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Criminal Law and Procedure

by *Rex A. Collings, Jr.**

Under our criminal procedure the accused has every advantage. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.¹

The time has come, I believe, when the nation should face up to the hard task of considering an amendment to the self-incrimination clause that will preserve all the Framers said and some of the Court's extensions, modify

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1. Justice Hand, in *United States v. Garsson*, 291 F. 646 (S.D.N.Y. [1923]).

others, expunge some altogether, and guard against accretions seemed to be in the making.²

Recently one of my favorite TV performers said: "I hate to look in a mirror. I realize I am a schnook." Our Supreme Court justices are human beings. Why won't some of them look in the mirror? Why don't they realize that they are parts of Supreme *Courts* not *SUPREME* Courts? I had a number of barbs removed from last year's article by the then editor, a good friend of mine. One of them was a reference to a poem by Robert Burns:

Oh wad some power the giftie gie us
To see oursels as others see us!
It wad frae many a blunder free us,
An' foolish notion.

Where are we going? Some of us remember the old Washington, D.C. We went there with our high school graduation class. High school classes went to Washington (well-chaperoned, of course), stayed at cheap hotels and had a wonderful time seeing the cherry blossoms and Mr. Hoover's Justice Department, sneaking kisses, buying pimple cures, etc. Those were the good old days. They are gone. Today, the high schools ignore the "great" city. It is a dangerous place for teenagers. Rape and robbery are rampant. Banks are robbed under the eaves of the White House. The Supreme Court sends home with bodyguards its secretaries who work after dark.

A hotel clerk or door attendant in Washington will practically beg you not to go out after dark. In fact it is somewhat dangerous to ride a bus in the daytime at least in some areas. San Francisco and Los Angeles have not quite reached this point. But they are on the way. Washington is practically a dead city at night. If you have to visit a big city go to Chicago. Mayor Daley and his police force apparently have it under control. It is still fairly safe to wander Chicago streets at night.

² Friendly, *The Fifth Amendment* *tional Change*, Lecture, Univ. of Cincinnati College of Law, Nov. 6, 1968.

And what of the latest crime statistics? Incidentally, I am a little upset with our California Bureau of Criminal Statistics for being so apologetic concerning its statistics. They have done an outstanding job and should never apologize. There can be little doubt that our Bureau keeps the best crime statistics in the world. This has been true for a long time. What do these statistics show? In a few sentences I am going to use them to demonstrate that the crime situation in California is tragic.

In 1954, the year before *People v. Cahan*,³ the year before the California Supreme Court started to “lead” us into “liberalism,” the crime index for major crimes per 100,000 persons in California was 1062.⁴ By 1967, the latest available year, it has risen to 2435.8 per 100,000. In other words for each 100,000 persons in California in 1967, over 2400 major crimes were committed. To put it another way, for each 100 persons in California 2½ major felonies were committed—serious felonies—murder, forceable rape, robbery, burglary, aggravated assault, larceny or auto theft. Or to put it still another way one out of every 40 persons in California, counting infants and old age pensioners, committed a serious felony in 1967.

I use the year of the *Cahan* case for comparison, because that is the year that the California Supreme Court went to work to become a far-out liberal court. Since then there has been nothing but trouble.

Consider some other statistics from our state figures. Felony arrests for all (not major) felonies have only risen from 487 per 100,000 in 1954 to 708.9 per 100,000 in 1967. To state this another way felony arrests have risen 45% since 1954 on the basis of population. Major crimes on the other hand have gone up 135% on the same basis—three times as fast as arrests. We are without doubt losing the crime war!

3. 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513 (1955).

4. The statistics and calculations based upon them used in this article come from California, Department of

Justice, Bureau of Criminal Statistics, Crime in California 1954 and California, Department of Justice, Bureau of Criminal Statistics, Crime and Delinquency in California, 1967.

It is difficult to find figures in comparing these various reports that show anything which is not unfavorable. In 1967 there were 265,780 reported burglaries and 6962 felony burglary convictions. Realizing that the same burglaries do not necessarily take place the year of the trials, the statistics seem to show that for every 38 reported burglaries, there is only one conviction. Similar statistics show only one conviction for every 12 robberies.

Population in California since 1954 has been increasing 4% a year. Major crimes have been increasing 19% a year, almost five times as fast as the population increase.

Who should we blame for all of this? I think this article demonstrates that a major part of the problem belongs to our supreme courts. Permissiveness is not only a problem of principals and parents and deans and trustees and regents and chancellors and college presidents and university presidents. It is not only a problem of disgusted and frustrated policemen who sometimes turn their backs on crime. It is not only a problem of the so-called silent majority. It is the problem of us all, but especially appellate courts which are next to it. I realize that I am tilting at windmills, but perhaps a few people will get mad as a result of this article. We frightened a few supreme court justices at the last judicial election. Perhaps next time we can scare them again. In any event, hopefully, they will not become too complacent. Some of them are certainly not representing their constituents.

The first ten amendments of the United States Constitution, as everyone knows, were intended to protect citizens of the newly formed federalist states from machinations of federal bureaucrats. However, in 1868, a curve was thrown called the Fourteenth Amendment. This provided in part that a person could not be deprived of life, liberty, or property without "due process" of law. By twisting and torturing "due process," the United States Supreme Court with some assistance from state courts, especially in California, has quite effectively deprived all state citizens of the protection of the first ten amendments. We now in effect have federal criminal procedure, as declared by the United States Supreme Court—

often by the familiar five to four decisions—running and ruining state criminal procedures.

In California this process is often accelerated by an eager majority of our Supreme Court. The majority seems to want Washington to run California criminal procedure. They like the trend to Washington dictatorship. They even try to anticipate the United States Supreme Court and be the leaders in destroying state's rights in criminal procedure.⁵

Enough of that!

It might be of some interest to know what the problem is in preparing an article such as this. In connection with its preparation. I screened all United States Supreme Court decisions as well as all California decisions which pertained to the subject. Two research assistants who perhaps did not know I was checking on them did the same job. I very carefully examined their "rejects" and reinstated some 20% for further examination. They were usually right. It is not always easy for a law student (or a law professor for that matter) to know a "good" case when he sees one.

I carefully read all relevant United States Supreme Court criminal procedure decisions. Many of them state California law. I decided, however, not to discuss them. Rather I cited them in notes.

California Supreme Court decisions of course must be read and reread. There were approximately 80. Courts of appeal decisions ran over 600. Half of the reported decisions in California this year are criminal law and criminal procedure decisions. Half of the pages in the reports are criminal law and criminal procedure decisions. I started to keep tallies, but did not complete them. This year, like last year, I decided to cover the decisions extensively, rather than intensively.

I probably missed decisions which should have been discussed. If I did, call them to my attention, and they will be mentioned next year. If some fine young lawyer would like to be a part of this project, let him contact me. It is not easy.

5. See discussion *Cal Law Trends and Developments* 1967, p. 386.

Probably some who read the article last year wonder why there were only 80 California Supreme Court criminal law and procedure decisions this year as against 100 last year. I think it is because there was but one death penalty decision, where the degree of the murder was reduced. The court held back on the death penalty cases until it could decide the constitutionality of the death penalty. This it did, but after the end date for this article which was September 30, 1968.⁶

Wouldn't it be nice if the courts of appeal would observe California Rules of Court 976(b) which purports to forbid publication of opinions which do not involve new and important issues of law, changes in established principles of law, or matters of general public interest? Many of their decisions are junk. We have all become used to throwing junk mail in the scrap basket. I suppose we can learn to throw junk decisions in the same place. My children enjoy them. They are very helpful in kindling a fire in the fireplace.

Tentative Draft No. 2 of the Penal Code Revision Project was published this year.⁷ The draft is extensive and would update the present archaic penal code to a considerable extent. Some of the suggestions will be discussed from time to time in the course of this article. The draft would make it a defense if a person as a result of mental illness "lacked substantial capacity to know or understand what he was doing was wrong." At first glance this sounds like a change in the law, but when read with *People v. Wolff*,⁸ it quickly becomes apparent that it is not.

In the attempt statute the draftsmen propose to modernize the law of attempt and do away with archaic notions that for attempt there must be something dangerously near to completion of the offense. Under our present day notion of criminal law, a person who attempts a crime is as dangerous as a person who completes it. Both must be subjected to

6. In re Anderson, 69 Cal.2d —, 73 Cal.Rptr. 21, 447 P.2d 117 (1968).

8. 61 Cal.2d 795, 40 Cal. Rptr. 271, 394 P.2d 959 (1964).

7. Joint Legislative Committee for Revision of the Penal Code, Tentative Draft No. 2 (1968).

confinement where necessary. The proposed revision would move what is now attempt far back into the area of preparation. Lying in wait, reconnoitering, collecting materials to commit a crime, could constitute an attempt. There need be no clear and present danger that the crime would be completed.

It is hoped that many California lawyers, judges as well as laymen will send their comments on the draft to the project director, Professor Arthur H. Sherry, University of California, Berkeley, that is, assuming the pickets allow the mail to go through.

Criminal Procedure

Pretrial Procedure

*Investigation.*⁹ The United States Supreme Court this year “discovered” and approved “stop and frisk.” In *Terry v. Ohio*¹⁰ the court approved a limited search for weapons in a legitimate investigation where the peace officer, although without reasonable grounds to make an arrest, is justified in believing that the person being investigated is armed and dangerous to the officer or others. In *Sibron v. New York*¹¹ (two cases), the court upheld the New York “stop and frisk” law, reversing in one case because the peace officer did not have sufficient grounds to warrant a belief that the suspect was armed and dangerous.

Justice Harlan in his concurring opinion in *Sibron* suggests that the court has laid down an important new development in the law. However, almost simultaneously with its adoption of the exclusionary rule in 1955, the California Supreme Court determined that events short of reasonable cause for arrest may justify investigation. Furthermore, such circum-

9. Two important eavesdropping decisions were *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967) and *Lee v. Florida*, 392 U.S. 378, 20 L.Ed.2d 1166, 88 S.Ct. 2096 (1968); see, also, Comment, Constitutional Limitations on Pre-Arrest In-

vestigations, 15 U.C.L.A. L. Rev. 1031 (1968).

10. 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968).

11. 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968).

stances may also justify a “frisk” or “patting down” for weapons.¹² Some recent decisions illustrating applications of the doctrine as well as some of its pitfalls are cited in the footnote.¹³ One interesting loser was *Sanchez*.¹⁴ He, a suspected dope peddler, was seen to go into a pedestrian tunnel several different times with different persons, always coming out the same end of the tunnel he had first used. Officers entered both ends of the tunnel and accosted him. He immediately reached into his pocket. The officer, fearing Sanchez was going for a weapon, grabbed his hand which was found to contain a box of narcotics. He also was armed. His main contention was that he was confined without probable cause at the time the officers entered both ends of the tunnel. The court upheld the arrest, search and seizure.

Can a defendant represented by counsel of his own choice fail to object to his confessions at three trials and then on habeas corpus claim that they were involuntary despite his abandonment of an appeal? The supreme court held by a four to three decision that he can.¹⁵ The murder and mutilation of the victim took place sometime before midnight. The defendant had been drinking but a finding that his first confession at 1 a.m. was voluntary was upheld by the supreme court. However, he made three later confessions ten, fifteen, and twenty hours later which the majority thought should have been excluded. Shortly after the first confession he was given a large dose of a tranquilizer (thorazine) because of emotional upset. There was some evidence that the combination of thorazine and alcohol might increase the effects of alcohol as well as slow down recovery from its effects. However, his own expert testified that he could not state that the defendant's free will was destroyed, and that the defendant had the ability to choose whether he would answer questions or not.

12. See, e.g., *People v. Martin*, 46 Cal.2d 106, 293 P.2d 52 (1956); *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57 (1956).

13. *People v. Britton*, 264 Cal. App. 2d —, 70 Cal. Rptr. 586 (1968); *People v. Nunn*, 264 Cal. App.2d —, 70

Cal. Rptr. 869 (1968); *People v. Rice*, 259 Cal. App.2d 399, 66 Cal. Rptr. 246 (1968).

14. *People v Sanchez*, 256 Cal. App. 2d 700, 64 Cal. Rptr. 331 (1967).

