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STATE CONSTITUTIONAL GUARANTEES AND PROTECTION OF DEFENDANTS' RIGHTS: THE CASE OF NEW YORK, 1960–1978*

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INTRODUCTION

The Burger Court's apparent retreat from the Warren Court's interpretation of the Bill of Rights has been reviewed by many commentators with dismay and alarm.[1] On closer inspection, however, this retreat seems limited to decisions affecting the practices of law enforcement officials.[2] Cases concerning the fourth, fifth, and sixth amendments are in sharp contrast, both in substance and tone, to similar Warren Court decisions.[3]

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1. This dismay is best caught by Professor Leonard Levy in his full length attack on the Burger Court's criminal procedure decisions. *See* L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974). *See generally* L. KOHLMEIER, GOD SAVE THIS HONORABLE COURT (1972); J. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA (1973).

2. *See* R. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION?: THE WARREN COURT AND THE BURGER COURT: JUDICIAL POLICY MAKING IN MODERN AMERICA (1977); S. WASBY, CONTINUITY AND CHANGE: FROM THE WARREN COURT TO THE BURGER COURT (1976); Steamer, *Contemporary Supreme Court Directions in Civil Liberties,* 92 POL. SCI. Q. 425 (1977). For the view that the Burger Court is committed to eroding the fourth amendment, see Nakell, *Search of the Person Incident to a Traffic Arrest: A Comment on Robinson and Gustafson,* 10 CRIM. L. BULL. 827 (1974). For a view that questions the integrity of the new Court, see 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).

3. Not a single defendant's claim prevailed in eight fourth amendment cases decided in the 1975 term. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Janis, 428 U.S. 433 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976); Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Santana, 427 U.S. 38 (1976); United States v. Miller, 425 U.S. 435 (1976); United States v. Watson, 423 U.S. 411 (1976); Texas v. White, 423 U.S. 67 (1976). The Court also ruled in favor of the government in several fifth amendment cases. *See* Fisher v. United States, 425 U.S. 391 (1976); Beckwith v. United States, 425 U.S. 341 (1976); Garner v. United States, 424 U.S. 648 (1976); Michigan v. Mosley, 423 U.S. 96 (1975). Other cases concerning criminal justice that were decided pro-government are Paul v. Davis, 424 U.S. 693 (1976);

Another set of reactions to the Burger Court's decisions has come from state supreme courts, which have apparently grown comfortable with the philosophy of the Warren Court in the area of criminal procedure and have refused to follow the Burger Court's rulings. They have done so by basing their decisions on state constitutional provisions and laws, thereby granting greater protection to their citizens than is required by the present Supreme Court's interpretation of the United States Constitution.[4] The Supreme Court's "adequate state grounds" doctrine provides that if there is an adequate and independent ground for a state court decision, then even when the state court has also decided a federal question, the Supreme Court will not review the decision.[5]

A number of authors have analyzed this development in the state courts by presenting overviews,[6] by examining the criminal justice area in the states where significant differences between state and federal rights have emerged,[7] and by dealing with the procedural questions and problems connected with this trend.[8] The

Imbler v. Pachtman, 424 U.S. 409 (1976); and Rizzo v. Goode, 423 U.S. 362 (1976). The 1975 term may have been the high water mark for the Burger Court's turn from the Warren Court's criminal rights revolution. While decisions overall continued to favor the government in the 1976 term, a significant number of important cases went the other way. *See, e.g.,* United States v. Chadwick, 433 U.S. 1 (1977) and G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) (search and seizure); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape is cruel and unusual punishment); Brown v. Ohio, 432 U.S. 161 (1977) and United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (double jeopardy); Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (self-incrimination); Brewer v. Williams, 430 U.S. 387 (1977) (right to counsel); Bounds v. Smith, 430 U.S. 817 (1977) (prisoner rights).

4. *See, e.g.,* Blue v. State, 558 P.2d 636 (Alaska 1977); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975).

5. The doctrinal base for this rule can be found in Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874), and Herb v. Pitcairn, 324 U.S. 117 (1945). *See also* Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine,* 1965 SUP. CT. REV. 187.

6. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Falk, *Foreword: The State Constitution—A More Than Adequate Nonfederal Ground,* 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); *Project Report: Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L.L. REV. 271 (1973).

7. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure,* 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism Revisited,* 64 KY. L.J. 729 (1976).

8. Beatty, *State Court Evasion of the United States Supreme Court Mandates During the Last Decade of the Warren Court,* 6 VAL. U.L. REV. 260 (1972); Bice, *Anderson and the Adequate State Ground,* 45 S. CAL. L. REV. 750 (1972); Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass,* 82 DICK. L. REV. 273 (1978); Note, *State Constitutional Guarantees as Adequate*

research in this area to date indicates that California, Pennsylvania, Michigan, and Alaska have been in the forefront of this independence movement.[9] The absence of research dealing with each state separately makes comparative analysis impossible. To help remedy this situation, and to examine one state, New York, which ostensibly has not taken part in this movement in any significant way, I have chosen the major New York court decisions on criminal procedure and constitutional law. Specifically, this article will examine the responses of the New York Court of Appeals to the Burger Court decisions in the areas of the right to counsel under the sixth amendment and searches and seizures under the fourth amendment. Particular controversy has been generated in the New York courts by the Burger Court interpretations of *Miranda v. Arizona*,[10] *United States v. Wade*,[11] *Gilbert v. California*,[12] and *Chimel v. California*.[13] While the focus will be on these areas, other New York court decisions rejecting Burger Court interpretations of other criminal procedure rights will also be discussed.

I. THE RIGHT TO COUNSEL, INTERROGATION, AND "CRITICAL STAGES": THE WARREN COURT

The major developments introduced by the Warren Court in the right to counsel area took place between 1960 and 1967. The Court did, of course, have a few precedents to build on. In 1932, in *Powell v. Alabama*,[14] though the Court narrowly limited the application of the sixth amendment, it agreed that the

State Ground: Supreme Court Review and Problems of Federalism, 13 AM. CRIM. L. REV. 737 (1976).

9. *See* Falk, *supra* note 6; Wilkes, *supra* note 7.

10. 384 U.S. 436 (1966). The major progeny of *Miranda* in the Burger Court include Brewer v. Williams, 430 U.S. 387 (1977); Weatherford v. Bursey, 429 U.S. 545 (1977); Oregon v. Mathiason, 429 U.S. 492 (1977); United States v. Mandujano, 425 U.S. 564 (1976); Michigan v. Mosley, 423 U.S. 96 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); and Harris v. New York, 401 U.S. 422 (1971).

11. 388 U.S. 218 (1967).

12. 388 U.S. 263 (1967). *See also* Stovall v. Denno, 388 U.S. 293 (1967). The Burger Court decisions are Manson v. Brathwaite, 429 U.S. 1058 (1977), United States v. Ash, 413 U.S. 300 (1973), Neil v. Biggers, 409 U.S. 188 (1972), and Kirby v. Illinois, 406 U.S. 682 (1972).

13. 395 U.S. 752 (1969). *See also* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Preston v. United States, 376 U.S. 364 (1964). The Burger Court decisions are South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. Watson, 423 U.S. 411 (1976); Texas v. White, 423 U.S. 67 (1975); United States v. Edwards, 415 U.S. 800 (1974); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); and Cady v. Dombrowski, 413 U.S. 433 (1973).

14. 287 U.S. 45 (1932).

right to counsel in a criminal proceeding was "fundamental" and attached at least at the arraignment stage.[15] Ten years later, in *Betts v. Brady*,[16] the Court refused to extend *Powell* and ruled that no general right to court-appointed counsel existed in state felony cases. *Crooker v. California*[17] held that persistent questioning by officers after denial of the defendant's request for counsel was permissible as long as any confession obtained was freely and voluntarily made.[18] In the companion case, *Cicenia v. Lagay*,[19] the defendant's lawyer had come to the station house and requested to see his client. The request was denied. Although the defendant was not as well educated as Crooker had been, and had requested counsel, the Court upheld his conviction, ruling that he enjoyed no constitutional right to counsel at the interrogation stage.

The Warren Court's expansion of the right to counsel began with *Spano v. New York*.[20] The Court decided the case by determining the "voluntariness" of the confession, and did not rule on whether the right to counsel was mandated in the case; but, in concurring opinions, four justices supported the view that once a person is formally charged by indictment or arraignment, he has a constitutional right to counsel.[21] The turning point came with *Gideon v. Wainwright*,[22] where the Court ruled that the right to counsel was fundamental in all state felony prosecutions. The next year the Court held in *Massiah v. United States*[23] that the informant's eavesdropping on the defendant was a violation of the right to counsel. The crucial factor was the postindictment status of the defendant.[24]

It was, however, with *Escobedo v. Illinois*[25] and *Miranda v. Arizona*[26] that the "revolution"[27] took place. The unindicted

15. *Id.* at 68.
16. 316 U.S. 455 (1942).
17. 357 U.S. 433 (1958).
18. *Id.* at 438.
19. 357 U.S. 504 (1958).
20. 360 U.S. 315 (1959).
21. *Id.* at 324-26 (Douglas, J., concurring, joined by Black & Brennan, JJ.; Stewart, J., concurring, joined by Douglas & Brennan, JJ.).
22. 372 U.S. 335 (1963). *See also* Douglas v. California, 372 U.S. 353 (1963) (indigent held to have constitutional right to appointed counsel for first appeal after conviction).
23. 377 U.S. 201 (1964).
24. *Id.* at 206.
25. 378 U.S. 478 (1964).
26. 384 U.S. 436 (1966).
27. So-called by Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 519 (4th ed. 1974).

suspect in *Escobedo* had been refused assistance of counsel during questioning. Justice Goldberg, in the majority opinion, first said that "no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment."[28] He concluded:

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . .[29]

Escobedo was in doctrine and by implication a revolutionary decision;[30] in terms of the right to counsel, *Miranda* represented a narrowing rather than a broadening of *Escobedo*. In *Miranda*, the Court shifted its emphasis from the sixth to the fifth amendment, creating in the process what has often been called a "fifth amendment right to counsel."[31] The *Miranda* Court outlined procedural safeguards in the form of informative warnings that had to be given to every suspect before any custodial questioning could take place. The Court also indicated that a person may waive these rights as long as the waiver is made "voluntarily, knowingly and intelligently."[32] Finally, the Court reasoned that the informative warnings would "dispel the compulsion inherent in custodial surroundings."[33]

Two points are important to note at this juncture. The first is the Court's shift from the "focus of investigation" to the "in custody" stage as the crucial time at which one's fifth and sixth amendment rights come into play. The second is the Court's decision to allow a suspect to waive his rights absent the advice of counsel while in the hands of the police. The result has been that, insofar as the Federal Constitution is concerned, the right to coun-

28. 378 U.S. at 486.
29. *Id.* at 490–91.
30. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 27, at 530 n.3.
31. Comment, *The New Definition of a Fifth Amendment Right to Counsel*, 14 U.C.L.A. L. REV. 604, 615 (1967).
32. 384 U.S. at 444.
33. *Id.* at 458.

sel has lost much of its effectiveness in preindictment proceedings.[34]

While recounting the line of cases linking the right to counsel to fifth amendment protection, the Court declared in *United States v. Wade:* [35]

> It is central to the constitutional principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[36]

A postindictment lineup is such a "critical stage" at which a suspect is entitled to counsel.[37] The Court, while ruling that Wade's counsel should have been notified of the lineup, and that his presence was "a requisite to conduct of the line-up," allowed for an "intelligent waiver" of that right as it had in *Miranda.*[38] On the other hand, the taking of handwriting exemplars was not considered a "critical stage" of the criminal proceedings entitling an individual to the assistance of counsel.[39]

Extensions of the right to counsel also occurred in *Coleman v. Alabama,*[40] where the Court found that a preliminary hearing was a critical stage, and in *Argersinger v. Hamlin,*[41] in which *Gideon* was held to apply to defendants facing a possible jail sentence.[42] This ended the steady expansion of constitutional guarantees for the accused. After the accession of Chief Justice Burger, a

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34. For evidence that without actual assistance of counsel before interrogation the *Miranda* warnings tend to be inconsequential, see O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT (1973); Griffith & Ayres, Faculty Note, *A Postscript to the Miranda Project: Interrogation of Draft Protestors,* 77 YALE L.J. 300 (1967); Medalie, Leitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968); Seeberger & Wettick, *Miranda in Pittsburgh: A Statistical Study,* 29 U. PITT. L. REV. 1 (1967); Project, *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967).

