Golden Gate University Law Review

Volume 5 | Issue 1 Article 2

January 1974

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ROBINSON AT LARGE IN THE FIFTY STATES: A CONTINUATION OF THE STATE BILLS OF RIGHTS DEBATE IN THE SEARCH AND SEIZURE CONTEXT

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INTRODUCTION

Several decisions handed down by the Supreme Court during its last term are probably the best indications yet that, as many observers have predicted, the direction of the Burger Court will "run counter to much of what occurred during the Warren era."[1] Because this new direction promises to create increasing tension be-

1. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). *See generally* J. SIMON, IN HIS OWN IMAGE, THE SUPREME COURT IN RICHARD NIXON'S AMERICA (1973); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 422-25 (1974).

tween the "lower" constitutional standards often defined by the Burger Court and "higher" Warren Court-inspired state standards,[2] a confusion of critical commentary and suggested solutions to potential problems has come forth. Some seek to relieve the tension by simply adopting Burger Court standards.[3] Others do not see the tension as a problem and recommend relying on states' bills of rights to preserve the greater protections state rules often provide.[4] Still others concentrate on revealing the defects of certain Burger Court decisions in the apparent hope that the Court will reconsider them in light of such revelations.[5] Unfortunately, state courts seem to be disagreeing as much as the commentators about how to respond to the Supreme Court's "retrenchment." This article examines several issues raised by this discord and suggests a procedure which, if followed, should resolve many of the problems created by the Supreme Court's new direction.

Part I examines the genesis of these problems by briefly tracing the checkered history of the states' bills of rights.[6] Part I also examines the "independent" (or "adequate") state ground doctrine in order to assess its present validity as a source of support for state rules. These examinations reveal that the advocates of renewed federalism have identified a viable solution to the problems created by the Supreme Court's retrenchment. Since we have concluded that renewed federalism is also the most reasonable solution to such problems, we have selected a retrenchment-oriented Burger Court decision, *United States v. Robinson*,[7] and a conflicting California Supreme

2. Such terms as "high," "strict," or "liberal" on the one hand and "low," "relaxed," or "conservative" on the other are extremely subjective. However, since both commentators and courts resort to this shorthand when characterizing constitutional standards, we will also. For this article's purposes, a strict standard is one which in comparison with another appears to offer the individual's right greater protection.

3. *See, e.g.*, Thompson, *The Burger Court in the California Crystal Ball*, 5 SW. U.L. REV. 238 (1973). For an even clearer expression of Justice Thompson's views see People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43 (1974).

4. *See, e.g.*, Falk, *The State Constitution: A More than "Adequate" Non-Federal State Ground*, 61 CALIF. L. REV. 273 (1973); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 271 (1973) [hereinafter cited as *Project Report*].

5. *See* Voarsanger, *United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*, 1 HASTINGS CONST. L.Q. 179 (1974).

6. *See* H. ABRAHAM, FREEDOM AND THE COURT 29-88 (1972); Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961); *Project Report*, *supra* note 4. Although our historical analysis has a different perspective, it is indebted to these historical surveys.

7. 414 U.S. 218 (1973), *noted in* 23 CLEVE. ST. L. REV. 135 (1974); 5 CUMBERLAND-SAMFORD L. REV. 130 (1974); 88 HARV. L. REV. 181 (1974); 11 HOUSTON L. REV. 1283 (1974); 18 HOW. L.J. 446 (1974); 4 MEMPH. ST. U.L. REV. 530 (1974); 25 MERCER L. REV. 943 (1974); 45 MISS. L.J. 800 (1974); 5 N. CAROLINA CENTRAL L.J. 370 (1974); 25 OKLA. L. REV. 136 (1974); 19 S. DAK. L. REV. 494

Court decision, *People v. Superior Court (Simon),*[8] and examined them as such conflicting decisions should be examined by any state court interested in preserving its ability to set standards higher than the United States Supreme Court. *Robinson* and *Simon,* which both dealt with searches incident to custodial traffic arrests,[8a] have been selected primarily because they underscore the fact that issues of federalism are especially complex in the area of search and seizure law.[9]

Part II examines *Robinson* and *Simon* solely on their merits because such examination is a necessary preliminary step for any state court confronting incompatible state and federal rules. If the federal rule is superior, it should prevail. On the other hand, if it is not, the tendency to follow United States Supreme Court precedent will clash with a desire to follow the "best" rule. This predicament produces so much confusion that, in dealing with the split between *Robinson* and *Simon,* California appellate courts have: (1) followed *Robinson*; (2) followed *Simon*; and (3) followed both.[10]

(1974); 43 U. CIN. L. REV. 428 (1974); 35 U. PITT. L. REV. 864 (1974); 8 U. RICHMOND L. REV. 610 (1974); 3 U. SAN FERNANDO VALLEY L. REV. 113 (1974); 8 U.S.F.L. REV. 777 (1974) *and* 49 WASH. L. REV. 1123 (1974).

For discussions of various issues raised by *Robinson* see Note, *Custodial Search Incident to Arrest: Siding with the Street Cop,* 3 CAPITAL U.L. REV. 266 (1974); Nakell, *Search of the Person Incident to a Traffic Arrest: A Comment on Robinson and Gustafson,* 10 CRIM. L. BULL. 827 (1974); Note, *Searches of the Person Incident to Traffic Arrest: State and Federal Approaches,* 26 HASTINGS L.J. 535 (1974); Comment, *United States v. Robinson: Its Effect on the Right to Search Incident to Arrests for Traffic Violations in California,* 7 LOYOLA L.A.L. REV. 516 (1974).

8. 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972), *noted in* 61 CALIF. L. REV. 481 (1973).

8a. Although the *Robinson* decision has generated an enormous amount of commentary—almost all of it critical of both the result in *Robinson* and the rationale which led to the result—the subject of searches incident to traffic arrests generated considerable interest in the early 1960's (when the rationale rejected by *Robinson* was gaining acceptance) also. *See, e.g.,* Simeone, *Search and Seizure Incident to Traffic Violations,* 6 ST. LOUIS U.L.J. 506 (1961); Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone,* 7 ST. LOUIS U.L.J. 1 (1962); 1959 WIS. L. REV. 347; 14 HASTINGS L.J. 459 (1963); 4 WILLAMETTE L.J. 247 (1966). Relevant later discussions include: Baker & Khourie, *Improbable Cause—The Poisonous Fruit of a Search after Arrest for a Traffic Violation,* 25 OKLA. L. REV. 54 (1972); Cook, *Warrantless Searches and Seizures Incident to Arrest,* 24 ALA. L. REV. 607 (1972); Player, *Warrantless Searches and Seizures,* 5 GA. L. REV. 866 (1969); Note, *Searches of the Person Incident to Lawful Arrest,* 69 COLUM. L. REV. 866 (1969); Comment, *Search Incident to Arrest and the Automobile,* 43 MISS. L.J. 196 (1972); Comment, *Criminal Law: Personal Searches Incident to Traffic Arrests —No Nexus Necessary?,* 25 U. FLA. L. REV. 239 (1972); Note, *Scope Limitations for Searches Incident to Arrest,* YALE L.J. 433 (1969).

9. For an indication of the complexity of the federalism issue in the area of search and seizure law see Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief,* 50 CALIF. L. REV. 421, 421-30 (1962).

10. *See* People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43 (1974), *hearing granted,* Crim. No. 17643, Cal. Sup. Ct., Mar. 20, 1974 (following *Robinson*); People v. Martinez, 36 Cal. App. 3d 527, 111 Cal. Rptr. 570 (1974), *hearing granted,* Crim. No. 17625, Cal. Sup. Ct., Mar. 11, 1974 (*Robinson* does not overrule *Simon*); People v. Longwill, 3 Crim. 7147 (1974), *hearing granted,* Crim. No. 17773, Cal.

This dissimilarity is apparently due to the absence of an accepted procedure for resolving conflicts like the one exemplified by *Robinson* and *Simon*. Accordingly, Part III outlines an approach which will both mitigate the possibility of decisional irregularities and allow for higher state standards when they are appropriate. A convenient focus for an application of this procedure to the *Robinson/Simon* rift is *People v. Norman*[11]—one of the California appellate court decisions which followed *Robinson*. Since the authors have concluded that California should retain its strict *Simon* rule, it is appropriate to compare our method of resolving the conflict between *Robinson* and *Simon* with the *Norman* court's. In this way, corrections for certain deficiencies in the *Norman* court's approach can be suggested. The appropriateness of focusing on *Norman* is emphasized by the fact that the case—and those that conflict with it—has been granted a hearing by the California Supreme Court. Our suggested approach to the difficulties alluded to above can therefore be compared with the California Supreme Court's ultimate approach. Hopefully, the two approaches will have much in common, but even if they do not, in-depth examination of California's presently unsettled situation will be a valuable method of understanding both the alternatives currently available to similarly situated courts in other states and the California Supreme Court's final decision regarding the effect of *Robinson* on California search and seizure law.[11a]

Sup. Ct., May 20, 1974 (unpublished opinion, following *Simon*); People v. Maher, 41 Cal. App. 3d 152, 115 Cal. Rptr. 864 (1974) ("*Simon* is not necessarily inconsistent with the principle enunciated in *Robinson*").

11. People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43 (1974), *hearing granted*, Crim. No. 17643, Cal. Sup. Ct., Mar. 20, 1974.

11a. Note: Although the *Norman* case had not yet been decided as this article went to press, the California Supreme Court did elect to settle the "unsettled situation" discussed above. *See* People v. Brisendine, Crim. No. 16520, Cal. Sup. Ct., Feb. 20, 1975 (4-3 decision).

In *Brisendine*, a camper was arrested for having an illegal campfire and escorted over a two mile trail back to the patrol car to be cited. Prior to leaving the campsite, a search of the camper's knapsack disclosed a capped, frosted, plastic bottle containing marijuana and tablets of restricted drugs wrapped in tinfoil and enclosed in envelopes. The supreme court specifically rejected the *Robinson* rule that the fact of a custodial arrest supplies the needed justification for a full search of the person and his effects. Following Justice Wright's reasoning in his concurring opinion in *Simon*, the court held that the fact of transportation justified a limited pat-down search of the knapsack for weapons, but found that the scope of such a search was exceeded when the officer opened the bottle and envelopes discovered within the knapsack.

Brisendine's rationale for retaining California's higher standard is most noteworthy. With an analysis which is in accord with the views expressed herein, Justice Mosk, writing for the court, unequivocally declared that: "The California Constitution is, and always has been, a document of independent force," *Id.* at 34, and:

> [I]n determining that California citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than that required by the United States Constitution, we are embarking on no revolutionary course. Rather we are simply reaffirming a basic principle of federalism—that the

PART I

The United States Supreme Court's incorporation of the Bill of Rights into the due process clause of the fourteenth amendment—a process which began in 1927 and greatly accelerated during the tenure of the Warren Court—has guaranteed to the citizens of each state protections from improper state action equivalent to the protections from improper federal action which have long been enjoyed. Presently, individual constitutional rights are commonly identified with the Federal Bill of Rights despite the fact that state constitutions contain substantial, if not literal, duplications of such guarantees.

The constitutional scheme which obtained prior to the onset of incorporation has been described as a "separation model."[12] Under the separation model, the Federal Constitution protected citizens' purely federal rights; all remaining protection (if any) came from the states. Accordingly, states' bills of rights were, in many respects, more important than their federal counterparts during the years of separation.

Presently, however, states' bills of rights are rarely relied upon in state court decisions and seem to have acquired the status of anachronisms. Presumably, the Warren Court had no desire to render nugatory states' bills of rights; in fact, their use was encouraged.[13] Their de-emphasis was apparently an inevitable result of incorporating rigorously reevaluated guarantees into the fourteenth amendment—thus making them binding on the states. Since a majority of the states had consistently enunciated constitutional standards which were lower than those imposed by the Warren Court's due process incorporations, it became an accepted misapprehension that a national system patterned on the Federal Bill of Rights was being constructed, particularly in the area where the Court was most active: criminal procedure.

During the Warren Court era, a time when states were so often compelled to drastically elevate the standards by which individuals' constitutional rights were protected, an understandable—though not necessarily commendable—tendency to not venture beyond the

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> nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.

Id. at 36-37.

12. *Project Report, supra* note 4, at 275.

13. *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967); Ker v. California, 374 U.S. 23 (1963).

mandates of the United States Supreme Court developed. It is difficult to say whether this unwillingness reflected respect for the Supreme Court or basic dissatisfaction with the liberality of standards which were evolving. Nonetheless, state courts became accustomed to doing no more than watching the Supreme Court and applying its landmark decisions to their respective jurisdictions. By a sort of default, however, the Burger Court's new direction is leaving states with higher standards than are required by the Federal Constitution. The novelty of this situation is suggested by the following historical survey.

A. HISTORICAL ANTECEDENTS: THE EVOLVING ROLE OF THE STATES' BILLS OF RIGHTS

After winning independence from England, the separate colonies asserted their own inherent sovereignty. With the brief exception of Connecticut and Rhode Island, the people of each colony drafted state constitutions, presumably designed to preserve the ideals for which the War of Independence had been fought. The indival states formed a confederation, "but so jealous was each [state] of its prerogatives that too few powers were surrendered, and the enterprise foundered."[14] The first attempt at formulating a federal constitution revealed both inexperience with and distrust of notions of centralized power. Despite their sense of independence, the colonialists were compelled to recognize the necessity of some federal union; by 1780, a consensus developed in favor of calling a convention to establish a more energetic authority.[15]

At the Constitutional Convention, the debate regarding the future of state sovereignty was, in retrospect, a near total victory for the advocates of a strong central government. The acceptance of the supremacy clause marked the turning point. Some feared, and justifiably so, that state autonomy was imperiled, despite Madison's assurance that the powers reserved to the several states would extend "to all objects which, in the ordinary course of affairs, concern the lives, liberties, and prosperities, and the internal order, improvement and prosperity of the State."[16]

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14. Brennan, *supra* note 6.

15. B. WRIGHT, CONSENSUS AND CONTINUITY, 1776-86 (1958). *See* P. FREUND, THE SUPREME COURT AND THE FUTURE OF FEDERALISM 41 (S. Shumway ed. 1968) where it is suggested that the pre-eminent values served by federalism are:

> (1)safeguarding citizens against the tyranny of power; (2) protecting minority groups; (3) diffusing political responsibility and widening political participation; and (4) encouraging innovation and experimental measures in the states.

16. *See* THE FEDERALIST No. 45, at 303 (Modern Library ed. 1937) (J. Madison);

Both inside and outside the state ratifying conventions, "complaints against the proposed Constitution became a sonorous refrain. It was contended that the new Constitution would establish a consolidated system, threatening rights basic to both states and individuals."[17] The critics, therefore, concentrated on passing amendments which would establish barriers against national power. Federal union was seen as an unpleasant necessity; state governments were the true inheritors of the revolution.[18] On the other hand, the framers of 1787 believed that they should impose few limitations upon the authority of the state legislatures, except such as were necessay from a national viewpoint. Matters of local interest, the relations between a state and its own citizens, were jealously preserved against national interference, protection, or restriction.[19]

To assuage the concern of the states, the Bill of Rights was conceived. The amended Constitution left intact the ideal of state autonomy.[20] Further evidence of the penchant for state sovereignty was the quick ratification of the tenth amendment which reserves those powers not delegated to the national government to the states or the people; a measure endorsed to quiet the excessive jealousies which had been excited. Despite this apparent concession to the states'-righters, the tenth amendment soon emerged as little more than a constitutional tranquilizer—at least where economic interests were concerned. The amendment in no way limited the central government's supremacy in the exercise of its delegated and implied powers. In fact, the tenth amendment, it now seems clear, does no more than restate the substance of the supremacy clause.[21]

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1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 22 (rev. ed. 1937); A. MASON, THE STATES RIGHTS DEBATE 4 (1964).

17. A. MASON, *supra* note 16.

18. Indicative is the statement of Madison during the Bill of Rights Debate: "[T]he greatest opponents of a Federal Government admit the State Legislatures to be sure guardians of the peoples liberty." 1 ANNALS OF CONG. 456 (1789).

19. *See generally* B. SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 31-39 (1955).

20. 1 ANNALS OF CONG. 452 (1789). Madison originally proposed not ten but seventeen amendments including a proposed amendment that read, "No state shall violate the equal rights of conscience, or the freedom of the press or the trial by jury in criminal cases." *Id.*

21. E. CORWIN, THE COMMERCE POWER VS. STATE RIGHTS (1936). Summarizing Chief Justice Marshall's position on the significance of the supremacy clause particularly with respect to the commerce power, Corwin writes:

> [W]hen the supremacy clause is given its due operation no subject-matter whatever is drawn from the delegated powers of the United States by the fact alone that the same subject-matter also lies within the jurisdiction of the reserved powers of the states; for when national and state power, correctly defined in other respects, come into conflict in consequence of attempting to govern simultaneously the same subject-matter, the former has always the right of way.

Id. at 12-13.

Madison's proposal for additional amendments directed against undesirable *state* action plainly reveals his belief that the amendment's which were adopted were not thought to extend to the states. The Federal Bill of Rights thus soon emerged as a bulwark intended to prevent only one type of abuse; overreaching by the federal government. Any doubts to the contrary[22] were definitively laid to rest by the Supreme Court in *Barron v. Baltimore.*[23]

The plaintiff in *Barron,* contending that he was entitled to just compensation under the fifth amendment to the United States Constitution, sought damages from the city of Baltimore for the loss of use of his wharf. Barron's argument, that the fifth amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States, was rejected by the Supreme Court. Chief Justice Marshall wrote:

> The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the power of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests . . . . [T]he limitations on power . . . are . . . necessarily, applicable to the government created by the instrument. They are limitations of power granted by the instrument itself; not of distinct governments, framed by different persons for different purposes.[24]

After Marshall's death, the course towards a dominant central government was somewhat slowed by Chief Justice Roger Brooke Taney, an appointee of Andrew Jackson.[25] Where non-economic indi-

22. *See* W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120-44 (1825). This nineteenth century textbook argued that, except for the first and seventh amendments, the Bill of Rights was binding on the states.
23. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
24. *Id.* at 247.
25. The License Cases, 46 U.S. (5 How.) 572-86 (1846). This series of cases involving the commerce power articulated Taney's conception of a "dual federalism."

vidual rights were concerned, Taney's distrust of increased concentration of national power surfaced in his adherence to the separation model embodied in *Barron*. The *Barron* doctrine was reaffirmed in a number of cases,[26] and the Court retained the notion that as to individual rights, the state constitution was the sole protection against state indiscretions. Marshall's decision in *Barron* thus established the model that was to control the relationship between the federal and states' bills of rights until the enactment of the reconstruction amendments, in theory, and in fact, until 1927.[27]

Essentially, the problem with the *Barron* model was the artificiality of the distinction, and the assumption that states could, or should, be trusted to protect the rights of minorities. As one commentator has observed:

> A federal system presupposes that the greater the concentration of authority the greater the danger of despotism. In fact, there can be village tyrants also, whose power may be all the greater because it is exercised without the glare of widespread public disclosure.[28]

The framers of the separation model simply did not appreciate its failings, and, as a result, frustrated a basic aim of our system of government—thwarting tyrannical power, whatever its origin. The separation model was incapable of declaring certain rights to be of sufficient magnitude to immunize them from encroachment by disparate state determinations. With strict state autonomy, there could be no guarantee that such rights attach to all citizens, in all events. What has been called a constitutional "lowest common denominator"[29] was needed to insure minimum standards consistent with the consicence of the national community.

It was to cure this weakness and to remove opportunities for abuse of power at all levels that the reconstruction amendments were conceived and adopted.[30]

Although the substance of the amendments was already em-

For further example of Taney's distrust of any accelerated drive toward national unity see Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (The Dred Scott case).

26. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1857).
27. See text accompanying notes 39-44 *infra*.
28. P. FREUND, *supra* note 15, at 42.
29. *Project Report*, *supra* note 4, at 290.
30. *See* J. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW (1890).

bodied in states' bills of rights,[31] the experience of the Civil War had convinced the Congress that notions of fundamental rights were simply not compatible with the unrestrained power of the states.[32] After the War, it was charged that the former Confederate states denied freedmen the protection given white persons and that the states were not sufficiently strong or willing to see that the fundamental guarantees of their constitutions were enforced even-handedly. The federal government was expected to preserve the fruits of victory since it, and not the states, had made victory possible. The fourteenth amendment limitations on state power could never have been secured when the Constitution was adopted; but after the Civil War, the nation, distinct from the states, became a permeating conception.[33]

The purpose of the amendments—a purpose which was frustrated for many years by the judiciary—"was to enforce on every foot of our soil rules of equality before the law and the rights of person and property, and to make certain that those rules could nevermore be violated according to the views or caprice of local majorities."[34] The belief that states should be relied upon to proscribe those actions inconsistent with democracy—and that the federal government could not be trusted, had with time, proven erroneous.

Whatever the actual intent of the framers of the reconstruction amendments, the due process clause of the fourteenth amendment has been interpreted to require the incorporation of practically all of the guarantees contained in amendments one through eight of the Bill of Rights. Such was not always the case though; it took a sustained effort, a change in theories, and a remarkable court under the leadership of Chief Justice Earl Warren to give the amendments the life they now enjoy. During this delay, the separation model survived intact. This survival was assured, and the spirit of the amendment simultaneously thwarted, when nearly five years after its adoption the question of the proper construction to be given the first section of the fourteenth amendment was for the first time presented to the Court for its determination. The elapsed time, however, probably did little to anaesthetize the shock of the radical reconstructionists when the decision in the *Slaughter-House Cases*[35] was handed down.

31. *See* SOURCES OF OUR LIBERTY (R. Perry & J. Cooper eds. 1959).
32. W. GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 2 (1898).
33. Warren, *Fourteenth Amendment: Retrospect and Prospect*, in THE FOURTEENTH AMENDMENT (B. Schwartz ed. 1970).
34. W. GUTHRIE, *supra* note 32, at 2.
35. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

The legislature of Louisiana had passed a statute which granted to one corporation a monopoly of the slaughterhouse business within certain parishes of New Orleans. The right of a state to establish such a monopoly was vigorously challenged.

Although other constitutional attacks on the statute were urged, the Court focused on appellant's chief contention that the law constituted a prima facie violation of that portion of section 1 of the fourteenth amendment which proclaimed that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Court held that whatever privileges were subsumed in the amendment, the privilege of being a butcher in New Orleans was not among them. To hold otherwise, explained Justice Miller for a majority of five, would be "to transfer the security and protection of all the civil rights . . .to the Federal government . . .; to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."[36] In fact, an opposite result, albeit a drastic departure from the separation model, would have been precisely the construction the amendment was intended to have.[37]

The *Slaughter-House* case has never been overruled, presumably because subsequent theories of constitutional law have rendered that decision innocuous. Criticisms of the case abound, however, and a careful analysis compels the conclusion that the case marked the practical overthrow of the congressional ideal within five years after its adoption.

At the outset, rights ultimately found to have their source in the fourteenth amendment were reduced to distant potentialities.[38] The pains the Supreme Court took to deflate the revolutionary purpose of the amendment were well spent, for a full fifty-three years would pass before the Court would abandon the *Slaughter-House* approach.

Beginning in 1875 with *Slaughter-House*, the Court was presented with a number of cases in which it was asserted that certain rights were within the "privileges and immunities" clause; in each case, the Court held that the right in question was not federally pro-

36. *Id.* at 77-78.
37. *See* J. BURGESS, *supra* note 30, at 228. Burgess pronounced the *Slaughter-House* decision "entirely erroneous" from all standpoints, be they "historical, political, or juristic." *Id.*
38. C. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 22-23 (1912).

tected.[39] Consequently, state action which abridged individual rights, no matter how reprehensible, was outside the scope of Supreme Court review.

Despite the impassioned opinions in dissent by Mr. Justice Harlan, consistently urging nationalization of the Bill of Rights,[40] it was not until 1925 that incorporation received its first judicial recognition, on at least a partial basis, in *Gitlow v. New York*.[41] Although the Court ruled, 7-2, that the statute in question—New York's Criminal Anarchy Act of 1902—violated neither due process nor free speech, the Court pronounced;

> For present purposes, we may and do assume that freedom of speech and of the press—which are now protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause . . . against impairment by the states.[42]

The *Gitlow* dictum was made a rule of law in *Fiske v. Kansas*,[43] where for the first time the Court upheld a claim based on the fourteenth amendment's due process clause, ruling specifically that a Kansas criminal syndicalism statute violated the due process clause because of the strictures of the first amendment.

Gradually, as incorporation gained acceptance, rights have been incorporated into the fourteenth amendment at a steadily increasing rate.[44] Accompanying the rise of the incorporation theory was a complete transformation of state courts' role as the sole expositor of individual rights. As more and more rights were incorporated, states' bills of rights were relegated to a decidedly secondary role. This relegation, it must be understood, was self-imposed. It was never suggested, by the Supreme Court at least, that states should re-

39. *See, e.g.*, Walker v. Sauvinet, 92 U.S. 90 (1875); United States v. Cruikshank, 92 U.S. 542 (1875); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886).

40. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 546 (1884); Maxwell v. Dow, 176 U.S. 581, 616 (1900); Twining v. New Jersey, 211 U.S. 78, 117 (1908).

41. Gitlow v. New York, 268 U.S. 652 (1925). (Holmes & Brandeis, JJ., dissenting).

42. *Id.* at 666. The dissenting justices had no quarrel with the incorporation announcement; their dissatisfaction rested on their belief that a finding of "clear and present danger," a recognized basis for limiting free speech, was not supported by the facts. *Id.* at 672-73.

43. Fiske v. Kansas, 274 U.S. 380 (1927).

44. *See* H. ABRAHAM, *supra* note 6, at 29-88, which offers a thorough chronology of the history of incorporation.

frain from interpreting their constitutional equivalents to the Bill of Rights as they saw fit. Since the initiation of vigorous incorporation can be attributed to the Warren Court, let us examine how it so quickly transformed the constitutional outlook of many state courts.

B. THE WARREN COURT INFLUENCE: INCORPORATION ASCENDANT

At the time of the reconstruction amendments' passage the political and judicial climate was simply not suited for a diminution of state court control over many of the constitutional standards affecting citizens' day-to-day lives. Not even the piecemeal incorporation initiated by the *Fiske* decision in 1927 significantly lessened the role of states as the primary expositors of individual constitutional guarantees. In short, the separation model continued to thrive long after the Federal Constitution was amended in order to eliminate it. This was especially true in the area of criminal procedure. As recently as 1950, criminal procedure was still a matter left largely to state courts, with over 90 per cent of the country's criminal prosecutions taking place at the state level, and law enforcement considered a local concern.[45]

Although the United States Supreme Court was setting standards for criminal procedure in federal cases, the Court, even after the theory of selective incorporation was recognized, proved exceedingly reluctant to abandon the historic separation model. As late as 1960, the majority of what are arguably the most important guarantees embodied in the Bill of Rights were still not deemed applicable to the several states.[46] Standards varied drastically from one jurisdiction to the next, with an inevitable compromise of what are now recognized as basic rights. As Justice William F. Brennan remarked in a 1961 lecture:

> Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal search and seizure,

45. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965). Judge Friendly forcefully advances the case for local responsibility for law enforcement.

46. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule as deterrent to unreasonable searches and seizures); Robinson v. California, 370 U.S. 660 (1962) (privilege against cruel and unusual punishment); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony cases); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Parker v. Gladden, 385 U.S. 363 (1966) (right to trial by impartial jury); Klofer v. North Carolina, 386 U.S. 213(1967) (right to speedy trial); Duncan v. Louisiana, 391 U.S. 145 (1968); Benton v. Maryland, 395 U.S. 784 (1969) (protection against double jeopardy).

> illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel and downright brutality.[47]

The guarantees espoused in the Bill of Rights and the blatant undermining of the principles embodied therein at the state level where the majority of criminal defendants came into contact with the law created a "disparity between the reality of the criminal process and the ideals of civilized conduct to which we as a nation had sworn allegiance."[48]

When Earl Warren was appointed Chief Justice in 1953, this gap between the illusion and reality of constitutional protection was acutely perceived. The Court recognized that "the principles of the Bill of Rights had to be applied to modern police, prosecutorial, and judicial practices if they were to retain their vitality in a modern age."[49]

It is generally conceded that "the Supreme Court got into the business of developing the Federal Bill of Rights through the default of the state courts."[50] The Supreme Court's demands that the state criminal process come up to federal standards were an attempt to break down, or circumvent, unconscionable state attitudes in areas of basic rights guaranteed by the United States Constitution. In an effort to insure uniform protection of fundamental rights, the separation model was abandoned. The Warren Court began a due process revolution by applying almost all the provisions of the Bill of Rights to the states through the fourteenth amendment. In so doing, the Court brought state criminal procedure up to existing federal levels, and in many areas created new and higher standards. The inadequacies of the separation model were to be rectified by ambitious incorporation of the Federal Bill of Rights into the fourteenth amendment's due process clause: the principles of federalism yielded to the desire of the Court to provide equal justice for rich and poor in state and federal criminal proceedings.[51]

Such an expansion of the Court's role into areas traditionally held by state governments was not an entirely new phenomenon, but it was

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47. Brennan, *supra* note 6, at 778.
48. Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 253 (1968).
49. *Id.* at 256.
50. P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 82 (1970).
51. Pye, *supra* note 48, at 252.

> [T]o the credit of the Supreme Court that it recognized that the nation was in the midst of a social revolution before this became apparent to most of the elective representatives of the people, and that it sought to eliminate the basic defects for the administration of criminal justice within our present structure.[52]

Whether due to inertia or fear of popular disapproval, the other branches of government (both federal and state) had failed to respond to grave problems in the country. Accordingly, the Warren Court became most active in areas where politicians were blind to fundamental justice. The Warren Court's sensitivity to the social problems throughout the country in several respects anticipated the revolution to come in race relations, political representation, and social institutions, but in no area were the Court's contributions more important and timely than in the realm of criminal procedure.

