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Multiple Punishment and Consecutive Sentences: Reflections on the *Neal* Doctrine

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California, like many states, has a statutory provision forbidding multiple punishment under different statutes for the same criminal acts. Professor Johnson examines the body of law that this statute has spawned, particularly the California supreme court's decision in Neal v. State and its progeny. Arguing that multiple concurrent sentences are seldom, if ever, prejudicial under California's indeterminate sentencing system, he criticizes current multiple punishment doctrine as unrealistic and inefficient because it fails to take indeterminate sentencing into account. Professor Johnson suggests that consecutive sentencing, rather than multiple punishment per se, is the source of excessive punishment and proposes that consecutive sentencing be abolished.

Troubles seldom come singly, and a defendant charged with crime often finds that he is charged with several offenses. This may occur because he has been on a crime spree, or because he has simultaneously committed two or more violations. He may rob *A* on Monday and *B* on Tuesday, or he may rob *A* and *B* together at the same time and place. He may attack his own minor daughter and commit forcible rape, statutory rape, and incest at one and the same time. While intoxicated, he may drive his automobile with a revoked driver's license.

In each of these examples, and in many others, it is necessary to determine whether a court may convict or punish the defendant for multiple crimes or only for one. Traditional doctrine provided two very limited protections against the multiplication of penalties, based upon

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common law traditions and constitutional prohibitions against double jeopardy.¹ One rule prohibited conviction for "necessarily included offenses," so that a single homicide could not be punished both as manslaughter and as murder, or a single physical attack as both aggravated assault and simple assault. A lesser offense is said to be "necessarily included" within a greater offense only when it is impossible to commit the greater without also committing the lesser.² Second, the doctrine of "merger" prevented conviction or punishment for certain inchoate crimes when the defendant was convicted of the completed crime, so that a single completed killing could not lead to convictions for both murder and attempted murder.³

The traditional rules leave a great deal of room for multiple punishment, even in situations where a mind untutored in the law's complexities would tend to see only a single criminal offense. The inchoate crime of conspiracy, for example, does not "merge" into the completed crime which is its object.⁴ Hence, if two or more persons agree to rob a bank and then rob it, they may be convicted and sentenced both for conspiring to rob and for the robbery itself. The result has been justified on the theory that a group is more dangerous and difficult to apprehend than an individual, and more likely to plan further crimes.⁵

However questionable this judgment may seem, it is at least more plausible than any that could be advanced to support such other illustrations of the conventional approach as the 1958 decision of the United States Supreme Court in *Gore v. United States*.⁶ Separate fed-

1. E.g., U.S. CONST. amend. V; CAL. CONST. art. I, § 13; CAL. PENAL CODE § 1023 (West 1957).

2. See discussion in *People v. Greer*, 30 Cal. 2d 589, 595-601, 184 P.2d 512, 515-19 (1947).

3. See R. PERKINS, CRIMINAL LAW 553 (2d ed. 1969). Strictly speaking, attempt is not "necessarily included" within the completed crime because it is possible to commit some crimes without being guilty of an attempt. For example, a defendant who caused a death by grossly reckless conduct might be convicted of murder, although he could not be convicted of attempted murder unless he had a specific intent or purpose to kill. See *id.* at 573-77.

4. *Callanan v. United States*, 364 U.S. 587 (1961); see 2 B. WITKIN, CALIFORNIA CRIMES § 964 (1963). The rule was otherwise at common law. See *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 968-71 (1959).

5. "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." *Callanan v. United States*, 364 U.S. 587, 593-94 (1961) (opinion of the Court by Mr. Justice Frankfurter).

6. 357 U.S. 386 (1958).

eral statutes punish the sale of narcotics outside the original stamped package,⁷ the sale of narcotics not pursuant to the appropriate Treasury order forms,⁸ and the sale of narcotics known by the seller to have been illegally imported.⁹ In *Gore* the Supreme Court held that a court could sentence a seller to three consecutive terms of imprisonment for violating all three statutes simultaneously in a single sale. The opinion by Mr. Justice Frankfurter reasoned that since each of the three offenses required proof of a fact not required by either of the other two, none of the three could be said to be "necessarily included" in either of the other two.¹⁰ It was possible, in other words, to commit any one offense without committing either of the other two.

The *Gore* opinion is a classic example of arid technical reasoning devoid of any serious effort to justify the result in terms of a sensible sentencing policy. A court less eager to wring the last drop of harshness out of the statutory scheme could have concluded that Congress meant to punish all nonmedical sales of narcotics only once, and provided three statutes out of an excess of caution to ensure that an accused could not escape conviction altogether due to some technical failure in the proof.¹¹ Yet if it is easy to criticize decisions like *Gore*, it is somewhat more difficult to formulate a doctrine that will properly measure a defendant's liability in the many and varied situations in which an issue of multiple punishment may be posed.

One state that has at least made an effort is California. Section 654 of the California Penal Code provides that when an "act or omission" is made punishable in different ways by different criminal statutes, it may be punished under either but not both.¹² Anxious to avoid

7. 26 U.S.C. § 4704 (1964).

8. *Id.* § 4705.

9. 21 U.S.C. § 174 (1964). The citations are to the sections as amended and codified presently. *Gore* was actually convicted under earlier versions of these statutes.

10. The text describes the reasoning of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which was incorporated by reference in the *Gore* opinion.

11. Chief Justice Warren advanced this argument in his dissenting opinion in *Gore*, 357 U.S. at 393-94. Three punishments would make somewhat more sense in the *Gore* situation if the statutes were intended to enforce three distinct taxing provisions rather than a single federal policy against narcotics sales. Congress was not interested in obtaining tax revenue from the narcotics traffic but in prohibiting it without exceeding its powers under the Constitution. Even Mr. Justice Frankfurter had no doubt of this fact. See *id.* at 390. The federal narcotics tax provisions have more recently been attacked as requiring self-incrimination. See *Minor v. United States*, 396 U.S. 87 (1969).

12. CAL. PENAL CODE § 654 (West Supp. 1969): "Alternative of Substitute and Cumulative Punishments. An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or

the kind of senseless multiplication of punishment that is naturally invited by a Penal Code notorious for its repetitive and overlapping provisions,¹³ the California supreme court gave this section an apparently broad reading in a landmark decision in 1960. The opinion in *Neal v. State*¹⁴ appeared to promise a new law of multiple punishment that would be influenced more by the court's understanding of the demands of a rational sentencing policy than by the technicalities of the common law. Unfortunately, the *Neal* doctrine has not lived up to that promise. It was applied somewhat inconsistently in the very case in which it was announced, has created confusion ever since, and has finally degenerated into a set of technicalities nearly as unrelated to policy as the common law rule applied in *Gore*.

This unhappy development occurred not because the *Neal* opinion was misinterpreted in later cases, but because it was fundamentally misconceived at the outset. Astonishingly, the court attempted to develop a doctrine regarding excessive multiple punishment without considering the importance of the outstanding feature of California sentencing law: the indeterminate sentence for felonies. By focusing instead upon the language and concepts of a statute codified in 1872, before the initiation of indeterminate sentencing,¹⁵ the court virtually guaranteed that its doctrine would be obsolete at birth. The predictable result has been that the court has since devoted its opinions to the solution of excruciatingly difficult technical questions whose practical importance barely rises to the level of triviality. At the same time the opinions have carefully ignored the questions that are of some practical importance.

A better approach was, and is, available. By basing a doctrine of excessive multiple punishment upon the policies implicit in California's indeterminate sentencing law and upon the statutory power of appellate courts to reduce excessive punishments, the California supreme court could for the first time begin to deal with the issues actually at stake

omission under any other. . . ." Section 654 prevents harassment of a defendant by multiple prosecution as well as multiple punishment. Multiple prosecution is forbidden in some circumstances when multiple punishment in a single prosecution would be permitted. See *Kellett v. Superior Court*, 63 Cal. 2d 822, 409 P.2d 206, 48 Cal. Rptr. 366 (1966). See also *Ashe v. Swenson*, 38 U.S.L.W. 4295, 4298 (U.S. April 6, 1970).

Similar statutes in Arizona, Utah, Minnesota and New York have generated far fewer appellate cases. See *State v. Enriquez*, 104 Ariz. 16, 448 P.2d 72 (1969); *State v. Jones*, 13 Utah 2d 35, 368 P.2d 262 (1962); N.Y. PENAL LAW § 70.25(2) (McKinney 1965); 40 MINN. STAT. ANN. § 609.035 (1963).

13. See CALIFORNIA JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE, 1967 REPORT 16-18.

14. 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960).

15. California's first indeterminate sentencing law was enacted in 1917. See *In re Lee*, 177 Cal. 690, 171 P. 958 (1918).

for prisoners and for law enforcement. At the same time, it could avoid the time-consuming and utterly unrewarding technical decisions required by the *Neal* doctrine. Part II of this Article explores and recommends this alternative approach. Before reaching the solution, however, one must discuss the problem. Part I analyzes the *Neal* opinion and the subsequent case law, and attempts to explain what went wrong.

I

THE *Neal* DOCTRINE

Homer Neal threw gasoline into the bedroom of Mr. and Mrs. Theodore Raymond and ignited it, apparently because he suffered from the delusion that Mr. Raymond was persecuting him. His victims survived, and Neal was convicted of arson and two counts of attempted murder. The trial judge sentenced him to two consecutive indeterminate terms for the attempted murders and a concurrent indeterminate term for the arson. The maximum term on each count was 20 years, and consecutive sentencing made the total maximum 40 years.

Some years after the court of appeal affirmed the conviction,¹⁶ Neal petitioned the California supreme court for release on the ground that the imposition of more than one sentence violated section 654. The court, in an opinion by Justice Traynor, held that the trial court should not have imposed the arson term, but that the two consecutive sentences for attempted murder were lawful.

The process of reasoning by which the court reached this result deserves very close analysis, for it is the root of all the confusion that has characterized the interpretation of section 654 ever since. Justice Traynor began his consideration of the merits by observing that the three convictions all rested upon the "defendant's act of throwing gasoline into the bedroom of Mr. and Mrs. Raymond and igniting it."¹⁷ He then noted that the common law doctrine of necessarily included offenses was not applicable, because one can commit arson without attempting murder, and attempt murder without committing arson. He further noted that section 654 is broader than the common law doctrine, however, and extends to any situation where multiple liability is based upon a single act.

