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United States v. Robinson: Its Effect on the Right to Search Incident to Arrests for Traffic Violations in California

John D. Vandevelde

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UNITED STATES v. ROBINSON: ITS EFFECT ON THE RIGHT TO SEARCH INCIDENT TO ARRESTS FOR TRAFFIC VIOLATIONS IN CALIFORNIA

"MISTER, THE SUPREME COURT SAYS IF YOU DRIVE WITH A BURNOUT TAIL LIGHT, YOU BELONG TO US!" 1

In United States v. Robinson2 and its companion case, Gustafson v. Florida,3 the United States Supreme Court held that "full" searches, that is, those extending beyond a simple "pat-down" and including removal and inspection of any item in the arrestee's possession,4 may

4. 414 U.S. at 221-23 n.2. A training instructor for the Metropolitan Police Department of the District of Columbia testified that "when a police officer makes 'a full custody arrest,' which he defined as one where an officer 'would arrest a subject and subsequently transport him to a police facility for booking,' the officer is trained to make a full 'field type search.'" Id. That search would include areas behind the collar, under the collar, the waistband, the cuffs, the socks, and the shoes. They are instructed to examine "the contents of all of the pockets." Further, the officer testified that "we expect the officer to examine anything he might find on the subject." Id. In a pat-down or frisk search, however, the officer is trained not to search further if he determines by feeling and squeezing the outside of the person's clothing that an object is
be conducted incident to a “lawful custodial arrest”\(^5\) (i.e., requiring transportation to the station house or a magistrate) and are permissible as a “reasonable” search and as an exception to the warrant requirement of the fourth amendment.\(^6\) Further, the Court decided that the reasonableness of the manner in which such a search is conducted is ordinarily not subject to judicial review.\(^7\) These decisions afford less protection to individual liberty than many courts, including those

\(^5\) Id. The stated reasons for all of those policies are the officer’s safety, the safety of the arrested individual, and the discovery of evidence of the crime. Id.

The officer is instructed not to search the physical area beyond the immediate control of the arrestee in a crime such as driving after revocation of a license. Id. The scope of a properly conducted “pat-down” or frisk is described in Terry v. Ohio, 392 U.S. 1 (1968):

“[The officer must feel with sensitive fingers every portion of the prisoner’s body. A thorough search must be made of the prisoner’s arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”

Id. at 17 n.13 (citation omitted).

\(^6\) 414 U.S. at 235; 414 U.S. at 265-66. Although the term “lawful custodial arrest” is not specifically defined in the Robinson or Gustafson cases, the term is used consistently. Both cases involved arrests for which the police officer had the authority to take the offender into custody (and transport the defendant to the station house) as opposed to merely being able to issue a citation. 414 U.S. at 221 n.2; 414 U.S. at 265. The issuing of a citation is, in California, technically an arrest, but the officer has no authority to take the offender into custody. People v. Superior Court (Simon), 7 Cal. 3d 186, 200, 496 P.2d 1205, 1215, 101 Cal. Rptr. 837, 847 (1972).

\(^7\) Id. The only limitation as to the reasonableness of the manner in which a search is conducted which was specifically made in Robinson is that it cannot partake of the kind of physical abuse which violates the due process clause of the fourteenth amendment, such as having the arrestee’s stomach pumped to produce contraband swallowed just prior to the arrest. 414 U.S. at 236. See note 37 infra.

The rejection of the need for case by case review of the reasonableness of the manner in which a search is conducted is a portion of the decision which undoubtedly will engender criticism. Indeed, the dissenters were most critical of that part of the majority view. 414 U.S. at 238-39. Justice Marshall wrote:

“As we recently held, “The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case.” Sibron v. New York, 392 U.S. 40, 59 (1968).

But because an exception is invoked to justify a search without a warrant does not preclude further judicial inquiry into the reasonableness of that search. It is the role of the judiciary, not of police officers, to delimit the scope of exceptions to the warrant requirement.

of California, have heretofore felt was acceptable. The conflict between the Robinson holding and the California approach compels California courts to determine whether or not their more protective approach rests on an independent state ground requiring a broader scope of protection than that contemplated by the fourth amendment. This Comment will compare the Supreme Court's reasoning with that of California courts which have dealt with the same or similar issues, in an effort to determine the effect of Robinson on California law.

I. THE SUPREME COURT DECISIONS

Both Robinson and Gustafson arose in the context of valid arrests for traffic violations made while the defendants were operating motor vehicles. In each case, the arrest was followed by a search conducted at the scene. Neither case involved a police officer who feared for his safety. In the course of each search, the arresting officer reached into the arrestee's coat pocket and removed an innocent appearing object which was immediately opened, revealing contraband material.

8. See notes 47-145 infra and accompanying text, discussing People v. Superior Court (Simon) and other California cases. As to decisions in other jurisdictions, see, e.g., Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); People v. Mayo, 166 N.E.2d 440 (Ill. 1960); People v. Watkins, 166 N.E.2d 433 (Ill.), cert. denied, 364 U.S. 833 (1960); People v. Ziegler, 100 N.W.2d 456 (Mich. 1960); People v. Gonzales, 97 N.W.2d 16 (Mich. 1959); Brinegar v. State, 262 P.2d 464 (Okla. 1953).

9. Because of the nature of the federal system and because of constitutional and statutory limits on the jurisdiction of the United States Supreme Court, decisions based on state grounds, which do not violate the minimum protection required by the fourth amendment, are not subject to review. See notes 44-46 infra and accompanying text.

10. 414 U.S. at 220; 414 U.S. at 261-62.

11. 414 U.S. at 221-23; 414 U.S. at 262.

12. In neither case was the defendant's conduct offensive to the officers. No mention of circumstances which would support an argument that the officers could reasonably have feared for their safety was made. The United States conceded in Robinson's case "that 'in searching respondent, [the officer] was not motivated by a feeling of imminent danger and was not specifically looking for weapons.'" 414 U.S. at 236 n.7. Justice Marshall wrote in his dissent in Gustafson that the officer did not in fact believe "that petitioner was a dangerous person or that the package contained a weapon." 414 U.S. at 267.

13. The officer in Robinson was conducting a "full field search," in which he would normally reach into the arrestee's pockets to check the contents. 414 U.S. at 221-23 n.2. See note 4 supra. In Gustafson the officer was conducting a pat-down search during which he felt an object in Gustafson's coat pocket. 414 U.S. at 262.

The objects in both cases were cigarette packages. Robinson's was a crumpled package containing fourteen gelatin capsules filled with heroin. 414 U.S. at 223. Gustafson's was a Benson and Hedges cigarette box containing marijuana cigarettes. 414 U.S. at 262.
In *Robinson*, the presence of probable cause to make the arrest, for the offense of operating a motor vehicle after revocation of his operator's permit and for obtaining a permit by misrepresentation, was undisputed. The laws of the District of Columbia specified that this offense was punishable by a mandatory-minimum jail term and/or a fine. Police regulations directed that this particular traffic offense required an arrest and transportation to the stationhouse for booking. Additionally, written police procedure in the event of such a "full custody arrest" required a "full 'field type search,'" which meant removal and examination of any items found in the arrestee's pockets.

In *Gustafson*, probable cause to make the "full custody arrest" was also conceded, but under the applicable Florida laws there was no

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14. In Robinson's case, the arresting officer had stopped him four days earlier, also while Robinson was driving his vehicle, and had conducted a "routine spot check." The officer asked to see Robinson's operator's permit and, after checking it and other identification, permitted Robinson to continue on his way even though there was a discrepancy in the birthdates on the identification presented. The discrepancy was in the dates of birth indicated on an operator's permit and a Selective Service card presented by Robinson. The permit indicated that he was born in 1938 while the other identification showed a date of birth of 1927. 414 U.S. at 239-40.

During the interim prior to the arrest of Robinson, the officer determined from a personal examination of police records that Robinson's license had been revoked and that he apparently had obtained another license fraudulently. The police records indicated that an operator's permit issued to Willie Robinson, Jr., born in 1927, had been revoked and that a temporary operator's permit had subsequently been issued to one Willie Robinson, Jr., born in 1938. The pictures on the revoked permit and on the application for the temporary permit were of the same man—the person stopped by [officer] Jenks for the routine check on April 19th. *Id.* at 239-40. It was pointed out that in the course of his investigation, the officer also could have discovered information regarding prior narcotics convictions of Robinson. *Id.* at 221 n.1.

15. *Id.* at 220. D.C. CODE ENCYCL. ANN. § 40-302(d) (1973) provides:

Any individual found guilty of operating a motor vehicle in the District during the period for which his operator's permit is revoked or suspended . . . under this chapter shall, for each such offense, be fined not less than $100 nor more than $500, or imprisoned not less than 30 days nor more than one year, or both.

16. For "the crime of operating a motor vehicle after revocation of an operator's permit, the officer shall make a summary arrest of the violator and take the violator, in custody, to the stationhouse for booking." D.C. Metropolitan Police Department General Order No. 3, series 1959 (Apr. 24, 1959), quoted in 414 U.S. at 223 n.2.

17. 414 U.S. at 221-23 n.2. See note 4 supra. This type of search would normally be conducted while the arrestee is leaning against a wall, spread-eagle fashion. Here, presumably because of the officer's height and weight advantage, the search was conducted face-to-face. 414 U.S. at 240-41.

