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RECENT CASES


When newsperson William Farr refused to disclose to a Los Angeles trial judge the identity of persons who had supplied him with information about a pending murder trial in direct violation of a court order, he was jailed for contempt. Publicity and legal commentary generated by Farr's subsequent efforts to overturn the contempt conviction have made his one of the most celebrated "free press v. fair trial" cases in the wake of Branzburg v. Hayes, the seminal United States Supreme Court decision on the press' right to protect confidentiality in the context of judicial proceedings.

1. "Free press v. fair trial" is here used as an expression signifying tension between the first amendment right of a newsperson to cover and publish reports of criminal investigations and criminal judicial proceedings, and the sixth amendment right of a defendant to stand trial before jurors free of bias. The tension is greatest when defendants or victims are public figures, or when the nature of the alleged crime arouses public interest. See United States v. Dickinson, 465 F.2d 496, 502-06 (5th Cir. 1972) (summary of historical clash between first and sixth amendments); A. Friendly & R. Goldfarb, Crime and Publicity (1967); J. Lofton, Justice and the Press (1966).

2. 408 U.S. 665 (1972). Branzburg is a consolidation of three cases: Branzburg v. Hayes, In re Pappas, and United States v. Caldwell. Each case involved newspersons who were subpoenaed to testify before grand juries regarding sources and content of information received in confidence in their capacities as journalists.

Paul Branzburg was a reporter for the Louisville Courier-Journal who infiltrated the marihuana-hashish processing and distribution systems in Louisville and Frankfort, Kentucky, promising confidentiality to interviewees. He refused to disclose to state grand juries either the names of persons he interviewed, or any other information he had acquired while researching his stories. Id. at 667-71.

Paul Pappas was a television newsperson who was allowed entry to a New Bedford, Massachusetts, headquarters of the Black Panther Party during civil disturbances. Because of his promises of confidentiality to Party members, Pappas refused to disclose to a state grand jury whom he had seen or what he had heard while in the headquarters. Id. at 672-75. Both Branzburg and Pappas refused to reveal their sources because they feared that to do so would destroy their credibility with future informants.

Earl Caldwell was a New York Times reporter who gained the trust of the Oakland, California, Black Panther Party. When subpoenaed to testify about his knowledge of the party organization, Caldwell refused to appear before the San Francisco federal grand jury. Caldwell felt that such an appearance, because of the secrecy of grand jury proceedings, might jeopardize his future relationship with Party members, and thus diminish his effectiveness as a journalist. Id. at 675-79.

For a discussion of the decision of the Branzburg trilogy, see text accompanying notes 24-35 infra.
Court decision dealing with the testimonial privilege of journalists. Confronted with an appeal from a district court's denial of a writ of habeas corpus, the United States Court of Appeals for the Ninth Circuit reduced numerous issues in the case of *Farr v. Pitchess* to a simply stated question: when a newspaper's first amendment rights conflict with a court's duty to conduct a fair trial, which interest prevails? The court found the latter duty paramount, and found Farr's contempt incarceration free from constitutional defect.

The *Farr* case arose out of the famous "Manson Family" murder trial in 1970-71. Charles Manson and his co-defendants were arrested and indicted in Los Angeles on multiple counts of first degree murder. The ghouliness of the so-called Tate-LaBianca murders and exhibitions of bizarre behavior by the defendants attracted intense media interest to the attending police investigation and subsequent court proceedings. In accord with the duty to protect the right of the defendants to fair trials, the superior court issued an "Order re Publicity" which prohibited any attorney, court attaché, or prospective witness from releasing to the press the contents or description of either proposed trial testimony or other possible evidence.

William Farr, then a reporter for the *Los Angeles Herald Examiner*, was one of scores of journalists assigned to the Tate-LaBianca murder investigations and "Manson Family" trial. During his reportorial investigation, Farr obtained copies of a prospective witness's statement concerning one of the defendants which had been elicited by a deputy district attorney.

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3. 522 F.2d 464, 467 n.1 (9th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3162 (U.S. Sept. 22, 1975) (No. 75-444). The court summarily dismissed Farr's contentions: that the trial judge was biased; that the trial judge had misled and misinformed him as to the effect of California's shield law (see note 13 infra); and that running of the statute of limitations precluded prosecution for contempt, and ought to relieve him of the need to purge himself of contempt.