16. Because the trial court heard incompetent evidence on the question of sentencing, the court of appeal remanded for a redetermination of whether the attempted murder sentences should run consecutively. *People v. Neal*, 97 Cal. App. 2d 668, 218 P.2d 556 (2d Dist. 1950). On remand consecutive sentences were again imposed, and no further appeal was taken. The California supreme court held that Neal could subsequently raise the issue of unlawful multiple punishment on habeas corpus. *Neal v. State*, 55 Cal. 2d 11, 15-18, 357 P.2d 839, 841-42, 9 Cal. Rptr. 607, 609-10 (1960).

17. 55 Cal. 2d at 18, 357 P.2d at 842, 9 Cal. Rptr. at 610.

The reader may wonder why Justice Traynor did not stop at that point. Having stated, in effect, that section 654 is designed to reach precisely the situation of which Neal was complaining, he had said all that was necessary to justify, or indeed require, the court to strike out two of Neal's three sentences. He continued, however, apparently intent on formulating a broader rule, and the remainder of the opinion took an entirely different approach.

"Few if any crimes, however, are the result of a single physical act,"¹⁸ Justice Traynor went on to say, apparently using the term "act" in a new sense. Previously, he had seemed to regard Neal's conduct as a single act, but now he observed that where more than one act "in the ordinary sense" is involved, section 654 nonetheless prohibits double punishment for a single "course of conduct," which is not "divisible." Justice Traynor then stated the following rule of law:

Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.¹⁹

Applying this general statement to the particular facts of the case, Traynor held that the arson was merely incidental to Neal's "primary objective" of murdering the Raymonds, and hence part of an indivisible course of criminal conduct. Once again, the opinion seemingly had reached a logical stopping place.

Once again, however, the opinion continued. Having stated a general rule and applied it to the arson conviction, Traynor next stated an exception to the general rule and applied that exception to the two attempted murder convictions. "Because the purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability,"²⁰ a defendant who commits an act of violence that injures or is likely to injure two persons is more culpable than a defendant who chooses a means that harms only a single person. Under that reasoning Neal could be punished twice for endangering two lives with one act of violence, and so the two consecutive attempted murder sentences stood.²¹

18. *Id.* at 19, 357 P.2d at 843, 9 Cal. Rptr. at 611.

19. *Id.* at 19, 357 P.2d at 842-43, 9 Cal. Rptr. at 610-11.

20. *Id.* at 20, 357 P.2d at 844, 9 Cal. Rptr. at 612.

21. Read literally, section 654 does not apply when a single act is punished twice under the same provision of the Penal Code. The court reads the statute to apply, however, whenever an act is subject to two criminal punishments. See *id.* at 18 n.1, 357 P.2d at 843 n.1, 9 Cal. Rptr. at 611 n.1.

A. Neal Analyzed: *The Unanswered Questions*

As with many famous groundbreaking opinions, one could read *Neal* as broadly or narrowly as one wished. This is not necessarily a serious vice, because an innovative court often has to start down a path before it knows exactly where the path is going to end. The trouble with the *Neal* opinion was that it left the direction of the path unclear as well as its destination.

1. Neal and the "Single Act" Rule

Read narrowly, Justice Traynor's opinion simply holds that, except as limited by the "multiple victim" exception, section 654 forbids the imposition of more than one punishment when the same physical conduct is the basis of two or more convictions. On this view of the holding the conviction and sentence for arson would have been upheld if, for example, Neal had shot his victims and subsequently burned the bedroom.

Anyone attempting to justify so narrow a reading of the opinion would probably argue that since *Neal* involved only a "single act," all of the intent and objective language was extraneous dictum. He might attempt to explain some of the complexities of the opinion by pointing out that the term "act" may be used in at least three distinct senses in this connection, and that the opinion may have become confused by failing adequately to distinguish among the three. In the first sense, Neal's convictions all rested upon a single act because the same physical conduct—throwing and igniting gasoline—was used to establish each offense. In a second sense, however, throwing gasoline is a different act from igniting it, just as aiming a pistol is distinct from firing it. Possibly Justice Traynor had this second sense in mind when he observed that "few if any crimes . . . are the result of a single physical act."²² Because any incident of physical conduct can be divided indefinitely into its component parts, section 654 must have used the term "act" in the first rather than the second sense; otherwise, it would never be applicable. A previous decision had established, for example, that a robber who struck his victim with a baseball bat and then took his money could not be punished for both robbery and assault.²³ Although the robber committed more than one act in the second sense of the term, the same forcible conduct was used to establish both offenses.

Justice Traynor also apparently meant to exclude a third possible meaning of "act" as used in section 654. In the criminal law, the term

22. *Id.* at 19, 357 P.2d at 843, 9 Cal. Rptr. at 611.

23. *People v. Logan*, 41 Cal. 2d 279, 260 P.2d 20 (1953). *Cf. In re Chapman*, 43 Cal. 2d 385, 273 P.2d 820 (1954).

"act" may be used to refer to the factual elements of a crime, expressed in the abstract. In this sense the act of arson is always distinct from the act of homicide, because one is the burning of a building and the other is the killing of a person. That Justice Traynor wished to make the point that section 654 does not use "act" in this third sense is apparent from his use of precedent. As authority for the proposition that the section sometimes applies even when there is more than one "act in the ordinary sense," he cited and quoted the court's 1958 decision in *People v. Brown*.²⁴ That case held that an abortionist could not be punished for both abortion and second degree felony murder when the woman upon whom he operated died as a result of the abortion. *Brown* overruled several earlier decisions that had held that section 654 used "act" in the third sense, and that therefore it added nothing to the common law doctrine of included offenses.²⁵ Murder and abortion have nothing in common in the abstract, because one is the killing of a person with malice aforethought, and the other is the use of a drug or instrument with intent to cause a miscarriage.²⁶ *Brown* established that they are nonetheless based upon the same act when the same physical conduct of the defendant is the basis of both convictions.

Anyone reading *Neal* as adopting a "single act" rationale—with "act" defined in the first sense—would undoubtedly have some difficulty explaining why the opinion expressed the rule in terms of the defendant's intent and objective rather than in terms of the identity of the physical conduct proved to establish both offenses. He might describe all the embarrassing language as dictum, of course, and confused dictum at that, but he might have the uneasy feeling that the dictum could become holding in the near future.

2. *Neal and the "Single Objective" Rule.*

The difficulty with reading *Neal* so narrowly is that a "single objective" test is quite different from a "single act" test. It is also considerably more uncertain in application. Suppose, for example, that Neal had burned the bedroom to destroy the evidence *after* murdering the Raymonds. There would be two distinct acts—in any of the three senses—instead of one, but arguably both would be part of a single course of conduct motivated by the single or primary (the opinion uses both words) objective of killing the Raymonds. Of course, one could as easily say that Neal in the hypothetical case, or in the actual case for that matter, had the separate objectives of killing the Raymonds and destroying the evidence by arson. In fact the *Neal* dissent

24. 49 Cal. 2d 577, 320 P.2d 5 (1958).

25. See *id.* at 594-95, 320 P.2d at 15-16 (dissenting opinion).

26. CAL. PENAL CODE §§ 187, 274 (West 1970).

did suggest that Neal was a pyromaniac who desired a fire for its own sake.²⁷ One may describe a concept like the defendant's objective as broadly or as narrowly as one wishes.

A reason for interpreting Neal's "objective" to be a single one in the hypothetical case is that the purpose of section 654 "is to insure that the defendant's punishment will be commensurate with his criminal liability."²⁸ It would be difficult to argue that the precise chronology of Neal's actions is an acceptable measure of his culpability. If anything, one could interpret the setting of the fire *after* the victims were already dead as an act of mercy, relatively speaking. Similarly, a robber who beats his victim is not necessarily more culpable if he beats him after instead of before he has obtained the money.²⁹ In brief, one could read *Neal* as abandoning the "single act" formula in favor of a broader test more relevant to questions of moral culpability or dangerousness.

Unfortunately, the *Neal* opinion did not clearly indicate what it meant by "objective," or how one might determine that elusive factor. I have already referred to the dissent's suggestion that Neal was a pyromaniac. One wonders what the result would have been if he had been the beneficiary of a fire insurance policy on the house and had hoped to destroy his persecutor and become rich in a single coup.³⁰ Nor is ambiguity the only fault to be charged to any test that looks to the defendant's "single" or "primary" objective. More serious is the consideration that it does not necessarily measure moral culpability any more accurately than the "single act" approach. *Neal* itself well illustrates this objection: Assuming Neal to have had the single objective of murdering Mr. Raymond, he would still be a double murderer if his scheme necessarily encompassed the murder of Mrs. Raymond.

3. The "Multiple Victim" Exception.

It was this last consideration that motivated the court to recognize an exception. Because it is more blameworthy to murder two people

27. 55 Cal. 2d at 23, 376 P.2d at 845, 9 Cal. Rptr. at 614 (dissenting opinion).

28. *Id.* at 20, 357 P.2d at 844, 9 Cal. Rptr. at 613.

29. A distinction might be drawn between the robber who uses only as much force as necessary to complete the robbery, and the sadist who employs additional force out of pure disinterested malice. Even so, the question is not when the beating was inflicted but why.

30. A recent opinion for the court by Justice Mosk, rich in dicta, has answered this and other questions raised in this Article: "Thus had the defendant [in *Neal*] had the completely independent criminal objectives of murder (perhaps for vengeance) and burning the house (to collect fire insurance), or had he attempted to kill his victims with a gun and then set fire to their house as an afterthought, he would have been punishable for both arson and attempted murder." *In re Hayes*, 70 Cal. 2d 604, 610 n.9, 451 P.2d 430, 434 n.9, 75 Cal. Rptr. 790, 794 n.9 (1969).

than one, the court upheld the two sentences for attempted murder. The reasoning is intelligible as far as it goes, but if pursued to its logical conclusion, it would require that the arson conviction and sentence also be upheld. Neal's single act had a third victim, represented somewhat inadequately by the Raymond's home. By setting fire to that home, Neal caused a financial loss to its owner or insurer and endangered the lives of the neighbors to whose houses the fire might have spread and of the firemen called to extinguish it. In choosing a means of accomplishing his objective that was in itself a serious and dangerous felony, he demonstrated greater culpability than if he had chosen a method that endangered only his intended victims. Even if for some reason the court were to hold the "multiple victim" exception to apply to people and not to property, arson endangers people. Moreover the court implied that double punishment for a joint robbery or kidnapping of two victims would not violate section 654, whether or not the victims were actually harmed. The exception applies only some of the time, and its application seems to be based more on the technical classification of the crimes involved than on the criminality of the individual defendant.