18. 414 U.S. at 262. Justice Stewart, in an opinion concurring with the majority in *Gustafson*, stated that the "claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." *Id.* at 266-67. Justice Powell, in his concurring opinion to both cases, expressed the same doubt that Justice Stewart voiced regarding the
mandatory minimum sentence for the defendant's offense of failure to have an operator's license in his possession, nor was there any administrative requirement regarding "full custody searches" or "full field type searches." In fact, such procedures were apparently subject to the unregulated discretion of the arresting officer, who in this case took the suspect into custody "in order to transport him to the stationhouse for further inquiry."

In each case, the defendant was charged with unlawful possession of the items found during the search, and the evidence seized during each search was introduced at trial. Although both defendants were found guilty by the respective trial courts, Robinson's conviction was reversed by the District of Columbia Circuit Court of Appeals, while Gustafson's conviction was upheld by the Supreme Court of Florida.

Justice Rehnquist, writing for a majority of the United States Supreme Court, based his opinion upon the premise that a search of the person of the defendant incident to a lawful custodial arrest is a valid exception to the fourth amendment's warrant requirement. Indeed,
the court observed that whatever limitations might be placed on the permissible area of search, beyond the person of the arrestee, "no


Of the cases cited, the Chiagles case seems to offer the most support for Justice Rehnquist's ultimate conclusion that a search incident to an arrest is per se reasonable. 414 U.S. at 235. In Chiagles the court wrote that

[The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation. Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.

142 N.E. at 584 (citation omitted). However, the remaining cases seem to place more emphasis on the factors which are traditionally used to justify a search incident to an arrest:

Unquestionably . . . the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. . . . The rule . . . is justified . . . by the need to seize weapons and things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime . . . .


Those cases cited involved factual situations where there was a need to take items from an arrestee which he might use in procuring an escape, Closson v. Morrison, 47 N.H. 482, 484 (1867); a need to seize evidence of the crime for which the person was arrested, United States v. Rabinowitz, 339 U.S. 56, 66 (1950); Harris v. United States, 331 U.S. 145, 148 (1947); Spalding v. Preston, 21 Vt. 9 (1848); or the need to search for weapons, Chimel v. California, 395 U.S. 752, 762 (1969); Preston v. United States, 376 U.S. 364, 367 (1964); Agnello v. United States, 269 U.S. 20, 30 (1925).

Despite the portions of those cases quoted by Justice Rehnquist which support the right to search incident to an arrest, the cases as a whole seem to call for a "reasonableness" limitation to such a search, even though "traditionally" justified. See Chimel v. California, 395 U.S. 752, 768 (1969) (limit the search to area within which arrestee might obtain a weapon or evidence); Trupiano v. United States, 334 U.S. 699, 706-08 (1948) (held an incident search invalid where there was time to get a warrant: "The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant"), rev'd, United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable"); Go-Bart v. United States, 282 U.S. 344, 358 (1931) (search incident to arrest pursuant to warrant held unreasonable because of "pretension of right and threat of force" and being "general and apparently unlimited"); Marron v. United States, 275 U.S. 192, 199 (1927) (involved an ongoing crime and seizure of items in plain view); Agnello v. United States, 269 U.S. 20, 30 (1925) (search of Agnello's home several blocks from place of arrest held invalid); Carroll v. United States, 267 U.S. 132, 149 (1925) (stressing the presence of probable cause to search arrestee's automobile). See generally Note, Searches of the Person Incident to Lawful Arrest, 69 COLUM. L. REV. 866 (1969).
doubt has been expressed as to the unqualified authority of the arresting officer to search the person of the arrestee.25

The limitations on searches of the person set forth in Terry v. Ohio,26 and relied upon by the lower court in Robinson,27 were inapplicable, the Court held, because the Terry search involved a justifiable investigative “stop-and-frisk” prior to the establishment of probable cause for arrest, while Robinson was under arrest before the search.28 Thus Robinson involved a search incident to arrest; Terry did not. In Terry, the Court stated:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where . . . he identifies himself as a policeman . . . and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment.29

The court of appeals, in an opinion by Judge J. Skelly Wright, had recognized that the nature of the traffic offense in Robinson was such that no further evidence could conceivably be found by an additional search. Therefore, the only potential justification for a search incident to this specific type of arrest was a search for weapons.30 Thus, Judge Wright reasoned that the danger presented to an officer in the traffic arrest situation was more akin to the type of encounter in Terry (justi-

25. 414 U.S. at 225.
27. 471 F.2d at 1097; cf. 447 F.2d at 1233.
28. 414 U.S. at 227. Justice Rehnquist also rejected possible limiting language in Peters v. New York, 392 U.S. 40 (1968), sub nom., Sibron v. New York (companion case to Terry v. Ohio, 392 U.S. 1 (1968)). In Peters, the officer had probable cause to arrest, unlike the Terry situation, and the Court, in approving the pat-down search conducted, wrote:

[The incident search was obviously justified “by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence . . . .” Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects.] 392 U.S. at 67. Justice Rehnquist stated that Peters did not limit the scope of a search incident to a lawful arrest, even though “[i]t is, of course, possible to read the second sentence from this quotation as imposing a novel limitation . . . .” 414 U.S. at 229.
fying a frisk) than to the typical arrest situation (justifying a "full" search). Justice Rehnquist agreed that evidence requiring preservation was usually lacking in the traffic arrest situation, but felt that the other traditional justification for a search incident to a lawful arrest, the need to disarm the suspect, obviated any argument that the non-arrest Terry standard should apply. The majority did not respond to Justice Marshall's point in the dissent that, even assuming that this "need to disarm" permitted the removal of any or all objects from a lawfully arrested person's pockets, such a need would not appear to necessitate the opening of any objects taken out. The policy reason advanced by Justice Rehnquist for allowing such a "full" search—the increased danger to an officer because of extended exposure following arrest and transportation in a police vehicle, as compared to the "fleeting" contact of a Terry "stop-and-frisk"—is simply not responsive to Justice Marshall's argument.

Nevertheless, this "extended exposure" to danger was considered by the majority to present such a pervasive threat that ad hoc second-guessing by appellate courts as to the actual danger present in individual cases was specifically denounced:

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

Thus, in Robinson and Gustafson, the Court eliminated any case-by-case adjudication of searches conducted incident to a lawful custodial arrest, except in the most extreme circumstances involving actual physical abuse. If the Robinson rule is generally followed, the focus

31. 471 F.2d at 1096-98.
32. 414 U.S. at 233.
33. Id. at 234.
34. Id. at 255-56. Justice Marshall simply said that, since the objects which might possibly constitute the threat to the arresting officer were no longer in the arrestee's possession, the threat had been eliminated, and thus the officer's safety should not be a justification for the further intrusion of opening the objects.
35. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical Terry-type stop.
36. Id. at 234-35.
37. Id. at 235. The majority here referred to situations which "[partake] of none of the extreme or patent abus[ive] characteristics which . . . violate the Due Process clause of the Fourteenth Amendment." Id., citing Rochin v. California, 342 U.S. 165
of attack for defendants in traffic arrest cases, which turn into more serious charges as the result of an incident search, will be confined to the lawfulness of the arrest itself\(^3\) and to the question of the officer’s authority to take the offender into custody.

Of course, the crucial question regarding the *Robinson* decision is its effect in states such as California which have afforded a significantly broader protection from unreasonable searches and seizures conducted incident to an arrest for a traffic violation.\(^4\) The media has in some instances portrayed *Robinson* as inviting law enforcement to conduct full searches for very minor offenses.\(^4\) What has not been emphasized is that the *Robinson* decision need not necessarily have an effect in California or in other states. The states may sustain, on state grounds, a more restrictive rule regarding the right of an officer to search in this context than that enunciated in *Robinson*.\(^4\)

The problem of conflicting views between the state courts and the United States Supreme Court in the field of search and seizure limitations imposed by the fourth amendment is, of course, not unique.\(^4\) One function of the Supreme Court is to resolve conflicts in the interpretation of the United States Constitution by means of its power to review state court decisions.\(^4\) Generally, however, the Supreme Court

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38. A search incident to an arrest would certainly be invalid if the officers have no probable cause to arrest (see, e.g., People v. Superior Court (Simon), 7 Cal. 3d 186, 198, 496 P.2d 1205, 1214, 101 Cal. Rptr. 837, 846 (1972); People v. Gonsoulin, 19 Cal. App. 3d 270, 96 Cal. Rptr. 548 (1971); People v. Franklin, 261 Cal. App. 2d 703, 68 Cal. Rptr. 231 (1968); Nugent v. Superior Court, 254 Cal. App. 2d 420, 62 Cal. Rptr. 217 (1967)), or if the arrest is a mere pretext for conducting a search. See Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); 414 U.S. at 238 n.2 (Powell, J., concurring).

39. See notes 74-145 infra and accompanying text.


41. See notes 42-44 infra and accompanying text.

42. Illustrative of this conflict are *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Wolf v. Colorado*, 338 U.S. 25 (1949). Both of those cases discuss the differences between states in regard to the adoption of the exclusionary rule.

has no power to review a state court’s interpretation of state law, and as Justice Jackson wrote in *Herb v. Pitcairn*:

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Thus, to assess the impact of the *Robinson* decision on the contrary rule which had previously been announced by the California Supreme Court in *People v. Superior Court (Simon)*, it is necessary to determine whether *Simon* was based on an adequate and independent state ground: the California Vehicle Code or article I, section 19 of the California constitution.

II. CALIFORNIA LAW OF SEARCHES INCIDENT TO TRAFFIC ARRESTS:

THE *SIMON* CASE

Prior to the *Robinson* and *Gustafson* cases, the California Supreme Court in *Simon* had already confronted the issue of the right to search incident to a custodial traffic arrest and had sharply limited the permissible scope of such searches.