15. *In re Cameron*, 68 Cal.2d 487, 67 Cal. Rptr. 529, 439 P.2d 633 (1968).

There was ample evidence that the defendant exercised his own judgment in making all three of the questioned confessions. The trial judge so found. The referee so found. And the three dissenting justices so found. In fact a reading of the majority opinion leaves one wondering whether they really felt they had grounds for reversal. Another murderer goes free. However, since his first confession was held to be voluntary, perhaps he can be retried.

The courts have practically destroyed the use of the line-up (sometimes called showup or identification parade). The Supreme Court has invented a "due process" right to have counsel at the line-up.¹⁶ It has also held that the line-up must be fair, that is, not unnecessarily suggestive.¹⁷ Small wonder that one police department which was a model for a well-known TV program has done away with the line-up altogether. Doubtless it will struggle along with a less fair device—showing mugshots of suspects to witnesses. These of course provide prison pictures complete with numbers, prison haircuts, and front and side views. The witness will be told to ignore the numbers and consider the pictures on their merits. I have no doubt that there have been abuses in the use of the line-up. It is not always easy on short notice to find several persons who resemble the suspect. But should this investigative tool be destroyed altogether? Perhaps we will soon see a decision where the courts will hold that there was a denial of due process because no line-up was held.

Other police forces continue to use the line-up but have developed policies which make it rather difficult to use. Furthermore, agile defense counsel look for defects in the policies for the purpose of testing possible technical flaws and thereby freeing the guilty. The courts are not alone in freeing the guilty.

I asked one distinguished defense attorney what he does with the new rule that created a right for the defendant to

¹⁶ See, e.g., *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967).

¹⁷ *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967).

have counsel present at the line-up. He said: "I go." I asked what he did while he was there. He said: "I sit." Of course he is well paid for his services. I wonder what the reaction is of public defenders and other court appointed counsel who are called at 3 a.m. to attend a line-up.

As might be expected we see the effects of the line-up cases in our courts. One important decision was *People v. Caruso*¹⁸ where the supreme court held that the line-up was unnecessarily suggestive. Apparently the other participants in the line-up did not closely resemble the suspect. He was a very distinctive appearing person. The facts occurred before the newly created doctrines of *Wade*, *Gilbert*, and *Stovall v. Denno*.¹⁹ The poor policemen should have hired a mind reader to anticipate those decisions. One would doubt on reading the decision that the defendant can be tried again. Perhaps he will be captured (and freed again?) sometime in the future for some other offense. Meanwhile the police go on playing the game—if they don't get disgusted and resign. Who would want to be a cop in California?

Or consider, *People v. Espinoza Menchaca*.²⁰ The line-up included a defendant of "Mexican extraction," and others who were not. Without ever seeing the witnesses or the others in the line-up and without discussing whether the defendant's "Mexican extraction" was apparent, the court reversed. How do you know if a person is of Mexican extraction? Such persons often look no different than anyone else. I am of Mexican extraction yet apparently no one ever noticed it. Perhaps my name is not a dead giveaway. But should I assume the name José Antonia de Medina, the name of one of my forebears perhaps it would be required that others of such Mexican descent be placed in my line-up. Phooey! My skin is quite white and my eyes continue to be hazel. Many "Mexicans" have very white skin and blue, green, or hazel eyes. You can't categorize a person by his race, especially if you are on an appellate court where you don't see him. Why

¹⁸. 68 Cal.2d 183, 65 Cal. Rptr. 336, 436 P.2d 336 (1968). For further discussion of this case, see Harvey, EVIDENCE, in this volume.

¹⁹. Cited notes 16 and 17, supra.
²⁰. 264 Cal. App.2d —, 70 Cal. Rptr. 843 (1968).

Collings: Criminal Law and Procedure

can't appellate courts leave factual problems to the trial courts who see the witnesses?

Again in *People v. Hogan*,¹ a "Negro" defendant was placed in a line-up with a "Mexican" and three "Caucasians." This was held to be a discriminatory line-up. Perhaps it was. But how does an appellate court know that a line-up is unfair? Why not leave this to the jury's determination of the weight of the evidence? They saw the witnesses.

In any event these decisions and others should spell out guidelines to counsel. If the line-up is used the police must lean over backwards to make it fair. If a person of "Mexican" extraction, whatever that means, is placed in a line-up with "Caucasians," whatever that means, at least evidence should be placed in the record to show that they were similar in appearance. The victim must choose between similar persons.

What should the police do for the time being? Perhaps they should forget about line-ups and show pictures to the victims. If so, they should then consider eliminating prison identification numbers. How do they know what they should do?

California Vehicle Code section 2814, recently adopted, permits roadblocks to inspect motor vehicles. A group of California Highway Patrol officers check vehicles for license, registration, brakes, lights, smog devices, etc. A mechanic checks the focus of headlights. In *People v. De La Torre*,² they noticed something else. This caused them to file a complaint for a violation of the Vehicle Code section 23102 for driving while under the influence of an intoxicating beverage. The trial judge ruled section 2814 unconstitutional and dismissed the complaint. The appellate department reversed as did the court of appeal. The per curiam decision contains a useful summary of the various roadblock cases.³

1. 264 Cal. App.2d —, 70 Cal. Rptr. 448 (1968).

2. 257 Cal. App.2d 162, 64 Cal. Rptr. 804 (1967).

3. See also, Comment, Interference with the Right to Free Movement:

Stopping and Search of Vehicles, 51 Cal. L. Rev. 907 (1963). This comment by a law student gives the background of the problem and with Shepard's should enable anyone interested to become current. Decisions are scarce, perhaps because misdemeanor

Arrest, search and seizure. The plight of a peace officer who is trying to do his job and outguess the courts is a perplexing one. Consider the saga of the Huntington Beach Police Department on Halloween night in 1966, which came to a tragic end in *People v. Marshall*.⁴ My students will probably nickname this the “trick-or-treat” case.

The police used an informer to make a purchase of marijuana at an apartment. The transaction took place in the bedroom of the apartment, and the informer returned with a cellophane bag. The bag appeared to contain marijuana and smelled like a rum-soaked cigar. The informer said the packet came from a larger brown paper bag. Fearful of the possibility of having to break the front door which was an 8 foot sliding glass door, they sent for a sergeant with instruments to pick the lock. They knocked several times and were not answered so they picked the lock.⁵ They searched the apartment and found the occupants had gone out. As they walked through the house they smelled the same odor that they had smelled in the package procured by the informer (apparently rum-soaked marijuana).

Then came their fatal mistake. The smell seemed to come from the closet, the door of which was open. The smell also seemed to come from a brown paper bag in an open cardboard box. They discussed getting a search warrant, but rejected the idea as impracticable at 9 p.m. on a Sunday night. So they opened the bag and found 21 cellophane packages similar to the one brought to them by their informant. (The bag and contents were used as evidence.) They then sat down and awaited the return of the occupants of the apartment. Some were arrested, one being the defendant Marshall.⁶

The trial judge thought the evidence was admissible. But the court of appeal thought the evidence was inadmissible.⁷ Three supreme court justices thought the evidence was admissible. However, four supreme court justices thought the

convictions seldom find their way into appellate reports.

4. 69 Cal.2d —, 69 Cal. Rptr. 585, 442 P.2d 665 (1968).

5, 6. The entry was held to comply with Penal Code § 844.

7. 64 Cal. Rptr. 690 (1967).

Collings: Criminal Law and Procedure
 evidence was improperly seized. The judgment was reversed. Pity the poor peace officers. Their training in the law is somewhat limited. They act quickly and here acted quite reasonably. A very masterful job of police work was ruined.

What went wrong? The officers should have obtained a search warrant before opening the brown bag. The majority quotes *Johnson v. United States*⁸ to the effect that inconvenience to the officers and some slight delay necessary to prepare papers and present them to the magistrate are not convincing reasons to by-pass the warrant requirement.

Now let us follow the process of obtaining a hypothetical warrant under the facts of *Marshall*. Fortunately the apartment was located not far from the police station so that little travel time would be involved. The district attorney in Orange County ordinarily does not permit peace officers to prepare warrants largely because most judges will not issue a warrant which has not been reviewed by a district attorney (and what district attorney would want it otherwise in view of the technicalities imposed by the appellate courts). Therefore it would be necessary to find a deputy district attorney and a stenographer. According to the district attorney's office:

It is anybody's guess as to how many phone calls would have been made before finding a deputy at home and available. Most of the deputies lived in the county and would have been no farther than 45 minutes driving time from the Huntington Beach Police Department. The same procedure would have to be followed to locate a stenographer and a judge. *Under ideal circumstances during office hours the average search warrant takes approximately 4 hours to complete.* Adding to this the time required to locate a deputy district attorney who would in turn have to locate a stenographer and judge, the estimate of time involved would probably exceed 6 hours.⁹

8. 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). Deputy District Attorney, Orange County, dated December 19, 1968 (emphasis added).

9. Letter from Michael R. Capizzi,

Just what else would obtaining a search warrant on a Sunday night entail in Huntington Beach? First of all it would be necessary to keep two officers guarding the brown bag. Since they were waiting for several adults to return to the apartment it would have been dangerous to leave only one man. Thus a third officer would be needed to do the legwork necessary to get the warrant. On duty at the time were the watch commander at the police station, his sergeant, and five other officers. In other words what the majority is suggesting is that half of the officers in the field be immobilized. The 12,000 souls of Huntington Beach are to be left at the mercy of Halloween vandals and other hoodlums with only the "protection" of three policemen. One bad automobile accident or holdup would immobilize at least two of the three.

Assuming the quest for a warrant began at 10 p.m., the warrant could be procured no earlier than 4 a.m. Meanwhile, the occupants of the apartment and friends showed up. At 10:55 p.m. four people showed up. One was arrested as being the owner of the apartment. Another was arrested as a juvenile in violation of curfew requirements. Who is to take them to the police station? This will necessitate the services of two of the three policemen still on duty in the city leaving one patrolman to guard the entire city. At 1:30 a.m., the defendant and a friend appeared. The defendant was arrested. The friend was asked and agreed to go to the station for a routine records check. The warrant has not arrived. Once again two of the three policemen on duty must be used to take the two suspects to the police station. Finally, the warrant arrives and the two officers guarding the bag of marijuana are free to return to the station to write up their reports.¹⁰ All of this, the majority of the court refers to as "inconvenience to the officers and some slight delay!"

10. Officer Hollingsworth who wrote the reports finished up his stint late the next afternoon when the Orange County crime laboratory confirmed that the contents of the various packets were marijuana. Whether, after his 24 hour day, he then went back to his evening

and night patrol does not appear. He probably was, and should be proud of what he had accomplished on that Halloween night—even though the supreme court pulled the rug out from under him.

Why must the peace officer go through this ceremonial rite of procuring a warrant? The majority explains that there is a difference between probable cause to believe that contraband will be found, which justifies issuance of a search warrant, and observation of contraband in plain sight which justifies search without a warrant. The reason for the difference is that the magistrate is "neutral and detached" while the officer may be zealously engaged in "the often competitive enterprise of ferreting out crime." The majority blinds itself to the fact that quite a few California magistrates are laymen. Nor does it allude to the probability of some lack of neutrality and detachment even by a lawyer-magistrate suddenly awakened at 3:30 a.m. after a delightful evening of passing out goodies to trick-or-treaters.

One possibility may be being overlooked by the law enforcement people. The justices of the supreme court are all magistrates.¹¹ It might be interesting for district attorneys who have supreme court justices in their counties to include them on the list of magistrates to call in the nighttime to authorize warrants. Surely, in view of the results in *Marshall*, at least four of the justices will be delighted to be awakened at 3:30 a.m. to sign warrants.

One other point made in *Marshall* is worthy of note. The majority analogized looking into the brown bag with the search made in *Bielicki v. Superior Court*.¹² In *Bielicki* the officers looked down through a hole above toilets in a private amusement park and caught the defendants violating Penal Code section 286. The peeping was held to constitute an illegal search and seizure. Even if you find the brown bag, you must not peep without a warrant. Furthermore, merely because you smell something which in all probability is marijuana in the bag, you must wait until you explain the whole thing to a magistrate. Of course, the magistrate will not be able to smell the bag, but because of his neutrality and detachment, he will be able to quiz you to find out if you were correct in your olifactory findings. The majority quips: "In plain

11. Penal Code § 808.

12. 57 Cal.2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962).

smell,' . . . is plainly not the equivalent of 'in plain view.' ” An officer properly on the premises can seize something he sees without the rubber stamp of the magistrate. His sense of smell must be reviewed by the magistrate.