The reasoning that the *Neal* opinion used to justify the "multiple victim" exception would also support allowing multiple punishment whenever the defendant violated, by a single act or otherwise, two or more statutes reflecting independent legislative policies. A law review note³¹ advocating something like this approach suggested that a court could punish a bartender who sold a minor a drink on Sunday both for violating the Blue Law and the Alcoholic Beverage Code. He has profaned, so to speak, both the Lord's Day and the state's alcohol policy, and violation of more than one distinct social norm is an indication of aggravated culpability.

An "independent legislative policies" exception, freely applied, would almost reduce Section 654 to a restatement of the common law doctrines of merger and necessarily included offenses. It would not permit multiple punishment in cases such as *Gore v. United States*, in which the defendant violated only a single public policy against selling narcotics, although the legislature chose to express that policy in three statutes with different technical elements. It would permit multiple punishment, however, in a great many cases where a "single act" test would not. A sex offender who raped his sister, for example, could be punished separately for rape and incest.³² Each

31. Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 929-31 (1958).

32. The California decisions do not permit double punishment in this situation. See *People v. Jarrett*, 6 Cal. App. 3d 737, 86 Cal. Rptr. 15 (4th Dist. 1970).

of these prohibitions reflects a distinct state policy, and the rapist who selects a victim from his immediate family demonstrates aggravated culpability.

4. *Concurrent and Consecutive Sentences*

Surprisingly, the court in *Neal* was unconcerned with whether the defendant's sentences were concurrent or consecutive. Before *Neal* obtained partial relief, he faced two consecutive indeterminate terms of up to 20 years each on the attempted murder counts, and a concurrent term of from two to 20 years on the arson count.³³ After the court struck out the arson sentence he was still subject to a total maximum sentence of 40 years, of which he had served about ten. Nor was his minimum term reduced,³⁴ although in any event the minimum had long been served.

The *Neal* court set aside the arson conviction as well as the sentence, but later cases have made clear that this action was inadvertent and erroneous.³⁵ Section 654, as the opinions are fond of saying, forbids not double conviction but double punishment, and the proper relief is to modify the judgment as to penalty only.³⁶ *Neal* was properly convicted of arson as well as attempted murder, but he could not be sentenced for both.

Even if the conviction as well as the sentence for arson were properly set aside, however, it is difficult to see that *Neal* would gain any practical benefit. Within the limits set by the statutory minimum and maximum terms, an administrative agency known as the Adult Authority sets the actual terms of imprisonment and parole for California prisoners. The Adult Authority is expected to consider and does consider the particular circumstances of the offense and of the offender in setting the actual date of release.³⁷ Given such a system,

33. CAL. PENAL CODE §§ 447(a) (West 1970); 664(1) (West 1957).

34. A prisoner sentenced to consecutive terms must serve a minimum of two years before becoming eligible for release on parole. *Id.* § 3043 (West 1957).

35. See, e.g., *In re Ward*, 64 Cal. 2d 672, 676, 414 P.2d 400, 403, 51 Cal. Rptr. 272, 275 (1966); *People v. Hicks*, 63 Cal. 2d 764, 765, 408 P.2d 747, 748, 48 Cal. Rptr. 139, 140 (1965); *People v. McFarland*, 58 Cal. 2d 748, 762-63, 376 P.2d 449, 457, 26 Cal. Rptr. 473, 481 (1962).

36. See *In re Wright*, 65 Cal. 2d 650, 655-56, 422 P.2d 998, 1002, 56 Cal. Rptr. 110, 114 (1967). A trial judge may sentence the defendant on all counts, and stay execution of the unlawful sentences; the stay to become permanent when the defendant completes serving the lawful sentence. By so doing he makes unnecessary a remand for resentencing in the event an appellate court reverses the conviction on the primary count. *Id.*

37. "There are many factors that are considered in the decision to release a man on parole. In general, we are concerned with a man's entire criminal, social, and psychological history. . . . We have no more important document before us than a good professional probation officer's report, i.e., we are interested in the man and

it is nearly impossible to attach meaning to the court's direction to the Authority to disregard the arson sentence. The court did not suggest that the Authority should pretend that Neal attempted to perpetrate the crime by some means other than fire, or that it could not properly conclude that persons who attempt to kill by setting fire to dwellings are more dangerous and require more prolonged confinement than other types of attempted murderers. The point is not only that the Adult Authority's decision will probably be unaffected by judicial relief from a concurrent sentence, but that it will properly be unaffected.

The court has since explained that it grants relief from all unlawful concurrent sentences because in a few circumstances it can make a difference.³⁸ For example, one of two concurrent sentences may have the higher minimum and the other the higher maximum.³⁹ Rather than require the defendant to establish the possibility of prejudice in each individual case, the court grants relief whenever too many sentences are imposed, unless the defendant has been lawfully sentenced to death on one count.⁴⁰ The result is that because the court can imagine circumstances in which concurrent sentences may be prejudicial, it wastes a great deal of time granting relief when they plainly are not.

Neal also illustrates a more disquieting aspect of the court's policy of disregarding whether the sentences are consecutive or concurrent. Once the court determined that the two sentences for attempted murder did not violate section 654, it did not trouble itself to consider why the trial court imposed consecutive instead of concurrent sentences, or whether consecutive punishment was appropriate at all. In California, and elsewhere, the appellate courts rarely disturb or even question a judge's exercise of discretion in sentencing consecutively⁴¹ unless it is clear that he relied on an impermissible criterion, such as the defend-

his established patterns of behavior, coupled with his current offense and his general profile of aggressiveness." Statement of Fred R. Dickson, Chairman, California Adult Authority, *First Sentencing Institute for Superior Court Judges*, 45 Cal. Rptr. Appendix 99, 101-02 (1965).

38. *In re Wright*, 65 Cal. 2d 650, 654, 422 P.2d 998, 1000, 56 Cal. Rptr. 110, 121 (1967).

39. Prejudice may also occur where one of two offenses incurs a longer prison term, but the other has more severe collateral consequences. For examples see *id.* at 654 n.2, 422 P.2d at 1000 n.2, 56 Cal. Rptr. at 121 n.2.

40. "Only in cases of improper multiple sentences for felonies that include a valid sentence of death can it be said that no useful purpose would be served by modifying the judgment." *Id.* at 654, 422 P.2d at 1000, 56 Cal. Rptr. at 121.

41. "The trial judge's discretion to impose consecutive sentences exercised within the scope of the statute is almost never disturbed." B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 618 (1963). The *Neal* case itself at an earlier stage was one of the rare exceptions. The court of appeals remanded for redetermination of whether the attempted murder sentences should run consecutively or concurrently because the trial judge had relied on incompetent evidence. See note 16 *supra*.

ant's refusal to plead guilty.⁴² The court might well have considered whether consecutive sentences are appropriate when a defendant attempts to murder two persons with one stroke, or whether they are ever appropriate. However it decided this issue, at least it would have been paying attention to what was really at stake for Neal and for law enforcement.

B. *The Subsequent Cases*

The cases since *Neal* have used its "single intent and objective" formula to strike down a few of the most universally criticized examples of double punishment that were permitted under the prior law. Unfortunately, despite the achievement of initial reforms, the cases have increasingly tended to reflect the inconsistencies and ambiguities inherent in that formula, and in the *Neal* opinion. Few of the cases deserve individual discussion; most fall conveniently into general categories.

1. *The Preparatory Crimes: Burglary and Conspiracy*

The *Neal* test has been most effective in the area of preparatory crimes which do not merge into the completed offense. The California Penal Code defines burglary as entry into almost any building or locked vehicle with the intent to commit larceny or any felony.⁴³ The issue of multiple punishment usually arises when the burglar completes the crime that he intended to commit at the time he entered. Although burglary is in form a preparatory crime like attempt, in practice it is more important as a device for imposing extremely severe penalties for crimes (usually theft) that are in themselves more lightly punished. Because burglary normally carries a higher penalty than the completed crime which is its object,⁴⁴ and because one can commit a crime without entering a building with the intent to commit it, burglary has never been thought to merge with or be included within the completed crime.⁴⁵ The problem is that burglary is misdefined. If it were rede-

42. *People v. Morales*, 252 Cal. App. 2d 537, 60 Cal. Rptr. 671 (1967). The opinion in *Morales* uncompromisingly upholds the defendant's right to put the state to its burden of proof without suffering any penalty thereby. This may be misleading to readers who are not aware that the California courts explicitly approve plea bargaining. See *People v. Delles*, 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968); *In re Hawley*, 67 Cal. 2d 824, 433 P.2d 919, 63 Cal. Rptr. 831 (1967).

43. CAL. PENAL CODE § 459 (West 1957).

44. Burglary in the first degree is punishable by an indeterminate term of five years to life in state prison. CAL. PENAL CODE §§ 460, 461 (West 1955). Grand theft carries a maximum term of ten years. *Id.* § 489. Even rape carries a slightly lesser penalty of three years to life. *Id.* § 264 (West 1970).

45. See *People v. McFarland*, 58 Cal. 2d 748, 762, 376 P.2d 449, 457, 26 Cal. Rptr. 473, 481 (1962). See also *id.* at 777, 376 P.2d at 464, 26 Cal. Rptr. at 488 (dissenting opinion of Schauer, J.).

defined as a form of aggravated theft, rather than a preparatory crime, the theft would be included within the burglary and the common law rule would prevent double punishment.

The burglary cases after *Neal* applied the "single intent and objective" interpretation of section 654 to bar punishment for both the burglary and the completed crime. When a defendant, acting with a single intent to steal, entered a building and then stole something, the courts permitted punishment for burglary or theft but not for both.⁴⁶ When the defendant committed a different or additional crime, however, two sentences could be imposed. A defendant who entered a home for the purpose of committing rape and then as an afterthought pocketed some money as well could be sentenced for both the burglary and the theft or the rape and the theft but not for the rape and the burglary.⁴⁷ His criminal activities could no longer be said to be governed by one objective. Arguably, commission of a second crime in addition to the one intended demonstrates additional culpability. If a defendant entered intending to rape, however, and then committed theft *instead* of the rape, the "single intent" rationale would allow double punishment even though he diminished his culpability by committing a lesser crime than that intended.