The facts of *Simon* were virtually identical to those of *Gustafson* in that a valid stop was made for a violation of the Vehicle Code.


45. 324 U.S. 117 (1945).

46. *Id.* at 125-26 (citations omitted). The concept whereby an “adequate state ground” can preclude review by the United States Supreme Court even though a federal claim has been denied is a concept which has been dealt with in depth by the Court. See Cardinale v. Louisiana, 394 U.S. 437 (1969); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Jankovich v. Indiana Toll Road Comm’n, 379 U.S. 487 (1965); Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943 (1965); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Cr. Rev. 187; Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 Colum. L. Rev. 822 (1962).

47. 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972).

48. Simon, a law student at the University of Southern California, was stopped for
the driver did not have any identification or registration,\textsuperscript{40} a lawful custodial arrest was then made,\textsuperscript{40} and a pat-down search followed even though the officer had no fear that the offender was armed.\textsuperscript{41} The officer discovered a soft package in Simon's pocket which contained marijuana.\textsuperscript{52} The essential issue posed in each of these cases was the same: Do the factors of extended custody and transportation of a traffic offender justify a police search?

The theory on which the California court relied to invalidate the search conducted under these circumstances was not precisely delineated in the \textit{Simon} opinion. The three possible bases include the fourth amendment, the state statutory scheme, and article I, section 19 of the California constitution.\textsuperscript{53}

\textbf{A. The Fourth Amendment}

The \textit{Simon} opinion's "point of departure" was \textit{People v. Superior Court (Keifer)},\textsuperscript{54} a case which was replete with language referring to the fourth amendment and United States Supreme Court interpretations of that constitutional provision.\textsuperscript{55} The rule adopted by the state court as best expressing its aversion to allowing pat-down searches in traffic-citation "arrests" was that of \textit{Terry v. Ohio},\textsuperscript{56} another Supreme Court interpretation of the fourth amendment. In discussing the "custody" argument, Justice Mosk, in \textit{Simon}, wrote that the issue to be considered was the "constitutionally permissible scope" of searches incident to cus-

\begin{itemize}
\item driving without headlights or tail-lights, according to the police officer. Simon testified that he had stopped not because of the police officer's request to do so, but because the ignition in his 13-year-old car had shorted, causing a fire and the loss of his headlights and tail-lights. \textit{Id.} at 7 Cal. 3d at 191-92, 496 P.2d at 1209, 101 Cal. Rptr. at 841.
\item Simon stated that the officers conducted their search before they asked him for his identification, a significant point which is not clearly resolved in \textit{Simon}. It is clear, however, that Simon did not have any identification or registration. \textit{Id.} at 192, 496 P.2d at 1210, 101 Cal. Rptr. at 842.
\item The \textit{Simon} court wrote:
Beyond these traffic violations, however, there were no other facts or circumstances from which Officer Erickson, as a reasonably prudent man, could have inferred that defendant was carrying a concealed weapon. Indeed, we have already pointed out that when asked on cross-examination, "Did you at any time fear for your life...?" Officer Erickson replied in the negative. \textit{Id.} at 208, 496 P.2d at 1221, 101 Cal. Rptr. at 853.
\item See notes 54-135 infra and accompanying text.
\item 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970).
\item \textit{Id.} at 812-15, 818, 828-29, 831, 478 P.2d at 451-53, 455, 463-5, 91 Cal. Rptr. at 731-33, 735, 743-45.
\item 7 Cal. 3d at 206, 496 P.2d at 1220, 101 Cal. Rptr. at 852. \textit{See} text accompanying notes 26-31 \textit{supra}. 
\end{itemize}
The court cited and quoted with approval *People v. Dukes* and *People v. Mercurio* (which followed the Dukes' reasoning), both of which rested on the fourth amendment: "That the officers were warranted in taking . . . the traffic offenders into custody for the traffic offenses because of their unsatisfactory identification does not expand the scope of the search permissible under the Fourth Amendment . . . ." Finally, the most significant aspect of the *Simon* opinion as to the fourth amendment issue was its express disapproval of another lower court case, *Morel v. Superior Court*, which had distinguished *Dukes* and *Mercurio* and concluded that "under the ultimate test of the Fourth Amendment, that is, whether the search is or is not reasonable, the balance weighs against petitioner."

In *Morel*, the defendant had been validly arrested for a Vehicle Code infraction and taken into custody by the arresting officer. The court had rested its opinion exclusively on the fact of custody requiring transportation:

We hold that when the officer has taken an alleged offender into custody and is about to transport him, whether to a magistrate only (if the arrestee is able to make bail) or to some place of detention until he shall have made bail, the officer may search the person of the

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57. 7 Cal. 3d at 208, 496 P.2d at 1221, 101 Cal. Rptr. at 853. The court pointed out in a footnote that its analysis applied to both mandatory custody and discretionary custody provisions of the Vehicle Code. *Id.* at 208 n.16, 496 P.2d at 1221 n.16, 101 Cal. Rptr. at 853 n.16.


60. 7 Cal. 3d at 210, 496 P.2d at 1222, 101 Cal. Rptr. at 854, quoting *People v. Dukes*, 1 Cal. App. 3d 913, 916, 82 Cal. Rptr. 218, 220 (1969). It also should be noted that the principal case on which the *Dukes* court relied was *Terry v. Ohio*, 392 U.S. 1 (1968), a fourth amendment case. 1 Cal. App. 3d at 917, 82 Cal. Rptr. at 220-21. *See note 56 supra* and accompanying text. Justice Mosk, in *Simon*, approved the *Dukes-Mercurio* line of cases (Agar v. Superior Court, 21 Cal. App. 3d 24, 98 Cal. Rptr. 148 (1971); Carpio v. Superior Court, 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971); *People v. Superior Court*, 14 Cal. App. 3d 935, 92 Cal. Rptr. 545 (1971)). 7 Cal. 3d at 210-11, 496 P.2d at 1222-23, 101 Cal. Rptr. at 854-55.


62. 10 Cal. App. 3d at 920, 89 Cal. Rptr. at 302.

63. 10 Cal. App. 3d at 916-17, 89 Cal. Rptr. at 299-300. *Morel* had been observed engaging in a speed contest, a violation of CAL. VEH. CODE ANN. § 23109(a) (West 1971). The arresting officer conducted a search of *Morel*'s pocket, immediately reached inside and discovered a bottle containing Secobarbital capsules. 10 Cal. App. 3d at 915, 89 Cal. Rptr. at 298-99.
arrestee. 64

The rationale used by the court of appeal was remarkably similar to that of Justice Rehnquist in Robinson, in that it was the fact of the custodial arrest itself which justified the thorough search of the person 65 because of the special duties and dangers involved for police officers when custody and transporation are effected. 66 Like the United States Supreme Court majority three years later, the Morel court distinguished Sibron v. New York 67 on substantially the same ground as that used by Justice Rehnquist in distinguishing its companion case, Terry v. Ohio, namely, that the issue in Sibron was a pat-down search before any arrest had occurred. 68 Because a valid custodial arrest with subsequent transportation to the police station was involved in Morel, the court held that the fourth amendment requirement that searches be reasonable was met in these circumstances. 69

The California Supreme Court's reason for overruling the Morel theory appeared to rest primarily on the constitutional requirement of reasonableness:

[We] cannot "hold that, as a matter of law, every person who is to be transported in a police vehicle, for any reason, may be subjected to a search . . . . Such a routine invasion of privacy, unsupported by some special necessity, is constitutionally unwarranted." 70

Justice Mosk cited with approval the language used by the New York Court of Appeals in People v. Marsh: 71

[The ordinary motorist who transgresses against a traffic regulation "does not thereby indicate any propensity for violence or iniquity," and the officer who stops him generally "has not even the slightest cause for thinking that he is in danger of being assaulted." 72
Thus, one conclusion which can be drawn from the overruling of Morel is that, contrary to the United States Supreme Court, the California court felt that danger to police officers in routine, custodial traffic arrests was so unlikely as to be insufficient justification for full searches.

Therefore, it would appear that Robinson and Gustafson are now controlling in California, since they are interpretations of the fourth amendment and since the Supreme Court's views in this respect are binding on state courts. There is another interpretation of Simon, however, which would enable the California Supreme Court's decision to withstand the Robinson/Gustafson onslaught: that the statutory scheme and legislative intent manifested therein was an independent basis for the Simon holding.

73. Since national constitutional law is the supreme law of the land (see, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326-27 (1819)) and since the United States Supreme Court is the ultimate arbiter of the meaning of the constitution (see, e.g., Pennekamp v. Florida, 328 U.S. 331, 335 (1946)), the decisions of the Supreme Court interpreting federal constitutional provisions are binding. Henry v. Rock Hill, 376 U.S. 776, 777 (1964) (per curiam).

The court has indicated in a number of cases dealing with search and seizure issues that states may develop their own rules as long as they do not infringe on rights guaranteed under federal law. See Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967); Beck v. Ohio, 379 U.S. 89, 92 (1964); Ker v. California, 374 U.S. 23, 34 (1963). The question is whether, in formulating rules more protective of constitutional rights than required by the federal constitution, as interpreted by the Supreme Court, state courts may do so on the basis of that same federal constitutional provision rather than on another basis such as state constitutional provisions, state statutes, or judicially developed rules.