Mapp v. Ohio[53] marked the beginning of the revolution in criminal procedure; by making the exclusionary rule binding on the states, the Court took a major step in establishing a basis for reform that would follow. Thirty-seven years earlier, the United States Supreme Court had ruled that evidence seized in violation of the fourth amendment was to be excluded from trials in the federal courts.[54] In *Wolf v. Colorado*,[55] the Court ruled that the proscriptions of the fourth amendment are binding on the states, but that the exclusionary rule per se is not a constitutional requirement. In so ruling, the Court let the individual states decide whether to follow the federal rule or find alternative methods of controlling illegal police conduct.

In the twelve years between *Wolf* and *Mapp*, over half the states had come to adopt the exclusionary rule, finding that other available sanctions against police lawlessness were largely ineffective. By 1961, it was evident that in those states not applying the exclusionary rule there was flagrant abuse of the spirit of the fourth amendment by state officials. Often evidence illegally seized was turned over to federal authorities under what was referred to as the "silver platter doctrine."

The Supreme Court, in *Mapp*, took the opportunity to again review the exclusionary rule in light of the due process requirement

52. *Id.* at 257.
53. 367 U.S. 643 (1961).
54. Weeks v. United States, 232 U.S. 383 (1914).
55. Wolf v. Colorado, 338 U.S. 25 (1949).

of the fourteenth amendment. Writing for the majority, Justice Clark concluded that the factual basis for the rule in *Wolf* had changed. In fact, the Supreme Court had warned the states in *Wolf*, and several states had ignored the warning. Besides failing to find other effective deterrents to illegal police conduct, states not adopting the exclusionary rule had disregarded the other basis of the rule:

> If the government becomes a lawbreaker, it breeds contempt for the laws; it invites every man to become a law unto himself; it invites anarchy. To declare in the administration of the criminal law that the end justifies the means—to declare that the government may committ crimes in order to secure the conviction of a private criminal—would bring terrible retribution.[56]

Consequently, *Mapp* declared the exclusionary rule to be binding on the states through the fourteenth amendment.

After the Court established this protection against illegal searches and seizures, it remained to interpret the scope of the protection applied to electronic surveillance which previously had been declared constitutional so long as there was no trespass to private property.[57] The Warren Court foresaw the need to require stringent probable cause requirements for such eavesdropping in light of the increased sophistication of the process.[58] Finally, the Court eliminated the specious distinction between trespassory and non-trespassory intrusions in favor of a standard based on a person's reasonable expectation of privacy.[59] In further response to the need for clarification of the scope of the fourth amendment, the Court established a strict probable cause test for warrant-seeking affiants,[60] and emphasized the requirement of establishing the reliability of informants.[61] Throughout these developments, state courts were becoming less and less concerned with the possible requirements of *their* constitutions.

One of the most significant decisions by the Warren Court involved the constitutionally permissible scope of search incident to arrest. The scope of a search incident to an arrest had been con-

56. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
57. *Id.*
58. Berger v. New York, 388 U.S. 41 (1967).
59. United States v. Katz, 389 U.S. 347 (1967).
60. Aguilar v. Texas, 378 U.S. 108 (1964).
61. Spinelli v. United States, 393 U.S. 410 (1968).

sidered previously, but not to the satisfaction of the current court.[62] The issue was treated forthrightly in *Chimel v. California*,[63] the majority concluding that the reasons for a warrantless search incident to an arrest suggested limitations on the permissible scope of such search to the area into which an arrestee might reach to obtain evidence or instrumentalities of the crime perpetrated. Another practice found violative of the fourth amendment was that of investigative searches. The Court, holding such practices were detention without probable cause, put an end to such activity in both state and federal law enforcement.[64] The imposition of the exclusionary rule upon the states, the vehicle for the other search and seizure reforms discussed below, had significant parallels in decisions directed at violations of other constitutional rights by less enlightened jurisdictions.

A court determined to make equality before the law a constitutional reality could not tolerate a situation where the financial status of a criminal defendant determined whether he or she was to have the benefit of counsel. In *Betts v. Brady*,[65] the Supreme Court had ruled that although defendants in federal cases had the sixth amendment right to counsel, the states had only to provide counsel in capital cases or those in which the circumstances of the case indicated that without counsel the defendant would be put to unfair disadvantage. The test of overall fairness was amorphous indeed, depending upon the individual judge's concept of fairness in each trial.[66] In 1963, the Warren Court laid the haziness of this test to rest by ruling, in *Gideon v. Wainwright*,[67] that state defendants in felony cases are entitled to counsel as a matter of constitutional right. Although a few states had argued for preservation of the *Betts* rule, its demise was a foregone conclusion in light of the Warren Court's concern with equality before the law.

The question after *Gideon* was at what point in the prosecution this constitutional right to counsel attached. In subsequent decisi-

62. *See* United States v. Harris, 331 U.S. 145 (1947) (sustained search of living room as incident to arrest of defendant in his home on charge of interstate transportation of forged checks); United States v. Rabinowitz, 339 U.S. 56(1950)(search of defendant's office one and a half hours after his arrest held incident to arrest).
63. Chimel v. California, 395 U.S. 752 (1969).
64. Davis v. Mississippi, 394 U.S. 721 (1968).
65. Betts v. Brady, 316 U.S. 455 (1942). *See* Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel incorporated into fourteenth amendment in capital cases).
66. Cash v. Culver, 358 U.S. 633 (1959) (denial of right to counsel due to defendant's age, lack of education); Crooker v. California, 357 U.S. 433 (1958) (no denial of right to counsel where defendant was interrogated for hours); Cicenia v. Lagay, 357 U.S. 504 (1958) (denial of right to counsel where defendant had surrendered on counsel's advice and later desired consultation).
67. 372 U.S. 335 (1963).

ons, the Court responded that the right attaches upon indictment and that any statements made in violation of the rule are inadmissible.[68] Furthermore, the Court ruled that the right attached at police-conducted lineups because these were considered a critical stage of the proceedings against the accused.[69] The right to counsel at sentencing was also held to be within the scope of the constitutional mandate,[70] as well as a state prisoner's right to obtain the assistance of counsel in preparing a habeas corpus petition.[71]

The Warren Court's application to the states[72] of both the right to counsel and the fifth amendment's protection against self-incrimination provided the backdrop for the Court's most controversial and spectacular reform of criminal procedure. The object of this revolution was involuntary confessions.

The Court had traditionally barred admission of confessions found to be physically coerced.[73] In later years, the Court adapted the rules regarding physical coercion to cases of more subtle psychological coercion.[74] The test became "whether the behavior of state law enforcement officials was such as to overbear the petitioner's will to resist and bring about confessions not fully self-determined."[75]

In this area, as in that of the sixth amendment right to counsel, obtaining relief became dependent on the granting of certiorari by the Supreme Court (which was rare in the field of criminal procedure prior to the Warren Court) and then on meeting this most subjective test. Such an undependable means of redress for violations of such basic rights was wholly inadequate, and, as a result, a "deep-rooted feeling in [the] country that the police must obey the laws while enforcing the laws"[76] was spawned.

Apparently, however, this feeling was not rooted deeply enough to reach the states' judiciaries, for abuses continued.

The Warren Court attempted to apply the due process test to cases containing evidence of highly coercive police conduct used to obtain confessions.[77] It was logical for a court that had already im-

68. Massiah v. United States, 377 U.S. 201 (1964).
69. United States v. Wade, 388 U.S. 218 (1967).
70. Mempa v. Rhay, 389 U.S. 128 (1967).
71. Johnson v. Avery, 393 U.S. 483 (1969).
72. Malloy v. Hogan, 378 U.S. 1 (1964).
73. Brown v. Mississippi, 297 U.S. 278 (1931).
74. Escobedo v. Illinois, 371 U.S. 478 (1964).
75. R. MASLOW, CODDLING CRIMINALS UNDER THE WARREN COURT 62 (1969).
76. *Id.* at 61.
77. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959).

posed the fifth amendment protection against self-incrimination and the sixth amendment right to counsel upon the states, to combine the two to protect individuals from being subjected to more subtle police tactics. This was the direction the Court took in *Escobedo v. Illinois,*[78] holding that the station-house interrogation of the defendant was a critical stage of the proceedings, and, therefore, the defendant's request for the assistance of counsel had to be honored.

Escobedo was received less than appreciatively at the state level.[79] It was often read in restrictive fashion, the rule being limited to the fact situation rather than expanded in keeping with its spirit. In the *Escobedo* case the Supreme Court was

> [t]rying to do what it has always done in the tender area of state criminal procedure—to establish a general proposition and then to give the states some leeway in changing their own procedures to bring their practices into line with that proposition.[80]

Once again, however, state courts did not meet the challenge, and the Court realized it was necessary to take further steps to protect the accused. The vehicle was *Miranda v. Arizona,*[81] wherein the Court required law enforcement officers to inform defendants, upon arrest or custodial interrogation, of their constitutional rights. While setting forth these directives, the Court allowed for experimentation at the state level so long as the practices followed assured at least as much protection as afforded by a literal application of *Miranda.*

It has been suggested that the *Miranda* decision represented a culmination of all the forces at work on the Warren Court which precipitated its reform of criminal procedure. Among these forces were the states' continuing violations of constitutional rights, the hypocrisy between what was set forth as every citizens' due in the Bill of Rights (and the constitutions of the states) and the reality of criminal procedure, and the Court's pervasive philosophy of egalitarianism.[82] Cases like *Chimel, Mapp,* and *Miranda* followed defaults, both legislative and judicial, in the administration of criminal justice. "It was

78. Escobedo v. Illinois, 371 U.S. 478 (1964).
79. *See generally* C. LYTLE, THE WARREN COURT AND ITS CRITICS 79-83 (1968).
80. *See generally* Silver, *The Supreme Court, The State Judiciary, and State Criminal Procedure,* 41 ST. JOHNS L. REV. 331 (1967).
81. Miranda v. Arizona, 384 U.S. 436 (1966).
82. *See generally* A. COX, THE WARREN COURT: CONSTITUTIONAL DECISIONS AS AN INSTRUMENT OF REFORM (1968).

only when the toleration by state courts of inhuman treatment of criminal defendants became intolerable that the Supreme Court finally interceded."[83] Then, the situation was acceptable, for if liberties were not protected in Des Moines, at least Washington could be relied on for relief.[84]

The activism of the Warren Court explains why dependence on the Supreme Court became entrenched—and why states' bills of rights suffered what might be called atrophy. Some now feel, however, that the Supreme Court is rapidly removing itself from the position of compensator for state court shortcomings. It is necessary, therefore, to evaluate the present status of the states' bills of rights since they may increasingly have to sustain the high constitutional standards the Warren Court inspired. The direction of the Burger Court will then be briefly examined in order to set the stage for a discussion of how its new direction in the area of search and seizure law has created special problems for state courts.

C. APPEARANCE VS. REALITY: THE CONTEMPORARY STATUS OF THE INDEPENDENT STATE GROUND DOCTRINE

The Warren Court only appeared to supplant states' bills of rights with an invigorated Federal Bill of Rights. The ability of the states to progressively expand individual rights remained unaltered as a fundamental feature of the nation's dual judicial system. This judicial duality significantly limits the power of the Supreme Court to review state court judgments which do not offend the Federal Constitution. For example, the United States Supreme Court will not review a judgment which has an "adequate and independent state ground." This concept is essential to the preservation of state judiciaries independent enough to be sensitive to the needs of their respective jurisdictions.

Given the importance of the independent state ground concept—and the shadow in which the Warren Court's activism placed it—it is appropriate to briefly review the concept and demonstrate how it not only allows, but impliedly compels an active development of state law under states' bills of rights.

The Supreme Court's power to review decisions of state courts

83. Warren, *supra* note 33, at 224.
84. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

is grounded in Article III of the Constitution which provides that the Court shall have appellate jurisdiction under such regulations as Congress shall make. The Court was first empowered to review state court decisions under the Judiciary Act of 1789[85] which was carefully drawn to limit jurisdiction to the consideration of federal questions only; jurisdiction to reverse state court judgments on any ground save that which "immediately respects" a claim of federal rights was expressly denied. The 1914 re-enactment of the Judiciary Act of 1789 expanded the Court's power to review state court judgments by authorizing review of such decisions even if the state court had sustained the federal claim[86] so as to enable the Court to enforce nationwide uniformity in the interpretation of federal law.[87] With only minor refinements, the 1914 provision continues to define the Supreme Court's power to review state court judgments, a power presently codified in 28 U.S.C. § 1257.[88]

On its face, section 1257 does not limit the power of the Court to review federal questions only. The notion that the Supreme Court's appellate jurisdiction over state courts is limited to the review of federal *questions* in cases rather than extending to the decisions of *cases* as a whole received its crucial test in 1875 after Congress deleted the sentence of the Judiciary Act of 1789 which limited review to error which "immediately respects" the federal question.[89] In the landmark case of *Murdock v. City of Memphis*,[90] however, the Court adhered to the limitation.

The "case or controversy" clause of Article III provides the basis for concluding that the Supreme Court lacks jurisdiction to re-examine a case which does not contain a federal question. Where issues of state law are dispositive and the supremacy clause has not been violated, there is simply no "case or controversy." There is persuasive evidence that the Court's policy to refuse to hear a case resting on an adequate and independent state ground is jurisdictional and constitutionally mandated. In *Herb v. Pitcairn*,[91] Justice Jackson stated that:

85. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 86-87.
86. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.
87. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUREME COURT 188-98 (1927). The amendment was prompted largely by the decision in Ares v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911) (holding the first workman's compensation statute in conflict with the due process clause of both the state and federal constitutions).
88. Act of June 25, 1948, ch. 646, 62 Stat. 929.
89. Act of Feb. 5, 1867, ch. 28, 14 Stat. 386, 387.
90. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).
91. Herb v. Pitcairn, 324 U.S. 117 (1945).

> The reason [for the policy] is so obvious that it has rarely been thought to warrant a statement. It is found in the partitioning of the power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. . . . [I]f the same judgment would be rendered by a state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.[92]

Thus, it appears that whether or not *Murdock* was technically a constitutional decision or a matter of statutory construction, it has through the years "assumed constitutional dimensions . . . and [i]t is inconceivable that either Congress or the Court would attempt to reverse it."[93] Apart from the fact that such a determination would obviously increase the Court's work load[94] and call for the Court to decide types of cases it has always refrained from considering, a reversal of *Murdock* would drastically and fundamentally intrude on principles of federalism vital to this nation's dual judicial system.

Murdock established two principles. First, the Court will not review a case, despite the presence of a federal question, if there is an adequate state ground which supports the decision. Second, the Court will accept as binding upon it the state court's decision of questions of state law. Thus, the Court is without jurisdiction to re-examine a case if the state court avoids any federal questions which may be present and grounds its decision exclusively on state law.[95] Also, there will be no review if the state court has decided both state and federal questions as long as its decision of the federal question was unnecessary to the disposition of the case.[96]

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92. *Id.* at 125-26. For more recent discussions of the doctrine see Fay v. Noia, 372 U.S. 391, 428-30 (1963); N.A.A.C.P. v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

93. *Project Report, supra* note 4, at 312.

94. *See generally* Hart, *Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Douglas, *The Supreme Court and Its Caseload*, 45 CORNELL L.Q. 401 (1951). *Cf.* Harlan, *Manning the Dikes*, 13 RECORD N.Y.C. BAR ASS'N 541 (1958).

95. *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966); Linde, *Without Due Process*, 49 ORE. L. REV. 125, 133 (1970). Professor Linde has argued that a state court *must* decide questions of state law first.

96. *See, e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965).

The above principles are controlling whenever the state court decision is "independent and adequate." By "independent," the Supreme Court has meant that the state analysis must evidence sufficient autonomy to withstand the collapse of the federal analysis. Often the threshold question is the most difficult: whether the state has in fact relied on its own law; in other words, whether there is any "manifestation of willingness to sustain the judgment on state law grounds."[97] For example, the fact that the wording of a provision of a state's bill of rights is identical to its federal counterpart would not, in and of itself, prove that the state's analysis is dependent on the federal one. Nor should it; for "it is certainly no novel perception that different men may employ identical language yet intend vastly different meanings and consequences."[98]

The task of ascertaining the basis for a state court decision becomes especially difficult where there is no opinion or where the basis for the opinion is ambiguous. Where, for instance, parallel citations of the state and federal constitutions is the sole indication of the decision's basis, the Federal High Court is incapable of determining the decision's foundation.[99]

The tests for "adequacy" have developed primarily in response to state court attempts to frustrate claims of federal rights. As noted by Professor Bice:

> [T]here is ample evidence in the history of the civil rights struggle to show that state judges have invoked state grounds to discriminate against the assertion of federal rights and have sought to preclude federal review of their decisions. In fact, the use of state grounds to discriminate against federal rights has been the major factor influencing the course of the Supreme Court's decisions which define the meaning of an adequate state ground.[100]

Usually, it is a procedural rule, rather than a substantive rule of law, which must meet the test of adequacy; this is the context in which the problem of justifiable Supreme Court review emerges with es-

97. *Project Report, supra* note 4, at 313.
98. Falk, *supra* note 4, at 282.
99. *See, e.g.*, People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). The court discusses the confusion that can result where parallel citations to the federal and state constitutions are the sole indication of a decision's basis.
100. Bice, *Anderson and the Adequate State Ground,* 45 S. CAL. L. REV. 750 (1972).

pecially sharp focus, for when a rule of procedure precludes the entertainment of a federal claim in the state court, the adequacy of such rule is itself a federal question.[101] In essence, the test of adequacy is met if the non-federal ground is "tenable" (*i.e.*, with fair and substantial support).[102]

We are concerned with situations where a state court relies on *substantive* grounds to *broaden* the protection guaranteed by the Federal Constitution as interpreted by the Supreme Court. Under any of the tests for "tenability,"[103] a construction of an individual's rights under substantive state law which is at least as favorable as the rights given by federal law assuredly meets the test for "adequacy," and, in effect, would "clearly serve to insulate the decision from Supreme Court review."[104]

The lack of attention given substantive law in the tests for adequacy is explained by the fact that it simply cannot serve the purpose of discriminating against the enforcement of federal rights. Since the supremacy clause prohibits a state court from approving state action solely on state grounds, it thus prohibits the state court from relying on substantive law as a justification for refusing to consider federal claims "*unless the state limitations are at least as favorable of federal rights as the federal restrictions.*"[105] Clearly, then, a state court will immunize its decision from Supreme Court review by giving a state guarantee which has a counterpart in the Federal Constitution a broader interpretation than the Supreme Court has given the parallel federal provision.

In light of this fact, the Burger Court's reversal of the direction Supreme Court decisions took during the Warren Court era raises difficulties. These difficulties, which will be discussed below, can best be understood if the way in which the Burger Court has mani-

101. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965); Love v. Griffith, 266 U.S. 32, 33-34 (1924); Camp v. Arkansas, 404 U.S. 69 (1971).

102. *See, e.g.*, Ward v. Love County, 253 U.S. 17, 22 (1920); Laurence v. Tax Comm'n, 286 U.S. 276 (1932). *See generally* Note, *The Untenable Non-federal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961); Comment, *Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decisions of Federal Questions*, 61 COLUM. L. REV. 255 (1961).

103. Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 543 (1930) (an untenable ground is one "without substantial basis"); Central Union Tel. Co. v. City of Edwardville, 269 U.S. 190, 195 (1925) (untenable ground is one "so unfair or unreasonable in its application to those asserting a federal right as to obstruct it"); Ward v. Love County, 253 U.S. 17 (1920) (untenable ground is one "without any fair or substantial support"); Vandalia R.R. v. Indiana *ex rel.* City of South Bend, 207 U.S. 359, 367 (1907) (untenable ground is one which is "unreasonable").

104. Wilkes, *supra* note 1, at 435.

105. Bice, *supra* note 100, at 754.

fested its departure from the Warren Court's orientation, especially in the area of criminal procedure, is examined.

D. STATES' BILLS OF RIGHTS IN THE BURGER COURT ERA: A NEW CHALLENGE

When the Warren Court tenure came to a close in 1969 there was recognition of its accomplishments, as well as a fear that its reform might be halted.

> [T]he doctrines of equality, freedom, and respect for human dignity laid down in the numerous decisions of the Warren Court cannot be warped back to their original dimensions. The attitude of more and more Americans . . . is one of intense commitment to human rights. . . . [I]t may well appear that what is supposedly the most conservative of American political institutions . . . did the most to help the nation adjust to the needs and demands of a free society.[106]

As we enter the fifth term of the Burger Court, it appears the fears of civil libertarians were well-founded.

In no area is the change in direction of the Court more apparent than in cases involving the fourth amendment. The constitutional protection against electronic surveillance suffered a retardation in *U.S. v. White*,[107] wherein the Court refused to apply *Katz* retroactively, and also found no distinction between electronically equipped and radio equipped agents.[108]

One of the most momentous and far-reaching decisions of the Warren Court, that applying the exclusionary rule to the states, appears to be in serious jeopardy. The Chief Justice has long been opposed to the rule as an effective deterrent to illegal police conduct. He expressed public disapproval as early as 1964,[109] and made his first forceful statement against it as Chief Justice in *Bivens v. Six*

106. Beaney, *The Warren Court and the Political Process*, 67 MICH. L. REV. 343, 352 (1968).
107. United States v. White, 401 U.S. 745 (1971).
108. *See* United States v. Kahn, 416 U.S. 143 (1974); United States v. Giordano, 416 U.S. 505 (1974). While these cases have upheld the probable cause and authorization requirements for a warrant to conduct electronic surveillance, they were disposed of as a matter of statutory construction and did not turn on the invasion of constitutional rights.
109. Burger, *Who Will Watch the Watchmen*, 14 AM. U.L. REV. 1 (1964).

Unknown Agents of Federal Bureau of Narcotics.[110] Other members of the Court have voiced similar feelings. The most serious blow to the rule thus far came in *United States v. Calandra,*[111] in which Mr. Justice Powell, writing for the majority, stated that the policy behind the exclusionary rule does not require its extension to grand jury proceedings. Accordingly, the Court held that a witness summoned to appear and testify before the grand jury may not refuse to answer questions on the ground that they are based on evidence obtained in an unlawful search and seizure.

The "search incident to arrest" exception to the fourth amendment's warrant requirement—an exception carefully limited by their predecessors, has also been altered by the Burger Court. The Court refused to give retroactive application to *Chimel v. California*[112] and has played illogical and confusing havoc with searches of both moving vehicles and persons beginning with *Coolidge v. New Hampshire*[113] and ending for the moment with the validation of full searches incident to custodial arrests in *United States v. Robinson.*[114]

Analogous to the current majority's retrenchment with respect to the exclusionary rule are the significant limitations placed on the fifth amendment's right against self-incrimination—a privilege so highly regarded only a few years earlier that it was given unparalleled protection in a number of the Warren Court's most controversial decisions. The most significant restriction yet of this privilege came in *Harris v. New York,*[115] a decision putting a major limitation on *Miranda.* Chief Justice Burger wrote for the majority in *Harris* that statements made in violation of the *Miranda* rules could be used for the purpose of impeaching a witness' testimony. As was pointed out in a recent article, the decision not only was an example of poor logic and limited candor, but could also be viewed as severely chilling a defendant's right to testify on his or her own behalf.[116] Also, in *Kastigar v. United States,*[117] the Court sustained the constitutionality of a federal immunity statute limited in its protection to com-

110. Bivins v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).
111. United States v. Calandra, 414 U.S. 338 (1974).
112. 395 U.S. 752 (1969).
113. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
114. United States v. Robinson, 414 U.S. 218 (1973), *decided with* Gustafson v. Florida, 414 U.S. 260 (1973).
115. Harris v. New York, 401 U.S. 222 (1972).
116. *See generally* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198 (1971).
117. Kastigar v. United States, 406 U.S. 441 (1971).

pelled testimony and evidence derived therefrom. Finally, the Court rejected the possibility of fifth amendment violations where a grand jury witness was ordered to give a voice recording and where a handwriting exemplar was required.[118]

There remained areas of the law regarding right to counsel where the rule of *Gideon*[119] had yet to be tested. The Burger Court's extension of the right to preliminary hearings and subsequently, to all offenses which may result in imprisonment cannot be ignored.[120] The underlying basis for the decisions, however, is of little comfort to civil libertarians. The Court apparently extended the right to counsel to pre-trial hearings primarily because it had been shown that appointment of counsel did not bog down the system—that it was logistically possible to carry out the direction of *Gideon* in the pre-trial setting. In the recent case of *Ross v. Moffit*,[121] however, the Court found that the fourteenth amendment does not require appointment of counsel on behalf of indigent defendants seeking federal discretionary appeals.

Lastly, in the crucial matter of a court's acceptance of guilty pleas, the Burger Court held that a guilty plea can stand so long as the plea is intelligently given—a standard that has come to mean without gross error on the part of counsel;[122] and the Court ruled that the possibility of avoiding the death penalty would not in itself render a guilty plea invalid.[123]

The decisions of the Burger Court which demonstrate a degree of sensitivity to the rights of the criminally accused cannot be dismissed;[124] but neither should they obscure the fact that the direction of the current Supreme Court is markedly different from that of its predecessor. This is especially true in the area of search and seizure law, where the Burger Court has shown a "growing resistance

118. United States v. Dionisio, 410 U.S. 1 (1973) (voice recording); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplar). In both cases the Court rejected fourth amendment objections as well.

119. 372 U.S. 335 (1962).

120. Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Argersinger v. Hamlin, 407 U.S. 25 (1972) (imprisonment).

121. Ross v. Moffit, 94 S. Ct. 2437 (1974).

122. *See, e.g.*, Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970).

123. *See* Brady v. United States, 397 U.S. 742 (1970); North Carolina v. Alford, 400 U.S. 25 (1970).

124. *See, e.g.*, Dickey v. Florida, 399 U.S. 235 (1970) (indigent may not be confined beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of his sentence); Furman v. Georgia, 408 U.S. 238 (1972) (death penalty unconstitutional as applied). It can readily be seen that most of these cases reflect the court's pragmatic concern with the efficiency of the criminal process rather than an interest in maintaining constitutional protections.

not only to the enlargement of the rights recognized by the fourth amendment but also an inclination to reconsider a few assumptions long accepted by the Court.[125]

One of the problems occasioned by this retreat from Warren Court standards concerns the state courts, whose own decisions, although often mere applications of minimum national standards when handed down, now frequently represent what at least one court has called the "stricter" rules associated with Warren Court interpretations of the Federal Constitution.[126] Strict rules are clearly constitutional, for the states are free to extend to their citizens greater protections than the Federal Constitution requires, but they are also uncomfortable for a state court to maintain in the absence of supportive Supreme Court decisions. Apparently, state courts associate a vanguard position with the nation's high court rather than themselves.

One of this article's primary objectives is to challenge the notion that state courts should automatically imitate the Supreme Court's outlook on fundamental constitutional questions. Even the Warren Court sought only to enunciate minimum "national standards of decency and propriety" rather than absolute standards.[127] Obviously, minimum standards can be improved upon at the local level in many ways. Accordingly, the Burger Court's retrenchment should be viewed as a simple readjustment of the nation's minimum constitutional standards rather than an attack on strict rules per se. Under the Burger Court, therefore, the states actually have greater responsibilities than they did under the Warren Court, for when constitutional minima are lowered the number of instances when more exacting state standards will be appropriate is necessarily increased. The independent state ground doctrine provides support for such standards while the experience gained under the Warren Court standards—which are by no means an upper limit on state rules—provides a basis for gauging appropriateness.

125. Stephens, *supra* note 1, at 272. *See* Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973); Broderick v. Oklahoma, 413 U.S. 601 (1973). In both these cases the mounting attacks on the "overbreadth" doctrine in first amendment cases bore fruit. The Court ruled that a statute must thereafter be found to be "substantially overbroad"—a conclusion Justice Brennan found to be a "wholly unjustified retreat from previously well-established . . . principles." *See also* Younger v. Harris, 401 U.S. 441 (1972) (significant restraints placed on litigants seeking federal relief from state criminal prosecutions); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (Stewart, J., dissenting). Justice Stewart in *Mitchell, supra*, observed that the only explanation of the decision was the change in the Court's membership.

126. People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43 (1974).

127. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Mapp*, 1961 SUP. CT. REV. 1, 2 (1961).

In an effort to justify these general observations *United States v. Robinson*,[128] a Burger Court search and seizure decision, and *People v. Superior Court (Simon)*,[129] a pre-*Robinson* California Supreme Court search and seizure decision enunciating constitutional standards significantly higher than those found in *Robinson*, will be examined. The tension between these two decisions and the conflicting ways in which lower California courts have attempted to relieve that tension exemplify the circumstances which will, it is submitted, stimulate a growing interest in federalism as a fair and workable solution to the problems created by the new direction of the Supreme Court.

PART II

Both *Robinson* and *Simon* present the same question: what circumstances permit a warrantless search of the person as incident to a custodial arrest arising from a traffic offense. Robinson was lawfully arrested for operating a vehicle after revocation of his driver's license and obtaining a permit by misrepresentation. The arresting officer then searched Robinson and extracted from an inside pocket a crumpled cigarette package which was found to contain capsules of heroin. In contrast, one year earlier, in *Simon*, the California Supreme Court had held that a search of the person incident to a custodial arrest for a traffic violation can only be upheld where there are specific facts or circumstances which indicate to the officer that the suspect is armed and dangerous. Moreover, the court would limit such a search to a pat-down reasonably calculated to discover weapons. The facts in *Simon* are strikingly similar to those in *Robinson*. Simon was stopped for driving without headlights or taillights. Unable to produce any identification, he was lawfully taken into custody and subsequently searched. The search revealed a bag of marijuana in Simon's pants' pocket. It seems appropriate therefore to examine the relative merits of the two decisions; for if the California Supreme Court finds the *Robinson* rationale preferable to that contained in *Simon*, no conflict exists. The state rule can simply be aligned with the new federal standard. The authors, however, believe that *Robinson* need not control those California decisions which provide greater protection from unreasonable search and seizure. *Robinson* may set minimum standards for fourth amendment protection, but it does not preclude stricter state standards. Moreover, we

128. 414 U.S. 218 (1974).
129. 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972).

suggest that *Simon* represents the better rule, reflects the majority view of state jurisdictions and measures more realistically the necessity for search incident to custodial arrest.