Conspiracy, like burglary, is in form a preparatory crime; it consists of an agreement to commit any offense followed by some act done to carry out that agreement.⁴⁸ Under traditional rules both the conspiracy and the completed crime which is its object may be separately and cumulatively punished because the act of agreeing to do something is distinct from the act of doing it, and because it is sometimes said that a criminal combination is inherently more dangerous to the public than an individual bent on the same purpose.⁴⁹ Applying the "single intent and objective" test, the California supreme court after *Neal* had little difficulty in holding that a conspirator bent upon a single criminal objective could not be punished for both the agreement and the commission.⁵⁰

The case in which the court announced the new rule, however, indicated how closely its effect was to be confined. In *In re Cruz*⁵¹

46. *People v. McFarland*, 58 Cal. 2d 748, 376 P.2d 449, 26 Cal. Rptr. 473 (1962).

47. *People v. Failla*, 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966). See also the opinion in the same case after retrial, 256 Cal. App. 2d 869, 65 Cal. Rptr. 115 (2d Dist. 1967).

48. CAL. PENAL CODE §§ 182, 184 (West 1970).

49. See 1 B. WITKIN, CALIFORNIA CRIMES § 214(d) (1963); 2 *id.* § 965(b). See also note 5 *supra*.

50. *In re Cruz*, 64 Cal. 2d 178, 410 P.2d 825, 49 Cal. Rptr. 289 (1966). See also *In re Román*, 64 Cal. 2d 826, 415 P.2d 798, 51 Cal. Rptr. 910 (1966).

51. 64 Cal. 2d 178, 410 P.2d 825, 49 Cal. Rptr. 289 (1966).

the trial court had sentenced the petitioner for conspiracy and three substantive counts of grand theft by false pretenses. The sentences on the substantive counts were to run concurrently with each other and consecutively with the conspiracy sentence. The essence of the complicated fraud was that Cruz and his partner obtained money in exchange for worthless assignments from a nonexistent escrow account they had pretended to establish in connection with the sale of a hospital building. The theory of a conspiracy prosecution is that the substantive offenses were to be committed pursuant to a common scheme or plan, and in this sense the conspiracy and all the thefts were incident to a single objective.

The California supreme court granted relief on a much narrower basis, however. It held that a defendant could not be punished both for conspiring to commit a single crime and for committing it, because a single objective would govern all his acts. If he conspired to commit and did commit two crimes, however, he could be punished for conspiracy and for either of the two completed crimes. As long as the court did not separately punish him for one of the objects of the conspiracy, it could punish him for all the other objects as well as for the conspiracy itself.⁵² The result for Cruz was that the court set aside the sentence on one of the substantive counts. Because the concurrent sentences for the other substantive counts were still consecutive to the conspiracy sentence, however, this relief had no practical effect whatsoever. Like Neal, Cruz must have wondered why the court went to the trouble of deciding his case.

2. *Multiple Victims*

Except in the area of preparatory crimes, the *Neal* rule has had little effect on multiple punishment. It is no coincidence that the situation in which judges are most likely to impose consecutive sentences is also the one in which the California supreme court has been most willing to approve multiple sentences: the crime of violence which injures more than one person. As the *Neal* opinion pointed out, a "defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person."⁵³ It is not equally certain that a robber who holds up a store tended by two clerks is more culpable than a robber who holds up a store tended by one, but all the cases agree that the culpability of a robber, like that of a murderer, may be measured by the number of

52. *Id.* at 181, 410 P.2d at 827, 49 Cal. Rptr. at 291.

53. 55 Cal. 2d at 20, 357 P.2d at 844, 9 Cal. Rptr. at 612.

victims.⁵⁴ Even a drunk driver who runs into another car may be punished separately for each person he injures or kills, as if he somehow had control over the precise consequences of his negligence.⁵⁵ The courts have not applied this rule to the nonviolent thief, however. If he steals items belonging to many owners in the course of a single burglary, he may be sentenced only once.⁵⁶

A recent case illustrates how abstract the rule is. In *People v. Bauer*,⁵⁷ Bauer and his accomplice ransacked a house after they had threatened, tied, and abused the three elderly ladies who occupied it. The pair then made their getaway in an automobile belonging to one of the ladies. Upon conviction the trial court sentenced Bauer concurrently on one charge of robbery and one of auto theft.⁵⁸ A unanimous California supreme court struck out the auto theft sentence because the robberies and the auto theft were part of a single criminal transaction. It did not apply the multiple victim exception because auto theft is not a crime of actual or threatened violence. The court in *Bauer* was manifestly playing with formalities rather than attempting to cure any violation of substantial rights. The auto theft in question did in fact involve the use of force, and Bauer could have raised no legal objection if the court had convicted and sentenced him on three counts of robbery.

3. Multiple Crimes—One Victim

The "single intent" test has been applied inconsistently in cases involving distinct acts of violence against a single victim. In the area of sex crimes it seemingly has had little effect. The rapist who commits a series of sexual acts upon his victim in a single course of conduct may be separately sentenced for each act without regard to what his intent

54. *People v. Johnson*, 210 Cal. App. 2d 273, 26 Cal. Rptr. 614 (2d Dist. 1962); *People v. Lagomarsino*, 97 Cal. App. 2d 92, 217 P.2d 124 (1st Dist. 1950). See also *People v. Ford*, 66 Cal. 2d 183, 424 P.2d 681, 57 Cal. Rptr. 129 (1967); *In re Ponce*, 65 Cal. 2d 341, 420 P.2d 224, 54 Cal. Rptr. 752 (1966); *In re Henry*, 65 Cal. 2d 330, 420 P.2d 97, 54 Cal. Rptr. 633 (1966); *People v. Ridley*, 63 Cal. 2d 671, 408 P.2d 124, 47 Cal. Rptr. 796 (1965); *People v. Knowles*, 35 Cal. 2d 175, 217 P.2d 1 (1950). A survey of the appellate opinions indicates that prosecutors generally forego the opportunity of charging a defendant with separate counts of robbery for each victim involved in a single transaction. Multiple counts are far more likely if the defendant kidnaps or assaults some of his victims.

55. *People v. Hernandez*, 242 Cal. App. 2d 351, 51 Cal. Rptr. 385 (4th Dist. 1966).

56. *People v. Bauer*, 1 Cal. 3d 368, 82 Cal. Rptr. 357 (1969).

57. 1 Cal. 3d 368, 82 Cal. Rptr. 357 (1969).

58. The jury also convicted Bauer of burglary and grand theft, but he was not sentenced on those counts.

or objective may have been.⁵⁹ The best example is *In re McGrew*,⁶⁰ in which the defendant forced his way into the victim's home and announced his intention to "have her in every way possible." He did not achieve this ambitious objective, but he was convicted and sentenced for burglary, two acts of rape, and one act of forcible oral sex perversion. The California supreme court held that he could be punished for the burglary or for all the sex offenses, but not for both. The court in fact struck out the sentences for the sex acts, but it did so only because the burglary sentence was more severe than the combined concurrent sentences on all the other counts. The opinion clearly implied that, absent the burglary sentence, the defendant could have been separately sentenced for each unlawful sex act. McGrew had a single objective if anyone ever did, but a single act rule still seems to govern the sex cases.

The courts apply an entirely different rule when a rapist also kidnaps or robs his victim, although the result tends to be the same. If the defendant had the intent to rape at the time he kidnapped or robbed the victim, the cases say he may be punished for only one crime. If he decided to rape her only after kidnapping or robbing her, two sentences are proper.⁶¹ This treatment is consistent with a "single intent" test, and it underlines how irrelevant that test is to questions of culpability. No opinion has attempted to explain why a defendant who intends to rape and rob from the start is less deserving of two sentences than a defendant who commits the second crime as an afterthought. The anomaly has prompted appellate courts to seize upon any fact in the record from which an inference, however dubious, can be drawn that will support multiple punishment. In *In re Ward*⁶² the defendant robbed a couple, and then told the lady that she need not be afraid that he would hurt her. Soothed by these words, she apparently sat quietly while he bound her companion. He then raped her. The court chose to draw the inference from this sequence of events that Ward did not form an intent to rape until after he had completed the robbery.

59. *In re McGrew*, 66 Cal. 2d 685, 427 P.2d 161, 58 Cal. Rptr. 561 (1967); *People v. Hicks*, 63 Cal. 2d 764, 408 P.2d 964, 48 Cal. Rptr. 139 (1965); *People v. Armstrong*, 268 Cal. App. 2d 324, 74 Cal. Rptr. 37 (2d Dist. 1968). For a complete review of the multiple sex act cases, see the opinion in *People v. Cline*, 2 Cal. App. 3d 989, 83 Cal. Rptr. 246 (1969).

60. 66 Cal. 2d 685, 427 P.2d 161, 58 Cal. Rptr. 561 (1967).

61. *In re Ward*, 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966); *People v. Ferguson*, 1 Cal. App. 3d 68, 81 Cal. Rptr. 418 (4th Dist. 1969); *People v. Flores*, 267 Cal. App. 2d 452, 73 Cal. Rptr. 118 (3d Dist. 1968); *People v. Mistretta*, 221 Cal. App. 2d 42, 34 Cal. Rptr. 365 (3d Dist. 1963); *People v. Fields*, 190 Cal. App. 2d 515, 12 Cal. Rptr. 249 (1st Dist. 1961).

62. 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966).

The *Neal* doctrine has had no effect at all on the robbery-assault cases. When a robber nonfatally shoots or severely beats his victim after the money has been handed over, the courts regard the transaction as divisible and allow two punishments, just as before *Neal*.⁶³ To avoid double punishment, the robber must murder his victim instead of simply assaulting him. In *People v. Teale*,⁶⁴ the defendants robbed a tavern, forced the bartender to accompany them in their car, and murdered him about an hour later. The California supreme court stated without explanation that a single indivisible transaction was involved, and so the defendants could be sentenced only for the murder.

The largest single category of cases in which the courts have applied *Neal* to prohibit multiple punishment involves robbers who also commit the offense of "kidnapping for the purpose of robbery," the penalty for which is life imprisonment.⁶⁵ The California decision reports are replete with examples of this type of case,⁶⁶ because until recently any forcible moving of the victim during the course of a robbery sufficed to establish the kidnapping offense; ordering the victim to move a few feet within the robbed premises was all that was necessary.⁶⁷ Before *Neal*, the courts allowed punishment for both the robbery and the kidnapping because in theory one can commit either offense without committing the other, although in practice the two are nearly always committed simultaneously.