35. 388 U.S. 218 (1967).

36. *Id.* at 226.

37. *Id.* at 237.

38. *Id.* Waiver of counsel in the *Miranda* context may be justified by demands of efficiency, but it is not clear "what comparable value is served by allowing suspects to waive counsel at the identification process." Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 27, at 619.

39. Gilbert v. California, 388 U.S. 263, 266–67 (1967). In the third case of this trilogy, Stovall v. Denno, 388 U.S. 293 (1967), the Court said that the test for judging the fairness of pretrial identification procedures was whether they were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny the defendant due process of law. *Id.* at 302.

40. 399 U.S. 1 (1970).

41. 407 U.S. 25 (1972).

42. *See* text accompanying note 22 *supra.*

number of decisions deviated significantly from established Warren Court principles.

II. The Right to Counsel, Interrogation, and "Critical Stages": The Burger Court

Harris v. New York[43] was the first major case decided by the Burger Court to raise *Miranda* questions. In that case, the Court ruled that voluntary statements, even though made without the *Miranda* warning of the right to appointed counsel, are admissible to impeach a defendant who takes the stand. In *Kirby v. Illinois*,[44] the Court refused to extend the right to counsel to a lineup held "before the commencement of any prosecution whatever."[45] The Court required the initiation of "adversary judicial proceedings."[46] In *United States v. Ash*,[47] the Court ruled that the "sixth amendment does not grant the right to counsel at photographic displays conducted by the government for the purpose of allowing a witness to attempt identification of the offender."[48] The *Ash* doctrine applies to both preindictment and postindictment photographic sessions. Unnecessary suggestiveness in identification procedures alone does not amount to a denial of due process;[49] however, to determine whether such a denial exists, the "totality of circumstances" must be considered.[50]

In *Michigan v. Mosley*,[51] the Court allowed questioning of an individual on a matter unrelated to his arrest after the suspect had exercised his right to remain silent.[52] The suspect had been given *Miranda* warnings before each interrogation. In *Beckwith v. United States*,[53] the Court approved the procedure used by FBI agents who had given less than full warnings before questioning a suspect in his home because the interrogation itself was not custodial or coercive. In *Oregon v. Mathiason*,[54] a suspect on parole was asked

43. 401 U.S. 222 (1971). *See also* Oregon v. Hass, 420 U.S. 714 (1975).
44. 406 U.S. 682 (1972).
45. *Id.* at 690.
46. *Id.* at 688.
47. 413 U.S. 300 (1973).
48. *Id.* at 321.
49. Manson v. Brathwaite, 429 U.S. 1058 (1977); Neil v. Biggers, 409 U.S. 188 (1972).
50. Neil v. Biggers, 409 U.S. 188, 199 (1972).
51. 423 U.S. 96 (1975).
52. *But cf. id.* at 118–19 (Brennan, J., dissenting) (concluding that the matters were not unrelated).
53. 425 U.S. 341 (1976).
54. 429 U.S. 492 (1977).

by a police officer to come to his office for questioning. The suspect complied and was told first that he was not under arrest, and then, after the questioning, that he was free to go. Although the questioning took place in the state patrol office and the officer falsely stated that Mathiason's fingerprints were found at the scene, the Court ruled that the suspect had not been "in custody" as required by *Miranda*. The Court did, however, rely on *Miranda* in *Doyle v. Ohio*[55] in ruling that a defendant's postarrest silence after he received *Miranda* warnings could not be used against him in any subsequent proceedings.

Recently, in *Brewer v. Williams*,[56] the Court, eschewing *Miranda*, reversed a conviction on sixth amendment grounds. In so doing, it summarized what appears to be current constitutional law on the right to counsel: "[O]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him . . . . [A]n accused can voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed."[57]

III. The Fourth Amendment and the Warren Court

The Burger Court's divergence from the doctrine of the Warren Court has nowhere been so great as it has in the area of warrantless searches and seizures: those incident to a lawful arrest; those based on probable cause; those conducted in exigent circumstances; and those of inventories after arrest.

The Warren Court's position was delineated in *Chimel v. California*,[58] *Preston v. United States*,[59] and *Dyke v. Taylor Implement Manufacturing Co.*[60] *Chimel* established that a search incident to a lawful arrest must be limited to the "arrestee's person and the area 'within his immediate control' "[61]—the area in which the arrestee may be able to reach for a weapon or destroy evidence. In *Vale v. Louisiana*,[62] the Court added the condition that "[a]

55. 426 U.S. 610 (1976).
56. 430 U.S. 387 (1977).
57. *Id.* at 401–03 (footnote and citation omitted).
58. 395 U.S. 752 (1969).
59. 376 U.S. 364 (1964).
60. 391 U.S. 316 (1968).
61. 395 U.S. at 763 (citation omitted).
62. 399 U.S. 30 (1970).

search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.' "[63] The Warren Court did, however, continue to accept the "exigent circumstances" exception to the warrant requirement.[64]

IV. The Fourth Amendment and the Burger Court

The Burger Court's response began with *United States v. Robinson*,[65] where the Court upheld a full-blown search of a suspect subsequent to his arrest for operating an automobile without a permit: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search . . . ."[66]

With *Robinson*, the connection between the nature of the crime and the items sought in the search was apparently severed. In the companion case of *Gustafson v. Florida*,[67] the Court upheld the search of a traffic offense suspect that yielded marijuana by officers authorized to arrest or issue a ticket. In other decisions of this type over the past several years, the Court has allowed the warrantless seizure of an automobile at a private garage over two hours after its owner was arrested;[68] the warrantless search of an automobile on its arrival at a police station after its owner's arrest, even though he refused to consent to the search;[69] the warrantless general inventory search of an impounded vehicle following its seizure for parking violations;[70] the warrantless arrest of a defendant based on probable cause, even though the arresting officers had ample time to obtain a warrant prior to the arrest;[71] an order

63. *Id.* at 33 (citations omitted). The Court reaffirmed the doctrine enunciated in *Preston*: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." Preston v. United States, 376 U.S. at 367 (citation omitted).

64. *See, e.g.*, United States v. Watson, 423 U.S. 411, 448 (1976) (Marshall, J., joined by Brennan, J., dissenting); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Chimel v. California, 395 U.S. at 773 (White, J., dissenting).

65. 414 U.S. 218 (1973).

66. *Id.* at 235.

67. 414 U.S. 260 (1973).

68. Cady v. Dombrowski, 413 U.S. 433 (1973).

69. Texas v. White, 423 U.S. 67 (1975).

70. South Dakota v. Opperman, 428 U.S. 364 (1976).

71. United States v. Watson, 423 U.S. 411 (1976).

commanding a suspect stopped for a routine offense to leave his car and submit to a "patdown" search, despite the fact that the officers in the case had no reason to suspect foul play.[72] In *United States v. Chadwick*,[73] however, the Court declared the search of a footlocker in the trunk of an automobile a violation of the fourth amendment. The Court considered a footlocker in a vehicle, for purposes of fourth amendment searches, distinct from the vehicle itself, and thus entitled to more protection than the vehicle.

The decisions of the Burger Court have not specifically overruled preceding Warren Court decisions in these areas. Considered collectively, however, the cases clearly indicate significant doctrinal shifts between the two Courts concerning safeguards required by the fourth amendment.

V. The Fourth Amendment and Automobiles: Abandon All Hope, Ye Who Enter Them!

Both *Robinson* and *Gustafson* have created a number of problems with searches incident to lawful arrests for traffic infractions. The doctrine enunciated in those cases was essentially that given any lawful custodial arrest, a full search of the arrestee is not only an exception to the warrant requirements of the fourth amendment, but is also "reasonable" under that amendment. Under this standard, a search could be conducted not only for weapons, but also for incriminating evidence unrelated to the initial arrest. The ramifications of this doctrine are readily apparent. Arrests for traffic offenses are common,[74] and a technical and strict application of those regulations could give police reason to stop a large segment of our mobile population.[75] Moreover, the possibility of pretext arrests has been greatly enhanced.[76] These and other problems

72. Pennsylvania v. Mimms, 434 U.S. 106 (1977).

73. 433 U.S. 1 (1977).

74. The New York State Police report that traffic offenses accounted for ten times more arrests than all other offenses combined, approximately 491,000 to 44,000. Note, *After United States v. Robinson: Effect on New York Law*, 39 Alb. L. Rev. 895, 905 (1975).

75. "Very few drivers can traverse any appreciable distance without violating some traffic regulation." B. George, Constitutional Limitations on Evidence in Criminal Cases 65 (1969).

76. That subterfuge is employed had been clearly established even before *Robinson*. *See* W. LaFave, Arrest 151 (1965); L. Tiffany, D. McIntyre & D. Rotenburg, Detection of Crime 141 (1967); Project, *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L. Rev. 1499, 1533-35 (1968).

have been noted by numerous commentators,[77] and a number of state courts have not followed the *Robinson* rule.[78]

The leading case in New York before *Robinson* was *People v. Marsh.*[79] Speaking for a unanimous court of appeals, Chief Judge Fuld wrote:

> There is no question, and the entire court agrees, that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction. It is urged, however, that the officer is empowered to conduct a search, as incident to a lawful arrest, when the defendant is taken into custody for a traffic violation on a warrant of arrest, following his failure to appear in court pursuant to the summons initially issued. We find no basis for making such a distinction, concluding as we do that it not only would offend against the legislative design for the treatment of traffic offenders but would also exceed constitutional limits on search and seizure.[80]

The court found a constitutional basis for this restriction: "Indeed, this conclusion is also dictated by the constitutional prohibition against 'unreasonable searches and seizures.' "[81] *Marsh* not only explicitly rejected the reasoning that would be used and the conclusion that would be reached by the Supreme Court in *Robinson* and *Gustafson,* but imposed a stricter standard than even the dissenters in *Robinson* were later to recommend. Justice Marshall, dissenting in *Robinson,* would have allowed a limited search for weapons. But *Marsh* held that

> no search for a weapon is authorized as incident to an arrest for a traffic infraction, regardless of whether the arrest is made on the

77. *See, e.g.,* Aaronson & Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest,* 64 GEO. L. REV. 53 (1975); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 (1974); LaFave, *"Case by Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma,* 1974 SUP. CT. REV. 127; Nakell, *supra* note 2; Comment, *Search Incident to Arrest: United States v. Robinson—An Analytical View,* 7 CONN. L. REV. 346 (1975); Note, *Warrantless Searches and Seizures of Automobiles,* 87 HARV. L. REV. 835 (1974); Note, *Searches of the Person Incident to Traffic Arrests: State and Federal Approaches,* 26 HASTINGS L.J. 536 (1974); Note, *Restricting the Scope of Searches Incident to Arrest: United States v. Robinson,* 59 VA. L. REV. 724 (1973).

78. Before *Robinson,* a clear majority of state courts that had dealt with search incident to arrest in a traffic infraction context had refused to validate such searches automatically. For a full list of state court cases, see Note, *Searches of the Person Incident to Traffic Arrest: State and Federal Approaches, supra* note 77, at 536 n.19. Some states have continued this policy in spite of *Robinson,* and others, rejecting *Robinson,* have adopted this approach for the first time. *See* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974); State v. Dubay, 338 A.2d 797, 799, 802 (Me. 1975).

