2-1-1974

A Proposal For Limiting The Duty Of The Trial Judge To Instruct The Jury Sua Sponte

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Errors in instructing the jury have become the single most common ground for appellate reversal in the Anglo-American legal tradition. It may be asserted that such reversals create no great

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A substantial amount of this article was researched and written while the author was a Faculty Fellow of the National Center for State Courts. The study was supported by Grant Number 72 DF 99-0035 awarded by the Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968. The opinions stated herein are those of the author and do not necessarily reflect the views of the Center or the U.S. Department of Justice. The author wishes to acknowledge the significant contributions of Justice Winslow Christian of the California Court of Appeal, first Director of the National Center for State Courts, in the preparation of this article.

1. D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 189 (1967). For example, 478 F.2d reports sixty-four appeals from criminal jury trials. Twenty-five of those sixty-four opinions discuss in some way the adequacy of the jury instructions. (When a decision contained no reference to whether the case had been heard by jury or judge, it was categorized as a jury trial). Since many decisions discussed only the issues upon which it was reversing or only the controlling issues (saying simply that it found all other issues raised by the petitioner to be without merit), the
cause for concern because they do not necessarily indicate an inadequacy of the trial system, but simply reflect the use of jury instructions as an appellate battleground for opposing legal theories. But one may ask whether such battles might have been fought more appropriately at trial, without the need for the unnecessary delay and expense of appellate reversal and retrial. At the very least, the high number of reversals due to errors in jury instructions indicate that problems in the jury instruction area deserve careful analysis.

Perhaps the most distressing problem with the present instruction procedure is that while instructions do not provide adequate means for airing and resolving legal conflicts at trial, neither do they perform adequately their primary function: to assist the jurors in understanding the law they are to apply to the case.\(^2\) It is no secret that ritualistic delivery of a collection of technically worded instructions may be more confusing than helpful.\(^3\)

It is suggested here that one reason instructions generally fail in their function of guiding and enlightening the jury is that trial judges are driven to a primary concern with avoiding reversal due to some technical error in formulating instructions. The technical and abstract language of pattern instructions, so confusing to laymen jurors,\(^4\) results from the scrutiny to which instructions are

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2. The Commentary to ABA Standard 4.6 relating to jury instructions begins, Instructions to jurors should be ‘clear, concise, accurate and impartial statements of the law written in understandable language and delivered in a conversational tone which will be of helpful guidance to the jurors’ [citation].

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 111 (1968).


4. See, e.g., CAL. JURY INSTR. CRIM. (CALJIC) 8.52

Murder or Manslaughter—Cooling Period

To reduce a killing upon a sudden quarrel or heat of passion from murder to manslaughter the killing must have occurred while the slayer was acting under the direct and immediate influence of such quarrel or heat of passion. Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused and sufficient time has elapsed for angry passion to end and for reason to control his conduct, it will no longer reduce an intentional killing to manslaughter. The question as to whether the cooling period has elapsed and reason had returned is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled his heat of passion and for his reason to have returned.
subjected on appeal. "[T]he language of decisions and statutes may represent correct and unimpeachable statements of the law, but the phraseology may be far removed from the juror's comprehension."

The function of instructions as a means of airing and resolving legal disputes at trial is, however, an important one. Effective communication of ideas and guidelines that are legally unsound is certainly as detrimental to the end of justice as is ineffective communication of legally correct information. The advocates must each have an opportunity to suggest instructions which represent their legal theory and to present to the court arguments in support

CALJIC 16.830 (1973 Revised)
Drunk Driving
Any person who, while [under the influence of intoxicating liquor,] [or] [under the combined influence of intoxicating liquor and any drug,] drives a vehicle, is guilty of a misdemeanor. [The term "drug", as used in this instruction, means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.]

CALJIC 1.20
"Willfully"-Defined
The word "willfully," when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.

CALJIC 8.10
Murder-Defined
Murder is the unlawful killing of a human being, with malice aforethought.

CALJIC 8.11
"Malice Aforethought"-Defined
"Malice" may be either express or implied. [Malice is express when there is manifested an intention unlawfully to kill a human being]. [Malice is implied [when the killing results from an act involving a high degree of probability that it will result in death, which act is done for a base, anti-social purpose and with a wanton disregard for human life] [or], [when the killing is a direct causal result of the perpetration or the attempt to perpetrate a felony inherently dangerous to human life].]

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. "Aforethought" does not imply deliberation or a lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

of those instructions and that theory. Only then can the court make a knowledgeable decision as to the proper law on which to instruct; and only then can an appellate court knowledgeably judge the quality of the trial court's actions.

This article will present what appears to be a workable system which allows fulfillment of both of the jury instruction functions—jury guidance and legal-theory-resolution—and which will simultaneously reduce the number of reversals due to judicial error in instructing the jury (the latter result may be anticipated in any system which is able to produce the former result).

It is currently standard practice to require a trial judge to determine which instructions are to be given, not only from those proposed by the advocates, but also from those not proposed; in other words, he must on his own, sua sponte, give the jury certain instructions in certain situations. And more important, any omission of a pertinent instruction may be cause for reversal on appeal. For an attorney with a weak case, the most effective tactic may be to withhold participation in the preparation of the jury instructions, to propose no instructions whatsoever, and instead to leave the judge to make his own way, determining for himself which instructions counsel might have proposed on behalf of his client.

In some cases this absence of assistance may even be replaced with an active obstruction or misleading of the judge, as may have occurred in the case of People v. Newton. There defense counsel offered an instruction, later withdrew it, but successfully argued on appeal that the judge should have given the withdrawn instruction sua sponte. Thus, not only is the judge obliged to take up a role abdicated by counsel, but in some situations he may be required to improve upon counsel's own voluntary decision.

This article proposes the abolition of the sua sponte duty of the trial judge except for certain basic instructions to be specified by statute or by rule of court. The proposal would retain for each advocate the opportunity to propose instructions reflecting his own

6. ABA Standard 4.6(c) provides:
   At a conference on instructions, which should be held out of the hearing of the jury, and, on request of any party, out of the presence of the jury, counsel should be afforded an opportunity to object to any instruction tendered by another party or prepared at the direction of the court. The court should advise counsel what instructions will be given prior to their delivery and, in any event, before the arguments to the jury.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 110 (1968).

theory of the case, and for the judge the responsibility to select or compose proper instructions. A judge believing that instructions beyond those proposed would be appropriate would still give those additional instructions. It would still be advisable for the court to confer with counsel before settling the instructions. The correctness and adequacy of instructions would still be reviewable on appeal. But the instruction process would cease to be a trap and would resume its rightful functions of guidance and communication.

**Evolution of the Sua Sponte Duty: From Shield to Sword**

The proposal here is simple, as is the procedure to implement it. The ability of such a simple reform to provide the needed solution may be explained by the fact that the evolution of the sua sponte duty to its present state has been a piecemeal aberration, unjustifiable from any broad perspective of the system.

The practice at common law was for the jury to decide both the facts and the law of the case. Thus, at the end of the trial, counsel argued his version of the law of the case, along with the facts, to the jury. The judge not only had no duty to instruct sua sponte, but no duty to instruct at all. In fact he had no authority to instruct.

