necessitates a case-by-case inquiry regarding the nature of competing interests in the collateral.

The adoption of Uniform Commercial Code section 9-313 would resolve the priority conflict presented in Goldie without mandating a classification of the nature of the lessor’s interest. Furthermore, it would provide needed guidelines for establishing priorities between a holder of an interest in fixtures or trade fixtures and an owner or encumbrancer of real property.

Carol Kinsock Francone

VII
CRIMINAL PROCEDURE

A. DISTRICT ATTORNEY’S DUTY TO INFORM GRAND JURY OF EXCULPATORY EVIDENCE

Johnson v. Superior Court.¹ The California Supreme Court held that a district attorney seeking an indictment, if aware of exculpatory evidence, must inform the grand jury of its existence and nature.² The court based the decision on statutory grounds, declining to subject the institution of the grand jury to the due process and equal protection scrutiny urged by Justice Mosk in his concurring opinion.³ The court’s

1. 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (Clark, J.) (unanimous decision).
2. We hold, therefore, that when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced.

Id. at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.
3. Id. Justice Mosk argued that due process and equal protection require that a defendant, even if previously indicted, be afforded a preliminary hearing, with its attendant safeguards. Chief Justice Wright joined in Justice Mosk’s opinion, while Justice Tobriner, in a separate opinion, took the position that the “serious constitutional questions” raised by the use of the grand jury indictment should await a case in which such questions are presented and argued by the parties. Id. at 270, 539 P.2d at 807, 124 Cal. Rptr. at 47. The grand jury has been the subject of considerable academic scrutiny in recent years, and the due process and equal protection arguments have been made at length elsewhere. See, e.g., Alexander & Portman, Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue, 25 Hastings L.J. 997 (1974). For a discussion of this aspect of
resolution of the case rests on a strained reading of a statute, but the holding nonetheless is the latest step in the development of a principle whose contours the court has been shaping for some time: that a district attorney is not necessarily bound by, but may not completely ignore, the outcome of a preliminary hearing. In imposing what may appear to be a mild obligation, however, the court may have rendered the use of the grand jury considerably less attractive to district attorneys, at least one of whom has already abandoned the indictment process in the wake of Johnson. The concept of exculpatory evidence is necessarily one of uncertain definition and ad hoc determination; Johnson may make indictments subject to dismissal without providing clear guidelines for prosecutors.

I. The Facts

Johnson was charged with conspiracy to commit and with commission of the crime of illegally transporting and selling a controlled substance (amphetamine tablets) and had originally undergone a preliminary hearing. His testimony apparently impressed the magistrate, who dismissed the complaint for insufficient evidence. The district attorney then took the case before a grand jury and obtained an indictment. In doing so, however, he neglected to inform that body of John-


4. The Johnson holding is relatively modest. It merely reflects the obligation recognized by the American Bar Association: “The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt.” ABA Standards, The Prosecution Function § 3.6(b) (1971), reprinted in American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice 90 (1974).

It is, moreover, a somewhat more cautious expression of the principle than was announced by the court of appeal, which had called upon the district attorney “to produce evidence in his possession or control which tends to negate guilt.” Johnson v. Superior Court, 113 Cal. Rptr. 740, 749 (3d Dist. 1974) (opinion vacated).

5. See note 34 infra.

6. One district attorney has expressed interest in a legislative definition of exculpatory evidence to avoid the uncertainty of case-by-case determination. Letter from Keith C. Sorenson, District Attorney, San Mateo County, to author (Oct. 4, 1976). Since Johnson rests on a statutory interpretation rather than on general due process considerations, it is within the power of the legislature to define the scope of the duty. Whether it would be within the legislature’s competence is considerably more doubtful. The resolution of any given case requires an analysis of the materiality of a particular piece of evidence, an analysis which does not lend itself to the formulation of a set of statutory rules.

7. Johnson testified that he had been promised leniency in connection with a previous drug charge in return for supplying information on narcotics dealers to a deputy district attorney. Although he had agreed to sell amphetamine tablets to the federal undercover narcotics agent and the latter’s informant—the transaction which led to the arrest—he claimed to have done so with the intention of informing on them. 15 Cal. 3d at 252, 539 P.2d at 794, 124 Cal. Rptr. at 34.
son's prior testimony. Furthermore, he led the grand jury to believe that Johnson would refuse to testify if called to do so.

The supreme court granted a writ of prohibition restraining the superior court from proceeding to trial on the basis of the indictment, without prejudice to the district attorney's seeking another indictment or filing another complaint.

II. The Statutory Grounds

The supreme court based its holding on Penal Code section 939.7, which empowers the grand jury to order the production of all exculpatory evidence believed to be available. Dismissing as "disingenuous" the People's contention that the district attorney is under no obligation to proffer exculpatory evidence in the absence of a request for it, the court noted that the grand jury cannot be expected to call for the production of evidence that has been concealed from it. The district attorney, if aware of such evidence, must make its existence known to the grand jury.

The court's discovery of such an implied duty embodied in the statute 125 years after its enactment is imaginative if somewhat unconvincing, since the statute has been relied upon principally to justify the exclusion of suspects from grand jury proceedings. It is traditional, of course, for courts to go beyond the plain meaning of a statute.

8. The district attorney's conduct in this regard does not appear to have been idiosyncratic. See Report of the Grand Jury Committee, San Diego Bar Association, 9 San Diego L. Rev. 145, 157 (1972).

9. The district attorney called the arresting officer, who testified that Johnson, informed of his Miranda rights upon his arrest, had refused to make a statement on the advice of counsel. 15 Cal. 3d at 253, 539 P.2d at 795, 124 Cal. Rptr. at 35. Such conduct on the part of the district attorney might itself have been a sufficient basis for dismissing the indictment. See People v. Miller, 245 Cal. App. 2d 112, 156, 53 Cal. Rptr. 720, 748 (4th Dist. 1966).

10. 15 Cal. 3d at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.

11. The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.


12. Section 939.7 of the Penal Code was enacted in 1959, but it remains essentially identical to its predecessor, a product of the first session of the legislature in 1850. 15 Cal. 3d at 254, 539 P.2d at 795-96, 124 Cal. Rptr. at 35-36.

13. See People v. Goldenson, 76 Cal. 328, 345, 19 P. 161, 169 (1888) (construing the forerunner of CAL. PENAL CODE § 939.7 (West 1970)).

The defendant was not entitled to notice that the grand jury was investigating a charge against him, nor was he entitled to be heard or have witnesses sworn and examined by that body, unless it called for the same.

where the relevant legislative history suggests it or where the constitution compels it. But the treatment of section 939.7 does not purport to proceed under either assumption. The court adduces no legislative history to support its construction of the section and specifically states that it "need not consider petitioner's alternative due process argument."

If the duty is to rest on more general policy considerations, however, it seems too limited. The court described section 939.7 as a codification of the "grand jury's 'historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor,'" and on that basis announced the existence of the prosecutor's duty to reveal exculpatory evidence. But such a broad statement about the grand jury's protective role could equally support the argument that such a role will be compromised if the defendant is not informed of the proceeding and invited to lend his perspective to the grand jury's thinking. Yet such reasoning has been squarely rejected.

Although the court's reliance on the statute was misplaced, the outcome in Johnson is understandable. The district attorney, having been rebuffed at the preliminary hearing, proceeded to ignore that result in two ways: he persisted in his attempt to bring Johnson to trial by seeking an indictment, and he chose to smooth his way by concealing from the grand jury the testimony that led to the prior dismissal. Such conduct treads heavily on a policy the court has developed in recent years: ensuring that the defendant's victory at his preliminary hearing is not a hollow one, while preserving the prosecutor's discretion. An examination of the pre-Johnson cases, though they were not used as a ground of decision, helps explain the court's treatment of Johnson.

III. Prelude to Johnson

In Jones v. Superior Court, the supreme court held that a district attorney may not ignore a magistrate's factual findings by charging a
defendant with crimes that a magistrate at a preliminary hearing has specifically found not to have been committed. The district attorney in Jones had originally charged the defendants with a string of sex crimes. The testimony of the prosecutrix at the preliminary hearing, however, undermined her allegations of forcible assault, and the magistrate held the defendants to answer only on a charge of statutory rape. The district attorney nevertheless filed an information charging all the original crimes. In doing so he relied on Penal Code section 739, which authorizes a district attorney, following a preliminary hearing, to file

an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.\(^2\)

The statute, read literally, might seem to justify the district attorney's action in Jones, since the evidence—the testimony found by the magistrate to have been unworthy of belief—did indicate that all the offenses charged had been committed. To read the statute this way, however, would render the preliminary hearing almost meaningless as an instrument for screening out unfounded charges and would make the magistrate's determination an empty ritual.\(^2\) The court therefore construed the statute to bar the filing of an information charging crimes that the magistrate had specifically found, as a matter of fact, had not occurred.\(^2\)

The issue of the degree of finality a district attorney is obliged to accord the findings of a magistrate at a preliminary hearing con-


\(^{21}\) The cases have recognized that a literal construction of section 739 would bring it into conflict with the constitutional mandate which "protects a person from prosecution in the absence of a prior determination by either a magistrate or a grand jury that such action is justified. 4 Cal. 3d at 664, 483 P.2d at 1243, 94 Cal. Rptr. at 291.

\(^{22}\) In reaching this result, the court was constrained to distinguish Parks v. Superior Court, 38 Cal. 2d 609, 241 P.2d 521 (1952), and the series of cases on which it relied, e.g., People v. Bird, 212 Cal. 632, 300 P. 23 (1931), which had construed section 739 to permit the charging of any offense shown by the evidence to have been committed if it arose out of the transaction which was the basis for the commitment. The court in Parks had approved an action by the district attorney that bore considerable resemblance to the Jones scenario. In Parks, however, as the Jones court now perceived it, the district attorney had challenged the magistrate's conclusion of law, not his finding of fact. 4 Cal. 3d at 666, 483 P.2d at 1244, 94 Cal. Rptr. at 292.

The degree to which Parks has survived Jones has been more clearly explicated by subsequent decisions than by Jones itself. See People v. Beagle, 6 Cal. 3d 441, 457-58, 492 P.2d 1, 11, 99 Cal. Rptr. 313, 323 (1972); People v. Eitzen, 43 Cal. App. 3d 253, 260, 117 Cal. Rptr. 772, 776-77 (1st Dist. 1974); Dudley v. Superior Court, 36 Cal. App. 3d 977, 111 Cal. Rptr. 797 (2d Dist. 1974); People v. Farley, 19 Cal. App. 3d 215, 220-21, 96 Cal. Rptr. 478, 480-81 (1st Dist. 1971).
fronted the court again in *People v. Uhlemann*. Uhlemann, charged with selling marijuana, raised the defense of entrapment at his preliminary hearing. The magistrate agreed with him and dismissed the complaint. The district attorney then brought the case before a grand jury and obtained an indictment. Citing *Jones*, the defendant asserted that the magistrate's explicit factual finding of entrapment should have barred the prosecutor's subsequent resort to the grand jury.

The supreme court experienced considerable difficulty in deciding *Uhlemann*. First it issued a unanimous opinion holding that such an ultimate factual determination by a magistrate does indeed bar further action by the district attorney. The court granted a rehearing, however, and issued a new opinion remarkably similar to the first except for its conclusion: that the district attorney is not bound by the magistrate's factual findings to any degree greater than was established in *Jones*. The prosecutor therefore cannot proceed to trial in the teeth of the magistrate's contrary factual findings, but he is free to bring the matter before a second magistrate or a grand jury in the hope of encountering a more receptive audience.