*Miranda*¹³ problems, as might be expected, continued to arise. Perhaps the most outrageous decision was that in *People v. Fioritto*.¹⁴ Defendant and two others burglarized a market. He was captured and brought into the police station and administered the standard *Miranda* warnings (or as Jack Webb's TV program puts it "given his rights"). However, he refused to sign a waiver of his rights. Thereafter he was confronted by his juvenile accomplices both of whom had confessed and implicated him. The accomplices after some discussion were taken out. Defendant again was advised of his rights and asked if he would like to sign the waiver. He then signed the waiver and confessed.

The supreme court in a 5-2 decision held that by refusing to waive his rights initially, the privilege was invoked. Once invoked all further attempts at police interrogation should have ceased. One more obstacle was placed in the way of law enforcement. The court threw a small crumb to the peace officers when it declared, citing *People v. Tomita*,¹⁵ that where the defendant after asserting his constitutional rights thereafter initiates a confession, his voluntary statements can be utilized.

Justice Burke, dissenting, relied on the purpose of *Miranda* which is the prevention of in-custody interrogation without advice of constitutional rights. He noted that in *Miranda* and companion cases no full and effective warning was given before interrogation. Here there were two warnings and a signed waiver. Furthermore, the defendant was a

13. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966). An interesting recent U.S. Supreme Court case is *Mathis v. United States*, 391 U.S. 1, 20 L.Ed.2d 381, 88 S.Ct. 1503 (1968), where the court held that "custody" for the purposes of *Miranda* includes custody for an unrelated of-

fense. Defendant was questioned while in a state jail by a federal tax agent in the course of investigation of his civil tax liability.

14. 68 Cal.2d 714, 68 Cal. Rptr. 817, 441 P.2d 625 (1968).

15. 260 Cal.App.2d 88, 66 Cal. Rptr. 739 (1968).

parolee "somewhat sophisticated in the field of law enforcement." Justice Burke thought that the notion that a voluntary statement must be initiated by the defendant is a novel interpretation of *Miranda*.

The court of appeal decisions in the *Miranda* area seem generally to show more awareness of the problems of law enforcement than do those of the supreme courts. For example, in *People v. Merchant*,¹⁶ peace officers had a tip that defendant, an ex-convict, possessed a forbidden weapon. They talked to him through a locked screen door asking whether he was an ex-convict and whether he possessed a weapon which would be forbidden to an ex-convict under Penal Code section 12021. He answered both questions in the affirmative. The court held that he was not in custody and that the *Miranda* warnings did not have to be given at that point.

A similar common sense result attained in *People v. Sievers*.¹⁷ In that case the defendant was apprehended at Arizona by FBI agents and given *Miranda* warnings. The next day he was questioned by a San Francisco policeman who did not so warn him. He made admissions which were used against him in evidence. The court, in dictum, declared that no more than one adequate warning need be given by a person who may be subject to successive interrogation.¹⁸

At the rate things are going, the time will probably come when peace officers will have to advise persons committing crimes in their presence of their constitutional rights. Fortunately, that time has not yet arrived. A police officer in plain clothes observed the attempt of a bartender to close his bar at 2 a.m. The defendant was in the doorway trying to embrace the bartender. As she left the bar she approached the officer and asked if he would like to go to a sex party where there would also be "pot." He went with her to her

16. 260 Cal. App.2d 875, 67 Cal. Rptr. 459 (1968).

17. 255 Cal. App.2d 34, 62 Cal. Rptr. 841 (1967).

18. It is not clear whether the FBI agents asked any questions or whether he declined to discuss his case with

them. If so, the later Supreme Court decision in *Fioritto* would have come into play. Furthermore, the decision may be inconsistent with *People v. Kelley*, 66 Cal.2d 232, 57 Cal. Rptr. 363, 424 P.2d 947 (1967) discussed in Cal. Law 1967, at p. 377.

apartment. Another officer followed and was also invited in. To make a long story short she collected marijuana cigarettes in her apartment and started away with the officers in an unmarked police car. When she started to smoke a "joint" she was arrested and advised of her rights at which time she produced other marijuana from her purse. She claimed that the act of smoking the marijuana while in "custody" was an admission and that she should earlier have been advised of her *Miranda* rights. By way of dictum the court said that smoking the marijuana was not an admission or confession but the criminal act itself. Under such circumstances *Miranda* warnings are not required.¹⁹

In *People v. Cheatham*²⁰ the court felt it necessary to state that a non-peace officer who makes a citizen's arrest need not advise the arrestee of his *Miranda* rights.

A recurring as well as a troublesome problem raised by *Miranda* and its ilk, is the problem of driving while under the influence of an intoxicating beverage. *Ent v. Department of Motor Vehicles*¹ is illustrative. Ent, an attorney, was arrested for driving while under the influence. She declined to submit to a chemical test of her blood, breath or urine as required by Vehicle Code section 13353. She demanded that an attorney be present during the test. No test was ever made. In accordance with the statute the department suspended her operator's license for 6 months. The superior court granted a writ of mandate which ordered the setting aside of the suspension. She contended that her refusal to take the test was not a refusal but a request to delay until her counsel could be present. The court of appeal rejected her contention relying on various decisions including *People v. Sudduth*.² It also pointed to the well known fact that the probative value of a

¹⁹. *People v. Marinos*, 260 Cal. App. 2d 735, 67 Cal. Rptr. 452 (1968).

²⁰. 263 Cal. App.2d —, 69 Cal. Rptr. 679 (1968).

¹. 265 Cal. App.2d —, 71 Cal. Rptr. 726 (1968).

². 65 Cal.2d 543, 55 Cal. Rptr. 393,

594 CAL LAW 1969

421 P.2d 401 (1966), cert. den. 389 U.S. 850, 19 L.Ed.2d 119, 88 S.Ct. 43, discussed in Cal. Law 1967, at p. 393. The court in *Sudduth* held: "Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample whether or not counsel is present."

Collings: Criminal Law and Procedure

chemical test for intoxication diminishes with the passage of time. She also made a rather outlandish contention that the officer should give her some warning analogous to the *Miranda* warnings to the effect that she had no right to counsel at the time of the test.³ This also was rejected. The peace officers can't lose them all!

The problem of required formalities for arrest continues to arise. *People v. Rosales*⁴ represents a significant limitation on the exceptions to the requirement that the formalities of Penal Code section 844 be complied with before making an arrest without a warrant. Section 844 requires that the officers demand admittance and announce the purpose for which it is desired before breaking in. The arrest, which took place at night was for parole violation. A possible escape attempt was anticipated since the defendant had absconded before. There was also a fear that defendant and his confederate, also a parole violator, would resist arrest. The officers identified themselves to a girl visible through the open door before they moved in and arrested defendant with heroin on his person. In another of the familiar 7-4 decisions (seven if you count the trial judge, the court of appeal and the three dissenting judges), a slim majority reversed a conviction for possession of heroin.

Fortunately the basis for the majority decision was section 844, not the Constitution, although the majority did note that the section is designed to protect fundamental rights. "Even an escape from custody . . . does not alone justify entrance into a house" without compliance with the section. The majority relies on *Miller v. United States*⁵ which up to now would have been deemed irrelevant in California because that case was based on an interpretation of a federal statute. The least that can be said for *Rosales* is that it represents

3. She relied upon *People v. Ellis*, 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966), discussed in *Trends and Developments* 1967, at p. 394, which was distinguished by the court.

4. 68 Cal.2d 299, 66 Cal. Rptr. 1, 437 P.2d 489 (1968).

5. 357 U.S. 301, 2 L.Ed.2d 1332, 78 S.Ct. 1190 (1958). A more recent decision is *Sabbath v. United States*, 391 U.S. 585, 20 L.Ed.2d 828, 88 S.Ct. 1755 (1968).

another tightening of the thumbscrews on good police work. However, it also may be a bellweather for further restrictions in this area. Once again the majority of the court find themselves in a race to anticipate the United States Supreme Court and thereby makes themselves the leaders in "progressive" criminal procedural developments.⁶

Perhaps the result in *People v. Gastelo*⁷ makes more sense. This was a search warrant entry and the problem arose under Penal Code section 1531 which is similar to section 844, and treated as analogous by the court. Here there was a forced entry without any attempt to comply with the section at 8:20 a.m. on a Saturday morning, the day after Christmas. The defendant and one Donna Grujillo were asleep in the bedroom at that time. The Attorney General, according to the court, contended that unannounced forcible entry is always reasonable to execute a search warrant in narcotics cases. This contention was rejected by a unanimous court.

In the *Marshall* case already noted⁸ the officers had probable cause to arrest the defendants in their apartment. The arrest was postponed briefly because of a dangerous glass door which the officers feared they might have to break through. Therefore they sent for an expert to pick the lock if necessary. They knocked several times and announced their identity. There was no response so the lock was picked and entry made. The court felt that this was substantial compliance with Penal Code section 844. This part of the decision seems far more sensible than *Rosales*.

The problem of how much subterfuge can be employed by officers has occasionally troubled our supreme court sometimes with absurd results. For example, in *People v. Reeves*,⁹ an anonymous informer told police that the defendant, a narcotics loser, had heroin and was staying at the St. George Hotel. One of the officers knew defendant had a prior conviction. They got him to open the door of his room on the

6. Cf. *Cal Law Trends and Developments* 1967, p. 367.

7. 67 Cal.2d 586, 63 Cal. Rptr. 10, 432 P.2d 706 (1967).

8. *People v. Marshall*, 69 Cal.2d —, 69 Cal. Rptr. 585, 442 P.2d 665 (1968).

9. 61 Cal.2d 268, 38 Cal. Rptr. 1, 391 P.2d 393 (1964).

Collings: Criminal Law and Procedure

ruse that there was a registered letter for him. They saw what appeared to be a marijuana cigarette, made the arrest and searched and seized other marijuana. This was held to be an illegal arrest, search, and seizure because of the ruse which was thought to amount to illegal "trickery, stealth or subterfuge." Seemingly, fighting crime is more like participating in a boxing match than a war. The Marquis of Queensberry rules are in force. Officers must use gloves of the proper weight and never hurt the criminal too much. Peace officers must always be perfect gentlemen in their dealings with hoodlums.

In *People v. Coleman*,¹⁰ a more sensible result was reached. There was an arrest warrant for possession by the defendant of marijuana. The assistant manager of the hotel where defendant resided told the desk clerk to take the peace officers to defendant's room. The desk clerk took them to the room, rapped on the door, and said that it was the desk clerk without prompting by the officers. The defendant opened the door, was arrested and large quantities of narcotics seized. The court very carefully distinguished *Reeves* as a case where there was no warrant and not even probable cause. The court felt that the conduct of the officers was proper even if there had been subterfuge to get in the room as contended by the defendant.

Two important arrest warrant decisions were handed down this year. At least since 1872 it has been customary in drafting complaints to "track" or follow the words of the statute. Penal Code section 952 authorizes this. Section 813 provides that if the magistrate is satisfied "from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it" he must issue an arrest warrant. The United States Supreme Court in *Giordenello v. United States*¹¹ held that a complaint which merely states the affiant's conclusions in the words of the statute cannot support a valid arrest warrant. This was stated to be applicable to the states in *Aguilar v.*

¹⁰. 263 Cal. App.2d —, 69 Cal. Rptr. 910 (1968).

¹¹. 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245 (1958).

Texas.¹² It was a foregone and predictable¹³ conclusion that when faced with the question, the California Supreme Court would hold that the customary practice in California of merely stating the words of the statute is unconstitutional. This it did in *People v. Sesslin*.¹⁴ A complaint must state facts to support the complainant's belief that the defendant committed the alleged felony. Furthermore, if it is based on information and belief, as is quite common, it must show facts relative to the identity or credibility of the source of such information and belief.