Although the matter was still a subject of controversy, at the time of American independence the prevailing rule had become that the court should judge the law, and the jury should apply that law to the facts. It had become the general consensus that in the interests of providing the defendant with an informed jury, the judge should have general responsibility for insuring that they were properly instructed as to the law of the case. Blackstone's *Commentaries*, for example, describes the 18th Century procedure, as follows:

> When the evidence is gone through on both sides, the judge in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.8

8. 4 W. BLACKSTONE, COMMENTARIES 375 (1803 ed.).
Interestingly, this procedure had been criticized in the American Colonies because it prevented the jury from disregarding assertedly arbitrary and unjust rulings of the judges holding office by authority of the Crown. As a result, many states followed the contrary rule, allowing juries to decide the law. Only Maryland still adheres to this position. Although many other states have such a rule provided in their state constitutions, all simply ignore it.

Under the general rule—the jury responsible only for determination of the facts—it could be assumed that there would often exist differences of opinion between opposing counsel and between court and counsel as to what instructions concerning the law should be given to the jury. The situation presents a fairly typical set of circumstances in which the problem is normally resolved, under the Anglo-American tradition, by the use of the adversary system. In the case of jury instructions, however, the American solution was something of a half-breed. The judge was given the general obligation to instruct, but the advocates were required to submit specific instructions, and, when they believed it necessary, to object to instructions proposed. The court's actions in accepting and rejecting counsel's proposed instructions were made reviewable on appeal.

The next step in the evolution was to require in the interest of justice that the court, even without request, instruct the jury as to the general principles of law necessary for determining the questions in the case, including, for example, instructions on the presumption of innocence, the burden of proof, and the definition of "reasonable doubt" or "preponderance of the evidence." Most jurisdictions in the United States today acknowledge some such sua sponte duty of the trial judge.

The last step of the process was to enlarge the sua sponte duty from an instruction concerning "fundamental principles of law" to any instruction which touches the legal theory of the case as determined by the appellate court. But before considering this current rule in more detail, two observations of the duty's development are in order.

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10. See Md. Const. art. XV, § 5.


12. See authorities compiled at 23A C.J.S. Criminal Law § 1324, n.48 and notes 16-65, infra.
First, the evolution was clearly one motivated by "hard cases." Note, for example, that capital cases were given special consideration in the development, perhaps establishing the duty, or an expansion of the duty, that was then extended to non-capital cases. Also note that while the sua sponte duty may exist for felony cases, it may not be required for misdemeanor cases in the same jurisdiction. No doubt the sua sponte expansion sprang from cases in which such expansion appeared appropriate, perhaps where inadequate defense counsel may have erroneously failed to point out the absence of a fundamental instruction. Unfortunately, the multitude of exceptions now available persuade competent defense counsel that the most advantageous strategy is not to point out the absence of an instruction fundamentally affecting the defendant's rights. The error of the appellate courts was in their failure to respond to the "hard cases" with the more appropriate theory of inadequate counsel, though such concept may not have been as well developed at that time as it is now.

Second, although each separate step in the process could have been justified as "in the interest of justice," the cumulative result, as will be shown in the next section, is not. "Hard cases" indeed made "bad law," in this instance. What was initially intended as a procedure to shield the defendant from an uninformed jury has become a defendant's sword with which he can foul the judicial machinery.

**Current Status of the Sua Sponte Duty**

The process of development noted above finds some form of sua sponte duty existing today in most jurisdictions of the United States. In a few states, namely Idaho, Kentucky, and Nebraska, the court must state to the jury all matters of law necessary for their information. In a criminal case it is the duty of the court to give the whole law of the case, whether asked by the defendant or not. "It was incumbent upon the
The court is required to instruct the jury on "the whole law of the case" or on "all matters of law necessary for their information." Most jurisdictions however follow a rule of limited sua sponte duty. The rule may be stated in either a negative or positive form: "There exists no duty to instruct without request of counsel, except . . ." or "the court has a duty to instruct without request of counsel only when . . ." The exceptions, or alternatively the limitations, are defined by such terms as "essential," "controlling," "material," or "substantial" principles of law or issues raised; or alternatively by such phrases as: instructions required to "guard the rights of the defendant" or to "allow the jury to arrive at a proper disposition of the case." Jurisdictions in this category include: Arizona, California, Colorado, Connecticut, District Court to give correctly to the jury the whole law of the case, and appellant was not required to offer any instructions or to object to the instructions given. His rights were fully preserved when in his motion and grounds for a new trial he raised the point that the instructions did not present the whole law of the case." Barton v. Commonwealth, 238 Ky. 356, 38 S.W.2d 218, 220 (1931); Skidmore v. Commonwealth, 311 Ky. 176, 223 S.W.2d 739, 741 (1949).

18. "The law is well established in this state that it is the duty of the court to instruct the jury upon all the issues of the case presented by the pleadings and the evidence . . . it is the duty of the court to instruct as to the law applicable, whether the defendant requests such instruction or not." Foreman v. State, 127 Neb. 824, 257 N.W. 237, 240 (1934); Washington v. State, 160 Neb. 385, 70 N.W.2d 378, 381-82 (1955).

19. The former form, the negative, is often found in earlier cases of many jurisdictions which now employ the latter form, the positive. This illustrates the trend of increasing support for an expanded sua sponte duty.

20. "[I]t is the duty of the court in criminal cases to give instructions on the general, fundamental principles of the law pertaining to the offense charged [whether requested to do so or not]." State v. Betts, 71 Ariz. 362, 227 P.2d 749, 754 (1951). But in an earlier case the court held, "In this jurisdiction the court is under no duty to give instructions that counsel have not requested. Burgunder v. State, 55 Ariz. 411, 103 P.2d 256." State v. Hendricks, 66 Ariz. 235, 186 P.2d 943, 950 (1947). (The case cited, however, does not support the statement made.) But an even earlier decision of the Arizona Supreme Court would seem to suggest that the court might have the duty to give an instruction which "guards the substantial rights of the defendant." Leonard v. State, 15 Ariz. 157, 137 P. 412, 415 (1913).


It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (People v. Castillo, 70 Cal. 2d 264, 270-271, fn. 5 [74 Cal. Rptr. 385, 449 P.2d 449]; People v. Henderson, 80 Cal. 2d 482, 489-490 [35 Cal. Rptr. 77, 388 P.2d 677]; People v. Jackson, 59 Cal. 2d 375, 380 [29 Cal. Rptr. 505, 379 P.2d 937]; People v. Putnam, 20 Cal. 2d 885, 890 [129 P.2d 367]; People v. Warren, 16 Cal. 2d 103, 116-117 [104 P.2d 1024].) The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (People v.
Wilson, 66 Cal. 2d 749, 759 [59 Cal. Rptr. 156, 427 P.2d 820]; People v. Wade, 53 Cal. 2d 322, 334 [1 Cal. Rptr. 683, 348 P.2d 118]).

For an analysis of how these general rules are applied in particular situations see notes 69-90 and accompanying text, infra.


23. "Indeed, we have repeatedly held that, in the absence of any request, a court is bound to submit to the jury matters which are necessarily involved in the disposition of a case or essential to a full and fair consideration of it." State v. Monte, 131 Conn. 134, 38 A.2d 434, 435 (1944).

24. "As to some essential questions of law, it is the duty of the trial court to instruct the jury, whether requested to do so or not." Kinard v. United States, 96 F.2d 522, 524 (D.C. Cir. 1938), citing Kreiner v. United States, 11 F.2d 722, 731 (2d Cir. 1926), cert. denied, 271 U.S. 688 (1926).