In a recent New York criminal case, People v. Kelly, No. —— (N.Y. Cty. Crim. Ct., Feb. 13, 1974) (excerpt published, 42 U.S.L.W. 2471 (1974)), the court faced the dilemma created by the conflict between People v. Marsh, 228 N.E.2d 783 (N.Y. 1967) (see notes 71-72 supra) and Robinson. The court in Kelly asked: "Is the court bound to enforce [the Marsh rule] or is it obliged to follow [Robinson, a] diametrically opposed ruling? Unquestionably the decision herein must be based solely upon the Fourth Amendment of the United States Constitution." 42 U.S.L.W. at 2471.

The court noted Cooper and Sibron in concluding that:

It appears, therefore, that the [New York] Court of Appeals may not narrow Fourth Amendment protections further than the Supreme Court dictates, but there is no prohibition against the State through its highest Appellate Court from extending such protection.

42 U.S.L.W. at 2472. The obvious difficulties with the Kelly decision are that Marsh was clearly decided on both federal and state grounds (228 N.E.2d at 785) each independently able to sustain that decision, and, secondly, if the fourth amendment means what the Supreme Court says it means, then a decision clearly inconsistent with a Supreme Court decision must necessarily rest on some other ground. Absent reliance on a state constitutional provision or statute, a court must at least rely on a judicial rule or policy.
B. The Statutory Scheme

The California Vehicle Code provides that violations of its provisions fall into three categories: felonies, misdemeanors, and infractions. In the case of a felony violation, the offender is treated as is any other arrestee. Thus the felony traffic violator is arrested, searched, and booked, and the traditional justifications validate the search. In the case of misdemeanors or infractions, the arrest procedure is governed by the Vehicle Code provisions and, as the Simon court observed with respect to such violations, "the Legislature has created a special tripartite scheme which reflects the lesser degree of criminality attached to the act of transgressing against ordinary traffic rules and regulations." First, the scheme presumes that, in the vast majority of cases in which a vehicle operator is stopped, the period of detention will be limited only to the period necessary to issue a citation. Although this detention and citation process constitutes an "arrest" in the "technical sense," no search, transportation, or booking is involved. Thus, the "citation procedure . . . is essentially an honor system, requiring the good faith and cooperation of the person cited."

The second aspect of the tripartite scheme is that in certain cases, such as reckless driving or failure to stop after an accident, the officer is given the option of issuing a citation or of taking the violator "with-

74. CAL. VEHICLE CODE ANN. §§ 40000.1, 40000.3, 40000.4-.28 (West Supp. 1974).
75. CAL. PENAL CODE § 16 (West 1972).
76. See notes 24-25 supra and accompanying text.
77. 7 Cal. 3d at 199, 496 P.2d at 1214, 101 Cal. Rptr. at 846. For example, CAL. VEHICLE CODE ANN. § 40301 (West 1971).
78. 7 Cal. 3d at 199, 496 P.2d at 1214, 101 Cal. Rptr. at 846. For example, id. at 201, 496 P.2d at 1216, 101 Cal. Rptr. at 848.
out unnecessary delay' before the 'nearest or most accessible magistrate'. . . ."^82

Finally, section 40302 requires that the officer must take an offender before a magistrate in situations such as misdemeanor drunk driving, refusal to give a written promise to appear, and the situation existent in the Simon case itself, failure to present a driver's license "or other satisfactory evidence of . . . identity."^83

In the Simon case, the Attorney General contended that, since the Vehicle Code required that the defendant be taken to a magistrate and since the defendant could be searched during the booking process (to prevent the "introduction of weapons or contraband into the jail facility"^84), it was permissible ("for the sake of safety") to advance

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82. Id. at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854. Arrests of traffic violators in this instance may be discretionary, as provided in CAL. VEHICLE CODE ANN. § 40303 (West 1971):

Whenever any person is arrested for any of the following offenses and the arresting officer is not required to take the person . . . before a magistrate, the arrested person shall, in the judgment of the arresting officer, either be given a 10 days' notice to appear as herein provided or be taken without unnecessary delay before a magistrate within the county . . . .

(Emphasis added). The specific offenses enumerated include injuring or tampering with a vehicle, failure or refusal of a driver to stop for various tests and inspections, speed contests, exhibition of speed, driving with a suspended or revoked license, evasion of arrest, persons upon vehicular crossings, and failure to stop for an accident involving property damage. Id.

The officer is required to take the offender into custody for violations of CAL. VEHICLE CODE ANN. §§ 23102, 23105 (West 1971), which are related to driving while under the influence of alcohol or drugs. Id. § 40302 (West Supp. 1974).

83. 7 Cal. 3d at 208, 496 P.2d at 1221, 101 Cal. Rptr. at 853. CAL. VEHICLE CODE ANN. § 40302 (West Supp. 1974) provides that:

Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate . . . . where the arrest is made in any of the following cases:

(a) When the person arrested fails to present his driver's license or other satisfactory evidence of his identity . . . .

(b) When the person arrested refuses to give his written promise to appear in court.

84. 7 Cal. 3d at 208, 496 P.2d at 1221, 101 Cal. Rptr. at 853. See People v. Rogers, 241 Cal. App. 2d 384, 388-90, 50 Cal. Rptr. 559, 561-62 (1966); People v. Reed, 202 Cal. App. 2d 575, 579-80, 20 Cal. Rptr. 911, 914 (1962). At least one court has expressly upheld this theory:

[In a case where the booking process is both legally required and to be followed, the fact that the search . . . is made in the field rather than at the police station does not render same violative of defendant's constitutional rights.

People v. Whitsett, 109 Cal. Rptr. 321, 327 (1973), hearing denied, ordered unpublished (California Supreme Court, Oct. 3, 1973). See Morel v. Superior Court, 10 Cal. App. 3d 913, 917, 89 Cal. Rptr. 297, 300 (1970) (dicta); People v. Dukes, 1 Cal. App. 3d 913, 916, 82 Cal. Rptr. 218, 220 (1969) (dicta). However, the Simon court determined that, since the arrest provisions of the Vehicle Code provided an exclusive procedure whereby the normal booking process and jail were avoided, or at least avoidable, the "jailable offense" theory is not applicable. And, in view of the "unpublishing" or-
dered for Whitsell, the viability of this theory as justification for field searches is questionable.

Chief Justice Wright, in his concurring opinion (7 Cal. 3d at 211, 496 P.2d at 1223, 101 Cal. Rptr. at 855), noted what is both a pivotal point in Justice Mosk's majority opinion and, perhaps, an analytical weakness. Can the Vehicle Code sections be fairly read to require an immediate release with no possibility of being booked, searched, and jailed? When a magistrate decides that bail is required rather than a mere written promise to appear and when the arrestee cannot post the amount of bail required, Chief Justice Wright, correctly it seems, concluded that a search would be not only possible, but also necessary. 7 Cal. 3d at 214-15, 496 P.2d at 1226, 101 Cal. Rptr. at 858.

Since the statute provides for release on posting of bail or a written promise to appear (Cal. Vehicle Code Ann. § 40306 (West 1971); id. § 40307 (West Supp. 1974)), the official's determination that bail is appropriate necessarily implies that payment thereof is a condition for utilizing this method of release from custody. The "written promise" method, if used, is chosen at the outset by the official, when the arrestee is presented. 7 Cal. 3d at 215 n.4, 496 P.2d at 1226 n.4, 101 Cal. Rptr. at 858 n.4. It is not an alternative to be used if the arrestee has insufficient funds to post bail. A subsequent failure to sign a written promise, after agreeing to do so, must be considered as roughly analogous to the subsequent failure to post sufficient money to meet the bail which has been set.

While Chief Justice Wright's analysis is correct on the face of the majority opinion, the express acknowledgement by the court of an exception to their "immediate release" theory, where the arrestee must be detained because of intoxication (7 Cal. 3d at 209 n.17, 496 P.2d at 1222 n.17, 101 Cal. Rptr. at 854 n.17), would seem to allow for another exception, that of insufficient funds to meet bail. Perhaps this possibility was too obvious to be mentioned. In any event, the general statutory intent that traffic arrestees be detained for the minimum amount of time possible is clear. Id. Given these logical exceptions, the majority's interpretation that any detention is required to be so brief that it amounts to a right of immediate release is not as unreasonable as Chief Justice Wright's analysis seems to suggest.

It certainly is true that the release procedure is markedly different in Vehicle Code violation cases than in "normal" criminal misdemeanor (Penal Code) cases, as reflected in a line of lower court cases approved in Simon. See note 60 supra. In Penal Code cases, even though there are strong statutory presumptions making quick release on bail virtually mandatory (see Cal. Penal Code §§ 1270-71 (West 1972) (defendant entitled to bail "as a matter of right" except in capital cases)), the process does involve an initial booking, which traditionally justifies a search incident thereto (see People v. Rogers, 241 Cal. App. 2d 384, 50 Cal. Rptr. 559 (1966); People v. Reed, 202 Cal. App. 2d 575, 20 Cal. Rptr. 911 (1962)) and then appearance before a magistrate and setting of bail. As interpreted, the Vehicle Code requires release on bail or written promise prior to booking. 7 Cal. 3d at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854.