This result was not reached without the dissent of three justices. They pointed out that *Giordenello* was based on a federal rule. This is true but a footnote in *Aguilar* makes it clear that *Giordenello* is applicable to the states under the 14th Amendment. They also suggest that magistrates often informally interrogate the complainant at length. However, one may doubt that they always do this. For once, I have to side with the majority which seems bound by *Giordenello* and *Aguilar*.

What are the implications of *Sesslin*? There seems no reason to apply it only to felonies. Penal Code section 1427 provides that if the magistrate is presented with a misdemeanor complaint and "is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it" he must issue a warrant for the arrest of the defendant. Once again the time honored practice with misdemeanor complaints is to track the statute. Doubtless at least some magistrates take their morning stack of complaints and warrants and sign them without even reading them. In any event in very few cases can they satisfy themselves "therefrom." There is insufficient information.

12. 378 U.S. 108 at 112 fn. 3, 12 L.Ed.2d 723 at 727, 84 S.Ct. 1509 at — (1964).

13. Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 Calif. L. Rev. 421, 455 (1962).

14. 68 Cal.2d 418, 67 Cal. Rptr. 409, 439 P.2d 321 (1968). For further discussion of this case see Harvey, EVIDENCE, in this volume.

What will be the effect of *Sesslin*? I suggested in an earlier article¹⁵ and again suggest that one may doubt that many magistrates will intensify their perusal of complaints before issuing warrants. Prosecutors and others will be forced to be more careful in preparation of complaints. They will do more than repeat the statutory language especially where the basis of the complaint is information and belief.

It would be a pity to stop using the short-form complaint. Rule 4(a) of the Federal Rules of Criminal Procedure was amended as a result of *Giordenello* to provide that it must appear from the complaint, "or from an affidavit or affidavits filed with the complaint" that there is probable cause. Such a solution should be acceptable to the California courts even in the absence of an amendment of the statute.

The number of consent to search cases reported each year since *Cahan* ranges between 10 and 15. The trend continues toward restricting peace officers in this area. The most important decision of the past year was another of the 4-3 decisions in *People v. Johnson*.¹⁶ There the peace officers had reliable information that one Cooper was selling narcotics at a named hotel. They went to the hotel and as they approached Cooper's room he came out and was questioned. He was searched without any narcotics being found. Cooper, when asked if his room could be searched, gave the officers the key to the room. They entered and found defendant in possession of narcotics. The majority held that the search of Cooper was unlawful because information from an informer could not be used to show probable cause as the officers declined to name him. "The succeeding events were so intimately connected with the officers' unlawful conduct that the evidence acquired must be held to be the result of that conduct." The majority declined to apply retroactively section 1042(c) of the Evidence Code which authorizes protection of the informer's identity, the principle of which was

15. Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 Calif. L. Rev. 421, 455 (1962).

16. 68 Cal.2d 629, 68 Cal. Rptr. 441, 440 P.2d 921 (1968).

upheld in *McCray v. Illinois*.¹⁷ In any event the majority felt that there was insufficient showing of the underlying circumstances which showed the informer to be reliable.

The dissent pointed out that the defense never relied at the trial on unlawful search of Cooper, nor was the matter argued on appeal. In any event the dissenters could see no illegal activity on the part of the officers. There was no overbearing conduct by the two officers. Cooper was not even arrested.¹⁸

In *People v. Chimel*,¹⁹ officers armed with *Sesslin*-type warrants were more successful. However, although the warrants were constitutionally insufficient, the prosecution sought *in the trial court* to justify the arrest independently of the warrant. The trial court found that there was probable cause based on the information the officer had at the time of the arrest. The supreme court affirmed with only Justice Peters dissenting. Thus, if there is any possibility that the warrant may be insufficient, the prosecutor still may be able to sustain a conviction if he shows *in the trial court* that the arresting officers had probable cause to make the arrest.

The problem of seizure of contraband discovered in an inventory of the contents of a motor vehicle arose this year in the context of two automobile accidents where the defendants had been disabled and hospitalized. In both cases the searches and seizures were upheld.²⁰

The problem of a computer generated warrant arose in

17. 386 U.S. 300, 18 L.Ed.2d 62, 87 S.Ct. 1056 (1967).

18. Other interesting consent cases include: *People v. Linke*, 265 Cal. App.2d —, 71 Cal. Rptr. 371 (1968) (wife's consent); *People v. Cruz*, 264 Cal. App.2d —, 70 Cal. Rptr. 249 (1968) (shoulder shrugging); *Pierce v. Board of Nursing Education & Nurse Registration*, 255 Cal. App.2d 463, 63 Cal. Rptr. 107 (1967) (female nurse living with male nurse on probation); *People v. Lobikis*, 256 Cal. App.2d 775,

64 Cal. Rptr. 390 (1967) (common law wife); *Bumper v. North Carolina*, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968) (grandmother owned home searched and rifle seized).

19. 68 Cal.2d 436, 67 Cal. Rptr. 421, 439 P.2d 333 (1968).

20. *People v. Roth*, 261 Cal. App.2d 430, 68 Cal. Rptr. 49 (1968); *People v. Norris*, 262 Cal. App.2d —, 68 Cal. Rptr. 582 (1968); cf. discussion in *Cal Law Trends and Developments 1967*, at p. 371.

Collings: Criminal Law and Procedure
*People v. Superior Court.*¹

The defendant was cited for a traffic violation. He violated his promise to appear and the computer generated the warrant. A clerk affixed the magistrate's facsimile signature and attached an IBM bail card. The magistrate never saw it. The peace officer was suspicious of a parked car and checked it out via radio and discovered the existence of the warrant. He also found narcotics. The superior court granted a motion to suppress under the new Penal Code section 1538.5 on the ground of the failure of the warrant to satisfy Penal Code sections 813 and 815.² The court of appeal granted a writ of prohibition to the prosecutor, holding that there is no requirement that the magistrate make a section 813 determination of probable cause. The offense, failure to appear, occurred in his presence. The magistrate ordered a warrant issued at the time of the non-appearance. There is no requirement, said the court, either in Vehicle Code section 40514 or Penal Code section 853.8 (failure to appear) that the magistrate actually sign the warrant.³

Pre-trial right to counsel. The case of *In re Hawley*⁴ involves the problem of a plea bargain well handled by all concerned. The defendant after quite a bit too much to drink beat another man and set the building afire. He was charged with murder and arson. The autopsy revealed that the fire rather than the beating caused the death. He was examined by two psychiatrists who came up with conflicting reports. One thought he was mentally ill, as well as so drunk as not to know right from wrong. The other thought he was quite sane. The public defender entered into an agreement with the prosecution to the effect that the defendant would plead to first degree murder if the prosecutor would dismiss the

1. 262 Cal. App.2d 283, 68 Cal. Rptr. 629 (1968).

2. It would appear that the applicable section is § 1427.

3. The court relies on the fact that the clerk's docket entry at the time of the nonappearance indicates that the magistrate ordered a warrant. What

is there behind that statement? Did the clerk place before the magistrate one, five or fifty files relative to failure to appear. Did the magistrate read them all before ordering issuance of warrants? Should he have to?

4. 67 Cal.2d 824, 63 Cal. Rptr. 831, 433 P.2d 919 (1967).

arson charge and recommend life imprisonment. The defendant was sentenced to life imprisonment. On habeas corpus he claimed that the above facts showed lack of effective representation by counsel, relying on *People v. Ibarra*.⁵ Although *Ibarra* involved representation at a trial, the court thought the same principles apply to pretrial representation. However, the court felt that incompetence could not be shown. In view of the conflicting facts on the issue of diminished responsibility, the gruesome nature of the evidence, and admitted conduct which showed some evidence of premeditation and malice, there was a significant possibility of a death penalty had trial been held and the decision to plead to first degree murder with a life sentence was proper.

The importance of full advice of right to counsel as well as full docket entries cannot be emphasized too much. In *People v. Harris*,⁶ the docket sheet relates that defendant requested counsel, but fails to show that he was advised of his right to appear with counsel or, if indigent, to have appointed counsel. If he appeared without counsel the record should contain sufficient facts to show a knowing and intelligent waiver of counsel. Fortunately, in the case of *Harris* the defects were waived by his failure to object to them in a Penal Code section 995 motion.

Grand jury. A superior court judge denied newspapers access to grand jury transcripts after the defendants were taken into custody. His apparent reasoning was that he had to insure a fair trial. The United States Supreme Court has gone over backward to prevent publicity from interfering with fair trial.⁷ Although it shows some awareness of the need for discovery by the defendant it has still been inclined to protect the secrecy of the grand jury proceedings.⁸ Cali-

5. 60 Cal.2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963).

6. 67 Cal.2d 866, 64 Cal. Rptr. 313, 434 P.2d 609 (1967), app. dismd. 391 U.S. 603, 20 L.Ed.2d 848, 88 S.Ct. 1867; see also, *In re Wells*, 67 Cal.2d 873, 64 Cal. Rptr. 317, 434 P.2d 613 (1967), as well as *In re Smiley*, 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d

179 (1967) and the discussion in *Cal Law Trends and Developments 1967* at p. 382.

7. See, e.g., *Estes v. Texas*, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628 (1965).

8. See, e.g., *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 2 L.Ed.2d 1077, 78 S.Ct. 983 (1958); see, also,

ifornia, on the other hand, has gone the other way and given the defendant a right to the transcript of the grand jury proceedings which lead to his indictment.⁹ How do you solve the dilemma? The court of appeal in *Craemer v. Superior Court*¹⁰ resolved it in favor of publicity. However, the defendant would have a reasonable time after receipt of the transcript to object to disclosure of inadmissible matter.

*Pre-trial motions.*¹¹ There have been a number of decisions on various aspects of the operation of the new motion to suppress procedure, section 1538.5. They do not appear worthy of mention here and can easily be found by standard research techniques. From a reading of these decisions it appears that the new procedure is off to a satisfactory beginning.

*Maine v. Superior Court*¹² involves the problem of change in venue where there is a combination of an atrocious crime, considerable publicity in a fairly small county, and the fact that the defendants were strangers to the country. Maine and Braun kidnapped a young couple, murdered the boy, raped the girl, beat her until they apparently thought she was dead, then hurled her body over a cliff. They were charged with murder, rape, kidnapping, and assault with intent to commit murder. They moved under Penal Code section 1033 for a change of venue on the ground that a fair and impartial trial could not be had in Mendocino County (population 51,000). The trial court denied the motion. The defendants sought a writ of mandate to direct a change of venue.

Preliminarily the supreme court had to determine whether mandate would lie to compel a change of venue. The court

Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668 (1962).

9. Penal Code § 938.1.

10. 265 Cal. App.2d —, 71 Cal. Rptr. 193 (1968).

11. See, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), relative to the problem of joinder of two defendants where one has confessed.

In *Roberts v. Russell*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921 (1968), the court held that the *Bruton* rule is applicable to the states under the Fourteenth Amendment. Furthermore, the *Bruton* rule must be applied retroactively.

12. 68 Cal.2d 375, 66 Cal. Rptr. 724, 438 P.2d 372 (1968).

after lengthy discussion and noting that mandate had not been employed previously in this situation upheld its use. It weighed the problem of protecting the right to a fair trial against the burdens of going through a trial and raising the issue on appeal. By way of dictum it suggests that the application for mandate should be made in advance of the trial not during or after impaneling the jury. A motion for change of venue can still be made at those stages of the procedure and error on appeal predicated on denial of such motions.

The court noted that mandate normally lies to control abuses rather than exercises of discretion. But in the case of this new use of mandate, *Sheppard v. Maxwell*¹³ requires the court to make an independent evaluation of the circumstances and satisfy itself that the defendant obtains a fair and impartial trial.

The court then proceeded to evaluate the circumstances and ruled unanimously that venue should be changed probably to a metropolitan county. There were other circumstances mentioned by the court in addition to the facts earlier set forth. The victims were a popular teen-age couple from respected families. A fund had been established to defray the girl's medical expenses and a local paper was urging all to contribute. A large fund was raised mostly from modest contributions. Although the sheriff and district attorney had been "extremely close-mouthed," others, including a state of Washington official (the defendants also committed crimes in that state), had revealed the fact that one defendant had confessed. The district attorney had disqualified the trial judge whom one defense counsel was opposing for re-election.