4. *Id.* at 468.

5. *Id.* at 469.


8. A deputy district attorney assigned to the Manson prosecution interviewed and obtained a statement from Virginia Graham, a former associate of the defendants and, as such, a prospective witness. In her statement, Ms. Graham alleged that defendant Susan Atkins had privately confessed complicity in the murders. Atkins also implicated Charles Manson in the crimes, and revealed to Graham plans for the murders of prominent entertainment personalities. The names of Elizabeth Taylor, Richard Burton, Frank Sinatra, Tom Jones, and Steve McQueen were offered as proposed victims. The statement was the basis for an exclusive and sensational story by
Release to a reporter of such information was incontestably in violation of the trial court's order. Before publication of Farr's story based on the witness's statement, the trial judge learned of the violation and sought from Farr the identities of the informants. Farr refused to reveal his sources, and the next day's Herald Examiner carried his sensational by-lined story based on the witness's statement.

Following the Manson trial, the court again ordered Farr to disclose his sources. Farr revealed only that he had obtained separate copies of the statement from three persons, at least two of whom were subject to the "Order re Publicity." He had promised each source confidentiality. After rejecting Farr's contention that the state's shield law and the first amendment immunized him from forced disclosure, the court held Farr in contempt and ordered him incarcerated until he complied with the order to disclose.

The trial court's order was affirmed by the state court of

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Farr. When Ms. Graham testified at the Manson trial, after the story was published, most of her allegations were not admitted into evidence. Farr v. Superior Court, 22 Cal. App. 3d 60, 65, 99 Cal. Rptr. 342, 344; cert. denied, 409 U.S. 1011 (1972).

9. Farr admitted being aware of the "Order re Publicity," and conceded that, to his knowledge, each of the sources was also aware of the order. Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975); Farr v. Superior Court, 22 Cal. App. 3d 60, 64, 99 Cal. Rptr. 342, 344 (1972).


11. The trial court, with a different judge presiding, conducted a hearing to determine the source of the violation for purposes of supplementing the Manson record on appeal with specific reference to the impact of publicity on the trial. The court also sought testimony relating to possible participation of court officers and attaches in the violation. Farr v. Superior Court, 22 Cal. App. 3d 60, 65, 99 Cal. Rptr. 342, 345, cert. denied, 409 U.S. 1011 (1972).

12. At the hearing, Farr stated that the order had been violated by two attorneys of record, and by one other person whose status as an attorney of record was neither confirmed nor denied. Id. at 66, 99 Cal. Rptr. at 345.

13. "Shield law" is the designation for CAL. EVID. CODE § 1070 (West Supp. 1975). At the time of Farr's refusal to disclose his sources of information, the shield law stated:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court . . . for refusing to disclose the source of any information procured for publication and published in a newspaper.

CAL. EVID. CODE § 1070 (West 1966). For subsequent amendments, see note 58 infra.

appeal on writ of review. The California Supreme Court denied Farr's petition for a hearing, and the United States Supreme Court refused certiorari. Farr was then afforded another opportunity to purge himself of the contempt; he again refused to betray his sources, and the superior court ordered execution of its prior contempt judgment. Farr initiated habeas corpus proceedings in federal district court, but the writ was denied. After an appeal was filed with the Ninth Circuit, Justice Douglas, acting in his capacity as Circuit Justice, ordered Farr's release from custody pending the instant decision.

The Ninth Circuit Court of Appeals found in the Farr facts a clear instance of the first amendment colliding with the sixth amendment. The metaphor the court chose, a head-on collision of constitutional interests, cleared the way for a straightforward analysis of basic constitutional issues and permitted the court to sidestep the myriad complexities which have clouded attempted resolutions of the "free press v. fair trial" conflict in other circuits. The qualified testimonial privilege afforded newspersons in Branzburg, the court concluded, must give way to a trial judge's obligation, mandated by Sheppard v. Maxwell, to protect the accused from prejudicial publicity. On its face, the Farr decision appears to resolve unequivocally the conflict between pressroom and courtroom in regard to potentially prejudicial publicity. The terseness of the opinion, however, may be deceptive; there is indication that the Court of Appeals has left room for a broad testimonial privilege, one affording more protection to journalists than the privilege rec-

15. Id. at 73, 99 Cal. Rptr. at 350.
16. Id.
20. Farr v. Pitchess, 409 U.S. 1243 (Douglas, Circuit Justice, 1973). After Justice Douglas' action, the California Court of Appeal ordered a superior court hearing to determine whether continued incarceration of Farr would accomplish the purpose of the order. After such a hearing was held, the Los Angeles Superior Court ordered Farr's permanent release from jail because there was no likelihood that Farr would comply with the order.
21. 522 F.2d at 468.
ognized in other circuits. This interpretation is suggested by the curiously oblique manner in which the Farr court dealt with Branzburg.