After *Neal*, the courts employed a "single intent" rationale to prohibit punishment for both the kidnapping and the robbery, when the former was undertaken for the purpose of committing the latter.⁶⁸

63. E.g., *People v. Massie*, 66 Cal. 2d 899, 908, 428 P.2d 869, 875, 59 Cal. Rptr. 733, 739 (1967). The rule is of much less importance since a 1967 amendment to PENAL CODE § 213 imposed a penalty of from 15 years to life in prison for robbers who inflict great bodily injury upon their victims. CAL. PENAL CODE § 213 (West 1970).

64. 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965).

65. CAL. PENAL CODE § 209 (West 1970).

66. See *People v. Daniels*, 71 Adv. Cal. 1165, 459 P.2d 225, 80 Cal. Rptr. 897 (1969), and cases cited therein.

67. See *id.* at 1172-86, 459 P.2d at 228-38, 80 Cal. Rptr. at 900-10. *Daniels* overruled a long line of prior decisions to hold that kidnapping is not established when "the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." *Id.* at 1186, 459 P.2d at 238, 80 Cal. Rptr. at 901.

68. *In re Malloy*, 66 Cal. 2d 252, 424 P.2d 929, 57 Cal. Rptr. 345 (1967); *In re Pratt*, 66 Cal. 2d 154, 424 P.2d 335, 56 Cal. Rptr. 895 (1967); *In re Ponce*, 65 Cal. 2d 341, 420 P.2d 224, 54 Cal. Rptr. 752 (1966); *In re Ward*, 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966). In *People v. Ford*, 65 Cal. 2d 41, 49, 416 P.2d 132, 137, 52 Cal. Rptr. 228, 233 (1966), the court said in a dictum that "the offense of robbery, of course, is necessarily included within the offense of kidnapping for the purpose of robbery where the kidnaper achieves his purpose." If

If the kidnapping occurs only after the robbery has been completed, however, and is therefore not "for the purpose of robbery," the court still allows two punishments, whether or not the defendant's actions were governed by a single overriding motive.⁶⁹

4. *Multiple Crimes—No Victim*

Neal's "single intent and objective" doctrine has had little impact upon multiple punishment for crimes involving no identifiable victim. The leading case is *In re Hayes*,⁷⁰ in which the defendant, who knew that his driver's license had been suspended, drove his automobile while intoxicated. He would have been subject to a substantial penalty for driving even if he had been sober, and the trial judge does not seem to have violated common sense by imposing an additional penalty for drunk driving. Nonetheless, no case in recent years has given the California supreme court more difficulty. Initially the closely divided court held double punishment unlawful on the theory that the term "act" in section 654 means the defendant's physical conduct, and the same physical conduct—driving—was common to both offenses.⁷¹ The court granted a rehearing, Justice Raymond Peters changed his mind, and Justice Stanley Mosk's dissent became the opinion for the new majority.⁷² Double punishment was permissible, Justice Mosk wrote, because section 654 means the defendant's *criminal* acts. Driving is not in itself criminal, and so within the meaning of section 654 Hayes committed the distinct criminal acts of driving with knowledge of the license suspension and driving while intoxicated.⁷³

All the opinions in *Hayes* are unpersuasive,⁷⁴ but more to the point is the fact that nowhere did the court explain why it was necessary

that rationale had been employed in the other cases cited, the conviction as well as the sentence for the lesser offense would have been set aside.

69. *People v. Ford*, 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966). In *Ford* the defendant's crime spree was apparently motivated by a desire forcibly to reunite his family. Towards that end he committed robbery, several kidnappings, and a murder.

70. 70 Cal. 2d 604, 451 P.2d 430, 75 Cal. Rptr. 790 (1969).

71. *In re Hayes*, 442 P.2d 366, 69 Cal. Rptr. 310 (1968).

72. *In re Hayes*, 70 Cal. 2d 604, 451 P.2d 430, 75 Cal. Rptr. 790 (1969).

73. "The proper approach, therefore, is to isolate the various *criminal* acts involved, and then to examine only those acts for identity. In the instant case the two criminal acts are (1) driving with a suspended license and (2) driving while intoxicated; they are in no sense identical or equivalent. Petitioner is not being punished twice—because he cannot be punished at all—for the 'act of driving.' He is being penalized once for his act of driving with an invalid license and once for his independent act of driving while intoxicated." *Id.* at 607, 451 P.2d at 432, 75 Cal. Rptr. at 792.

74. Justice Mosk's reasoning (see the preceding footnote) would allow three punishments in the *Neal* case. His subsequent attempt to distinguish *Neal* can only be described as lame. See *id.* at 609-10, 451 P.2d at 433-34, 75 Cal. Rptr. at 793-94,

to decide the case at all. Although the trial court imposed sentence on both misdemeanor counts, the total sentence was less than the maximum permissible on either count. No one on the court disputed that Hayes was properly convicted on both charges, or that the trial judge could properly consider that fact in imposing sentence on either count.⁷⁵ For all that appears, the outcome of the case should have had no impact whatever on the penalty actually imposed.

The holding in *Hayes* is probably best explained as an application of the "multiple legislative policies" test discussed previously. The court has said that the purpose of section 654 is "to insure that a defendant's punishment will be commensurate with his criminal liability," and Hayes demonstrated additional culpability by violating two distinct regulatory norms just as Neal did by attempting to murder two persons. The opinions in the case are frustrating because they persist in meaningless hair-splitting on the meaning of the word "act" rather than face the policy question outright. The effect of this over-technicality can be truly pernicious: One court of appeal read *Hayes* as permitting double punishment in the case of a drunk driver who also had an illegal open container of liquor in the car.⁷⁶ This is the "single act" rule at its worst, for the purpose of one prohibition is apparently to prevent violations of the other.

The reasoning in the narcotics possession cases exhibits a similar tendency to concentrate on form rather than substance. The cases both before and after *Neal* unanimously hold that a defendant may be punished separately for possession of marijuana and heroin upon the same occasion, even if the authorities find the two drugs in a single container, apparently for no better reason than that the act of possessing one thing is inherently different from the act of possessing something

and the dissent of Chief Justice Traynor, *id.* at 617, 451 P.2d at 439, 75 Cal. Rptr. at 799. The Chief Justice's reasoning was no better when he wrote the original majority opinion, however. He argued that the only "act" involved was that of driving, and it could not be punished twice simply because it was accompanied by the different "subjective states" of being intoxicated and knowing of the license suspension. 442 P.2d at 370, 69 Cal. Rptr. at 314. Not only does this argument ignore considerations of policy, but it also is technically incorrect. Being drunk is an objective fact, not a subjective state of mind. A drunk who thinks he is sober is still drunk. Knowledge of a license suspension is a subjective condition, but the suspension itself is an objective fact. Presumably a driver who believed that his license to be suspended would not be guilty of a violation of CAL. VEHICLE CODE § 14601 (West 1960) if the license were not actually suspended.

75. The original opinion granting relief did not strike out either one of the sentences, but instead remanded the case to the trial court for resentencing. The opinion implied that it would be entirely proper for the court to impose the same sentence as before, provided it rested that sentence on only one count. 442 P.2d at 374, 69 Cal. Rptr. at 318.

76. *People v. Wren*, 271 Cal. App. 2d 788, 76 Cal. Rptr. 673 (3d Dist. 1969).

else.⁷⁷ As a result, a defendant who possesses a small amount of marijuana and a small amount of heroin theoretically may be punished more harshly than if he possessed a rather large amount of heroin. Trial courts ought to have enough good judgment to avoid such a result in practice, but the entire purpose of the *Neal* doctrine is to place formal limits on multiple punishment rather than to leave the matter to sentencing discretion.

5. *The Neal Doctrine Today: A Critique*

The doctrine as developed in the cases after *Neal* is subject to two important criticisms: it is difficult to apply, and it bears no apparent relationship to any sentencing policy or philosophy.

The *Neal* doctrine is difficult to apply for the most obvious of reasons: nobody knows what it is. The subsequent cases have simply elaborated the confusion that existed in *Neal* itself. There are two primary sources of ambiguity. First, it has never been clear to what extent *Neal* abandoned the "single act" formula. As a result, many of the cases have proceeded as if the only important question were the presence or absence of distinct criminal acts on the part of the defendant. Other cases have held or implied that it makes no difference how many distinct acts were involved, if they were all incident to a single intent and objective.

The second source of ambiguity is the "single intent and objective" test itself. The California supreme court has never given a coherent explanation of what this concept means, except that it is clearly designed to prevent punishment for both a preparatory crime and for the completed crime which is its object.⁷⁸ Whether it has any broader meaning is hard to say. The court has occasionally indicated that a series of distinct criminal acts that are part of some larger transaction may not be subjected to separate punishments,⁷⁹ but at other times it has forcefully rejected any such idea.⁸⁰ The court is understandably wary of expanding the "single intent and objective" test, because the test has very little to do with any rational criterion that might govern the appropriate degree of punishment. A defendant who commits sev-

77. See *In re Hayes*, 70 Cal. 2d 604, 606, 451 P.2d 430, 431, 75 Cal. Rptr. 790, 791 (1969), and cases cited therein. Presumably the same holding would follow in a case involving sale of two drugs, although sale of a single drug in two separate deliveries may be punished only once. *In re Johnson*, 65 Cal. 2d 393, 420 P.2d 393, 54 Cal. Rptr. 873 (1966).

78. See text accompanying notes 43-52 *supra*.

79. See, e.g., *People v. Teale*, 61 Cal. 2d 551, 393 P.2d 705, 39 Cal. Rptr. 393 (1964); *People v. Quinn*, 61 Cal. 2d 551, 393 P.2d 705, 39 Cal. Rptr. 393 (1964).

80. See, e.g., *In re Hayes*, 70 Cal. 2d 604, 451 P.2d 430, 75 Cal. Rptr. 790 (1969); *People v. Massie*, 66 Cal. 2d 899, 428 P.2d 869, 59 Cal. Rptr. 733 (1967).

eral crimes is not necessarily less culpable or less dangerous if all the crimes were intended to further a single ultimate purpose.

It is likely that the *Neal* doctrine has protected few if any defendants from excessive punishment. With a few exceptions the cases granting relief have involved only concurrent sentences, leaving the prisoner's actual date of release to the discretion of the Adult Authority. Although there are rare circumstances in which it might benefit a defendant to be relieved of the lesser of two concurrent sentences, these circumstances seem never to have presented themselves to the California supreme court in the form of an actual case. In the few cases in which the court has granted relief from consecutive sentences, the practical effect has likewise been negligible.⁸¹ Courts have imposed consecutive sentences which have prejudiced defendants, but they have not imposed them very often in the few situations in which the *Neal* doctrine will allow relief.