Hopefully, the court will be sparing in its use of mandate in such cases. Maine and Braun were tried in San Jose, some 170 odd miles from Ukiah, the Mendocino County seat. The prosecutor and his assistants and defense counsel (I believe they were court appointed) must be transported to San Jose and paid per diem while there. The same is true of the witnesses. The prosecutor's operations suffer by his absence. No

¹³ 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

doubt he spends his evenings trying to prepare his case for the next day and answering long distance phone calls from his office. He spends his weekends back in Ukiah. But after all there are 168 hours in a week.

A stalling ploy often resorted to by the sophisticated con is a last minute decision to discharge his court appointed counsel and go ahead on his own. He asks for a continuance and when the case is called for trial, he may later “realize” his inadequacies and asks that counsel again be appointed and for another continuance. Perhaps the food is better in county jails than in San Quentin. Who knows? If the motion is granted, the sixty or so persons on the jury panel have to be sent home.

In *People v. Maddox*¹⁴ the defendant repeatedly asked that he be permitted to represent himself. On more than one occasion his appointed counsel, the public defender, also asked to be relieved. The motions were denied on the last occasion with the prospective jurors sitting in the court room. The trial judge excused the public defender and proceeded with the trial despite defendant’s claim that he was not ready because he had insufficient opportunity to use the law library and subpoena witnesses. He declined to state what would be the testimony of the witnesses he desired to subpoena. The court thereupon commenced to impanel the jury and denied a motion for a continuance of 60 days. The trial proceeded and defendant was convicted of the crimes charged—battery and attempted escape. The supreme court allowed itself to be suckered into a reversal on the ground that the trial judge should have granted a continuance to give the defendant time to prepare his case for trial. Only Justice McComb dissented.

What is a proper solution of this problem? The defendant is informed in the inferior court of his right to counsel. He is again informed of this right when he comes before the superior court. Perhaps he should also be informed that he not only has a right to proceed with or without counsel,

¹⁴. 67 Cal.2d 647, 63 Cal. Rptr. 371, 433 P.2d 163 (1967).

but that if he elects to proceed with counsel, without good cause being shown, he will not be granted a continuance if he later elects to proceed without counsel. Isn't it about time that the courts cease letting the con-wise make monkeys out of them?

Trial preparation. A perennial problem is the procuring of foreign, that is, out of state, witnesses. The Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases (Penal Code sections 1334-1334.6) has been in force since 1937. It has its problems. However you obtain a foreign witness, it is expensive and will affect the budget. When must the court call him? When can it get along with his testimony at the preliminary examination, etc.?

A rare case came before the supreme court this year. In *People v. Cavanaugh*¹⁵ the defense was alibi, that the defendant was in Boston at the time of the crime. The defendant wanted to bring eleven witnesses from Massachusetts to testify to his alibi. The trial judge ruled that the number of witnesses was out of proportion to realities and asked reconsideration. Defense counsel was permitted to submit written interrogatories to the witnesses, who were examined by the Boston public defender. Defense counsel then moved that four witnesses be brought from Massachusetts. The trial judge announced he would allow two witnesses to be brought. Counsel selected two and testimony of others was read to the jury.

The court, recognizing an equal protection issue, held that its problem was primarily one of determining whether the trial judge properly exercised his discretion. After noting that the testimony of the absent witnesses, was either vague or cumulative, held that the trial judge had properly exercised his discretion.

Another decision under the Uniform Act is also worthy of note. In *People v. Woods*¹⁶ the court noted that under Evi-

15. 69 Cal.2d —, 70 Cal. Rptr. 438, Page, 390 U.S. 719, 20 L.Ed.2d 255, 88 444 P.2d 110 (1968). S.Ct. 1318 (1968). In *Barber v. Page*,

16. 265 Cal. App.2d —, 71 Cal. the Court, after noting that it is often Rptr. 583 (1968); see also, *Barber v.* possible to procure the attendance of

dence Code section 1291(a), the fact that a witness is out of the state is not enough to make his former testimony (here a preliminary transcript) admissible since his testimony can be compelled by process. However, the defendant did not object to the use of the transcript and therefore waived any rights to have its use reviewed on appeal.

Whether criminal discovery belongs here I do not know. However, two important cases should be mentioned somewhere.¹⁷ *People v. Russel*,¹⁸ involved the *Ballard*¹⁹ problem. Defendant was charged with violations of Penal Code sections 285 (incest) and 288, the alleged victim being his daughter. After a mistrial because of failure of the jury to reach a verdict, the defendant was granted an order that the child be examined by a psychiatrist to determine whether her mental or emotional condition affected her veracity. Apparently the psychiatrist talked to her for 20 minutes.²⁰ The trial judge in the second trial declined to admit the "evidence." The supreme court felt that the record did not sufficiently show the basis for the trial judge's exercise of his discretion and therefore it resolved that question in favor of the defendant. *Ballard*, it said, requires liberal exercise of discretion in such cases in favor of the defendant. Failure of the trial judge to state his reasons for his ruling requires reversal. (All one has to do to understand his reasons is to read the report.) Hopefully, the prosecutor will try again. The still unanswered question is who is going to analyze the psychiatrists, who under decisions like *Russel*, *Ballard*, and the diminished responsibility cases, unquestionably invade the province of the jury?

In *People v. Garcia*,¹ the supreme court by another of its

out-of-state witnesses under modern procedures, stated that mere absence of a witness is insufficient ground for using his preliminary testimony at the trial unless the prosecutor has made a good-faith effort to obtain his presence.

17. See also, *Smith v. Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968), relative to discovery of the name of an informer.

18. 69 Cal.2d —, 70 Cal. Rptr. 210, 443 P.2d 794 (1968).

19. *Ballard v. Superior Court*, 64 Cal.2d 159, 49 Cal. Rptr. 302, 410 P.2d 838, 18 A.L.R.3d 1416 (1966).

20. His brief report is quoted in note 7 of the opinion.

1. 67 Cal.2d 830, 64 Cal. Rptr. 110, 434 P.2d 366 (1967).

4-3 decisions, actually by dictum, gutted Evidence Code section 1042(c). The informants in a narcotics case according to the majority were not participants or eyewitnesses. However, there was a "possibility" that they might support defendant's case. The majority's speculation as to these "possibilities" must be read to be believed. The test is whether their evidence "might" result in exoneration of the defendants. If there is a "possibility" that the informer's evidence "might" help the defendant, disclose his name. The very strong "possibility" that he "might" be murdered is not worthy of consideration. These informers did not participate in or witness the transaction. They were not present when the evidence was seized and the arrest was made. They made no accusation against the defendant, but only against individuals involving premises not under control of the defendant. In fact there is no evidence that they knew or had ever heard of the defendant. Once again I suggest that the majority has gutted section 1042(c). It is predictable that the majority will frustrate other sections of the Evidence Code before it is through.²

Trial

*Trial by jury.*³ This article will not discuss recent United States Supreme Court developments in trial by jury problems.

2. Cf. *People v. Johnson*, 68 Cal.2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968).

3. *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968). When is there a right to trial by jury in minor crimes? Recent legislation in California creates an offense known as an infraction. Penal Code § 19c. A person charged with an infraction is not entitled to a right to trial by jury. This would appear to be constitutional under *Duncan*.

Bloom v. Illinois, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477 (1968). When is there a right to trial by jury for "criminal" contempts? What is a criminal contempt? See also, *Dyke v.*

Taylor Implement Mfg. Co., 391 U.S. 216, 20 L.Ed.2d 538, 88 S.Ct. 1472 (1968).

Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). When can a prospective member of a jury in capital case be excused who is opposed to the death penalty? Implications of *Witherspoon* are tremendous. Can you challenge them peremptorily? Can you challenge "Mexicans" when the defendant is Mexican? Can you challenge "Italians" when the defendant is Italian? Can you challenge naturalized citizens when the defendant is naturalized and the case involves immigration matters? The Court in *Witherspoon* just did not think

These will no doubt be in the forefront next year. The decisions are cited in the notes, however. Perhaps it is worthy of note that the Supreme Court of California decided in *People v. Harris*,⁴ that the contention of an atheist that he should be allowed to exclude all jurors who believe in God is devoid of merit.

Public trial. Decisions involving the right to public trial are rare but always interesting when they arise. One problem is to whom does the right to a public trial belong—defendant, prosecutor, public or press? Can the defendant request, without objection of the prosecutor, closed proceedings to keep out the public and the press? *Oxnard Publishing Co. v. Superior Court*⁵ involved a number of very peculiar circumstances. For example the court on request of the public defender prevented the prosecutor from commenting on witnesses at a lineup in his opening statement. The judge in closed session heard all sorts of testimony (30 witnesses), visited the scene of the crime, and heard psychiatrist testimony over a seven week period. A table listing the numerous closed hearings is included in the opinion. In any event the appellate court ordered the trial judge to vacate his closing order. The decision is a useful summary of the law in this area, even if the facts set forth are rather unsatisfactory.

Competent counsel. Does a trial judge have the right to remove incompetent counsel over the objection of the defendant? This was the issue in *Smith v. Superior Court*.⁶ The trial judge relieved court appointed counsel in a murder case. The defendant objected and stated that he demanded that attorney and no other. The supreme court upheld this right. Admission to the bar establishes that the State deems an attorney competent to undertake the practice of law before all of the courts. The only court capable of action otherwise

the problem through and came down with a very bad decision. It all goes to show that the Court is an inadequate legislature. See, also, *Bumper v. North Carolina*, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968).

4. 67 Cal.2d 866, 64 Cal. Rptr. 313,

434 P.2d 609 (1967), app. dismd. 391 U.S. 603, 20 L.Ed.2d 848, 88 S.Ct. 1867.

5. 68 Cal. Rptr. 83 (1968), hearing granted, dismissed.

6. 68 Cal.2d 547, 68 Cal. Rptr. 1, 440 P.2d 65 (1968).

is the supreme court. If the attorney is making mistakes to the prejudice of the client who wants him anyway, the judge's only remedy, if any, is to hold him in contempt. Query whether an attorney could be punished for contempt for his incompetence if unintentional.⁷

Trial testimony. The practice in Southern California of trying a case on the record of the preliminary hearing has its advantages—but may also be a booby trap. In *People v. Wheeler*,⁸ the trial went like this:

In the superior court defendant was represented by private counsel. On June 20, 1966, defendant, in person, waived his right to a jury trial. Counsel joined in the waiver. The prosecutor and defense counsel then entered a stipulation to submit the matter on the transcript of the preliminary hearing, subject to the right of both sides to call additional witnesses. Defendant did not personally participate in the stipulation or affirmatively indicate his assent thereto.

The case came on for trial on June 30, 1966. The following is a complete copy of the transcript of the proceedings: "THE COURT: People versus Wheeler. Let the record show that the Court has read the entire transcript of the preliminary hearing in this case and has examined the exhibits. MR. LEWIS: The People rest. THE CLERK: Was there a submission here? THE COURT: Yes. [DEFENSE COUNSEL]: The defense rests, your Honor. THE COURT: Do you want to argue it? MR. LEWIS: The People will submit the matter. [DEFENSE COUNSEL]: The defense submits the matter, your Honor. THE COURT: I find the defendant guilty of assault with a deadly weapon, a lesser and necessarily included offense than that charged in the Information, assault with a deadly weapon with intent to commit murder. THE DEFENDANT: What! [DE-

7. See *Lyons v. Superior Court*, 43 Cal.2d 755, 278 P.2d 681 (1955), cert. den. 350 U.S. 876, 100 L.Ed. 774, 76 S.Ct. 121.

8. 260 Cal. App.2d 522, 67 Cal. Rptr. 246 (1968).

