not been for one additional circumstance. Harley's brother happened to have been conserved for real. He had evidently been mentally ill for years. More than that, he was on outpatient status, being treated with heavy doses of phenothiazines. Harley's mother did all the talking; the brother sat through it all like a zombie, zonked to the gills. I hoped that condition would escape Harley's notice, but no such luck.

Not only did he notice, but he was terrified at the thought that he could end up drugged in the same way as his brother if he went along with the conservatorship. Harley was very much a creature of the 40's. He was scared to death of pharmaceuticals. It was an interesting comparison to the felons who came of age a decade or two later, who were enthusiastic champions of anything animal, vegetable, or mineral, that might produce an altered mental state. When the actual petition was served on him two or three days later, in the formal and formidable statutory language, he became adamant that he wanted nothing to do with my clever scheme.

He kept pointing at one paragraph or another in the pleading, so upset he was almost stuttering ` Lookee here, Mr. Berry,' he said, over and over, and nothing I could say could reassure him. He was certain that turning himself over to the mental health authorities would result in his being chemically lobotomized in the same way that his brother had been. At that point in his life, freedom must have seemed to him an illusion, an unobtainable day dream. As I said, his only real complaint with jail custody was that he missed the extensive pornography collection he had San Quentin, consisting mainly of women with shaved pudendas in postures that left nothing to the imagination. He was not about to trade that known routine for something as dangerous and marginal as what I proposed.

Harley V.'s intransigence led to an ethical dilemma that is common enough in theory, but actually rather rare in practice, between what a client wants done and what is best for him. What's the right thing to do? What he wants? Or what seems to be best? These may be nice points to discuss at the debating club, but this was real life, I had a real flesh-and-blood human being who was determined to spend the rest of his life in prison rather than brave what I knew to be a non-existent danger, and I was simply not going to allow him to do that to himself. There was no way of ducking responsibility – if you

have alternatives, you are responsible for the choice you make, and no amount of equivocation relieves you of the burden of that fact.

So in real life I arranged matters so the conservatorship would go on wheels. I took no chance that Harley V. would do or say anything to upset the applecart. Normally when an inmate had a court appearance on a civil matter – say, for a divorce or small claim or some such, as a matter of routine the sheriff's office would transport him to the right court. I called in some markers and saw to it that he remained in the jail on the day in question. I also talked to the deputy public defender assigned to the LPS calendar and made certain that the petition would not be contested, that it would be granted by default. The upshot was that Harley V. was conserved without muss, without fuss, and with nary a peep being heard.

I don't want unnecessarily to scandalize the reader here. I was absolutely sure of what I was doing. Harley V. was rightly terrified of phenothiazines, which are very powerful, mind altering drugs. But he was totally wrong to think he was going to be forced to take them. They are not prescribed willy-nilly to every one who comes into the system. Then – and I suppose now – their principal use is to control behavior of unruly inmates. Harley V. was anything but unruly; in fact, the whole problem was his passivity. No doctor was going to waste drugs on him. More than that, I had deliberately popularized the case in what was a fairly small community. There was no possibility of misunderstanding or misdiagnosis. Everyone understood what was going on here. The daycare home was a sort of decompression chamber in which Harley V. could gradually become accustomed to modern life and ordinary freedom. Add to that that there was an interested family in the vicinity, and . . .

I could go on and on. The bottom line was that Harley V. was mentally ill, but he wasn't psychotic. He didn't need the more drastic resources of the mental health system, and those resources were too

scarce to force upon him simply for the fun of it. In short, another factor that often plagues these issues – the question of uncertainty – was simply absent here.

That didn't stop him from being agitated, but events then began to move so rapidly and happily for him that he relaxed quite a bit. With a custodial authority now lawfully in play besides the jail or prison, I persuaded the presiding judge to release Harley for a weekend to one of a day-care facility, sort of a tryout, with a further release for an afternoon. These were fairly simple pleasures – a daycare facility would never be mistaken for a suite at the Hilton – and yet he came back glowing, almost ecstatic. There were the first two days that he'd not spent behind bars in 26 years – plus I had the definite impression that he'd had a fairly hardscrabble life even before the arrest. So everything had gone swimmingly, all was now sweetness and light, and the case was almost over.

The sentencing hearing when it finally arrived was anti-climactic. The perceptive reader might have wondered where the district attorney's office was all this time. The short answer was that no one in that office gave a damn about this case. Harley V. had done his time, resembled one of Disney's dwarfs more than a street punk, and was about as dangerous. It was not as if the D.A.'s Office was willing to open the door and let him walk out, but its concern was more with situations that were a little less historical. So on this occasion I had the field to myself.

I called seven psychiatrists, several from San Quentin and others that practiced locally. They were all of the opinion that Harley V. could succeed in the outside world, `success' in this context meaning that the court could be reasonably confident that if released he would not do anything that would embarrass the court, which had always been the ultimate consideration. I did not call the John Rickey, who was very much alive and available. By this time the case had become quite well

known around the court house, and generated a lot of talk. One of my colleagues, speaking at one of our favorite watering holes with the mellow sentiment that two hard drinks will produce, had suggested that I call Rickey in support of the release. But I thought of that rather emphatic identification that Rickey had made, that in some circumstances even 28 years might not be that long, and I wanted nothing to do with that plan.

The conclusion the Court ultimately came to was foregone. No one really wanted to send this harmless middle aged man back to the Q. The judge ordered that he be granted probation, conditioned on compliance with all the terms and conditions of the conservatorship, and released him. I shook hands with him, he left through the front door of the courtroom, and that was that. It all worked out as planned – no one even thought of psychotropic drugs for a patient ad docile and malleable as he was. With the promise of a real life, he sloughed off the `replacement atoms' delusion as easily as a snake sheds skin. The mental health professionals thereupon lost all interest him, and he was released to his family. I never saw him again after he left the courtroom, and I never heard of him again after he was released. In the eternal November of public defenderdom, that counts as a success.