79. 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967).

80. *Id.* at 100, 228 N.E.2d at 785, 281 N.Y.S.2d at 791.

81. *Id.* at 102, 228 N.E.2d at 786, 281 N.Y.S.2d at 793 (citations omitted).

> scene or pursuant to a warrant, unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime.[82]

Additionally, the court made it clear that traffic infractions like speeding do not ipso facto give that reason to fear.[83]

New York's position in 1967 gave its citizens a greater degree of freedom from searches incident to traffic arrests than existed in most states.[84] The court went even further in 1973 when it stated in *People v. Adams* [85] that an arrest for a misdemeanor under section 442 of the New York Vehicle and Traffic Law [86] "without more, will not sustain [a] search."[87] The suspect had been arrested because his vehicle's identification number had been altered. Relying heavily on *Preston v. United States*[88] and the court of appeals decision in *Robinson*,[89] the court ruled that since there had been neither instrumentalities nor evidence of the crime for which the suspect had been arrested, and since there was no evidence that the suspect had posed a danger to the arresting officer, the search could not be justified. Although the court in *Adams* mentioned *Marsh* as a precedent, it is not clear to what extent the decision rested on adequate state grounds. Moreover, the court's heavy reliance on *Robinson*, *Preston*, and other federal cases seems to indicate that the court's decision was based on the Federal Constitution.

Adams also marked the beginning of a division of opinion among the judges of the New York Court of Appeals. Judge Jasen, in dissent, argued that *Adams* was clearly distinguishable from *Marsh* because the underlying crime in the former had been a misdemeanor, whereas in the latter it had been a traffic infraction. This distinction was at the heart of the reasoning in *Marsh*, Judge Jasen claimed, and simply did not apply in the case of a misdemeanor.[90]

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82. *Id.*

83. *Id.* at 101, 228 N.E.2d at 785, 281 N.Y.S.2d at 792.

84. A constitutionally sanctioned limited search, such as the one approved by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), was not available to the *Marsh* court, but comments in the later case of People v. Adams, 32 N.Y.2d 451, 454, 299 N.E.2d 653, 654–55, 346 N.Y.S.2d 229, 231 (1973), indicated that such a search accompanying an arrest for a traffic infraction might be acceptable.

85. 32 N.Y.2d 451, 299 N.E.2d 653, 346 N.Y.S.2d 229 (1973).

86. N.Y. VEH. & TRAF. LAW § 442 (McKinney 1970).

87. 32 N.Y.2d at 455, 299 N.E.2d at 655, 346 N.Y.S.2d at 232.

88. 376 U.S. 364 (1964).

89. 471 F.2d 1082 (D.C. Cir. 1972).

90. 32 N.Y.2d at 456, 299 N.E.2d at 656, 346 N.Y.S.2d at 232 (Jasen, J., dissenting).

Judge Jasen's plea for limiting *Marsh* to traffic infractions was partially vindicated in *People v. Weintraub*,[91] where Judge Jasen, writing for the majority, refused to extend *Marsh* and *Adams* to an arrest based on a trespass, a violation, or misdemeanor under New York law.[92] *Weintraub* was the first case after *Robinson* in which the court of appeals examined this question, and the effect of *Robinson* was pronounced. Judge Jasen noted that "insofar as the holdings of *Marsh* and *Adams* are predicated on the Federal Constitution, they must be read with the Supreme Court's decision in the *Robinson* case."[93] The questionable status that this remark undoubtedly bestowed on *Marsh* and *Adams* provoked Judge Wachtler, in a concurring opinion, to emphasize that the court of appeals holding in *Marsh* had been "primarily an expression of state policy found in the state constitution and the legislative intent underlying the arrest provision of the Vehicle and Traffic Law stands firmly on that ground alone."[94]

That same term, the court further eroded the *Marsh* doctrine in *People v. Perel*.[95] After noting that "an arrest for a particular offense may not carry with it the right to engage in a full-blown search of the person or his belongings, because as a matter of State law such searches are found to be unreasonable,"[96] the court held that an inventory and search of the personal effects of a suspect while he is in custody is permissible. Given the gross nature of the initial intrusion that occurs when a person is detained, "it is reasonable to conduct a less intrusive search of his person and the possessions he carried with him."[97] The court added, "[i]f logic, to the minds of some, may not seem to compel the rule, history supports it and precedents justify it."[98]

The stage was then set for the direct confrontation of doctrine in *People v. Troiano*.[99] The court unanimously decided that a search incident to a lawful arrest for a traffic misdemeanor was constitutional. There was a dispute, however, among the judges concerning the bearing of *Troiano* on *Marsh* and *Adams*. Judge

91. 35 N.Y.2d 351, 320 N.E.2d 636, 361 N.Y.S.2d 897 (1974).
92. N.Y. PENAL LAW §§ 140.05, 140.10, 140.15 (McKinney 1970).
93. 35 N.Y.2d at 353, 320 N.E.2d at 637, 361 N.Y.S.2d at 899.
94. *Id.* at 355, 320 N.E.2d at 638, 361 N.Y.S.2d at 900–01 (Wachtler, J., concurring).
95. 34 N.Y.2d 462, 315 N.E.2d 452, 358 N.Y.S.2d 383 (1974).
96. *Id.* at 468, 315 N.E.2d at 456, 358 N.Y.S.2d at 389 (citing *People v. Marsh*) (other citations omitted).
97. *Id.* at 467, 315 N.E.2d at 456, 358 N.Y.S.2d at 389.
98. *Id.*
99. 35 N.Y.2d 476, 323 N.E.2d 183, 363 N.Y.S.2d 943 (1974).

Breitel's majority opinion, joined by Judges Jasen, Jones, and Stevens, was sweeping in its language, relying heavily on the reasoning of *Robinson*:

> So long as the person is being taken into custody, he has lost whatever interest in privacy he had before arrest, the taking into custody itself being the grossest intrusion upon his privacy . . . . Still further, there is no doubt that once the arrested person is taken to the place of detention a full inventory search is merited for his protection and that of his property, as well as for the safety of his custodians . . . .
>
> . . . .
>
> In short, so long as an arrest is lawful, the consequent exposure to search is inevitable.[100]

Insofar as *Marsh* had already been confined to traffic infractions, *Troiano* broke no new ground; but *Adams'* extension of *Marsh* to misdemeanors was overruled by *Troiano*. The majority hinted at what might be left of *Marsh* when it noted: "There is, perhaps, an area of traffic violation 'arrest' where a full-blown search is not justified, but it might seem to be confined to a situation where an arrest was not necessary because an alternative summons was available or because the arrest was a suspect pretext."[101] One could read *Troiano* as rejecting *Gustafson*, where the officer had discretion to either arrest or issue a summons, and the offense was driving without a license—an infraction under New York State law. It may be precisely in this situation that *Troiano* would preclude a full-blown search. The court, seemingly uncomfortable with the discretion its opinion would give to the police, added that "[i]f the unnecessarily intrusive personal search is to be restricted, the cure might be by limiting the right to arrest or to take into custody."[102]

Judge Rabin's concurring opinion[103] went to great lengths to save *Adams* as well as *Marsh*. He pointed out that while the federal underpinning might be gone, the rationale for *Marsh*, based on the state constitution and legislative intent, still retained vitality.[104] He stated that the law in this area should remain as follows:

> (1) an arrest based solely on a traffic infraction, will not, without more, authorize a frisk for weapons, whether the arrestee is taken

100. *Id.* at 478, 323 N.E.2d at 184–85, 363 N.Y.S.2d at 945.
101. *Id.* at 478, 323 N.E.2d at 185, 363 N.Y.S.2d at 945 (citations omitted).
102. *Id.*
103. *Id.* Judges Gabrielli and Wachtler joined in Judge Rabin's opinion.
104. *Id.* at 479, 323 N.E.2d at 186, 363 N.Y.S.2d at 946 (Rabin, J., concurring).

> into custody or not; (2) a proper custodial arrest for a traffic misdemeanor will authorize a police officer to conduct a frisk appropriate to the discovery of weapons; (3) if based solely upon a custodial arrest for a traffic misdemeanor for which a search for evidence is not appropriate, the extent of a search of the person incident to that arrest must initially be limited to a frisk of the body and clothing of the arrestee; and (4) if such a frisk reveals an object that might reasonably be thought to be a weapon, or if there is some other basis supporting a reasonable belief that a weapon may be present, the officer may go beyond a frisk in order to ascertain whether weapons are present.[105]

It seems likely, however, that the *Troiano* majority rejected the first point. If the arrest is made, some search will be justified.

The status of *Marsh* was not clarified by *Troiano*. The remarks of the majority do not adequately address a number of problems. Under New York law, police officers are given the right to make custodial arrests for all traffic infractions, but the exercise of the right is in their discretion;[106] they may choose to issue only an appearance ticket, or what is commonly known as a summons or "ticket."[107] Does *Troiano* give us a standard for judging this discretionary power? It seems to stop short of the permissive doctrine of *Robinson,* but the extent to which that limitation means anything is problematic. If a police officer has the discretion to issue an appearance ticket to one driver and arrest another, then the problems commentators have noted concerning *Robinson*[108] are not eliminated by the New York position. The person issued the ticket drives off, freedom intact, to answer the summons with dignity. The arrested violator is handcuffed, placed in police custody, and put through the delay and indignity of the arrest procedure—all because he has committed a traffic infraction, or because the police would like to search him. *Troiano* can be interpreted, however, to make the latter situation illegal. At least one lower New York court thought *Troiano* meant that without probable cause to believe that an offender is guilty of more than a simple traffic infraction, or unless there are special circumstances in addition to the commission of that traffic infraction, police will

105. *Id.* at 483, 323 N.E.2d at 188, 363 N.Y.S.2d at 949 (Rabin, J., concurring).

106. For the conditions under which a warrantless arrest may be made, see N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1971).

107. N.Y. VEH. & TRAF. LAW § 226 (McKinney 1970).

108. *See* note 77 *supra.*

not be permitted to deviate from that ordinary procedure of summoning a defendant.[109]

In *People v. Copeland,*[110] the supreme court, although reversing the lower court's suppression of evidence, reaffirmed the traffic infraction exception to searches and seizures incident to lawful arrests. The court reasoned that the "special circumstances" in this case included the "recklessly dangerous conduct which . . . justif[ied] an arrest."[111] The New York Court of Appeals affirmed in a memorandum opinion, intimating that the reasoning of the lower court was acceptable: "Without the available data on which to prepare a uniform traffic summons and confronted with a driver of a weaving car who possessed no operator's license, we can only conclude that the arrest was warranted . . . ."[112]

In the most recent case of a traffic arrest, the court of appeals, in another memorandum opinion, seemed to move closer to the *Gustafson* position.[113] The defendant was stopped for driving through a red light. Although he was not under arrest, the police searched his automobile and discovered contraband. The court declared the search illegal because the suspect had not been placed under arrest, but it implied that if the officer had arrested the suspect, the search would have been legitimate: "A search incident to arrest is justified in the interest of protecting the officer's safety by assuring that a defendant, in custody, has no weapons or other instruments which might be used to assault the officers or effect escape . . . ."[114]

What then is left of the *Marsh* position? Perhaps no more than the one point on which all the judges of the court of appeals agreed when that case was decided, "that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction."[115] The pattern and direction marked by subsequent decisions are clear, however. Before *Robinson,* the high water mark of state doctrinal independence in this area was reached in *Adams.* After *Robinson,*

109. People v. Copeland, 82 Misc. 2d 12, 370 N.Y.S.2d 775 (App. T. 1975), *aff'd mem.,* 39 N.Y.2d 986, 355 N.E.2d 228, 387 N.Y.S.2d 234 (1976).

110. 82 Misc. 2d 12, 370 N.Y.S.2d 775 (App. T. 1975), *aff'd mem.,* 39 N.Y.2d 986, 355 N.E.2d 228, 387 N.Y.S.2d 234 (1976).