A. *UNITED STATES V. ROBINSON*: IS THE NEW RULE OF SEARCH INCIDENT TO "CUSTODIAL" ARREST MERITORIOUS?

Severe Departure from Established Search and Seizure Precedent

The search in *Robinson* was upheld under the search-incident-to-arrest exception to the warrant requirement of the fourth amendment. In order to analyze the merits of Justice Rehnquist's majority opinion in *Robinson*, it is best to begin not with an analysis of the search-incident-to-arrest exception, but with an analysis of the fourth amendment, the "warrant requirement," its exceptions and then specifically the search-incident-to-arrest exception. Neither the language of the fourth amendment itself nor the Court's interpretation of the amendment provides a clear guide for evaluation of searches and seizures. The Court's fourth amendment decisions have been characterized by a multiplicity of opinions,[130] sharply-worded dissents[131] and rapid shifts in interpretation.[132] However, from a review of the decisions since the Court adopted the exclusionary rule for the federal courts, there does emerge a general scheme of analysis of the warrant requirement and its exceptions. The often reiterated principles of the necessity for judicial review and of a case-by-case adjudication remain constant. The *Robinson* majority directly rejects the principles of judicial review and case-by-case adjudication and departs significantly from the analytic scheme of the warrant requirement and its exceptions.

The fourth amendment contains two clauses. The first is a general prohibition against unreasonable searches and seizures; the second lays out the requirements for a valid warrant.[133] The first dif-

130. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

131. *See* United States v. Rabinowitz, 339 U.S. 59, 68-86 (1950) (Frankfurter, J., dissenting); Terry v. Ohio, 392 U.S. 1, 35-39 (1968) (Douglas, J., dissenting); Adams v. Williams, 407 U.S. 143, 153-62 (1972) (Marshall, J., dissenting).

132. *See, e.g.*, Marron v. United States, 275 U.S. 192 (1927). Beginning with *Marron, supra*, the Court apparently reversed itself five times before adopting the present rule.

133. U.S. CONST. AMEND. IV reads, in toto,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ficulty in fourth amendment interpretation is whether to read these two clauses independently or together. Read independently, they present a bifurcated scheme whereby the first applies to warrantless searches and the second to searches under authority of a warrant. This, however, has not been the reading the Supreme Court has given the fourth amendment. The Court has in the past read the two clauses together, equating reasonable searches allowed in the first clause with the requirements for a warrant—a judicial determination of probable cause and requisite specificity as to items subject to seizure—as outlined in the second clause.[134] Thus, reading the two clauses together produces a minimum standard of reasonableness and a mandate for judicial review, but still leaves unanswered the very important question of the function of the warrant, when it is or is not needed.

From the wording of the fourth amendment which prohibits unreasonable searches, not warrantless searches, and from the very first decisions of the Court acknowledging the need to search without a warrant in certain circumstances, it has been clear that warrantless searches are not necessarily unreasonable.[135] The strictest interpretation of the primacy of the warrant would require that where a warrant might have been obtained and yet was not, the resulting search would be unreasonable. The Court, though, has not taken that position. In *Trupiano v. United States*[136] where the seizure of an illicit distillery incident to a lawful arrest was held invalid, the Court reasoned that a search warrant should have been obtained since there was sufficient information available as a basis for the warrant, there was ample time to obtain one and the "property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant."[137] Just two years later, however, in *United States v. Rabinowitz*,[138] the Court effectively overruled *Trupiano*'s reliance on the requirement of a search warrant, saying, the "relevant test is not whether it is reasonable to procure

134. *See* Warden v. Hayden, 387 U.S. 294, 316 (1967) (Douglas, J., dissenting); United States v. Matlock, 415 U.S. 164, 180 n.1 (1974) (Douglas, J., dissenting). The original draft of the fourth amendment read: "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause. . . ." (1 ANNALS OF CONG. 754 (1789)). Justice Douglas argued in dissent in *Warden, supra,* and *Matlock, supra,* that the change in the adopted version indicated the framers intent that both clauses be read together. The first clause, argued Douglas, was intended to strengthen the protection afforded individual rights, not to allow warrantless searches to become the rule.

135. *See* Weeks v. United States, 232 U.S. 383 (1913); Carroll v. United States, 267 U.S. 132 (1924); Agnello v. United States, 269 U.S. 20 (1925).

136. Trupiano v. United States, 334 U.S. 699 (1948).

137. *Id.* at 706.

138. United States v. Rabinowitz, 339 U.S. 56 (1950).

a search warrant but whether the search was reasonable."[139] Though the *Trupiano* case has not disappeared from Supreme Court discussion of the fourth amendment, it has never been specifically revived.[140]

Though the Court has repudiated the *Trupiano* position, it has consistently voiced a preference for warrants. Because the question of whether a warrant could have been obtained is only one question to be asked in evaluating a warrantless search, the focus of the Court's inquiry has been on the necessity to search. The preference for warrants then really means that there must be some showing of exigent circumstances to justify a warrantless search. Justices Douglas, Frankfurter and Jackson, who formed the *Trupiano* majority, and who continued to emphatically assert the primacy of the warrant requirement, advocated that warrantless searches only be permitted in situations of "absolute necessity" under circumstances where a warrant was practically unobtainable.[141] Thus, Justice Douglas, in *McDonald v. United States*,[142] said:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from constitutional mandate that the exigencies of the situation make that course imperative.[143]

The more typical expression of the scheme of the warrant requirement and its exceptions has been framed in less forceful language as found in *Katz*:

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[144]

This phrasing subsumed the requisite showing of exigent circum-

139. *Id.* at 66.
140. *See* Coolidge v. New Hampshire, 403 U.S. 443, 476-77, 518-19 (1971).
141. United States v. Rabinowitz, 399 U.S. 56, 70 (1950).
142. McDonald v. United States, 335 U.S. 451 (1948).
143. *Id.* at 455-56.
144. 389 U.S. 347, 357 (1967).

stances in the judicial history of the "well-delineated exceptions."[145]

Those few exceptions to the warrant requirement include: (1) search incident to arrest;[146] (2) warrantless search of automobiles;[147] (3) search in hot pursuit of a felon;[148] and (4) perhaps search of objects in plain view.[149] Such exceptions have been established by the Court when circumstances were present which indicated a warrant could not be practicably obtained.[150] The Court's procedure has been to examine the circumstances of each case to determine whether the search or seizure could be justified. There has been, though, continuous disagreement on the Court as to the degree of exigency required to invoke one of the exceptions. Again, those Justices who advocated strict adherence to the warrant requirement jealously would limit warrantless searches "to the demands of necessity."[151] Justice Frankfurter warned in his dissent in *Rabinowitz* that to interpret the requirement of exigent circumstances loosely is to enthrone the exceptions into the rule. In reality this may have already occurred simply because most searches and seizures are in fact conducted without a warrant.[152] Justice Frankfurter's fears are being realized in recent decisions of the Burger Court including *Robinson*. These decisions concerning the search-incident-to-arrest and warrantless search of automobiles exceptions have abandoned a careful inquiry into the necessity to search in a specific set of circumstances and have substituted a general test of "reasonableness" tempered by considerations of a set-off of competing interests of effective law enforcement and individual rights.[153] If the search can be classified under one of the exceptions and if it was not an unreasonable police procedure, these decisions find the "reasonableness" re-

145. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1970). The language in *Katz* has been frequently quoted by the Court in setting out the scheme of the warrant requirement and its exceptions.
146. Chimel v. California, 395 U.S. 752 (1969).
147. Carroll v. United States, 267 U.S. 132 (1924).
148. Warren v. Hayden, 387 U.S. 394 (1967).
149. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
150. *See* Carroll v. United States, 267 U.S. 132 (1924); Warden v. Hayden, 387 U.S. 394 (1967).
151. United States v. Rabinowitz, 339 U.S. 56, 73 (1950) (Frankfurter, J., dissenting).
152. *See* United States v. Robinson, 471 F.2d 1082, 1113 n.7 (D.C. Cir. 1972), *rev'd* 414 U.S. 218 (1973). The court reveals that "[i]n 1966 the New York police obtained 3,897 search warrants and made 171,288 arrests (of which only 366 were made pursuant to an arrest warrant)." For California there are figures indicating an even greater ratio of arrests to search warrants. *See* 2 LOYOLA U.L.A.L. REV. 168 (1960), stating that "in the period from 1931 to 1961, the Los Angeles Municipal Court issued only 538 search warrants. In the same period 500,000 felony criminal prosecutions originated in the court."
153. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433, 439 (1973) ("The ultimate standard set forth in the Fourth Amendment is reasonableness").

quirement of the fourth amendment to be satisfied. The decisions then treat "warrantless searches as if they were the rule rather than a 'narrowly drawn' exception."[154]

The warrantless search of automobiles and search-incident-to-arrest exceptions have often been closely intertwined in fourth amendment decisions.[155] However, they had very separate origins. The search-incident-to-arrest exception stems from the common law while the Court created the exception for automobiles in *Carroll v. United States*[156] in 1924. In addition, each exception has had a separate history in fourth amendment decisions. The search-incident-to-arrest exception was long the subject of intellectual controversy until in 1969 the Warren Court, in *Chimel v. California*,[157] redefined the boundaries of the exception according to Frankfurter's concept of "necessity"—the need to search for evidence or weapons. The history of the warrantless search of automobiles exception was a subject of little controversy until the years of the Warren Court. In those years, the Court groped to reconcile the demands of law enforcement with the clear requirements of the exception found in *Carroll*. What resulted were decisions that were inconsistent and ultimately confusing to those who tried to interpret their meaning.[158] In these decisions, the Burger Court has subsequently found the needed support to go beyond certainly the intent of the Warren Court decisions and to find reasonable warrantless searches of automobiles where the exigent circumstances which created the exception were not present.

In *Carroll*, where the warrantless search of automobiles exception was first delineated, federal prohibition agents stopped and searched the automobile of two men known to the agents as sellers of illegal liquor. The Court upheld the search of the car because the agents had probable cause to believe "that intoxicating liquor was being transported in the automobile," and because a warrant could not be practicably obtained due to the fact that the vehicle could be quickly moved out of the locality or jurisdiction in which the war-

154. Adams v. Williams, 407 U.S. 143, 154 (1972) (Marshall, J., dissenting).

155. *See* Carroll v. United States, 267 U.S. 132 (1924); Preston v. United States, 376 U.S. 364 (1964); Chambers v. Maroney, 399 U.S. 42 (1970). Where an automobile search resulted from or was contemporaneous with an arrest, the Court has discussed both exceptions.

156. Carroll v. United States, 267 U.S. 132 (1924).

157. Chimel v. California, 395 U.S. 752 (1969).

158. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); People v. Webb, 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967). *Compare* Preston v. United States, 376 U.S. 364 (1964) *with* Cooper v. California, 386 U.S. 58 (1967) *and* Harris v. United States, 390 U.S. 234 (1968). *See also* Chambers v. Maroney, 399 U.S. 42 (1970).

rant must be sought.[159] The requirements of the exception were at its inception very clear; justification was based on the mobility of the automobile and probable cause to believe contraband was contained therein. Cases following *Carroll* employed the dual criteria. Thus, in *Dyke v. Taylor Implement Mfg. Co.*,[160] the Court found no probable cause to believe that there was contraband in the automobile and therefore no right to search. Where defendant and his wife were already in police custody and the automobile was parked at defendant's home when it was seized, the Court in *Coolidge* held that despite probable cause to seize the car the seizure was invalid without a warrant. The decision depended on the fact that defendant was unable to move the car and, therefore, no emergency existed which justified a warrantless seizure. However, in decisions prior to *Coolidge*, the Court upheld warrantless searches conducted while the automobiles were in police custody with no threat of their being moved out of the jurisdiction. In *Chambers v. Maroney*,[161] the Court found the fact that the auto had been seized "on the highway" satisfied the criteria of mobility. In *Cooper v. California*,[162] however, the Court appeared to uphold the search because the custody was effected under a state statute; no question of the car's mobility was discussed.

Recent Burger Court decisions relying on *Chambers* and *Cooper* appear to have rejected completely the significance of mobility. In *Cardwell v. Lewis*,[163] Justice Blackmun writing for the Court relied on *Chambers* to uphold a warrantless seizure of an automobile from a public parking lot in a situation where there was probable cause, but where there were no exigent circumstances. The decision interpreted the "on the highway" reference in *Chambers* as significant not because it suggested mobility but because it suggested presence on public property. In *Cady v. Dombrowski*,[164] Justice Rehnquist relied on *Cooper* to uphold a warrantless search of an auto held in a private garage where there was neither danger of the car's being "moved out of the jurisdiction" nor probable cause to believe contraband present.[165]

159. 267 U.S. 132, 162 (1924).
160. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). *See also* Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Cardwell v. Lewis, 94 S. Ct. 2464 (1974); United States v. Matlock, 415 U.S. 164 (1974); United States v. Edwards, 415 U.S. 800 (1974).
161. Chambers v. Maroney, 399 U.S. 42 (1970).
162. Cooper v. California, 386 U.S. 58 (1967).
163. Cardwell v. Lewis, 94 S. Ct. 2464 (1974).
164. Cady v. Dombrowski, 413 U.S. 433 (1973).
165. In *Cady*, the driver, a member of the Chicago Police Department, had been

Justice Rehnquist in *Cady* purported to rely on the line of cases following *Carroll*, but the circumstances which justified the right to search in *Carroll* were absent in *Cady*. He relied instead on the interests of the police and the reasonableness of their procedures to protect public safety.[166] To support the validity of the seizure of the car, he argued that:

> [T]here [was] no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.[167]

To support the validity of the search of the automobile, he argued again that it was not an abnormal police procedure in rural Wisconsin and concluded that:

> [T]he fact that the protection of the public might . . . have been accomplished by "less intrusive" means [did] not, by itself, render the search unreasonable.[168]

Such an approach is analogous to that taken in the *Robinson* opinion in its treatment of the search-incident-to-arrest exception.

Unlike the warrantless search of automobile exception, the search-incident-to-arrest exception was developed in English and American common law and was adopted by the Supreme Court. Though before *Weeks*[169] there were very few cases even at common law dealing with the right to search incident to arrest, what cases there were limited the proper purposes of such a search to the need to discover fruits, instrumentalities, or evidence of the crime for which the suspect was arrested and weapons which could be used against the arresting officer or as a means to escape.[170] Each of

arrested for drunk driving and the police believed his service revolver was in the car. The revolver lawfully belonged to Dombrowski and was therefore not contraband. Neither was it evidence of the crime. In contrast, in *Chambers* there was probable cause to believe evidence was contained in the car; and in *Cooper* it was assumed that the probable cause requirement was met because Cooper was arrested in his car on suspicion of trafficking in narcotics. In his dissent, Justice Brennan characterized the search in *Cooper* as a new exception: a warrantless search of an automobile subject to forfeiture proceedings.

166. 413 U.S. 433, 453 (1973) (Brennan, J., dissenting). Justice Brennan characterized the majority's decision as resting "on a subjective view of what is deemed acceptable in the way of investigative functions performed by rural police officers." *Id.*

167. *Id.* at 447.

168. *Id.*

169. 232 U.S. 383 (1913).

170. *See* Spalding v. Preston, 21 Vt. 9 (1848) (fruits, instrumentalities or evi-

these early common law cases, with the exception of *Leigh v. Cole*,[171] involved an arrest for a crime for which there were fruits or instrumentalities. *Leigh* involved an arrest for drunkeness, and the judge in his address to the jury advised that:

> [T]here is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has a weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case.[172]

The decisions of the common law cases were given constitutional approval in the early search and seizure cases decided after the adoption of the exclusionary rule. In *Weeks*, the Supreme Court first recognized a "right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits and evidences of crime."[173] Nine years later in *Carroll*, again in dictum, the Court extended the right to search to "whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense. . . ."[174] One year after *Carroll*, in *Agnello v. United States*,[175] the Court first included the other traditional justification and in dictum affirmed the right to search for "weapons and other things to effect an escape from custody. . . ."[176]

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dence of theft of silver); Reifsnyder v. Lee, 44 Iowa 101 (1876) (fruits, instrumentalities or evidence of theft of cattle); Kneeland v. Connally, 70 Ga. 424 (1883) (fruits, instrumentalities or evidence of gambling); Dillon v. O'Brien and Davis, 16 Cox. Crim. Cas. 245 (Exch. Ireland 1887) (fruits, instrumentalities or evidence; papers and books seized on charges of illegal scheme to defraud); Holker v. Hennessey, 141 Mo. 527, 42 S.W. 1090 (1897) (fruits, instrumentalities or evidence of larceny and means of escape); Getchell v. Page, 103 Me. 387 (1908) (fruits, instrumentalities or evidence of illegal distillery); Leigh v. Cole, 6 Cox. Crim. Cas. 329 (Oxford Cir. 1853) (weapons); Closson v. Morrison, 47 N.H. 482 (1867) (weapons).

171. Leigh v. Cole, 6 Cox. Crim. Cas. 329 (Oxford Cir. 1853).
172. *Id.* at 332.
173. 232 U.S. 383, 392 (1913).
174. 267 U.S. 132, 158 (1924).
175. Agnello v. United States, 269 U.S. 20 (1925).
176. *Id.* at 30.

The first Supreme Court decision to hold a search incident to an arrest valid under the fourth amendment was *Marron v. United States.*[177] As an incident to a lawful arrest, officers had seized certain bills and an account book which were used as evidence of the criminal enterprise. However, that case was subsequently limited by *Go-Bart Importing Co. v. United States*[178] and *United States v. Lefkowitz*[179] to stand for the proposition that a warrantless search is valid only when the evidence is readily visible and specifically related to the criminal enterprise. *Go-Bart* and *Lefkowitz,* rejecting *Marron*'s broad reading of the search-incident-to-arrest exception, established the principle that a valid arrest in itself cannot justify the incident search; the arrest cannot be a pretext for the search and neither can general or exploratory searches be justified by the fact of the arrest.[180]

Those cases of the first twenty years of the Court's search-incident-to-arrest decisions, from *Weeks* to *Lefkowitz,* firmly grounded the exception on the common law justifications for search incident to an arrest. Subsequent decisions frequently concerned a search of the premises, as did *Marron, Go-Bart* and *Lefkowitz,* or of an automobile, and usually evaluated searches in the context of an arrest for a crime involving fruits or instrumentalities. No cases before *Robinson* dealt precisely with the question of the right to search the *person* of a suspect arrested for a crime involving neither fruits nor instrumentalities. The theoretical approach which the Court employed in the review of each search-incident-to-arrest case is appropriate to apply to the *Robinson* case: (1) was the search justified as as a search incident to arrest; and (2) if so justified, did the search exceed its permissible scope.

The threshold question to be asked in evaluating any search or seizure is whether there was probable cause to search or seize. The requirement of probable cause is contained in the text of the fourth amendment itself; it has come to stand for those circumstances which would create a reasonable belief that a crime has been committed[181] or that contraband or weapons are present.[182] In a search-incident-to-arrest inquiry, the Court has in the past focused on whether there

177. Marron v. United States, 275 U.S. 192 (1927).
178. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
179. United States v. Lefkowitz, 285 U.S. 452 (1932).
180. *See* Amador-Gonsalez v. United States, 391 F.2d 308 (5th Cir. 1968) (traffic arrest held a mere pretext for search and therefore unreasonable).
181. Draper v. United States, 358 U.S. 307 (1959).
182. Spinelli v. United States, 393 U.S. 410 (1968).

was probable cause to arrest. Before *Robinson*, the Court had not discussed whether an arrest based on probable cause necessarily included the right to conduct some kind of search. Where a crime involves weapons, fruits or instrumentalities, the circumstances surrounding the arrest will justify the requisite probable cause both to effect an arrest and a warrantless search. Clearly, probable cause to believe the arrestee is an armed robber raises probable cause to believe the arrestee has either a weapon or stolen goods on his person or in his control.[183] Such is the arrest situation which poses the least constitutional difficulties and is most often reviewed by the courts. Consequently, the numerous cases dealing with the search-incident-to-arrest exception have resulted in a blurring of the distinction between the necessary grounds justifying an arrest and those justifying a search incident to that arrest into one requirement of probable cause. Nevertheless, such a distinction is compelled by the requirements of the fourth amendment. Probable cause is the standard for both seizures and searches, and it would seem mandatory that justification for both an arrest and an ensuing search be measured against that standard. Probable cause to believe an arrestee has committed a traffic offense or is a vagrant does not raise probable cause to believe he is concealing contraband or a weapon. Other circumstances which would raise "independent probable cause"[184] to search must be present to justify searches incident to arrests for nonviolent crimes where there are no fruits or instrumentalities.

Because the cases defining the search-incident-to-arrest exception— the very cases relied on by *Robinson*—have usually involved circumstances justifying both probable cause to arrest and to search, they have focused the inquiry on the permissible scope of the search. Whether a search incident to arrest is reasonable in its scope has generally been a question of what geographical area can be searched. *Agnello* early established that the search of premises other than those where an arrest was made was not reasonable; and in *Preston v. United States*,[185] the Court held that a search of the car of a suspect held in custody was not reasonable as being too remote in time and place from the arrest. The cases of *Harris v. United States*[186] and *United States v. Rabinowitz*,[187] however, found

183. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 412-13 (1974). *See also* Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866, 868 (1969) [hereinafter cited as *Searches Note*].
184. Baker & Khourie, *supra* note 8a, at 57.
185. Preston v. United States, 376 U.S. 364 (1964).
186. Harris v. United States, 331 U.S. 145 (1947).
187. United States v. Rabinowitz, 339 U.S. 56 (1950).

reasonable searches of the area under arrestee's control. The cases defined the area of control quite liberally and thus validated thorough searches of the entire premises, limited only by *Go-Bart*'s prohibition against general and exploratory searches. Justice Frankfurter in his dissents in those two cases asserted that such searches were contrary to the reasonableness requirement of the fourth amendment and were searches in excess of that justified by the search incident to arrest exception. He viewed the exception as having its "basic roots" in "necessity."

> What is the necessity? Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, and secondly, to avoid destruction of evidence by the arrested person.[188]

Subsequently, in *Chimel v. California*,[189] the Court overruled the *Rabinowitz* and *Harris* cases and adopted Justice Frankfurter's view that necessity dictates the scope of the search. Further, that necessity was limited to the traditional common law justifications for search incident to arrest.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.[190]

Chimel relied extensively on the reasoning in *Terry v. Ohio*,[191] decided one year previously by the Warren Court. Taken together, these two cases provide a carefully reasoned and logically consistent approach to defining a valid search. The starting point is the requirement of reasonableness. "What the constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[192]

188. *Id.* at 72.
189. Chimel v. California, 395 U.S. 752 (1969).
190. *Id.* at 763.
191. Terry v. Ohio, 392 U.S. 1 (1968).
192. Elkins v. United States, 364 U.S. 202, 222 (1960), *quoted in* Terry v. Ohio, 392 U.S. 1, 9 (1968).

The inquiry as to reasonableness is a dual inquiry—"whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[193] Since "a search which is reasonable at its inception may violate the fourth amendment by virtue of its intolerable intensity and scope, . . . the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible."[194]

Reasonableness is not a concept in a vacuum; it depends on "balancing the need to search (or seize) against the invasion which the search (or seizure) entails,"[195] and is intimately connected with the history of the fourth amendment.

The state in *Chimel* argued that "it would be reasonable to search a man's house when he is arrested in it," but the majority opinion countered; "that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests."[196] The opinion approved Justice Frankfurter's formulation that "[t]he test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and safeguards afforded by it against the evils to which it was a response."[197]

The court in *Chimel* finds in the history of the fourth amendment a mandate for searches under a search warrant except in several recognized exceptions. Such an exception is the right to search incident to arrest justified by the need to seize destructible evidence and weapons. Quoted with approval is the reasoning in *Preston*:

> The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the

193. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).
194. *Id.* at 17.
195. *Id.* at 21.
196. 395 U.S. 752, 764 (1969).
197. *Id.* at 765.
198. Preston v. United States, 376 U.S. 364, 367 (1964), *quoted in* Chimel v. California, 395 U.S. 752, 764 (1969).

> accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest.[198]

Since the scope of the search must be "strictly tied to and justified by the circumstances which rendered its initiation permissible," the permissible scope of the search incident to arrest must be limited to a search reasonably calculated to discover destructible evidence or dangerous weapons.

The careful process of examining the circumstances in each particular case is to determine first, whether the intrusion was justified and second, whether the scope of the search was sufficiently tied to such justification has been followed by the Supreme Court in cases decided subsequent to *Chimel* and *Terry*.[199] In contrast, the *Robinson* decision, while purporting to follow *Terry* and *Chimel*, represents a decided erosion of their underlying principles.

The Substance of the Robinson *Rule*

The precise issue of the validity of a search of the person arrested for a traffic offense had never come before the Supreme Court; neither had the companion issue of whether a car could be searched incident to a traffic arrest. However, numerous state and federal courts[200] had reviewed the validity of such searches. The majority view was that a search was unreasonable if justified by a traffic arrest and nothing more.[201] Such searches were not invar-

199. *See* Adams v. Williams, 407 U.S. 143 (1973), where the court upheld the seizure of a gun from the suspect's person holding that "the policeman's action in reaching to the spot where the gun was thought hidden constituted a limited intrusion designed to insure his safety," and was therefore reasonable. *See also* Cupp v. Murphy, 412 U.S. 291 (1973), where the taking of fingernail scrapings was held to be reasonable. The Court reasoned that "the rationale of *Chimel*, in these circumstances, justified the police in subjecting . . . [the] arrestee . . . to the very limited search necessary to preserve the highly evanescent evidence found under the fingernails." *Id.* at 269.

Justice Marshall, concurring in *Cupp, supra*, indicated his commitment to a very strict application of *Chimel*.

> Indeed, in my view, the Fourth Amendment would have barred a more extensive search, for the police had no reason to believe that Murphy had on his person more evidence relating to the crime, or in light of the fact that this case involved a strangulation, a weapon that he might use at the station house.

Id. at 299.

200. *See* United States v. Robinson, 471 F.2d 1082, 1104 n.39 (D.C. Cir. 1972), *rev'd* 414 U.S. 218 (1973). *See also* Barrentine v. United States, 434 F.2d 636 (9th Cir. 1970); United States v. Davis, 441 F.2d 28 (9th Cir. 1971); United States v. Woods, 468 F.2d 1024 (9th Cir. 1972).

201. United States v. Robinson, 471 F.2d 1082, 1103-05 (D.C. Cir. 1972), *rev'd* 414 U.S. 218 (1973).

iably invalidated, though, for the courts often found "something more" to justify the search. Often, "special circumstances" were identified which gave the officer probable cause to believe that there was contraband on the arrestee's person or in his car.[202] Where the officer had a suspicion that the arrestee was armed and dangerous, a pat-down search was allowed. Alternatively, it was reasoned that when the officer had to transport the arrestee in a patrol car, the increased danger to the officer justified a pat-down search. While the latter justification was found applicable by the Court of Appeals in the circumstances of *Robinson*, the court found the permissible scope of the pat-down was exceeded.

Robinson was arrested for operating his vehicle after revocation of his driver's permit and obtaining a permit by misrepresentation. The arresting officer, Jenks, had previously determined that these offenses had been committed by Robinson. Officer Jenks searched Robinson after Robinson had emerged from his car. The officer first conducted a pat-down search of Robinson's person. Upon feeling an object in his left breast pocket, he reached into the pocket and extracted a crumpled cigarette package. He opened the cigarette package and found fourteen gelatin capsules of white powder which was subsequently identified as heroin. The Court of Appeals, relying on the principles of *Terry* and *Chimel*, held that a limited search of Robinson's person could have been made to discover weapons in order to protect the officer when he was transporting the arrestee, but reaching into Robinson's pocket exceeded that limited search. A full search of the person incident to a traffic arrest could not be justified because there was no evidence of the crime to be discovered. The Supreme Court, Justice Rehnquist writing for the majority, held that a full search of the person incident to a custodial arrest is per se reasonable and reversed the lower court decision.

The majority opinion, while purporting to follow *Terry* and *Chimel*, actually evades their underlying principles by putting the search in *Robinson* into a separate category—a search of the person incident to a custodial arrest. The opinion distinguishes *Chimel* in that a search of the premises was involved there and distinguishes *Terry* on the basis that there was an arrest in *Robinson*.

Justice Rehnquist makes a distinction between the search of the person and the search of premises incident to arrest. They both have been affirmed "in principle," but the latter is "subject to differ-

202. *Id.* at 1103 n.38.

ing interpretations as to the extent of the area which may be searched." His thesis is that it has been well-settled that the right to search the person and the area in his immediate control is "not simply . . . an exception to the warrant requirement, but . . . an affirmative authority to search," and that the long controversy over the scope of the right has been merely a geographical controversy over boundaries. It is correct that the greatest controversy about search incident to arrest has been concerning the scope of the search, but the majority's thesis ignores two important considerations. First, the supporting authorities have phrased the right to search in terms of the right to seize fruits or instrumentalities of the crime and weapons. Secondly, the controversy over the scope of the search is a controversy as to the principles supporting the search incident to arrest exception. As such, the principles elucidated in that controversy (and in *Chimel*, the leading case) must have a broad applicability.