Collings: Criminal Law and Procedure

DEFENSE COUNSEL]: Your Honor, the defendant waives time for sentence and requests leave of Court to file a written application for probation. THE COURT: The matter will be referred to the Probation Department. It will be set for hearing on probation and sentence on July 21st at 9:30. The defendant is remanded to the custody of the Sheriff pending further hearing. THE DEFENDANT: You mean I have been tried? THE COURT: Certainly. You just got tried and were found guilty. [DEFENSE COUNSEL]: A.D.W. THE DEFENDANT: Wait a minute. I haven't said a word. THE COURT: Take him out of here. THE DEFENDANT: What is this? THE COURT: Wait a minute. Come here. This case was submitted on the transcript by your counsel. At the last hearing it was submitted on the transcript of the testimony taken at the preliminary hearing and I have read the transcript, and on the basis of the testimony there I found you guilty, so you have had a trial. What are you complaining about? THE DEFENDANT: I haven't said a word. THE COURT: You don't have to say a word. Your counsel didn't put you on. You don't have to say anything. THE DEFENDANT: What did I pay him for? THE COURT: I don't know. Take him out. [DEFENSE COUNSEL]: Thank you."

Needless to say the judgment was reversed.

Comment and instructions. Despite *Griffin v. California*⁹ the problem of comment on the failure of the accused to testify will continue. Aside from the fact that every jury has at least one person on it who knows the implications of failure to testify and will raise them, there are other problems.

In *People v. Hernandez*¹⁰ the prosecutor asked for and the trial judge gave CALJIC 51 which instructs the jury not to draw an inference of guilt from the failure of the defendant to testify and not to discuss this in the jury room. Must this instruction be given at the request of the defendant, at the

9. 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965).

10. 264 Cal. App.2d —, 70 Cal. Rptr. 330 (1968).

request of the prosecutor, or *sua sponte*? *Hernandez* includes numerous citations. Doubtless the matter will be taken up by the supreme court. The *Hernandez* court solved the problem by saying that it was error to give the instruction, but not reversible error.

In *People v. McClellan*,¹¹ the court stated the *Griffin* problem just about as well as it could possibly be stated. It said: “. . . the judgments against McClellan and Ford, two murderers, must now be reversed because the supreme court changed the rules after the case was tried.” Palmer, their victim, won’t mind. He is dead.

Some of the *Griffin* opinions are way off base. For example, in *People v. Summerfield*,¹² the court gave a modified version of CALJIC 235 to the effect that evidence that a person in possession of stolen property soon after it was taken who has a reasonable opportunity to explain his possession may tend to show his guilt by not making an explanation. This is an obvious truth, but the jury must never be told this, at least if his appeal goes to the Court of Appeal, Second District, Division Three. Judge Frampton sitting pro tem. dissented.

What are we going to do about CALJIC anyway? Some district attorneys treat it as gospel and provide ample copies for all to use. Others arbitrarily refuse to use it preferring their own boiler plate. CALJIC is used all over the country. It is now prepared by a committee of judges in Los Angeles county. Should it be completely revised? Should it be turned over to a statewide committee? Should the committee be judges? One thing I have noted is the long delay between the time a new decision comes down and CALJIC discovers it. Raymond Sinetar comments on these problems in a recent article.^{13, 14}

11. 257 Cal. App.2d 350, 64 Cal. Rptr. 903 (1967). *CALJIC*, 43 Cal. State Bar J. 546 (1968).

12. 262 Cal. App.2d 626, 69 Cal. Rptr. 10 (1968). **14.** See also Letters to Editor 43 State Bar Journal 706, 709 (1968).

13. Sinetar, *A Belated Look at*

Sentencing. Troublesome problems of out-of-state prior convictions continue to arise. Illustrative is the case of *In re Finley*.¹⁵ The defendant was convicted of first degree robbery. He admitted a prior second degree burglary in Washington in 1932 and a prior first degree robbery in California, and was sentenced to life imprisonment as an habitual criminal. He now attacks the determination of habitual criminality because second degree burglary in Washington is defined differently than in California. There it is entry to commit any crime whether felony or misdemeanor. Here it is entry with intent to commit any felony or grand or petit larceny. The only record available, an authenticated copy of the Washington judgment, does not show whether he entered with intent to commit a misdemeanor other than petit larceny. Thus, says the court, the thirty-six year old Washington judgment cannot support a finding of habitual criminality. The court refused to overrule a line of cases which determined that by habeas corpus there could be inquiry into the underlying facts of the conviction.¹⁶ This is of course an exception to the normal rule that review on habeas corpus extends only to the face of the record. The exception here is because there is an issue of "fundamental constitutional deprivation." However, the defendant still is serving an indeterminate sentence of five years to life and his petition for habeas corpus was denied. He won the battle but lost the war.

Again this year there were numerous decisions involving the problem of double punishment and the unfortunate language of Penal Code section 654.¹⁷ One of the worst was the case of *In re Hayes*.¹⁸ There the defendant drove a motor vehicle with knowledge that his driving privilege was suspended (Vehicle Code section 14601). At the same time he drove while under the influence of intoxicating liquor

15. 68 Cal.2d 389, 66 Cal. Rptr. 733, 438 P.2d 381 (1968).

16. See, e.g., *In re McVickers*, 29 Cal.2d 264, 176 P.2d 40 (1946), as well as cases cited in *Finley*.

17. *Neal v. California*, 55 Cal.2d 11, 9 Cal. Rptr. 607, 357 P.2d 839 (1960).

18. 68 A.C. 899, 69 Cal. Rptr. 310, 442 P.2d 366 (1968), rehearing granted, Aug. 8, 1968.

(Vehicle Code section 23102). He pleaded guilty to both offenses and was sentenced for both. On habeas corpus he contended that this was forbidden double punishment. The court concluded in a 4–3 decision that both offenses constituted a single act and granted the writ. The minority points out that each offense is obviously a separate offense. One can drive while intoxicated and properly licensed. One can drive while sober without a license. They are unrelated offenses and even accepting the various decisions under section 654, this one is wrong. Both the majority and minority opinions provide useful summaries of the morass which has bogged down the court in this area. Hopefully the Penal Code revision process will straighten it out.¹⁹

Appeal. The problem of the duty of counsel on appeal where there is no merit to the appeal was considered in *People v. Feggans*.²⁰ The problem resulted from *Douglas v. California*,¹ where the United States Supreme Court created a due process right of counsel on appeal for indigents. It was compounded by *Anders v. California*² where the same court discovered another “due process” right, the right to make frivolous appeals. In *Feggans*, the California Supreme Court set forth guidelines for no merit appeals which seem to go further than required by *Anders*. Counsel must prepare a brief setting forth the facts, include citations to the transcript, discuss the legal issues, with citations to appropriate authority and argue all issues that are arguable. Counsel will not be permitted to withdraw until the court is satisfied that he has discharged these duties to the court and client.

19. See, also, *People v. Bell*, 258 Cal. App.2d 450, 65 Cal. Rptr. 730 (1968) (possession of heroin, marijuana and amphetamine is three offenses); *People v. McKerney*, 257 Cal. App.2d 64, 64 Cal. Rptr. 614 (1967) (defendant unclothed was shining a flashlight upon himself; thereafter he saw victim and assaulted her with intent to commit rape; the victim screamed; another person saw the naked defendant; misdemeanor offense of indecent exposure set aside because of § 654); *People v. Chap-*

man, 261 Cal. App.2d 149, 67 Cal. Rptr. 601 (1968) (victim after being robbed of tavern receipts was taken elsewhere and personally robbed and murdered; held to be one offense). There are a number of other § 654 decisions.

20. 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21 (1967).

1. 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963).

2. 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967).

Collings: Criminal Law and Procedure

In other words, it is the duty of the attorney to be intellectually dishonest. Bertram Ross suggests that he must make such arguments as that the statute does not apply to American Indians and there is nothing in the record which shows that the defendant is not an American Indian, or that the laws against murder should be repealed.³ He must be "willing to 'do a snow job' for the court . . . with tongue in cheek be willing to help the administration of justice by lending his professional skill to such a travesty of justice." Mr. Ross's analogy to a Rube Goldberg cartoon is certainly apropos. Hopefully the public defenders will take over most of the burden. Who then will want to be a public defender? Who is going to pay for all this useless garbage? Remember the good old days when the courts used to chide attorneys for making frivolous appeals, often naming names in the opinions.

*In re Ketchel*⁴ involved the right of the counsel for a defendant under sentence of death to have his client examined by a psychiatrist of his choice. The supreme court upheld this right over contentions that on appeal the attorney would be bound by the trial record. Two justices dissented.

Habeas corpus. In the case of *In re Cameron*,⁵ the defendant was convicted of murder and sentenced to life imprisonment. He failed to perfect his appeal. Some ten years later he brought a petition for a writ of habeas corpus. He contends that at the time of the trial a successful appeal would have opened the way for a new trial and a possible sentence of death. Since that time the court in *People v. Henderson*⁶ determined that a defendant who successfully appealed a life sentence conviction could not be sentenced to death. Cameron successfully contended that the risk that he might receive a death penalty on retrial excused his failure to perfect his appeal. A three-justice minority was willing to allow habeas

3. *Wanted by the Appellate Courts*—*Competent Lawyers to Perform Miracles for Indigent Appellants*, 43 Cal. State Bar J. 381 (1968).

4. 68 Cal.2d 397, 66 Cal.Rptr. 881, 438 P.2d 625 (1968).

5. 68 Cal.2d 487, 67 Cal. Rptr. 529, 439 P.2d 633 (1968), see also earlier discussion at note 15 p. 107 supra.

6. 60 Cal.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

corpus under such circumstances but thought that the majority's attempt to search the recesses of the defendant's mind to fathom his motivation for abandoning his appeal was "a chimerical and futile exercise."

*Probation.*⁷ Courts continue to impose rather ridiculous conditions on probation. They have been known to order a probationer to stay away from ex-convicts when his wife is an ex-convict. They order him to stay away from bars when there is no evidence that drinking had anything to do with his problems. Illustrative is *People v. Dominguez*,⁸ where a condition of probation was that the defendant not become pregnant without being married. At the time of her conviction for second degree robbery she was unmarried and pregnant. She also had two illegitimate children. She accepted the condition and the judge suggested that she might find out where the Planned Parenthood Clinic was located. To make a long story short she became pregnant again while unmarried and the trial judge revoked probation. The court of appeal held that the condition of probation was unreasonable. It was unrelated to the robbery. "Contraceptive failure is not an indicium of criminality."

Mentally disordered sex offender commitments. There were about a dozen decisions involving mentally disordered sex offender commitments. Most of them arose because of failure to be fully familiar with the rather involved statutory scheme and its rather intricate procedural requirements. Two such cases reached the supreme court. In *People v. Foster*,⁹ apparently all concerned overlooked the fact that persons ineligible for probation under the Penal Code are excluded from the operation of the mentally disordered sex offender provisions by Welfare and Institutions Code section 5500.5. One can sympathize with those who are forced not only to be familiar with the sex offender provisions but also with that

7. See, *Mempa v. Rhay*, 389 U.S. 128, 19 L.Ed.2d 336, 88 S.Ct. 254 (1967), where the court creates some limited rights to counsel at the time when sentence is being imposed upon revocation of probation.

8. 256 Cal. App.2d 623, 64 Cal. Rptr. 290 (1967). The opinion collects examples of reasonable and unreasonable conditions of probation.

9. 67 Cal.2d 604, 63 Cal. Rptr. 288, 432 P.2d 976 (1967).

Collings: Criminal Law and Procedure

complex monstrosity, Penal Code section 1203. Foster was convicted of a violation of Penal Code section 288. Since he had earlier been convicted of another felony, the sex offender provisions were inapplicable. However, the court did say he was entitled to credit on his indeterminate sentence for his time spent at Atascadero. (How do you know if the Adult Authority gives such credit in determining an indeterminate sentence?)

Another decision involving defective proceedings was *People v. Succop*.¹⁰ The case involved the preliminary determination whether to send the defendant to Atascadero for 90 days for examination. He was not advised of his rights to make a reply and produce witnesses at his sex offender proceeding. He was also denied a right to cross-examine the psychiatrists. Furthermore, he was denied a right to produce evidence on his own behalf. A new hearing was ordered.

Narcotics commitments. There were also numerous decisions involving the complicated procedures for narcotics commitments. Two are cited in a note.¹¹ In *People v. Coley*,¹² defendant pleaded guilty on the condition that he would be accepted for narcotics treatment at the California Rehabilitation Center. That Center determined that he was not a fit subject for confinement and treatment at the Center. The trial court upheld the Center, but then refused the defendant's application to withdraw his plea of guilty. This was held to be an abuse of discretion.