In Branzburg v. Hayes, the United States Supreme Court confronted the question of whether the first amendment afforded reporters a conditional privilege against being compelled to testify before grand juries with respect to information received in confidence. While acknowledging first amendment protection of newsgathering and publishing, the Court found no constitutional grounds to support a newsperson's refusal to disclose to grand juries both the content and source of confidential information. Speaking for a plurality of four, Justice White held that newspersons were "not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation." The Court unequivocally rejected the argument that as a precondition to forced disclosure, the government should be required to show a compelling interest in obtaining the information. The Supreme Court plurality stressed that persons appearing before a grand jury are not without recognized constitutional rights, but refused to extend any special constitutional shield to journalists.

In a concurring opinion which created a majority, Justice Powell emphasized that even absent an express first amendment privilege, newspersons are protected from indiscriminate interrogation by investigatory bodies. Justice Powell appeared willing to recognize a qualified testimonial privilege, but it is not clear the interest he sketched is of constitutional dimension. While the Powell opinion neither described the precise parameters of this not-quite-constitutional privilege, nor offered a firm test, Powell seemed to suggest that such a privilege should be recognized if a grand jury investigation were not being conducted in good faith, if requested information were only remotely related to the investigation, or if there were no

24. The question of whether a newsperson has a testimonial privilege not to disclose confidential sources had not been argued before the Court. Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968).
26. Id. at 689-90.
27. Id. at 685.
28. Id. at 701-02.
29. Id. at 707-08.
30. Id. at 709.
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legitimate need of law enforcement requiring revelation of the confidential information or source.\textsuperscript{31} Whether a newperson's motion to quash a subpoena should be granted and a protective order issued would be decided by "striking . . . a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."\textsuperscript{32}

Three dissenting Justices argued for a conditional privilege based squarely on the first amendment.\textsuperscript{33} As a precondition to compelling testimony from newpersons, Justice Stewart argued, the government ought to be required to demonstrate (1) that there is probable cause to believe the newperson possesses information clearly relevant to specific probable violations of the law; (2) that there are no alternative means of obtaining the information less destructive of first amendment liberties; and (3) that there exists a compelling state interest in the information itself.\textsuperscript{34} Justice Douglas, who also found a first amendment reporter's privilege, indicated in a separate dissent that the immunity so conferred is unqualified and absolute.\textsuperscript{35}

Although \textit{Branzburg} dealt specifically with testimony before a grand jury, the court of appeals held that its reasoning "appears to teach broadly enough to be applied to other civil

\begin{itemize}
\item \textsuperscript{31} Id. at 709-10.
\item \textsuperscript{32} Id. at 710.
\item \textsuperscript{33} Justice Stewart, joined in dissent by Justices Brennan and Marshall, argued that the plurality's view of the first amendment reflected "a disturbing insensitivity to the critical role of an independent press in our society." \textit{Id.} at 725. He further emphasized that confidentiality is essential for many types of newsgathering, and predicted that if newpersons were to be compelled to disclose confidential information, sources would be deterred from giving information, reporters would be deterred from publishing it, and uncertainty would lead to self-censorship. \textit{Id.} at 730-31.
\item \textsuperscript{34} \textit{Id.} at 743. The thrust of the Stewart test had been accepted by the Ninth Circuit in \textit{Caldwell v. United States}, 434 F.2d 1081 (9th Cir. 1970): [\textit{W}e hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance. \textit{Id.} at 1089.
\item \textsuperscript{35} The \textit{Caldwell} court rejected, however, the reporter's formulation of a three-part test similar to the one accepted by Stewart. \textit{Id.} at 1089 n.10. Justice Stewart apparently integrated the test rejected in \textit{Caldwell} with a similar test proposed by the late Professor Alexander Bickel, who represented the three largest television networks, the \textit{New York Times}, and other press interests as amicus curiae. Brief for Amici Curiae at 29, \textit{Branzburg v. Hayes}, 408 U.S. 665 (1972).
\end{itemize}

\textit{Id.} at 743.
or criminal judicial proceedings as well." This broad applicability of the Branzburg rule to claims of testimonial privilege in non-grand jury settings has escaped other circuits, and Justice Douglas. 