111. *Id.* at 15, 370 N.Y.S.2d at 778.

112. 39 N.Y.2d at 986–87, 355 N.E.2d at 228, 387 N.Y.S.2d at 234.

113. People v. Erwin, 42 N.Y.2d 1064, 369 N.E.2d 1170, 399 N.Y.S.2d 637 (1977).

114. *Id.* at 1065, 369 N.E.2d at 1171, 399 N.Y.S.2d at 638 (citations omitted).

115. 20 N.Y.2d at 100, 228 N.E.2d at 785, 281 N.Y.S.2d at 791.

the court began to move closer to the federal position and the extent of the difference between the two is at present undefinable.[116] The doctrine so boldy announced in *Marsh* has been muted to little more than a whisper by subsequent court qualifications and limitations; the effect on prior New York doctrine awaits more definite elaboration by the court of appeals.[117]

116. Lest one get the impression that the New York situation is one of almost complete retreat in this area, People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975), should be noted. The case involved the issue of whether a police officer may arbitrarily stop an automobile solely for the purpose of examining the motorist's license and registration or inspecting the vehicle for equipment violations. Though noting the discretionary language of the statute authorizing such inspections, and court decisions reading the statute to authorize such stops, the court of appeals determined that "an arbitrary stop of a single automobile for a purportedly 'routine traffic check' is impermissible unless the police officer reasonably suspects a violation of the Vehicle and Traffic Law." *Id.* at 419, 330 N.E.2d at 43, 369 N.Y.S.2d at 74. The standard of reasonable suspicion assigned by the court was that of Terry v. Ohio, 392 U.S. 1 (1968). The court has continued to adhere to this standard. *See* People v. Sobotker, 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978); People v. Joe, 63 A.D.2d 739, 405 N.Y.S.2d 295 (1978). In none of these cases was the state constitution specifically invoked as the basis for the decision.

Recently, the Supreme Court held that police cannot constitutionally subject motorists to seizures on the basis of random checks of automobiles. Delaware v. Prouse, 99 S. Ct. 1391 (1979). Justice White, writing for an eight to one majority, stated that the absence of either a factual basis for suspicion directed at a particular automobile, or some substantial objective standard to control the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights." *Id.* at 1400. This may represent a departure from earlier federal cases upholding state statutes that grant police sweeping authority to spot check automobiles. For a discussion of previous federal cases, see Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person,* 25 STAN. L. REV. 865, 870–71 nn.33 & 34 (1973). For a similar list of state cases, see Note, *Commonwealth v. Swanger—Spot Checks Eliminated,* 47 TEMP. L.Q. 640, 643–44 n.32 (1974). In 1976, Texas joined those states in making such stops illegal. Faulkner v. State, 549 S.W.2d 1 (Tex. Crim. App. 1976). In 1978, Delaware also rejected the legality of such stops in *Prouse.*

117. The New York Court of Appeals has followed the general principles established by the Burger Court in other fourth amendment areas. It had accepted vehicular inventory searches even before South Dakota v. Opperman, 428 U.S. 364 (1976). *See* People v. Sullivan, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971); People v. Lawrence, 53 A.D.2d 705, 384 N.Y.S.2d 37 (1976); People v. Middleton, 50 A.D.2d 1040, 377 N.Y.S.2d 938 (1975), *aff'd mem.,* 43 N.Y.2d 703, 372 N.E.2d 41, 401 N.Y.S.2d 207 (1977); People v. Martin, 48 A.D.2d 213, 368 N.Y.S.2d 342 (1975); People v. Butler, 44 A.D.2d 413, 355 N.Y.S.2d 172 (1974), *aff'd mem.,* 36 N.Y.2d 990, 337 N.E.2d 120, 374 N.Y.S.2d 604 (1975); People v. Rivera, 72 Misc. 2d 307, 339 N.Y.S.2d 82 (Crim. Ct. N.Y. 1972). The New York courts have also followed the Supreme Court positions as set forth in Chambers v. Maroney, 399 U.S. 42 (1970), Coolidge v. New Hampshire, 403 U.S. 443 (1971), and Cardwell v. Lewis, 417 U.S. 583 (1974). *See* People v. Kreichman, 37 N.Y.2d 693, 339 N.E.2d 182, 376 N.Y.S.2d 497 (1975); People v. Brosnan, 32 N.Y.2d 254, 298 N.E.2d 78, 344 N.Y.S.2d 900 (1973); People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied,* 414 U.S. 1033 (1973); People v. Coffey, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721 (1963).

VI. Counsel, Self-Incrimination, and Consent: Chemical Tests for Intoxication

The strong right to counsel tradition under New York law [118] has carried over into situations in which the police request a motorist to submit to chemical tests to determine whether his blood alcohol level renders him legally inebriated. In *People v. Gursey*,[119] the court of appeals considered whether in such a situation a suspect has a right to consult counsel before taking the blood alcohol level test. Its analysis began with a principle first enunciated in *People v. Ianniello*:[120] "As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel . . . ."[121] Relying on this principle, *Escobedo*, and *People v. Donovan*,[122] the court argued that drunk driving cases were in the class of "binding decisions concerning [an individual's] legal rights"[123] that triggered a limited right to counsel. The court recognized, however, that the two hour limitation on the administration of the test[124] made granting an absolute right to counsel impractical, and concluded:

> The privilege of consulting with counsel concerning the exercise of legal rights should not, however, extend so far as to palpably impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their licenses . . . . Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene . . . .[125]

The court based its decision on state statutory law and federal precedents concerning the right to counsel. With *Gursey*, as with *Marsh*, the New York Court of Appeals clearly went beyond the

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118. *See* text accompanying notes 148–51 *infra*.

119. 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

120. 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462, *cert. denied*, 393 U.S. 827 (1968).

121. *Id.* at 424, 235 N.E.2d at 443, 288 N.Y.S.2d at 468.

122. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). *See* text accompanying notes 159–63 *infra*.

123. 22 N.Y.2d at 227–28, 239 N.E.2d at 352, 292 N.Y.S.2d at 418.

124. N.Y. Veh. & Traf. Law § 1192 (3) (McKinney 1970) (current version at N.Y. Veh. & Traf. Law § 1194.1 (2) (McKinney 1970 & Supp. 1978)).

125. 22 N.Y.2d at 229, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.

requirements of the Federal Constitution and beyond the requirements demanded by the courts in most other states.[126]

In the 1971 decision of *People v. Craft*,[127] the court, though not overruling *Gursey*, did limit the scope of its application. Craft claimed that the failure to give him his *Miranda* warnings before he took the blood test was a violation of his right to counsel and his right against self-incrimination. Relying on *Schmerber v. California*,[128] the court declined to grant any right to counsel at this stage since "there [was] neither need nor reason for presence of counsel."[129] The difference between *Gursey* and *Craft*, the court pointed out, was that while a request for a lawyer must be honored within reasonable time limits, no affirmative obligation to inform a suspect that he has the right is constitutionally mandated. Thus, the court has continued to sustain *Gursey* on state grounds,[130] but has created a dichotomy between the strong protection given those who either already have or request counsel and a more limited protection for those who do not.

The chemical test for intoxication has raised constitutional issues in the fifth amendment area as well. In *People v. Paddock*,[131] the court of appeals ruled that a motorist's refusal to take the blood test may not be admitted into evidence at a subsequent trial on a charge of driving while intoxicated. The court relied heavily on *People v. Stratton*,[132] which had interpreted section 71-a of the Vehicle and Traffic Law[133] as giving a right to refuse

126. Schmerber v. California, 384 U.S. 757 (1966), explicitly rejected a right to the assistance of counsel at this point. *Id.* at 766. The general rule in the states is that a defendant is not entitled to the assistance of counsel because he has no legal right to refuse to take the test under *Schmerber* and because of implied consent legislation. *See* 2 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 32.03 (3d ed. 1978). The state court cases that adhere to this rule are as follows: Cogdill v. Department of Pub. Safety, 135 Ga. App. 339, 217 S.E.2d 502 (1975); State v. Severino, 56 Haw. 378, 537 P.2d 1187 (1975); Swenumson v. Ohio Dep't of Pub. Safety, 210 N.W.2d 660 (Iowa 1973); Spradling v. Deimeke, 528 S.W.2d 759 (Mo. 1975); Lewis v. Nebraska State Dep't of Motor Vehicles, 191 Neb. 704, 217 N.W.2d 177 (1974); McNulty v. Curry, 42 Ohio St. 2d 341, 71 Ohio Op. 2d 317, 328 N.E.2d 798 (1975); State v. Carson, 512 P.2d 825 (Okla. Crim. 1973); Commonwealth Dep't of Transp. v. Cannon, 4 Pa. Commw. Ct. 119, 286 A.2d 24 (1972); Law v. City of Danville, 212 Va. 702, 187 S.W.2d 197 (1972).

127. 28 N.Y.2d 274, 270 N.E.2d 297, 321 N.Y.S.2d 566 (1971).

128. 384 U.S. 757 (1966).

129. 28 N.Y.2d at 278, 270 N.E.2d at 300, 321 N.Y.S.2d at 569.

130. The principle established in *Gursey* was also applied by lower New York courts in Leopold v. Tofany, 68 Misc. 2d 3, 325 N.Y.S.2d 24 (Sup. Ct. 1971), and People v. Huelin, 85 Misc. 2d 139, 378 N.Y.S.2d 865 (Suffolk County Ct. 1975).

131. 29 N.Y.2d 504, 272 N.E.2d 486, 323 N.Y.S.2d 976 (1971).

132. 286 A.D. 323, 143 N.Y.S.2d 362 (1955), *aff'd*, 1 N.Y.2d 664, 133 N.E.2d 516, 159 N.Y.S.2d 29 (1956).

133. Section 71-a of the former Vehicle and Traffic Law read: "If such person having been placed under arrest and having therefore been requested to submit to such chemical

to take the test, and ruled that the right would be rendered meaningless if comment in court on that refusal were allowed.[134]

Judge Jasen, in a concurring opinion, questioned the continued viability of the *Stratton* ruling. He noted that insofar as *Stratton* rested on the Federal Constitution, *Schmerber* rendered it untenable: "[S]ince there is no constitutional right to refuse to submit to such a test . . . there can be no constitutional prohibition to prevent comment upon the accused's failure to take the test."[135] The court in *Stratton* had misread the intent of the legislature in allowing an individual to refuse to take the test, according to Judge Jasen, and since "*Stratton* rests solely upon this statutory basis, the Legislature may, if it be so advised, correct this situation."[136]

In 1973, the New York State Legislature did revise section 1194, the current version of section 71-a, making clear its intent to allow evidence in court of a refusal to take the test.[137] If Judge Jasen's interpretation of *Schmerber* is correct, then both *Stratton* and *Paddock* are no longer good law. Subsequent to the legislative revision, lower courts have divided on the question of the continued viability of *Paddock*. In *People v. Smith*,[138] for example, a county court ruled that since a defendant has no constitutional right to refuse to take a chemical test after being arrested for driving while intoxicated,[139] he has no right to have mention of that refusal

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tests, refuses to submit to such chemical tests, the test shall not be given but the Commissioner shall revoke his license . . . ." 1953 N.Y. Laws, ch. 854, § 71-a (repealed 1959). This provision was adopted verbatim by the present law in N.Y. VEH. & TRAF. LAW § 1194.2 (McKinney 1970 & Supp. 1978).

134. *Stratton* also relied on New York's self-incrimination laws. *Id.* at 332, 143 N.Y.S.2d at 365 (citing People v. Hyman, 284 A.D.2d 347, 131 N.Y.S.2d 691, *aff'd*, 308 N.Y. 794, 125 N.E.2d 597 (1955)).

135. 29 N.Y.2d at 505, 272 N.E.2d at 486, 323 N.Y.S.2d at 976.