At least implicitly, Justice Mosk assumed in Simon that, in actuality, the vast majority of traffic arrestees are released within minutes of arrival at a magistrate's office or a jail. Otherwise, his statement that these persons could not lawfully be subjected to the booking process and incident search (id.) would make no sense, since intoxicated persons and those without sufficient funds for bail would be incarcerated and thus booked and searched. It is arguable, absent empirical data, and given the statutory requirement that bail be available in most criminal cases, that persons arrested for "criminal" misdemeanors, even though "booked," actually spend no more time in police custody than the traffic offender awaiting release by a magistrate or an officer in charge of a jail. Consequently, the technical distinction which Justice Mosk effectively drew between normal criminal misdemeanants as being "jailable," and thus subject to a search, and the absence of justification for the search of a traffic offender because the offense is
the time of search to the time of the arrest. The court responded by stating that, "[w]hatever the merits of this argument in generality, it is inapplicable to the case at hand." The court relied on the provisions commanding that the offender be taken "without unnecessary delay" to the nearest magistrate and must then be provided the opportunity to post bail or sign a promise to appear and is then entitled to be released. The court interpreted these provisions to mean that

not "jailable," is questionable. The difference between where the offender is temporarily detained, in a jail or in a magistrate's office, seems less important than the fact that he is being detained by the police. As Chief Justice Wright noted, there is no more cause to believe that one arrested for a minor crime such as petty theft is armed than there is to believe that a traffic arrestee is not armed. Id. at 214, 496 P.2d at 1225, 101 Cal. Rptr. at 857. In either case, if the arrestee is armed, a substantial threat is posed. Simply because the legislature, in the court's opinion, contemplated minimal detentions of traffic violators does not mean that the court should ignore the practicalities of traffic arrests. If in fact there is no substantial difference in the respective periods of detention, and assuming the correctness of Chief Justice Wright's view of the equivalent threat posed by both types of offenders, the assumption that traffic violations are inherently "non-jailable," that is, arrestees are actually rarely incarcerated, loses some of its validity. One of the traditional justifications for searches incident to arrest, the need to disarm (see note 23 supra), is still valid in California, and it should make little difference whether the particular offense is "jailable." Rather, if protection of police officers is a valid goal, the court should look to the actual period of detention involved and the actual threat posed in each custodial arrest. The Simon opinion, if it is capable of supporting booking searches, assumes that the introduction of weapons into a jail is a greater evil than the failure to protect a police officer. While one could imagine reasons that would support such a preference, it is hard to believe that such a preference could dictate a policy difference, let alone one of constitutional dimensions.

85. 7 Cal. 3d at 209, 496 P.2d at 1221, 101 Cal. Rptr. at 854.
86. Id. at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854.
87. Id. See CAL. VEHICLE CODE ANN. § 40306 (West 1971); id. §§ 40302, 40303, 40307 (West Supp. 1974). In the case of all misdemeanor and infraction offenses there must be a schedule of bail adopted. CAL. PENAL CODE § 1269b(b) (West Supp. 1974). In the case of a warrant issued for outstanding traffic violations, the issuing judge must endorse upon the warrant a signed statement authorizing bail and establishing the amount of bail. CAL. PENAL CODE § 815(a) (West 1972). When brought before the appropriate official, the offender must be given an opportunity to post bail and then be released if he does so. People v. Superior Court (Simon), 7 Cal. 3d at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854.

Several California appellate courts have dealt with the issue of what an opportunity to post bail entails. In People v. Aylwin, 31 Cal. App. 3d 826, 107 Cal. Rptr. 824 (1973), a driver was arrested for driving erratically at high speeds. Four separate searches were conducted. The important one, regarding the opportunity to post bail, was the fourth one, conducted at the police station prior to booking, which revealed a note in his hat band that led to information used at his trial. The court wrote:

Wiggins was not given the opportunity to make bail on the traffic violation. He did have something over $50 on his person, and he testified that had he been informed he might have arranged to have some additional money sent to him. He was not given the opportunity . . . .

31 Cal. App. 3d at 837, 107 Cal. Rptr. at 832. But see People v. Rhodes, 23 Cal.
no booking could be countenanced. Instead, the court indicated that the Vehicle Code prescribed the exclusive procedure to be followed in custodial traffic arrests and that it required that the offender be taken directly to a magistrate and immediately released on bail or written promise to appear.  

Thus, the Vehicle Code rendered the booking argument of the Attorney General inapplicable; in addition, there is language in the opinion which could be used to support the view that the statutory scheme invalidated a search incident to the transportation process as well. In the midst of his fourth amendment discussion, Justice Mosk used language embracing policy justifications which could be construed to be derived from the statutory scheme. At the very least, a consider-

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App. 3d 257, 100 Cal. Rptr. 487 (1972), where the court said that the evidence “established that defendant could not have posted bail even had she been given the opportunity.” Id. at 259, 100 Cal. Rptr. at 488. Bail in this case was $127, and defendant had only $6.23. Id. at 258, 100 Cal. Rptr. at 488.

In Carpio v. Superior Court, 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971), the court stated:

However, both the speeding violation and the Imperial County warrant were matters entitling petitioner to release on bail, by the jailor, pursuant to a fixed bail schedule in one case and the terms of the warrant in the other. . . . [N]o reason to assume that petitioner would not have been able to post the required bail bond had he been given the opportunity to do so [appears] . . . . Unless, and until, it was determined that petitioner was about to be placed in the jail, there was no necessity for the search which was made. The search was unlawful. Id. at 793, 97 Cal. Rptr. at 188.

88. 7 Cal. 3d at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854. This result is reached since Vehicle Code section 40302 (see note 83 supra) requires that an offender taken into custody be brought “without unnecessary delay” before a magistrate or other appropriate official, and Vehicle Code section 40307 (CAL. VEHICLE CODE ANN. § 40307 (West Supp. 1974)) requires that the offender must be immediately released by the magistrate or other official upon posting of bail or the written promise of the offender to appear. 7 Cal. 3d at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854. The court in Simon did not explain why the Vehicle Code procedure for arrests was exclusive, although the key to that conclusion is found in People v. Wohlleben, 261 Cal. App. 2d 461, 67 Cal. Rptr. 826 (1968), a case the Simon court cited. In Wohlleben, the court interpreted Vehicle Code section 40300 which reads:

The provisions of this chapter shall govern all peace officers in making arrests for violations of this code without a warrant for offenses committed in their presence, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade.

CAL. VEHICLE CODE ANN. § 40300 (West 1971).

The Wohlleben court stated that:

The insertion of the word “otherwise” in the second clause of section 40300 can only mean that to the extent stated in the first clause the arrest procedure of the Vehicle Code is exclusive. Thus . . . the procedure on arrests without a warrant for misdemeanor Vehicle Code violations is that prescribed by the Vehicle Code and not the procedure prescribed by the Penal Code.

261 Cal. App. 2d at 463, 67 Cal. Rptr. at 828 (citations omitted and emphasis added).

89. 7 Cal. 3d at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854. See note 84 supra.

90. Id. at 209, 496 P.2d at 1222, 101 Cal. Rptr. at 854.
able overlap of constitutional and statutory reasoning is apparent. The court quoted extensively from the New York case, People v. Marsh,91 which decided the same issue on the basis of both New York statutes and the fourth amendment.92 The court in Marsh felt that the effect of New York statutes was to make a full search of a traffic violator taken into custody impermissible.93 The court stated:

[T]he Legislature never intended to authorize a search of a traffic offender unless, when the vehicle is stopped, there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction . . .

. . . [T]he statutory scheme does not contemplate treating him as a common criminal to be booked, photographed, fingerprinted and jailed. It is equally degrading—and most assuredly not the Legislature's intention—to subject him to the affront of a search when one is not necessary . . .94

This language, when considered in light of the court's references to the basically non-criminal nature of traffic violations and the specially-designed "arrest" procedures for such transgressions,95 implies that the Vehicle Code itself was the basis, in the supreme court's opinion, for the different search and seizure policy in traffic arrests.

It would seem that the Simon court could have said that this statutory procedure indicated an intent by the legislature to limit the right of a police officer to arrest a traffic offender (in the traditional sense of the term) and thus an intent to limit the right to search.96 Such

91. 228 N.E.2d 783 (N.Y. 1967).
92. Id. at 785-86. Marsh was essentially a statement by the court that it had decided the case on dual grounds, both the statutory provisions and constitutional considerations. The majority opinion held that the search "would offend against the legislative design for the treatment of traffic offenders . . . [and] would also exceed constitutional limits on search and seizure." Id. at 785. The court then discussed the intent and effect of statutory provisions and concluded that the search was impermissible. Id. at 785-86. Again the court noted that its "conclusion is also dictated by the constitutional prohibition against 'unreasonable searches and seizures.'" Id. at 786.
93. Id. at 785-86. Both the New York statutes regarding vehicle code arrests and the California provisions provide for a citation procedure and for an immediate right to release on bail if the offender is taken into custody.
94. Id. at 786.
95. See notes 74-88 supra and accompanying text.
96. One problem in reaching the decision in Simon is the absence of reports of the legislature's actual intent. The problem of discerning the intent of the legislature is generally a difficult one in California. See, e.g., Van Alstyne & Ezer, Legislative Research in California: The Unchartered Wilderness, 35 Los Angeles B. Bull. 116 (1960). The court in People v. Mercurio, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970), however,
a conclusion would then be analytically identical to that portion of the Marsh opinion where the court decided the same issue, reaching the

felt that the meaning of the Vehicle Code sections regarding arrest procedures "is quite evident from the sections, themselves, and reference by us to earlier enactments and to semantics is not required." Id. at 431, 88 Cal. Rptr. at 753. Indeed, it is evident that the "[l]egislature has created distinctions among the kinds of traffic offenses, and those distinctions are helpful in the judicial determination of the reasonableness of the search of traffic arrestees." Pugh v. Superior Court, 12 Cal. App. 3d 1184, 1187, 91 Cal. Rptr. 168, 170 (1970). Nevertheless, a review of the development of the present Vehicle Code provisions involved in the Robinson-Simon problem is useful.