The majority opinion admits that "[v]irtually all the statements of this court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta," but nevertheless on the basis of such dicta, the opinion holds that a search of the person incident to a custodial arrest is per se reasonable. Justice Rehnquist finds his "unqualified authority" in the line of cases from *Weeks* to *Chimel* which have dealt with the right to search incident to arrest and in two recent cases. Only in one case, *Adams v. Williams*,[203] was the search at issue a search of the person and only *Preston* involved an arrest for a crime for which there were neither fruits nor instrumentalities. The "unqualified authority" is really only justified by language in cases deciding other issues—usually whether premises or a car could be properly searched—and in that language establishing nothing more than the common law right to search incident to arrest "in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody."[204]

The majority's review of the common law reveals no more than its review of Supreme Court precedents and is, in addition, misleading in its selection of cases and its emphasis. Justice Rehnquist finds no authority in Pollack and Maitland for the right to search incident to arrest. Interestingly enough, in *People v. Chiagles*,[205] Justice

203. Adams v. Williams, 407 U.S. 143 (1972).
204. Agnello v. United States, 269 U.S. 20, 30 (1925), *quoted in* 414 U.S. at 225.
205. People v. Chiagles, 237 N.Y. 193, 142 N.E. 283 (1923).

Cardozo quoted their *History of English Law* to demonstrate the source of the right from the "days of hue and cry." The right was first a logical outgrowth of the law of arrest, for the right to seize the murderer certainly included the right to seize the bloody knife.[206] In later cases, the courts found it also reasonable to seize weapons which could be used to thwart the arrest by being used against the officer or as a means of escape, and several cases are cited in *Robinson* to that effect.[207] However, unmentioned is the fact that none of these cases actually involved a search for weapons. In each case, the arrestee was arrested for a crime in which there were fruits or instrumentalities. The only case in which there was no evidentiary justification present was *Leigh v. Cole*, a case not mentioned by the majority opinion. Its omission was not surprising, however, since the judge in that case, when addressing the jury, stressed that the right to search to recover weapons was not automatic, but depended on the circumstances of the situation—whether the arrestee was violent, threatening or dangerous.[208]

Thus taken together, the Supreme Court and common law precedents hardly mandate a general authority to search incident to arrest. Justice Rehnquist's characterization of that right as "unqualified" and "affirmative" is clearly contrary to the reasoning in every case concerning search incident to arrest from *Weeks* to *Chimel*. Contrary to the majority's assertion, *Chimel* can hardly be interpreted to approve an "unqualified authority of the arresting officer to search the arrestee's person." *Chimel* holds that the search incident to arrest is an exception to the warrant requirement justified by the necessities present in an arrest situation and that the scope of the resulting search is dictated by those necessities. In *Chimel*, the court specifically approved the language in *Peters v. New York*,[209] which was relied upon by the Court of Appeals:

> [T]he incident search was obviously justified by the need to seize weapons and other things which might be used to assault an officer or ef-

206. *See* note 183 *supra*. *See also* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969). Professor Taylor quotes Pollack and Maitland to say that early arrests were probably only effected when catching someone in the act, as there were very unpleasant consequences for effecting a false arrest.

207. 414 U.S. 218, 231-32 (1973). *Robinson* cites Closson v. Morrison, 47 N.H. 482 (1867); Holker v. Hennessey, 141 Mo. 527, 42 S.W. 1090 (1897); People v. Chiagles, 237 N.Y. 193, 142 N.E. 283 (1923).

208. *See* United States v. Robinson, 414 U.S. 218, 247 n.2 (1973) (Marshall, J., dissenting). Justice Marshall characterizes the majority's use of precedent as "disingenuous" and similarly, the "attempt to dip into English common law" as "selective." This is evidenced by the fact that *Leigh v. Cole* was not mentioned.

209. Peters v. New York, 392 U.S. 40 (1968) (citation omitted).

> fect an escape, as well as by the need to prevent the destruction of evidence of the crime. . . . Moreover, it was reasonably limited in scope by these purposes. Officer Laskey did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects.[210]

It is inaccurate for the majority to assert that the *Peters* quotation (and the Court of Appeals' reliance on it) implied a "novel limitation on the established doctrine" of search incident to arrest.[211] The concept of a search incident to arrest being limited to the achievement of its objectives is not a novel concept.[212] In *Cupp v. Murphy*,[213] cited by the majority, the court specifically approved the taking of fingernail scrapings from Murphy because the intrusion was "the very limited search necessary to preserve the highly evanescent evidence . . . found under his fingernails."[214] The reasoning employed in *Cupp v. Murphy*, as in *Peters* and *Chimel*, means that it is not the arrest itself, but rather the necessities of the situation, which dictate both when an intrusion is necessary and what the scope of that search should be. This is consistent with the well-accepted view that there "is no formula for the determination of reasonableness. Each case is decided on its own facts and circumstances."[215]

Because the majority opinion deems of primary importance the *fact* of arrest, it considers *Terry* inapplicable. Though *Terry* was the only Supreme Court case to consider the justifications for and extent of intrusion allowed in a weapons search, the search in that case was in the context of a detention based on less than probable cause. The majority opinion finds support for its rejection of the applicability of *Terry* to an arrest situation in the language of *Terry* itself. The Court, rejecting Terry's argument that no search was allowed absent probable cause for arrest, distinguished the arrest situation from one of temporary detention on two grounds. First, upon an arrest, there are other grounds for a search in addition to the need to discover weapons. Second, the "arrest is the initial stage in a criminal prosecution" and "is inevitably accompanied by future interference with the individual's freedom of movement."[216] However,

210. *Id.* at 67, *quoted in* 414 U.S. at 228-29.
211. 414 U.S. 218, 229 (1973).
212. *Id.* at 280-82 (Marshall, J., dissenting).
213. Cupp v. Murphy, 412 U.S. 291 (1973).
214. *Id.* at 296.
215. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931), *quoted in* 414 U.S. at 238 (Marshall, J., dissenting).
216. Terry v. Ohio, 392 U.S. 1, 25-26 (1968), *quoted in* 414 U.S. at 228.

in *Robinson,* neither of these factors characterizing an arrest are present. There was no further need to search because no fruits or instrumentalities existed; nor was there any expectation of substantial future interference with Robinson's liberty as he would probably not be booked and would have the opportunity to put up collateral.[217] What remains is the fact that the detention in *Robinson* was an arrest, while in *Terry* it was a temporary detention based on suspicion amounting to less than probable cause for an arrest. "It is the fact of the lawful arrest which establishes the authority to search."[218] Therefore, finding *Terry* inapplicable, the majority concluded that the authority to search incident to arrest means the authority to conduct a full search of the person and his effects.

Substantive Shortcomings: A Rule in Search of a Rationale

Justice Rehnquist does not directly engage in the "balancing test" outlined in *Terry* to determine the reasonableness of the search, for he held the fact of arrest in itself is ample justification for the companion search of the person.

> It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment but is also a "reasonable" search under that Amendment.[219]

However, it is apparent that underlying the majority opinion is the conclusion that the need to search overcomes any considerations of individual rights. The "balancing test" weighs the individual's interest to be free from intrusion against the state's interest in protecting its citizens through law enforcement. The majority opinion, however, adjudged an arrested individual's interest to be minimal after the arrest, and society's interest in having its police protected and their judgments not subject to the vagaries of judicial interpretation to be of primary importance.

In Justice Rehnquist's view, the arrest is the significant intrusion; "that intrusion being lawful, a search incident to arrest requires no additional justification."[220] Justice Powell, in his concurring opin-

217. *See* United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972).
218. 414 U.S. 218, 235 (1973).
219. *Id.*
220. *Id.*

ion, explains that at the "root" of the majority's opinion is the idea that "[t]he search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest."[221] This, however, has not been the view previously adopted by the Court. In *Chimel,* the court specifically rejected that assertion;

> And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.[222]

The *Robinson* majority, though, finds the arrest to be the necessary justification for the companion search incident thereto and finds any further intrusion reasonable. There need be no separate finding of probable cause to search the person of an arrestee. Accordingly, there can be a valid search despite the officer's belief that neither weapons nor fruits nor instrumentalities were present. The scope of the search need not be "strictly tied to and justified by the circumstances which rendered its initiation permissible," for it is the fact of the arrest itself which justifies the search. Therefore, the Court upholds the search of the cigarette package even though confiscation of it would have been adequate to attain the purpose of protecting the officer from the use of any weapon contained therein.

The majority opinion's reliance on the fact of the arrest as the most significant factor in *Robinson* appears to stem not only from its reading of legal precedents, but also from two policy considerations. First, Justice Rehnquist apparently finds an arrest to be a necessary point of certainty that an officer may conduct a full search of the person. A rule which covers all custodial arrests provides a guide for police behavior which does not require an officer to weigh the possibilities of danger in each situation. So long as the arrest is lawful (and not a mere pretext for the search), the officer's

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221. *Id.* at 237-38. *See* Amsterdam, *supra* note 183, where he argues that the view Powell espouses,

> cannot be harmonized with the plain proscription of the warrant clause of the fourth amendment that even when a search has been ordered by a magistrate, goods of the person searched that are not named in the search warrant cannot be seized.

Id. at 412-13.

222. 395 U.S. 752, 768 n.13 (1969).

decision to search the arrestee is not subject to judicial review. In emphasizing the need for that point of certainty, he betrays a dissatisfaction with judicial review and a desire not to interfere with police judgments.

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.[223]

As Justice Marshall strongly argues in dissent,

> [t]he majority's fear of overruling the "quick ad hoc judgment" of the police officer is . . . inconsistent with the very function of the Amendment—to ensure that the quick ad hoc judgments of police officers are subject to review and control by the judiciary.[224]

What Justice Rehnquist here holds is that there is a prior determination of reasonableness based on the fact of the arrest. Even so, that does not obviate the necessity of a judicial review; for it must still be determined whether the arrest is lawful (*i.e.*, based on probable cause) or whether the arrest was used as a pretext for the search.[225] Granted, in making these determinations the judiciary is weighing probabilities and making judgments as to the state of mind of the officer, but such has been the mandate of the fourth amendment; it requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and police."[226]

Second, the majority opinion argues that the fact of an arrest mandates a full search of the person. Justice Rehnquist states: "[t]he danger to the police officer flows from the fact of arrest, and its attendant proximity, stress and uncertainty, and not from the grounds for arrest."[227] The opinion admits, however, that the only purpose of the search was to discover weapons in order to protect the officer. The only previous decision which defined the scope of

223. 414 U.S. 218, 235 (1973).
224. *Id.* at 242.
225. *See* Amsterdam, *supra* note 183, wherein he notes that after *Robinson* the law is that "an arrest may not be used as a pretext for a search incident to arrest, but a search incident to arrest may be used as a pretext for a general search." *Id.* at 373.
226. Wong Sun v. United States, 371 U.S. 471, 481-82 (1963), *quoted in* 414 U.S. at 242.
227. 414 U.S. 218, 234 n.5 (1973).

a protective search for weapons, *Terry*, balanced the competing interests and concluded that when

> [t]he sole justification of the search is the protection of the police officer and others nearby . . . it must . . . be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.[228]

It would appear that this reasoning would be equally applicable to a protective search for weapons in a custodial arrest situation, as well as in the stop-and-frisk situation of *Terry*. Clearly, the search in *Robinson* would be constitutionally unreasonable if the *Terry* standard for protective searches were applied. Nothing need be added to the cogent observation in the Marshall dissent that

> if the crumpled up cigarette package that was seized by the officer during the search of Robinson had in fact contained some sort of small weapon, it would have been impossible for respondant to have used it once the package was in the officer's hands. Opening the package, therefore did not further the protective purpose of the search.[229]

Justice Rehnquist, though, as has been seen, finds *Terry* inapplicable because there was no arrest. He chooses to categorize the search in *Robinson* not as a protective search, but as one incident to a custodial arrest.

> It is scarcely upon to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop.[230]

Justice Rehnquist concludes, therefore, that the officer's safety becomes "an adequate basis for treating all custodial arrests alike for the purposes of search justifications."

But does it? One way of testing the validity of this conclusion is to examine the statistical information the Court cites to support

228. 392 U.S. 1, 29 (1968).
229. 414 U.S. 218, 256 (1973).
230. *Id.* at 234-35.

it. In an important footnote, Justice Rehnquist reinforces his conclusion that searches incident to custodial arrest are reasonable by citing figures which indicate that approximately one-third of all police fatalities occur during traffic stops.[231] Ironically, decisions which conclude that routine searches incident to arrest are not necessary have also noted that many officer deaths occur in the traffic stop context.[232] If "traffic arrests" are as potentially dangerous as the Supreme Court believes *and* if incidental searches will mitigate that danger, then it must be conceded that a legitimate reason for validating such searches exists. However, the statistical data relied on in *Robinson* is unpersuasive on several counts. The principal defects in the Court's statistical discussion can be summarized as follows: (1) Uniform Crime Reports[233] (hereinafter UCR) information is used in a selective and misleading fashion; (2) the statistics cited in *Robinson* have little relevance to an inquiry into the dangers attending searches incident to arrest because they do not generally relate to arrest situations; and (3) the one academic source relied upon in *Robinson* fails to support the majority's assertions.

Although the *Robinson* opinion claims that its estimate of the dangers of the traffic arrest reflect "the available statistical data concerning assaults on police officers who are in the course of making arrests," the only data actually cited is extremely limited. The Court observed that one fourteen year old study found that "approximately 30%" of the shootings of officers occur during traffic stops.[234] The Court then observed that 11 of the 35 (31.4%) officer deaths recorded by the UCR from January to March, 1973, occurred in the

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231. *Id.* at 234 n.5. The footnote reads in part:

> One study concludes that approximately 30% of the shootings of police officers occur when the officer approaches a person seated in an automobile. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963), cited in Adams v. Williams, 407 U.S. 143, 148 (1972). The Government in its brief notes that the Uniform Crime Reports, prepared by the Federal Bureau of Investigation, indicate that a significant percentage of police officer murders occur when the officers are making traffic stops. Brief for the United States, at 23. Those reports indicate that during January—March, 1973, 35 police officers were murdered; 11 of those officers were killed while engaged in traffic stops. Ibid.

232. *See, e.g.*, United States v. Robinson, 471 F.2d 1082, 1097 n.22 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973); People v. Superior Court (Simon), 7 Cal. 3d 186, 205, 496 P.2d 1205, 1219, 101 Cal. Rptr. 837, 851 (1972); State v. Curtis, 290 Minn. 429, 436, 190 N.W.2d 631, 635-36 (1971).

233. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS (1973) [hereinafter cited as UCR].

234. *See* Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963), *cited in* 414 U.S. at 234 n.5. Although this study was published in 1963, it was conducted from 1960 to 1961.

traffic stop context. Repetition of the 30% figure by the Court is highly misleading. UCR data shows that only 9.4% of all police officer deaths during the last *ten year* period reported occurred in traffic stop situations.

U.S. POLICE DEATHS RELATED TO TRAFFIC STOPS[235]

	1963-1970	1971	1972	1973	Ten Year Period 1963-1973
Total non-accidental officer deaths	548	126	112	127	858
Deaths in traffic stop context	26	20	14	25	81
Percentage of deaths occuring in traffic stop context	4.7%	15.9%	12.5%	19.7%	9.4%

Even if the statistically inconclusive UCR figures for the first three months of 1973 are cited merely to show a sudden increase in the perilousness of traffic stops, the 31.4% figure is a gross distortion. During 1973, 19.7% of all officer deaths were attributed to traffic stop incidents. California's figures are comparable; thirteen of the 106 (12.3%) California police officers killed from 1960 to 1972 died in traffic stops.[236]

It is also instructive to place the available traffic stop data in its proper perspective. For instance, the UCR discloses that 26.5% of all officer deaths from 1963 to 1972 occurred while the apprehension or arrest of robbery or burglary suspects was being attempted.[237] In 1973, 561,530 robbery and burglary arrests were reported nationwide.[238] Traffic arrests in California alone numbered in the millions.[239] It would seem, then, that traffic arrests are relatively safe. At the very least, there is no statistical foundation for the claim in *Robinson* that the grounds for arrest bear no significant relation to the danger to be expected.

The above discussion deals with statistics relating to traffic

235. UCR, *supra* note 233, at 41 (chart 21).
236. *See* CALIFORNIA DEP'T OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA: 1972, at 23 [hereinafter cited as CRIME AND DELINQUENCY].
237. *See* UCR, *supra* note 233, at 41 (chart 21).
238. *Id.* at 121 (chart 24).
239. Unpublished records of the California Highway Patrol, Analysis Section, show that the California Highway Patrol conducted 1,897,288 traffic arrests in 1973; 136,132 of these arrests were custodial. None of the custodial arrests led to an officer's death. *See* text accompanying notes 247-53 *infra*.

stops rather than traffic arrests because the UCR characterizes all officer deaths occurring in any traffic related situation as "traffic stop" deaths. Obviously, not all of these stops involve an arrest or even attempted arrest.[240] The figures relied on in *Robinson*, therefore, shed little light on the realistic dangers inherent in those situations involving the close proximity and protracted contact which supposedly form the basis for validating searches incident to all custodial arrests. As will be shown, once a suspect is under custodial arrest he is under the effective control of the officer, but, prior to custody or during non-arrest stops (*i.e.*, in situations where *Robinson*'s search authorization would not apply) the deranged, desperate or drunk individual can easily shoot the unsuspecting officer. Because figures relating to "traffic stops" are inflated by those non-arrest and pre-custody deaths, they should be scrupulously avoided by any court defining constitutional standards regarding search incident to arrest. In no other way can there be an accurate assessment of the interests which must be balanced before the reasonableness of any police intrusion can be determined. By carelessly juxtaposing traffic *stop* figures with authoritative sounding pronouncements about the dangerous quality of *arrest* situations, the *Robinson* majority has left room for serious doubt about the validity of the grounds it relied on to justify its decision.

The UCR is not the only source the *Robinson* majority relied on to support its conclusion that traffic stops entail enough risk to justify a search whenever an arrest becomes custodial. As in *Adams v. Williams*,[241] Justice Rehnquist cited a 1963 article by Professor Allen P. Bristow which, according to the Court, "concludes that approximately 30% of the shootings of police officers occur when an officer stops a person in an automobile." According to Professor Bristow, however, his article leads to no such conclusion.[242] It is true that approximately 30% of the shooting incidents examined by the Bristow pilot study ("based on a small group of cases" primarily involving "officers who were shot while dealing with suspects who were either in automobiles or buildings")[243] occurred in traffic stop

240. *See* text accompanying notes 247-53 *infra*.
241. Adams v. Williams, 407 U.S. 143, 148 n.3 (1973).
242. Letter from Professor Allen P. Bristow to the authors, Oct. 15, 1974, on file with the law library, Golden Gate University School of Law [hereinafter cited as Letter]. Professor Bristow indicated that his pilot study employed case study analysis because he sought to "extract identical elements" from a select number of shooting incidents rather than ascertain what percentage of officer deaths occur in what contexts. Thus, "UCR statistics should *not* be compared with my pilot study of 1960-61." *Id.* (emphasis in original).
243. *See* Bristow, *supra* note 234, at 93.

situations. But this hardly means that, as the *Robinson* majority would have us believe, 30% of *all* non-accidental officer deaths occur during traffic stops. Perhaps if the majority had given a balanced presentation of UCR statistics, which reveal that at the time of the Bristow study less than 5% of all officer deaths occurred during traffic stops, Professor Bristow's article would not have been misread.

In fact, the Bristow article provides cogent support for the view that an indiscriminate right to search incident to custodial arrests will have little or no effect on the actual number of traffic stop deaths. By identifying the circumstances surrounding officer shootings, Professor Bristow discovered that in traffic stop situations a high percentage of such shootings occur before custody is achieved or when arrest is not even contemplated. Significantly, prior to many of the shootings studied the officer either "*knew or had good reason to believe that the suspects were armed.*"[244] Obviously, *Robinson*'s expanded search authority will not assist in protecting officers making such non-arrest or high risk stops. In the non-arrest situations searches incident to arrest are clearly unauthorized. In high risk situations the shootings occurred even though ample probable cause to search existed.

In correspondence with the authors, Professor Bristow verified the accuracy of this reading of his pilot study by indicating that the problem of officer shootings cannot be solved by searches incident to arrest. He believes, on the other hand, that "these problems can probably best be overcome by: (a) technology (body armor, security holsters, etc.); and (b) *training*."[245] Professor Bristow's remarks, it should be noted, are consistent with the remedies suggested at the end of his 1963 article.

It is clear that crime statistics can be easily misused. By selecting both unrepresentative and incompetent statistical data, and by misrepresenting both the content and conclusions of a relevant pilot study, the *Robinson* majority committed common but nonetheless serious errors in its statistical analysis. So serious, in fact, that the pertinent statistics appear to support conclusions contrary to those found in *Robinson*. Statistics, however, are not the best support for subjective policy judgments affecting constitutional rights, as articles

244. *Id.* at 94. Although no percentage was given for traffic stop situations, 71% of the shootings in or near buildings involved such circumstances. *See also* CRIME AND DELINQUENCY, *supra* note 236, at 23; table within text accompanying note 251 *infra*.

245. Letter, *supra* note 242.

criticizing crime statistics—especially UCR statistics—point out.[246] Therefore, in keeping with Professor Bristow's emphasis on examining the circumstances surrounding officer deaths, the authors conducted the following study of all non-accidental California Highway Patrol officer deaths since 1960.

The California Highway Patrol Case Study: The Reality which Robinson *Ignores*

The following discussion is based on detailed information provided by the California Highway Patrol (hereinafter CHP) relating to all non-accidental CHP officer deaths since January, 1960.[247] The CHP is the fifth largest police force in the nation,[248] and the only force of its size required by law to specialize in traffic law enforcement.[249] In view of the fact that California's vehicle population is twice that of any other state,[250] it is doubtful that any police force in the world has had more experience with traffic law enforcement problems than the CHP.

Aside from accidental deaths and two ambush-like shootings, fourteen CHP officers were killed during the fifteen year period from January, 1960 to December, 1974. The following table summarizes the factual details of these killings.

Exactly one-half of the officer deaths occurred in situations characterized by the CHP as "high risk." This means that, prior to stopping the vehicle containing the assailant, the officer in question had some knowledge that the person he was confronting was armed and/or dangerous. The instructors interviewed at the CHP Training

246. *See, e.g.*, Kamisar, *How to Use, Abuse and Fight Back with Crime Statistics*, 25 OKLA. L. REV. 239 (1972); Robison, *A Critical View of the Uniform Crime Reports*, 64 MICH. L. REV. 1031 (1966); Wheeler, *Criminal Statistics*, 58 J. CRIM. L.C. & P.S. 317 (1967); Note, *Crime Statistics—Can They Be Trusted?*, 11 AM. CRIM. L. REV. 1045 (1973). It should be noted that the UCR appears to be a reliable source for information regarding the number, if perhaps not the circumstances surrounding officer deaths.

247. Through the cooperation of Inspector O.K. Camenish of the California Highway Patrol Training Academy, Sacramento, California, this information was obtained from Sergeant John Knight, instructor of enforcement tactics at the Academy. We wish to acknowledge the invaluable assistance provided by Sergeant Knight and two fellow instructors specializing in arrest and search and seizure procedures: Sergeants Jack Conway and William Carlson. Most of the information contained in this case study was obtained during extensive interviews with these officers on August 2, 1974. All conclusions based on this information are those of the authors, however.

248. *See* UCR, *supra* note 233, at 177 (table 69), 178-86 (table 70). The CHP is substantially larger than any other state police or highway patrol. Only the metropolitan police departments of New York City, Los Angeles, Chicago and Philadelphia are larger than the CHP.

249. CAL. VEH. CODE §§ 2400-01 (West 1971).

250. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 548 (table 902) (1973); CALIFORNIA STATISTICAL ABSTRACT 100 (tables J-6 & J-8) (1973).

CALIFORNIA HIGHWAY PATROL OFFICER DEATHS (1960-1974)[251]

OFFICER	DATE	TYPE OF STOP	TIME OF DAY	STATUS	TYPE OF WEAPON USED	PRE-EFFECTIVE CUSTODY?*
A	2/1960	Misdemeanor	10:47 PM	alone	.32 Cal. pistol	yes
B	3/1963	Felony: vehicle theft	4:45 PM	alone	.38 Cal. pistol	yes
C	11/1963	High risk: pursuing bank robbers.	8:50 PM	alone	9 MM pistol	yes
D	2/1965	Misdemeanor: transporting prisoner.	6:00 PM	alone	.25 Cal. pistol	no
E	7/1967	High risk: vehicle theft.	4:20 AM	partner	.357 Cal. pistol	yes
F	12/1967	High risk: stop of a known mental patient.	4:15 PM	alone	rifle	yes
G	11/1969	Misdemeanor	8:47 PM	alone	9 MM pistol	yes
H	2/1970	Misdemeanor	3:20 PM	alone	.375 Cal. pistol	yes
I, J K, & L	4/1970	High risk: stop of known ex-convicts who were wanted for brandishing guns.	11:55 PM	partner	pistols and CHP shotgun	yes
M	8/1972	Misdemeanor; drunk driving.	2:07 AM	partner	.38 Cal. pistol	yes
N	3/1973	Misdemeanor	7:50 AM	alone	.38 Cal. pistol	yes

* A "yes" indicates that the officer was either shot before arrest, before effective custody could be achieved, or in a situation where no custodial arrest was contemplated. A "no" indicates that the shooting occurred after custody was achieved.

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Academy believe that most, if not all, of these deaths could have been averted had the officer exercised greater caution while confronting known danger. A description of the circumstances of each high risk incident follows:

> (1) Officer C stopped a vehicle containing suspected bank robbers. One of the suspects shot Officer C as he emerged from his patrol car.
>
> (2) Officer E stopped suspected car thieves shortly after 4 A.M. One of the suspects shot Officer E as he approached the stopped vehicle.
>
> (3) Officer F stopped a known mental patient. As Officer F was emerging from his patrol car, the mental patient shot him with a rifle.
>
> (4) Officers I, J, K and L were all killed in a single incident near Newhall, California, in 1970. Around midnight two of the officers stopped a vehicle because it reportedly contained ex-convicts who were wanted for brandishing guns. After the stop, both the officers and the suspects emerged from their vehicles. Just as one of the officers initiated a pat-down search of one of the suspects, another suspect was able to draw a pistol and shoot the second officer. This distracted the first officer and enabled the suspect he had started to search to draw a pistol and shoot him (the remaining officer). Immediately after this double-killing, a "back-up" patrol car with two officers arrived. They were shot also; one with a CHP shot-gun taken from the first patrol car. One of the suspects committed suicide immediately thereafter.

In all of the high risk incidents the following facts are clear:

> First, ordinary traffic stops were not involved. In every case ample probable cause to conduct a search for weapons existed.

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251. This table is a virtual duplication of one used at the CHP Training Academy as an instructional aid. Only the category relating to whether the shooting occurred prior to effective custody was devised by the authors. Letter designations have been substituted for the deceased officer's names at the request of the CHP. The "high risk," "felony" and "misdemeanor" designations were devised by the CHP. Explanatory words have been added by the authors.

> Second, in none of these incidents were custodial arrests or searches of any type possible before the shooting occurred.

The circumstances surrounding the other CHP officer deaths are equally revealing:

> (1) Officer A was shot as he emerged from his patrol car after making a stop for a violation not requiring custodial arrest. A custodial arrest had not been contemplated; the shooting was apparently motiveless. It was near 11 P.M.
>
> (2) Officer B was shot while pursuing juveniles wanted for felony car theft; no stop actually took place. This situation was not considered high risk only because Officer B had no knowledge the suspects were armed.
>
> (3) Officer D is the only officer of this entire group to be shot *after* the arrestee was in custody, and the CHP considers his death the least excusable. The suspect had been detained by the Border Patrol for a variety of offenses, including drunk driving. After being patted down by the Border Patrol, the suspect was turned over to a CHP officer who in turn conducted a pat-down search in an apparently cursory manner, thinking the suspect had already been searched. Officer D was then detailed to transport the prisoner to the appropriate facilities. It is unknown whether or not Officer D, who knew the prisoner had been searched twice, conducted his own search. In any event, none of the searches detected a .25 cal. automatic pistol that the prisoner had hidden. While transporting the handcuffed prisoner in his patrol car, Officer D was shot from behind.
>
> (4) Officer G stopped a vehicle for speeding. He did not know the vehicle contained escaping bank robbers. He was shot as he was talking on his patrol car radio; no custodial arrest had been contemplated.
>
> (5) Officer H stopped a vehicle for a minor traffic violation. The young driver of the vehicle had stolen it earlier in the day and gone on

> a "crime spree." Officer H was unaware of this; he was shot before he reached the stopped vehicle. The young driver then used the same pistol to kill himself. Custody had apparently not been contemplated.
>
> (6) Officer M was shot shortly after 2 A.M. by a combative drunk driving suspect. This case is unusual in that Officer M's own service revolver, which had been seized by the suspect during the altercation, was the murder weapon.
>
> (7) Officer N was shot while investigating a vehicle parked on the highway with a flat tire. The driver was also suspected of being intoxicated, but before custodial arrest could be made, the lone officer was killed.

The most striking feature of all the non-high risk and high risk incidents described above is that in every case a firearm was used. It must be assumed, therefore, that even a limited pat-down would have detected the weapon. But, with the exception of the incident involving Officer D, an opportunity to search was never available. This means that constitutional limits on the officer's right to search in no way contributed to the deaths. Not even Officer D, who was shot by a man under the influence of alcohol, would have been endangered by the California Supreme Court's refusal to allow pat-down searches in the absence of "specific facts or circumstances giving the officer reasonable grounds to believe that a weapon is secreted on the motorist's person."[252] In Officer D's case, the CHP instructors stated that a pistol of the type used would have been detected by a properly conducted pat-down search, that Officer D did not know the suspect had been defectively searched, and that this fact and a fatal sense of complacency led to his death.[253]

Another salient characteristic of traffic stop deaths is that a deranged or desperate individual, who has usually not even been stopped for an offense requiring arrest, is frequently the perpetrator.