*Johnson* may have been the resolution the court was seeking in *Uhlemann*; the scenario was basically the same in both cases. Once it had resolved *Uhlemann* in favor of prosecutorial discretion by allow-

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25. Justice Mosk dissented in *Uhlemann*, holding to the court's original position. His dissent foreshadowed his opinion in *Johnson*:
   Since the issue [the validity of grand jury proceedings] was not raised below, or briefed and argued on appeal, I do not reach those provocative due process and equal protection problems in this case.
9 Cal. 3d at 670 n.1, 511 P.2d at 614 n.1, 108 Cal. Rptr. at 662 n.1. Justice Mosk's restraint had apparently been exhausted by the time *Johnson* was decided, for, as Justice Tobriner noted there, the issues were not raised or argued by the parties in that case either. See note 3 supra.
26. [A preliminary hearing] is not a trial, and if the magistrate forms a personal opinion regarding the guilt or innocence of the accused, that opinion is of no legal significance whatever in view of the limited nature of the proceedings.
9 Cal. 3d at 667, 511 P.2d at 612, 108 Cal. Rptr. at 660. Whether the magistrate's "personal opinion" can still be characterized as "of no legal significance" is perhaps debatable in light of *Johnson*. See note 28 infra.
27. Although the magistrate in *Johnson* had dismissed the complaint for insufficiency of the evidence, 113 Cal. Rptr. at 743, rather than, as in *Uhlemann*, on an ultimate finding of innocence, the cases cannot be thereby distinguished. After *Uhlemann* a magistrate would have no reason to make a specific finding of innocence since such a finding would have no consequences beyond those which flow from a finding of insufficient evidence. The distinction was never more than technical, as the court in *Uhlemann* may have perceived. In a system that puts the burden of proof on the prosecution, a finding of innocence in a forum competent to make that determination is not different from a finding of insufficient evidence.
ing the district attorney to proceed in the face of an adverse determination at the preliminary hearing, however, it was inevitable that the court would curtail the abuse of such discretion. But Johnson generated new uncertainty for district attorneys trying to apply its holding. Specifically, the case requires prosecutors to judge the exculpatory nature of their evidence, a problem examined in the next section.

IV. What Negates Guilt?

In Brady v. Maryland the United States Supreme Court held that suppression by the prosecution of evidence favorable to the accused upon request violated due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.

The experience of the courts in the wake of Brady indicates that exculpatory evidence is not easily defined. A prosecutor is usually unaware of the defense theory of the case and, by his basic orientation, is more sensitive to evidence of guilt than of innocence. Consequently, he may experience considerable difficulty in accurately predicting what evidence in his possession will, in retrospect, be deemed exculpatory. The structure of the grand jury hearing further complicates the problem: the concept of exculpatory evidence developed for the trial court, where the adversary process shapes solutions, may need to be altered for the grand jury. More importantly perhaps, the prosecutor cannot avoid the Brady burden at trial, but he has the option of avoiding the obligations of Johnson: he may simply charge defendants by information, using the preliminary hearing rather than the grand

28. The court in Johnson avoided saying that the district attorney should have informed the grand jury of the prior dismissal of Johnson's complaint, for to have done so would have been to admit that such a determination carries with it more than the legal implications recognized in Uhlenmann, albeit something short of res judicata. Cf. FED. R. EVID. 803(22). But while not disavowing its stance in Uhlenmann that a magistrate's decision adverse to the prosecution only requires a district attorney to seek a second determination of probable cause, the court's remarks in Johnson indicate that such a determination may also serve to flag exculpatory evidence that the prosecutor will then be obligated to bring to the attention of the grand jury:

Petitioner's testimony at the preliminary hearing did tend to “explain away” the charges against him, at least in the magistrate's opinion. Therefore, petitioner contends, the district attorney had an implied duty under section 939.7 to disclose this testimony to the grand jury.

15 Cal. 3d at 251, 539 P.2d at 793, 124 Cal. Rptr. at 33.


30. Id. at 87.


jury, an option Johnson makes more attractive.

Prosecutors will find that not all the questions raised by Johnson are answered in post-Brady decisions. The exculpatory evidence concealed from the grand jury in Johnson, for example, was the defendant's own testimony offered at the preliminary hearing. That fact alone removes it from the scope of any post-Brady development; the spectrum of conceivably exculpatory material evidence prosecutors have suppressed in the course of a trial obviously has never included the defendant's own story.

33. "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." Cal. Const. art. I, § 14.

34. The response to Johnson by district attorneys has been varied. In Contra Costa County, where more than 100 defendants a year were being indicted prior to the decision, the district attorney has entirely abandoned the use of the grand jury to seek indictments. Surprised by the liberality with which the superior court was dismissing indictments under Johnson and unwilling to appeal such rulings for fear that the delay involved would jeopardize the prosecutions, the district attorney has chosen to proceed by way of preliminary hearing and information. Letter from William A. O'Malley, District Attorney, Contra Costa County, to author (Sept. 23, 1976).

Although the problem of predicting what evidence an appellate court will view as exculpatory would seem to be equally great at trial, the district attorney has no alternative at that stage of the proceeding. The prospect of additional pretrial litigation over the issue of concealed exculpatory evidence may outweigh any perceived benefits of using the grand jury, however, and the district attorney may well decide to employ the preliminary hearing exclusively, as Mr. O'Malley has done.

In San Diego County the district attorney, while continuing to use the grand jury, confesses to having "no inkling as to what is a reliable definition of exculpatory evidence" in the Johnson context. The practical effects of Johnson in that county have been an increase in the length of grand jury presentations and the creation of "hours of litigation in hearings concerning what evidence the District Attorney had, and what he should have presented, at the Grand Jury hearing." Letter from Edwin L. Miller, Jr., District Attorney, San Diego County, to author (Oct. 8, 1976).

Johnson has occasioned no particular problems for the district attorneys of Alameda and Los Angeles Counties, the former having decided to give Johnson a broad reading by informing the grand jury of "any evidence which in any way might tend to show the defendant's innocence, whether legally admissible or not," and the latter reporting that the Johnson duty has been essentially followed before Los Angeles grand juries for many years. Letter from D. Lowell Jensen, District Attorney, Alameda County to author (Sept. 13, 1976), and Letter from Joseph V. Siler, Legal Advisor to the Los Angeles County Grand Jury, to author (Oct. 19, 1976).

35. Moreover, although one would expect a defendant's version of the relevant transaction to be exculpatory, it is exculpatory evidence of a particularly soft kind. Johnson's testimony at the preliminary hearing, for example, was apparently unsupported by that of any other witness. It presumably could have been either corroborated in part or impeached by the deputy district attorney for whom he claimed to have been working, but that official was never called to testify. The supreme court suggested that the magistrate may have credited Johnson's testimony in part because of the failure of the prosecution to call that witness to contradict the accused's account. 15 Cal. 3d at 252, 539 P.2d at 795, 124 Cal. Rptr. at 35. On the other hand, it would seem equally to have been in Johnson's interest to offer the witness, assuming his testimony would have been helpful. If the district attorney was unaware prior to the hearing of the nature of
The nonadversarial nature of the grand jury proceeding, moreover, presents additional obstacles to the direct adoption of Brady's progeny in the grand jury context. Certain types of exculpatory evidence can, of course, be easily presented to the grand jury; the existence of eyewitnesses to the crime who will testify that the accused is not the perpetrator, for example, offers no particular difficulties. But even assuming a high degree of sensitivity and good faith on the part of the prosecutor, it may not be easy for him to reconcile his traditional role with his duty to present less straightforward types of exculpatory evidence, such as credibility-related evidence.

The Johnson-imposed duty of the prosecutor to inform the grand jury of the existence of exculpatory evidence includes the obligation to produce evidence relating to the credibility of prosecution witnesses. The California Supreme Court in People v. Ruthford refused to distinguish, for purposes of the prosecutor's duty to make exculpatory evidence available to the defendant at trial, between evidence which goes directly to the issue of guilt and evidence which casts doubt on the credibility of key prosecution witnesses. Furthermore, if "guilt" in the Johnson holding is defined operationally as a set of circumstances suf-

\[\text{Johnson's defense, it is not surprising that he was unprepared to rebut it.}\]

36. The degree to which prosecutors are sensitive to their duty to present such evidence is more problematical. See Newman, Discovery in Criminal Cases, 44 F.R.D. 481, 500-01 (1967) in which U.S. Attorney (now U.S. District Judge) Jon O. Newman relates the story of his address to a large group of state prosecutors. He put to them the hypothetical of a crime in which several eyewitnesses identify the defendant while one claims that the defendant is the wrong person. Only two prosecutors raised their hands when asked whether they had a duty to reveal the name of that witness to the defendant.

Anyone who has attended a law school class and seen a professor's question meet with only two raised hands may well hesitate to draw any quick conclusions from the anecdote. Moreover, it is now a decade later and Brady is presumably more firmly engrained in prosecutors' minds, if only because of the volume of litigation that has raised the issue. See Comment, Implementing Brady v. Maryland: An Argument for a Pretrial Open File Policy, supra note 32, at 909 n.89. But see People v. Johnson, 38 Cal. App. 3d 228, 113 Cal. Rptr. 303 (4th Dist. 1974), for a case involving a prosecutor's refusal to inform the defense of the names of expert witnesses who do not fall very far outside Newman's hypothetical, which he considered the "easiest case—the clearest case for disclosure of exculpatory evidence." 44 F.R.D. at 500.

37. The importance of credibility-related evidence at the pretrial stage is demonstrated by Jones and Uhlemann. In both cases, the testimony of the prosecution witnesses themselves, on cross-examination by defense counsel, led the magistrates to dismiss the complaints. In Uhlemann it was the testimony of the police informant, charged by the defendant with entrapping him, which the magistrate deemed incredible. 9 Cal. 3d at 665, 511 P.2d at 610-11, 108 Cal. Rptr. at 658-59. For the facts of Jones, see text accompanying note 19 supra.

38. 14 Cal. 3d 399, 408, 354 P.2d 1341, 1347, 121 Cal. Rptr. 261, 267 (1975). Although the court interpreted the prevailing rule as requiring the defendant to demonstrate prejudice when the credibility of a key prosecution witness is at issue, it adopted the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967).
ficient to persuade a trial jury to convict the defendant, then certainly evidence casting doubt on the credibility of prosecution witnesses would be “evidence reasonably tending to negate guilt.” Such a view finds support in Penal Code sections 939.6 and 939.8, which indicate that the grand jury’s determination is intended to be in the nature of a prediction of what the trial jury will do.

The discharge of such an obligation, however, may not be meaningful. The district attorney, if asked by the grand jury to produce credibility-related evidence, can deprive the information of much of its impact. Certainly he will not be required to emphasize the importance of the evidence and draw out the relevant conclusions. Furthermore, the significance of such evidence often lies not so much in the information itself but in its value as a lead to other, previously undiscovered facts. Reviewing courts may look to such additional evidence in examining the prejudicial effect of suppression at the trial stage, but it is unlikely that the same rationale would prevail in the grand jury context. The grand jury itself is not equipped to pursue such leads, and Johnson places no obligation on the district attorney to extend his own investigation.

V. Applying Johnson: Lowered Expectations

Although Johnson suggests that an accused would in the future enjoy greater access to the grand jury, a post-Johnson case raises doubts. In People v. McAlister the defendant, charged with a series of sexual assaults, had a preliminary hearing at which one of the charges against him was dismissed. The district attorney brought the case before a grand jury in the hope of having McAlister indicted on all the charges. On learning this, McAlister’s attorney wrote to inform the grand jury that one of the charges it was considering had been previously dismissed and that several witnesses were available to testify that they were with the accused when two of the attacks occurred. Such testimony, if true, would clearly have been exculpatory, and had the ad-

39. “The grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action . . . .” CAL. PENAL CODE § 939.6(b) (West 1970).