26. "Upon the trial of a criminal case, the trial judge, in his charge to the jury, with or without request, should instruct them as to the general principles of the law which of necessity must be implied by them in reaching a correct conclusion upon the questions submitted for their consideration. Sledge v. State, 99 Ga. 684, 26 S.E. 756 (1896)." Spivey v. State, 59 Ga. App. 380, 1 S.E.2d 60, 61 (1939).

27. The court has a duty to instruct sua sponte when it concerns "material questions of law in the case." State v. Perry, 246 Iowa 861, 69 N.W.2d 412, 415 (1955).

28. KANSAS STAT. ANN. 62-1447 (1963) (now KANSAS STAT. ANN. of 1970, ch. 129, § 22-4604) provides in part: "In charging the jury [the judge] must state to them all matters of law which are necessary for their information in giving their verdict." The caselaw holds that this requires the trial court to instruct the jury on all salient features, and that failure to do so, with or without request, is reversible error. State v. Roth, 200 Kan. 677, 680, 438 P.2d 58, 61 (1968).

29. In Michigan it is reversible error to omit a "legally essential ingredient" even though MICH. COMPIL. LAWS, CCP § 768.29 (1968) provides in part: "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by accused." This conclusion is based on language in the same section which requires a judge to "instruct the jury as to the law applicable to the case." People v. Guillett, 342 Mich. 1, 69 N.W.2d 140, 143 (1955), citing People v. Tolewitzke, 332 Mich. 455, 52 N.W.2d 184 (1952).

30. The sua sponte duty exists in Minnesota (See, e.g., Robertson v. Burton, 88 Minn. 151, 92 N.W. 538 [1902]), but is most often delineated according to what matters are not included in the duty. Specific instructions as to the case in nearly every U.S. jurisdiction are not required to be given without request. State v. Rasmussen, 241 Minn. 310, 63 N.W.2d 1, 5 (1954). See 23A C.J.S. Criminal Law § 1325(1), especially note 52. Neither are cautionary instructions part of the sua sponte duty in Minnesota. State v. Soltau, 212 Minn. 20, 2 N.W.2d 155, 158 (1942), citing State v. Jenkins, 171 Minn. 173, 213 N.W. 923 (1927).

31. "It is made the duty of the court to instruct the jury on all questions
of law arising in the case whether asked or not. State v. Palmer, 88 Mo. 571. State v. Hutchinson, 111 Mo. 257, 264, 20 S.W. 34, 35 (1893). But this has been construed not to include instructions on “collateral questions.” State v. Brooks, 92 Mo. 587, 5 S.W. 257, 270 (1887). State v. Lackey, 230 Mo. 703, 132 S.W. 602, 606 (1910). Ann. Mo. Stat. § 546.070 (4) (1953) provides in part: “Whether requested or not, the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict. . . .”

32. Cases in Nevada impose on counsel the duty to request that a desired instruction be given. “The failure to so request normally waives the right to complain on appeal, unless the instruction is so necessary to the case that the court, sua sponte, must be sure that it is given.” Mears v. State, 83 Nev. 3, 422 P.2d 230, 234–35 (1967).

33. “[A] mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case. . . . And the duty is not affected by the failure of a party to request that it be discharged.” State v. Butler, 27 N.J. 560, 143 A.2d 530, 550 (1958). Earlier cases, however, required a request to charge. “It is settled law that the failure to charge a proposition of law, even though applicable to the facts in the case, cannot be made the basis for an assignment of error or of a cause for reversal in the absence of a request to charge. State v. Capawanna, 118 N.J.L. 429, 193 A. 902 (Sup. Ct. 1937); State v. Yevchak, 130 N.J.L. 584, 34 A.2d 321 (Sup. Ct. 1943).” State v. Auld, 2 N.J. 426, 67 A.2d 175, 180 (1949).

34. People v. Odei, 230 N.Y. 481, 130 N.E. 619, 622 (1921); People v. Montesanto, 236 N.Y. 396, 140 N.E. 922 (1923).

35. N.C. Gen. Stat. 1-180 (1969) provides in part: “[the judge] shall declare and explain the law arising on the evidence given in the case.” This has been construed to provide a basis for the following conclusion: “[T]he authorities are at one in holding that, both in criminal and civil causes, a judge, in his charge to the jury, should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect.” State v. Merrick, 171 N.C. 788, 795, 88 S.E. 501, 505 (1916); State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313, 318 (1953).


37. “It is the duty of the court, without request, to instruct the jury upon all of the essential issues raised by the evidence, but, where no omission is pointed out, the trial judge need not submit an instruction on every question of law that might be involved, or touching upon every remote deduction that might be drawn from the evidence.” Roberts v. State, 38 Okla. Crim. 28, 251 P. 612, 614 (1926). “It is the duty of the trial judge to instruct the jury on the salient features of law raised by the evidence without a request from defendants. . . .” Hopkins v. State, 28 Okla. Crim. 405, 231 P. 97, 98 (1924). These conclusions are required by Okla. Stat. § 23–856 which states in part: “[I]t is mandatory that the court must inform the jury on matters of law which he thinks necessary for their information in rendering their verdict.” Daniel v. State, 87 Okla. Crim. 174, 93 P.2d 47, 49 (1939).

38. “Consequently, when the issue is not clear, it becomes the duty of the court even though not requested to do so, to give sufficient instructions to the jury that they may know precisely what propositions are submitted for their consideration so that they may render a just verdict.” Commonwealth v. Gold, 123 Pa. Super. 128, 130–31, 186 A. 208, 210 (1936); Commonwealth v. Franklin, 160 Pa. Super. 484, 52 A.2d 230, 232 (1947).
39. In Rhode Island a defendant’s failure to request an instruction “does not relieve a trial court from giving whatever instruction may be made necessary by the state of the evidence. R.I. GEN. LAWS of 1956 (1969 Reenactment) § 8-2-38, requires a trial justice in every civil or criminal case tried by a jury in the Superior Court to ‘instruct the jury in the law relating to the same * * * ’. We have held this statute to be mandatory and to contemplate that juries should be given correct instructions as to those rules of law that of necessity must be applied to the issues raised at trial. Macaruso v. Massart, 96 R.I. 168, 190 A.2d 14.” State v. Goff, 267 A.2d 686, 688 (R.I. 1970).

40. Some cases suggest that “[t]he failure to request instructions on this question can only be regarded as a waiver of the right to such an acquiescence in the omission. State v. Jamison, 221 S.C. 312, 70 S.E.2d 342.” State v. Fleming, 254 S.C. 415, 175 S.E.2d 624, 628 (1970). However, the governing rule in South Carolina appears to be that “the burden rests upon the Trial Judge to charge the law on all material issues, but where the general charge fairly presents the case to the jury, the party who desires an instruction on some particular question should request it ....” State v. Napier, 218 S.C. 320, 62 S.E.2d 793, 794 (1950).

41. Apparently the rule in South Dakota is that a sua sponte duty is present where needed to protect the defendant’s rights. State v. Magnuson, 46 S.D. 156, 191 N.W. 460, 461 (1922).