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252. People v. Superior Court (Simon), 7 Cal. 3d 186, 206, 496 P.2d 1205, 1220, 101 Cal. Rptr. 837, 852 (1972).

253. There are indications that, more than anything else, simple complacency accounts for most traffic stop deaths. The Federal Bureau of Investigation only recently learned that,

> Surprisingly, complacency was mentioned as the primary reason for most traffic stop deaths; the officers felt that traffic stops are handled in a more relaxed manner than most other police contacts.

FBI LAW ENFORCEMENT BULLETIN, April, 1974, at 15.

Of the seven officers killed in non-high risk situations, such individuals clearly accounted for the deaths of Officers B, G and H. Encounters with this type of individual obviously take the officer by surprise and serve to underscore the necessity of never treating any traffic stop as routine. However, this may be the only practical protective measure an officer can take under such circumstances. Surely, an alteration of the law of search and seizure will afford no protection in such cases.

What legitimate conclusions can now be drawn about the dangers faced by officers making traffic stops and traffic arrests? Certainly not the conclusions drawn by Justice Rehnquist. In *Robinson*, it is assumed that thorough searches incident to arrest will provide some measure of officer protection. An instructor at the CHP Training Academy, however, when asked if any of the slain CHP officers discussed above would be alive today had *Robinson* been the law, unhesitatingly replied "No, not a one; it wouldn't have made any difference."[254] Unfortunately, the circumstances leading to officer deaths pursuant to traffic stops are an unavoidable aspect of what is acknowledged to be a dangerous profession. Faced with such circumstances, and with the need to protect officers in situations where the law of search and seizure does not operate, the CHP Training Academy concentrates on instilling in new officers fundamental concepts such as alertness to any suspicious circumstances and extreme caution even during "routine" stops. As a result, lives are saved; with the exception of one ambush-like shooting in 1971—against which there is virtually no protection—only two CHP officers have been killed during the fifty-seven month period since the quadruple slaying in April, 1970; none have died in the last twenty-one months. It is suggested, therefore, that instead of adjusting well established and reasonable search and seizure ground rules in an effort to forestall traffic stop deaths, every effort be made to upgrade officer training programs with a special emphasis on non-arrest, pre-arrest and vehicle approach situations.

The Experienced Officer's View of Robinson

Even though the circumstances surrounding CHP officer deaths indicate that searches incident to arrest are not the solution to the problem such deaths represent, many law enforcement officers wel-

254. The question was asked by Sergeant Carlson, *supra* note 247, and answered by a fellow instructor.

come *Robinson* and its expanded search authorization.[255] The officers apparently believe that in some future situation a thorough search of the type approved by *Robinson* may mean the difference between the life and death of an officer. In conversations with the authors, however, one CHP instructor conceded that "We've shown we can live with *Simon.*" If this is the case, then, even if it might make a difference in rare instances, the *Robinson* rule sacrifices more in the way of individual rights than is required in the interest of officer safety.

Officer safety is not the only reason CHP instructors advanced in favor of *Robinson.* Other considerations of importance to them include:

1. The *Robinson* rule would permit the arresting officer who must make spontaneous and subjective judgments during the arrest transaction to conduct as thorough a search as his discretion dictates is appropriate without fear that his search is either too broad to be legal or too restricted to discover the existence of crime. There would, in other words, be procedural simplicity.

2. *Robinson* eliminates frustration. Realistically, the inability to search the pockets of all arrestees frequently results in the transportation of an individual whom the officer "knows" is carrying contraband. The final resting place of this contraband is often somewhere behind the back seat of the patrol car.[256] Most officers find this situation offensive and feel that if they are expected to enforce the laws they should be permitted to make a pocket search, which they believe is no greater affront to a person's dignity than an arrest.

The procedural simplicity argument has long had appeal. In 1960, the Supreme Court of Illinois recognized that a "uniform rule permitting a search in every case of a valid arrest, even for minor traffic violations, would greatly simplify our task and that of law enforcement officers." "But," cautioned the court, "such an approach would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the constitution

255. See POLICE CHIEF, Feb., 1974, for an editorial comment reflecting this approval.

256. *See* Morel v. Superior Court, 10 Cal. App. 3d 913, 918, 89 Cal. Rptr. 297, 300 (1970) where this situation is discussed. *But see* People v. Superior Court (Simon), 7 Cal. 3d 186, 211, 496 P.2d 1205, 1223, 101 Cal. Rptr. 837, 855 (1972) (expressly overruling *Morel, supra*).

is designed to provide."[257] This is an apparent recognition of the fact that, as the United States Supreme Court has recently observed, "[t]he Constitution recognizes higher values than speed and efficiency."[258] The California Constitution apparently recognizes the same values.[259] Therefore, the appropriate response to law enforcement's approval of the presumption in *Robinson* that it is always reasonable to search incident to a custodial arrest is, as the Supreme Court has said in another context, "procedure by presumption is always . . . easier than individualized determination. But, . . . it needlessly risks running roughshod over . . . important interests. . . ."[260]

In response to the second point relating to the frustration created by an officer's inability to enforce laws he "knows" are being violated in his presence, it is only necessary to refer to the basic concept of probable cause. Although *Robinson* does authorize a search when there is no reason to suspect fruits, instrumentalities or evidence of the crime leading to arrest, when there is no indication of the existence of another crime, and when there is no indication that the arrestee is armed or dangerous, the need for a search in such circumstances is difficult to discern. As one CHP instructor admitted, if it were somehow possible to have a magistrate at the arrest scene, the officer would be unable to obtain a search warrant in such situations because he or she would be unable to particularly describe the "things to be seized." Under *Robinson*, therefore, the search incident to arrest can become a method for confirming an officer's hunch regarding the presence of contraband rather than an exception to the constitutionally mandated warrant requirement. Although in this context the Supreme Court of Texas has said "we are not. . . dealing with a case of a search upon probable cause but a search incident to a lawful arrest,"[261] such an easily exercised method of evading the probable cause requirement should be viewed with alarm. Since the vast majority of all searches of the person are conducted incident to arrest, the right to be free from unreasonable searches will all but evaporate if, officer frustration notwithstanding, states do not outlaw searches conducted in the absence of probable cause.

257. People v. Watkins, 19 Ill. 2d 11, 18, 166 N.E.2d 433, 437 (1960).
258. Stanley v. Illinois, 405 U.S. 645-56 (1972).
259. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (citing Stanley v. Illinois, 405 U.S. 645).
260. Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).
261. Lane v. State, 424 S.W.2d 925, 927 (Tex. 1967).

B. CALIFORNIA SEARCH AND SEIZURE LAW: SIMON AS THE ANTITHESIS OF ROBINSON

The Origins of the Simon *Rule*

The less than consistent development of federal search and seizure law has not been imitated by the California Supreme Court as it sought to determine for itself what standards were mandated by the state and federal constitutions in relation to searches incident to arrest. In 1955, the California Supreme Court adopted the exclusionary rule in *People v. Cahan.*[262] *Cahan* can be seen to mark the inception of California search and seizure law.[263] Forty-one years earlier, the exclusionary rule had been adopted by the federal courts in *Weeks,* but was not held applicable to the states until 1961. California's independent experience and reasoning served as the wellspring for the California exclusionary rule; while it was adopting the rule as promulgated in *Weeks,* the California Supreme Court carefully stressed that it was not necessarily adhering to the Supreme Court cases interpreting that rule:

> In developing a rule of evidence applicable to the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions this court need not follow them.[264]

The California Supreme Court expressly grounded the *Cahan* decision on the California Constitution as well as the Federal Constitution.

> Most of the incriminatory evidence introduced at the trial was obtained by officers . . . in flagrant violation of the United States Constitution (4th and 14th Amendments), the California Constitution (art. I, §19), and state and federal statutes.[265]

Justice Traynor, writing for the majority, continued:

> [*B*]*oth* the United States Constitution *and the California Constitution* make it emphatically

262. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
263. *Cf.* Collings, *supra* note 9, at 421-22; Manwaring, *California and the Fourth Amendment,* 16 STAN. L. REV. 318, 324-25 (1964).
264. People v. Cahan, 44 Cal. 2d 434, 450, 282 P.2d 905, 915 (1955).
265. *Id.* at 436, 282 P.2d at 906.

> clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected.[266]

Consequently, in the years following *Cahan*, California defined the principles which governed its search and seizure law independently of the controversies which occupied the Supreme Court; nor were California courts so divided on fundamental issues as the Supreme Court in its decisions on search incident to arrest.[267] In addition, California courts often reviewed the validity of searches resulting from traffic arrests. Thus, at the time of *Simon*, the California Supreme Court, unlike the Court in *Robinson*, had both a consistent set of principles and a substantial number of opinions dealing with searches incident to traffic arrests from which to reason.[268]

The California Supreme Court first acknowledged the right to search incident to arrest in *In re Dixon*,[269] a case decided before *Cahan*. The court approved a search of the arrestee's premises, saying, "[t]hereafter it was proper for them, as an incident to a lawful arrest, to search the premises and seize articles which they believed were being used by petitioner in the commission of the crime for which he was arrested." Subsequent to *Cahan*, the California Supreme Court reviewed several search incident to arrest cases and established the boundaries of that right. There must be a lawful arrest, and while the search may precede the arrest, there must be probable cause for the arrest at the time of the search. It is not sufficient for the officer to have a hunch things are amiss.[270] Neither may the prosecution later claim that the search was justified by the fact that a felony was actually being committed, unknown to the officer.[270a] A search may not be justified by what it reveals. Most significantly, even if there is probable cause to arrest, the arrest in

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266. *Id.* at 438, 282 P.2d at 907.

267. Compare the "warrant requirement" controversy in *Coolidge* with the following language from Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956).

> [T]he defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification.

Id. at 272, 294 P.2d at 25. This language has been quoted in most California search and seizure opinions. *See, e.g.*, People v. Superior Court (Kiefer), 3 Cal. 3d 807, 812, 478 P.2d 449, 451, 91 Cal. Rptr. 729, 831 (1970).

268. *See* Collings, *supra* note 9, at 421-22.

269. *In re* Dixon, 41 Cal. 2d 756, 264 P.2d 513 (1955).

270. People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955).

270a. People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955).

itself does not necessarily validate a subsequent search.[271] In *People v. Brown*,[272] the court stated:

> It should be noted at the outset that the legality of an arrest is not necessarily determinative of the lawfulness of a search incident thereto. Just as some searches may be reasonable and hence lawful in the absence of a warrant or an arrest, others may be unreasonable and hence unlawful although incident to a lawful arrest. Accordingly the question presented is not whether arrest of a guilty felon is lawful in the absence of reasonable cause for the officer to believe him guilty, but whether the search incident to arrest is reasonable. . . .[273]

What the court in *Brown* condemned was general exploratory searches predicated on the fact of arrest. Thus, it was held that where a search was too remote in time and place, it bore no relation to the arrest and was therefore unreasonable.[274] Similarly, it was held that a search incident to arrest for one crime cannot be the occasion to search for evidence of other crimes.[275] However, when there were evidences or fruits of a crime to be seized, the court's were not hesitant to allow a search of the arrestee's person and premises.

> [The right to search incident to arrest] may be exercised in aid of discovery of evidence of the particular crime for which the arrest is made. In *People v. Allen*, 14 Cal. App. 2d 267, 288 (398 P.2d 714), this court, referring to *United States v. Rabinowitz*, said: "While the court condemned 'general, exploratory searches,' it did not suggest as violative of the constitution a reasonable search for specific evidence at the locale of the crime."[276]

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271. *But cf.* People v. Ross, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967); People v. Smith, 142 Cal. App. 2d 287, 298 P.2d 540 (1956).
272. People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955).
273. *Id.* at 643, 290 P.2d at 530 (citations omitted).
274. People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955).
275. People v. Mills, 148 Cal. App. 2d 392, 306 P.2d 1005 (1957). The court held that the undercover agent arresting Mills had ample evidence already in the transaction between himself and Mills to arrest him for violation of security laws and that the officer's thorough search of Mills' office was a general exploratory search to uncover evidence of additional crimes.
276. *Id.* at 401-02, 306 P.2d at 1012 (citation omitted). *See also* People v. Winston, 46 Cal. 2d 151, 293 P.2d 40 (1955); People v. Coleman, 134 Cal. App. 2d 594, 286 P.2d 582 (1955).

People v. Cruz[277] formulated the rule that "a search is not 'incident to arrest' unless it is limited to the premises where the arrest is made; is contemporaneous therewith, has a definite object; and is reasonable in scope."[278]

Though the California courts had permitted a search of the premises incident to arrest until the allowable scope of the search was diminished by *Chimel*, the kind of reasoning used in *Chimel* to limit the scope of the search had been used previously by the California courts in several situations. In *People v. Roberts*,[279] officers, while investigating robberies of radios, heard low moaning from within an apartment and entered to render aid. The court said that the scope of a search allowed in such a situation could not exceed that reasonably calculated to discover if someone was in distress. Subsequently, three California Courts of Appeals decisions held that officers entering premises to arrest on a warrant a suspect in a situation where there was no further evidence to be discovered had no right to search the premises.[280] Such searches are considered general, exploratory and calculated to discover evidence of other crimes.[281] In evaluating the validity of seizures the *Roberts* rationale has also been used by the Courts of Appeals to limit the scope of the intrusion to what is necessary to achieve the original objective. In *People v. Willett*,[282] the court found a detention of forty minutes, after stopping Willett for a vehicle equipment violation, exceeded the constitutional scope of temporary detention. In *Pendergraft v. Superior Court*,[283] the court held that where an officer detained a hitchhiker believing him to be a runaway, any further intrusion, once it was determined he was not a runaway, exceeded the permissible scope of the detention.

These cases illustrate the philosophy of California courts that

277. People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964).
278. *Id.* at 866, 395 P.2d at 892, 40 Cal. Rptr. at 844.
279. People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956).
280. People v. Baca, 254 Cal. App. 2d 428, 62 Cal. Rptr. 182 (1967) (arrest of fugitive on a warrant); People v. Vasquez, 256 Cal. App. 2d 342, 63 Cal. Rptr. 885 (1967) (arrest on outstanding traffic warrants); People v. Tellez, 268 Cal. App. 2d 375, 73 Cal. Rptr. 892 (1968) (arrest on warrant for sale of heroin).
281. *See* People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) (Peters, J., dissenting). Justice Peters argued that *Baca, Vasquez,* and *Tellez* illustrated the requirement of a "definitive object" of the search in the *Cruz* rule. *But cf.* People v. Jones, 255 Cal. App. 2d 163, 62 Cal. Rptr. 848 (1967), wherein the court upheld a search incident to arrest for rape even though the police "didn't know what they were looking for."
282. People v. Willett, 2 Cal. App. 3d 555, 83 Cal. Rptr. 22 (1969).
283. Pendergraft v. Superior Court, 15 Cal. App. 3d 237, 93 Cal. Rptr. 155 (1971).

the exigencies of the individual situation determine the reasonableness of the search. Thus, California courts evaluating searches in a traffic arrest situation have looked carefully into the circumstances of each case to determine which if any intrusions were necessarily required.

In 1956, the California Supreme Court decided *People v. Blodgett.*[284] In that decision, the court reasoned that the search of a cab cannot be justified on the ground that the cab driver could have been arrested for double parking since it has no relation to the traffic violation and would therefore not be incidental. Nevertheless, the court upheld the search because a furtive gesture of the arrestee justified the officer in believing that something was being hidden. He then had probable cause to believe contraband was present and could search the car. Courts of Appeals cases following *Blodgett* held that a traffic arrest could not provide justification for search of a vehicle.[285] However, the courts often found other justifications for a search—consent, contraband in plain view, or most often, furtive gesture.[285a]

In 1970, the California Supreme Court, in *People v. Superior Court (Kiefer),*[286] reviewed these cases. Though acknowledging there was probable cause to arrest Kiefer for speeding, the court held that "that fact alone. . .would not have justified a search of the vehicle as 'incident' to the traffic arrest." The court, stating that this rule, first enunciated in *Blodgett*, "has been more often stated than explained," proceeded to explain the rationale for the rule. The right to search incident to arrest is based on the need to discover fruits or instrumentalities of the crime, contraband or weapons. The court reasoned, therefore, that "the arresting officer in a routine traffic case. . .cannot reasonably expect to discover either instru-

284. People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956).

285. *See, e.g.*, People v. Molarius, 146 Cal. App. 2d 123, 303 P.2d 350 (1956) (illegal turn and outstanding traffic warrants); People v. Moray, 222 Cal. App. 2d 743, 35 Cal. Rptr. 432 (1963) (illegal turn and failure to stop); People v. Cruz, 264 Cal. App. 2d 437, 70 Cal. Rptr. 249 (1968) (frame of car below wheel rim). This rule has been subject to the exception that searches incident to arrest for driving under the influence of alcohol or drugs are permissible, for then there are fruits or instrumentalities to be discovered. *See, e.g.*, People v. Robinson, 62 Cal. 2d 889, 402 P.2d 834, 44 Cal. Rptr. 726 (1965); People v. Yniguez, 15 Cal. App. 3d 669, 93 Cal. Rptr. 444 (1971).

285a. *See, e.g*, People v. Davis, 265 Cal. App. 2d 341, 71 Cal. Rptr. 242 (1968) (consent); People v. Figueroa, 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (1969) (plain view); People v. Sanson, 156 Cal. App. 2d 250, 319 P.2d 422 (1957) (furtive gesture); People v. Shapiro, 213 Cal. App. 2d 618, 28 Cal. Rptr. 907 (1963) (furtive gesture); Bergeron v. Superior Court, 2 Cal. App. 3d 433, 82 Cal. Rptr. 711 (1969) (furtive gesture); People v. Mosco, 214 Cal. App. 2d 581, 29 Cal. Rptr. 644 (1963) (furtive gesture).

286. 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970).

mentalities or fruits or seizable evidence of the offense," nor do "the 'circumstances justifying the arrest'—*e.g.* speeding, failing to stop, illegal turn, or defective lights—. . .also furnish probable cause to search the interior of the car." What the court was admittedly here applying was a test of independent probable cause to justify a search,[287] and when the court turned to investigate the third category—the right to search for weapons—that test was not abandoned. The court, conforming with *Terry*, used the phrase "reasonable grounds" instead of probable cause, but the dual nature of the test was unimpaired. A "warrantless search for weapons, like a search for contraband, must be predicated in traffic violation cases on specific facts or circumstances giving the officer reasonable grounds to believe that such weapons are present in the vehicle he has stopped."[288]

Kiefer was speeding and so the officer was authorized merely to issue a citation according to California Vehicle Code procedure. Certain violations permit the officer to take the violator into custody at his own discretion; other violations require the officer to do so.[289] In such situations, it has been argued that a search of the violator's car is justified as incident to the officer's duty to impound the car. California decisions on the right to enter and search a vehicle reveal that in evaluating this question the courts have examined the exact circumstances of each case to determine whether and what kind of an intrusion was necessary. Thus, courts have held that an officer's entry of an unoccupied vehicle was reasonable when the car was illegally parked and had to be moved, but such an entry was unreason-

287. *Id.* at 815, 478 P.2d at 453, 91 Cal. Rptr. at 733.

288. *Id.* at 829, 478 P.2d at 464, 91 Cal. Rptr. at 744. *Keifer* effectively destroyed law enforcement officers' previous reliance on the "furtive gesture" to justify automobile searches. *See Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A.L. REV. 1499, 1533-35 (1968), *noted in* 3 Cal. 3d at 827 n.13, 478 P.2d at 462-63 n.13, 91 Cal. Rptr. at 743-44 n.13.

289. *See* CAL. VEH. CODE § 40303 (West 1971). Arresting officers are authorized at their own discretion to either give the arrestee "a 10 days' notice to appear . . . or [take the arrestee] without unnecessary delay before a magistrate" for offenses including reckless driving, refusal to stop for certain equipment inspections, speed contests, and driving with a suspended or revoked license; CAL. VEH. CODE § 40304 (West 1971) authorizes CHP officers in addition to those offenses covered by § 40303, *supra*, to transport any arrestee arrested for any misdemeanor not specifically codified in the Vehicle Code; CAL. VEH. CODE § 40305 (West 1971) permits an officer to transport any non-resident cited for violation of any traff c law if the arrestee cannot "furnish satisfactory evidence of identity and an address within [California] at which he can be located. . . ." *See also* CAL. VEH. CODE § 40302 (West 1971) which prescribes mandatory custody in the following situations: (1) failure to present driver's license or other satisfactory identification; (2) refusal to give written promise to appear; (3) upon demand of immediate appearance before a magistrate; and (4) driving under the influence of alcohol or drugs.

able when there was no emergency.[290]

A search incident to arrest may be made to discover destructible evidence and to seize weapons from the vehicle in the area under the arrestee's immediate control.[291] In addition, when the nature of the crime gives the officer probable cause to believe there is contraband in the vehicle, a search of the vehicle is allowed.[292] If necessary, the car can be impounded and taken to the police station and searched there.[293] *Preston v. United States*[294] and *People v. Burke*,[295] in which searches of the automobile at the police station were held invalid as being too remote in time and place from the arrest, were distinguished in *People v. Webb*;[296] for the California Supreme Court found in *Webb* that it was reasonable to have the car removed to the station since it was blocking the roadway and "a mob" was forming. The search at the station was a continuation of the search at the scene of arrest.

When, however, there is no right to search the car, as in the case of a traffic arrest, California courts have not usually found that it was necessary to impound the car simply because the driver was being taken into custody. In *Virgil v. Superior Court*,[297] the driver was arrested for reckless driving and taken into custody. The officer inventoried the car prior to impounding it and discovered marijuana plants. The court held that there was no need to impound the vehicle; that it could have been removed by one of the passengers;

290. People v. Grubb, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965) (reasonable search); People v. Superior Court (Fishback), 2 Cal. App. 3d 304, 82 Cal. Rptr. 766 (1969) (unreasonable search where officer entered car and searched glove compartment to identify owner for the purpose of notifying him that his tape deck had been stolen).

291. People v. Burke, 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964); Chimel v. California, 395 U.S. 752 (1969).

292. People v. Webb, 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967). The court argued that the need to seize weapons or fruits and instrumentalities did not exhaust all possible justifications for search incident to arrest. *But see* Mestas v. Superior Court, 7 Cal. 3d 537, 498 P.2d 977, 102 Cal. Rptr. 729 (1972). Here the court indicated that *Chimel* and *Chambers*, both decided after *Webb*, clearly held "that circumstances surrounding an arrest will justify a search of the car after the defendant has been removed from the scene only if those circumstances show probable cause to search for contraband or evidence." *Id.* at 541 n.3, 498 P.2d at 979 n.3, 102 Cal. Rptr. at 731 n.3.

293. *See* People v. Webb, 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967). *See also* People v. Williams, 67 Cal. 2d 226, 430 P.2d 30, 60 Cal. Rptr. 472 (1967); People v. Upton, 257 Cal. App. 2d 677, 65 Cal. Rptr. 103 (1968); People v. Laursen. 8 Cal. 3d 201, 501 P.2d 1145, 104 Cal. Rptr. 425 (1972).

294. Preston v. United States, 376 U.S. 364 (1964).

295. People v. Burke, 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964).

296. People v. Webb, 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967). *Accord*, People v. Williams, 67 Cal. 2d 226, 438 P.2d 30, 60 Cal. Rptr. 472 (1967).

297. Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968). *See also* People v. Van Sanden, 267 Cal. App. 2d 662, 73 Cal. Rptr. 359 (1960); Martinez v. Superior Court, 7 Cal. App. 3d 569, 84 Cal. Rptr. 6 (1970).

and that, therefore, the search was illegal. In *People v. Nagel*,[298] the court found it was unnecessary to impound the vehicle of a traffic violator when it could have been safely parked a block away.

Finally, even if a vehicle is lawfully impounded, *Mozzetti v. Superior Court*[299] has sharply limited the scope of the inventory allowed to that reasonably necessary to achieve the objectives of the impounding.

> Where "[t]he vehicle [was] stored for safekeeping, . . . the contents need not be examined or removed because they may readily and adequately be protected by locking the vehicle. . . . In no case is an inventory of items not within plain sight essential to safeguard the contents or fulfill a 'slight duty of care'."[300]

California courts have found neither the fact of the arrest nor the fact of police custody to be determinative in justifying a search of the automobile. Instead, California courts have evaluated each question—when can an officer enter a car, search the car, impound it or inventory it, and what would be the reasonable scope of any such intrusion—by weighing the necessity of the intrusion against the prohibition against unreasonable searches and seizures in each individual set of circumstances. There have been no indications in California cases that this method is not equally applicable in evaluating searches of the person.

Searches of the person incident to a traffic arrest have no more compelling justification than that for search of the car. There are no evidences of the crime, and without more, no probable cause to believe contraband to be present on the arrestee's person. The question of the validity of the search, then, depends on the validity of a search for weapons. The first California cases to rule on the question of weapons searches in a traffic arrest held that a "cursory search" for weapons was permissible. The court in *People v. Stewart*[301] reasoned:

> Any officer who, when arresting an unknown

298. People v. Nagel, 17 Cal. App. 3d 492, 95 Cal. Rptr. 129 (1971).
299. Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). In *Mozzetti, supra*, the defendant was taken to a hospital following an auto accident injury. Her car was held by police and its contents inventoried. A small, locked suitcase found on the back seat was opened and was found to contain marijuana.
300. 4 Cal. 3d 669, 702, 484 P.2d 84, 90, 94 Cal. Rptr. 412, 418 (1971).
301. People v. Stewart, 189 Cal. App. 2d 176, 10 Cal. Rptr. 879 (1961).

> person, fails to search that person before commencing to transport him to jail would be derelect in common caution and in all probability would experience some unpleasantness.[302]

Other cases, subsequent to *Stewart*, likewise upheld the right to search for weapons in a traffic arrest without defining the permissible scope of the search.[303] However, in 1968, the United States Supreme Court decided *Terry*, which defined when a weapons search was permissible and the proper scope of such a search. California courts then began to look more closely at the necessities and justifications for a weapons search in a traffic arrest situation. In the years between 1968 and 1972, when *Simon* was decided, the Courts of Appeals developed several conflicting rules and rationales as to when and in what manner a weapons search could be made.

The single case which took the *Terry* rationale totally as its guideline was *People v. Hana*.[304] In that case, the court equated the traffic arrest situation with the temporary detention in *Terry* and therefore held that a pat-down search could be made only if the officer had reasonable grounds to believe the suspect was armed and dangerous. The most prominent line of cases following *Terry* ignored the first part of the "dual inquiry" in *Terry* to focus on the second—the permissible scope of the search. Thus, the court in *People v. Nunn*[305] argued,

> Although *Terry v. Ohio* involved a search for weapons conducted in the absence of probable cause to arrest, its teaching concerning the proper scope of a weapons search is equally applicable to a search made after a lawful arrest where the sole justification for the search is the protection of the officers and persons nearby.[306]

People v. Graves,[307] decided in the same year, formulated the rule that:

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302. *Id.* at 179, 10 Cal. Rptr. at 881.
303. *See, e.g.*, People v. Reed, 202 Cal. App. 2d 575, 20 Cal. Rptr. 911 (1962); People v. Kraps, 238 Cal. App. 2d 675, 48 Cal. Rptr. 89 (1965). *See also* People v. Strelich, 189 Cal. App. 2d 632. 11 Cal. Rptr. 807 (1961). In *Stewart, supra*, and *Reed, supra*, there was no indication whether a pat-down search was initially conducted. In *Kraps, supra*, there was a pat-down search which revealed a hard bulge which proved to be a film can containing marijuana.
304. People v. Hana, 7 Cal. App. 3d 664, 86 Cal. Rptr. 721 (1970). *See also* People v. Figueroa, 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (1969); People v. Superior Court (Fuller), 14 Cal. App. 3d 935, 92 Cal. Rptr. 545 (1971).
305. People v. Nunn, 264 Cal. App. 2d 919, 70 Cal. Rptr. 869 (1968).
306. *Id.* at 924-25, 70 Cal. Rptr. at 873.
307. People v. Graves, 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968).

> [A] valid arrest for a traffic offense permits a search by the arresting officer of the arrestee's person for weapons, but does not justify a complete search of his person for evidence of other unrelated crimes unless the officer has probable cause for believing that the traffic offender is guilty of a crime other than the traffic offense for which he is being arrested.[308]

The *Graves* court reasoned that the need to search for weapons was traditionally justified in an arrest, that the permissible scope of such a search is a pat-down search following *Terry* and that in view of the danger to police in stopping traffic violators, a routine pat-down search should be allowed for adequate police protection. Following *Graves*, other Courts of Appeals cases have upheld a pat-down weapons search in traffic arrests.[309]

The *Graves* rule meant that the only search justified as a search incident to arrest was a protective pat-down search for weapons. It had been argued, however, that a full search of the person could be justified as well when incident to booking or when incident to the transportation of the arrestee. The first of these arguments was rejected by the Courts of Appeals. Although it was well-settled not only that a search at booking was proper to prevent weapons or contraband from being introduced into the detention facility, but also that when a proper booking search was allowed a search in the field was reasonably contemporaneous,[310] the court noted that in a traffic arrest there is no requirement for booking and therefore no proper booking search. California Vehicle Code section § 40307 was construed by *People v. Dukes*[311] and *People v. Mercurio*[312] to mean that the traffic violator taken into custody must be brought directly before a magistrate and allowed to post bail or be released on his own recognizance.[313] Relying on *Nunn* and *Graves*, these cases reasoned that the only search allowed in a traffic arrest was a protective search for weapons.