40. “The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury.” CAL. PENAL CODE § 939.8 (West 1970).

41. See In re Ferguson, 5 Cal. 3d 525, 533, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971).

42. See id. at 533, 487 P.2d at 1240, 96 Cal. Rptr. at 600.

43. The district attorney’s duty encompasses only information in his own posses-

44. 54 Cal. App. 3d 918, 126 Cal. Rptr. 881 (3d Dist. 1976).
vantage over the Johnson scenario of not issuing from the mouth of the defendant himself. The grand jury indicted without ever calling any of the witnesses, however, and the defendant moved to set aside the indictment.

Relying on the court of appeal decision in Johnson, the superior court granted the motion, reasoning that the district attorney had either failed to inform the grand jury of the alibi witnesses or, if he had, that the grand jury had abused its discretion in failing to call them. The court of appeal reversed, pointing out that its decision in Johnson had been vacated by the supreme court's grant of a hearing when the superior court ruled on the motion and was therefore of no precedential value. Johnson, therefore, could only be of aid to the defendant if it had retroactive effect, which it did not, according to the court of appeal in McAlister.

But even if McAlister could take advantage of Johnson, the court of appeal said, he would not prevail. Noting first that there was no indication that the defense attorney's letter had not in fact reached the grand jury and that the defendant had therefore failed to show that the district attorney had not discharged his duty under Johnson, the court added:

The [superior] court's holding that the grand jury abused its discretion by failing to subpoena the witnesses called to its attention is clear error. The effect of such a rule would be to fetter the grand jury with an incapacity to return an indictment until it has summoned all potential witnesses designated by an accused, whether they number five as in this case, or five hundred. Such is not the law, and Johnson v. Superior Court did not so hold. Once the district attorney has discharged his duty as defined by Johnson . . . the grand jury may pursue further the inquiry into the potential exculpatory evidence or not, as in its discretion seems proper . . . Such discretion is not abused by the mere failure to subpoena the potential witnesses called to its attention.

McAlister, whatever one may think of its proffered specter of a grand jury crippled by the necessity of calling 500 defense witnesses, is no doubt correct in its reading of Johnson, for Johnson speaks of the grand jury's "power" to call for the production of exculpatory evidence, not its duty to do so. Read together, however, Johnson and

45. 113 Cal. Rptr. 740 (3d Dist. 1974) (opinion vacated).
47. Central to the court's determination that Johnson should not be applied retroactively was the assumption that the rule is not essential to the integrity of the fact-finding process; that is, that the defendant retains his right to present a full defense at his trial. 54 Cal. App. 3d at 925, 126 Cal. Rptr. at 885.
48. Id. at 926-27, 126 Cal. Rptr. at 886.
49. 15 Cal. 3d at 255, 539 P.2d at 796, 124 Cal. Rptr. at 34.
McAlister produce a somewhat startling construction of section 939.7. The statute is said to imply a duty on the part of the district attorney to bring to the attention of the grand jury the existence of exculpatory evidence. But the grand jury itself retains apparently unlimited discretion to hear or not to hear such evidence, even though the statute says that the grand jury “shall” order such evidence to be produced.

Conclusion

Johnson can be read as a variation on the court's theme of according some weight to the pretrial findings of magistrates. But while it may have been intended by the court as no more than a gentle reminder to prosecutors to observe a modest degree of fairness before the grand jury, the case highlights the anomaly of a district attorney's playing the role of the defendant's advocate. And beyond the question of the prosecutor's ability to play that role when he recognizes his obligation to do so, the decision introduces an inevitable uncertainty into the indictment process, thereby making the preliminary hearing an increasingly attractive alternative for district attorneys.

Jonathan R. Bass

B. IMPEACHMENT WITH CONSTITUTIONALLY INFIRM EVIDENCE

People v. Disbrow.1 The California Supreme Court held that the self-incrimination clause of the California Constitution2 bars the prosecution from using statements that are violative of Miranda v. Arizona3 for impeachment purposes. In so holding, the court overruled its own recent decision in People v. Nudd,4 and refused to follow the United States Supreme Court's interpretation of the substantially identical fifth amendment to the United States Constitution.5 In Harris v. New York,6 the United States Supreme Court had upheld the impeachment

1. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (Mosk, J.) (4-3 decision).
2. "Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . ." CAL. CONST. art. I, § 15.
5. "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.
of a criminal defendant with statements obtained in violation of *Miranda*.7

I. Facts

Searching for his estranged wife, Harriet, and two stepchildren, Robert Disbrow went to the home of his wife's friend, Kathleen Pairis, on the night of April 16, 1973. At Kathleen's house a struggle began between Disbrow, who was carrying a pistol, Kathleen, who also was armed, and Harriet; Harriet and Kathleen were killed and Disbrow was shot five times.8

Disbrow was apprehended 5 days later and taken to a hospital for treatment of his wounds. While being wheeled from the emergency room, he was questioned by a police detective who secretly tape recorded the conversation.9 When Disbrow was informed of his *Miranda* rights, he stated that he wished to remain silent and to consult an attorney. The detective assured Disbrow that any statements he made could not be used against him, and continued the questioning.10 Relying upon this assurance, Disbrow made certain inculpatory statements.11 Disbrow was then charged with murdering Harriet and Kathleen. After Disbrow testified at trial that he had acted in self-defense, the prosecution introduced the statements he had made to the detective to impeach his testimony.12

The jury convicted Disbrow of second-degree murder for the killing of his wife, but could not reach a verdict regarding Kathleen's death. Disbrow subsequently waived a further jury trial on this charge and was found guilty of voluntary manslaughter by the court, based on the transcript of the prior trial.13

The California Supreme Court reversed the convictions, holding that the California Constitution bars the prosecution from using any statements obtained in violation of *Miranda*—either as affirmative evidence or for impeachment purposes.14 Chief Justice Wright filed a concurring opinion;15 Justice Richardson, joined by Justices Clark and

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7. Such evidence is only admissible for impeachment if it meets the legal standards of trustworthiness. *Id.* at 224. Impeachment with involuntary confessions would thus be barred even under *Harris*.
8. 16 Cal. 3d at 104, 545 P.2d at 273, 127 Cal. Rptr. at 361.
9. *Id.*
10. The officer thus violated the rule set forth in *Miranda* that all interrogation must cease if the defendant indicates that he wishes to remain silent or consult an attorney. 384 U.S. at 444-45, 473-75.
11. 16 Cal. 3d at 104-05, 545 P.2d at 273-74, 127 Cal. Rptr. at 361-62.
12. *Id.* at 105, 545 P.2d at 274, 127 Cal. Rptr. at 362.
13. *Id.* at 103, 545 P.2d at 273, 127 Cal. Rptr. at 361.
14. *Id.* at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.
15. *Id.* at 116, 545 P.2d at 281, 127 Cal. Rptr. at 369.
McComb, wrote a lengthy dissent.\(^\text{16}\)

\section*{II. Analysis of the Decision}

\subsection*{a. The Court's Reasoning}

The state conceded that Disbrow's statements were the fruits of an illegal interrogation.\(^\text{17}\) Thus the only question before the court was whether these statements could be used to impeach Disbrow's testimony.

1. Use of Precedent. The California Supreme Court had adopted the \textit{Harris} rule in \textit{People v. Nudd}.\(^\text{18}\) In \textit{Nudd}, the defendant was charged with possession of narcotics and narcotics paraphernalia. After being advised of his \textit{Miranda} rights, he asserted his privilege against self-incrimination. In response to an "off the record" question from a police officer, however, the defendant made certain inculpatory statements. When the defendant testified at trial, the prosecution introduced these incriminating statements to impeach his testimony. The supreme court affirmed the defendant's conviction, quoting a portion of the \textit{Harris} opinion and expressly adopting the \textit{Harris} rationale.\(^\text{19}\) The majority in \textit{Disbrow} began by reexamining what it termed \textit{Nudd}'s "uncritical acceptance" of \textit{Harris}.\(^\text{20}\) This entailed a review of the authority on which \textit{Harris} had relied\(^\text{21}\)—the cases carving out an "impeachment exception" to the exclusionary rule for evidence obtained in contravention of the fourth amendment.\(^\text{22}\)

The United States Supreme Court first considered an impeachment exception—and rejected it—in \textit{Agnello v. United States}.\(^\text{23}\) During a trial for conspiracy to sell cocaine in violation of the internal rev-

\begin{itemize}
  \item \textit{Id.} at 117, 545 P.2d at 282, 127 Cal. Rptr. at 370.
  \item \textit{Id.} at 105, 545 P.2d at 274, 127 Cal. Rptr. at 362.
  \item \textit{Id.} at 208, 524 P.2d at 846, 115 Cal. Rptr. at 374. The court also considered and rejected defendant's contentions that his statements were involuntary, that the trial court committed prejudicial error by failing to instruct the jury on its own motion, that the defendant's statement should be considered only as to the issue of credibility, and that the prosecution improperly suppressed his statement until it was offered on rebuttal. \textit{Id.} at 208-10, 524 P.2d at 846-48, 115 Cal. Rptr. at 374-76.
  \item 16 Cal. 3d at 107, 545 P.2d at 275, 127 Cal. Rptr. at 363.
  \item \textit{Id.}
  \item 269 U.S. 20 (1925).
\end{itemize}
enue laws, the defendant was asked on cross-examination whether he had ever seen narcotics; he replied that he had not. In rebuttal, the prosecution introduced a can of cocaine which had been seized illegally in a warrantless search of the defendant's bedroom. The Court held that the admission of this evidence violated the defendant's fifth amendment rights and reversed the conviction.\textsuperscript{24}

An exception to \textit{Agnello} was established in \textit{Walder v. United States}.\textsuperscript{25} In an earlier case, the defendant had been charged with possession of narcotics. The government's principal evidence in that case had consisted of a capsule of heroin that was discovered during an unlawful search. When the defendant's motion to suppress this evidence was granted, the charges were dropped. Two years later, in \textit{Walder}, the defendant was indicted on new narcotics charges, totally unrelated to the earlier indictment. The defendant took the stand at trial and asserted both during his direct testimony and on cross-examination that he had never seen or possessed narcotics. The prosecution impeached this claim with the testimony of an officer who had participated in the search 2 years before, and of the chemist who had analyzed the illegally seized heroin capsule. The Court held this impeachment proper. \textit{Agnello} was reaffirmed, but was distinguished because there the prosecution had sought to use illegally seized evidence \textit{directly related to the crime charged} to impeach the defendant.\textsuperscript{26} In \textit{Walder}, the defendant went beyond denial of the crime charged and denied collateral matters;\textsuperscript{27} the impeaching evidence was related only to the collateral matters, and not to the crime charged. Its admission did not raise the possibility that the jury would misuse it as evidence of guilt, since it proved nothing about the crime with which the defendant was charged.\textsuperscript{28} Subsequent cases expanded the \textit{Walder} exception, permitting impeachment on matters collateral to the crime charged, whether or not the impeaching evidence related to that crime.\textsuperscript{29}

\textsuperscript{24.} \textit{Id.} at 33-34. The Court's holding was a direct application of \textit{Silverthorne Lumber Co. v. United States}, 251 U.S. 385 (1920), where Justice Holmes stated for the Court: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." \textit{Id.} at 392, \textit{quoted in} \textit{Agnello v. United States}, 269 U.S. 20, 35 (1925).