136. *Id.* at 506, 272 N.E.2d at 487, 323 N.Y.S.2d at 978.

137. Under this amendment, the following language was added to § 1194: "Evidence of a refusal to submit to such chemical test shall be admissible in any trial . . . upon showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in his refusal." N.Y. VEH. & TRAF. LAW § 1194.4 (McKinney 1970 & Supp. 1978).

138. 79 Misc. 2d 172, 359 N.Y.S.2d 446 (Broome County Ct. 1974).

139. *Id.* at 173, 359 N.Y.S.2d at 447-48; *accord*, People v. Rosenthal, 87 Misc. 2d 186, 384 N.Y.S.2d 358 (Dist. Ct. 1976). *Rosenthal* also discussed the interesting question of whether the results of sobriety tests should be suppressed when the subject has not received *Miranda* warnings. The court held that "[i]n the light of the abundance of authority finding the performance or [*sic*] sobriety tests to be without the protection of the *Miranda* warnings . . . the performance test given by defendant [should] not be suppressed." *Id.* at 190, 384 N.Y.S.2d at 361; *accord*, People v. Mosher, 93 Misc. 2d 179, 402 N.Y.S.2d 735 (Webster Town Ct. 1978); People v. Bartlett, 82 Misc. 2d 152, 368 N.Y.S.2d 799 (Yates County Ct. 1975) (failure to give *Miranda* warnings will not prevent

excluded from the trial.[140] Furthermore, the court suggested that the statutory basis for *Paddock* had been removed by the 1973 amendment to section 1194.[141]

The most significant case holding the refusal to take the blood test inadmissible at trial is *People v. Rodriguez*.[142] In reviewing *Stratton* and *Paddock*, the court took issue with Judge Jasen's interpretation of *Paddock*, arguing that he had misread *Schmerber*. While submission to the test is not testimonial, the court said, refusal to submit is testimonial, and "[i]t follows therefrom that to make admissible the defendant's failure to take the prescribed test is violative of his rights under the Fifth Amendment."[143] In *People v. Delaney*,[144] the court examined section 1193-a of the Vehicle and Traffic Law, and held that it violated the federal privilege against self-incrimination. Section 1193-a requires a motorist who has been in an accident to submit to a breath test;[145] if he refuses, he is given a summons and allowed to proceed.[146] Since "the only reason for asking the motorist to take a breath test" is to help the officer decide whether the defendant should be arrested, and the "sole and only function [of the test] is to incriminate," the court held the provision unconstitutional.[147]

At present, there has been no reconciliation of these disparate decisions by the lower courts in New York. The applicability of *Miranda* and *Schmerber* to chemical intoxication tests is unclear. What is clear, however, is that none of the lower court opinions have relied on New York State constitutional guarantees. It seems unlikely either that *Rodriguez* will survive appellate court con-

admission of blood test results, though statements made at time of test may be suppressed). *But see* People v. Houghland, 79 Misc. 2d 868, 361 N.Y.S.2d 827 (Dist. Ct. 1974).

140. *Id.* at 173, 359 N.Y.S.2d at 447–48. The majority rule is that "since compelled chemical test evidence violates no privilege against self-incrimination . . . evidence that one accused of intoxication refused to take a chemical test is admissible." 2 R. ERWIN, *supra* note 126, § 31.02. *But see* notes 152–63 & accompanying text *infra*.

141. 79 Misc. 2d at 174, 359 N.Y.S.2d at 448.

142. 80 Misc. 2d 1060, 364 N.Y.S.2d 786 (Sup. Ct. 1975).

143. *Id.* at 1064, 364 N.Y.S.2d at 791. In contrast to *Rodriguez*, the court in People v. Mosher, 93 Misc. 2d 179, 180, 402 N.Y.S.2d 735, 736 (Webster Town Ct. 1977), said that making a distinction between refusal to take the test, which would be admissible, and the words "I refuse," which would not be admissible, is a theory that "strains rationality." For cases discussing the inadmissibility of a refusal to take a chemical analysis test after arrest for driving while intoxicated, and the possible effects of waiver, see People v. Johnson, 89 Misc. 2d 53, 387 N.Y.S.2d 801 (Crim. Ct. N.Y. 1976), and People v. Houghland, 79 Misc. 2d 868, 361 N.Y.S.2d 827 (Dist. Ct. 1974).

144. 83 Misc. 2d 576, 373 N.Y.S.2d 477 (Dist. Ct. 1975).

145. N.Y. VEH. & TRAF. LAW § 1193-a (McKinney Supp. 1978).

146. 83 Misc. 2d at 577, 373 N.Y.S.2d at 478.

147. *Id.* at 579, 373 N.Y.S.2d at 480.

sideration on federal constitutional grounds, or that the New York Court of Appeals will resurrect *Stratton* on state constitutional grounds.

VII. The Right to Counsel

> In our discussions of New York statutes and of the modern constitutional constructions by the United States Supreme Court, we must not forget that in our State the right to counsel was announced and insisted upon in much older case law.[148]

A. *Counsel and Interrogation: 1960–1978*

The protection of the right to counsel has an extensive and rich history in New York, and the task of making that right a reality has been taken seriously by the courts in the state.[149] This tradition has been continued in recent years. Although the New York Court of Appeals was reversed by the Supreme Court in *Spano v. New York*,[150] the court, in a series of cases beginning with *People v. Di Biasi*,[151] not only went beyond the requirements of the federal courts, but explicitly based its decisions on the state as well as the Federal Constitution.

The Supreme Court in *Spano*, relying on the traditional voluntariness standard, did not decide whether any postindictment confession given in the absence of counsel could be used without violating a defendant's constitutional rights. *Di Biasi* resolved the question: "we do not think we are concluded by this court's decision in *Spano*. We think this questioning was a violation of

148. People v. Witenski, 15 N.Y.2d 392, 396–97, 207 N.E.2d 358, 361, 259 N.Y.S.2d 416 (1965) (Desmond, C.J.).

149. *See, e.g.*, People v. Marincic, 2 N.Y.2d 181, 139 N.E.2d 529, 158 N.Y.S.2d 569 (1957) (though defendant had been informed of her right to counsel at every stage of the proceeding, in order for the right to be effective "the court must make it clear to a defendant . . . that her right is not only to have counsel if she so wishes but also to have all further proceedings postponed until she shall have consulted with counsel and taken his advice," *id.* at 184, 139 N.E.2d at 530, 158 N.Y.S.2d at 571); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944) (right to counsel requires that defendant have a "reasonable time and a fair opportunity to secure counsel of his own choice," *id.* at 483, 53 N.E.2d at 357). *See also* People v. Shenandoah, 9 N.Y.2d 75, 172 N.E.2d 548, 211 N.Y.S.2d 165 (1961); People v. Banner, 5 N.Y.2d 109, 154 N.E.2d 553, 180 N.Y.S.2d 292 (1958); People v. Palmer, 296 N.Y. 324, 73 N.E.2d 533 (1947) (the right to counsel may be waived); People v. Brantle, 13 A.D.2d 839, 216 N.Y.S.2d 329 (1961). New York's concern in this area became apparent almost from the beginning of the state's history by the requirement that counsel be assigned to the poor. *See* People v. Witenski, 15 N.Y.2d 392, 397, 207 N.E.2d 358, 361, 259 N.Y.S.2d 413, 416 (1965).

150. 360 U.S. 315 (1959).

151. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

this defendant's constitutional rights . . . ."[152] Although the court did not explicitly rely on the state constitution or state statutes, its decision was clearly a step away from the traditional voluntariness standard that had been used by the Supreme Court since *Brown v. Mississippi*.[153] In subsequent cases, the court explicitly used state law as the basis for its decisions. *People v. Waterman*,[154] affirming and extending *Di Biasi*, decided that after indictment the right to counsel is absolute and a defendant must be advised of his privilege against self-incrimination and his right to counsel. The court referred to article I, section 6 of the New York Constitution and New York case law.[155] *People v. Meyer*[156] extended the *Waterman* rule to the arraignment stage, and *People v. Rodriguez*,[157] reaffirming *Meyer*, described the state constitutional ground for the rule:

> It is the interrogation, in the absence of counsel, after the criminal proceeding has been commenced, whether by grand jury indictment or by a charge placed before a magistrate following an arrest, which is forbidden. The procedure followed by the law enforcement officers . . . violated [the defendant's] right to assistance of counsel . . . .[158]

This was the position of the court regarding postarraignment or postindictment situations.

The court began to develop an even stronger right to counsel principle in *People v. Donovan*.[159] Donovan had been apprehended and questioned by the police. After his lawyer's request to see him had been denied, the police obtained a seemingly involuntary confession. The court ruled that any statement made to authorities by a defendant in police custody after a request for

152. *Id.* at 550, 166 N.E.2d at 828, 200 N.Y.S.2d at 25.
153. 297 U.S. 278 (1936).
154. 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).
155. *Id.* at 565, 175 N.E.2d at 447, 216 N.Y.S.2d at 74.
156. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962). *Meyer* also indicated that the right to counsel could be waived. *Id.* at 165, 182 N.E.2d at 104, 227 N.Y.S.2d at 428. *See* text accompanying notes 184–204 *infra*.
157. 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962). In People v. Richardson, 25 A.D.2d 221, 268 N.Y.S.2d 419 (1966), the court held that the right to counsel attaches once the judicial process has begun. *Id.* at 223–24, 268 N.Y.S.2d at 422. The arrest and detention of the suspect for purposes of arraignment were considered sufficient conditions for the attachment of the right.
158. 11 N.Y.2d at 284, 183 N.E.2d at 652, 229 N.Y.S.2d at 355 (citing N.Y. CONST. art. I, § 6).
159. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

counsel has been ignored, or after counsel's request to see his client has been denied, is inadmissible.

Donovan is a vivid example of the New York Court of Appeals' use of state constitutional and statutory authority as a basis for its decisions.[160] It marked a "breakthrough"[161] that, in effect, was eventually adopted by the Supreme Court in *Escobedo*.[162] And, *Donovan* retained its vitality after *Escobedo* and *Miranda* by offering additional protection to that given by *Miranda*. Professor Richardson provides the following example:

> Consider, for instance, a defendant who, after receiving the *Miranda* warnings, and after validly waiving his rights, starts to answer questions where an attorney retained by his family appears and demands access to him. Does not the *Donovan* rule, and not the *Miranda* rule, require that the attorney be given access or, at the least, that the defendant be made aware of the fact that an attorney is present?[163]

People v. Arthur[164] was the final major pronouncement by the New York Court of Appeals in this area during the Warren Court period. After reaffirming *Donovan's* reliance on state constitutional and statutory authority, the court in *Arthur* proceeded to extend both the point at which the right to counsel attaches, and the conditions for waiver of that right:

> Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel . . . . There is no requirement that the attorney or the

160. The court's reasoning relied exclusively on New York law. Judge Fuld, writing for the majority, stated:

> [W]e find it unnecessary to consider whether or not the Supreme Court of the United States would regard [the confession's] use a violation of the defendant's rights under the Federal Constitution . . . . [Q]uite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel . . . require the exclusion of [this] confession . . . .

Id. at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 842 (citations omitted).

161. Interview with the Honorable Charles Desmond, former Chief Judge of the New York Court of Appeals, in Buffalo, N.Y. (June 15, 1978).

162. The United States Supreme Court cited *Donovan* approvingly in Escobedo v. Illinois, 378 U.S. at 486–87. In People v. Sanchez, 15 N.Y.2d 387, 207 N.E.2d 356, 259 N.Y.S.2d 409 (1965), the court held that the *Donovan* rule applied to a defendant when taken into custody whether he is "regarded by police as 'accused,' 'suspect' or 'witness.'" *Id.* at 389, 207 N.E.2d at 356, 259 N.Y.S.2d at 410.