43. Tex. STAT. art. 36.19 (1966) provides: “Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14 [Charge of Court], 36.15 [Requested Special Charges], 36.16 [Final Charge], 36.17 [Charge Certified by Judge] and 36.18 [Jury may take Charge] has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial.” See, e.g., Thayer v. State, 452 S.W.2d 496, 497 (Tex. Crim. 1970); Ashworth v. State, 418 S.W.2d 668, 670 (Tex. Crim. 1967); Rogers v. State, 420 S.W.2d 714, 715 (Tex. Crim. 1967).

44. Rule 51 of the Utah Rules of Civil Procedure provides in part: “No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving or failure to give an instruction.” Also note that Rule 46 makes a formal exception unnecessary. The party need only bring an error or omission to the attention of the court in order to preserve his right to review. The special exception “in the interest of justice” provides the court below with a sua sponte duty to insure that the instructions provided a just result; even though cases are under the former law. UTAH Code
A third group of states at least claim that they do not recognize a sua sponte duty. States in this group include: Alabama,\(^4\) Ar-

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\(^4\) of 1943, § 104-24-14 now incorporated into Rule 51: State v. Yee Foo Lun, 45 U. 521, 147 P. 485 (1915); In re Hanson's Will, 50 U. 207, 167 P. 256 (1917); Salt Lake & U.R. Co. v. Schramm, 56 U. 53, 189 P. 90; and under the current rule: Morgan v. Pistone, 25 U. 2d 63, 475 P. 2d 839 (1970), demonstrate situations where no such sua sponte duty was required.

45. It is not entirely clear, however, whether a sua sponte duty actually operates in Vermont. The Supreme Court held, "[a] court, in its charge to the jury, has a primary duty to define essential issues of fact and in-struct on the law applicable to such issues, even without request. State v. Coburn, 122 Vt. 102, 105, 165 A. 2d 349, 352 (1960)." State v. Audette, 284 A. 2d 786, 789 (Vt. S. Ct. 1970). But five years earlier the same court held, "It is the duty of the court to charge fully upon all points of law in the case whether or not it is requested to do so. [citations]. But where it is claimed the court has failed to instruct on one or more essential points or issues, such failure must be brought to the court's attention before the jury retires so as to afford the court fair opportunity to correct, add to, or modify the instructions given. This is the well established law of this state [citations]." State v. Quesnel, 124 Vt. 491, 207 A. 2d 155, 157 (1965). The requirement that the judge be informed by counsel of any omission before the jury retires, would seem to effectively counter the effect of any sua sponte duty of the judge.


47. Fed. R. Crim. P. 30 reads in part: "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests . . ." (emphasis added). This seems to be as clear a statement as any that a judge need not give an instruction unless so requested. But the case law indicates: "In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. [citations]." Samuel v. United States, 169 F. 2d 787, 788 (9th Cir. 1948). Although Rule 30 is more recent (amended Feb. 28, 1966, effective July 1, 1966) than any case using the broad "essential ques-tions" language quoted above, specific examples of such exceptions can be found recently. See, e.g., United States v. Rybicki, 493 F. 2d 509, 603 (6th Cir. 1968) (elements of crime charges must be given whether or not requested). The means the Rybicki Court used, and other courts will undoubtedly use, to ignore the limitation of the trial court's duty under Rule 30 is the "plain error" rule of Fed. R. Crim. P. 52(b). That Rule states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Thus Rule 30 may have served only to shift the sua sponte duty from "essential question" to questions "affecting substantial rights" of the defendant, if such can be called a shift.

48. A sua sponte duty does not exist in Alabama, in fact no reviewable error results even if counsel objects or excepts to the court's omission. A party's only remedy is to submit a written request for the instruction it desires. Long v. State, 24 Ala. App. 571, 139 So. 113 (1932); Patterson v. State, 37 Ala. App. 161, 68 So. 2d 191, 193 (1955); Binger v. State, 206 So. 2d 894, 895-97 (Ala. App. 1967).
Limiting the Duty to Instruct
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kansas, Delaware, Hawaii, Illinois, Indiana, Louisiana,

49. ARK. STAT. § 43-2134 (1947) provides: "When the evidence is concluded, the court shall on motion of either party, instruct the jury on the law applicable to the case." The cases agree that a request from counsel is required before the omission of an instruction may be complained of. See Judd v. State, 192 Ark. 1178, 96 S.W.2d 604, 606 (1936); Carlton v. State, 109 Ark. 516, 161 S.W. 145, 147 (1913).

50. DEL. SUPER. CT. (Civ.) R. 51 (1971) provides in part: "At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests... No party may assign as error the giving or failure to give an instruction unless he objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict... Opportunity shall be given to make the objection out of the hearing of the jury." The purpose of enacting this rule was to abolish the practice of taking general exceptions to the charge and to provide the court without notice of errors or omissions. Dietz v. Mead, 2 Storey 481, 160 A.2d 372 (1960); Chrysler Corp. v. Quimby, 1 Storey 264, 144 A.2d 123 (1958). This necessarily precludes the existence of a sua sponte duty.

51. The HAWAI REV. STATS. (1968) provide generally for the court to "instruct the jury regarding the law applicable to the facts of the case..." (§ 635-17), and further provide for jury to be instructed that they are exclusive judges of fact (§ 635-17). But the existence of a sua sponte duty is put in doubt by § 635-41 which provides that "[i]t shall be the duty of the counsel for the respective parties to a cause to furnish the court with a written memorandum, of their request for charging of the jury upon the points of law involved therein, and it shall not be incumbent upon the court, in cases where the parties are represented by counsel, to charge the jury upon the law, unless requested in writing. But if either party is unrepresented by counsel, the court shall charge the jury on his own behalf, and the court may, of its own motion, charge the jury upon any point of law involved in the trial."

52. "It has consistently been held in Illinois that if a defendant wishes certain instructions to be given, he should offer them and request the court to give them, since the trial court is under no duty to give instructions on its own motion. (People v. Lindsay, 412 Ill. 472, 494, 107 N.E.2d 614 (1952).)" People v. Marshall, 96 Ill. App. 2d 124, 238 N.E.2d 182, 183 (1968). But despite this rule, the Illinois Courts when hard pressed will act otherwise. In People v. Birmingham, 301 Ill. 513, 134 N.E. 54 (1922), for example, the trial court had not instructed as to the presumption of innocence. The Supreme Court concluded: "It is no part of the court's duty to prepare instructions for either party to a criminal prosecution... We will not, however, affirm a judgment of conviction in any such case where the evidence leaves us in serious doubt of the defendant's guilt." 134 N.E. 54 at 57.

53. IND. STAT. § 9-1805 (1956) provides in part: "In charging the jury the court must state to them all matters of law which are necessary for their information in giving their verdict." But the cases conclude that this language "does not relieve a party from submitting desired instructions, if the court, through oversight or otherwise, fails to instruct as fully as a

54. LA. CODE CRIM. P. art. 802(1) (1966) generally provides that, “[t]he court shall charge the jury: [as] to the law applicable to the case.” But the Code further provides that certain instructions must be given in certain or specified situations: role of jury (Art. 802(2)), evaluation of evidence (Art. 802(3)), lesser included offenses (Art. 803), presumption of innocence (Art. 804 A.(1)), proof beyond a reasonable doubt (Art. 804 A.(1)), benefit of doubt for defendant (Art. 804 A. (2)), duty of jury if not convinced to find not guilty (Art. 804 B.). With these legislative guidelines it is not surprising that parties may not complain on appeal of instructions not given, unless those instructions were requested. State v. Straener, 190 La. 457, 182 So. 571 (1938); State v. Scossoni, 48 La. Ann. 459, 14 Ind. Dec. 405, 237 N.E.2d 258, 262 (1968).