\textsuperscript{26.} \textit{Id.} at 66.

\textsuperscript{27.} The Court stated that a defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for use in its case in chief." \textit{Id.} at 65.


The erosion of the *Agnello* rule culminated in *Harris v. New York*. In *Harris*, the defendant, charged with selling heroin, answered police questions voluntarily when he was taken into custody, but he was not advised of his right to counsel as required by *Miranda*. At trial, the defendant testified on direct examination that he had sold baking powder, not heroin, as part of a scheme to defraud the purchaser. This differed from his original statements to the police. The prosecution used the original statements in cross-examining the defendant. The jury, instructed to consider these statements only in assessing the defendant's credibility and not as evidence of guilt, found the defendant guilty.

The Supreme Court affirmed the conviction in a two-page opinion by Chief Justice Burger. The Court rested its decision on *Walder*, even though the defendant in *Harris* was impeached with evidence directly related to the crime charged, making the case closer on its facts to *Agnello* than to *Walder*. Significantly, *Agnello* was not even cited; it was totally ignored. The collateral-direct distinction was termed unpersuasive, although no reasons were given for this conclusion. The Court acknowledged that some "comments" in *Miranda* could be read as barring any use of improperly obtained statements, but dismissed such language as dictum. The Court failed to address the fifth

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33. [N]o distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.
34. 401 U.S. at 224.
amendment issues; rather, it based its decision on policy grounds: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."\(^{35}\)

Based upon its own review of these cases, the California Supreme Court concluded that the principles enunciated in *Agnello* and *Walder* could not support the *Harris-Nudd* rule.\(^{36}\) Further, the court rejected the policy considerations advanced to support the *Harris* decision. The court’s reasons for doing so are discussed in the next section.

2. Prejudice and the Privilege Against Self-Incrimination. The *Disbrow* court's main objection to the *Harris-Nudd* rule was the “considerable potential” that a jury would view a defendant's extrajudicial inculpatory statements as evidence of guilt rather than restricting its use of this evidence to the issue of credibility.\(^{37}\) The court reasoned that a limiting instruction was ineffective. Since adherence to such an instruction in this context would require a “mental gymnastic which is beyond, not only [the jury’s] power, but anybody else’s.”\(^{38}\) The court

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35. Id. at 226.

36. 16 Cal. 3d at 110, 545 P.2d at 277, 127 Cal. Rptr. at 365. The court noted that by its review of *Agnello, Walder,* and *Harris* it did not profess to interpret federal law. Rather, it said, these cases were examined only to determine whether they are persuasive authority to establish an impeachment exception to the self-incrimination clause of the California Constitution. *Id.* at 110 n.9, 545 P.2d at 277 n.9, 127 Cal. Rptr. at 365 n.9.

37. *Id.* at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367. The court also feared that the *Harris-Nudd* rule would revive the amorphous “totality of the circumstances” test by requiring courts to consider the difficult question of statements’ voluntariness, encourage police misconduct by giving them an incentive to violate a suspect’s rights, and impair judicial integrity by making the courts a party to illegal police practices. *Id.* at 110-13, 545 P.2d at 277-80, 127 Cal. Rptr. at 365-68. The court’s fears were realized in People v. Rising Sun, 55 Cal. App. 3d 1024, 1029-30, 128 Cal. Rptr. 281, 285 (2d Dist. 1976), where a police officer testified that he intentionally violated the defendant’s *Miranda* rights in order to obtain evidence for impeachment purposes should the defendant testify at trial.

38. *Id.* at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367 (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.) (L. Hand, J.), cert. denied, 285 U.S. 556 (1932)). Judge Hand was very critical of the jury’s ability to follow limiting instructions. See cases cited in *Bruton v. United States*, 391 U.S. 123, 132 n.8 (1968).


Findings reported in *Broeder, The University of Chicago Jury Project*, 38 Neb. L.
concluded that the ineffectiveness of a limiting instruction would place a defendant under great pressure to forego his right to testify on his own behalf. Accordingly, the court excluded such evidence as a matter of state constitutional law. Since the statements were clearly inadmissible on the issue of Disbrow's guilt, the likelihood that the jury nonetheless considered the statements in determining guilt or innocence violated the defendant's privilege against self-incrimination.

Although the court's fear that the jury in Disbrow used the impeaching statements as substantive evidence of guilt was probably well-founded, the implications of its decision went beyond the facts of the particular case. The court implicitly determined that there are instances when concededly relevant evidence must be kept from the trier of fact because of its tendency to undermine the defendant's constitutional rights. In failing to explain the standard to be used in applying this principle, the court provided no guidance to trial judges confronted with other situations in which courts traditionally have relied upon limiting instructions to protect the constitutional rights of defendants.

One standard that might be applied is suggested by the United States Supreme Court's decision in Bruton v. United States. Bruton involved the joint trial of Evans and Bruton for armed robbery. Evans invoked his fifth amendment privilege not to testify. A prosecution witness testified that Evans had confessed to having committed the robbery with Bruton. The jury was instructed to consider this testimony only for purposes of determining Evans' guilt; the confession was inadmissible hearsay as to Bruton. Both men were convicted, but the Supreme Court reversed Bruton's conviction, acknowledging that while...
there are many circumstances in which the jury can be relied upon to
follow the court’s instructions,

there are some contexts in which the risk that the jury will not, or can-
not follow instructions is so great, and the consequences of failure so
vital to the defendant, that the practical and human limitations of the
jury system cannot be ignored.44

The “practical limitation” in Bruton was the obvious difficulty of giving
Evans’ confession full weight when considering Evans’ guilt, and giving
it no weight when considering Bruton’s. Because of the danger that
the jury did use Evans’ confession as substantive evidence of Bruton’s
guilt, Bruton’s sixth amendment right to confront the witnesses against
him was substantially threatened by Evans’ decision not to testify. The
Court refused to accept the limiting instruction as an adequate substi-
tute for Bruton’s right of confrontation: “The effect is the same as if
there had been no instruction at all.”46

In determining the adequacy of a limiting instruction, the court
developed a test that focused on the likelihood that the jury would not
follow the court’s instructions, and the substantiality of the harm to the
defendant if it did not.48 The likely harm to the defendant thus deter-
mined should then be considered in relation to the constitutional right
which the defendant claims will be prejudiced or denied if the evidence
is admitted.47 Where the harm may impair a specific constitutional
guarantee—such as the right to confront witnesses or the privilege
against self-incrimination—very little or no prejudice should be toler-
ated.48 If, instead, the defendant asserts a general denial of due pro-
cess by admission of the evidence, a more flexible balancing approach
would be appropriate.49 Where the evidence would be “virtually dis-
positive of the case and extremely damaging” to the defendant if mis-

44. 391 U.S. at 135.
45. Id. at 137.
46. Id. at 135. See also The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63,
234 (1968).
47. See The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 235 (1968).
(1971), which also used independent state grounds in declining to follow Harris, spe-
cifically rejected consideration of the state’s interest in obtaining a conviction as a coun-
tervailing value. One court has attempted to harmonize Harris and Bruton by suggesting
that in Harris there was no simple procedure available to avoid the resulting prejudice,
while in Bruton the only government interest was in efficiency, since the prejudice could
have been avoided by separating the trials of the two defendants. United States v. Ben-
nett, 460 F.2d 872, 880 n.30 (D.C. Cir. 1972).

It has been argued, however, that the consideration of a government interest in ob-
taining a conviction is foreclosed by the very terms of the Constitution. People v.
used by the jury, it should be excluded. Where the balance is less decisively in favor of exclusion, however, the state's interest in admitting the evidence (subject, perhaps, to a limiting instruction) should be considered.

This is essentially a constitutional prejudice rule, analogous to section 352 of the California Evidence Code. The proposed rule, however, would provide a defendant with considerably more protection than the California provision. First, as a constitutionally based standard such a rule may receive more vigorous and sensitive enforcement. Second, under the proposed rule, if a defendant claims that admission will impair a specific constitutional guarantee, then the probative value of the evidence is not considered at all—even a small amount of prejudice will result in exclusion. This is far more protective than the strict balancing test of section 352; evidence that would be admissible under present state practice may thus be excluded under the proposed constitutional prejudice rule.

In the case of a defendant like Robert Disbrow, who has been impeached with his own prior inconsistent statements, it is quite likely that a jury will not follow any limiting instruction that a court might give. Such a defendant will have been caught in deliberate perjury; the confession that the jury will have heard is probably the most damaging kind of evidence that can be offered against a defendant. Under such circumstances, it is simply not reasonable to expect a jury to perform the mental feat of confining to a consideration of credibility evidence which it will obviously feel is highly relevant to the defendant's guilt. Applying the Bruton test would definitely require that Disbrow's inconsistent statements be excluded.

The straight balancing test of Evidence Code section 352 does not adequately protect a defendant in cases such as Bruton and Disbrow where the introduction of evidence might prejudice a defendant through denial of his constitutional rights. The court in Disbrow quite properly provided the extra protection required to preserve the defendant's constitutional rights, but it failed to explain its reasoning suffi-

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51. CAL. EVID. CODE § 352 (West 1966).
54. CAL. EVID. CODE § 352 (West 1966).
ciently to assist a trial judge facing an analogous situation in the future. Application of the Bruton rule would provide the missing guidance.

b. The Independent State Ground

The California Supreme Court, by resting its decision in Disbrow on the self-incrimination clause of the California constitution, was able to avoid following Harris and to preclude review by the United States Supreme Court, which will not review a decision based upon an adequate and independent state ground.

The independent state ground doctrine presents unique problems of constitutional interpretation. State constitutional provisions are often substantially identical to their counterpart provisions in the United States Constitution; yet the interpretation given a state constitutional provision by a state's highest court may differ considerably from the interpretation given the corresponding federal provision by the United States Supreme Court. The propriety and desirability of this result has been the subject of a great deal of discussion by judges and commentators. Although the California Supreme Court has used the independent state ground doctrine to circumvent United States Supreme Court precedents and to insulate its decisions from that Court's review, it has not formulated any criteria delineating when the doctrine

55. CAL. CONST. art. I, § 15.
58. See Project Report: Toward an Activist Role for State Bills of Rights, 8 HARV. C.R.-C.L. L. REV. 271, 326 (1973) [hereinafter cited as Project Report]. The court has interpreted the California Constitution as embodying certain rights prior to a similar interpretation of the federal Constitution by the United States Supreme Court, e.g., People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), and on two occasions has granted criminal defendants protections in the face of United States Supreme Court decisions holding that these protections are not required by the federal Constitution. People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975), declining to follow United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (defendant has standing to object to introduction of evidence obtained in violation of a third party's constitutional rights), was reaffirmed in Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971), despite the United States Supreme Court's intervening decision in Alderman v. United States, 394 U.S. 165, 171-76 (1969) (the fourth amendment does not require third party exclusion).

In People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973),
may appropriately be invoked. Certain factors may be identified, however, that should be considered in determining whether departure from federal precedent is justified. 59

One factor that ought to be considered is the subject matter of the case. Criminal law is an especially appropriate area for state-based decision. 60 State courts handle most criminal litigation. 61 Moreover, they have received additional responsibility in the criminal law field as a result of the Supreme Court's recent decision in Stone v. Powell, 62 restricting the scope of federal habeas corpus relief from state judgments of conviction. It makes sense, then, for state courts to discharge this responsibility by deciding constitutional issues based on their own experience and their own state constitution, subject of course to the minimum standards guaranteed by the United States Constitution.