The most important conclusion which can be drawn from a review of the history of the present California Vehicle Code provisions for arrests (CAL. VEHICLE CODE ANN. § 40300 et seq. (West 1971)) is that there has always been a distinction between traffic offenders and criminal misdemeanants, and, consequently, a distinction in arrest procedures.

In the first act regulating traffic and vehicle operation (ch. 612, §§ 1-10, [1905] Cal. Stat. 816-22) violations were made misdemeanors (ch. 612, § 6, [1905] Cal. Stat. 821), and offenders taken into custody were required to be brought before the nearest justice of the peace for an immediate hearing (ch. 612, § 6(2), [1905] Cal. Stat. 821-22). From 1913 until 1915 the arrest procedure of the 1905 act was not in force due to legislation amending the vehicle laws which repealed all previous laws. Ch. 326, § 40, [1913] Cal. Stat. 656. In 1915, however, a citation procedure was enacted which provided for immediate release unless the arrestee demanded an appearance before a magistrate. Ch. 188, § 22(c), [1915] Cal. Stat. 409. Then in 1919, the arrest provision was amended to provide for an immediate release and the granting of a continuance following an appearance before a magistrate and upon the posting of bail or making a promise to appear. Ch. 147, § 13, [1919] Cal. Stat. 220, 222.

In 1923 the California Vehicle Act was passed which also provided for a citation procedure (ch. 266, § 154, [1923] Cal. Stat. 566-67), the right to demand an appearance before a magistrate, a continuance, and immediate release upon a promise to appear or the posting of bail if the arrestee failed to promise to appear. Id. That act also provided authority to take the offender before a magistrate if he refused to promise to appear in situations in which a citation was authorized. Id.

The requirement that a driver carry identification first arose in 1925 and implied that an offender's failure to produce satisfactory identification required that he appear before a magistrate. Ch. 240, § 154, [1925] Cal. Stat. 415.

The present Vehicle Code was enacted in 1935 (ch. 27, § 1-803, [1935] Cal. Stat. 93-247), and provided then, as it does today, that arrestees for felonies are treated as other felons. Ch. 27, § 735, [1935] Cal. Stat. 236-37 (CAL. VEHICLE CODE ANN. § 40301 (West 1971)). The 1935 code also provided for mandatory and discretionary appearances before a magistrate in specified situations. Ch. 27, §§ 736-37, [1935] Cal. Stat. 237-38 (CAL. VEHICLE CODE ANN. § 40302 (West Supp. 1974); id. § 40303 (West 1971)).

The immediate release provision of previous acts was retained (CAL. VEHICLE CODE ANN. § 40306 (West 1971)), and the citation procedure was retained. Ch. 27, § 739, [1935] Cal. Stat. 329 (CAL. VEHICLE CODE ANN. § 40500 et seq. (West 1971)).

The one change in language since the enactment of the 1935 Code, which at first appears to be of significance to the problem here, is the change from the requirement that an offender taken into custody be transported "immediately" before a magistrate, to the requirement that he be taken "without unnecessary delay." Ch. 802, §§ 1-2, [1951] Cal. Stat. 2289-90. This change, however, was not meant to permit an extension per se in the period of custody, but rather was meant to allow an arresting officer the necessary time to locate the magistrate, or if he were unavailable, his clerk, or to
same result on the basis of New York statutes. From a reading of *Simon*, however, there was no expression by the court that it had in fact relied on the statutory scheme of the California Vehicle Code. On the other hand, nothing in the opinion remotely suggests that the statutory framework could not be employed as an independent basis for the result.

C. California's "Fourth Amendment"

Perhaps the most curious aspect of the *Simon* opinion is its failure to even mention that the California constitution could have been relied upon as an independent basis for the result, but the opinion does not consider the issue and does not rely on any cases which employ the California constitution as authority.

Article I, section 19 of the California constitution is almost identical to the fourth amendment of the United States Constitution:

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

The California Supreme Court has considered this provision in past search and seizure cases, and, in the past, the court has not felt con-
strained to limit the protection afforded to criminal suspects and defendants when the United States Supreme Court has decreed that par-


In a number of instances, the court has discussed the fact that in the area of search and seizure, article I, section 19 and the fourth amendment both protect personal privacy and are essentially identical. See People v. Triggs, 8 Cal. 3d 884, 901-92 n.5, 506 P.2d 232, 237 n.5, 106 Cal. Rptr. 408, 413 n.5 (1975) (see text accompanying note 113 infra); People v. Krivda, 8 Cal. 3d 623, 624, 504 P.2d 457, 105 Cal. Rptr. 521 (1973) (see text accompanying notes 103-09 infra); People v. Myers, 6 Cal. 3d 811, 814 n.1, 494 P.2d 684, 685 n.1, 100 Cal. Rptr. 612, 613 n.1 (1972) ("[r]eference hereinafter to Fourth Amendment rights are intended to include not only the right to be free from unreasonable searches and seizures as proscribed by the Fourth Amendment of the federal Constitution but also by article I, section 19, of the California Constitution"); People v. Cahan, 44 Cal. 2d 434, 438, 282 P.2d 905, 907 (1955) (rights are "essentially identical"). However, in some cases the court has at least impliedly indicated that there was some distinction despite the obvious similarity. See Stapleton v. Superior Court, 70 Cal. 2d 97, 100 n.2, 447 P.2d 967, 969 n.2, 73 Cal. Rptr. 575, 577 n.2 (1968) (search conducted by a private individual not protected by the fourth amendment but here individual was acting as agent for police. The court commented: “[W]e express no opinion . . . as to their application to the proper interpretation of
ticular procedures are not necessary to assure compliance with the re-
quirements of the United States Constitution. In a number of instances,
the California Supreme Court has extended greater protection to crimi-
nal defendants than that afforded by the United States Constitution.100

article I, section 19 of the California Constitution”); People v. Sesslin, 68 Cal. 2d 418,
422 n.2, 439 P.2d 321, 324 n.2, 67 Cal. Rptr. 409, 412 n.2 (1968), cert. denied, 393
U.S. 1080 (1969) (the court noted that article I, section 19 was “similar” to the fourth
amendment).

In other instances the court apparently decided a search and seizure issue solely on
the basis of article I, section 19 grounds. See Aday v. Superior Court, 55 Cal. 2d 789,
795, 362 P.2d 47, 51, 13 Cal. Rptr. 415, 419 (1961); People v. Keener, 55 Cal. 2d
714, 719, 361 P.2d 587, 589, 12 Cal. Rptr. 859, 861 (1961); People v. Mayen, 188
Cal. 237, 241-42, 205 P. 435, 437 (1922); People v. Tipton, 73 Cal. 405, 408, 14 P.
894, 895 (1887).

In dealing with search and seizure issues in the civil context, the court has been more
apt to rely on the California constitutional provision. They have done so when con-
sidering discovery orders (see Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal. 3d 161,
170 n.11, 465 P.2d 854, 860-61 n.11, 84 Cal. Rptr. 718, 724-25 n.11 (1970), quoting
West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 415, 364 P.2d 295, 298,
15 Cal. Rptr. 119, 122 (1961)); subpoenas ducem tecum (see Strauss v. Superior
Court, 36 Cal. 2d 396, 397, 224 P.2d 726, 727 (1950); Southern Pac. Co. v. Superior
Court, 15 Cal. 2d 206, 210, 100 P.2d 302, 304 (1940)); and orders to produce
books and records (see Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 394, 364
P.2d 266, 287, 15 Cal. Rptr. 90, 111 (1961); Munson v. Munson, 27 Cal. 2d 659, 673,
166 P.2d 268, 276 (1946) (dissent); Kutner-Goldstein Co. v. Superior Court, 212 Cal.
341, 346, 298 P. 1001, 1003 (1931); Hirschfeld v. Dana, 193 Cal. 142, 153, 223 P. 451,
455 (1924); Ex parte Clarke, 126 Cal. 235, 238, 58 P. 546, 547 (1899)). However,
the court has also based decisions in the civil area on both article I, section 19 and the
fourth amendment. They have done so regarding the claim and delivery statute (Blair
v. Pitchess, 5 Cal. 3d 258, 264, 486 P.2d 1242, 1246, 1261-62, 96 Cal. Rptr. 42,
46, 61-62 (1971); a political disclosure statute (City of Carmel-By-The-Sea v. Young,
2 Cal. 3d 259, 268, 466 P.2d 225, 231, 85 Cal. Rptr. 1, 7 (1970)); and orders to pro-
duce books and records (Paladini v. Superior Court, 178 Cal. 369, 373, 173 P. 588, 590
(1918)).

100. In a number of significant decisions the California Supreme Court has preceded
a similar decision by the United States Supreme Court. See People v. Anderson, 6 Cal.
3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), cert. denied, 406 U.S. 958 (1972),
and Furman v. Georgia, 408 U.S. 238 (1972), regarding the death penalty; People v.
Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), and Mapp v. Ohio, 367 U.S. 643 (1961),
regarding the exclusionary rule; In re Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal.
Rptr. 228 (1965), and Argersinger v. Hamlin, 407 U.S. 25 (1972), regarding the right
to counsel in misdemeanor prosecutions. In each of those instances, the California
court's action was based on state grounds.