55. Maryland is unique in that by constitutional mandate (Md. Const. art. XV, § 5) “[i]n the trial of all criminal cases, the Jury shall be the Judges of Law.” The trial court, however, is required to give advisory instructions as to the law. Beard v. State, 71 Md. 275, 17 A. 1044 (1889). Although no duty has been established, the Maryland Supreme Court now “recommend[s] that a trial court should give instructions whenever requested or whenever the court considers it desirable even though not requested.” (emphasis added) Giles v. State, 229 Md. 370, 183 A.2d 359, 365 (1962), appeal dismissed, 372 U.S. 767 (1963). Luery v. State, 116 Md. 284, 81 A. 681 (1911). In the same case, however, the Giles court refused to consider a claim that the jury should have been, but was not, adequately instructed, solely on the ground that the defendant had not requested the instruction he now urged was needed. 183 A.2d 359 at 367. No sua sponte duty is likely to exist in Maryland as long as the scheme of jurors as judges of law retains its vitality.


57. Although the language of the Mississippi statute is typical of statutes concerning jury instructions (“at the request of either party he shall instruct the jury upon the principles of law applicable to the case.” Code of 1942, § 1530), Mississippi is the only state which has construed the language as prohibiting the court from instructing. See Ouille v. Saliba, 246 Miss. 355, 149 So. 2d 468 (1963); Gangloff v. State, 232 Miss. 355, 99 So. 2d 461, 464 (1958); Jones v. State, 216 Miss. 186, 60 So. 2d 217, 217-218 (1953); J.C. Penney Co. v. Evans, 160 So. 779, 781 (Miss. S. Ct. 1935) (giving same construction to same statute in prior code, Code of 1930, § 586).

58. REV. CODE MONT. § 95-1910(e) (1969) provides in part: “When the instructions have been passed upon and settled by the court, and before the arguments to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as have been passed upon and settled.” This language and that of the previous statute on instructions, REV. CODE MONT. § 94-7201 (1947) now repealed, is construed to prevent appellate review of omissions in instructions which were not pointed out at trial. State v. Stone, 40 Mont. 88, 93, 105 P. 89 (1909); State v. Watson, 144 Mont. 576, 398 P.2d 949 (1965); State v. Francis, 58 Mont. 659, 670, 194 P. 394 (1920); State v. Peters, 146 Mont. 188, 405
kota,⁵⁹ Oregon,⁶⁰ Virginia,⁶¹ Washington,⁶² West Virginia⁶³ and

⁵⁹. N.D. Cent. Code § 29-21-33 (1960) provides: “The court may submit to the counsel in the case for examination the written instructions which it proposes to give to the jurors, and may require such counsel, after a reasonable examination thereof, to designate such parts thereof as he may deem objectionable, and thereupon such counsel must designate such parts of the instructions as he may deem improper, and thereafter only the parts so designated shall be deemed excepted to, or subject to exception.” The cases hold that where the court so submits the written instructions to the counsel for approval, counsel cannot later object to them unless they properly preserved an exception upon such submission by the court. State v. Powell, 72 N.W.2d 777 (N.D. 1955); State v. Carroll, 123 N.W.2d 659 (N.D. 1963); State v. Henderson, 156 N.W.2d 700 (N.D. 1968).

⁶⁰. While a court may instruct without a request to do so as provided by statute he has no obligation to do so. State v. Murray, 238 Or. 567, 395 P.2d 780, 785 (1964). But in Oregon, as in a number of other states, the courts have not yet been faced with a case where a fundamental instruction, such as on the presumption of evidence, is omitted. Only after such a case can the true extent of the absence of a sua sponte duty be accurately measured.

⁶¹. It is the practice in Virginia for the trial court to give only those instructions requested by counsel. Drinkard v. Commonwealth, 165 Va. 799, 183 S.E. 251, 253 (1936); Poole v. Commonwealth, 211 Va. 262, 176 S.E.2d 917, 921 (1970). The litigation in that state is not over the court’s duty, but rather the court’s authority. See Drinkard, Poole, supra.

⁶². “Misdirection may be error, but nondirection in the absence of a request, is never error. Counsel forthrightly concedes that no instruction upon this subject was requested. Consequently, the assignment of error presents nothing for this court to review.” State v. Myers, 53 Wash. 2d 446, 334 P.2d 536, 539 (1959); State v. Goldstein, 58 Wash. 2d 155, 361 P.2d 639, 641-42 (1961); State v. Missner, 72 Wash. 2d 1022, 435 P.2d 638, 642 (1967), cert. denied, 393 U.S. 885 (1968).

⁶³. According to the cases, no duty exists in West Virginia. State v. Cobbs, 40 W. Va. 718, 22 S.E. 310, 311 (1895); State v. Beatty, 51 W. Va. 232, 41 S.E. 434, 436-37 (1902); State v. Alie, 82 W. Va. 601, 96 S.E. 1011, 1013 (1918). The rule was established, however, because the instructions given and refused were not made part of the appellate record, and the trial court was presumed to have properly instructed the jury. If no exception showed on the appellate record, the appellate court would not know whether the instruction had in fact been given. Thus the rule became: if no exception to an instruction showed on the record “it must be held here, either that the prisoner waived his right to have such an instruction, or that the court gave the instruction. It is easy to conceive of circumstances which may have led the prisoner to waive that right, and under which he would not thereby be prejudiced.” State v. Beatty, 41 S.E. at 437. Soon after these cases were decided, however, all instructions given were
Wisconsin. Many of these states are likely to shift from this group to the previous group, however, when they are finally faced with a “hard case” such as the failure to instruct the jury on the presumption of innocence or as to the burden of proof. The fact that many small states with low appellate activity are in this category supports this point.

A few of these states, however, have already addressed a “hard case” and have confirmed the continuing non-existence of a sua sponte duty. In Mississippi, sua sponte instructions not only are not required, but are, in fact, prohibited by statute. Unfortunately, this leaves the judge without the ability to give instructions he feels are needed, even instructions explaining basic legal principles.

In the four remaining jurisdictions of Alaska, New Hampshire, New Mexico and Maine the issue of a sua sponte duty has apparently not been raised.

Although this article proposes the abolition of the sua sponte

required to be part of appellate record. W. Va. C. § 56-6-20 (1966). But at the same time was passed W. Va. C. § 56-6-19, which, W.Va. R. Cose P. 51, has recently been held to require a party to except to an omission in the instructions. Yeager v. Stevenson, 180 S.E.2d 214, 218 (W. Va. S. Ct. 1971).

64. Generally there exists no duty in Wisconsin. State v. Yancey, 32 Wis. 2d 104, 112, 145 N.W.2d 145, 149 (1966); Johns v. State, 48 Wis. 2d 619, 180 N.W.2d 607, 612 (1970). But the case of Price v. State, 37 Wis. 2d 117, 154 N.W.2d 222 (1967), adds an interesting wrinkle. After reaffirming the absence of a duty, the court holds that in the unusual case in which there is a great disparity between the skill of counsel, justice may require that the trial judge offer an instruction for counsel’s consideration. Id. 154 N.W.2d at 228. The rule that counsel must request instructions which he later complains were omitted, is then left intact. The Price case involved a “disparity of skill” in favor of the prosecution. It is not clear whether incompetent prosecutors must be rendered the same service.