Another relevant factor in determining whether a decision may appropriately be based on a state constitutional provision is the existence of local precedent. 63 Such precedent refutes by its very existence charges of ad hoc manipulation to avoid federal constitutional review. The most obvious authority regarding the availability of an impeachment exception is, of course, Nudd. Although Nudd affirmed the existence of such an exception, the majority in that case ignored People v. Lilliock. 64 In Lilliock, the defendant had been convicted of first-degree murder. During the guilt phase of defendant's trial, 65 the prosecution had introduced statements by the defendant that had been ob-

where, after acknowledging that it is often difficult to determine whether California search and seizure cases are decided under the state or federal constitution, the court stated: "The issue is, of course, crucial to federal review of our decisions." Id. at 891 n.5, 506 P.2d at 237 n.5, 106 Cal. Rptr. at 413 n.5.


60. See Project Report, supra note 58, at 302-05.

61. Id. at 302.


64. 265 Cal. App. 2d 419, 71 Cal. Rptr. 434 (2d Dist. 1968).

65. Lilliock was tried under California's bifurcated murder trial procedure. Under this system, the guilt or innocence of a defendant is determined without a finding as to penalty if the offense charged is punishable in the alternative by life imprisonment or death. If the defendant is found guilty and sane on a plea of not guilty by reason of insanity, then there is a further proceeding on the issue of penalty. CAL. PENAL CODE § 190.1 (West Supp. 1976).
tained without the defendant having been advised of his right to counsel and to remain silent. The California Supreme Court reversed the conviction, holding that the statements had been obtained in violation of Massiah v. United States 66 and Escobedo v. Illinois 67—United States Supreme Court cases decided after the defendant's trial—and were therefore inadmissible in the prosecution's case-in-chief. 68 At retrial, the defendant was impeached with testimony he had given during the penalty phase of the first trial. On appeal of his subsequent conviction, the appellate court stated that it could not be certain that the defendant had testified in the first trial for any reason other than to counter the impact of the illegally obtained statements that had been previously introduced. His testimony was therefore tainted as "fruit of the poisonous tree." 69 It could not be used for "any purpose" at the second trial, and thus its admission for impeachment purposes required reversal. 70 The viability of Lilliock after Nudd is questionable; it does demonstrate, however, that a California court has rejected an impeachment exception in the past, and that Disbrow is a return to this earlier position rather that a new rule created simply to avoid federal review.

A third factor that should be considered by a state court before it invokes independent state grounds for its decision is the uniformity or diversity of opinion about the legal issue to be decided. Where there is substantial diversity of opinion, each state should be able to adopt the rule it thinks is best. This would have the dual effect of permitting state courts to develop legal rules that accord with the interests of the people in their state—subject of course to the minimum standards guaranteed by the United States Constitution—and allowing the states to experiment so that their experiences under differing rules can be compared. A rule that proves itself to be most effective through practical application may then be generally adopted, while any harm that results from a rule that proves unsatisfactory will be confined to the states that adopted the rule. 71 The substantial diversity of opinion concerning the efficacy of exclusionary rules 72 strongly supports the

70. 265 Cal. App. 2d at 426, 71 Cal. Rptr. at 439.
California Supreme Court's reliance on independent state grounds in *Disbrow*.

It is unfortunate that none of these factors were mentioned to justify the court's departure from *Harris*; the court sought to justify its position by asserting that it was merely following the lead of other states that had previously rejected *Harris*. The court thus missed an opportunity to develop guidelines for applying the independent state ground doctrine in a principled fashion.

Developing criteria for determining whether a question should be decided on independent state grounds is particularly important for a state supreme court that is concerned with the retrenchment that is occurring under the Burger court after the expansion of rights of criminal defendants under the Warren court.

The United States Supreme Court, as expositor of the Federal Constitution, has the power, through the fourteenth amendment, to fix the minimum constitutional standards that the states must meet. Each state, however, is free to adopt a higher standard, based on provisions of its own constitution. During the Warren court years, activist state judges had little cause to exercise this power, since the minimum being set was very high. Now that the federal standard is being lowered, those state courts that agreed in principle with the Warren court decisions have the opportunity, and responsibility, to preserve them. This can be effectively accomplished through the utilization of independent state grounds according to an analysis of factors such as those discussed above.

**Conclusion**

In *Disbrow*, the court acknowledged a practical flaw in the jury system which requires that certain evidence be excluded in order to protect a California defendant's privilege against self-incrimination.

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77. *See Project Report*, supra note 58, at 274.


79. See text accompanying notes 60-72 supra.
The decision may be more significant, however, for its reliance on the state constitution. *Disbrow* demonstrates that the California Supreme Court has accepted the challenge of maintaining the spirit of the Warren court. It is thus a reaffirmation of California's activist role in criminal justice, and adds another state to the short list of those whose courts have decided to play their full role in the federalist system.

Henry Lukas

C. WARRANTLESS ARRESTS WITHIN THE HOME

*People v. Ramey.* The court held that, in the absence of exigent circumstances or consent, warrantless arrests within the home violate both the fourth amendment and the California Constitution. A burglary victim informed the police that defendant Ramey had admitted to buying and disposing of his stolen gun. After a 3-hour delay, the police, following a standard departmental practice, sought to arrest the suspect in his home before securing a warrant. After the officers identified themselves, defendant retreated into his home and was apprehended as he reached behind a portable bar, where a gun and drugs were later found. Noting that the core protection of the fourth amendment is the right to privacy within the home, the court held the arrest unlawful and the evidence illegally seized.

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2. The defendant's arrest took place in the afternoon, but the court did not limit its holding to daytime arrests. The court implied, however, that a daytime arrest provides a stronger case for requiring a warrant because magistrates are then readily available. 16 Cal. 3d at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637. The time of day may be one factor the California courts will consider in deciding whether an arrest took place under exigent circumstances. *See generally* Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1970). In contrast, the Model Penal Code of Pre-Arraignment Procedure requires a warrant to arrest a suspect within the home between the hours of 10 p.m. and 7 a.m. only. *Model Code of Pre-Arraignment Procedure § 120.6(3)* (1975).

3. 16 Cal. 3d at 275, 545 P.2d at 1340, 127 Cal. Rptr. at 636. The court also held that citizen informants who are victims of or witnesses to the crime should be considered reliable in the absence of information to the contrary. *Id.* at 269, 545 P.2d at 1336, 127 Cal. Rptr. at 632.

4. *Id.* at 277, 545 P.2d at 1341, 127 Cal. Rptr. at 637.
Statutory and common law formerly permitted the police to arrest individuals within the home if they had probable cause to believe that the individual had committed a felony and was inside the home to be entered and searched. The practice of making warrantless home arrests was not unique to California. Although the use of an arrest warrant has always been the judicially preferred method of making arrests, as of 1971 few courts had ever held the common law rule to be unconstitutional. In contrast, it had long been recognized that unlike arrest, warrantless searches in homes were unconstitutional except in a few well-recognized situations. This anomaly between the law governing searches and the law regulating arrests persisted despite judicial recognition that the fourth amendment's language referred equally to the seizure of persons and to the search for property. The inconsistency led commentators to charge that the law was unjustifiably protecting property rights more than personal rights.

In the 1970's a number of state and federal courts finally addressed this inconsistency in a reasoned manner. The overwhelming majority concluded that warrantless arrests within the home in the absence of exigent circumstances were unconstitutional. In Ramey, the California Supreme Court found unjustifiable the previous inconsistency in the law prohibiting warrantless searches but permitting warrantless arrests in the home. Analyzing the privacy interests at stake, it joined the majority of courts and laid to rest the contrary common law and statutory rule in California.

The approach taken by the court in Ramey is at variance with the recent views of the United States Supreme Court. The Court has not yet reached the question of the constitutionality of warrantless home arrests, but in United States v. Watson, it held that warrantless felony arrests in public places do not violate the fourth amendment.

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11. Id.
12. 16 Cal. 3d at 275, 545 P.2d at 1340, 127 Cal. Rptr. at 636.
though *Watson* is distinguishable on its facts, the decision is important since, unlike the reasoning in *Ramey*, *Watson* disregarded the fourth amendment interests at stake and relied exclusively on the common law and legislative views to reach its decision.\(^\text{15}\) If the Supreme Court extends *Watson*'s analysis to the question posed by *Ramey*, it will be impossible for the Court to reach *Ramey*'s result. The California court's steadfast use in *Ramey* of an analysis that identifies and weighs the relevant fourth amendment interests is the superior approach and is one that the Supreme Court should follow.

Following a discussion of *Ramey* and *Watson*, this Note suggests two further reforms of fourth amendment law. First, the court's holding in *Ramey* should be extended to prevent police who intend to arrest an individual believed to be inside a residence from going near the home without a warrant or from seeking the occupant's consent to enter. In addition, the court should correct a second anomaly in search and seizure law: police should not enter any home to search for an individual for whom they have an arrest warrant unless there has been a judicial determination of probable cause to believe the suspect is in the home to be searched. These rules are necessary to ensure the complete protection of an individual's right to privacy in the home.

### I. The Decision

#### a. The Court's Reasoning

Two central concerns led the court to its decision. First, the court noted the difference between the law governing searches for property and arrests and concluded that there was no justification for the greater protection accorded to property. In *Coolidge v. New Hampshire*\(^\text{16}\) four members of the United States Supreme Court recognized this difference, stating that the rules on arrest were "in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a [home] without [a] warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'"\(^\text{17}\) Noting this view, the court reasoned that the language of the relevant constitutional provisions alone, which refers equally to seizures of the person as well as to seizures of property, provides no basis for this inconsistency.\(^\text{18}\) In addition, the court found no significant difference between the intrusiveness of an entry to search or to arrest: an arrest is merely a seizure following a search for a

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15. *Id.* at 423.
17. *Id.* at 477-78.
18. 16 Cal. 3d at 271, 545 P.2d at 1337, 127 Cal. Rptr. at 633.
person. The California Supreme Court concluded that the same privacy considerations which led courts to the conclusion that warrantless searches within the home are unreasonable applied with equal force to arrests. The arrest situation provides an even stronger case for application of a warrant requirement because the exclusionary rule will not deter police arrests on less than probable cause. An illegal arrest does not void a subsequent conviction whereas an illegal search will result in exclusion of the evidence seized.

The court's second concern, preservation of the core fourth amendment value—the individual's right to privacy within the home—was the determinative factor in the Ramey decision. The court characterized the arrest intrusion into the home as "one of the most awesome incursions of police power into the life of the individual." The court concluded that the California and United States Constitutions required the "dispassionate judgment of a magistrate" to protect adequately the individual's right to privacy.

The Ramey rule is a modest protection of privacy rights that does not intolerably burden effective law enforcement. First, it does not interfere with the established police practice of making warrantless public arrests. The court noted that the fourth amendment was satisfied in such cases where the officer has probable cause, thus squaring its holding with that of the United States Supreme Court in Watson. Second, the consent exception ensures that the rule will not interfere with police investigations where the decision to arrest has not yet been made. When the police have been voluntarily admitted to a home during their investigation of a crime and probable cause to arrest arises, a warrantless home arrest should be permissible. Third, the Ramey rule will not lead to the needless escape of criminals, destruction of evidence, or danger to human life. In any case where a bona fide emergency exists and the police must act immediately, the exigent circumstances exception justifies a warrantless arrest within the home.