There are numerous other instances in which the court has used state grounds for
decisions involving “constitutional” problems. See, e.g., In re Lynch, 8 Cal. 3d 416,
503 P.2d 921, 105 Cal. Rptr. 217 (1972) (cruel or unusual punishment); Klopping v.
City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 151 (1972) (just com-
pensation in eminent domain); People v. Compton, 6 Cal. 3d 55, 490 P.2d 537, 98
Cal. Rptr. 217 (1971) (double jeopardy); Curry v. Superior Court, 2 Cal. 3d 707, 470
P.2d 345, 87 Cal. Rptr. 361 (1970) (double jeopardy); In re Haro, 71 Cal. 2d 1021,
458 P.2d 500, 80 Cal. Rptr. 588 (1969) (right to counsel); People v. Superior Court,
67 Cal. 2d 929, 434 P.2d 623, 64 Cal. Rptr. 327 (1967) (unanimous jury verdict);
Four recent decisions of the California court illustrate the court's understanding of the relationship between the national and state search and seizure provisions. In three of these cases the California rule was ultimately retained,\footnote{101} while in one instance the California rule was modified to correspond with a decision of the United States Supreme Court.\footnote{102}

A significant case for purposes of this analysis, People v. Krivda,\footnote{103} deals with a search and seizure issue\footnote{104} and presents a situation ana-

\footnotesize{
\textit{In re Smiley}, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967) (right to counsel, speedy trial); \textit{In re Perez}, 65 Cal. 2d 224, 418 P.2d 6, 53 Cal. Rptr. 414 (1966) (rights to be present, defend, and have counsel); People v. Clark, 62 Cal. 2d 870, 402 P.2d 856, 44 Cal. Rptr. 784 (1965) (right to speedy trial); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963) (double jeopardy); Cardenas v. Superior Court, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961) (double jeopardy).


\footnote{101} Those cases are People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, \textit{cert. denied}, 412 U.S. 919 (1973); People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973); and Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

\footnote{102} People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

\footnote{103} \textit{Krivda} was first reported as People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971). The United States Supreme Court, in a \textit{per curiam} opinion, vacated and remanded for a determination of whether the decision was based on federal or state grounds. California v. Krivda, 409 U.S. 33, 35 (1972). The California Supreme Court stated that its prior decision was based on both state and United States constitutional grounds and reiterated it in its entirety. 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

\footnote{104} In \textit{Krivda}, police officers suspected the defendant of narcotics violations. They
logous to *Simon* in that the *Krivda* court originally did not clearly indicate whether its decision, holding the search invalid, could have independently been based on article I, section 19 of the California constitution. The state then appealed to the Supreme Court. The policy of the Court in cases where the basis of the state court's decision is unclear has been to vacate and remand for a clarification by the state court. In *Krivda*, the California Supreme Court stated, on remand, that, "We relied upon both the Fourth Amendment to the United States Constitution and article I, section 19, of the California Constitution, and . . . accordingly the latter provision furnished an independent ground to support the result . . . ." The only mention of the California constitutional provision in *Krivda*, however, was by way of citation to another case which had expressly relied on article I, section 19.

Another pertinent case is *People v. Triggs,* which dealt with the clandestine observation by a police officer, without a warrant, of homosexual activity in a public restroom. In *Triggs*, the California court spoke of the "Fourth Amendment's prohibition of unreasonable
But their decision was also based on the parallel protection afforded by the California Constitution:

Although for the sake of convenience we often refer to constitutional guarantees, both state and federal, against unreasonable searches and seizures under the rubric of "Fourth Amendment" rights, our decision today is based both upon our reading of applicable Fourth Amendment law and our own determination of the proper construction of article I, section 19 . . . . 113

An especially important factor in the Triggs decision, which is analogous to the situation in Simon, is the effect of a statute which prohibited the use of two-way mirrors in public restrooms. 114 The court considered that statute to be the legislature's "declaration of . . . the reasonability of expectations of privacy in restrooms." 115 Thus, although prior lower court decisions had upheld the validity of similar clandestine observations on the basis of the lack of a "reasonable expectation of privacy" by the offender, 116 the Triggs court felt that the "method of surveillance employed in this case . . . violates the spirit and policy considerations which led to the enactment of [the statute]." 117 The Vehicle Code provisions of Simon, expressly limiting the arrest process, would seem to be at least as closely tied to that court's resulting limitation on the right to search incident to an arrest as the "two-way statute" of Triggs was to its result. 118

112. Id. at 891, 506 P.2d at 236, 106 Cal. Rptr. at 412.
113. Id. at 892 n.5, 506 P.2d at 237 n.5, 106 Cal. Rptr. at 413 n.5.
114. The statute in question provided in part:
   Any person who installs or who maintains . . . any two-way mirror permitting observation of any restroom, toilet, [etc.], is guilty of a misdemeanor.

   "Two-way mirror" as used in this section means a mirror or other surface which permits any person on one side thereof to see through it . . . while any person on the other side . . . can see only the usual mirror or other surface reflection.

CAL. PENAL CODE § 653n (West 1972).
115. 8 Cal. 3d at 893, 506 P.2d at 238, 106 Cal. Rptr. at 414.
118. See notes 74-97 supra and accompanying text.
Similarly, in Kaplan v. Superior Court, the California Supreme Court retained an extension of the federally-dictated protection from unreasonable searches and seizures. In 1955, in People v. Martin, the California Supreme Court had held that a defendant could assert the right to exclude illegally obtained evidence, even though that evidence was obtained as a result of a violation of another person's fourth amendment rights. The United States Supreme Court subsequently made it clear in Alderman v. United States that one did not have "vicarious standing" to assert such violations. Yet, the Kaplan court chose to retain the "vicarious standing" rule in California, basing its decision in part on the failure of the legislature to change the Martin rule in the creation of the California Evidence Code.

The one recent exception to the retention of California rules in the area of fourth amendment and article I, section 19 protections is that of People v. McKinnon, which adopted the rationale of the Supreme Court in Chambers v. Maroney. Prior to McKinnon and Chambers, the California Supreme Court, in People v. McGrew and Abt v. Superior Court, had held that warrantless searches by airline employees of cartons which were to be transported by the airline violated the rights of their passengers to be free from unreasonable searches and seizures. In deciding McKinnon, however, the court determined that "the reasoning of the United States Supreme Court in Chambers . . . undermines . . . McGrew and Abt." Apparent-

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119. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).
121. Id. at 759-60, 290 P.2d at 857. The rule is referred to by the court as the "vicarious exclusionary rule." Kaplan v. Superior Court, 6 Cal. 3d at 153, 491 P.2d at 2, 98 Cal. Rptr. at 650.
123. Id. at 171-76.
124. 6 Cal. 3d at 153, 161, 491 P.2d at 2, 7-8, 98 Cal. Rptr. at 650, 655-56.
125. The Kaplan decision discussed the enactment of the California Evidence Code, which was a product of the California Law Revision Commission's "painstaking analysis of many evidentiary rules that are of far less importance and notoriety than Martin." Id. at 159, 491 P.2d at 6, 98 Cal. Rptr. at 654. Thus the court concluded that the failure to affirmatively alter the rule of Martin in the code meant that the legislature did not intend to change that rule. Id.
126. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).
128. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).
130. 1 Cal. 3d at 408-09, 462 P.2d at 4, 82 Cal. Rptr. at 476; 1 Cal. 3d at 420-21, 462 P.2d at 11, 82 Cal. Rptr. at 483.
131. 7 Cal. 3d at 910, 500 P.2d at 1104, 103 Cal. Rptr. at 904. It is noteworthy that in this instance, in which the California Supreme Court deferred to a later decision
ly unwilling in this instance to extend the protection from unreasonable search and seizure on California constitutional grounds, the court overruled its prior decisions.

There is ample precedent, then, for the California Supreme Court to hold that the broad, "full search" incident to custodial arrest allowed by the United States Supreme Court is not and should not be the law in California. One distinction between the previous cases and the Simon decision, however, is the lack of any mention of the state constitutional provisions in Simon. As previously noted, the constitutional references which are present relate to the fourth amendment. There does not appear to be a source of "confusion," as the United States Supreme Court found in Krivda, as to which constitutional theory was used by Justice Mosk in Simon. The Supreme Court discerned confusion in Krivda because it relied primarily on a prior California holding which did expressly rest on the California constitution's analogue of the fourth amendment. In none of the prior instances where article I, section 19 was applied did the California court refer to a previous decision and say, in effect, that, even though the court did not explicitly state the proposition in the previous instance, the prior case did in fact rest on both the state constitution and the fourth amendment. This is essentially the dilemma facing the California court if, in the future, it wishes to avoid the Robinson/Gustafson theory on the basis of the state constitution as applied in Simon.

One possible solution is the language in Triggs indicating that "the rubric of 'Fourth Amendment' rights" is often used as a shorthand reference for both state and federal guarantees. Such language might reflect the understanding that California search and seizure decisions impliedly rest on both the United States and state constitutions despite the absence of express adoption of an independent state ground.