The transportation justification was announced in *Morel v.*

308. *Id.* at 733-34, 70 Cal. Rptr. at 519.
309. *See* People v. Weitzer, 269 Cal. App. 2d 274, 75 Cal. Rptr. 318 (1969); Taylor v. Superior Court, 275 Cal. App. 2d 146, 79 Cal. Rptr. 677 (1969).
310. People v. Ross, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967).
311. People v. Dukes, 1 Cal. App. 3d 913, 82 Cal. Rptr. 218 (1969).
312. People v. Mercurio, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970).
313. *Accord*, Carpio v. Superior Court, 19 Cal. App. 3d 790, 94 Cal. Rptr. 186 (1971); Agar v. Superior Court, 21 Cal. App. 3d 24, 98 Cal. Rptr. 148 (1971).

Superior Court.[314] That opinion preliminarily noted that searches incident to arrest are "usually" reasonable:

> [T]he general principle is that the search of the person which is incident to a lawful arrest is valid, . . . [but] [t]here is, however, the question of the permissible scope of the incident search.[315]

The court concluded that a full search is to be allowed whenever the suspect is taken into custody to be transported.[316] The court in *Morel* distinguished *Graves* and its successors on the ground that they did not discuss the issue of the permissible search incident to transportation. *Graves* upheld the search as based on probable cause to believe Graves had committed burglaries; the *Dukes* and *Mercurio* decisions concerned booking searches, not searches incident to transportation. To most observers, however, *Hana, Graves,* and *Morel* presented an obvious divergence of opinion in the Courts of Appeals to be resolved when the *Simon* case came before the California Supreme Court.

Simon: *California's Better Rule*

Simon found the requirement in *Kiefer* that there be either an independent finding of probable cause to search a vehicle for contraband or reasonable grounds to search for weapons, applicable to a search of the person. Applying then the principle of *Terry* that "the scope of the search must be reasonably related to and justified by the circumstances which rendered its initiation permissible," the court held that a pat-down only is allowed when the search's purpose is to discover weapons.

Simon, therefore, expressly disapproves the *Graves* right of an automatic pat-down search and approved the reasoning in *Hana.* For the *Graves* court, the arrest itself provided the "constitutionally adequate reasonable ground" for a protective search, but this view was not endorsed in *Simon.*

It is difficult, as the court argues in Section IIA of the opinion, to determine what is an "arrest" in the legal sense. "Such language

314. Morel v. Superior Court, 10 Cal. App. 3d 913, 89 Cal. Rptr. 297 (1970).
315. *Id.* at 916, 89 Cal. Rptr. at 299 (citations omitted). *See* People v. James, 1 Cal. App. 3d 645, 648, 81 Cal. Rptr. 845, 847 (1969) (valid traffic arrest justifies per se a full search of the person).
316. *Id.* at 917-18, 89 Cal. Rptr. at 300-01. For cases following the reasoning in *Morel* see Pugh v. Superior Court, 12 Cal. App. 3d 1184, 91 Cal. Rptr. 168 (1970); People v. Brown, 14 Cal. App. 3d 507, 92 Cal. Rptr. 473 (1971).

is at best only a kind of verbal shorthand."[317] It seems, therefore, unreasonable to make determinations as to whether constitutional rights can be invaded on such legal uncertainties. "[T]he physical risk to the officer is created by the circumstances of the confrontation taken as a whole, not by the technical niceties of the law of arrest."[318] To identify a valid protective search for weapons, the proper question is whether "this [is] the kind of confrontation in which the officer can reasonably believe in the possibility that a weapon may be used against him?"[319]

The *Graves* court found that because of a known danger to police in affecting traffic arrests, a routine pat-down search should be permitted. *Simon* acknowledged the "dangers faced daily by the men who bear the burden of policing our streets and highways," but nevertheless "adhere[d] to *Kiefer*'s common sense appraisal of the situation," noting that only a small percentage of the millions of traffic stops would prove dangerous. Therefore, the court found the procedure in *Terry*—a pat-down search when the suspect appears to be dangerous—to be sufficient to protect the officer. The CHP case study, reported above, supplies empirical confirmation of the validity of *Simon*'s viewpoint.

Simon also disapproved of the *Morel* reasoning which would justify a full search of the suspect because he was being transported before a magistrate. Reading California Vehicle Code §§ 40302, 40306 and 40307 carefully, the court found that:

> The clear and unmistakable import of these provisions, when read together, is that a person taken into custody pursuant to section 40302 must be transported *directly* to a magistrate or to one of the officials listed in section 40307, and must *immediately* be released on bail or written promise to appear.[320]

The search of a traffic violator cannot then be upheld as contemporaneous to a valid booking search.[321] Neither can the search be upheld by the fact of the transportation. To do so, the court warned, would be to hold "that, as a matter of law, every person who is to

317. 7 Cal. 3d 186, 200, 496 P.2d 1205, 1215, 101 Cal. Rptr. 837, 847 (1972).
318. *Id.* at 204, 496 P.2d at 1218, 101 Cal. Rptr. at 850.
319. *Id.*
320. *Id.* at 209, 406 P.2d at 1222, 101 Cal. Rptr. at 854 (footnote omitted).
321. *Id.* at 209-10 n.18, 496 P.2d at 1222-23 n.18, 101 Cal. Rptr. at 854-55 n.18.

be transported in a police vehicle, for any reason, may be subjected to a search."[322]

Simon specifically rejected the *Graves* argument that the arrest itself provided "constitutionally adequate reasonable ground" for a search. It held instead that the "circumstances of the confrontation" must provide the reasonable grounds for an intrusion. This has been the understanding of California since the "inception" of its search and seizure law. Early California Supreme Court cases decided immediately after *Cahan* established the policy in California of looking to the facts of each situation to determine what necessities are present requiring a search. Where there is no search warrant, California has clearly placed the burden on the prosecution to show proper justification for the search.[323] In viewing whether the search of the person or his vehicle as incident to a traffic arrest was permissible, California courts have examined the following factors: (1) authority to take the arrestee into custody; (2) necessity to take the arrestee's vehicle into custody; (3) other circumstances giving the officer probable cause to believe contraband present or to believe the arrestee had committed another crime; and (4) reasonable grounds to believe weapons present on the person or in the vehicle of the arrestee. *Simon*, unable to discover any reasonable grounds for the officer's belief that contraband or weapons were present on Simon's person, found no necessity to search. Cases arising after *Simon* generally followed the reasoning in that case.[324] To reject the *Simon* rule and substitute the *Robinson* rule would have more impact on California's search and seizure law than just a change in the rule of searches incident to traffic arrests. It would call into question the underlying principles of all California search and seizure law; for the hallmark of that law has been the court's insistence on requiring police intrusions to be specifically dictated by the need to search in the circumstances of each particular situation.

For this reason, and because *Simon* enunciates a constitutional standard which does not fall below the national minimum standard established by *Robinson*, it is neither mandatory nor advisable that California adopt the *Robinson* rule. There are at least two other rea-

322. People v. Smith, 17 Cal. App. 3d 604, 607, 95 Cal. Rptr. 229, 231 (1971).
323. Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956).
324. *See, e.g.*, People v. Lawler, 9 Cal. 3d 156, 507 P.2d 621, 107 Cal. Rptr. 13 (1973); People v. Aylwin, 31 Cal. App. 3d 826, 107 Cal. Rptr. 824 (1973); People v. Grace, 32 Cal. App. 3d 447, 108 Cal. Rptr. 66 (1973). *But see* People v. Ramos, 26 Cal. App. 3d 108, 102 Cal. Rptr. 520 (1972); People v. Superior Court (Scott), 35 Cal. App. 3d 621, 110 Cal. Rptr. 875 (1973).

sons for this conclusion. First, in view of the realities of traffic stop dangers as reflected in the CHP case study, the traditional justifications for a search incident to an arrest, and California's sound independent probable cause to search and scope of search requirements, *Simon* strikes a fairer balance between competing individual and law enforcement interests than *Robinson*. Second, *Simon* reflects the superior case-by-case approach to assessing the reasonableness of searches and seizures. This second point is important enough to warrant additional discussion.

Simon exemplifies what Justice Marshall, in his *Robinson* dissent, called the "tradition of case-by-case adjudication of the reasonableness of searches and seizures . . . ." In fact, the California Supreme Court, by requiring that even "a pat-down search for weapons as an incident to [a traffic] arrest must be predicated on specific facts or circumstances giving the officer reasonable grounds to believe that a weapon is secreted on the motorist's person,"[325] has served notice that an officer's decision to conduct even the most routine search can always be examined by the courts and, if the facts so indicate, be found constitutionally unreasonable. Justice Jackson, in a frequently quoted passage from *Johnson v. United States*,[326] also recognizes that searches cannot be evaluated before they happen:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[327]

The *Robinson* majority ignored these wise remarks and declared that, henceforth, every non-pretext and non-conscience shocking search incident to a custodial arrest automatically satisfies the exacting constitutional standard of reasonableness. In effect, the Court has announced that it simply will not question the judgment of the arresting officer who conducts a thorough personal effects search as long as it attends a "custodial" arrest. There is no indica-

325. People v. Superior Court (Simon), 7 Cal. 3d 186, 206, 496 P.2d 1205, 1220, 101 Cal. Rptr. 837, 852 (1972).
326. Johnson v. United States, 333 U.S. 10 (1948).
327. *Id.* at 13-14.

tion, however, that the fact of custody always renders an officer's judgment reasonable;[328] *Simon* describes a situation in which the California Supreme Court specifically found that, custody notwithstanding, the officer's decision to search was unreasonable.[329] We conclude, therefore, that there is a great need for judicial review of searches incident to arrest because, as the *Robinson* majority points out, the inferences discussed by Justice Jackson are made on an ad hoc basis by the arresting officer rather than by a neutral and detached magistrate and because an officer's judgment can occasionally be unreasonable.[330]

There are other indications that the *Simon* rationale is superior to that found in *Robinson.* Both Judge Wright in his opinion for the Court of Appeals in the *Robinson* case and Justice Marshall in his dissent to the majority's opinion discuss the relevant state and federal pre-*Robinson* case law, concluding in Marshall's words, that "the prevailing federal and state authority . . . condemns the search of persons and automobiles following routine traffic violations."[331] At least one state high court, the Supreme Court of Rhode Island, was sufficiently impressed with the logic of Judge Wright's opinion and of the authorities cited therein to align its state rule with the prevailing rule despite the fact that it knew the Supreme Court would render its own, perhaps conflicting, opinion in the *Robinson*

328. We make this observation without necessarily endorsing one commentator's assertion that "[o]ne's ultimate opinion of *United States v. Robinson* may well turn on his attitude toward the police." Note, *Restricting the Scope of Searches Incident to Arrest*, 59 VA. L. REV. 724, 748 (1973) (commenting on the *Robinson* case before it reached the Supreme Court). One need not suspect police motives to realize that it is humanly impossible for *all* police officers to exercise sound judgment in *every* arrest situation.

329. 7 Cal. 3d 186, 208, 496 P.2d 1205, 1221, 101 Cal. Rptr. 837, 853 (1972). Even if one disagrees with the California Supreme Court's determination, it is obvious that at least some of the countless custodial arrests for minor misdemeanors will not involve circumstances justifying even the most minimal pat-down search, as the recent spate of arrests in Southern California for nude sunbathing attests. Traffic arrests are easily the most numerous; UCR, *supra* note 233, reported in addition 265,600 custodial arrests of "runaways," 62,300 vagrancy arrests, 151,200 curfew and loitering arrests, etc., nationwide. For some relevant thoughts on the subject, see Douglas, *Vagrancy and Suspicion*, 70 YALE L.J. 1 (1960); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE—TASK FORCE REPORT: POLICE 187 (1968). While much of the abusive use of such arrests described by the President's Task Force Report has probably been eliminated (*but see Judicial Attempts to Control Police*, CURRENT HISTORY, July, 1971, at 16-17), if every such arrest will automatically support a full personal search, the potential for abuse will be so great that courts will probably be unable to control it.

330. *See* 18 How. L.J. 446, 457 (1974). Since the *Robinson* majority did "leave for another day questions which would arise on facts different from these" (414 U.S. at 221 n.1), it has been suggested that the various implications of the *Robinson* rule, of which the injury to the case-by-case method is a major one, can be avoided by careful factual distinctions. For the lower federal courts especially, this is sound advice.

331. 414 U.S. 218, 246 (1973).

case.[332] In addition to California and Rhode Island, at least thirteen other states accepted some variation of the *Simon* rationale prior to *Robinson*,[333] while only seven firmly rejected it.[334] Almost two-thirds of the state courts confronting the issues raised by searches conducted incident to arrest for minor infractions thus preferred the rule that probable cause to search must exist before even a search incident to arrest is justified. They also recognized that there are some situations where no arrest is justified even though a custodial arrest is involved, and that the case-by-case adjudication of search and seizure cases is essential for the effective preservation of the constitutional prohibition against unreasonable searches and seizures.

Whether or not Justice Rehnquist's decision to ignore rather than respond to these earlier decisions is, as Justice Marshall suggests, "disingenuous," it is indeed unfortunate, for how can states with rules antithetical to *Robinson* determine the status of their state rules if the Supreme Court does not discuss them? Can it be that the *Robinson* majority sought only to lower the national minimum constitutional standard and intentionally left undisturbed the various higher state standards? In the absence of direction from the Supreme Court, such a conclusion seems entirely justified. The courts of at least two states have already expressed, along with sharp criticism of the result in *Robinson*, opinions which are consistent with this view.[335] Judge Goldfluss' opinion in *People v. Kelly*[336] is of special interest:

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332. State v. Soroka, — R.I. —, 311 A.2d 45 (1973).

333. State v. Quintana, 92 Ariz. 267, 376 P.2d 130 (1964); People v. Valdez, — Colo. —, 511 P.2d 472 (1973); State v. Cuellar, 25 Conn. Sup. 229, 200 A.2d 729 (Superior Ct., Fairfield Cty. 1964); Rowland v. State, 117 Ga. App. 577, 161 S.E.2d 423 (1968); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967); Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953); State v. O'Neal, 251 Ore. 163, 444 P.2d 951 (1968); Commonwealth v. Dussel, 439 Pa. 392, 266 A.2d 659 (1970); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962); Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964). State v. Hanawahine, 50 Hawaii 461, 443 P.2d 149 (1968), seems to have anticipated the Hawaiian Supreme Court's rejection of *Robinson* in State v. Kaluna, —Hawaii —, 520 P.2d 51 (1974).

Some states are beginning to retreat in the face of *Robinson*. *See, e.g.*, People v. Cannon, 18 Ill. App. 3d 781, 310 N.E.2d 676 (1974); People v. Moore, 391 Mich. 426, 216 N.W.2d 770 (1974); Hughes v. State, 522 P.2d 1331 (Okla. 1974).

334. State v. Culver, 288 A.2d 279 (Del. 1972); People v. Gustafson, 258 So. 2d 1 (Fla. 1973); Watts v. State, 196 So. 2d 79 (Miss. 1967); State v. Moody, 443 S.W.2d 802 (Mo. 1969); State v. Campbell, 53 N.J. 230, 250 A.2d 1 (1969); State v. Coles, 20 Ohio Misc. 12. 249 N.E.2d 553 (Ct. C.P. Montgomery Cty. 1969); Lane v. State, 424 S.W.2d 925 (Tex. 1967).

335. People v. Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 111 (N.Y. Cty. Crim. Ct. 1974); State v. Kaluna, — Hawaii —, 520 P.2d 51 (1974). *Kelly, supra*, has been criticized because it purportedly interprets the fourth amendment differently than the

> It appears . . . that the court of Appeals may not narrow Fourth Amendment protections further than the Supreme Court dictates, but there is no prohibition against the State through its highest appellate court extending such protection. For these reasons, it is the opinion of this court that [*People v.*] *Marsh* [20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967)] is not replaced by *Gustafson* and *Robinson* and is still the law in New York. The principle of *Marsh* is fair, reasonable, and equitable, and was consistent with Federal interpretations of the Fourth Amendment prior to *Gustafson* and *Robinson.* These latter cases take issue with *Marsh* on the theory that the privacy of interest guarded by the Fourth Amendment is subordinate to a "legitimate and overriding governmental concern." Such a phrase has connotations which could erode Fourth Amendment protections and with very little imagination, could be the basis for the "ignoble shortcut to conviction" which Judge Clark abhorred in *Mapp v. Ohio.*[337]

As has been suggested earlier, this type of aggressive state independence is an effective and legitimate method of dealing with the anxiety created when a state rule is deprived of federal constitutional support. Since a resurgence of federalism will also engender anxiety, however, it must be treated as an issue which is separate from considerations regarding the merits of various rules.

PART III

The foregoing discussion of the contrast between *Robinson* and *Simon* suggests that, at least for California, *Simon* remains the better rule. This conclusion raises the issue of whether *Simon* presently is—or can quickly become—supported by an independent and adequate state ground. Any state court which compares conflicting fed-

United States Supreme Court. *See* Comment, *United States v. Robinson: Its Effect on the Right to Search Incident to Arrests for Traffic Violations in California,* 7 LOYOLA L.A.L. REV. 516, 529 n.73 (1974) [hereinafter cited as Comment]. However, we read *Kelly* differently. *Kelly* holds merely that People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967), which is New York's equivalent of *Simon* and which is expressly grounded on the New York Constitution, "is not replaced by . . . *Robinson.*" 77 Misc. 2d at 269, 353 N.Y.S.2d at 117. The dicta in *Kelly* regarding the fourth amendment may be nothing more than an index of the *Kelly* court's dissatisfaction with the *Robinson* rationale.

336. People v. Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 111 (N.Y. Cty. Crim. Ct. 1974).

337. *Id.* at 269, 353 N.Y.S.2d at 117.

eral and state decisions, as *Robinson* and *Simon* have been compared above, will face such an issue if it concludes its state rule is preferable. Even more fundamental than the state ground issue, therefore, is the issue of whether federalism is still a viable doctrine; whether, in other words, it is appropriate for state courts to impose constitutional standards on their jurisdictions which are stricter than those minimally required by the Federal Constitution.

If, as one writer has suggested, "the federal and California prohibitions upon illegal search and seizure [are] co-extensive,"[338] then perhaps *Simon* should be abandoned in deference to *Robinson*, notwithstanding any support the former may derive from the California Constitution. On the other hand, the *Simon* rule may be retained if it is proper for a state's bill of rights to operate independently. An inquiry into the federalism question is thus essential—especially since the Burger Court's retrenchment may result in abandonment of the constitutional interpretations upon which state courts have often relied in their own decisions.

Two recent California appellate court decisions illustrate how unfamiliar state courts are with the federalism issue. In *People v. Norman*,[339] a Second District Court of Appeal expressed the "anti-federalist" opinion that it was required to adopt the *Robinson* rule because "recent decisions of the United States Supreme Court . . . implicitly overrule California Supreme Court decisions to the contrary."[340] In *People v. Martinez*,[341] however, the Third District Court of Appeal adopted the "states rights" position that *Simon* is supported by a California Supreme Court interpretation of California Constitution article I, section 19 (the California equivalent of the fourth amendment) and is thus "binding upon [lower California courts] notwithstanding the United States Supreme Court rule . . .

338. Thompson, *supra* note 3, at 249. Although Justice Thompson actually says the California Supreme Court has, in at least one decision, treated the fourth amendment and the California Constitutional equivalent, article I, section 19, as coextensive, the tone of his article and of his opinion in People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43 (1974), strongly suggests that he, rather than the supreme court, is the source of this view. *See In re* Love, 11 Cal. 3d 179, 189, 520 P.2d 713, 719, 113 Cal. Rptr. 89, 95 (1974), in which the supreme court recently recognized that the California "Constitution is, of course, a separate and independent source upon which decisions might be grounded." *Id.* [Note: On Nov. 7, 1974, the voters of California approved a proposal to reorganize parts of the California Constitution. As a result, article I, § 19 is now numbered article I, § 13.]

339. People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43 (1974), *hearing granted*, Crim. No. 17643, Cal. Sup. Ct., Mar. 20, 1974.

340. *Id.* at 883, 112 Cal. Rptr. at 45.

341. People v. Martinez, 36 Cal. App. 3d 527, 111 Cal. Rptr. 570 (1974), *hearing granted*, Crim. No. 17625, Cal. Sup. Ct., Mar. 11, 1974.

as applied to federal cases under the facts in *Robinson*. . . ."[342]

Perhaps due to this diversity of responses, the California Supreme Court has granted hearings in *Norman, Martinez,* and similar cases.[343] A perfect opportunity thus exists to assess the various options available to state courts in positions similar to those of California courts.

A. PROCEDURE FOR DECIDING WHETHER TO RETAIN A STATE RULE: THE INDEPENDENT STATE GROUND DOCTRINE IN PRACTICE.

Since an inquiry into a topic as vast as federalism is somewhat ambitious, the goals of the following sections are both limited and pragmatic. First, the procedure a state court should employ when it confronts a conflict between state and federal rules (henceforth referred to as simply "the procedure") will be outlined. Second, the *Norman* opinion will be examined throughout in order to illustrate how careless use of the procedure can lead to unwarranted anti-federalist decisions. Third, the policy considerations ultimately advanced by the *Norman* court in support of its decision will be analyzed.

"THE PROCEDURE"—Step One.

The first step in the procedure is to ascertain whether or not the conflicting rules apply to the facts of the case at bench. For example, do the *Robinson* and *Simon* rules, which only apply to situations where there is no indication that a search for fruits, instrumentalities, evidence, or weapons is needed, apply to the facts of the *Norman* case? The *Norman* court asserts that they do, but the following description of the events preceding Mr. Norman's arrest engenders doubt.

In the early morning darkness of February 28, 1973, a van driven by Jack Lee Norman was observed by Officer Leo J. Repp

342. *Id.* at 539 n.1, 111 Cal. Rptr. at 576 n.1. *See* People v. Longwill, 3 Crim. 7147 (1974), *hearing granted*, Crim. No. 17773, Cal. Sup. Ct., May 20, 1974) (unpublished opinion). The *Longwill* court stated:

> Since the states are free to effectuate under their own laws stricter standards than those laid down by the United States Supreme Court, . . . we are bound to the holding in the *Simon* case. . . .

Id. at 3. *But see* People v. Maher, 41 Cal. App. 3d 152, 115 Cal. Rptr. 864 (1974) ("*Simon* is not necessarily inconsistent with the principle enunciated in *Robinson*").

343. The California Supreme Court disposed of the issues raised by these conflicting opinions in People v. Brisendine, — Cal. 3d —, — P.2d —, — Cal. Rptr. — (1975). For a brief discussion of *Brisendine* see note 11a *supra.*

of the Inglewood, California, Police Department. Although Officer Repp was initially concerned about the fact that the van's lights were not illuminated, this relatively minor traffic violation soon became the least of Mr. Norman's worries. The court explains:

> [After spotting the van driving without lights,] Officer Repp shined the spotlight of the police vehicle on respondent who "gave [Repp] a rude gesture with his finger and continued southbound on La Brea." Repp activated the red lights of his vehicle and pursued respondent down La Brea to Cedar where respondent made a left turn against a red light. Respondent, who ran a stop sign, continued on Cedar until he stopped just short of Manchester. Repp exited the police car and approached the stopped van. Respondent "stuck his head out the driver's window and said 'Fuck you, cop' and drove off." Repp returned to his vehicle and pursued the van at a speed of 45 to 50 miles per hour to just past La Cienga where he forced the van to a halt. Repp left the police car and approached the van with gun drawn. A second police car, driven by Officer Errol D. Cobb, arrived at the scene, and Officer Cobb also approached the van.
>
> Respondent exited the van from the driver's door. He had a black cylindrical object in his hand which appeared to be a gun. Repp pointed his service revolver at respondent and told him "to either drop it or die." Respondent turned his body a "little bit to the rear" and with a "wrist flip" threw the black object to a point under the van, one or two feet in front of the left rear wheel. Officers Repp and Cobb both saw the black object as it fell to the ground. Since it made no noise when it hit, Cobb realized the object was not a gun. Repp said to Cobb: "He threw it over there. He had something in his hand and he threw it." Cobb responded that he had seen the object. Repp placed respondent and a female companion in handcuffs. Cobb picked up the object which respondent had thrown, a black plastic tobacco pouch five and one-half inches wide and four to four and one-

> half inches deep. Cobb brought the tobacco pouch to Repp. Inside the pouch were marijuana, Zig Zag cigaret papers and seconal pills.[344]

The respondent was charged in an information alleging possession of marijuana and seconal. The drugs seized by Officer Repp had been received at the preliminary hearing over respondent's objection that they were the product of an illegal search. Pursuant to a defense motion, however, the trial court dismissed the information "on the ground that the only evidence adduced against [the defendant] at the the preliminary hearing was illegally obtained."[345] The state appealed the dismissal and the appellate court, although asserting that under *Simon* the validity of the examination of the inside of the tobacco pouch would be "in doubt," nonetheless reversed on the ground that *Robinson* "implicitly overrules" *Simon*.[346]

As the facts are presented by the *Norman* court, it appears that Officer Repp had reason to believe Mr. Norman was driving under the influence of an intoxicant, was dangerous, or both. Since *Simon* expressly permits searches in such cases,[347] the *Norman* court could possibly have reversed the lower court without concerning itself with the troublesome issue of federalism. Even if this possibility was not available because, among other things, there was no arrest for intoxication and no indication the pouch was a weapon, courts should still carefully examine the facts of each case before they decide they are required to choose between two incompatible rules.

Step Two: Identifying the Constitutional Footing of Controlling State Precedent

All courts apparently recognize that if a state rule expressly reflects a state high court's interpretation of the state constitution, it is unaffected by the creation of a lower federal standard.[348] State lower courts would therefore be required to follow such local rules unless they are modified by the court which enunciated them. The only way to determine whether this is so in any given case is to identify the constitutional footing of the relevant state decisions.

The *Norman* court found that the Federal Constitution is the foundation upon which *Simon* rests. The court advanced at least

344. 36 Cal. App. 3d at 882, 112 Cal. Rptr. at 44-45.
345. *Id.*
346. *Id.* at 883, 112 Cal. Rptr. at 45.
347. 7 Cal. 3d at 202 n.12, 496 P.2d at 1216 n.12, 101 Cal. Rptr. at 848 n.12.
348. *See generally* text accompanying notes 85-105 *supra.*

two reasons for its conclusions: (1) the California Supreme Court, although equivocal, has mandated that United States Supreme Court search and seizure decisions be followed; and (2) *Simon*, which is based on interpretations of the fourth amendment and *not* interpretations of article I, section 19, must be discarded in the face of the explicit fourth amendment interpretation contained in *Robinson*. Both of these reasons, and the general advisability of this type of submission to the Federal High Court, must be carefully assessed in light of the nature and function of states' bills of rights discussed above, and especially in light of California's singular history of judicial independence in the area of search and seizure law.

The *Norman* court's belief that the California Supreme Court has mandated that the United States Supreme Court be followed in the area of search and seizure law is based on an involved analysis of what the appellate court perceived as a conflict between two lines of California Supreme Court authority. One line of authority, represented by *People v. McKinnon*,[349] "determines that a United States Supreme Court decision construing the Fourth and Fourteenth Amendments to the United States Constitution controls [the California Supreme Court's] determination of a parallel issue."[350] The other line of authority is represented by *People v. Krivda*[351] and *People v. Triggs*.[352] The *Norman* opinion acknowledges that these latter decisions stand for the general proposition that California Supreme Court search and seizure decisions are grounded on article I, section 19 of the California Constitution as well as the fourth amendment, notwithstanding the fact that some of those decisions may somewhat carelessly neglect to mention the state constitutional ground. Decisions validly grounded on the California Constitution would, of course, be unaffected by reinterpretations of the fourth amendment by the United States Surpeme Court.[353]

In light of the "inconsistency" in California Supreme Court decisions, the *Norman* court recognized an obligation to resolve the "conflict between the approach of our Supreme Court in *McKinnon*

349. People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).
350. People v. Norman, 36 Cal. App. 3d 879, 886, 112 Cal. Rptr. 43, 47 (1974).
351. People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *remanded*, 409 U.S. 33 (1972), *aff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).
352. People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). *See* Comment, *People v. Triggs: A New Concept of Personal Privacy in Search and Seizure Law*, 25 HASTINGS L.J. 575, 577 & *passim*.
353. *See* text accompanying notes 85-105 *supra*.

on the one hand and its reasoning in *Krivda* and *Triggs* on the other. . . ." This obligation was not one the court could escape, either, for the conflict is so grave that the *Norman* court concluded it was "forced to choose between conflicting lines of decision of our Supreme Court where neither appears to be overruled by implication [and] that it must determine for itself which of the high court decisions is the better reasoned."[354] Considering Justice Thompson's announced antifederalism, it is not surprising that he decided *McKinnon* is the better reasoned authority and that it, and as a result *Robinson*, "binds our decision in the case at bench."

It seems unlikely that the California Supreme Court will agree with a reading of *McKinnon* which envisions such a dramatic attrition of state court autonomy. An examination of *McKinnon* itself reinforces this view, for *McKinnon* simply does not contain the mandate perceived by the *Norman* court.

In the words of Justice Stanley Mosk, writing for the majority in *McKinnon*, a "typical air freight search case," the supreme court was called upon to reconsider an established and fairly strict California search and seizure rule "in light of supervening developments in the law." The supervening developments referred to by the supreme court were contained in the United States Supreme Court decision of *Chambers v. Maroney*,[355] which involved the following facts: (1) the stop of an automobile matching the description of a vehicle believed to contain men who committed a service station robbery; (2) a lawful arrest of four men for the robbery; (3) the transportation of the vehicle to a police station; and (4) a warrantless search of the vehicle at the police station based on probable cause. The *McKinnon* case dealt with facts similar to those in two pre-*Chambers* California Supreme Court decisions, *People v. McGrew*[356] and *Abt v. Superior Court*.[357] These three cases involved: (1) the attempted shipment of narcotics via air freight; (2) the warrantless search of the parcels (by shipping company agents) based upon alleged probable cause; and (3) the arrest of the suspects for violations of narcotic control laws.