Substantive Criminal Law

Diminished Capacity. Should this court-invented doctrine be denominated as diminished responsibility or diminished capacity? The supreme court is using the latter

10. 67 Cal.2d 785, 63 Cal. Rptr. 569, 433 P.2d 473 (1967), cert. den. 390 U.S. 983, 19 L.Ed.2d 1281, 88 S.Ct. 1104.

11. These are not discussed here because the supreme court granted hearing and decided them since the termination date for coverage in this article. See,

People v. Moore, 68 Cal. Rptr. 98 (1968), 69 Cal.2d —, 72 Cal. Rptr. 800, 446 P.2d 800 (1968); *People v. Murphy*, 67 Cal. Rptr. 164 (1968), 70 Cal.2d —, 74 Cal. Rptr. 65, 448 P.2d 945 (1969).

12. 258 Cal. App.2d 787, 65 Cal. Rptr. 559 (1968).

expression. However, most of its recent decisions seem to be grounded on the notion that some defendants because of mental conditions should be held to a lower degree of responsibility than others. At least some of these decisions are frankly grounded on the idea that the personal turpitude of the defendant is the distinguishing factor between first and second degree murder. There will always be psychiatrists willing to testify to diminished capacity due to mental defects or conditions.¹³ Some of us like the emphasis on personal turpitude of the defendant and are not too far off from the test of the majority in *People v. Goedecke*¹⁴ where it said that the "controlling issue as to degree depends not alone on the character of the killing but also on the personal turpitude of the defendant."¹⁵ The extent of personal turpitude is a conclusion that a jury is well qualified to make, certainly more qualified than psychiatrists, or even a majority of the supreme court. If the court will become aware of the significance of this and take the next logical step it may escape the bind in which it now finds itself. Psychiatrists should never be allowed to usurp the functions of the jury any more than appellate courts.¹⁶ Let us either go back to the jury system or turn the whole mess over to a panel of psychiatrists.

The leading diminished capacity decision of the year, *People v. Bassett*,¹⁷ is distinguished mostly by the fact that it was signed by the entire supreme court. Bassett methodically

13. Cf. *People v. Gentry*, 257 Cal. App.2d 607, 65 Cal. Rptr. 235 (1968), where court appointed physician testified in a bad check case. Due to defendant's neurotic disorder he had no intent to cheat or defraud. He cashed them out of fear that he might lose his wife and family. His fear kept him from fully understanding the quality of his actions!

14. 65 Cal.2d 850, 56 Cal. Rptr. 625, 423 P.2d 777 (1967).

15. To say that I have sympathy with the test is not to say that I do not think that the court misapplied it. See discussion in *Cal Law Trends and Developments 1967*, at p. 403. I feel that

the court must turn this issue over to the trier of fact on properly developed instructions.

16. Compare Roche, *The Criminal Mind* (1958), pp. 108, 617-618. Dr. Roche says that a psychiatrist who answers moral questions is testifying as a man, not as a psychiatrist. "The conclusions, the inferences, from the facts are for the trier of facts." I wrote a nasty book review of Dr. Roche's award winning book some years ago. 26 Chicago L. Rev. 485 (1959). My respect for his ideas—not the way he expresses them—continues to grow.

17. 69 Cal.2d —, 70 Cal. Rptr. 193, 443 P.2d 777 (1968).

Collings: Criminal Law and Procedure

planned and executed the murders of his father and mother. He knew his crimes were wrong. However, even the district attorney admitted he was and had been a paranoid schizophrenic. Bassett was convicted of first degree murder. There was ample psychiatric testimony of diminished capacity, and very little to the contrary. The court reduced the crime to second degree murder without even finding it necessary to talk about personal turpitude.

One can speculate why the court in *Bassett* did not reduce the offense to manslaughter, or even not guilty. Certainly the diminished capacity doctrine has the effect of creating by judicial legislation a kind of non-statutory manslaughter.¹⁸ Perhaps *People v. Moore*¹⁹ furnishes a clue to the unexpressed reasoning of the court. There, in a court trial, it was contended that the diminished capacity of the defendant reduced his murder to manslaughter. The trial judge expressed as part of his reasons for refusing to accept this contention the "societal" problem, the need for something more permanent than temporary confinement. He was reversed for frankly expressing his reasoning. Perhaps the supreme court in some of its decisions does not express its fear of turning loose on society some of the results of the Frankenstein monster it created when it invented diminished capacity.

All of this points to the need of legislation. The supreme court can legislate and create new types of manslaughter but perhaps it finds itself in difficulties in providing procedures—for example—to convict someone like Bassett of manslaughter (maximum 15 years) or acquit him altogether. Bassett must never be freed. If you doubt this, read the opinion signed by all the justices. The penal code revision project would continue to allow proof of a mental disease or defect when relevant to prove a state of mind (*Wells-Gorshen*). However, it would require notice that mental condition will be in issue as is now the case where the defendant pleads not guilty by

18. See *People v. Conley*, 64 Cal.2d 310, 49 Cal. Rptr. 815, 411 P.2d 911 (1966); *People v. Moore*, 257 Cal. App. 2d 740, 65 Cal. Rptr. 450 (1968); *People v. Aubrey*, 253 Cal. App.2d 912, 61 Cal. Rptr. 772 (1967).
 19. 257 Cal. App.2d 740, 65 Cal. Rptr. 450 (1968).

reason of insanity. Such notice would set in motion a procedure for court appointed psychiatrists much as we have now when there is a plea of not guilty by reason of insanity. Even if the defendant is acquitted by reason of diminished capacity procedures are set up for his commitment.²⁰

A technical problem which has not been resolved in the area of diminished capacity is whether the trial court has the duty to give *sua sponte* a diminished capacity instruction where some evidence comes before the court as to mental defect or intoxication. The cases seem to go both ways.¹

Homicide. Homicide decisions were rare as earlier pointed out because the supreme court did decide but one death penalty decision of consequence, a diminished capacity case. Two other decisions were of interest. In *People v. Lillock*,² the question was whether it is proper to give a felony-murder instruction when the murder information was returned after the running of the statute of limitations for the underlying felony. The court asked for supplemental briefs on this point. No authority was found either by the court or counsel. The court felt that the purpose of the felony-murder rule is to deter negligent or accidental killings in the course of the felony. It decided it would permit a felony-murder instruction even where the statute of limitations would bar prosecution of the constituent felonies.

In *People v. Lovato*,³ the problem was whether the second degree felony-murder doctrine applies where the underlying felony is possession of a concealable weapon by an *alien* (Penal Code section 12021). A divided court held that the doctrine would not apply. By judicial decision the under-

20. See Joint Legislative Committee for Revision of the Penal Code, Tent. Draft No. 2, §§ 530-535.

1. See, e.g. *People v. Fanning*, 265 Cal. App.2d —, 71 Cal. Rptr 641 (1968) (should have been given in robbery case; dissent); *People v. Muszalski*, 260 Cal. App.2d 611, 67 Cal. Rptr. 378 (1968) (not prejudicial in murder case); *People v. Farr*, 255 Cal. App.2d 679,

63 Cal. Rptr. 477 (1967) (should have been given *sua sponte* in murder case); *People v. Bolton*, 255 Cal. App.2d 485, 63 Cal. Rptr. 153 (1967), certiorari denied, 390 U.S. 1032, 20 L.Ed.2d 291, — S.Ct. — (not error).

2. 265 Cal. App.2d —, 71 Cal. Rptr. 434 (1968).

3. 258 Cal. App.2d 290, 65 Cal. Rptr. 638 (1968).

lying felony for second degree murder must be inherently dangerous to human life. Whether the felony is such is a judicial determination made by looking at the elements of the felony in the abstract not the particular facts of the case.⁴ The court refused to accept the analogy to cases where it has been held that possession of a concealable firearm by an *ex-felon*, also in violation of Penal Code section 12021 looked at in the abstract is inherently dangerous to human life. An *ex-felon* has already demonstrated his instability and propensity for crime. On the other hand most aliens are law abiding persons. Simply carrying a concealable firearm does not in the abstract demonstrate instability.

This case is certainly correct in the light of controlling supreme court decisions. However, it demonstrates some of the difficulties raised for lower courts when the supreme court turns from adjudicating to legislating.⁵ The defendant carried the weapon with a purpose to commit murder. By using it he did demonstrate that the felony—not in the abstract but concretely—was dangerous to life. Looked at abstractly the carrying of a concealable weapon by an alien, or even by an *ex-felon*, is not necessarily dangerous to life. But if the alien uses it to commit dangerous acts, perhaps the violation of the statute helps to demonstrate that conscious disregard of human life which under our judicial decisions distinguishes murder from manslaughter. Thus in *People v. Phillips*⁶ the court said that a killing is second degree murder if “the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and acts with conscious disregard for life.” The court suggests that the line between murder and manslaughter depends primarily upon whether a subjective or objective test is applied “in determining whether the defendant acted with conscious disregard of life.” The *Lovato*

4. *People v. Williams*, 63 Cal.2d 452, 47 Cal. Rptr. 7, 406 P.2d 647 (1965); *People v. Phillips*, 64 Cal.2d 574, 51 Cal. Rptr. 225, 414 P.2d 353 (1966).

5. Cf. Note, *Recent Developments—*

California Rewrites the Felony Murder Rule, 18 Stan. L. Rev. 690, 697 (1966).

6. 64 Cal.2d 574, 51 Cal. Rptr. 225, 414 P.2d 353 (1966).

case was tried on a felony-murder theory, not on a reckless murder theory. It goes back for a possible retrial on that theory.

Of course, if the *Phillips* test is properly applied the felony-murder doctrine is really not necessary. However, *Phillips* does represent a limitation on the common-law felony-murder doctrine. The felony-murder doctrine can no longer apply where the underlying felony, theft by false pretenses, looked at in the abstract is not dangerous to life. Phillips obtained money by falsely representing that he could cure a child's cancer without surgery. There was evidence that surgery which Phillips knew was then contemplated could have saved the child's life. The trial jury could certainly infer from this and other evidence, the sort of recklessness described by the court as the essence of second degree murder, that is, "conscious disregard of life." But it cannot convict him of second degree felony-murder.

A man named Roman murdered a police officer. His contention was that he could not be convicted of murder because the entry of the officers prior to the murder in response to a child beating complaint was illegal. All the evidence was that they entered legally. However, the decision in *People v. Roman*,⁷ contains a dictum to the effect that unlawful arrest no longer furnishes sufficient provocation to reduce murder to manslaughter. This is the result of the enactment of Penal Code section 834a in 1957.

Assault and Deadly Weapons. Several decisions involved interpretation of assault statutes. In *People v. Curtis*,⁸ the defendant assaulted a peace officer with a broom handle during the course of an arrest for burglary. The court found that there was no probable cause for the arrest. The defendant was held properly convicted of a battery on a peace officer (Cal. Penal Code section 243). The court read section 243

7. 256 Cal. App.2d 656, 64 Cal. Rptr. 268 (1967).

8. 264 Cal. App.2d —, 70 Cal. Rptr. 271 (1968). Hearing granted Sept. 11, 1968. See also, *People v. Hooker*, 254

Cal. App.2d 878, 62 Cal. Rptr. 675 (1967) which holds that a peace officer who is working part time as a detective in a store is still a peace officer within the meaning of Penal Code § 243.

^{Collings: Criminal Law and Procedure}
with section 834a which takes away the right to use force to resist an arrest by a police officer. It upheld the constitutionality of section 834a.

People v. Romo,⁹ involved an interpretation of Penal Code section 4501 (assault with a deadly weapon by person confined in state prison) and section 4502 (possession of deadly weapon by person confined in state prison, or at prison camps or farms). The defendant, a Youth Authority ward, was an inmate of Deuel Vocational Institution, which is a Department of Corrections institution. Penal Code section 6082 seems to limit Title 5 of Part 3, which includes sections 4501 and 4502, to persons in the custody of the Department of Corrections, thus excluding Youth Authority wards. The court held therefore that the defendant could not be convicted under the two sections. It modified the judgment to declare defendant guilty of assault with a deadly weapon (Penal Code section 245). The dissenting judge read section 2041 as making sections 4501 and 4502 as applicable to Deuel whether the inmates were from the Youth Authority or not. It should be remembered that Deuel is a medium security institution which contains some very dangerous individuals. Doubtless the Department of Corrections will cause remedial legislation to be introduced.