Within one month of the Robinson and Gustafson decisions, however, a California Court of Appeal considered and decided the case...
of *People v. Norman*,\(^{136}\) wherein the court followed the example of *McKinnon*\(^{137}\) and held that *Simon* had been overruled as a result of the Supreme Court decisions on the *Simon* "custodial arrest" issue. The facts of the case were clearly distinguishable from the *Simon, Robinson*, and *Gustafson* fact situations, but Justice Thompson, the author of the opinion, decided that the issues presented were identical.\(^{138}\) Justice Thompson focused on the state and national constitutional issues in *Simon* and did not discuss the statutory considerations of that case. *McKinnon* was the preferable approach to be taken, in his opinion, because of that decision's deference to rulings of the United States Supreme Court.\(^{139}\) Such deference was said to be appropriate because:

By the nature of federal and state jurisdiction that court has acquired a degree of expertise not shared by any state court. Matters of constitutional import are likely to reach the United States high court on a cleaner record and to be better briefed and argued than are similar issues in the state system. The persuasion of the United States Supreme Court decisions is particularly strong in the area of search and seizure and the exclusionary rule. California courts have for years spoken of the basis of the exclusionary rule as the Fourth Amendment. A sudden switch to a California ground to avoid the impact of federal high court decisions invites the successful use of the initiative process.

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\(^{137}\) See notes 126-31 supra and accompanying text.

\(^{138}\) 112 Cal. Rptr. at 44, 50. *Norman* appears to be distinguishable on the basis of the factual situation therein. After a lengthy chase, involving several traffic violations, an initial stopping in which the defendant allegedly stated "Fuck you, cop," and a subsequent chase, the defendant stopped his van and exited holding a black object in his hand. The approaching officer cautioned Norman, who then threw the object under the van. Inspection of the object, which made no discernible sound when it struck the ground, revealed marijuana and seconal. *Id.* at 44-45.

The case was argued on appeal on the basis of *Simon* and prior to the decision in *Robinson*. No supplemental briefs were requested regarding the possible effect of the *Robinson* decision on *Simon* or on the *Norman* case. Interview with Dennis A. Fischer, Deputy Public Defender, Los Angeles County, California, in Los Angeles, Feb. 15, 1974.

In a case involving a similar factual situation, the court wrote:

The officer saw defendant throw the bag, and it was readily inferable that he saw it land and that it remained in plain sight on the ground. . . . The police are not required to close their eyes to items in plain sight.

*People v. Duke*, 276 Cal. App. 2d 630, 636, 81 Cal. Rptr. 69, 72 (1969). Thus, since the material was in plain view, there was no search, and, therefore, no unreasonable seizure. *See*, e.g., *People v. Irvin*, 264 Cal. App. 2d 747, 753-55, 70 Cal. Rptr. 892, 895-97 (1968); *People v. Escobosa*, 179 Cal. App. 2d 751, 754, 3 Cal. Rptr. 917, 919 (1960).

\(^{139}\) 112 Cal. Rptr. at 48-50.
to overrule the California decision with its concomitant harm to the prestige, influence, and function of the judicial branch of state government. The very purpose of the exclusionary rule, to deter unlawful police searches . . ., requires that there be certainty in the ground rules of search and seizure. The more courts feel free to adopt ground rules unpersuaded by contrary decisions of other courts, the greater the likelihood there is of uncertainty in those ground rules. The uncertainty is mitigated if proper deference is paid United States Supreme Court holdings.¹⁴⁰

Indeed, Justice Thompson maintained that the state system should accept the interpretation of the United States Supreme Court of language in the federal Constitution as controlling of our interpretation of essentially identical language in the California Constitution unless conditions peculiar to California support a different meaning.¹⁴¹

Such a position seems to rest on a fundamental misunderstanding of the nature of the federal system. Even when the United States Supreme Court construes "identical language" it construes that language in light of the basic values of the body politic. The "reasonableness" of a search can only be determined by a balancing of the competing values of privacy and order. Those values are weighed by the United States Supreme Court, informed by a wise appreciation of the underlying traditions and values of the American people from all of the states. Members of the United States Supreme Court are constitutionally presumed to be the most qualified to make these judgments, but this presumption in no way extends to interpretations of the California constitution which must be interpreted in light of California traditions and values. If the California Supreme Court were to adopt Justice Thompson's suggestion, it not only would abdicate its constitutional responsibility to independently interpret the California constitution, but also would abdicate it to a body which, although interpreting identical language, does so on a basis that is potentially irrelevant to California values. Justice Thompson complains that the adoption of an interpretation of the California constitution in order to avoid review by the Supreme Court raises questions about the "intellectual integrity" of the court.¹⁴² Far from it. It rather gives substance to Justice Black's observation that:

It is always time to say that this nation is too large, too complex and

¹⁴⁰ Id. at 49 (citations omitted).
¹⁴¹ Id.
¹⁴² Id. at 49 n.9.
composed of too great a diversity of peoples for [the Court] to have
the wisdom to establish the rules by which local Americans must govern
their local affairs . . . . I suspect this is a most propitious time to re-
member the words of the late Judge Learned Hand, who so wisely
said: "For myself it would be most irksome to be ruled by a Ægy
of Platonic Guardians, even if I knew how to choose them, which I
assuredly do not.\textsuperscript{143}

And perhaps it is also time to say with Justice Frankfurter that the
fourteenth amendment "is not the basis of a uniform code of criminal
procedure federally imposed. Alternative methods of arriving at truth
are not—they must not be—forever frozen. There is room for growth
and vitality, for adaptation to shifting necessities . . . ."\textsuperscript{144}

But even if one were to accept the premises of the Norman op-
inion, the conclusion that Robinson controls Simon need not obtain.
Justice Thompson's express denial that there were "conditions peculiar
to California"\textsuperscript{145} which might warrant a different result than that
reached by the Supreme Court is not convincing. While Simon was
not as clear on this point as one might hope, one cannot just ignore
the California Vehicle Code provisions which were prominently men-
tioned in that case.\textsuperscript{146}

CONCLUSION

If the Norman case becomes the vehicle by which the California
Supreme Court resolves the conflict between the Robinson and Simon
decisions,\textsuperscript{147} there are important considerations which will be weighed,
both in the context of the Norman case and its search and seizure
issues, and in the larger context of whether the overall protection of
individual rights is to rest on the United States Constitution, as inter-
preted by the "Burger Court," or on some balance between the United
States and the California Constitutions.\textsuperscript{148}

\textsuperscript{143} Powell v. Texas, 392 U.S. 514, 547-48 (1968) (Black, J., concurring).
\textsuperscript{144} F. Frankfurter, Law and Politics 192-93 (1939), quoted in Friendly, The
\textsuperscript{145} No similar declared public policy [to that of the Penal Code provision in
Triggs] or other condition peculiar to California exists with respect to searches
incident to custodial arrest for violations of traffic laws the issue presented by the
case at bench.
\textsuperscript{146} See notes 74-97 supra and accompanying text.
\textsuperscript{147} See notes 136 & 138 supra. It seems likely that the Norman decision will
be distinguished factually by the California Supreme Court. It is also possible that the
court may simply not decide the case, meaning that the Court of Appeal opinion
will not be published, an option within the supreme court's power. Cal. Const. art. VI,
§ 14; Cal. R. Ct. 976.
The resolution of the immediate conflict ultimately seems to call for a balancing of values by the state court: the obvious necessity on the one side of insuring the safety of police officers; on the other side, the importance of protecting individual liberties (the right of privacy and the right to be free from unreasonable government intrusion) where persons have committed only the most minor of “crimes.” This conflict may be resolved by adopting the view of Chief Justice Wright, who, in his concurring opinion in *Simon*, urged the approval of a pat-down search in situations calling for the traffic offender to be taken into custody.\(^4\) In no instance, however, does it appear likely that the California court would go as far as Justice Rehnquist,\(^5\) who placed the greatest weight on the side of protecting police by authorizing a full search. The outer limits of any decision would seem to be the position taken by Justice Marshall, that items may be removed from arrestees, but that additional inspection is impermissible.\(^6\)

In reaching a decision in *Norman* or in another similar case, the California Supreme Court must still resolve the larger conflict, which is perhaps a product of the change in basic outlook between the “Warren Court” and the “Burger Court.” That conflict involves the basic question of judicial consideration of state constitutional and statutory provisions in areas also covered by national constitutional provisions. At least one commentator has urged that any judicial decision logically should be based first on statutory considerations if possible, then on state constitutional provisions, and only if it is necessary to reach a decision, on national constitutional grounds.\(^7\) Justice Thompson, in *Norman*, urged deference to the fourth amendment as interpreted by the Supreme Court in cases involving search and seizure questions.\(^8\) That deference was seen by the *Norman* court as a way of avoiding

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\(^4\) 7 Cal. 3d at 212, 496 P.2d at 1224, 101 Cal. Rptr. at 856. It is arguable that, since Chief Justice Wright concurred with the majority and since Justices McComb and Burke concurred with Wright, all seven Justices supported the proposition that a full search was not justified by a custodial traffic arrest, thus putting all of the California justices in a position contrary to the *Robinson* court.

\(^5\) See notes 35-36 supra and accompanying text.

\(^6\) Id.

\(^7\) Linde, Without “Due Process”: Unconstitutional Law in Oregon, 49 Ore. L. Rev. 125, 182 (1970). Professor Linde wrote:

To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state’s constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state.

\(^8\) 112 Cal. Rptr. at 49.
the "'whims of the [California] Court's membership.'" Yet it certainly must be true that the California Supreme Court is required to be sensitive to its own unique responsibility, as the final interpreter of California law, to insure that laws created by the people of California, if not offensive to the United States Constitution, are properly applied. Indeed, that argument has the support of the author of the Simon opinion:

[W]e are fortunate to have a perfectly good Constitution in California and I, as one-seventh of the Supreme Court of our state, am perfectly content in general to decide cases involving fundamental rights on the basis of the Constitution of California.155

John D. Vandevelde

154. Id.