65. A rule effective July 1, 1972 provides in part:

(a) The court must instruct the jury upon all questions of law necessary for guidance in returning a verdict. . . . (g) Except as provided in paragraph (a) of this rule, for the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed.

N.M. Stats. Ann. § 41-23-41 (Supp., 1973). This language would seem to clearly negate any sua sponte duty. But since other statutes appearing just as clear have been construed otherwise, a better conclusion would be that it is now too early to determine whether a duty exists in New Mexico.


"During a jury trial the presiding justice shall rule and charge the jury, orally and in writing upon all matters of law arising in the case . . . ." But the issue as to whether counsel must request material instructions omitted to assign error, has not yet been decided.
duty, it criticizes the Mississippi system as failing to insure that the jury is adequately informed to correctly perform its function. Abolition of the duty of the trial judge to give instructions in the absence of request by counsel can only be justified when statutes or court rules insure that each jury will be instructed on the legal principles which describe the basic rules of their task. It is proposed here that states having statutes which already require such basic instructions be given may simply abolish the sua sponte duty. States having no such statutes should abolish the sua sponte duty only with enactment of such statutes. Mississippi, it is recommended, should legislate such mandatory instructions if it keeps its sua sponte prohibition statute.

**Policy Evaluation**

As noted above, California is only one of the many states imposing a sua sponte duty on the trial judge. But, perhaps because of the large amount of appellate activity in the state, the unjustified difficulties caused by the sua sponte duty are more acute and hence more visible. The situation in California will be the focus of the remaining sections of this article, but the conclusions drawn may be applied to any jurisdiction with a sua sponte duty or any jurisdiction concerned with the problem of adequately instructing the jury as to the applicable law of the case.

As in other states, the expansion of the duty of a California trial judge to instruct the jury without request of counsel is a recent development in the appellate decisions. While at one time it was assumed that a California trial court had no obligation to instruct the jury on particular points in the absence of request by counsel, the variety of instructions now required to be given sua sponte is extensive. Judge Julius M. Title of the Los Angeles Superior Court has observed:

> [In recent years the appellate courts have established a trend which places an increasingly onerous burden on the trial judge to instruct in a variety of areas without any request by counsel. The list of *sua sponte* instructions has proliferated to such an astounding degree, that some knowledgeable defense counsel now make it

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68. See, e.g., *People v. Matthai,* 135 Cal. 442, 445, 67 P. 694, 695-96 (1902).
their general practice to request no instruction of any kind from the Court, knowing that if the prosecutor and judge are not completely knowledgeable concerning sua sponte requirements, that there is practically a built-in ground for reversal in almost every case of any complexity that defense counsel wishes to appeal.69

The duty to instruct sua sponte is present in such diverse areas as: basic elements of the charged offense,70 reasonable doubt, presumption of innocence and burden of proof,71 circumstantial evidence,72 caution as to oral admissions and confessions,73 cautionary instruction in sex cases,74 expert testimony,75 specific intent,76 flight,77 involvement of accomplice,78 self-defense,79 use of terms with particular legal or technical meaning,80 lesser included offenses,81 defense of diminished capacity,82 corroboration of testi-

71. CAL. PEN. CODE §§ 1096-96a (West 1970); CALJIC R.2.90 (3d ed.).
72. People v. Marlborough, 55 Cal. 2d 249, 359 P.2d 30, 10 Cal. Rptr. 632 (1961); CALJIC R.2.01 (3d ed.).
75. CAL. PEN. CODE § 1127c (West 1970); CALJIC R.2.52 (3d ed.).
77. The sua sponte duty has undergone an interesting development in the diminished capacity area. The decision in People v. St. Martin, for example, states: "[T]he trial court on its own motion must instruct on the issue of diminished capacity . . . where there is substantial evidence that the defendant is relying upon such a defense." 1 Cal. 3d 524, 531, 463 P.2d 441, 444, 83 Cal. Rptr. 166, 169 (1970) (emphasis added). This language provides a significantly different standard for determining the court's duty. It focuses upon evidence that the defendant relied upon the defense, rather than evidence of the defense.
78. Normally the duty is defined as the duty to "... instruct on the general principles of law relevant to the issues raised by the evidence." General principles of law governing the case are considered to be those principles "closely and openly connected with the facts before the court,

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mony in abortion cases, an unconsciousness as complete defense, effect of provocation in homicide prosecution, effect of reasonable doubt of jury as to the degree of an offense, entrapment as a defense, joint venture defense to theft prosecution, and

and which are necessary for the jury’s understanding of the case.” Id. The special factor on the extent to which the defendant relied on a defense appears to be an unsupported aberration of the general rule. The language concerning defense reliance quoted above from the St. Martin decision, is supported by the citation of three cases: People v. Castillo, 70 Cal. 2d 264, 270-71, 449 P.2d 449, 452, 74 Cal. Rptr. 385, 388 (1969), which does not use such a standard of reliance on the defense by defendant, but rather the traditional standard of evidence supporting the defense; People v. Henderson, 60 Cal. 2d 482, 490-91, 386 P.2d 677, 684, 35 Cal. Rptr. 77, 84 (1963), which uses a reliance standard but cites two cases, People v. Harris, 29 Cal. 678, 683-84 (1866) and People v. Jackson, 59 Cal. 2d 375, 380, 379 P.2d 937, 940, 29 Cal. Rptr. 505, 508 (1963), neither of which mention such a reliance standard; and People v. Corley, 64 Cal. 2d 310, 319, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966) which uses such a defense reliance standard but cites only Henderson, supra, in support. It appears, then, that there is no authority for the deviation from the traditional standard under which the trial judge must give the instruction sua sponte if the evidence presented suggests that such a defense might be helpful to the defendant, regardless of whether the defense counsel actually intended to rely on the defense.

Unfortunately the standard focusing on defense counsel reliance on the defense is probably preferable. Such a standard would serve to lessen the harshness of the sua sponte duty now imposed on California judges. It would require at least some minimal activity by defense counsel to bring the defense to the court’s attention. The desirability of such a softening of the current sua sponte rule probably accounts to some degree for the creation and continuation of this unauthorized deviation from the normal sua sponte rules. But so much authority exists for the stricter sua sponte duty that nothing short of a clear-cut change in policy by the California Supreme Court or an act of the California Legislature will limit the sua sponte duty.

The unauthorized deviation quoted above may well be addressed by the California Court of Appeal in a case now before it, People v. Gainey, No. 1 Crim. 10953.

83. CAL. PEN. CODE § 1108 (West 1970); People v. Buffum, 40 Cal. 2d 709, 724, 250 P.2d 317, 325; CALJIC R.11.01 (3d ed.).
86. CAL. PEN. CODE § 1097 (West 1970); People v. Aiken, 19 Cal. App. 3d 685, 703, 97 Cal. Rptr. 251, 264 (1971).
comment by court on evidence. This list is not exhaustive.