163. RICHARDSON ON EVIDENCE § 546 (10th ed. 1973).

164. 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).

> defendant request the police to respect this right of the defendant.[165]

Arthur's requirements exceeded those of the Warren Court decisions,[166] so that by the twilight of the Warren era in the late sixties, the New York Court of Appeals could properly claim that "[t]he right to counsel in this State has had a rich development under the State's Constitution."[167]

The cases decided by the court of appeals between 1969 and 1972 signaled a retreat from the doctrines enunciated in the sixties. The court decided that the *Donovan-Arthur* rule did not apply to noncustodial interrogation,[168] or to unsolicited spontaneous statements.[169] Then, in *People v. Robles*,[170] the *Arthur* rule was, for all intents and purposes, emasculated. In an attempt to distinguish the facts of the case, which seemed squarely governed by *Arthur*,[171] the court called the *Arthur* principle "merely a theoretical statement of the rule" and stated that "[t]his dogmatic claim is not the New York law."[172] *Robles* threw the right to counsel doctrine in New York into disarray.[173]

Six years later, *People v. Hobson*[174] reaffirmed the *Donovan-Arthur* rule in a strongly worded opinion. The court noted that the state constitutional basis for the rule had "extended constitutional protections of a defendant under the State Constitution beyond those afforded by the Federal Constitution,"[175] and was

165. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666.

166. For an application of *Arthur*, see People v. Miles, 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913 (1969). Even after *Miranda* warnings are given, a waiver is impermissible unless made in the presence of an attorney. *Id.* at 542, 245 N.E.2d at 696, 297 N.Y.S.2d at 924.

167. People v. Blake, 35 N.Y.2d 331, 338, 320 N.E.2d 625, 630, 361 N.Y.S.2d 881, 889 (1974).

168. People v. McKie, 25 N.Y.2d 19, 28, 250 N.E.2d 36, 41, 302 N.Y.S.2d 534, 541 (1969).

169. People v. Kaye, 25 N.Y.2d 139, 144, 250 N.E.2d 329, 331, 303 N.Y.S.2d 41, 45 (1969).

170. 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970).

171. *Id.* In *Arthur*, the lawyer appeared and requested that detectives not question the defendant any further. The following morning, the detectives did question the defendant, who made incriminating statements. In *Robles*, the attorney, who was in the police precinct with the suspect, left and asked an officer to watch the defendant. The officers questioned the defendant who then made incriminating statements.

172. 27 N.Y.2d at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 795.

173. In his treatise, Richardson had this comment: "It is difficult to determine the precise impact upon the *Donovan-Arthur* rule of . . . *People v. Robles* . . . or the precise basis for the holding . . . ." RICHARDSON, *supra* note 163, at § 545.

174. 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). *Hobson* also reaffirmed the exceptions to the *Arthur* rule. *See* text accompanying notes 168–69 *supra*.

175. *Id.* at 483–84, 348 N.E.2d at 897, 384 N.Y.S.2d at 422.

justified by the nexus between the privilege against self-incrimination and the right to assistance of counsel of a suspect in custody.[176] The court believed that *Miranda* warnings are ineffective in this context and that an extended right to counsel provides the only way to ensure that a defendant's rights are more than a formality.[177]

While the court made it clear that its holding applied only to persons who had already obtained counsel, its argument would logically seem to apply to the individual who, having never retained counsel, might be ignorant of the importance of counsel. But, neither the New York Court of Appeals nor the United States Supreme Court has taken this position.[178]

Decisions subsequent to *Hobson* have underscored the New York court's commitment to protect the right to counsel. In *People v. Ramos*,[179] the court of appeals held that the burden of inquiring whether the defendant might be represented by counsel, thus triggering the *Donovan-Arthur* rule, rests with the prosecution.[180] In *People v. Howard*,[181] a suspect who had counsel was engaged in conversation by an officer. The appellate division held that although the conversation was not designed to elicit inculpatory statements, when such conversations do in fact elicit damaging admissions they must be seen as a form of "latent interrogation" and be suppressed.[182]

176. *Id.* at 485, 348 N.E.2d at 898, 384 N.Y.S.2d at 423. "Notwithstanding that warnings alone might suffice to protect the privilege against self-incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel . . . ." *Id.* at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 423.

177. The court recognized that the presence of counsel is important in order to "protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State." *Id.* at 485, 348 N.E.2d at 898, 384 N.Y.S.2d at 423. The right to counsel was "more important than the preinterrogation warnings given to defendants in custody. These warnings often provide only a feeble opportunity to obtain a lawyer, because the suspect or accused is required to determine his need, unadvised by anyone who has his interests at heart." *Id.* at 485, 348 N.E.2d at 899, 384 N.Y.S.2d at 423.

178. For a review of federal and state cases on this point, see Note, *Interrogation and the Sixth Amendment: The Case for Restriction of the Capacity to Waive the Right to Counsel*, 53 IND. L.J. 313 (1977).

179. 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976).

180. *Id.* at 617–18, 357 N.E.2d at 961, 389 N.Y.S.2d at 304.

181. 62 A.D.2d 179, 404 N.Y.S.2d 345 (1978).

182. For other decisions adhering to the letter and spirit of *Hobson*, see People v. Pinzon, 44 N.Y.2d 458, 377 N.E.2d 721, 406 N.Y.S.2d 268 (1978); People v. Singer, 44 N.Y.2d 241, 376 N.E.2d 179, 405 N.Y.S.2d 17 (1978); People v. Buxton, 44 N.Y.2d 33, 374 N.E.2d 384, 403 N.Y.S.2d 487 (1978); People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977); People v. Howland, 62 A.D.2d 1094, 405 N.Y.S.2d 131 (1978); People v. Ermo, 61 A.D.2d 177, 401 N.Y.S.2d 831 (1978); People v. Ellis, 91 Misc. 2d 98, 397 N.Y.S.2d 541 (Sup. Ct. 1977).

There are two discrete rules in New York regarding the right to counsel that have their basis in state statutory and constitutional law. The first is the postarraignment/postindictment rule, which provides that incriminating statements made after arraignment or indictment in the absence of counsel are inadmissible.[183] This rule, developed before *Escobedo* and *Miranda,* provides that if a defendant is not advised of his right to assistance of counsel, incriminating statements will be inadmissible at trial. While there are statements in both *Waterman* and *Meyer* indicating that the right to counsel could be waived, the issue was not resolved until *People v. Lopez.*[184] In a four to three decision, the court held that a defendant in a postindictment/prearraignment situation could waive his right to the assistance of counsel. Judge Breitel, writing for the dissenters, argued that this decision marked a retreat from the strong right to counsel that had been developed in New York "well in advance of the United States Supreme Court."[185] He continued:

> Whatever vitality a waiver rule might have under the *Miranda* doctrine, other considerations require a contrary rule in the area of postarraignment and postindictment interrogation. After criminal action is begun, it is no longer a general inquiry into an unsolved crime but rather a form of pretrial discovery; it is no longer a suspect who is being interrogated but the accused; the interest in affording the police an opportunity to carry on investigatory interrogation for purposes of reaching a decision to charge and in what degree is diminished.[186]

Judge Breitel thought that waiver of counsel should be allowed in preindictment or prearraignment situations, but not in postarraignment/postindictment contexts.

The continuing viability of *Lopez* is questionable. Although followed in *People v. Wooden,*[187] the federal district court in *United States ex rel. Lopez v. Zelker*[188] held that Lopez had not made a knowing and intelligent waiver. Specifically, Lopez had not known that he had already been indicted, and ignorance of

183. *See* text accompanying notes 150–58 *supra.*

184. 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825 (1971).

185. *Id.* at 26, 268 N.E.2d at 629, 319 N.Y.S.2d at 827 (Breitel, J., dissenting).

186. *Id.* at 28–29, 268 N.E.2d at 631, 319 N.Y.S.2d at 829 (Breitel, J., dissenting).

187. 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434 (1972), *cert. denied,* 410 U.S. 987 (1973).

188. 344 F. Supp. 1050 (S.D.N.Y.), *aff'd mem.,* 465 F.2d 1405 (2d Cir.), *cert. denied,* 409 U.S. 1049 (1972).

"so stark a legal fact" voided the waiver.[189] More important, however, the court of appeals overruled *Lopez* in *People v. Hobson* [190] as a matter of state law on other grounds. The New York courts thus do not accept a waiver of counsel as readily as do the federal courts.[191]

Hobson left unanswered the question whether a person in custody can waive his right to assistance of counsel after the filing of an accusatory instrument, but prior to the entrance of counsel. Did the New York courts intend to extend the right to post-arrest/prearraignment situations? In a number of cases, the commencement of criminal proceedings or criminal prosecution has been set at the filing of an accusatory instrument.[192] Two of these cases, *People v. Cranmer*,[193] and *People v. Babcock*,[194] both read *Hobson* as precluding interrogation in the absence of counsel in both postarraignment and postindictment contexts, and confronted the question whether a defendant can waive his right to counsel after the filing of a felony complaint, but before actual arraignment on the charge. In *Babcock*, police had read the suspect his *Miranda* rights, which he "intelligently and voluntarily waived,"[195] and then obtained incriminating statements from him.

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189. *Id.* at 1055.

190. 39 N.Y.2d 479, 490, 348 N.E.2d 894, 902, 384 N.Y.S.2d 419, 426 (1976). Judge Gabrielli did not believe that *Hobson* overruled *Lopez*, since Hobson had been represented by counsel while Lopez had decided to forego legal representation. *Id.* at 491–92, 348 N.E.2d at 903, 384 N.Y.S.2d at 427 (Gabrielli, J., concurring).

191. Several federal courts have held postindictment statements made after a waiver of the right to counsel admissible. United States v. Crisp, 435 F.2d 354, 358–59 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); United States v. Garcia, 377 F.2d 321, 324 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967).

192. *See* People v. Richardson, 25 A.D.2d 221, 268 N.Y.S.2d 419 (1966). The court held that the right to counsel attached once the "judicial process had been invoked." *Id.* at 224, 268 N.Y.S.2d at 422. The detention of a suspect for purposes of arraignment is a sufficient condition for the attachment of the right to counsel. In People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974), the point at which the right of counsel was held to attach was the filing of an accusatory instrument. *Id.* at 339, 320 N.E.2d at 631, 361 N.Y.S.2d at 890. In People v. Sugden, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974), the court held that the court-ordered removal of a defendant who was a target of police investigation was sufficiently judicial in nature to warrant the attachment of the right to counsel.

193. 55 A.D.2d 786, 389 N.Y.S.2d 905 (1976). In *Cranmer*, the suspect had been indicted, arrested, taken to the police station, and questioned about a robbery. After being given his *Miranda* warnings, he waived all of his rights, including his right to counsel. Accepting the position that *Hobson* overruled *Lopez*, the court reversed the conviction on grounds that in the absence of counsel, the right cannot be waived while the suspect is in custody after indictment. *Id.* at 787, 389 N.Y.S.2d at 907.

194. 91 Misc. 2d 921, 399 N.Y.S.2d 103 (Albany County Ct. 1977).

195. *Id.* at 922, 399 N.Y.S.2d at 104.