II

MULTIPLE PUNISHMENT AND CONSECUTIVE SENTENCES: AN ALTERNATIVE APPROACH

The flaws in the *Neal* doctrine are so fundamental that it would not be worth the effort for either the California supreme court or the Legislature to attempt to cure them. At the same time, it is important to make a new start so that the countless hours the courts and the criminal bar have spent attempting to interpret *Neal* can be used for some more productive purpose. An entirely new doctrine is needed, directed to the circumstances in which cumulative punishment may actually be excessive and contrary to the policies implicit in California's sentencing laws. The proposal which follows is a simple one, in two parts. It can be adopted by the California supreme court without violating any section of the present Penal Code, or it can be enacted by the Legislature.

First, overrule the decision in *In re Wright*,⁸² which held that defendants may obtain relief under section 654 from unlawful concurrent sentences without demonstrating prejudice. For reasons previously explained, additional concurrent sentences are nearly always harmless. If the courts reserved relief for the unusual circumstances in which they may be prejudicial, as when one sentence has the higher

81. See, e.g., *In re Ward*, 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966) (prisoner still serving life sentence without possibility of parole); *People v. Hicks*, 63 Cal. 2d 764, 408 P.2d 747, 48 Cal. Rptr. 139 (1965) (prisoner still serving indeterminate term with maximum of life plus 30 years).

82. 65 Cal. 2d 650, 422 P.2d 998, 56 Cal. Rptr. 110 (1967). See text accompanying notes 38-40 *supra*.

minimum term and the other the higher maximum, section 654 would become practically inoperative. In the case of misdemeanors, where sentencing is at the discretion of the trial judge, the courts should likewise deny relief whenever the total sentence imposed does not exceed the maximum permissible on any count. Relief would still be available whenever the defendant could demonstrate prejudice, but past experience indicates that few cases would arise.

Second and more important, the courts should prohibit *consecutive* sentences altogether, except in the few circumstances in which the present Penal Code requires that they be imposed.⁸³ The prohibition should apply whether the sentences are imposed at the same trial, or at different trials at different times.⁸⁴ The argument is that, given California's indeterminate sentencing system, consecutive sentencing has no useful role to play. The remainder of this Article will explain that system and its implications for consecutive sentencing.

A. California's Indeterminate Sentencing System

Introduced in California in 1917, indeterminate felony sentencing has existed in approximately its present form since the creation of the Adult Authority in 1944.⁸⁵ The system is simple to describe in broad outline, although piecemeal amendments over the years have made the specific sections governing such vital matters as parole eligibility incredibly complex and confusing.

California judges may not fix the term of imprisonment for convicted felons; they merely sentence the offender to "the term prescribed by law" for the offense for which he has been convicted.⁸⁶ An administrative agency known as the Adult Authority⁸⁷ determines the amount of time a convict actually serves in prison by "fixing" the sentence at some point between the statutory minimum and maximum.⁸⁸ The term so fixed is the total term to be served before absolute discharge, and the convict normally serves part of it on parole. With some exceptions, prisoners serving a minimum term of more than one year are eligible for release on parole after they have served one-third

83. See note 134 *infra*.

84. The proposal does not mean that a prisoner would not suffer additional punishment under a subsequently imposed sentence. The subsequent sentence would still begin to run only when imposed. In addition, the Adult Authority would consider it when fixing the prisoner's sentence.

85. For a brief history of the California correctional system, see CALIFORNIA YOUTH AND ADULT CORRECTIONS AGENCY TASK FORCE, THE PAROLING BOARDS OF THE AGENCY: AN ADMINISTRATIVE ANALYSIS 4-7 (1962).

86. CAL. PENAL CODE § 1168 (West Supp. 1969).

87. For female prisoners, the equivalent of the Adult Authority is known as the Women's Board of Terms and Parole. *Id.* § 6025.

88. *Id.* §§ 3020 (West Supp. 1969), 3023 (West 1956).

of the minimum term.⁸⁹ First degree murderers and others sentenced to an express term of life imprisonment are eligible for parole after seven years;⁹⁰ "habitual" criminals with three previous convictions are ineligible for twelve years.⁹¹ Train wreckers and certain kidnappers who inflict bodily harm upon their victims incur a statutory sentence of life imprisonment without possibility of parole,⁹² a sentence which owes more to hysteria than logic.

The Adult Authority frequently does not fix a prisoner's term until he has been in confinement for some years, and until it acts he is considered to be serving the maximum term provided for his offense.⁹³ The Authority may refix a previously fixed term for "cause," such as violations of prison regulations.⁹⁴ The Authority specifies what portion of the fixed term the convict may serve on parole and sets the conditions of parole. If it finds the parolee to have violated any of these conditions, it may revoke his parole and refix the term at the maximum⁹⁵ without notice or hearing.⁹⁶ As a practical matter the Authority's judgments are immune from judicial review.⁹⁷

To appreciate the extent of the Adult Authority's discretion, one must realize that the statutory maxima are extremely long in relation to the time normally served in practice. Second degree murder, armed robbery, rape, and first degree burglary each incur a maximum term of life in prison.⁹⁸ Yet in 1965, the median time served in prison by

89. *Id.* § 3049 (West 1956).

90. *Id.* § 3046 (West Supp. 1969).

91. *Id.* §§ 3048, 3048.5 (West 1956).

92. *Id.* §§ 209, 218, 219 (West 1970).

93. "It is fundamental to the indeterminate sentence law that every such sentence is for the maximum unless and until the Authority acts to fix a shorter term. The Authority may act just as validly by considering the case and then declining to reduce the term as by entering an order reducing it." *In re Mills*, 55 Cal. 2d 646, 653-54, 361 P.2d 15, 20, 12 Cal. Rptr. 483, 488 (1961).

94. *See In re Schoengarth*, 66 Cal. 2d 295, 302, 425 P.2d 200, 204-05, 57 Cal. Rptr. 600, 604-05 (1967).

95. *See In re McLain*, 55 Cal. 2d 78, 357 P.2d 1080, 9 Cal. Rptr. 824 (1960).

96. *Id.* Normally, as a matter of policy the Authority does hold a hearing on parole revocation. *See, e.g., In re Cleaver*, 266 Cal. App. 2d 143, 72 Cal. Rptr. 20 (1st Dist. 1968); *In re Gomez*, 64 Cal. 2d 591, 414 P.2d 33, 51 Cal. Rptr. 97 (1966).

97. "The discretion lodged in the Authority is so broad that it is seldom that a case can be made out that would show an abuse of that discretion." *Azeria v. California Adult Authority*, 193 Cal. App. 2d 1, 5, 13 Cal. Rptr. 839, 842 (1961). *See also In re Brown*, 67 Cal. 2d 339, 431 P.2d 630, 62 Cal. Rptr. 6 (1967). *Brown* illustrates two important reasons for the Authority's freedom from effective judicial review: First, it may determine that a prisoner or parolee committed a criminal act even if he has not been convicted of that act; and second, it may revoke parole for a minor violation of the numerous conditions of parole although its action may have been motivated by a more serious but unprovable charge.

98. CAL. PENAL CODE §§ 190, 213, 264 (West 1970), 461 (West Supp. 1969), 671 (West 1956).

prisoners released on parole for these offenses ranged from a high of 5.4 years (second degree murder) to a low of three years (first degree burglary).⁹⁹ Of 522 armed robbers released on parole in that year, 439 had served five years or less in prison, and only three had served more than ten years.¹⁰⁰ The situation for nonviolent offenses is similar. Forgery, for example, carries a maximum sentence of 14 years.¹⁰¹ Of 432 forgers released on parole in 1965, 337 had served two years or less. Only one had served more than 5½ years.¹⁰²

The Penal Code provides no standards to guide the Adult Authority in exercising its vast discretion to release a prisoner or to confine him indefinitely. Opinions of the California supreme court have said that the Authority ignores such matters as retribution and deterrence and fixes a prisoner's term in accordance with his progress towards social rehabilitation.¹⁰³ Undoubtedly it is part of the Authority's function to release prisoners who appear unlikely to offend again, not only for humanitarian reasons but also because it is extremely expensive to keep a person in prison.¹⁰⁴ The life maxima for most really dangerous crimes indicate that, conversely, it is expected to retain some exceptionally dangerous individuals indefinitely although it releases others convicted of the same crimes after a few years.

The Adult Authority itself, however, has never made any secret of the fact that the extent of a prisoner's rehabilitation is only one of the factors it considers in fixing his term. A statement of policy issued by the Authority in 1952¹⁰⁵ listed six factors of "paramount importance" in the decision, some not easy to reconcile with others. Crimes which "more grievously offend the public conscience . . . demand longer

99. A comprehensive statistical table for time served by California prisoners prior to first release on parole for the year 1965 is reprinted in CALIFORNIA JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, PENAL CODE REVISION PROJECT 22-33 (Tent. Draft No. 2, 1968).

100. *Id.*

101. CAL. PENAL CODE § 473 (West 1956).

102. CALIFORNIA JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, PENAL CODE REVISION PROJECT 26 (Tent. Draft No. 2, 1968).

103. "The Authority does not fix that period [of incarceration] pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual and analyzed as a human composite of intellectual, emotional and genetic factors." *People v. Morse*, 60 Cal. 2d 631, 642-43, 388 P.2d 33, 39-40, 36 Cal. Rptr. 201, 207-08 (1964). See also *In re Lee*, 177 Cal. 690, 693-96, 171 P. 958, 959-961 (1918).

104. "The cost of maintaining one adult prisoner in 1966-67 was \$2,628, including all institutional costs, excluding capital outlay.

"The average parole cost in that year was \$572 per parolee." CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS 38 (1968) [hereinafter cited as DETERRENT EFFECTS].

105. CALIFORNIA ADULT AUTHORITY, PRINCIPLES, POLICIES AND PROGRAM 8-9 (1952).

sentences" because "the punishment should fit the crime."¹⁰⁶ Deterrence of others should also be considered, and prisoners who commit the same offense under similar circumstances should receive equal punishments. An inmate's behavior and attitude in prison is also extremely important, however, and the most important factor of all is "the length of time it seems advisable to exercise control over an offender to carry out a purposeful and effective treatment program for his reformation."¹⁰⁷ Section 3022 of the Penal Code indicates what sources of information the Legislature thinks the Authority ought to utilize. Before fixing a prisoner's term, the Authority must notify the sentencing judge, the prosecuting attorney, and the law enforcement agency that investigated the case.¹⁰⁸ There is no requirement that it notify the prisoner.