It has been argued that the sua sponte duty is necessary to insure that every jury is properly instructed as to the applicable law. This argument, however, is not compelling. A properly instructed jury is to be desired; the question is by what mechanism this goal shall be reached. Should the burden of initiative rest on the judge or on the advocates? What should be the consequence of failure to instruct with full precision?

Consider an analogous situation: it is clearly desirable to have the facts established on the basis of the best available evidence and to have the case determined on the applicable legal theory. But each of these goals is left to the adversary process which is the very basis of the Anglo-American system of justice. Why in the case of jury instructions should this adversary theory be abandoned? Are defense attorneys any less competent to propose jury instructions than to decide which evidence to present or which legal theory to pursue?

The selective introduction of an inquisitorial role for the trial judge causes a number of undesirable results. First, placing on the judge an exclusive burden to compose jury instructions may reduce the quality of defense representation in that aspect of trial practice. As noted in California Criminal Law Practice:

Since the decisions clearly and firmly place the burden on the trial court to fully and fairly instruct the jury on every material issue, defense counsel tend to disregard the important right the law gives them to request court instructions on pertinent issues. This is a serious mistake resulting in the loss of many strategic advantages available of defense counsel by the thoughtful use of instructions.

Second, trial judges may be led into reversible error by defense lawyers who withhold requests for instructions they know should be given. The sua sponte duty wastes the competence and the familiarity with the defendant's interests offered by defense counsel.

Third, a broad sua sponte duty puts competent defense counsel under the burden of "intermeddling" by the trial judge which may handicap trial strategy. While it is true that a request of defense counsel not to include certain instructions may properly be accom-

89. CALJIC R.17.32 (3d ed.).
90. This list was derived from an unpublished notebook, "Trials," 310-314 (1972), prepared for the California College of Trial Judges, by Honorable Julius M. Title, Honorable Bonnie L. Martin, and Frances M. Davis and from Appendix A of the same notebook by Honorable Philip H. Richards.
modated if he shows that such request has a “deliberate tactical purpose,” the fact remains that the process causes an unnecessary additional burden for both in performing their duties, and an unnecessary risk of reversal.

The second and third problems mentioned above were noted by the court in People v. Chapman:

Overbroad appellate demands for sua sponte instructions tend to hamper the tactical choices of defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophisticated instructions. They also supply defense counsel an opportunity to capitalize on invited error by failing to request an instruction thinly supported by meager evidence, then utilizing its absence as an argument for appellate reversal.

THE LEGAL BASES FOR THE SUA SPONTE DUTY

The bases of authority for the current California sua sponte duty are obscure. None of the reported decisions specifically rest the sua sponte duty on constitutional authority, and only a few refer to statutory authority; most simply refer to earlier decisions. The case law trail seems to lead back to the often-cited authority of 8 CAL. JUR. § 362 which states simply:

It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves.

This statement is supported by the citation of two decisions: People v. Peck and People v. Olsen. Olsen is a case in which the court gave an instruction of which the defendant on appeal complained. Concerning the duty to instruct, the Supreme Court in this case said only:

We do not wish to be understood as holding that an entire failure

94. Id. at 174, 67 Cal. Rptr. at 616-17.
95. 8 CAL. JUR. Criminal Law § 362 (1922). This rule has now been modified to include “general principles of law relevant to the issues raised by the evidence,” thus extending the duty to principles concerning every issue raised in the case.
96. 43 Cal. App. 638, 185 P. 881 (1919).
97. 80 Cal. 122, 22 P. 125 (1889).
to instruct on this subject, in this class of cases, would not be er-
or.\textsuperscript{98}

This is hardly definitive support for the sua sponte duty.

\textit{Peck}, the other case relied upon by 8 Cal. Jur. \textsection 362, states, without citation, the principle reported in \textit{California Jurisprudence} and goes on to say: "This rule is so well settled that authorities need not be cited herein in support of the statement thereof."\textsuperscript{99} So the trail ends.

A number of cases rest the sua sponte duty upon apparent legislative intent. For example, in \textit{People v. Graham}\textsuperscript{100} the court stated the "competing considerations of the underlying policies" as follows:

On the one hand, the attorney should exercise control over his case and bear the responsibility for tactical decisions reached in the course of his representation. On the other hand, the \textit{legislature} has indicated that instructions which affect the substantial right of a defendant should be subject to review, even though his counsel, through neglect or mistake, has failed to object to them.\textsuperscript{101} [emphasis added]

While the legislature has so indicated for instructions "given, refused or modified",\textsuperscript{102} it is not clear that instructions \textit{not given because not requested} were also intended to be subject to such review.

The trial court's affirmative duty to instruct is defined in Penal Code \textsection 1127:

\textit{[}I\textit{n charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, \ldots \textit{. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.\textsuperscript{103} [emphasis added]}

The statute's use of "may" in the first sentence and "shall" in the second suggests that except in situations specified by statute the court has no obligation to give a particular instruction.

Similarly, Penal Code \textsection 1093(6) provides:

\textit{The judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party; \ldots \textit{At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable on the}}

\textsuperscript{98} Id. at 128, 22 P. 125 at 127.
\textsuperscript{100} 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969).
\textsuperscript{101} Id. at 319-20, 455 P.2d at 163, 78 Cal. Rptr. at 227.
\textsuperscript{102} \textit{CAL. PEN. CODE \textsection 1259 (West 1970).}
\textsuperscript{103} \textit{CAL. PEN. CODE \textsection 1127 (West 1970).}
case as he may deem necessary for their guidance on hearing the case.\(^{104}\) [emphasis added]

Again, the statute does not appear to indicate a sua sponte duty; rather its wording seems specifically to refute the existence of such a duty.

But on this point *People v. Bender*\(^{105}\) states:

> From a literal reading of section 1127 and subdivision 6 of section 1093 of the Penal Code . . . it may appear that the duty of the trial judge to give instructions, in the absence of request therefore, extends only to those instructions which the Penal Code expressly requires. But we cannot believe that, . . . *the legislative intent* . . . was to relieve the court from the duty of charging the jury, on the court's own motion, on all matters of law necessary for their information. . . .\(^{106}\) [emphasis added]

This analysis suggests two points. First, the current sua sponte duty evolved through case law which, perhaps because the earlier decisions were not founded on any real authority, now relies upon interpretations of legislation. And second, such legislative interpretations are of questionable validity.

No constitutional basis for the sua sponte duty has ever been offered. It might be argued, however, that the constitutional right to “trial by jury” requires “trial by a jury properly informed.” As noted above, authority for such an interpretation does not exist; but further, there is good reason to believe that it could not exist. First, the discussion in the previous section of this article makes it clear that the sua sponte duty, at least as it has become today, is hardly a promoter of an informed jury, but rather is an incentive for counsel to refrain from assisting in the development of an informed jury. And second, the proposed interpretation of the constitutional right to a jury trial is contradicted by other well-supported interpretations of that constitutional provision. For example, there is much authority for the view that the sua sponte duty does not exist in civil cases. In *Gargosion v. Burdick’s Television*,\(^{107}\) for example, the court stated:

> There is neither reason nor justification for compelling a trial judge to act as a sort of advisory or ’backup’ counsel, with all the


\(^{105}\) 27 Cal. 2d 164, 163 P.2d 8 (1945).

\(^{106}\) Id. at 176, 163 P.2d at 16.

\(^{107}\) 254 Cal. App. 2d 316, 62 Cal. Rptr. 70 (1967).
frustration of the employed attorneys' trial strategy and tactics which such a holding could encompass.  