19. Id. at 274, 545 P.2d at 1340, 127 Cal. Rptr. at 636. In Barrett, supra note 9, at 46-47, the author argued that an arrest is more severe than a search because it has personal liberty consequences in addition to property and invasion of privacy consequences for the innocent individual. A search only results in a loss of personal liberty for the guilty individual.
20. 16 Cal. 3d at 275, 545 P.2d at 1340, 127 Cal. Rptr. at 636.
21. Id.
22. Id.
23. Id. at 273, 545 P.2d at 1339, 127 Cal. Rptr. at 635.
24. Id. at 275-76, 545 P.2d at 1340-41, 127 Cal. Rptr. at 636-37. The court broadly defined exigent circumstances to include not only danger to human life and imminent escape of a suspect, but also serious damage to property and destruction of evidence. Id. at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637. While this exception is
Realistically, *Ramey* will only change the practice of routinely arresting individuals within the home before securing a warrant. The court's decision protects the individual's fourth amendment right to privacy within the home, but does not substantially burden or change law enforcement practices.

b. *A Comparison with Watson*

In *Ramey*, the California Supreme Court had the opportunity to discuss and justify the differences between its perspective and that of the United States Supreme Court in the fourth amendment area. The court, however, only briefly referred to the Supreme Court's most recent decision on the subject of warrantless arrests, *United States v. Watson*, and only noted that the issue of warrantless arrests within the home had not been squarely adjudicated.

Although *Watson* explicitly reserved decision on the issue in *Ramey*, the Court's approach in that case carried the implication that warrantless home arrests may not be unreasonable. Instead of addressing the interests underlying the fourth amendment or the inconsistency in the law governing searches and arrests, the Court relied on the common law approval of warrantless felony arrests made in public, Congressional and state legislation, and its own prior assumption of the practice's validity. Unfortunately, such a fourth amendment approach that places total reliance on history and

necessary in cases that call for immediate police action, the courts must carefully examine any police attempt to argue the existence of exigent circumstances. A police officer's unsubstantiated fear that there is an "emergency" should not justify an exception that swallows up the rule.

25. The Court's claim in *Watson*, 423 U.S. at 423, that criminal prosecutions will be encumbered with endless litigation over the existence of exigent circumstances should be rejected. First, the argument is equally applicable to the well-accepted rule against warrantless home searches. Second, the unsubstantiated allegation of burdening the court's administration should not save a practice which impinges on fourth amendment rights.

26. Justices Clark and McComb dissented, criticizing the majority for a continuing failure to show deference to the United States Supreme Court. 16 Cal. 3d at 277, 545 P.2d at 1341-42, 127 Cal. Rptr. at 637-38. There is no merit to this criticism. It is settled that the state constitution is an adequate independent nonfederal ground of decision. *See People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); Falk, *The Supreme Court of California, 1971-1972—Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973). Therefore, it seems that the dissenters' accusation is only representative of their real concern—preventing the adoption of a rule that imposes any new burdens on law enforcement.

27. 16 Cal. 3d at 272, 545 P.2d at 1338, 127 Cal. Rptr. at 634.
28. 423 U.S. at 418 n.6.
29. *Id.* at 418-20.
30. *Id.* at 415-17, 420-23.
31. *Id.* at 416-18.
legislation will probably lead to the conclusion that warrantless home arrests are also permissible.\footnote{32}

\textit{Watson's} historical and statutory approach departed considerably from recent fourth amendment cases that, like \textit{Ramey}, balanced the privacy interest of the defendant against the burdens that a new rule would place on law enforcement.\footnote{33} Although the fourth amendment is generally construed in light of the common law,\footnote{34} the courts have never used history alone to define constitutional guarantees;\footnote{35} rather, it has only been taken as a point of departure for analysis.\footnote{36} Similarly, the traditional rule of legislative deference only authorizes a court to presume that legislation is constitutional;\footnote{37} it does not authorize a court

\footnote{32} The Court still might conclude that warrantless home arrests are invalid without changing its approach. It is not entirely clear that at common law an officer had the right to break into a suspect's home to effect a warrantless arrest. In the comment to section 120.6 of the Model Code of Pre-Arraignment Procedure, the American Law Institute noted, "At common law officers were authorized to break into a house to effect an arrest only if the arrest was under a warrant, or according to some but not all authorities without a warrant on suspicion of felony." \textsc{model code of pre-arraignment procedure} § 120.6, Comment at 308 (1975). For a thorough discussion of the authorities on the common law relating to warrantless home arrests, see Accarino \textit{v. United States}, 179 F.2d 456 (D.C. Cir. 1949).


The Supreme Court's failure to balance the suspect's privacy interest against the warrant requirement's burden on law enforcement is puzzling. Justice Powell adverted to this approach in his concurring opinion in \textit{Watson:} acknowledging the guiding principles and interests of the fourth amendment, he recognized the weakness of the Court's historical and statutory analysis. 423 U.S. at 427-29. He admitted that an unwarranted arrest is a greater invasion of an individual's privacy than a search. But in the end he agreed with the majority that this was a case where "logic . . . must defer to history and experience." \textit{Id.} at 429. Both the majority and Justice Powell seem to have hidden their real concern—the burden that a total ban on warrantless arrests would place on law enforcement—behind their unprecedented conclusion that history and legislation must govern.


\footnote{35} \textit{Williams v. Florida}, 399 U.S. 78, 124-25 (1970) (dissenting opinion); Antieau, \textit{supra} note 34, at 392.

\footnote{36} See, \textit{e.g.}, \textit{Harris v. United States}, 331 U.S. 145, 150-53 (1947), where, in passing on the validity of a warrantless search of the defendant's home incident to his arrest, the Court noted that the practice of searching incident to arrest was of ancient origin, and then went on to examine the interests involved.

In addition, the Court's interpretation of history in \textit{Watson} is inaccurate. As the \textit{Watson} dissenters pointed out, the majority's rule permitting warrantless felony arrests is broader than the common law rule because the concept of a felony has expanded. 423 U.S. at 439-40. Some offenders arrested of crimes now categorized as felonies would not have been subject to warrantless arrest under the common law. \textit{Id.} at 40 n.9.

\footnote{37} \textit{United States v. DiRe}, 332 U.S. 581, 585 (1948).
to find the legislative decision determinative without offering any reasons why the statute is constitutional.\textsuperscript{38}

The court in \textit{Ramey} did not use the case as a method of criticizing or attempting to influence the approach of the United States Supreme Court in fourth amendment cases. This failure is unfortunate; the importance of the citizens' interest in privacy in their homes demands that the Supreme Court follow \textit{Ramey} and rely on more than history or legislative deference.

\textbf{II. Beyond Ramey}

\textit{a. The Consent Exception}

In \textit{Ramey}, the court stated that if the police obtain consent to enter, they may effect a warrantless arrest within the home.\textsuperscript{39} The court did not define what it meant by consent to enter, leaving open the opportunity for police to abuse their arrest powers. Such situations arise once the police have probable cause to arrest but have not yet obtained a warrant.

To avoid abuses, courts should limit the consent exception to situations in which the request to enter the home is made without probable cause to arrest, but in which such probable cause arises during the investigation. When the officers have probable cause to arrest and there is ample time to obtain a warrant, there is no law enforcement need for the power to seek consent. Otherwise there will be no incentive for police immediately to seek a warrant given the possibility that the occupant will consent to their entry.

There are two important reasons for limiting the consent exception. First, once a person is arrested, a court's factual determination into the voluntariness of consent will be particularly difficult where consent was sought after the decision to arrest had been made. In the usual arrest situation officers arrive at the home uniformed and armed and inform the occupant that they wish to make an arrest. There obviously is an implicit threat of coercion in such an appearance at a home, a threat that hardly makes consent voluntary.

Second, when police have decided to arrest, but are unsuccessful in obtaining consent to enter, they may argue that warrantless home arrests are justified by the exigent circumstances exception. If the police believe the suspect is located within a dwelling, but their request

\textsuperscript{38}. The \textit{Watson} dissenters pointed out that "[t]he court's error on this score is far more dangerous than its misreading of history, for it is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice." 423 U.S. at 443.

\textsuperscript{39}. 16 Cal. 3d at 275, 545 P.2d at 1340, 127 Cal. Rptr. at 636.
to enter is met with silence, it is always possible the suspect saw the police, consciously decided not to let them in, and plans to escape if they leave to procure a warrant. If the request is specifically refused, there may be an even greater likelihood of escape or destruction of evidence. In either case the police can, in effect, use the consent exception to undermine the spirit and intent of Ramey.

The danger of permitting police to go near a suspect's home without an arrest warrant is illustrated by United States v. Santana. In that case the police approached the defendant's home and, observing her standing in the doorway, sought to arrest her there; when she retreated into the vestibule, they followed her inside to effect the arrest. In a very short opinion, the Supreme Court, citing Watson, held that there was no violation of the fourth amendment because, when the police first sought to arrest Santana, she was in a public place—her doorway. The Court also held that the police had the right to follow her into her home because of the "hot pursuit" exception to the warrant requirement. Dissenting Justices Marshall and Brennan pointed out that the real issue was whether an exigency justified the police decision to approach the defendant's home without a warrant for the purpose of arresting her.

The importance of Santana in light of Ramey lies in the fact that its logic is not limited to cases in which the suspect is approached in a public place and retreats into the home. The Court stated, "Once Santana saw the police, there was . . . a realistic expectation that any delay would result in destruction of evidence." Thus, even if the suspect is fully within the home, the police might argue with similar success that the suspect saw them and was trying to escape or to destroy evidence. Upholding this argument would emasculate the court's intent to protect fourth amendment interests. The method of avoiding this result is to limit the consent exception. Police who do not possess a warrant should not even be allowed, absent true exigent circumstances, to approach a dwelling when they have probable cause to arrest an individual believed to be inside.

40. 96 S. Ct. 2406 (1976).
41. Id. at 2409. The Court stated, "She was not merely visible to the public but was exposed to public view, speech, hearing and touch as if she had been standing completely outside her house." Id. Santana thus expanded the Watson power to make warrantless arrests in public by enlarging the definition of a public place to include private property within the curtilage of a home.
42. Id.
44. 96 S. Ct. at 2411-12.
45. Id. at 2410.
46. This rule will, of course, be easily manipulated if police officers fail to testify honestly that they had probable cause to arrest before going near the home.
47. Alternatively, the court might allow this practice, but refuse to uphold the
b. Searching the Home for the Suspect

Ramey corrected one anomaly in the law by holding that warrantless home arrests are as invalid as warrantless home searches. Under the California Penal Code and the Federal Rules of Criminal Procedure, however, the arrest and search warrant procedures still differ in another significant way. Under the search warrant procedure, there must be a dual determination of probable cause: the magistrate must find that there is probable cause to search for an object, and that there is probable cause to believe the object is in the place to be searched. The present arrest warrant procedure, by contrast, has no similar dual determination requirement.

An arrest warrant indicates only that a magistrate has determined that there is probable cause to arrest an individual. The magistrate need not determine that there is probable cause to believe the suspect is at any specific residential location, even though, like the power to search, the power to arrest includes the power to search the house for the suspect. Instead, Penal Code section 844 leaves this second probable cause determination to the police. Once the officers possess an arrest warrant, they may enter any home to search for the suspect and to effect an arrest if they have probable cause to believe that the suspect will be found there. This procedure does not adequately protect the privacy of third-party homes because the exclusionary rule does not operate to deter police searches for a suspect on less than probable cause.

As Ramey made clear, there is no reason to distinguish between the search for property and the search for a person. The court noted its concern with protecting the core fourth amendment value—the privacy of an individual within the home—even where the individual was suspected of a crime. Under the present arrest warrant procedure in California, however, the privacy rights of the suspected criminal are given greater protection than the privacy rights of innocent citizens. An arrest warrant only deals with the rights of a suspect; it does not involve
and thus does not protect third parties. The privacy of third parties is needlessly invaded if police enter and search their homes under the mistaken belief that the suspect is there.