The California Supreme Court held that the searches in *McGrew* and *Abt* were unreasonable in that they were warrantless and none of the exceptions to the warrant requirement applied. In

354. *See* note 338 *supra*.
355. Chambers v. Maroney, 399 U.S. 42 (1969).
356. People v. McGrew, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).
357. Abt v. Superior Court, 1 Cal. 3d 418, 461 P.2d 10, 82 Cal. Rptr. 481 (1969).

Chambers, however, the United States Supreme Court held that, in terms of the fourth amendment standard of reasonableness, there is no difference between seizing an automobile until a warrant authorizing its search can be obtained and simply searching the automobile without a warrant.[358] As long as probable cause to search exists, "either course is reasonable under the fourth amendment."[359] The California Supreme Court decided that the same rationale could apply to *McKinnon*'s fact situation and overruled *McGrew* and *Abt* because, "under the rationale of *Chambers*," searches of the type described in *McKinnon*, *McGrew* and *Abt* are "constitutionally reasonable."[360] In other words, as reported in *Norman*, the supreme court simply felt that,

> [f]airly construed, the reasoning of the United States Supreme Court in *Chambers* thus undermines the foundation of the majority opinions in *McGrew* and *Abt*.[361]

The critical part of this passage is obviously that the *reasoning* of *Chambers* undermined the earlier rule's foundation. Nowhere does the *McKinnon* opinion indicate anything other than the fact that, because of its more persuasive logic, *Chambers* would be applied to fact situations analogous to *McKinnon*'s. There is absolutely no indication in *McKinnon* that United States Supreme Court decisions will, as a matter of judicial deference, be routinely followed by the California Supreme Court. Almost incredibly, however, the *Norman* court follows the quotation of the *McKinnon* opinion reproduced above with this pronouncement:

> Thus *McKinnon* determines that a United States Supreme Court decision construing the Fourth and Fourteenth Amendments to the United States Constitution *controls* the California Supreme Court's determination of a parallel issue.

Although it is difficult to explain such a fundamental misinterpretation of the *McKinnon* decision, some of the confusion may derive from the *Norman* court's insensitive editing technique. For instance, the *McKinnon* language quoted above and in *Norman* stated:

358. 399 U.S. at 51-52.
359. *Id.* at 52.
360. 7 Cal. 3d at 907, 500 P.2d at 1102, 103 Cal. Rptr. at 902. For a balanced discussion of why the *Chambers* rationale convinced the California Supreme Court to overrule itself see 61 CALIF. L. REV. 497 (1973).
361. 7 Cal. 3d at 910, 500 P.2d at 1104, 103 Cal. Rptr. at 904, *as quoted in* People v. Norman, 36 Cal. App. 3d at 886, 112 Cal. Rptr. at 47.

> [T]he reasoning of the United States Supreme Court in *Chambers* thus undermines the foundation of the majority opinions in *McGrew* and *Abt.*

In adapting the passage to its own needs later in its opinion, however, the *Norman* court mangles it:

> [T]he United States Supreme Court decisions in *Robinson* and *Gustafson* "[undermine] the foundation of the majority opinions in [*Kiefer*] and [*Simon*]."[362]

By deleting the word "reasoning" from the passage, and by failing to devote even one word of its opinion to an assessment of the merits of the *Robinson* rationale, the *Norman* court reveals that it did just the opposite of what it purported to do, which was to follow *McKinnon*. *McKinnon* provides *no* authority for inferior courts to view clearly constitutional California Supreme Court decisions as overruled by United States Supreme Court decisions of untested merit. In fact, since the California Supreme Court is the only California court which can pass conclusively on the persuasiveness of *Robinson*, there is only one proper response for the lower courts when they are confronted with a conflict between a constitutional state rule and an intervening federal rule; they must follow the California high court until such time as it evaluates the conflicting decisions and decides which one will be the law of California. The doctrine of stare decisis would seem to compel such an approach in all states where such conflicts obtain.

The conclusion that *McKinnon* does not mandate automatic acceptance of *Robinson* leads to several observations. First, since *McKinnon* is the only case relied upon by the *Norman* court to establish the putative conflict between two lines of California Supreme Court authority, and since the conflict only exists if *McKinnon* is misread as discussed above, the conflict appears to be illusory. Second, if no conflict exists, *Krivda* and *Triggs* cannot be ignored. And, as the *Norman* court recognizes, *Krivda* and *Triggs* unmistakably declare that California search and seizure decisions rest on state as well as federal provisions proscribing illegal searches and seizures, and are thus to be followed even if the federal standard is changed.[363] Third, if *Krivda* and *Triggs* cannot be ignored, then *Norman* is—at least to the extent that it recognizes a mechanical rule which sub-

362. 36 Cal. App. 3d at 887, 112 Cal. Rptr. at 48 (brackets in original).
363. *Id.* *See generally* Comment, *supra* note 335, at 540-42.

ordinates the state bill of rights to the Federal Bill of Rights—ill conceived. Fourth, at a time when the uncertain status of the states' bills of rights results in a tendency to moor decisions to the more secure constitutional anchorage provided by the Federal Constitution, state courts must sedulously guard against doing violence to the decisions of their own state high courts.

This last observation raises a related issue. Since the constitutional footing of a decision can be misunderstood even if the actual holding is not misread, some analysis of how to trace a decision's constitutional background is required. Again, *Norman* illustrates the problems involved. Although the *Norman* court rests its decision primarily on its analysis of *McKinnon*, the opinion also makes it clear that it specifically views *Simon* itself as grounded exclusively on interpretations of the fourth amendment.[364] If this is true, the stricter rule of California as enunciated in the pre-*Robinson* decisions of *Kiefer* and *Simon* would conceivably be jeopardized by the interpretation of the fourth amendment contained in *Robinson*. If, on the other hand, *Simon* is supported by article I, section 19 of the California Constitution, it could not have been overruled by *Robinson*. Obviously, this issue can only be resolved by an examination of *Simon*'s constitutional underpinnings.

As the present discussion illustrates, troublesome uncertainty can be created by a state court which fails to expressly identify the constitutional provisions it interpreted in arriving at its decision. It must be recognized, however, that the California Supreme Court need not mention article I, section 19 in its opinion in order to base its decision on an interpretation of that provision.[365] Since *Simon* adverts to the fourth amendment several times, but makes no mention of the California Constitution, it is possible that the *Norman* court relied on that fact alone to conclude that no independent state grounds supports the *Simon* rule. Other facts are available, however. For instance, *Simon* is noticeably ambiguous in its constitutional references. The opinion addresses itself to the issue of "the constitutionally permissible scope of a search of a traffic violator who is required to be transported before a magistrate pursuant to [California] Vehicle Code section 40302,"[366] but no indication of which constitution's standards are being defined is ever given. This am-

364. 36 Cal. App. 3d at 887, 112 Cal. Rptr. at 48.
365. People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973). *See Project Report, supra* note 4, at 286.
366. 7 Cal. 3d at 208, 496 P.2d at 1221, 101 Cal. Rptr. at 853.

biguity alone warrants rejection of dogmatic assertions regarding the constitutional basis for the supreme court's decision in *Simon*.

There are, however, more reliable indices of *Simon*'s constitutional background. Since *Simon* is but one of a long sequence of California decisions dealing with fourth amendment rights in the troublesome area of search incident to arrest for traffic offenses, the opinion is anything but ambiguous about the California case law upon which it is grounded.[367] Consider the third sentence of *Simon*:

> In *People v. Superior Court* [*Kiefer*] . . . we determined the constitutionally permissible scope of a warrantless search of a *vehicle* as an incident to the arrest of its driver for an ordinary traffic violation. In the case at bar we are called upon to apply the reasoning of *Kiefer* to a similar search of the *person* of the driver or a fellow passenger . . . [and] we conclude the search here conducted cannot be justified as an incident to defendant's arrest. . . .[368]

Kiefer, therefore, is an appropriate focus for those seeking to determine the constitutional footing of *Simon*, for *Simon* is a direct extension of *Kiefer*. *Kiefer* is undeniably more explicit than *Simon* in its constitutional references. Justice Mosk, who authored the *Simon* and *Kiefer* opinions as well as the *McKinnon* opinion, said:

> The controlling issue in [*Kiefer*] is whether in the circumstances shown Officer Cameron's act of opening the door of defendants' car and looking inside was an unreasonable search within the meaning of the Fourth Amendment to the United State Constitution.[369]

And at the conclusion of the opinion the search, although held to be incident to a valid (non-custodial) arrest, was held to be "manifestly exploratory in nature, and [violative of] both the letter and the spirit of the Fourth Amendment."[370]

Those words are clearly not general references to "Fourth Amendment rights" as described in *Triggs*,[371] but are pointed and

367. For one purpose or another, *Simon* contains citations to forty-seven California search and seizure decisions. The only United States Supreme Court case law cited, on the other hand, is the *Terry-Sibron-Peters* triad.
368. 7 Cal. 3d at 191, 496 P.2d at 1208-09, 101 Cal. Rptr. at 840-41.
369. 3 Cal. 3d at 812, 478 P.2d at 450-51, 91 Cal. Rptr. at 730-31.
370. *Id.* at 831, 478 P.2d at 465, 91 Cal. Rptr. at 745.
371. 8 Cal. 3d at 892 n.5, 506 P.2d at 237 n.5, 106 Cal. Rptr. at 413 n.5.

purposeful references to the Federal Constitution. It is thus obvious that while deciding *Kiefer* the California Supreme Court had Warren Court interpretations of the fourth amendment in the forefront of its consciousness. But does this mean that interpretations of article I, section 19 were not also being simultaneously considered? At the time *Kiefer* was decided California courts had frequently arrived independently at interpretations essentially identical to federal interpretations of parallel constitutional rights. Many of those independent state interpretations were expressly grounded on the state constitution as well as the Federal Constitution.[372] Mentioning the fourth amendment alone, although somewhat careless, could arguably be construed as the California Supreme Court's method of reinforcing interpretations of the state constitution with persuasive United States Supreme precedents in accord.[373]

Fortunately, the *Kiefer* opinion was not Justice Mosk's last word on the case. The next year, in response to narrow lower court applications of *Kiefer*, the Supreme Court was "forced to grant a hearing in *Gallik v. Superior Court* . . . to reassert principles it had already enunciated [in *Kiefer*]."[374] In *Gallik*,[375] Justice Mosk, although again referring only to the fourth amendment (a deficiency which, it is beginning to appear, might simply be explained as a bad habit of Justice Mosk's),[376] states:

> We dismiss at the outset the Attorney General's suggestion that *Kiefer* is inapplicable because it assertedly declared "a new rule in California," and should therefore be given prospective effect only . . . . [O]ur decision in *Kiefer* did not "change the law" of probable cause, . . . as our opinion expressly pointed out, the rule had been recognized in California at least as early as *Peo-*

372. *See* Bice, *supra* note 100, at 755-56 & n.21; *see also* Comment, *supra* note 335, at 537 n.99. We do not agree with the Comment author's apparent belief that this phenomenon indicates that the California Supreme Court views article I, section 19 and the fourth amendment as "duplicate protections." Such a view implies that the state provision is a supernumerary.

373. It is not unreasonable to view every California Supreme Court interpretation of constitutional mandates as an interpretation, either express or implied, of the California Constitution. *See* Linde, *supra* note 95, at 133-35; *Project Report, supra* note 4, at 286-89.

374. Chilton, *Appellate Court Reform: The Premature Scalpel* (pts. 1-2), 48 CAL. ST. B.J. 393, 462, 467 (1973).

375. Gallik v. Superior Court, 5 Cal. 3d 855, 489 P.2d 573, 97 Cal. Rptr. 693 (1971).

376. This is not meant in a pejorative sense; the hegemony of the Warren Court made such omissions commonplace. *See Project Report, supra* note 4, at 287 & n.76.

> *ple v. Tyler. . . . Kiefer* simply explained the origin and scope of the rule. . . ."[377]

As discussed above, the rule in *Kiefer* is that searches—even searches incident to arrest—must be predicated on probable cause or, at the very least, the conceptually similar "reasonable grounds" to suspect the presence of a weapon. *Simon*, of course, applies the *Kiefer* rule to searches of the person incident to custodial traffic arrests, for the same requirements logically exist; if neither probable cause nor reasonable grounds to search are present, a search in such circumstances cannot be characterized as reasonable within the meaning of at least article I, section 19 of the California Constitution. These cases are consistent with one another and represent, as do all California search and seizure decisions, the continuous process through which California courts have refined California's search and seizure standards on a case-by-case basis. From this continuity *Simon*'s constitutional footing emerges. If *Simon* is an extension of a rule "recognized in California at least as early as *People v. Tyler*," then *Tyler*[378] and its antecedents should rightfully be examined.

Although the facts in *Tyler* were somewhat confused,[379] the court held that under such facts the search described therein "was reasonable."[380] The defendant contended, however, that *Mapp v. Ohio* required a different result. The *Tyler* court responded by saying that "[w]e find nothing in [*Mapp*] to indicate that as a result of that decision the states are bound to follow the federal requirements of reasonable and probable cause instead of their own." It appears, therefore, that while deciding *Kiefer* the California Supreme Court gave serious consideration to a California precedent which not only recognized the independent probable cause to search requirement, but also demonstrated marked independence from "the federal requirements."[381]

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377. 5 Cal. 3d at 859, 489 P.2d at 575, 97 Cal. Rptr. at 695 (citations omitted).
378. People v. Tyler, 193 Cal. App. 2d 728, 14 Cal. Rptr. 610 (1961).
379. Two officers who had on occasion attempted to engage the defendant as an informer approached the defendant intending again to ask him to inform on drug dealers. The defendant ran from the officers who pursued him into a hotel lobby. The defendant lunged over a counter and then placed something in his mouth. A struggle ensued as one of the officers tried to get defendant to open his mouth. Although no narcotics were found, defendant was arrested for battery and resisting arrest. A search at the station house disclosed heroin in defendant's pocket. *Id.* at 730-31, 14 Cal. Rptr. at 611.
380. *Id.* at 734, 14 Cal. Rptr. at 613.
381. *Tyler*, of course, exercised independence in a manner which was subsequently prohibited in Ker v. California, 374 U.S. 23 (1963) (imposing upon the states as a minimum standard the fourth amendment standard of reasonableness), but its spirit is indicative of the attitude California courts have traditionally displayed.

Tyler, as *Gallik* observed, only followed the rule which *Kiefer* and *Simon* refined. Justice Traynor's opinion in *People v. Brown*,[382] which is cited in both *Tyler* and *Kiefer*, is therefore of major significance. *Brown*, which was expressly grounded on article I, section 19 as well as the fourth amendment, contains dictum which Justice Mosk considered important enough to quote in part in *Kiefer*:

> It should be noted at the outset that the legality of an arrest is not necessarily determinative of the lawfulness of a search incident thereto. Just as some searches may be reasonable and hence lawful in the absence of a warrant or an arrest, . . . others may be unreasonable and hence unlawful although incident to a lawful arrest.[383]

Although *United States v. Lefkowitz*[384] and *Go-Bart Importing Co. v. United States*[385] were cited to support this general observation that searches incident to arrest (the arrest in *Brown* was custodial) are not ipso facto reasonable, there is no doubt that Justice Traynor rooted the notion in the California Constiution firmly enough to give it the status of a rule of California search and seizure law. This conclusion is supported by more than specific reference to article I, section 19 in *Brown* or subsequent supreme court extensions of the rule's logic in *Kiefer* and *Simon*. *Brown*'s heightened significance derives from the fact that it is one of eighteen search and seizure opinions written by Justice Traynor for the California Supreme Court during the year after his landmark opinion in *People v. Cahan*.[386] As Professor Collings has pointed out, this extraordinary achievement represents a most remarkable jurist's almost single-handed revision and modernization of California search and seizure law.[387] Significantly, Justice Traynor frequently cited article I, section 19 as he went about the task of defining the "workable rules" by which law enforcement would become aware of the constitutional right which the exclusionary rule was expressly adopted to safeguard.[388] As *Kiefer* and *Simon* clearly illustrate, California search and seizure

382. People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955).
383. *Id.* at 643, 290 P.2d at 530 (citations omitted).
384. United States v. Lefkowitz, 285 U.S. 452 (1932).
385. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
386. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). For an able, although perhaps overly emotional, summary of the California Supreme Court's accomplishments from 1955 to 1962 see Collings, *supra* note 9, at 421-22.
387. Collings, *supra* note 9, at 421-22.
388. *See, e.g.*, People v. Malotte, 46 Cal. 2d 59, 292 P.2d 517 (1956); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955).

law continues to build upon the extensive, state-oriented foundation which Justice Traynor prepared. It seems, therefore, that continuity supplies what habit or convenience has almost eradicated: evidence of article I, section 19. This continuity may not show that *Brown* or *Tyler* or any identifiable precedent led to the *Simon* rule, but it does show that *Simon* is not grounded exclusively on interpretations of the fourth amendment. As an outgrowth of California's vast body of search and seizure law, *Simon* is too inextricably bound up in a history of unique California interpretations of both the federal and state constitutions to be viewed as exclusively grounded on either.[389]

It is submitted, therefore, that in addition to doing violence to the content of *McKinnon*, the *Norman* opinion ignores the state constitutional footing of the *Simon* rule. It thus appears that the *Martinez* court's view of the *Robinson* rule's status in California is the accurate one and that *Robinson* is not binding upon the lower courts as long as *Simon* is not overruled by the California Supreme Court.

If, however, the second step of the procedure reveals conclusively that the state decision under scrutiny is not supported by the state constitution (an eventuality our research indicates will be rare), then one additional step must be taken before a court can conclude it must grapple with conflicting state and federal rules and the concomitant issue of federalism: the court must determine whether the state rule reflects a "peculiar state condition" or "declared public policy."[390]

The Procedure's Third Step: Identifying The "Declared Public Policy"

There is no need to discuss here the significance of a declared public policy or other peculiar state condition, for, as the *Norman* court acknowledges, if such conditions obtain a unique state rule is justified.[391] The court explicitly observes, however, that no such conditions influenced the supreme court's decision in *Simon*. The observation is erroneous; *Simon* clearly rests on exactly the type of legislatively declared public policy which justifies interpreting article

389. *See* State v. Williams, — Ore. App. —, 522 P.2d 1213 (1974). This recent opinion echoes this sentiment in relation to Oregon law, reflects the analytical approach the authors recommend, and illustrates how problematical the process of tracing a decision's constitutional background can be. *But see* State v. Florance, — Ore. —, 527 P.2d 1202 (1974) (following *Robinson*).

390. People v. Norman, 36 Cal. App. 3d 879, 889, 112 Cal. Rptr. 43, 50 (1974).

391. *Id.* at 889, 112 Cal. Rptr. at 49.

I, section 19 differently than the United States Supreme Court has interpreted the fourth amendment. The opinion states:

> Whatever the merits of [the argument that for protective purposes at least a pat-down search is justified] in generality, it is inapplicable to the case at hand. As noted above, . . . sections 40300-40604 of the Vehicle Code provide the *exclusive* procedure to be followed after making a warrantless arrest for a trafic violation not amounting to a felony, and those provisions must be read together to effectuate the deliberate legislative scheme they embody. . . .
> The clear and unmistakable import of these provisions, when read together, is that a person taken into custody pursuant to section 40302 must be transported *directly* to a magistrate or to one of the officials listed in section 40307, and must *immediately* be released on bail or written promise to appear. Accordingly, he cannot lawfully be subjected to the routine booking process used in the case of a nontraffic misdemeanant; nor can he be searched as an incident of the process, either in field or at a police station.[392]

If this is not a declaration of a public policy based upon a unique California legislative formulation, then the phrase "declared public policy" has no meaning. By its own words the supreme court declined to examine the general merit of some form of protective pat-down search because California's Vehicle Code renders such an inquiry inapplicable in all cases where, as with Simon, custody eventuates because of the exclusive procedures prescribed by the Vehicle Code. The supreme court then examined the circumstances of the arrest and found no other need for even a pat-down search. By the *Norman* court's own admission, therefore, *Robinson* cannot overrule *Simon* even if the California Supreme Court shared the *Norman* court's views, for "conditions peculiar to California support a different meaning."[393]

It is one thing to acknowledge that the result in *Norman* is invalid because *Simon* rests on a declared public policy; it is another

392. 7 Cal. 3d at 209, 496 P.2d at 1221-22, 101 Cal. Rptr. at 853-54 (footnote omitted).
393. 36 Cal. App. 3d at 889, 112 Cal. Rptr. at 49.

to understand how such policies can be identified. Accordingly, some analysis of *Simon*'s interpretation of California Vehicle Code § 40300 *et seq.* is in order.

Courts are, of course, familiar with the conventional methods of researching legislative intent. Such research, although of little assistance in the instant case, is probably an advisable starting place. There is a tendency, however, to examine in excessive detail the mechanical operation of statutes in the abstract as if that will disclose a legislative scheme, which in turn will suggest procedural rules which may or may not conform to reality.[394] This inverts the desirable approach. If courts can begin by discovering what problems actually exist, effective procedural rules can be fashioned within the broad expression of public policy which most statutes represent. Rather than observe, for instance, that "the scheme in effect presumes that in the vast majority of cases the violator will not be taken into custody,"[395] courts should ascertain how frequently custody actually occurs. They should also examine what happens at every point along the post-custody continuum rather than simply speculate about how the irregular case will possibly effect established procedures. The CHP case study above, although limited, was an examination of this sort. The discussion below demonstrates how this approach might be adapted to investigations regarding public policy.

As has been noted earlier, each year millions of California drivers are stopped for violations of the traffic laws.[396] Ordinarily, these stops are arrests only in the technical sense that for the brief period required to investigate and prepare the citation the driver is not free to leave.[397] *Robinson* and almost every state recognizes that searches are not required under such circumstances. This is a reflection both of the minimal danger entailed and of the normally noncriminal nature of the transgressor. Some arrests are for felonies, of course, and therefore sustain searches for a variety of reasons.[398] There is a third category, however, which has something in common with each extreme. When a driver is, for example,

394. For an example of how this admittedly necessary type of analysis can become involved and speculative see Comment, *supra* note 335, at 535 n.96.

395. People v. Superior Court (Simon), 7 Cal. 3d 186, 199, 496 P.2d 1205, 1215, 101 Cal. Rptr. 837, 847 (1972).

396. *See* note 239 *supra.*

397. *See* People v. Hubbard, 9 Cal. App. 3d 827, 833, 88 Cal. Rptr. 411, 415-16 (1970), *cited in* People v. Superior Court (Simon), 7 Cal. 3d 186, 200, 496 P.2d 1205, 1215, 101 Cal. Rptr. 837, 847 (1972).

398. For a discussion of why felony traffic arrests are treated like other felony arrests see Comment, *supra* note 335, at 530.

stopped for driving without a driver's license or other adequate identification (the offense which led to custody in Mr. Simon's case), he or she must be transported before a magistrate "without unnecessary delay."[399] There are several more situations which, at the discretion of the arresting officer, can lead to custodial transportation.[400] These situations often involve infractions which are just as "noncriminal" as those for which transportation is not allowed, but because of an administrative requirement, custody eventuates, just as in the felony arrest context.

Before deciding how to treat this third category for search purposes, the California Supreme Court took into consideration the scheme of which the code sections requiring transportation are a part as well as the fact of custody. Although the "lesser degree of criminality" associated with Mr. Simon's offense and the purely administrative nature of the transportation requirement led the supreme court to conclude that in Simon's case a search was unreasonable, empirical observation may provide a more valid basis for, in this instance, the same result.

If an examination of the post-arrest behavior of those who commit relatively minor crimes were conducted, it would probably reveal that treating such persons as noncriminals is well advised. We could find no record of an officer being fatally assaulted by a person who would not have been in custody had it not been for Vehicle Code § 40302.[401] Apparently most transportations, and they are not uncommon, involve persons who pose no threat to the officer. If such a threat exists, then, almost by definition, some feature of the confrontation gives the officer reasonable grounds to search. This probably explains why one legal scholar who has done specialized studies of traffic law violations concludes that the best authorities advocate: (1) the removal of criminal stigmatization from traffic offenses; (2) the abolition of arrests for such offenses; and (3) the

399. CAL. VEH. CODE § 40302 (West 1971). Section 40302 is discussed at note 289 *supra*.

400. *See* note 289 *supra*.

401. Interview with CHP instructor, CHP Training Academy in Sacramento, Cal., August 2, 1974; and phone conversation with representatives of the CHP Analysis Section in Sacramento, Cal., November, 1974. Although complete records of transportations are generally not kept, a study conducted from October to December, 1973, disclosed that, in addition to the custodial ar.ests reco ded that year, other types of transportation occurred at the rate of 1,550 per month. *See also* N. WATSON & J. STERLING, POLICE AND THEIR OPINIONS 155 (1969), in which a study conducted by the International Association of Chiefs of Police reported that problems such as paper work, lack of promotional opportunity, command pe-sonnel incompetence, fellow officer incompetence, and similar problems were considered more serious by experienced patrolmen than problems of physical danger.

creation of effective "noncriminal" administrative procedures for dealing with violators.[402] When one realizes that the average driver commits nine traffic law violations for every five minutes of driving time, and that "most traffic law violation is undeliberate," committed by average people with no desire to complicate their lives beyond that created by the initial violation,[403] such suggestions seem sound.

At least one California jurist is in agreement. When a legislative committee was reexamining the sections of the Vehicle Code under discussion in order to determine if they should be decriminalized, Orange County Superior Court Judge Claude M. Owens stated that:

> Classification of minor traffic offenses as crime tends to take force away from the criminal law in general. It is submitted that calling these infractions crimes tends to remove the stigma from crime. We know there is no bad act, no wrongful intent connected with the infraction, but if they are still called crimes people may well consider that there is nothing bad about any crime.[404]

While California traffic law has not been decriminalized, these remarks confirm that, absent a showing that such a policy would have adverse results, people who have commited crimes of such low criminality that the crime itself would not justify a search should not be searched just because they must be driven to the court house. The California Supreme Court, in other words, is justified in refusing to recognize a "search-incident-to-administrative-transportation" exception to the constitutionally mandated warrant requirement.

The necessity of a meaningful analysis of the peculiar state conditions which may underlay unique state rules cannot be overemphasized. Analyses of this type should intensify now that United States Supreme Court decisions regarding individual rights are impliedly calling higher state standards into question. If a unique state condition cannot be identified, however, are there alternatives to acceptance of Supreme Court interpretations of the Federal Bill of Rights? The *Norman* court answers this question negatively; this answer and the reasons for it must now be examined.

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402. Ross, *Folk Crime Revisited*, 11 CRIMINOLOGY 71, 78-84 (1973).
403. *Id.* at 77, *citing* U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT 177 (1970).
404. CALIFORNIA ASSEMBLY, INTERIM COMMITTEE ON CRIMINAL PROCEDURE, SUBCOMMITTEE ON TRAFFIC COURT PROCEDURES REPORT, 22 ASSEMBLY INTERIM COMMITTEE REPORTS, No. 11, at 13 (1967).

B. BEYOND THE PROCEDURE: FEDERALISM'S NEW ROLE

People v. Norman: *A Novel Antifederalist Proposal.*

The *Norman* court recognizes, as it must, that notwithstanding *Robinson*'s purported impact on *Simon*, "California may adopt a stricter standard of search and seizure than is required by the Fourth Amendment. . . ."[405] While, as in *Norman*, *Cooper v. California* is usually cited for this proposition, the earlier opinion in *Ker v. California* is more emphatic and gives some indication of the factors justifying a different state rule. In pertinent part *Ker* states:

> The states are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the state, provided that those rules do not violate the constitutional proscriptions of unreasonable searches and seizures.[406]

Now that *Robinson* has lowered the fourth amendment standards of reasonableness, and thus destroyed the identity formerly shared by California and federal interpretations of their respective search and seizure provisions, California's workable *Simon* rule, which *Ker* does not discourage, appears strict when contrasted with the recently relaxed federal rule. This is true despite the *Norman* court's erroneous assertion that such a state-oriented rule can only materialize if the California Supreme Court "declare[s] retrospectively that *Kiefer* and *Simon* were determined upon an independent state ground in the form of article I, section 19, of the California Constitution. . . ."[407] Although this misstatement flows naturally from the flaws in the *Norman* court's analysis discussed above, the court's discussion of why the states *should* defer to United States Supreme Court interpretations of the Federal Bill of Rights does not. Accordingly, this part of the *Norman* opinion deserves to be treated as an antifederalist policy proposal. This proposal, however, only confronts issues which arise if the procedure outlined above discloses that the case under consideration is controlled by conflicting rules, that no state supreme court decision controls the federalism question,

405. 36 Cal. App. 3d at 887, 112 Cal. Rptr. at 48.
406. 374 U.S. at 34.
407. 36 Cal. App. 3d at 887, 112 Cal. Rptr. at 49. *See also* Falk, *supra* note 4, at 280; *Project Report*, *supra* note 4, at 324-26.

and that no state constitutional provision or declared public policy supports the state rule.

In one desultory paragraph the *Norman* court enumerates an impressive number of reasons why a state's bill of rights should be subordinated to the Federal Bill of Rights in those areas where the two support conflicting rules. They are: (1) United States Supreme Court opinions are highly persuasive; (2) the Supreme Court has more expertise than state courts; (3) the Supreme Court hears cases of constitutional import that are on "cleaner" records, better briefed, and better argued than cases before state courts; (4) the Supreme Court is especially experienced at dealing with search and seizure issues; (5) California courts have "for years" spoken of the fourth amendment as the basis for the exclusionary rule; (6) article I, section 19 and the fourth amendment are essentially identical in wording; (7) a stricter state rule will invite use of the initiative process to override state courts; and (8) nationally uniform search and seizure ground rules are needed if the exclusionary rule's deterrent effect is to be preserved.[408]

It should be noted initially that not all of these considerations are independent of one another. The third and fourth clearly relate to the second, which in turn seems to explain the first. The first four points will therefore be dealt with in a general discussion of the significance of having an experienced and persuasive national high court.