Whatever may have been the intentions of the many persons who contributed to the founding of the Adult Authority system, it seems apparent that the system serves a number of objectives, mentioned here not necessarily in the order of importance. First, it reduces inconsistency in sentencing. Although the Authority may be and is inconsistent itself,¹⁰⁹ it is unlikely that a single administrative agency could ever approach the spectacular disharmony inevitable if sentences were imposed by hundreds of judges spread over a vast state. Second, the system obviously puts enormous pressure upon inmates hopeful of release to behave themselves and to take advantage of such rehabilitational programs as are offered. Third, it does allow early release for the rehabilitated and indefinite confinement for the unrehabilitated, within the usually broad statutory limits.

Finally, the role that the Adult Authority actually plays in the sentencing of California felons is limited by the fact that most convicted felons receive probation, which may be combined with a term in the county jail.¹¹⁰ The trial judge's decision to grant or deny proba-

106. *Id.* at 8.

107. *Id.* at 9.

108. CAL. PENAL CODE § 3022 (West Supp. 1969).

109. "The variation in median time served by prison inmates from one year to the next reflects the absence of any reliable yardstick that might be used by the paroling authorities. The average time served, for all offenses, over the past 10 years has ranged from a low of 24 months to a high of 30 months. This variation, by the agency's own analysis, resulted from something less than objective study. 'There is no evidence,' stated the agency report, 'that this variance has come about via careful analysis of available materials on parole outcome in relation to length of stay.'" DETERRENT EFFECTS, *supra* note 104, at 40.

110. Many offenses, charged and tried as felonies, may be punished as misdemeanors in the discretion of the sentencing judge. See CAL. PENAL CODE § 17 (West 1970). Even when the misdemeanor alternative is not available, the judge may grant probation and impose a county jail sentence as a condition of probation. *Id.* § 1203.1 (West Supp. 1969).

tion is undoubtedly the most significant step in the proceedings for many defendants. All but the most violent first offenders are eligible for probation.¹¹¹ Due to plea bargaining, recidivists and others who are formally declared ineligible often receive probation nonetheless, by waiving their right to a trial in exchange for a reduction in the charge. Mandatory sentencing provisions are primarily important not because they require defendants to be sent to state prison, but because they put enormous pressure on defendants to plead guilty to lesser charges.¹¹² As a result of plea bargaining and the probation system, only 13.6 percent of convicted felony defendants were sentenced to state prison in 1968.¹¹³ Unless trial judges exercised their discretion irrationally,¹¹⁴ we must assume that the offenders actually sentenced to state prison committed extremely serious crimes or were believed to have extensive criminal backgrounds.

111. The general provision governing eligibility for probation is *id.* § 1203 (West Supp. 1969), a section long notorious for its intricacy and internal inconsistency.

112. "There is persuasive evidence of nonenforcement of mandatory sentencing provisions by the courts and prosecutors. For example, where certain offenses carry long mandatory prison terms, prosecutors frequently reduce the charge to a lesser offense if the defendant agrees to plead guilty. The result of this practice is that in a number of jurisdictions convictions for offenses carrying severe mandatory sentences are rare. In California:

"Of all felony prosecutions, 5.6 percent go to jury trial. Considering the enormous volume (about 37,000 annually) of felony cases involved, only a 1 percent increase in jury trial load could be disruptive to the courts involved. The criminal court subsystem is, therefore, highly dependent upon the maintenance of a high rate of guilty pleas, usually to offenses less severe than the original charge." *DETERRENT EFFECTS*, *supra* note 104, at 33.

113. CALIFORNIA BUREAU OF CRIMINAL STATISTICS, *CRIME AND DELINQUENCY IN CALIFORNIA* 97 (1968).

114. A California Superior Court Judge lecturing at a sentencing institute described the decision on sentencing to state prison as follows:

"Has the defendant been driven to his crime by what he may consider virtual economic necessity? Has the crime been motivated at least in part by the fact that some mental or physical defect has handicapped him in his efforts to secure steady employment and acceptance in the world in which he lives? And in either of these two events has this been the offender's first transgression of the law? Further, is the offender of tender years, who is groping and trying to find answers to life and who has as yet been unsuccessful? Or is he an older person completely frustrated by his lack of education, work prospects and the future, and therefore finally driven to a criminal offense? Or is it just an isolated situational matter that probably will not recur? If any of these factors are predominant, then probably sentence to state prison is not indicated.

"Where, however, the offense has been well thought out, planned, and committed on a grand scale, or where there is a crime of violence, e.g., an aggravated assault, robbery, or something of that nature, which is committed by a sociopath, in the absence of any dependable knowledge concerning the cause of treatment of his blindly impulsive conduct, it is necessary that he be kept almost indefinitely in confinement."

Remarks of the Honorable Joseph A. Waysner, *Proceedings of the First Sentencing Institute for Superior Court Judges*, 45 Cal. Rptr. Appendix 1, 47-48 (1965).

B. *The Adult Authority System and Consecutive Sentencing*

In the sentencing system just described, the statutory punishments are evidently not intended to serve as penalties for individual criminal acts. They are better described as categories defining the limits of the Adult Authority's discretion in dealing with broad classes of offenders. The Legislature sets the maximum penalty at a level deemed sufficient for the most dangerous or incorrigible offenders in the class and the minimum penalty at a level deemed appropriate for the most deserving offenders sentenced to state prison. It contemplates that there will be many shadings of culpability or dangerousness in between and that the Adult Authority will take account of all the factors in fixing the term. It leaves the determination to an agency rather than to the courts, both to reduce inconsistency and to allow rehabilitation or good behavior after conviction to affect the outcome.

In this type of system, consecutive sentences may have an effect either by increasing the minimum term or the maximum term. Formally, a judge's order that sentences run consecutively requires the totaling of both the minima and the maxima where possible. For example, a defendant sentenced consecutively for two armed robberies (each five years to life) must serve from ten years to life, one life being all that he has to give for his state. Addition of a third consecutive term, however, would have no effect at all, because the Penal Code sets a limit of ten years upon the totaling of consecutive minimum terms.¹¹⁵ It is also important to bear in mind the relation between the minimum term and the minimum period of confinement in prison. Subject to particular exceptions, the most important of which apply to habitual criminals¹¹⁶ and repeated drug offenders,¹¹⁷ the Adult Authority may release prisoners on parole after expiration of one-third of the minimum term if the minimum is more than one year.¹¹⁸

Insofar as consecutive sentencing increases a prisoner's *maximum* term, it will rarely have any practical effect because it is very unusual for a prisoner to serve the maximum term in any event. This is not to say, however, that it is no concern of the courts whether a thief or a marijuana user is subjected to a maximum of ten years or some multiple of that figure. Like any agency, the Adult Authority may abuse its power in individual cases, and the maximum term is meant to be a ceiling upon the exercise of that power.

Any increase in an offender's maximum term due to consecutive sentencing violates the policies implicit in California's indeterminate

115. CAL. PENAL CODE § 3024(d) (West Supp. 1969).

116. *Id.* §§ 3047-48.5 (West 1956).

117. *See generally* CAL. HEALTH & SAFETY CODE div. 10 (West Supp. 1969).

118. CAL. PENAL CODE § 3049 (West 1956).

sentencing system. For reasons already explained, the Legislature did not intend the statutory indeterminate sentences as punishments for individual criminal acts but rather as limits upon Adult Authority discretion in dealing with various classes of criminals. It is practically inconceivable that the Legislature set a ten-year maximum penalty for grand theft, an offense ordinarily punished by probation or a county jail sentence,¹¹⁹ in the expectation that the Authority would impose that penalty upon a prisoner who committed only a single act of theft in his life. It must have contemplated that only thieves of some extensive criminality would be sentenced to state prison at all, and that only a few of those would serve the maximum. The conclusion is even clearer if one reflects that the number of acts of theft involved is not necessarily the best measure of the culpability of the thief. The total amount stolen may be just as important, and so may other factors.

Consecutive sentences have their most deplorable effect when they increase the minimum term, or rather, the minimum period for parole eligibility. Insofar as it has the legal power to do so, the Adult Authority presumably will attempt to treat like offenders in a like manner, regardless of the presence or absence of consecutive sentences, because one of its most important functions is to provide a uniform sentencing policy and practice.¹²⁰ It will of course consider the number of convictions as bearing on a prisoner's culpability or dangerousness, but unless it abandons its responsibilities it will make an independent judgment on the precise effect this factor ought to have on the fixing of the total sentence.

Allowing a trial judge to impose consecutive sentences that have the effect of restricting the Adult Authority's power to parole or to release simply reintroduces the evils that the Adult Authority system was instituted to cure. Local prejudice and judicial idiosyncracies may result in consecutive sentences for a defendant whom a different judge in another area would have sentenced concurrently or permitted to plead guilty to one count. Even without consecutive sentencing there is much inconsistency in California sentencing, because local judges have authority to grant or deny probation.¹²¹ At least the Adult Authority can place an upper limit in such cases, by granting early releases to prisoners who should have received probation or county jail terms. When its hands are tied, only injustice can result.

119. In 1968, only 9.4 percent of California defendants convicted of grand theft (excluding auto theft) were sentenced to state prison. CALIFORNIA BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA 97 (1968).

120. "Wide variations in the sentencing policies of courts played a major role in transferring the fixing of terms from the courts to a single administrative board, such as the Adult Authority." CALIFORNIA ADULT AUTHORITY, PRINCIPLES, POLICIES AND PROGRAM 9 (1952).

121. See *DETERRENT EFFECTS*, *supra* note 104, at 34.

Fortunately, there are important limits on the extent to which consecutive minimum terms can restrict Adult Authority discretion. Even when the total minimum term is ten years, which is as much as the Penal Code will allow, the Adult Authority may release the prisoner on parole in most cases after he has served one third of that term. Furthermore, the minimum term for all offenses with a maximum of 15 years or less is six months,¹²² so that even two or three consecutive sentences leave a prisoner eligible for release fairly soon.¹²³

Consecutive sentencing has its most unfortunate effect in the area of drug offenses, where the statutes provide lengthy terms that must be served in prison. A seller or transporter of marijuana, for example, may not be paroled until he has served at least three years.¹²⁴ Totaling of such minimum periods of confinement obviously creates opportunities for excessive punishment, and for discrimination among offenders of comparable culpability.