The court applied the reasoning of *People v. Bodie* [196] and *People v. Stockford.*[197] In *Bodie,* the defendant had been allowed to waive his right to counsel, having been properly informed of it, after the filing of an information and the issuance of an arrest warrant. In *Stockford,* the court stated that while

> issuance of a warrant is the commencement of a criminal proceeding . . . this stage of the proceeding has not yet been fully equated to that which would exist where, after arraignment and the appearance of counsel in a court, the police attempted to question a defendant not in the presence of that counsel. . . . Nor may an information used to obtain an arrest warrant be regarded as the equivalent of the formal triable document . . . .[198]

The court in *Babcock* stated that *Hobson* had not overruled *Bodie* or *Stockford,* and declared that "no matter how logically inconsistent with the rule set forth in *Hobson* with respect to post-indictment, pre-arraignment, situations, it must be assumed that *Bodie* and *Stockford* are still the law with respect to waiver of counsel in post-information, pre-arraignment, cases." [199] The court read *Hobson* as establishing a rule that in cases of indictment, the point after which the privilege against self-incrimination and the right to counsel cannot be waived in the absence of counsel is the filing of the indictment; in cases of accusatory instruments other than indictments, the starting point is arraignment in court.[200]

People v. Coleman [201] gave support to the interpretation in *Cranmer* and *Babcock.* Coleman had been incarcerated on an unrelated charge when a judicial order was secured to remove him from jail for the purpose of conducting a lineup. He was advised of his right to counsel, a right that he ostensibly waived. Judge Jasen, writing for the majority, ruled that "the right to counsel

196. 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965).

197. 24 N.Y.2d 146, 247 N.E.2d 141, 299 N.Y.S.2d 172 (1969).

198. *Id.* at 148, 247 N.E.2d at 142, 299 N.Y.S.2d at 173 (footnote omitted).

199. 91 Misc. 2d at 925, 399 N.Y.S.2d at 106.

200. While this result might follow from *Di Biasi, Waterman, Meyer,* and *Rodriguez, see* text accompanying notes 151–58 *supra, Hobson* seemed to affirm the *Donovan-Arthur* rule. The police had knowingly questioned Hobson in the absence of his retained counsel. Moreover, there is some question about the scope of *Stockford* after the decision in People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974). In *Blake,* the court argued that *Stockford* no longer applied to preindictment identification proceedings at least in the right to counsel area. *Id.* at 339–40, 320 N.E.2d at 631–32, 361 N.Y.S.2d at 890–91. *See* text accompanying notes 208–34 *infra.*

201. 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977).

may be waived notwithstanding the absence of counsel," [202] but found that the prosecution had failed to establish that the defendant had voluntarily and intelligently waived his right to counsel.[203] *Coleman* indicates that prearraignment or preindictment waivers are permissible when counsel has not been retained in connection with the criminal charge at issue. Whether waivers in postindictment and postarraignment contexts are now permitted by the New York Court of Appeals is not altogether clear.[204]

B. *Identification Proceedings and the Right to Counsel: Kirby—More or Less*

The Supreme Court, in *Kirby v. Illinois*,[205] refused to extend the *Wade* principle to a postarrest/preindictment lineup. This result has not been completely accepted by all states. Michigan,[206] for example, has rejected *Kirby*, while other states have attached the right at earlier points than *Kirby* might require.[207] Prior to *Kirby* and its companion case *Ash*, New York courts had applied *Wade* to both prearraignment and preindictment identification proceedings.[208]

New York's initial reaction to *Kirby* came in *People v. Blake*.[209] *Blake* involved two viewings that took place two hours after arrest, but before arraignment. The court, analyzing the situation in the context of the "rich development" of the right to

202. *Id.* at 226, 371 N.E.2d at 821, 401 N.Y.S.2d at 59.

203. *Id.* at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 60–61.

204. People v. Colon, 62 A.D.2d 398, 405 N.Y.S.2d 735 (1978), addressed the question whether a defendant under indictment for approximately five months could waive his right and make a statement to police in the absence of counsel. Noting Judge Breitel's strong dissent in *Lopez*, the court ruled:

> [I]t would seem that the majority in *Hobson* believed that the commencement of adversary judicial proceedings through the filing of an indictment is the functional equivalent of the "entry" of a lawyer into the proceedings. That being the case, it is apparent that there can be no postindictment waiver of the right to counsel unless counsel is present . . . .

Id. at 404, 405 N.Y.S.2d at 738.

205. 406 U.S. 682 (1972).

206. *See* People v. Anderson, 389 Mich. 155, 170–71, 205 N.W.2d 461, 467–68 (1973).

207. For a discussion of the varied responses to *Kirby*, see Note, *State Responses to Kirby v. U.S.* [*sic*], 1975 WASH. U.L.Q. 423.

208. *See* People v. Harrington, 29 N.Y.2d 498, 500, 272 N.E.2d 482, 484, 323 N.Y.S.2d 971, 973 (1971) (Burke, J., dissenting on other grounds); People v. Oakley, 28 N.Y.2d 309, 270 N.E.2d 318, 321 N.Y.S.2d 596 (1971); People v. Logan, 25 N.Y.2d 184, 250 N.E.2d 454, 303 N.Y.S.2d 353 (1969).

209. 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974).

counsel under the state constitution,[210] stated that it was "free to evaluate independently the necessity of mandating, under the State Constitution as it interprets it, the presence of counsel at prearraignment viewings, as a derivative of the right to counsel without traversing the necessarily vague and elusive byways of the constitutional right to due process." [211]

Before discussing its understanding of *Kirby*, the court applied state cases to the lineup question. It began by applying the *Donovan-Arthur* rule to identification procedures. The rule provides that when an accused, at any stage before or after arraignment, is known by officials to have retained counsel, his "right or access to counsel may not be denied," and that fact "may establish his right to counsel at the viewing."[212] Citing the right to counsel cases decided in the sixties, the court further concluded that "once the general right to counsel attaches in a criminal context, even if defendant has not yet obtained or received a court-assigned lawyer, the right to have counsel present, where appropriate, at subsequent procedures such as a corporeal identification viewing, also exists."[213] Turning to an examination of the federal rule as stated by *Kirby*, the court accepted the *Kirby* limitation on *Wade*, subject to the state guaranteed rights discussed above. The Supreme Court in *Kirby* stated that the right to counsel attaches at the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[214] The *Blake* court, following this language, explained that in New York proceedings would begin "with the filing of an 'accusatory instrument' as defined by statute, which serves as the basis for prompt arraignment or issuance of a warrant of arrest."[215] The court concluded: "[U]pon the filing of an accusatory instrument, whether or not a lawyer has been retained or assigned for general purposes, there may not be, except

210. The court noted that "[a]lthough framed in more restrictive terms, the right to counsel under the State Constitution has, in some areas, been interpreted more expansively than under the Fifth and Sixth Amendments as interpreted by the Supreme Court . . . ." *Id.* at 335, 320 N.E.2d at 629, 361 N.Y.S.2d at 887 (footnote omitted).

211. *Id.* at 336, 320 N.E.2d at 629, 361 N.Y.S.2d at 887.

212. *Id.* at 338–41, 320 N.E.2d at 630–32, 361 N.Y.S.2d at 889-91.

213. *Id.* at 339, 320 N.E.2d at 631, 361 N.Y.S.2d at 890.

214. 406 U.S. at 689.

215. 35 N.Y.2d at 339, 320 N.E.2d at 631, 361 N.Y.S.2d at 890. The New York Criminal Procedure Law defines an accusatory instrument as an indictment, an information, a simplified information, a misdemeanor complaint, or a felony complaint. N.Y. CRIM. PROC. LAW § 100.05 (McKinney Supp. 1978).

in exigent circumstances, a corporeal viewing of the defendant for identification purposes in the absence of counsel . . . ."[216]

Commentators have concluded that *Blake* essentially adopted the *Kirby* position;[217] this is, however, an oversimplification of *Blake*. *Blake*'s application of the *Donovan-Arthur* rule to lineups gave an accused more protection than the federal rule. Moreover, it is not certain whether *Kirby* intended to encompass *Blake*'s definition of the beginning of the adversary process.[218] In *Holland v. Perini*,[219] for example, the Sixth Circuit Court of Appeals interpreted *Kirby* differently when it decided that a show-up held after a suspect had been detained and booked, but before formal charges had been filed, was permissible in the absence of counsel.[220] *Blake* apparently resolved this issue on state statutory grounds; so, while *Blake* did not reject *Kirby* outright, it also did not accept it without qualification.

The *Blake* decision creates a basis for different treatment of those arrested pursuant to a complaint, and those arrested on probable cause without a warrant. This could encourage police to delay taking a suspect to a judicial officer, or discourage them from obtaining warrants. The court in *Blake* dealt with this potential abuse: "Since such a rule offers opportunity for delay between arrest and the filing of an accusatory instrument, an undue delay is prima facie a suspect circumstance suggesting that the delay may have been for the purpose of depriving the accused of counsel at a viewing."[221] Such delays would be grounds to exclude the identification.[222]

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216. 35 N.Y.2d at 340, 320 N.E.2d at 632, 361 N.Y.S.2d at 891.

217. *See, e.g.*, Lewin, *Criminal Procedure*, 27 SYRACUSE L. REV. 69 (1976) ("[t]he *Blake* court concluded that the state constitution did not afford any greater protection to the accused than did the federal constitution," *id.* at 109 (footnotes omitted)); Note, *supra* note 207, at 437.

218. Professor Fellman points out that

> [w]hile some courts have taken the position that "adversary judicial proceedings" begin with the filing of the complaint and the issuance of the warrant, so that the right to counsel applies to any planned confrontation with witnesses after that, the more orthodox view has been that the right to counsel so far as identification is concerned, begins only after the filing of formal charges whether by indictment or information.

D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 221 (2d ed. 1976). Under New York State Criminal Procedure Law, misdemeanor and felony complaints are both accusatory instruments that serve as a basis for commencement of a criminal action. N.Y. CRIM. PROC. LAW § 100.10 (McKinney 1970).

219. 512 F.2d 99 (6th Cir.), *cert. denied*, 423 U.S. 934 (1975).

220. *Id.* at 102-03. *See id.* at 103 n.1.

221. 35 N.Y.2d at 340, 320 N.E.2d at 632, 361 N.Y.S.2d at 891.

222. *But cf.* Commonwealth v. Richman, 458 Pa. 167, 173, 320 A.2d 351, 354 (1974).

Finally, the court noted in summary that "[a]fter arrest but before the filing of an accusatory instrument the presence of counsel is not mandated, but *is desirable.*"[223] *Blake,* though cautiously written, created stronger protection of the right to counsel in the area of corporeal lineups than *Kirby.*[224]

C. *Right to Counsel: Other Critical Stages*

Thus far, this article has concentrated on the right to counsel in the pretrial stages of the criminal justice process. The New York Court of Appeals also anticipated the Supreme Court's position on the right to defend pro se and has extended the right to have assistance of counsel at parole revocation hearings beyond the point provided by the Court.

In *People v. McIntyre,*[225] the court faced the issue of the right of a defendant to represent himself in criminal proceedings. After noting that "limitations, if any, on the right to defend *pro se* remain largely undefined,"[226] the court stated that "the New York State Constitution and criminal procedure statute

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The Pennsylvania Supreme Court could see no reason for such a difference in treatment. The court said: "To allow uncounseled lineups between warrantless arrests and preliminary arraignment would only encourage abuse of the exigent circumstances exception and undercut our strong policy requiring warrants whenever feasible."

223. 35 N.Y.2d at 340, 320 N.E.2d at 632, 361 N.Y.S.2d at 891 (emphasis added). Law enforcement agencies in New York have taken this recommendation seriously and, though not required by *Blake,* it is standard practice in New York to inform a suspect of his right to counsel and allow counsel to observe the identification procedures both before and after the filing of an accusatory instrument, if either counsel or the suspect so desires. Both the rights required by *Blake* and those provided as a matter of policy are, however, subject to various exceptions and exemptions based on exigent circumstances. Such exceptions were recognized by the federal courts before *Kirby. See, e.g.,* Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), *cert. denied,* 411 U.S. 971 (1973) (accidental or happenstance show-ups); United States v. Hamilton, 469 F.2d 880 (9th Cir. 1972) (arranged show-ups while suspect is at large); Russell v. United States, 408 F.2d 1280, 1284, *cert. denied,* 395 U.S. 298 (1969) (prompt on-the-scene show-ups). *Blake* accepted these exceptions, 35 N.Y.2d at 336–37, 320 N.E.2d at 629–30, 361 N.Y.S.2d at 888. These exceptions were applied in New York in People v. Smith, 38 N.Y.2d 882, 346 N.E.2d 546, 382 N.Y.S.2d 745 (1976), and in People v. Styles, 90 Misc. 2d 861, 866, 395 N.Y.S.2d 1007, 1011 (Sup. Ct. 1977).