Two final notes. The press had picked up on the human interest aspect of Harley V.'s situation, and we actually made the front page. John Rickey was still very much alive and in the community. The reporter conscientiously contacted the Rickey family for a reaction. They issued a cautious, interesting statement, hoping the court had done the right thing and that Harley V. was in fact no longer a menace to society. I thought of my colleague's sentimental suggestion that I enlist the family's support in Harley's V. behalf, and felt immensely relieved that I had rejected it. For John Rickey, Harley V. was and would always be the sneering vicious punk he had encountered in 1946.

That to him was the essence of the man, frozen in time and immutable, and it would take a much more self-confident person than I am to say that he was wrong.

The second is much more private. The sentencing hearing took place on February 16, 1975. Two days earlier I met with him in jail to finalize matters. It was also the occasion of his 53rd birthday. I gave him my best wishes, and then suddenly the meaning of his middle name - `Valentine' – became clear to me for the first time. Some famous lines of Yeats occurred to me:

*What youthful mother, a shape upon her lap*
*Honey of generation had betrayed. . .*
*Would think her son, did she but see that shape*
*With sixty of more winters on its head,*
*A compensation for the pang of his birth,*
*Or the uncertainty of his setting forth?*

The mother who had named her newborn son after the patron saint of love some fifty years earlier could not possibly have foreseen what fate actually had in store for him. No one would ever confuse the clientele I represented as a public defender with the characters in a Shakespearean tragedy. But if you weren't careful they could break your heart just as easily.

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What to make of all this? I am going to draw very few moral conclusions from these little tales, and now is just as good a time to begin not drawing them. It is not easy to parse the case of Harley V. in terms of standard concepts of justice.

Did he receive an excessively long sentence? No, not at the outset, whether considered in terms of the statutory punishment (death), or consistency (other persons did get that penalty), or proportionality (the crime, a home invasion with torture, was truly horrific). Did society have the right to demand that he modify his personality ? Absolutely. As drastically as it was modified ? Almost certainly not. Was he imprisoned for longer than he should have been? Not at the outset. Almost certainly at the end. Did the parole board do the best it could for him? In terms of legal responsibility, no - it never acted in anything other than good faith. In terms of sensitivity at the human level, no. But just how much sensitivity was Harley V. owed? Is the filigree touch something that he forfeited along with his freedom? And what about his passivity, and his family's inertia?

All of these perspectives are valid. None is decisive - and therein lies the rub. The problem is not an absence of reality, but an excess of it. I have my own prejudices about criminal justice, and one of the biggest is against commentators who make profound moral pronouncements of one sort or other. What they invariably do is adopt one value system to the exclusion of all the others and pontificate to their hearts content. But there are not only two sides to these questions, there are an infinity of them, and no intellectually honest method to simplify the problem.

As matters actually happened in real life, none of these abstract issues were very important, to me, to the court, to anyone. The reason was the absolute, perceivable fact that Harley V. was no longer a menace. He was no longer the same person who had committed the crime. In a crude, roughhewn way, the prison system had worked. It had succeeded in changing his fundamental character, which was its theoretical purpose. That does happen, although not often (there is some point to recidivist laws). Whether the right adjective to describe the change in his personality was `rehabilitated'; or `destroyed' a

question very much in the eye of the beholder. We are back in the area where there is too much to think about, where there is too much to say to say anything.

In any case, things were changing. Harley V. had been sentenced under what was known as the Indeterminate Sentencing Law. What that meant was that the judge did not set a particular term of years at the time of sentencing, but simply directed imprisonment. The inmate was then kept in the facility for an indeterminate period, until the powers that be decided he was ready to return to society. It was a system that had its drawbacks – Harley's story could not illustrate them more completely – but it did provide for the flexibility necessary to distinguish between the truly dangerous and those who were not. Moreover, the worst excesses of the Indeterminate Sentencing Law had been ended by some fairly good decisions of the California Supreme Court, announced just a few months before I made the acquaintance of Harley. They came too late to help him, but some major reforms had been made.

However, Jerry Brown had been elected governor in November of 1974, and brought with him into office a small army of dilettantes. One of the objects of their interest was California's sentencing system, which they either did not know or did not care had been substantially changed about six months before Brown took office. The result of their efforts was the creation in 1976 of the Determinate Sentencing Law, a monstrous one-size-fits-all system in which the court imposes a term of a fixed number of years based on the statutory offense and a number of strictly defined criteria. Te long and short of it is that these days Harley would either be released at a relatively young age, when he was still extremely dangerous, or held for a much, much longer term than he actually was. Not much of an improvement.

But a lot more than that was afoot. At the same time I was doing what I could for Harley V., ten miles north, up in Cupertino and Los

Altos, the two Steves, Jobs and Wozniak, were working on the first personal computer. As much as I thought the County had changed during my lifetime, it was tame stuff compared to what was coming. What was left of the orchards was going to disappear forever, and Silicon Valley spring up in their place. Everything was going to be different, in ways that no one could have imagined – not me and certainly not Harley V. and the others of his ilk.

All that happened thirty seven years ago, coincidentally or not at about the midpoint of my life when I began assembling these notes. I wonder how someone who had spent all that time in prison would do these days. Would a transition be practical ? Would it even be possible ?

Probably not. Replacement atoms aren't as easy to come by these days as they used to be.

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