There were two narrow decisions on definitions under Penal Code section 12020. The supreme court by a 5–2 decision held that a long knife is not a “dirk or dagger.”¹⁰ A court of appeal held that what apparently were homemade brass knuckles were not “metal knuckles.”¹¹ Penal Code section 12020 et seq. obviously are in need of thorough revision.

Kidnaping. Or should I be archaic and say kidnapping?

The United States Supreme Court recently held that the capital punishment clause of the federal kidnaping act is un-

9. 256 Cal. App.2d 589, 64 Cal. Rptr. 151 (1967).

10. *People v. Forrest*, 67 Cal.2d 478, 62 Cal. Rptr. 766, 432 P.2d 374 (1967).

11. *People v. Deane*, 259 Cal. App. 2d 82, 66 Cal. Rptr. 177 (1968). *People v. Williams*, 264 Cal. App.2d —, 70

Cal. Rptr. 882 (1968) (§ 243 is constitutional); *Pittman v. Superior Court*, 256 Cal. App.2d 795, 64 Cal. Rptr. 473 (1967) (conviction under § 245(b) can be sustained even though assault on police officer occurred after illegal entry into house where assault took place).

constitutional. This is because of failure to set forth a procedure for imposing the death penalty on a defendant who waives right to jury trial or one who pleads guilty.¹² Under the federal statute the defendant is practically forced to waive his right to trial by jury where he might be given a death penalty to seek a trial by a judge who cannot impose that penalty. However, according to one of our courts in *People v. Spaniel*,¹³ there is no deficiency in the California statute. As construed by the courts and as a result of Penal Code section 190.1, either the judge or jury can impose the death penalty. Whether the supreme court will frustrate the decision may be a matter of some doubt.

*Theft.*¹⁴ Can a person who enters an establishment and makes purchases with a stolen credit card be convicted of burglary? The credit card statute (Penal Code section 484a(b) (6)) at the time made it a felony if the goods were worth over \$50, otherwise a misdemeanor. The court in *People v. Scott*¹⁵ answered the question in the negative. It relied on the principle paid down in *In re Williamson*,¹⁶ that a special statute excepts the matter included in a broader general act. If this decision is correct then the credit card offenses can no longer be treated as burglary. This would also mean that a person who uses a stolen credit card to obtain goods over \$50 and commits a homicide in the course of the transaction could not be convicted under the felony murder rule. Statutes in the theft area have grown like Topsy and are badly in need of a complete revision. For example the statute might well provide that purchases made in various stores with a stolen credit card could be accumulated to make the offense a felony. For that matter, why draw the line between felony and misdemeanor at all?

Vehicle Code. Vehicle Code offenses make up a large part,

12. United States v. Jackson, 390 U.S. 570, 20 L.Ed.2d 138, 88 S.Ct. 1209 (1968).

13. *People v. Spaniel*, 262 Cal. App. 2d —, 69 Cal. Rptr. 202 (1968).

14. See *People v. Ornorff*, 261 Cal. App.2d 212, 67 Cal. Rptr. 824 (1968),

for a good description of the "Jamaica Switch."

15. 259 Cal. App.2d 589, 66 Cal. Rptr. 432 (1968).

16. 43 Cal.2d 651, 276 P.2d 593 (1954).

Collings: Criminal Law and Procedure

perhaps a majority, of those which come to the attention of the courts each year. It seems right that *Cal Law* should at least mention some of the problems.

One important problem is persons driving with suspended operators' licenses. There are thousands of them. They at least have shown signs of being dangerous drivers or their licenses would not have been suspended. It is not easy to have a license suspended. Many of them have no public liability insurance or financial responsibility. The supreme court in *In re Murdock*,¹⁷ practically destroyed enforcement of the laws against such drivers. The statute, Vehicle Code section 14601, makes it a crime to drive an automobile with knowledge that the operator's license has been suspended. Remember we are dealing with defendants who are quite ready to mark a letter from the Department of Motor Vehicles with a curt "Moved, left no address." The Department to date does not try to contact them personally. It may have to henceforth with expenses paid by the taxpayers.

Vehicle Code section 14600(a) requires that any person with an operator's license who moves notify the Department of his new address within 10 days. Couple that with the fact that a defendant who engages in some crime or other activity which requires suspension of his license is presumed to know the law—or at least was prior to 1968—is there not constructive knowledge that his license has been suspended? The supreme court says that is not enough.

In the *Murdock* case, the defendant was involved in an automobile accident and had his license suspended. Before then he had moved and failed to give notice of change of address. The Department notified him of his suspension at his last known address. This notification letter was returned marked "Moved, left no address." Thereafter he was arrested for speeding and driving with a suspended driver's license. The supreme court 5–2 held that constructive knowledge (failure to report change of address, accident, etc.) was not enough. As the dissent pointed out, one who moves frequently

17. 68 Cal.2d 313, 66 Cal. Rptr. 380, 437 P.2d 764 (1968).

and fails to notify the Department of change of address can now drive indefinitely with a suspended driver's license.

Doubless the Department is working on this problem. *Murdock* is not a constitutional law case. The legislature can substitute for the word "knowledge" in the statute the terms notice or constructive knowledge and define them carefully. Another possible solution would be to provide for forfeiture of motor vehicles driven by a driver with a suspended driver's license. Why should not the grantors of credit be required to see that the debtor has a valid license? Department of Motor Vehicle computers can check this in a few minutes. There must be 9 or 10 million licensed drivers in California. Surely there is some way to keep the unlicensed off the roads—perhaps by tying driver's license, motor vehicle registration, and realistic financial responsibility (i.e. either insurance or cash deposit) together.

As of this year at least the crime of failure to stop at the scene of an accident and file reports is not unconstitutional. The cases of *Byers v. Justice Court*¹⁸ and *People v. Bammes*¹⁹ so held. But considering the cases which held it unconstitutional to require a gambler or a possessor of a firearm to register and pay taxes,²⁰ one may wonder if *Byers* and *Bammes* were decided properly (that is, in accordance, with United States Supreme Court precedents). The courts in *Byers* and *Bammes* try to distinguish these cases. They state that the purpose of the statutes involved was to coerce evidence from persons involved in illegal activities. But surely the purpose of making it a crime for failure to stop at the scene of the accident is to coerce those involved in illegal activities to stop. Those innocent of crime would stop anyway. Usually those who would not stop would be those who thought they might have committed a crime—e.g. driving under the influence,

¹⁸. 265 A.C.A. 1031, 71 Cal. Rptr. 609 (1968). Hearing granted November 12, 1968.

¹⁹. 265 Cal. App.2d —, 71 Cal. Rptr. 415 (1968).

²⁰. *Marchetti v. United States*, 390

U.S. 39, 19 L.Ed.2d 889, 88 S.Ct. 697 (1968); *Grosso v. United States*, 390 U.S. 62, 19 L.Ed.2d 906, 88 S.Ct. 709 (1968); *Haynes v. United States*, 390 U.S. 85, 19 L.Ed.2d 923, 88 S.Ct. 722 (1968).

Collings: Criminal Law and Procedure
speeding, etc. In any event, one can't blame the courts for trying in *Byers* and *Bammes*.

Failure to Provide. One of the nastiest problems in every district attorney's office is failure to provide. The cases are a nuisance. However, the threat of prosecution is a useful weapon to keep the "victim" off the welfare rolls and thereby help the county budget. *People v. Sorensen*¹ presents an interesting sidelight on the problem. Can a defendant who agrees to artificial insemination of his wife later be required to support the child? If he does not can he be convicted of failure to provide (Penal Code section 270)? The supreme court answered these questions affirmatively in a unanimous opinion. Artificial insemination in California is not adultery. Nor are the offspring illegitimate. Of course the court had to stretch the word "father" in Penal Code section 270 a little.

Sex Crimes. An uncle may be hot-blooded or cold-blooded, but if he is half-blooded, he cannot be guilty of incest.² Penal Code section 285 will not be interpreted to apply to sexual relations between an uncle and the daughter of defendant's half sister. Justice McComb dissented.

Two divisions of the court of appeal considered the constitutionality of Penal Code section 286 (sodomy) and section 288a (oral copulation). Both involved consensual relations. In each it was argued that the statute involved is a violation of the right to privacy protected as a result of *Griswold v. Connecticut*.³ Neither case was a very good one in which to raise the issue. In one the act took place in the public portion of a park restroom. The other took place in Atascadero. Needless to say each court upheld the constitutionality of the section involved.⁴ The tentative penal code revision would remove penal sanctions from consensual sexual

1. 68 Cal.2d 280, 66 Cal. Rptr. 7, 437 P.2d 495 (1968).

2. *People v. Baker*, 69 Cal.2d —, 69 Cal. Rptr. 595, 442 P.2d 675 (1968).

3. 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965).

4. *People v. Roberts*, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967), reversed on other grounds, *People v. Frazier*, 256 Cal. App.2d 630, 64 Cal. Rptr. 447 (1967).

relations of all sorts where adults are involved.⁵ A loitering statute would take care of the public restroom situation. One may assume that some place the draftsmen will take care of the institutional situation.

People v. Smith,⁶ points to some rather ridiculous problems in proving a rape case. The prosecutor did not ask the victim if she was the defendant's wife. Fortunately there was circumstantial evidence that proved she was not. Prosecutors should not only be careful about following the statute in pleading. They should also follow the pleading in making their case even if it does make them sound a little foolish. Ask her if she is married to the defendant. Ask her if the place where the crime took place is in the county.

Disorderly Conduct.⁷ There are numerous disorderly conduct, riot, etc., cases this year. Perhaps a few should be mentioned.

The supreme court in a very brief opinion upheld the constitutionality of Penal Code section 404.6, relative to incitement to riot.⁸ The problem of section 404.6 is that its application is limited to cases where there is a clear and present danger of force or violence. Recent riots have been planned well ahead of time. Any clear and present danger test is clearly outmoded and should be overruled. The peace officers need a right to arrest the inciters well ahead of the riot. Thus if plans are being made in a public park for a subsequent riot at the induction center, public safety requires arrests and charges of offenses against the inciters while they are in the park. Why wait until the riot takes place in front of the induction center?

Penal Code section 602 subd. (n) [formerly subd. (o)],

5. Joint Legislative Committee for Revision of the Penal Code, Tent. Draft No. 1, §§ 1600-1608.

6. 263 Cal. App.2d —, 69 Cal. Rptr. 670 (1968); cf. *People v Gann*, 259 Cal. App.2d 706, 66 Cal. Rptr. 508 (1968).

7. See, *Hinshaw, Riot and the Law: "Justifiable Homicide,"* 43 Cal. State Bar J. 541 (1968); *Powell v. Texas*, 392

U.S. 514, 20 L.Ed.2d 1254, 88 S.Ct. 2145 (1968). (It seems that physicians cannot solve the problem of the common cold any more than lawyers and courts can solve the problem of the common drunk.)

8. *People v. Davis*, 68 Cal.2d 481, 67 Cal. Rptr. 547, 439 P.2d 651 (1968).

^{Collings: Criminal Law and Procedure}
making it a crime to refuse to leave a public building upon request after it is closed to the public, was upheld in *Parrish v. Municipal Court*.⁹ And Penal Code section 602.7 relative to failure to leave a campus where directed was upheld in *People v. Agnello*.¹⁰

I had difficulty deciding whether to end this article with a pervert or a rioter. I finally decided on the latter. Unquestionably both are perverted. Last year the kind people who worked like slaves to put together this useful and outstanding publication allowed me to end my article with a “God Bless You” to a Mrs. Wolff who successfully fought off a pervert.

This year I hope they will give me the satisfaction of doing the same to someone else who so far is successfully fighting off other perverts. GOD BLESS YOU PRESIDENT HAYAKAWA!

⁹. 258 Cal. App.2d 497, 65 Cal. Rptr. 862 (1968).

¹⁰. 259 Cal. App.2d 785, 66 Cal. Rptr. 571 (1968).

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