To protect the privacy of third-party homes, an arrest warrant should include a magistrate's determination of the suspect's last known address, or the residential address or addresses where the police now believe the suspect is to be found. Requiring a prior judicial determination even when the suspect's own home is to be entered is necessary to protect third parties from police mistakes in identifying the suspect's actual address. In most instances the burden of showing that a particular location is the suspect's home will be minimal. But in cases where the suspect's address is uncertain, or when the officers seek to arrest the suspect at a third-party's home, a thorough judicial determination of the suspect's probable location should be required. When the suspect is not found at home and the officers have probable cause to believe that the suspect is in another residential location, they should be required to return to a magistrate to amend their warrant unless they face exigent circumstances, such as the suspect's deliberately changing locations in an attempt to frustrate the law enforcement effort.

Certain decisions as a practical matter must be left with the police. First, the timing of the entry—the determination of whether a suspect is actually at home—is properly left to the police. It would be impractical to require a magistrate's determination that a suspect is at home at the time of entry because probable cause is usually based on the officers' on-the-scene personal observations indicating that the dwelling is occupied. Second, the police may decide independently to seek consent to enter any home during their investigation of the suspect's whereabouts, as long as they do not have probable cause to believe that the suspect will be there.

Conclusion

In Ramey the court applied a reasoned interest analysis and extended fourth amendment protections to forbid warrantless arrests in the home in most cases. This approach was a wise one that followed

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52. Present law does not require an arrest warrant to include any particular address. CAL. PENAL CODE § 815 (West 1970).
traditional fourth amendment analysis, a tradition that was dangerously undermined by the United States Supreme Court in Watson. Hopefully the Court will recognize the propriety of the Ramey analysis when it is faced with a similar case. The core of the fourth amendment's right to privacy—the protection of the individual in the home—demands nothing less.

If the California Supreme Court continues to apply an interest analysis, two further reforms in fourth amendment law are appropriate. First, to insure the effectiveness of its holding in Ramey, the court should extend its decision to prohibit warrantless home approaches and attempts to obtain consent after the officers have probable cause to arrest. Second, in order to protect the privacy of third-party homes, the court should require a judicial determination of the suspect's location when the police seek to arrest the suspect in any home. These changes in fourth amendment law will ensure complete protection of the individual's right to privacy within the home.

Cathy Surace

D. ARREST: THE CALIFORNIA PREREQUISITE FOR A PRETRANSPORTATION PAT-DOWN SEARCH FOR WEAPONS

People v. Scott.\(^1\) The California Supreme Court held that a warrantless pretransportation weapons search by highway patrolmen unreasonably invaded the defendant's privacy in violation of the state\(^2\) and federal\(^3\) constitutions where: (1) no arrest was made, even though there was probable cause to arrest; (2) the highway patrolmen had no duty to transport the individual to his destination; and (3) the patrolmen had no reason to believe that the individual was armed and dangerous.\(^4\)

This Note will analyze the holding and its rationale in the light of federal and state search and seizure law. It will suggest that the court, in focusing on whether or not an arrest was made, missed an opportunity to balance the conflicting interests that arise when the police choose a protective action other than arrest where probable cause to

\(^1\) 16 Cal. 3d 242, 546 P.2d 327, 128 Cal. Rptr. 39 (1976) (Mosk, J.) (4-3 decision).
\(^3\) U.S. CONST. amend. IV.
\(^4\) 16 Cal. 3d at 248-50, 546 P.2d at 331-33, 128 Cal. Rptr. at 43-45.
arrest exists. The Note will examine those interests and conclude that
the court's decision, though it may promote procedural simplicity,
unduly burdens the social service function of the police and overlooks
the individual's interest in not being arrested and subjected to the
criminal process.

I. The Facts

Early one morning in December 1972, two California Highway
Patrol officers observed defendant and his 3-year-old son standing
near an offramp of Highway 101, apparently urinating. The officers
stopped to investigate. Defendant explained that he and his son had
been riding in a pickup driven by a friend. While returning the child
to his mother, defendant's former wife, defendant and his friend each
had two cans of beer; a dispute arose and the friend ordered defendant
and his son out of the truck.

Defendant was unable to produce any identification. His speech
was incoherent and his eyes were bloodshot; he swayed to keep his
balance. One officer later described defendant's condition as "intoxi-
cated to the point he couldn't take care of himself or his son." Though
the officers had probable cause to arrest defendant on several grounds,
they decided instead to transport him and the child to San Francisco
to return the child to his mother. They asked defendant to submit to
a pat-down search for weapons before he entered the patrol car. As
defendant complied, his coat pocket opened, revealing a plastic bag
containing marijuana. The officer placed him under arrest for pos-
session of marijuana and made a further search that uncovered 454
white tablets later identified as LSD.

Defendant was charged with violating Health and Safety Code
sections prohibiting the possession of LSD and the possession of mari-
jjuana. The trial court granted defendant's motion to suppress the evi-
dence as the fruit of an illegal search and seizure. On a writ of man-
date, the court of appeal vacated the suppression order, holding that
a pretransportation weapons search is permissible even when there has
been no arrest. Defendant pleaded guilty to the charge of possession
of LSD and appealed on the evidentiary issue. A different division

5. Id. at 252, 546 P.2d at 334, 128 Cal. Rptr. at 46.
6. The grounds for arrest cited by the court were: drunkenness, CAL. PENAL CODE § 647(f) (West 1972); drunkenness in the presence of a child, CAL. PENAL CODE § 273(g) (West 1972); contributing to the delinquency of a minor, CAL. PENAL CODE § 272 (West Supp. 1976); depositing waste matter on a public right of way, CAL. PENAL CODE § 374(b) (West Supp. 1976); hitchhiking, CAL. VEH. CODE § 21957 (West 1971); and pedestrian on a freeway, CAL. VEH. CODE § 21960 (West Supp. 1976). 16 Cal. 3d at 254, 546 P.2d at 335, 128 Cal. Rptr. at 47.
of the court of appeal affirmed the judgment and the California Supreme Court granted a hearing.

II. The Court's Analysis

The supreme court initially decided that the doctrine of the law of the case did not preclude its inquiry into the legality of the pat-down search. Because the defendant's conviction rested on evidence admitted pursuant to the court of appeal's misapplication of the principles set forth in the concurring opinion in People v. Superior Court (Simon), the court found that a departure from the doctrine of the law of the case was warranted:

In Simon, the court noted that the justifications ordinarily asserted for a search attending an arrest were to find evidence of the crime and to find weapons that might be used to attack the officer. The court in Simon held that since a search could not yield any evidence of a violation of the Vehicle Code, a person arrested for a minor vehicular offense could be searched only if the officer had independent grounds to believe contraband or weapons were present. In his concurrence, Chief Justice Wright noted that officers were often required to transport arrestees before a magistrate, and suggested that transportation should be a "specifically articulable fact of . . . increased danger to the officer reasonably warrant[ing] the limited or relatively minor intrusion of a pat-down search." This rationale was adopted by a majority of the court in Brisendine v. California to justify a pat-down of four persons arrested for building a campfire in a restricted area prior to their transportation through a primitive area to a patrol car.

In Scott, the State argued that validly proposed transportation of an individual in a police vehicle should be a special circumstance justifying a limited pat-down search for weapons. The supreme court re-

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7. 7 Cal. 3d 186, 211, 496 P.2d 1205, 1223, 101 Cal. Rptr. 837, 855 (1972) (Wright, C.J., concurring). The principle relied upon by the court of appeal was that an officer was justified in making a pretransportation weapons pat-down of an arrestee for a vehicular offense before taking him before a magistrate.
9. 7 Cal. 3d at 201-02, 496 P.2d at 1216-17, 101 Cal. Rptr. at 848.
10. Id. at 201-11, 496 P.2d at 1216-23, 101 Cal. Rptr. at 848-55.
11. Under Cal. Veh. Code § 40302 (West Supp. 1976), a person must be taken before a magistrate if he (a) fails to give satisfactory evidence of his identity; (b) refuses to give a written promise to appear; (c) demands an appearance before a magistrate; or (d) is charged with misdemeanor drunk driving or driving under the influence of any drug which renders him incapable of safe driving. Two further misdemeanor sections, §§ 40303 (West Supp. 1976) and 40304 (West 1971), give the arresting officer discretion to issue a citation or to take the arrested person before a magistrate.
12. 7 Cal. 3d at 214, 496 P.2d at 1225, 101 Cal. Rptr. at 857.
jected such a reading of Simon, limiting that decision to situations where an arrest had actually occurred. Although probable cause to arrest the defendant in Scott existed, "the fact that the officers arguably could have arrested him does not elevate the situation to one in which an arrest actually occurred."

The court applied the requirements delineated by the United States Supreme Court in Terry v. Ohio and essentially adopted by California in People v. Superior Court (Kiefer): before a pat-down search can be made in a nonarrest situation, the officer must have reason to believe he is dealing with an armed and dangerous person. Since the officers had no reason to fear attack from Scott, the pat-down was invalid.

The court suggested that law enforcement officers should give people like Scott an option to be transported to a safer place and a warning that they will be searched if they accept. This suggestion is deficient, however, in that it gives the police officer no real guidance in dealing—as he often does—with the obstreperous drunk, the mentally unbalanced person, or the defensive juvenile. It effectively forces the officer to arrest if the prospective rider refuses the ride.

III. The Search and Seizure Context

a. The Advent of Balancing Analysis

The fourth amendment protects the privacy of individuals by prohibiting unreasonable government intrusions. A search warrant has traditionally been required to legitimize a search or seizure, on

14. 16 Cal. 3d at 249, 546 P.2d at 332, 128 Cal. Rptr. at 44.
17. 16 Cal. 3d at 250, 546 P.2d at 332-33, 128 Cal. Rptr. at 44-45.
18. See Mapp v. Ohio, 367 U.S. 643, 656 (1961), where the United States Supreme Court refers to the fourth amendment as creating a "right to privacy, no less important than any other right . . . particularly reserved to the people . . . ." The right of privacy is protected by several amendments to the Constitution, but no single amendment explicitly safeguards the right. See Griswold v. Connecticut, 381 U.S. 479 (1965).
19. Reasonable government action is permitted. If the policeman obtains the requisite warrant, or if his action is appropriate under an applicable exception, the fruits of his search or seizure will be admissible in court. United States v. Robinson, 414 U.S. 218, 242-44 (1973) (Marshall, J., dissenting). See generally Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349 (1974).
20. See Katz v. United States, 389 U.S. 347 (1967) (eavesdropping agents had probable cause but also had time to obtain warrant; search held invalid); Wong Sun v. United States, 371 U.S. 471 (1963); Johnson v. United States, 333 U.S. 10 (1948). Where certain "specifically established and well delineated exceptions" apply, a warrant is not required. Katz v. United States, 389 U.S. 347, 357 (1967). Such exceptions have included: searches of a moving vehicle, Carroll v. United States, 267 U.S. 132 (1925);
the theory that cause to search for evidence of criminal activity should be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."21

The United States Supreme Court has expanded fourth amendment protection to areas outside the criminal law enforcement system. In analyzing on-the-street frisks,22 housing,23 and welfare inspections,24 the Court has examined the interests asserted by the opposing parties and balanced them to delimit the proper scope of searches. While protecting individual rights through judicial review, the Court has allowed law enforcement officers to make limited searches as an incident to their noncriminally related activities.