224. In People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977), the court extended the point at which a suspect has the right to have counsel at a lineup to "a court order directing the removal of a defendant serving a sentence on an unrelated charge," and which required him to visit the scene of the crime. Such an order was sufficiently judicial and "'not unlike arraignment or issuance of an arrest warrant, so that a right to counsel exists . . . after th [*sic*] order issued . . . .'" *Id.* at 225, 371 N.E.2d at 821, 401 N.Y.S.2d at 59 (citations omitted). The court also held, however, that this right could be "voluntarily and intelligently" waived. *Id.* at 227, 371 N.E.2d at 822, 401 N.Y.S.2d at 61.

225. 36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837 (1974).

226. 36 N.Y.2d at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 843.

clearly recognize this right."[227] The Supreme Court established the right to proceed pro se as a federal constitutional right a year later in *Faretta v. California.*[228] *McIntyre* represents another example of the willingness of the New York State Court of Appeals to resort to its own constitutional traditions in developing an independent set of state guaranteed constitutional rights.

The Supreme Court, in a series of decisions beginning with *Mempa v. Rhay,*[229] extended procedural rights for probationers and parolees. The Court refused, however, to grant an automatic right to counsel at the hearing to determine whether parole or probationary status should be revoked in *Morrissey v. Brewer*[230] and *Gagnon v. Scarpelli.*[231] Prior to *Morrissey* and *Gagnon,* the New York Court of Appeals, in *People ex rel. Menechino v. Warden of Green Haven,*[232] had extended the right to counsel to a final parole revocation hearing, stating that "[t]he demands of due process, under both the United States Constitution and the Constitution of New York State, require that a parolee be represented by a lawyer, and entitled to introduce testimony, if he so elects."[233]

New York's response to *Gagnon* and *Morrissey* came in *People ex rel. Donohoe v. Montanye.*[234] The court was explicit in its rejection of the federal position.

> True, the United States Supreme Court has made the right to preliminary and final revocation hearings depend upon the circumstances of each case . . . . Nevertheless, this court is not required to retreat from its *Menechino* holding based, in part, on the State Constitution.
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> . . . The board regulation [that] bars counsel from final revocation hearings for parolees who have been convicted of a crime while on parole . . . is inconsistent with the parolee's right to counsel under the State Constitution.[235]

Unlike the areas of intoxication tests, and arrests and searches related to traffic infractions, here the court of appeals has neither

227. *Id.,* 324 N.E.2d at 326, 364 N.Y.S.2d at 842–43 (citing N.Y. CONST. art. I, § 6; N.Y. CRIM. PROC. LAW §§ 170.10 (6), 180.10 (5) (McKinney 1970)).
228. 422 U.S. 806 (1975).
229. 389 U.S. 128 (1967).
230. 408 U.S. 471 (1972).
231. 411 U.S. 778 (1973).
232. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).
233. *Id.* at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 454.
234. 35 N.Y.2d 221, 318 N.E.2d 781, 360 N.Y.S.2d 619 (1974).
235. *Id.* at 225–27, 318 N.E.2d at 783–84, 360 N.Y.S.2d at 622–23 (citation omitted).

modified nor retreated from its position in the face of decisions made by the Burger Court.[236] In large part, this is the result of the strong right to counsel tradition in New York—a tradition that is absent in the other two areas.[237]

The New York Court of Appeals has also provided greater protection to individuals than the Supreme Court when there is a delay between the commission of an offense and prosecution. The Supreme Court in *United States v. Lovasco*[238] held that a delay of approximately one and one-half years for investigative purposes was not a violation of the defendant's due process rights even though "his defense might have been somewhat prejudiced by the lapse of time."[239]

In *People v. Singer*,[240] the New York Court of Appeals was confronted with a similar case, except that the delay was for a period of forty-two months. The court ruled that a defendant is entitled to a dismissal if the commencement of an action has been delayed for a lengthy period even though "there may be no showing of special prejudice."[241] This was the first time the New York court had held that a delay in proceeding was a ground for dismissal where no criminal proceeding had been commenced. The court did not clearly establish whether the crucial factor had been the length of time, or the lack of adequate justification for the delay, but it was clear that it interpreted its own due process

236. The *Menechino* decision in 1971 was a narrow one (4–3), but the *Montanye* case in 1974 was 7–0. Major changes in court personnel took place between the two cases. Only Chief Judge Breitel participated in both cases. In *Menechino,* Judge Breitel dissented, arguing that while the right to counsel was desirable in the case, it was not constitutionally mandated. 27 N.Y.2d at 394, 267 N.E.2d at 249, 318 N.Y.S.2d at 464. In contrast, Judge Breitel wrote the majority opinion of *Montanye,* and supported the constitutional basis for the right to counsel in these cases.

237. In Davis v. Shephard, 92 Misc. 2d 181, 399 N.Y.S.2d 836 (Sup. Ct. 1977), a lower court directed town justices to provide assigned counsel to a defendant accused of a violation even though there was no chance of imprisonment. The court in *Davis,* though recognizing that federal cases did not require counsel, *see, e.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972), ruled that § 170.10(3)(c) of the Criminal Procedure Law "requires the assignment of counsel when the defendant is charged with a violation . . . in situations that are not mandatory under the *Argersinger* ruling." 92 Misc. 2d at 183, 399 N.Y.S.2d at 837. Section 170.10(3) reads, in part: "the defendant has the right to aid of counsel at the arraignment and at every subsequent stage of the action." N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 1976).

238. 431 U.S. 783 (1977) (8–1 decision; Marshall, J., writing for the Court).

239. *Id.* at 796.

240. 44 N.Y.2d 241, 376 N.E.2d 179, 405 N.Y.S.2d 17 (1978) (4–3 decision).

241. *Id.* at 254, 376 N.E.2d at 187, 405 N.Y.S.2d at 25–26 (citing People v. Staley, 41 N.Y.2d 781, 364 N.E.2d 1111, 396 N.Y.S.2d 339 (1977), and People v. Winfrey, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967)).

clause to require more demanding standards than the Federal Constitution for the operation of the criminal justice process.[242]

The due process clause of the state constitution also provided the basis for the decision in *People v. Isaacson*,[243] where conduct of the police, though perhaps not illegal under entrapment standards, was considered "egregious and deprivative" when tested by due process standards.[244] In reaching their decision, the five members of the majority explicitly recognized the court's right to impose higher standards than those held to be necessary by the Supreme Court under similar federal constitutional provisions.[245] *Isaacson* represents a significant step in the articulation of state based due process standards as boundaries for permissible police conduct.

CONCLUSION

This article has examined the extent to which the New York courts, and especially the New York Court of Appeals, have relied on the state constitution and common and statutory law to find an independent basis for procedural rights in the area of criminal justice. The New York courts, in spite of the modifications noted in the traffic arrests area,[246] have consistently recognized the independent value of their own constitutional traditions. Moreover, this recognition is not a recent phenomenon brought about by the Burger Court's retrenchment in criminal procedure.

The court of appeals has been able to accomplish this independent basis without flatly rejecting various Burger Court interpretations; it has adopted modified versions of Supreme Court decisions,[247] as in *Troiano* and *Blake*. In the right to counsel area,

242. *See* United States v. Lovasco, 431 U.S. at 796–97.

243. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

244. *Id.* at 519, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.

245. *Id.* at 519–20, 378 N.E.2d at 82, 406 N.Y.S.2d at 718.

246. *See* text accompanying notes 91–117 *supra*.

247. There are really four categories of decisions creating independent state guarantees of rights. The first, and the one on which commentators have tended to concentrate, is where a state court grants a defendant a right that has been denied by the federal courts in a similar situation. The New York decisions in this category are *Singer, Montanye, Arthur-Hobson* insofar as it applies to waivers before arraignment or indictment, and *Troiano*. *Troiano* is the weakest candidate for this classification, but on the strength of the dictum in that case and subsequent lower court interpretations, I have concluded that there is at least a modicum of protection accorded a defendant in a New York court that would not be available to him in a federal court. A second category is where the Supreme Court has, in effect, allowed a range of possible interpretations of decisions by

the court had adopted a state constitutional standard by the sixties, and in some cases much earlier. In the case of the *Arthur-Hobson* rule, the standard established was even more demanding than that of the Warren Court. In most of the areas dealt with in this article, especially the right to counsel, the creation of the more exacting state standards preceded the recent refusal of various state courts to adopt some of the standards established by the Supreme Court under Chief Justice Burger. It is, perhaps, for these two reasons that most commentators either have failed to note or have misinterpreted the extent to which New York has been in the forefront in establishing its own standards for the protection of individual liberty.[248] Some analysts have criticized the use of state constitutions as lacking uniformity and have noted the failure of some state courts to articulate legitimate state interests to justify rejecting the federal rule.[249] This is not the case in

choosing open ended terms such as "initiation of adversarial proceedings," or "custodial arrest," or "critical stages." *Blake* would fall into this category. The third category consists of court decisions granting rights on state grounds in areas the Supreme Court has not yet decided. *Gursey, McIntyre,* and the postarraignment/postindictment *Arthur-Hobson* rule would be in this category. A final category would consist of rights based on state constitutional guarantees not present in the federal constitution. For example, the New York Constitution guarantees its citizens the right to benefits of public assistance, N.Y. CONST. art. XVII, § 1, and the right to organize and bargain collectively, N.Y. CONST. art. I, § 17. I did not find any New York cases in this category. For a similar classification, see Note, *supra* note 8, at 738. Only by examining cases in all categories can one gauge the full extent of independent state law. The so-called "evasion" cases, while spectacular and important in their own right, constitute only one part of this development.

248. New York cases feature prominently in none of the articles on this topic, and those that are mentioned, such as *Marsh, Troiano,* and *Blake,* are given misleading interpretations. *See, e.g.,* Wilkes' three articles, *supra* note 7, and Howard, *supra* note 6. Since these articles concentrated on the seventies, they often missed the strong right to counsel tradition created much earlier in New York, while others suggested that this development among state courts was a very recent phenomenon. For instance, Supreme Court Justice William Brennan wrote: "I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions." Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 495 (1977). And: "In recent years, however, some state courts have renewed their interest in this area and have begun to revitalize the guarantees of fundamental rights expressed by their state constitutions." Note, *supra* note 8 at 737–38. Both statements are misleading at best, and incorrect at worst; however, both stem from the tendency of recent scholarship to concentrate on the tensions between the Burger Court and state supreme courts, and as a result, to neglect the question of the extent to which state courts had been revitalizing fundamental rights in earlier periods. For examples of pre-Warren Court research focusing on the expansion of fundamental rights outside the area of criminal justice, see Paulsen, *State Constitutions, State Courts and First Amendment Freedoms,* 4 VAND. L. REV. 620 (1951), and Paulsen, *Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91 (1950).

249. *See generally* Bice, *supra* note 8; Howard, *supra* note 6, at 934–35; Comment, *The Scope of Search Incident to Arrest in California: Rejecting the Federal Rule,* 9 U. S.F.

New York. Decisions such as *Marsh* and *Troiano, Donovan* and *Hobson, Stratton* and *Paddock, Gursey* and *Craft, Menechino* and *Montanye, Blake* and *McIntyre,* exhibit not only a sophisticated understanding of the federal position, but also contain articulated, persuasive justifications for these higher standards based on New York's particular needs and constitutional traditions.

L. REV. 317, 338 (1974); Note, *supra* note 8, at 737. Howard offers a series of guidelines he believes state courts ought to consider before deciding whether to strike out on their own or follow federal standards. For comments on these various problems, see Galie & Galie, *supra* note 8, at 291–93.