The most favorable inference that can be drawn from the fact that the United States Supreme Court is a competent and persuasive authority is that Supreme Court decisions are sounder than their California counterparts. Whether or not this is true, it is irrelevant to the larger issue of federalism. The proper role of the states' bills of rights can only be determined by examining general policy considerations such as the need for uniform national standards and the conflicting need to allow states latitude to devise measures which meet local requirements.[409] This determination is not assisted by allusions to the quality of Supreme Court decisions, for federalism may serve valid purposes even if *every* Supreme Court decision is superior to any parallel state decision.[410]

408. 36 Cal. App. 3d at 888, 112 Cal. Rptr. at 50.
409. For a more detailed discussion of these considerations see text accompanying notes 433-49 *infra*.
410. *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., joined by Stone, J., dissenting), for a discussion of the need for local variation if the

It also seems clear that federalism would not thwart acceptance of sound Supreme Court rulings.[411] Federalism, in fact, can be viewed as an acknowledgment of a limited state prerogative to improve upon constitutional standards enunciated by the Supreme Court when such improvement will advance local interests. Since a prerogative of this type would not discourage acceptance of well reasoned Supreme Court decisions, it must be concluded that an anti-federalist position cannot logically derive support from the mere fact of Supreme Court expertise.

The fifth point of the *Norman* proposal appears to suffer from the defect which rendered the first four irrelevant to an inquiry into federalism. By stating that "California courts have for years spoken of the basis of the exclusionary rule as the Fourth Amendment," the *Norman* court seems to imply that interpretations of the fourth amendment alone shaped California's search and seizure law, and that the state law should therefore be altered to confrom to federal law whenever the expert at interpreting the fourth amendment adopts a new interpretation. If so, then the *Norman* court again circumvents issues relevant to federalism by simply seeking the "best" rule.[412]

If the *Norman* court only means by its observations regarding the exclusionary rule that the rule is not supported by state grounds,[413] then relevant issues are avoided once again. The question presently confronting state courts which reach this point in the procedure being outlined is whether the state bill of rights ought to be invoked to support rules previously supported by the Federal Constitution. To simply point to this previous support begs rather than answers the question; the implications of federalism in the future, rather than a given rule's federal origin, is the subject of relevance.

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state courts are to serve as laboratories for testing of different constitutional standards. *See also Project Report, supra* note 4, at 292-93.

411. *See, e.g.*, People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

412. This criticism of *Norman*'s apparent quest for the best rule is not inconsistent with our contention that the merits of competing rules should be tested before any issues of federalism are addressed. We acknowledge that any given Supreme Court rule may, in light of the state's needs, be superior to the extant state rule. The *Norman* court's position is much different; it seems to argue that there should be a non-rebuttable presumption that all Supreme Court rules are superior to parallel state rules. This method of isolating "best rules" may be consonant with *Robinson*'s rejection of the case-by-case approach, but it ignores the vicissitudes of reality.

413. *See* People v. Cahan, 44 Cal. 2d 434, 436, 282 P.2d 905, 906-07 (1955). It should be noted that California's exclusionary rule, adopted before *Mapp v. Ohio*, is expressly grounded on article I, section 19 of the California Constituion as well as the fourth amendment.

Certainly, a state rule which is deprived of the federal support which impelled it is in an awkward position. As long as a provision of the state constitution can serve as an alternate ground, however, the potential for preserving the rule exists. This single fact argues against rejecting federalism merely because the Federal Constitution has influenced state decisions. A look at *Simon* bears this out.

While ostensibly inspired solely by interpretations of the fourth amendment, *Simon* actually reflects a state high court's independently arrived at perception of what constitutes an unreasonable—and thus unconstitutional—search. This is undoubtedly true of most state decisions which were not merely unwilling adoptions of strict Warren Court standards. This independent quality is not destroyed just because a state high court takes, among other things, United States Supreme Court thoughts on the subject into consideration during its deliberations. Failure to understand this probably results from a failure to distinguish between an abstract right and the standards or rules which have to be established in order to lend substance to the right. The two are interrelated, but not the same. If a state court genuinely embraces a Supreme Court standard, then in a sense the standard becomes detached from the general right it was designed to protect and becomes the state's method of safeguarding the right. Even if the Supreme Court later decides that it has set a national standard which is too high, in a given state that high standard may continue to protect with perhaps great efficiency the abstract right. Therefore, when a state court's perceptions regarding the appropriateness of a standard remain even after the Supreme Court expresses a different view, it is not only proper, but prudent to rely on state bills of rights to safeguard personal liberties to the extent it deems necessary. This rationale would even apply to state decisions which, unlike *Simon*, rest exclusively on interpretations of the Federal Constitution.

If there are antifederalist considerations which override a state's need to, on occasion, provide its citizens with a greater measure of protection than the Supreme Court can impose nation-wide, they are not to be found in the *Norman* proposal's first five points.

The significance of the *Norman* proposal's sixth point is somewhat obscure. The *Norman* court stated that the fourth amendment and article I, section 19 are "essentially identical," but it neglected to mention that the bills of rights of all states mirror the essence of

the Federal Bill of Rights.[414] Viewed from this larger perspective, it is clear that this commonality forms no basis for rejecting federalism.

Even if it is assumed that identical rights must flow from identical provisions, it is obvious that the practical standards which are formulated to insure the protection of abstract rights may legitimately vary from one jurisdiction to another depending upon local conditions. This is espcially true in the area of search and seizure law, where the subjective standard of reasonableness is only established by the balancing of competing individual and law enforcement interests. In California and other states, this balancing process led to the *Simon* rule. In some jurisdictions it has not. But since the rules of the various jurisdictions seem to work, it appears that the interests as they exist in each state have been properly balanced.[415]

Some have argued persuasively that article I, section 19,[416] which was adopted fifty-eight years after the fourth amendment, was not intended by the original framers to be a mechanical reiteration of the fourth amendment.[417] This may be why Justice Mosk, the author of *Simon* and *Kiefer* (and *McKinnon)*, believes that:

> There is not the slightest impropriety when the highest court of a *state* invalidates *state* legislation, *state* administrative action, or conviction of a defendant in a *state* prosecution as being violative of the *state* Constitution. Nor is the problem exacerbated merely because the state constitutional provision is similar to, *or even identical with* [emphasis added], the federal Constitution.[418]

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414. *See* Harris v. United States, 331 U.S. 145, 160-61 & n.5 (1946) (Frankfurter, J., dissenting), for a list of all the state equivalents of the fourth amendment and an interesting discussion of their origins and status as independent mandates. *See also* Rankin, *The Bill of Rights*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 162 (W. Graves ed. 1960).

415. For example, California and New York, which restrict an officer's right to search more than any other states, do not appear to have thereby exposed their police to greater danger. In fact, the UCR reveals that New York is in a region where the number of injury causing assaults per 100 officers is lower than the national average (4.8 per 100 in 1972). California is in a region where the number of such assaults is above the national average (7.3 per 100 in 1972). Florida, on the other hand, is in a region with the highest rate of such assaults (8.8 per 100 in 1972) despite having fewer restrictions on police search authority. *See* 1972 UCR 167 (table 62); 1971 UCR 163 (table 59). In 1973 all three regions were above the national average. *See* 1973 UCR 170 (table 61).

416. Article I, § 19 is now numbered article I, § 13. *See* note 338 *supra.*

417. *See, e.g.*, Falk, *supra* note 4, at 286-87.

418. Address by Justice Mosk, California State Bar Annual Convention, Luncheon for University of Chicago Law School Alumni, Sept. 12, 1973, *reported in* L.A. Daily

Significantly, Justice Mosk's remark was in direct response to Professor Bice's assertion that a "difficult question of propriety is posed when a state court attempts to preclude Supreme Court review because it fears that the Supreme Court will give the federal constitutional provisions a narrower, more restricted interpretation."[419] There can be little doubt, therefore, that textual similarity between state and federal constitutional provisions is not a valid reason for rejecting the kind of vital federalism Justice Mosk obviously endorses.

The *Norman* court probably would not have made its seventh point regarding the initiative process had not the memory of the controversy over the emotional and politically sensitive issue of capital punishment been fresh in its mind, for that controversy represents the only time a California Supreme Court interpretation[420] of the state bill of rights led to a successful constitutional initiative designed specifically to nullify that interpretation.[421] This realization, combined with a cursory examination of how the California initiative process has worked in practice, should allay fears that respect for the judiciary will decline if the California Supreme Court establishes constitutional standards more "liberal" than those minimally required by the United States Supreme Court.

Since California's adoption of the initiative process in 1911, no initiative measure, with the exception of the 1972 initiative to make capital punishment constitutional, has dealt directly with the fundamental rights enumerated in article I of the California Constitution.[422] There are at least two reasons for this. First, article I is an articulation of fundamental rights which, because generality accommodates wide differences of opinion, has never required reevaluation or alteration. Second, decisions interpreting article I rights

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Journal Report, Dec. 19, 1973, at 26. Justice Mosk has set forth his views in greater detail in Diamond v. Bland, 11 Cal. 3d 331, 336-40, 521 P.2d 460, 479-83, 113 Cal. Rptr. 468, 471-75 (1974) (dissenting).

419. Bice, *supra* note 100, at 756.

420. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (declaring capital punishment to be cruel *or* unusual and thus proscribed by the California Constitution article I, section 6).

421. Proposition 17 appeared on the November, 1972 ballot. Its passage added section 27 to article I of the California Constitution, expressly stating that capital punishment is constitutional.

422. *See* W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, Appendix I (1950). Professor Crouch details data on all initiative measures from 1911 to 1949. For similar data from 1950 to 1965 see CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON CONSTITUTIONAL AMENDMENTS, THE INITIATIVE AND THE EFFECTIVE DATES OF STATUTES, 27 ASSEMBLY INTERIM COMMITTEE REPORTS, No. 5, at 67-68 (1966). For information relating to the 1966, 1968, 1970, 1972 and 1974 elections see CALIFORNIA SECRETARY OF STATE, STATEMENT OF THE VOTE (1966-74).

are, especially in the area of criminal procedure, largely technical in nature. Accordingly, they are not likely to generate the widespread popular agitation and enormous investment required to overturn a supreme court decision through the initiative process. In fact, it is rare for initiatives to even qualify for the ballot, let alone receive a majority vote, without the support of powerful special interest groups.[423] Apparently no special interest group is concerned with reshaping the general principles contained in article I, for, except in the capital punishment case, not one has directed its resources against supreme court interpretations of the article.[424] As a result, judicial interpretations of article I, section 19 should not be influenced by the fact that California's constitution allows popular legislation.

An understanding of the original purpose of the initiative mechanism also explains why the California Supreme Court has generally been free of popular political reproof. Professor Crouch has observed that initiative and referendum mechanisms were adopted because legislative bodies and political leaders were distrusted.[425] He also observes that:

> [T]he best function of the initiative has been to provide a balance wheel to correct some of the shortcomings of the legislature. . . . [T]he pressure of several powerful lobbies upon a two-house legislature is often sufficient to block passage of important social and economic legislation. In such a situation, the initiative provides a significant counter balance to be used outside the legislative halls.[426]

It can be seen, therefore, that the initiative is designed to circumvent an unresponsive legislature rather than review supreme court decisions. In light of the fact that most initiative measures have dealt with social and economic issues—and not with unpopular court decisions—one can conclude that the initiative has been used as originally intended.

California Supreme Court decisions can, nevertheless, be re-

423. W. Crouch, *supra* note 422, at 17.
424. *See id.* at 7-8. From 1911 to 1920 economic and moral issues were focused upon. From 1920 to 1950 economic, educational, and administrative reorganization issues predominated. Recent concerns include political reform, environmental protection, and, of course, economic issues.
425. *Id.* at 3.
426. *Id.* at 21.

viewed by the initiative process. If, in contrast to the past, such a trend were to develop the *Norman* court apparently feels the "prestige, influence, and function of the judicial branch of the state government" would be harmed.[427] The following considerations indicate that this fear is unwarranted.

The *Norman* court professes concern for the prestige and influence of the judiciary. It is submitted, however, that following United States Supreme Court decisions merely because a differing interpretation of the state constitution might be unpopular is more clearly harmful to the prestige and integrity of the state's courts than adopting an unpopular position would be. Although perhaps politically expedient, such a policy ignores the fact that the Supreme Court of California, and all state courts, have a responsibility to interpret the state constitution in a manner which gives substance to the document's provisions—even if that entails disagreeing with a United States Supreme Court interpretation of a parallel federal provision. If state citizens disagree with a state court's interpretation, it is entirely proper for them to use the initiative process in an effort to alter the constitutional provisions which led to the decision they oppose. Such actions do not bespeak contempt for the judiciary, which has only performed its constitutional duty, but, rather, reflect a similar exercise of duty by concerned citizens for whose benefit the constitution exists. Certain language from the *Norman* opinion itself suggests an understanding of this fact; the court observed that,

> [j]udges do not represent people, they serve people. To do so, they must *not* represent a political or social point of view; they must serve the rule of law.[428]

It is noteworthy that the *Norman* court's apparent distrust of the initiative process is not generally shared by commentators who yet disapprove of excessive reliance on independent state grounds. In one such commentary, Professor Bice laments the practice of grounding state supreme court decisions on both the state and federal constitutions because such dual support insulates the decisions from both United States Supreme Court review *and* popular political review.[429] By not expressing a preference for one form of review over the other, Professor Bice seems to imply that the initiative is

427. 36 Cal. App. 3d at 888, 112 Cal. Rptr. at 50.
428. 36 Cal. App. 3d at 887, 112 Cal. Rptr. at 49 (citation omitted and emphasis added).
429. Bice, *supra* note 100, at 757.

an essential concomitant of California's constitutional equipoise. Given Professor Crouch's observation that "the record indicates. . . that [the voters] exercise discrimination and judgment"[430] when deliberating the merits of various initiative measures, Professor Bice's apparent acceptance of political review of court decisions seems justified.

One writer argues that "the courts should adhere to their often repeated principle that the initiative and referendum provisions of the constitution should be broadly construed so as to maintain the maximum power in the people [because] . . . by and large . . . they are good legislators."[431] By suggesting that political review of supreme court decisions is pernicious, the *Norman* court goes against the spirit of this sound advice. It is essential, therefore, to reiterate that such extralegal considerations do not justify automatic acceptance of United States Supreme Court decisions. Although the debate over the proper role of the states' bills of rights will undoubtedly gain momentum as the Burger court continues to remove federal constitutional support from various state rules, it is hoped that valuable political institutions will not be attacked in the process.

The *Norman* proposal's last point deserves more serious consideration than the previous seven because it deals with relevant policy considerations rather than indirect speculation about which courts render the soundest decisions. It is necessary to realize, however, that the "national uniformity" argument has limited utility as a basis for rejecting federalism. The *Norman* court, for instance, confines it to the fourth amendment because nationally uniform "ground rules of search and seizure" are only needed to establish the certainty required to preserve the exclusionary rule's deterrent effect. Any of the "particulars" of the bills of rights which do not depend upon the exclusion of evidence from criminal proceedings for their protection would not, therefore, have to be interpreted uniformly. There is, however, no valid reason for uniform national standards even in the search and seizure area.

Although the *Norman* court does not expressly call for uniform national search and seizure standards, this is a fair characterization of its quest for "certainty in the ground rules of search and seizure." By claiming that "the more courts feel free to adopt ground rules

430. W. CROUCH, *supra* note 422, at 33.
431. Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1747 (1966).

unpersuaded by contrary decisions of other courts, the greater likelihood there is of uncertainty in those ground rules," and that this "uncertainty is mitigated if proper deference is paid United States Supreme Court holdings,"[432] *Norman* not only makes it clear that the Supreme Court is the only "other court" in a position to articulate a national standard, but that "proper deference" is only achieved when Supreme Court standards are accepted regardless of their desirability in relation to local needs or the presence of a stricter state rule.

The incompatibility of this notion with Justice Frankfurter's assertion that "[a]n important safeguard against [the idiosyncratic preferences of Supreme Court Justices] is an alert deference to the judgment of the State court[s]"[433] is explained by the unprecedented nature of *Norman*'s uniform national standard concept. While there are, and long have been, other advocates of national uniformity, these other antifederalists only advocate the establishment of national *minimum* standards rather than an array of binding rules.[434] The difference between the two views is the difference between the limitation of federalism and its virtual elimination. The phrase "limited-federalism" will thus be used below to distinguish "minimum national standard" antifederalism from the true antifederalism of the *Norman* court.

Beginning in 1925, and especially since *Mapp v. Ohio*, expanded reliance on the first part of the fourteenth amendment has enabled the Supreme Court to impose most of the Bill of Rights' guarantees upon the states as a minimum measure of protection against the excesses of state governments. Those who opposed this trend often launched such abusive attacks against the Court that the term "states' rights" took on a negative or even ugly connotation.[435] This is unfortunate, for responsible federalists have frequently ad-

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432. 36 Cal. App. 3d at 888, 112 Cal. Rptr. at 50.

433. Adamson v. California, 332 U.S. 46, 68 (1947) (concurring).

434. *See* Allen, *Federalism and the Fourth Amendment: A Requim for Wolf*, 1961 SUP. CT. REV. 1; Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1959); Allen, *Due Process and State Criminal Procedure: Another Look*, 48 NW. U.L. REV. 16 (1953); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950). In this series of articles, Professor Allen advocates both the greater absorption of the "particulars" of the Federal Bill of Rights into the fourteenth amendment to create "a national standard of decency and propriety" (1961 SUP. CT. REV. at 2) *and* retention of "the essentials of federalism" (8 DEPAUL L. REV. at 255). *See also* Knowlton, *The Supreme Court, Mapp v. Ohio, and Due Process of Law*, 49 IOWA L. REV. 14 (1963); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L. REV. 319.

435. *See, e.g.*, the materials cited in Knowlton, *supra* note 434, at 14 n.1. *See also* Kurland, *The Supreme Court and its Literate Critics*, 47 YALE REV. 596 (1958); note 75 *supra*.

vanced valid reasons for protecting the states' right to self-determination; reasons which the limited-federalists would evidently concede justify an active federalism above the Supreme Court's minimum standards.

Recent renewed interest in federalism has led contemporary federalists to analyze and elaborate upon these reasons in an effort to rejuvenate the states' bills of rights. A compendium of these reasons would include:

1. State judges are frequently elected and are therefore sensitive to local political sentiment. If such judges are not bound by Supreme Court rules, they will be able to respond to the locality's needs when those needs can be met by rules above the minimum standard.[436]

2. Even where state judges are not elected, local conditions vary enough to justify allowing state judges, who can witness said conditions and assess the impact of particular rulings on them, substantial latitude to render decisions which satisfy local needs.[437]

3. Federal decisions often plot an erratic course, especially in the area of search and seizure. To force state courts to abandon what are often well established rules in deference to the High Court might generate disruptive uncertainty.[438]

4. State courts decide a much higher volume of cases than the Supreme Court. They are, therefore, perfect laboratories for testing new solutions to either new or recurring problems. In fact, state experimentation may be the only efficient method for the law to develop since nation-wide imposition of novel theories may involve unacceptable risks.[439]

5. State courts "might—and, indeed should—provide higher standards than the Constitution requires."[440]

6. Our basic system of government demands federalism; courts must insure that the tenth amendment is not "squeezed out of existence."[441]

436. *See, e.g., Project Report, supra* note 4, at 294-95.
437. *See* Traynor, *supra* note 434, at 427-29.
438. *See* text accompanying notes 450-52 *infra*. *Cf.* Collings, *supra* note 9, at 427-29.
439. *See, e.g., Project Report, supra* note 4, at 292-93.
440. Weinstein, *Local Responsibility for Improvement of Search and Seizure Practice*, 34 ROCKY MT. L. REV. 150, 170 (1962). Although the quote is taken from an older article, the notion permeates articles by contemporary federalists. *See, e.g.*, Falk, *supra* note 4.
441. Collings, *supra* note 9, at 423. This thought has been reiterated recently by a member of the Supreme Court's new majority. In Johnson v. Louisiana, 406 U.S.

7. "Many of the Supreme Court interpretations of federal constitutional guarantees applicable to the states are not clearly acceptable today—much less for the indefinite future."[442]

8. Not all of the federal constitutional mandates have been held applicable to the states.[443]

9. An autonomous state judiciary, reading a state's bill of rights independently, will act as a "second line of defense" against an erosion of individual liberties.[444]

10. State courts may simply want to be "more generous" than the Supreme Court can be.[445]

Although these points cannot be discussed in detail here (some are not even relevant to search and seizure issues), they give an indication of the strength of the federalist position. Brief discussion will illustrate that in this instance, there is validity where there is strength.

The last point is a good example. It may not seem that a simple desire to establish higher standards can be considered a valid reason for federalism. In actuality, however, desires are never simple; they usually reflect needs dictated by any number of complex variables. The states, therefore, cannot be held to absolute standards. It is an unavoidable consequence of this nation's diversity—and diversified judicial system—that state courts will sometimes have to set standards differently (*i.e.*, higher) than the Supreme Court if constitutional mandates are to receive optimum implementation in each state. This is because the United States Supreme Court is, as one writer has aptly stated, "under an obligation to search for the lowest common denominator."[446] In those states where the minimum national standard is not appropriate, it would be irresponsible for state courts not to establish a higher standard based on the state

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356 (1972), Justice Powell stated that:

> [Reading the fou teenth amendment as incorporating] "jot-for-jot and case-for-case" every element of the Sixth Amendment . . . derogates principles of federalism that are basic to our system [and] . . . deprives the States of freedom to experiment with adjudicatory processes different from the federal model.

Id. at 375 (concurring) (footnote omitted). The same considerations would seem to apply to the area of search and seizure, where local needs are even more varied.

442. Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 456 (1970) (containing an address given in June, 1968).

443. *See, e.g., id.*

444. *See, e.g., id.*

445. *See, e.g., id.*

446. *Project Report, supra* note 4, at 290.

bill of rights.[447] Of course, if a higher state standard collides with a paramount federal interest it would have to be invalidated by the Supreme Court,[448] but, with few exceptions, such collisions seem unlikely.[449]

The *Norman* court may feel it had identified a paramount federal interest when it pointed out the deleterious effect uncertainty would have on the exclusionary rule's deterrent effect. It may have, but it also identified the wrong method of protecting the interest. As the third point above indicates, federalists feel that if conformity to Supreme Court standards is required, uncertainty, rather than certainty, will result—especially in the area of search and seizure law. The federalists are unquestionably correct. It has been repeatedly observed by the Supreme Court itself that its search and seizure decisions are inconsistent and unpredictable.[450] Justice Harlan's concurring opinion in *Ker v. California* reveals both this fact and other points which California courts in particular may find germane.

> In my opinion this further extension of federal power over state criminal cases is quite uncalled for and unwise. It is uncalled for because the states generally, and more particularly California, are increasingly evidencing concern about improving their own criminal procedures. . . . The rule is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional straitjacket and also because the States, more likely than not, will be placed *in an atmosphere of uncertainty* since this Court's decisions in the realm of search and seizure are hardly notable for their predictability.[451]

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447. *See* Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alas. 1970) (extending the right to jury trial beyond that recognized by the Supreme Court). The Alaska Supreme Court clearly expresses the idea that:

> While we must enforce the minimum standards imposed by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free *and we are under a duty* to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language . . . .

(Footnote omitted and emphasis added).

448. *See Project Report, supra* note 4, at 285 & n.67.

449. *Id.*

450. *See generally* La Fave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255.

451. 374 U.S. at 45 (concurring) (citations omitted and emphasis added).

Antifederalists may object that such "odes to federalism" were usually intended to justify state exemption from heightened Supreme Court standards. But, as one writer has succinctly stated, "the point . . .is that the same logic which Justice. . .Harlan. . .used to oppose the nationalizing of progressive standards can be employed to encourage the adoption of progressive standards by the state courts."[452]

Even if the Supreme Court's search and seizure decisions were not unpredictable, the *Norman* court's "certainty" argument would be an invalid basis for rejecting federalism for the simple reason that the practical effect of having differing state search and seizure standards would *not* be a reduction of the exclusionary rule's deterrent effect. As long as a state's courts apply a uniform state standard evenhandedly, no confusion or loss of deterrence will eventuate.[453] This is true even if no other state shares the standard, as is demonstrated by California's experience with the "vicarious exclusionary rule,"[454] which has worked well since 1955 despite the fact that all other jurisdictions and the United States Supreme Court have either rejected or ignored the rule.[455]

A discussion of the federalist's second and fourth points can also revolve around the vicarious exclusionary rule. The most frequently raised argument in favor of federalism is that local needs require local rules—rules which the local courts must devise since they are in the best position to identify the needs. Employment of the states as experimentation laboratories is simply an efficient exploitation of this situation. The history of the exclusionary rule, and California's vicarious exclusionary rule, illustrates the validity of these propositions.

When the Supreme Court recognized, in *Wolf v. Colorado*, that the right to be free from unreasonable searches and seizures "form[s] part of the protections of the due process clause of the Fourteenth Amendment,"[456] it refused to dictate that the exclusionary rule was the required method of protecting that right; it pre-

452. *Project Report, supra* note 4, at 293.
453. *Cf.* Collings, *supra* note 9, at 428-29.
454. *See* Alderman v. United States, 394 U.S. 165 (1969); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). The United States Supreme Court rejected the notion of a vicarious exclusionary rule which in California permits a defendant to prevent admission of inculpating evidence obtained in violation of another person's fourth amendment rights.
455. *See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969).
456. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 255 (1959).

ferred to allow states the freedom to employ other remedies as "the experience of the states" dictated.[457] So the states, including California, experimented with local rules. Six years after *Wolf*, however, the California Supreme Court also adopted the exclusionary rule "because other remedies have completely failed to secure compliance with the constitutional provisions. . . ."[458] This conclusion, in turn, apprised the United States Supreme Court of how "worthless and futile" the other remedies were, and significantly influenced the Supreme Court's decision, in *Mapp v. Ohio*, to nationalize the exclusionary rule.[459]

The California Supreme Court was not through experimenting, however. Shortly after adopting the exclusionary rule, the court fashioned a vicarious exclusionary rule because "all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights."[460] Although this is one experiment the Supreme Court has not been impressed with, the California Supreme Court has, in *Kaplan v. Superior Court*,[461] reexamined its unique rule in light of California's needs and constitution and concluded that: "without [the vicarious exclusionary rule] 'the deterrent effect of the exclusionary rule would be seriously weakened'."[462] As the concurring opinion by Justice Burke states, "the majority reaffirm [the vicarious exclusionary rule] solely on the basis of their own preferences regarding scope of the exclusionary rule, and have abandoned further reliance upon federal constitutional principles, as defined by the United States Supreme Court."[463] It thus appears that, in the opinion of the California Supreme Court, disagreement with United States Supreme Court rulings may sometimes be necessary to preserve the exclusionary rule's deterrent effect. For this reason, and because state experimentation can be of obvious assistance to the High Court, the second and fourth points above are valid reasons for retaining a vital federalism.

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457. Wolf v. Colorado, 338 U.S. 25, 31-32 (1949).
458. People v. Cahan, 45 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955).
459. *See* Mapp v. Ohio, 367 U.S. 643 (1961).
460. People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955).
461. Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).
462. *Id.* at 161, 491 P.2d at 8, 98 Cal. Rptr. at 656, *citing* People v. Varnum, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967).
463. 6 Cal. 3d at 162, 491 P.2d at 8, 98 Cal. Rptr. at 656. *See* Note, *The Vicariouis Exclusionary Rule in California*, 24 STAN. L. REV. 947 (1972).

Although the remaining points also have validity, they are discussed in detail elsewhere and need not be reexamined here. Most of them are simply various expressions of Justice Fortas' eloquent observation that:

> It [the due process clause] does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 states. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observation of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the states as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our constitution sets up a federal union, not a monolith.[464]

These thoughts suggest that no further explanations of the value of federalism are needed, for even the most ardent supporters of "total incorporation plus" only see the nationalization of the Bill of Rights as "a matter of minimum fairness and necessity."[465] Therefore, absent the certainty-for-the-sake-of-deterrence argument (which we feel is untenable), there emerges no plausible policy reason for discouraging standards above the national minimum. In fact, as even limited-federalists have recognized, the interests of justice can often be served more efficiently if higher state standards are established—thus confirming one federalist's conclusion that state courts "might—and, indeed should—provide standards higher than the [Federal] Constitution requires."[466]

CONCLUSION

As a system of governmental organization, federalism has a potential both for great benefit and great abuse. Before the concept of applying the Federal Bill of Rights to the states as minimum guarantees became accepted, the benefits that accompany federalism were often overshadowed by the abuses which were sheltered under the states' rights rubric. The nationalization of fair minimum stand-

464. Bloom v. Illinois, 391 U.S. 194, 214 (1968) (concurring).
465. *See* H. ABRAHAM, *supra* note 6, at 84.
466. *See* text accompanying note 440 *supra*.

ards has, however, virtually eliminated from our federated system the potential for abuse in the form of constitutional standards which are too low to protect fundamental rights. With the system thus improved, it seems clear that the benefits of federalism can now inure *if* "imagination unimpeded by unwarranted demands for national uniformity"[467] is exercised by the states' courts.

If such imagination exists, and we are confident that it does, then our procedure for deciding whether or not to fashion or retain a higher state standard should not be difficult for state courts to apply. Courts are accustomed to assessing the merits of conflicting rationales. They are also used to dealing with constitutional issues and the declared public policies of their own state. What states may temporarily be unfamiliar with is how to: (1) assess the extent to which their state bill of rights has influenced their state law; and (2) enunciate meaningful, independent interpretations of their state's bill of rights. But familiarity will come; in the context of the history of the states' bills of rights it is obvious that, their deemphasis during the Warren era notwithstanding, states' bills of rights must have a continuing and dynamic role if there is to be a proper distribution of surveillance against the erosion constitutional rights. And, the *Norman* proposal notwithstanding, the independent state ground doctrine not only can, but should, be the method of effectuating this continuing role.

467. Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Burger, C.J., concurring).