In analyzing and applying the provisions of the California Constitution, the California Supreme Court has been influenced,25 but not bound, by the United States Supreme Court's interpretation of substantially identical federal constitutional provisions. California has given a higher degree of protection to the right of privacy in the search and seizure area; this is illustrated by the different treatment accorded by the two courts to the privacy interest of arrestees who are being searched.26


22. Terry v. Ohio, 392 U.S. 1 (1968). The Court balanced the police officers' interests in their own safety and in effective law enforcement against the individual interest in privacy to shape the reasonable justification and limited scope of on-the-street weapons frisks in the absence of arrest. See generally LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 39 (1968).

23. Camara v. Municipal Court, 387 U.S. 523 (1967). The Court balanced the housing inspectors' interest in maintaining a certain level of safety in housing against the individual's desire to maintain the privacy of his home to define an area standard for showing probable cause for a warrant.

24. Wyman v. James, 400 U.S. 309 (1971). The Court stressed the noncriminal nature of the sanction of loss of welfare benefits and the limited nature of the intrusion in holding fourth amendment protection inapplicable. This reasoning is doubtful in that it does not analyze all the interests involved but stops with these observations; it does, however, emphasize that fourth amendment protections have traditionally been most strictly applied in the criminal justice area.


26. See People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (limiting scope of search of arrestee in police custody); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (vicarious exclusionary rule). There has been a difference of opinion within the California Supreme Court as to whether the United States Supreme Court's interpretation of similar provisions should control. See Blubaugh, A
In *United States v. Robinson*, and *Gustafson v. Florida*, the United States Supreme Court allowed full body searches of arrestees as an incident to a valid custodial arrest. The California Supreme Court has looked to the interests of the parties in arrest situations as a basis for limiting the justification and scope of searches incident to custodial arrests for such offenses as vehicular offenses, evading arrest, camping in a restricted area, and public intoxication. In these misdemeanor arrest situations, the California court has explicitly adopted an analysis similar to that set forth in *Terry v. Ohio*; it has sought to delineate narrowly the permissible scope of searches incident to such arrests, determining reasonableness by balancing the need to search against the invasion which the search entails. It has not permitted the fact of arrest to justify the search, but has examined each situation to see whether the traditional justifications for arrest searches applied.

Under this analysis, the increased risk to the officer transporting an arrestee for a minor offense has justified a limited pretransportation pat-down search for weapons. This balancing analysis seems especially appropriate in situations where the officer is not governed by the

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28. *Id.* at 260.
29. *People v. Lawler*, 9 Cal. 3d 156, 507 P.2d 621, 107 Cal. Rptr. 13 (1973) (permissible scope of search of person and effects of suspect "detained" for hitchhiking); *People v. Superior Court (Simon)*, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972) (permissible scope of search of person of arrestee incident to arrest for vehicular offense); *People v. Superior Court (Kiefer)*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970) (permissible scope of search of the arrestee's vehicle incident to arrest for vehicular offense). For an argument that such protection for searches incident to vehicular offenses is particularly appropriate in California, see Comment, *The Scope of Searches Incident to Traffic Arrests in California: Rejecting the Federal Rule, 9 U.S.F.L. Rev. 317 (1974).*
33. 392 U.S. 1 (1968).
35. See cases cited in notes 29-32 supra.
incentives and sanctions of the criminal justice system, and where the search involved is relatively nonintrusive.

b. California Precedent on Searches Incident to Arrest

In People v. Superior Court (Hawkins), the California Supreme Court held that a nonarrest situation cannot be treated as if an arrest has actually occurred, even if probable cause to arrest exists. In Hawkins, police officers found the defendant driver apparently intoxicated and injured at the scene of an automobile accident. They had probable cause to arrest him, but instead brought him to a hospital where a doctor took a blood sample for an intoxication test pursuant to section 13353 of the Vehicle Code. The court excluded the results of the test because the driver had not been arrested at the time the test was administered.

Hawkins may be distinguished from Scott because the blood test was taken pursuant to a statute specifically requiring that the person tested be an "arrestee." In both Hawkins and Scott, however, the supreme court overlooked substantial California precedent holding that as long as there was probable cause to make an arrest when the search took place, and the search was contemporaneous with the arrest, it was immaterial that the search actually preceded the arrest. This earlier case law supports an analysis of the underlying interests in each situation rather than a resort to the formal event of arrest to determine when pat-down searches are acceptable.

37. 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972).
38. CAL. VEH. CODE § 13353 (West 1971) mandates an implied consent when an "arrestee" is given a blood, urine, or breath test for intoxication. The test is explicitly defined in the statute as being "incidental to a lawful arrest." The Hawkins court emphasized this expression of apparent legislative intent in its decision. 6 Cal. 3d at 765, 493 P.2d at 1150, 100 Cal. Rptr. at 286.
39. See note 38 supra.
40. See, e.g., People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968) (search held invalid because it took place several hours before arrest). Justice Traynor noted: "A search that is substantially contemporaneous with arrest may precede the arrest, so long as there is probable cause to arrest at the outset of the search." Id. at 61, 442 P.2d at 671, 69 Cal. Rptr. at 591. See also People v. Cockrell, 63 Cal. 2d 659, 408 P.2d 116, 47 Cal. Rptr. 788 (1965) (validating search of dwelling on probable cause to arrest when search immediately preceded arrest; noting that United States Supreme Court decisions on point have consistently used the ambiguous word "contemporaneous" when dealing with the search incident to arrest exception, and citing Ker v. California, 374 U.S. 23 (1963), and Agnello v. United States, 269 U.S. 20 (1925)); People v. Torres, 56 Cal. 2d 864, 366 P.2d 823, 17 Cal. Rptr. 495 (1961); People v. Duroncelay, 48 Cal. 2d 766, 312 P.2d 690 (1957); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); People v. Maltz, 14 Cal. App. 3d 381, 92 Cal. Rptr. 216 (1971).
41. A leading scholar in the field, speaking of the stop-and-frisk exception advanced in Terry, has commented:

It is the reasonableness of the officer's conduct, not what the state chooses to
The supreme court should not drop the requirement of arrest in all situations as this would increase the likelihood of unjustified exploratory searches. Probable cause for arrest, however, should tip the balance in favor of a narrow exception allowing a limited protective pat-down for weapons when the officer chooses, as an alternative to arrest, to transport the individual away from the scene.

IV. The Interests Involved

a. The Interests of the Police

1. Safety. In Scott, the supreme court's decision turned on the event of arrest; this represents a significant departure from the reasoning of Terry and Brisendine, which had accepted danger to policemen as a factor to justify limited weapons searches. The court failed to note that the police officer's risk of attack is greatest when he is approaching a potential arrestee in a nonfelony situation. Nor did the court recognize the substantial danger to policemen in transporting known offenders. As Chief Justice Wright noted in his concurrence in Simon: "The critical factor in these or similar situations is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer if in fact that person is armed.”

2. Effective Discretion to Perform Social Services. A police call it, which is in issue. If the courts adhere to this principle, then the "importance of another verbalism—the term 'arrest'—which for a long time has tended to dominate legal thinking in this area" may wane.

LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 39, 52 (1968) (quoting, in part, Remarks of Justice Walter V. Schaefer of the Supreme Court of Illinois, Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution" (July 19, 1968)). See also LaFave, Search and Seizure: 'The Course of True Law . . . Has Not . . . Run Smooth' 1966 U. Ill. L.F. 255. Though the necessity for the formality of an arrest is often assumed, in most of the cases setting forth that rule "there were either other reasons for holding the search unreasonable or the statement of the rule was dictum.” M. Paulsen & S. Kadish, Criminal Law and Its Processes, 740 n.i (1962).

42. Of 132 officers killed in 1974, 61 were killed in attempting an arrest; 29 while investigating "disturbance calls" (family quarrels, bar fights, etc.); 12 while investigating suspicious circumstances; 11 while making traffic stops; and 10 while transporting suspects. In the same year, police reported 29,511 assaults (or 15 assaults per 100 officers). Of these assaults, 79 percent were made upon vehicle patrol officers. 1974 F.B.I. UNIFORM CRIME REPORTS FOR THE UNITED STATES 223-24, 241, 246. For a survey finding that nearly all shootings of police officers took place in traffic violation, field investigation, or interrogation situations, see Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963).


44. People v. Superior Court (Simon), 7 Cal. 3d 186, 214, 496 P.2d 1205, 1225, 101 Cal. Rptr. 837, 857 (1972) (Wright, C.J., concurring).
officer's job is not merely to arrest and take into custody people who violate the law. The average police officer in California spends 60 to 75 percent of his time in noncriminally related activity—providing social services and performing regulatory and administrative duties. In responding to different situations, the police officer exercises substantial discretion. He has the authority to invoke the sanction of the criminal justice system; when dealing with conduct that endangers the public, he will normally use this authority and arrest the offender. But when the conduct is not inherently dangerous to the public—as in the case of a hitchhiker or a public drunk—he may decide, because of the triviality of the offense and the limited resources of the criminal justice system, not to arrest but to respond by taking some form of protective action.

Scott distorts the exercise of police discretion by providing an incentive to arrest where there is probable cause, even though the officer might prefer to use different methods for solving the problem. This effectively undermines individual privacy—a right Scott purports to promote and ignores suggestions similar to those of the American Bar Association:

The assumption that the use of an arrest and the criminal process is the primary or even the exclusive method available to police should be recognized as causing unnecessary distortion of both the criminal law and the system of criminal justice. . . . There should be clarification of the authority of police to use methods other than arrest . . . to deal with the variety of behavioral and social problems which they contact.

45. "[The officer] spends considerably more time keeping order, settling disputes, finding missing children, and helping drunks than he does in responding to criminal conduct which is serious enough to call for arrest, prosecution, and conviction." President's Commission on Law Enforcement and Administration of Justice, Task Force Reports: The Police 13 (1967). The American Bar Association, proposing standards for urban police conduct, notes that police spend substantial time in providing general social services, including "assistance to citizens in need of help such as the person who is mentally ill, the chronic alcoholic, or the drug addict." ABA Standards, The Urban Police Function § 1.1 (1973), reprinted in American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice 13 (1974).


47. President's Commission on Law Enforcement and Administration of Justice, supra note 45, at 13-14. See generally LaFave, Arrest—The Decision to Take a Suspect into Custody 61-143 (1965).

48. ABA Standards, The Urban Police Function §§ 3.2-3.3 (1973), reprinted in American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice 18 (1974); Attorney General's Advisory Commission on Community-Police Relations, supra note 46,
The court's failure in *Scott* to consider the mix of criminal law enforcement and social service functions of the police will actually impair effective police practice.

b. *The Interests of the Individual*

In *Scott*, defendant's interest in not being patted down by a police officer is clear. The California Supreme Court fails, however, to deal with the defendant's interest in not being arrested. An arrest, even though it does not culminate in prosecution and conviction, can have a substantial impact on one's life. It can seriously impair future employment opportunities or generate adverse publicity if the arrest record is disseminated. A limited pat-down would seem to be far less intrusive than an arrest followed by a pat-down.

**Conclusion**

*Scott* can perhaps be justified by the supreme court's legitimate reluctance to create an exception to the requirement of a warrant for a search and seizure that might have far-reaching and unpredictable consequences. A limited exception could be created, however, when a law enforcement officer has probable cause to arrest, but instead chooses the less severe alternative of transporting a person to a safer location in a patrol car. Such an exception would benefit both the police and potential arrestees. In applying search and seizure law in areas where exercise of the criminal sanction is undesirable, the Court should return to the sensitive weighing of interests that it adopted as its method of analysis in *Kiefer* and *Brisendine*.

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50. These possibilities have been cited in lower court decisions which have relied on the presumption of innocence and the right of privacy to forbid publication of arrest records where no formal charges against the arrestee are filed. See Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975), United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973), Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).