Some cases, however, find error upon a complete failure to instruct properly on basic issues. But clearly, the sua sponte duty in civil cases is considerably less demanding than in criminal cases. This result contradicts the proposed "right to jury trial" argument above, for although the California Constitution declares that "the right of trial by jury shall be secured to all, and remain inviolate. . . ." no distinction is made between civil and criminal cases. Other provisions of the Constitution do make such a distinction, suggesting that the absence of any distinction regarding the right to trial by jury was deliberate. One must conclude that there is no Constitutional authority for the sua sponte duty.

The ultimate conclusion here is that since no constitutional basis for the sua sponte duty is, or could be, stated, and since the only stated authority, which is itself of questionable validity, is based upon legislative interpretation, the sua sponte duty may clearly be controlled by legislative revision.

The analysis indicates that a defendant has no constitutional right to have the trial judge give instructions not requested. It is suggested that the "right to a jury trial" might most accurately be construed to require that the defendant be given the opportunity to request whatever instructions he believes appropriate and the right to have the trial judge give such requested instructions as may be necessary for the jury to resolve the issues according to law. These rights are clearly not infringed by revision of the sua sponte duty by the legislature.

Revision of the Sua Sponte Duty

With these practical and legal evaluations as background, it is not surprising to find that the Conference of California Judges has proposed the following legislative reform:

Except for instructions required by statutes or instructions affecting a defendant's fundamental constitutional rights, it shall not be

108. Id. at 318, 62 Cal. Rptr. at 72.
111. CAL. CONST. art. I, § 7.
112. Having reviewed the difficulties surrounding the sua sponte duty, this section's analysis of the legal foundation for the sua sponte duty is particularly distressing. The sua sponte duty may present the best example of the dangers of judicial legislation.
error for a court in a criminal case to fail to give an instruction unless requested by a defendant.\textsuperscript{113}

This proposal might be implemented by enactment of a new Penal Code section immediately following section 1093.5, as follows:

\textbf{Penal Code Section 1093.6:}

\begin{quote}
It shall not be error for a court in a criminal case to fail to give an instruction unless requested by a defendant, except:

1. In any criminal trial or proceeding in which the opinion of any expert witness is received in evidence, the court shall instruct the jury pursuant to Penal Code section 1127b;

2. In any criminal trial or proceeding in which evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury pursuant to Penal Code section 1127c;

3. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses, as required by Penal Code section 1127;

4. The court shall instruct the jury in all cases on the subject of the presumption of innocence and on the definition of reasonable doubt, according to the Penal Code section 1096a;

5. The court shall instruct the jury in all cases as to which party bears the burden of proof on each issue and as to what that burden requires, as required by Evidence Code section 502.\textsuperscript{114}
\end{quote}

The five exceptions listed above embody all the instructions mandated by statute. The new statute proposed here does not include reference to “a defendant's fundamental constitutional rights” as mentioned in the proposal of the Conference of California Judges. The omission is intentional; there are no fundamental constitutional rights, not already covered in the five exceptions, that would need specific treatment in jury instructions. The constitutional rights which do come into play in criminal proceedings (e.g., exclusion of unconstitutionally obtained evidence, freedom from coercion of plea, protection against double jeopardy) are within the province of the judge rather than the jury. Further, inclusion of a broad “fundamental constitutional


\textsuperscript{114} At a meeting May 12, 1973, the Judicial Efficiency and Economy Committee unanimously recommended enactment of this proposed language, as California Penal Code § 1093.6. At a September 10, 1973 meeting of the entire Conference of California Judges, this recommendation was adopted.
rights” exception could undermine the statute's limitation of the sua sponte duty.

The fact that no present Penal Code section requires revision to be consistent with restriction of the sua sponte duty, reveals the large extent to which the existence of that duty rests upon judicial interpretation or elaboration of legislative intent. However, to insure absolute clarity of legislative intent it would be appropriate to amend several provisions of the codes as follows:

*Penal Code* § 1259:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby; but the appellate court shall not review the failure to give instructions not requested, except where an instruction is required by Penal Code section 1093.6.

*Penal Code* § 1368:

6. The court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict, which are required by law or have been requested by counsel.

*Penal Code* § 1469:

Upon appeal by the people the reviewing court may review any question of law involved in any ruling affecting the judgment or order appealed from, without exception having been taken in the trial court. Upon an appeal by a defendant the court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done and which affected the substantial rights of the defendant. The court may also review any instruction given, refused or modified, even though no objection was made thereto in the trial court if the substantial rights of the defendant were affected thereby; but the court shall not review the failure to give instructions not requested, except where an instruction is required by Penal Code section 1093.6. The reviewing court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependant upon, such judgment or order, and may, if proper, order a new trial. If a new trial is ordered upon appeal, it must be had in the superior court unless the appeal is from a municipal court in which case the new trial must be had in the court from which the appeal is taken.

Penal Code sections which affect jury instructions but require no revision include sections 1093, 1127 and 1181.115

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6. The judge may then charge the jury, and must do so on any
Such legislative restriction of the sua sponte duty would alleviate the problems discussed earlier yet would continue to provide points of law pertinent to the issue, if requested by either party; and he may state the testimony, and may comment on the failure of the defendant to explain or deny by his testimony any evidence or facts in the case against him, whether the defendant testifies or not, and he may make such comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case and he may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as he may deem necessary for their guidance on hearing the case. The trial judge may cause copies of instructions so given to be delivered to the jurors at the time they are given.

The enactment of the proposed Penal Code § 1093.6 should effectively counter the interpretation of this section given in People v. Bender, at text accompanying note 105 supra.

CAL. PEN. CODE § 1127 (West 1970):
All instructions given shall be in writing, unless there is a phonographic reporter present and he takes them down, in which case they may be given orally; provided however, that in all misdemeanor cases oral instructions may be given pursuant to stipulation of the prosecuting attorney and counsel for the defendant. In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. Either party may present to the court any written charge on the law, but not with respect to matters of fact, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must endorse and sign its decision and statement showing which party requested it. If part be given and part refused, the court must distinguish, showing by the endorsement what part of the charge was given and what part refused.

CAL. PEN. CODE § 1181 (West 1970):
When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury;

Other sections which concern jury instructions to a lesser degree and are also unlikely to need revision include CAL. PEN. CODE §§ 1093.5, 1096a, 1126, 1127b, 1137, 1138, and 1176 (West 1970).
protection of the defendant's constitutional rights and other im-
portant interests. The legislature has already specified, and would
have the opportunity to further specify by statute, any instruc-
tions necessary to be given without a request by counsel. The
trial judge would retain his responsibility to give all instructions
he considered appropriate.

Failure of defense counsel to request necessary instructions can
always be reviewed under the standard of incompetence of counsel
set out in People v. Ibarra.116 Reviewing a claim of incompetency
of counsel appears a more appropriate remedy for failure of de-
fense counsel to represent his client adequately in proposing in-
structions, than is the expansion of the sua sponte duty of the trial
judge. The rising level of familiarity with criminal law matters
of the bar in general, the increasing trend toward specialization
and certification, and the current availability of various sources
of continuing education render the sua sponte duty less necessary
than it might once have been, especially in conjunction with the
alternative protective measures noted above.

(1963).