The point is not that the Adult Authority is wiser than trial judges, or that the indeterminate sentence is necessarily a good idea. Obviously there is a great deal to be said against a system that allows penalties to be set in informal proceedings with few safeguards against abuse. But for better or worse, California has decided to allow an agency rather than a judge to determine the length of a state prisoner's confinement. In this respect the California system differs from the indeterminate sentencing laws of New York and the Model Penal Code, which grant the sentencing judge discretion to specify a minimum period of confinement.¹²⁵ Discretionary consecutive sentences cannot be reconciled with a system designed largely for the purpose of removing discretion from trial judges.

122. "Penal Code § 18b states that where a statute imposes a maximum term of less than fifteen years, the minimum term shall be six months. This is construed by the Department of Corrections to reduce the minimum to six months even where the statute prescribes a higher minimum." JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, PENAL CODE REVISION PROJECT 34 n.a (Tent. Draft No. 2, 1968).

123. Release on parole does not mean freedom, because a parolee is subject to many restrictions on his liberty and he may be returned to prison at any time for violation of the conditions of his parole. See *In re Cleaver*, 266 Cal. App. 2d 143, 72 Cal. Rptr. 20 (1st Dist. 1968). Whatever the minimum term, however, the Adult Authority may grant absolute release after the prisoner has served two years on parole. CAL. PENAL CODE § 2943 (West Supp. 1968).

124. CAL. HEALTH & SAFETY CODE § 11501 (West Supp. 1969). The section sets even higher penalties for recidivists.

125. N.Y. PENAL LAW § 70.00 (McKinney 1965); MODEL PENAL CODE § 6.06 (Proposed Official Draft, 1962). The New York provision allows the judge to specify a minimum period of confinement in some cases of up to 25 years.

Both the New York Penal Law and the Model Penal Code allow consecutive sentencing, but severely restrict its effect. A New York judge may order that sentences run consecutively, but the order has no effect on the minimum term and almost

The California Penal Code section that directs judges to indicate whether sentences are to run concurrently or consecutively contains an important proviso that is entirely consistent with the argument advanced in these pages. Section 669 requires that when a prisoner is subject to an express term of life imprisonment, all his other sentences, whenever imposed, run concurrently with that life term.¹²⁶ Justice Traynor's opinion in *Neal* used the case of a murderer who killed his victim by a means that also killed or endangered many other persons as the prime example of a situation in which multiple punishment would be justified. If such a murderer were not sentenced to death, he could be given a life term for every person he killed. Section 669 would forbid consecutive sentences, however, and he would be eligible for parole just as if he had only one murder on his conscience.¹²⁷ The fact that many were killed would of course be considered by the jury in deciding whether to impose the death penalty¹²⁸ and by the Adult Authority in considering the possibility of parole.

Section 669 applies only to sentences "expressly prescribed" as life imprisonment. It does not forbid consecutive sentencing for such crimes as robbery, punishable by a minimum term of some years and a maximum term of life, or for crimes with a maximum of less than life.¹²⁹ The Legislature does not approve every practice that it has not forbidden,¹³⁰ however, and in determining the legality of consecutive sen-

no effect on the maximum. N.Y. PENAL LAW § 70.30 (McKinney 1965). Under the Model Penal Code "the aggregate of consecutive indefinite terms shall not exceed in minimum or maximum length the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed." MODEL PENAL CODE §§ 7.03, 7.07 (Proposed Official Draft, 1962). Both provisions appear to recognize that the power of a sentencing judge over terms of confinement should not be expanded to any great extent by allowing consecutive sentencing.

126. "If the punishment for any of said crimes is expressly prescribed to be life imprisonment, whether with or without the possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term." CAL. PENAL CODE § 669 (West 1956).

127. See *People v. Holman*, 62 Cal. App. 2d 75, 164 P.2d 297 (1st Dist. 1945), in which the trial court imposed 22 consecutive life sentences upon a defendant who set a fire that killed 22 persons. The district court of appeal, citing section 669, ordered that the sentences run concurrently.

128. For a discussion of the types of evidence and argument normally used at a California death penalty trial, see comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1269, 1406-14 (1968).

129. *In re Quinn*, 25 Cal. 2d 799, 800-01, 154 P.2d 875, 876 (1945); *People v. White*, 222 Cal. App. 2d 774, 780, 35 Cal. Rptr. 571, 575 (2d Dist. 1963).

130. In this connection it would be a misuse of legal reasoning to argue that because the Legislature has forbidden consecutive sentences in a single instance it has impliedly approved them in others. The Legislature has frequently amended the Penal Code to deal with a specific problem of current concern, without considering the implications of its action in other situations. See CALIFORNIA JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, REPORT 14-18 (1967).

tences in a particular case the courts ought to consider whether section 669 reflects a policy that is equally applicable to other situations. If a court may not give a murderer consecutive terms for killing several people at once, it hardly makes sense to allow it to impose consecutive terms upon a robber who robs two shopkeepers, or upon an addict who possesses two drugs.

The Penal Code authorizes appellate courts to reduce the punishment imposed in criminal cases¹³¹ and there appears to be no reason why this authority should not be used to develop a law governing consecutive sentencing. The California supreme court has been reluctant to undertake to review purely discretionary sentencing decisions,¹³² but the argument here is that consecutive sentencing should not be a discretionary matter. The court would not be forced to review intricate questions of fact and judgment if it banned discretionary consecutive sentences; it would merely announce a simple rule and enforce it.

A ban on discretionary consecutive sentences would not be inconsistent with Penal Code section 669, which directs trial judges to specify whether multiple sentences are to run concurrently or consecutively, or with other sections of the Penal Code that assume a court may impose consecutive sentences.¹³³ These sections can be interpreted as referring to the few instances—notably the sections governing escapes from state prisons¹³⁴—where the Penal Code *requires* consecutive sentencing. Mandatory consecutive sentences do not invite inconsistency in sentencing among trial judges, and they probably do no more than direct the Adult Authority to do what it would do in any event. When a defendant is convicted of an offense requiring a consecutive sentence the sentencing judge should of course indicate that fact in the judgment, because otherwise the sentences will be concurrent in defiance of the statute.¹³⁵ In all other cases, he should direct that the sentences run concurrently.

Finally, elimination of consecutive sentences would have a collateral effect which ought not be ignored. I have already indicated the importance of plea bargaining in any consideration of punishment. Although proof is not available, it is likely that prosecutors charge mul-

131. CAL. PENAL CODE § 1260 (West 1956).

132. See, e.g., *People v. Reeves*, 64 Cal. 2d 766, 777, 415 P.2d 35, 42, 51 Cal. Rptr. 691, 698 (1966).

133. CAL. PENAL CODE §§ 3021, 3024(d) (West Supp. 1969), 3043 (West 1956).

134. See *id.* §§ 4500, 4530, 4532 (West Supp. 1969) (involving offenses committed by state prisoners). Offenses committed with the aid of deadly weapons incur additional penalties which are said to run consecutively with the penalty for the offense itself. See *id.* §§ 12022, 12022.5.

135. Even where consecutive sentences are mandatory, the judgment must so indicate or the Adult Authority must treat the sentences as concurrent. *In re Sandel*, 64 Cal. 2d 412, 412 P.2d 806, 50 Cal. Rptr. 462 (1966).

multiple counts not primarily for the purpose of obtaining multiple sentences, but for the purpose of obtaining pleas of guilty to a single count.¹³⁶ Elimination of the possibility of consecutive sentencing would to some extent reduce the pressure upon defendants to plead guilty. The effect would certainly be slight, however, because there are many more potent inducements to plead guilty than the possibility of enhanced punishment through consecutive sentencing.

C. Multiple Punishment and Misdemeanors

Double punishment for misdemeanors deserves separate mention, because the severity of misdemeanor punishment is at the discretion of the trial judge rather than an administrative agency. It is entirely appropriate for a judge to consider, in setting the amount of a fine or the length of a county jail term, that the defendant exhibited aggravated culpability by committing a series of related unlawful acts, or by violating more than one statute at the same time. Questions of excessive punishment arise only because the maximum statutory penalties, for misdemeanors as for felonies, are terribly severe in relation to the penalties ordinarily imposed. A drunk driver, for example, may be sentenced to six months in jail and fined 500 dollars for a first offense.¹³⁷ Actual imposition of such a penalty is so rare that the Legislature has found it necessary to require that the courts sentence second offenders to at least seven days in jail.¹³⁸ This disparity between the ordinary penalty and the maximum penalty creates a possibility of unequal treatment that is compounded if a judge may impose consecutive sentences for other violations committed at the same time. The problem is primarily one of excessive statutory penalties or abuse of sentencing discretion rather than multiple punishment, but prohibiting consecutive jail sentences for misdemeanors as well as for felonies would have some tendency to keep the possibilities for abuse within reasonable bounds.

CONCLUSION

The California supreme court has spent a great deal of its valuable time interpreting the *Neal* doctrine, without either clarifying its mean-

136. See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58-105 (1968).

137. CAL. VEHICLE CODE § 23102 (West Supp. 1969).

138. *Id.* Even this requirement is frequently evaded, because the increased mandatory penalty applies only if the prior offense is pleaded and proved, and plea bargaining is prevalent in drunk driving cases. In practice, the most important penalty for drunk driving is the likely suspension or revocation of the offender's driver's license, which may be accomplished in an administrative proceeding. See *id.* §§ 13201 (West 1960), 13352 (West Supp. 1969).

ing or providing any effective remedy for excessive punishment. What is needed is a fresh start and a rule that looks to the vices of consecutive sentences rather than to the "divisibility" of an act or transaction.

Multiple punishment plays only a very marginal role in California criminal punishment in any case, because of the overwhelming importance of high statutory penalties and Adult Authority discretion. If the court means to have a genuine effect in restricting excessive punishment, it may find it necessary to invade the hitherto sacrosanct area of Adult Authority action, particularly in the granting or denial of parole. The almost incredible freedom from procedural safeguards enjoyed by this agency, in comparison with the increasingly strict standards applied to the actions of trial courts, is the most important anomaly in California criminal procedure. Until the court is ready to take on the task of overseeing the Adult Authority, its duty must be at least to control judicial actions that lead to inconsistent or irrational punishments.