Curiously, while the court of appeals cited Branzburg as clearly negating Farr’s claim of first amendment privilege, the court just as clearly rejected the United States Supreme Court’s plurality holding regarding the existence of the privilege. The Supreme Court plurality declined to acknowledge any constitutional testimonial privilege. The court of appeals, however, apparently counted judges and included Powell among the advocates of a constitutional privilege, for a total of five; consequently, the court posited the existence of a “limited or conditional” constitutional privilege, and proceeded to examine its scope in terms that echo, in part, both the Powell concurrence and Stewart dissent in Branzburg.

Although the Powell concurrence is never cited, the Farr court paraphrased the Justice’s call for a balancing of press interests against investigatory interests. Unlike Powell, however, the court clearly found the newsperson’s testimonial priv-

36. 522 F.2d at 467.
37. Judicial interpretation of Branzburg has been inconsistent. Some courts have limited the decision to its facts, requiring disclosure only in grand jury proceedings, or where a compelling interest was clearly demonstrated. E.g., United States v. Dionisio, 410 U.S. 1 (1973); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972) (all holding that Branzburg applies only to grand jury proceedings); Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972) (limited to criminal proceedings); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (limited to instances where the government can demonstrate a compelling state interest for disclosure); Democratic Nat’l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (limited to instances in which there are no alternative means for obtaining the information).

Other courts have joined the Farr court in expanding the strict holding in Branzburg to include other than grand jury settings. E.g., Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974) (extended application to civil actions); Smilow v. United States, 465 F.2d 802 (2d Cir. 1972) (Branzburg requirement to testify extended to persons other than reporters); United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972) (extended to all criminal proceedings).
39. See notes 26-29 supra.
40. 522 F.2d at 467.
41. Compare text accompanying note 32, supra with:
The application of the Branzburg holding . . . seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest.
ilege rooted in the first amendment freedom of press. The reasoning of the court also seems to indicate implicit approval of at least part of the Stewart test for conditional constitutional privilege. While not specifically applying the Stewart test, the court of appeals paraphrased the compelling interest requirement for forced disclosure. The touchstone of the Farr court's test for its hybrid Powell/Stewart privilege appears to be the absence of a conflicting interest so compelling as to override the privilege. On the Farr facts, the court found such a countervailing consideration in the trial judge's duty to protect sixth amendment rights of defendants.

The Supreme Court, in Sheppard v. Maxwell, noted "the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors," and charged trial courts to "take strong measures to ensure that the balance is never weighed against the accused." Holding that a new trial must be ordered when prejudicial publicity was likely to have threatened the fairness of a trial, the Court nevertheless emphasized that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." The Sheppard Court suggested means available to a trial judge for limiting the effect of prejudicial publicity, including restrictions on the release of information to the press by court officers or parties to the action. The court singled out collaboration between counsel and the press regarding information that might affect the fairness of a criminal trial as "not only subject to regulation, but . . . highly censurable and worthy of disciplinary measures." The court of appeals

42. Id. at 467.
43. Compare text accompanying note 34 supra with the court's summary of the district court decision it affirmed: "[T]he court below concluded that the newsman's privilege must yield to the more important and compelling need for disclosure." 522 F.2d at 469.
45. Id. at 362.
46. Id. at 363 quoted in Farr v. Pitchess, 522 F.2d 464, 468; petition for cert. filed, 44 U.S.L.W. 3162 (Sept. 22, 1975) (No. 75-444).
47. Among the Court's suggestions were limiting newspeople's access to the courtroom; insulating witnesses; regulating release of investigatory leads to the press by police; prohibiting the release of possible testimony by counsel and witnesses; and prohibiting extrajudicial statements by court officials, witnesses, counsel, or parties. Id. at 358-62.
found the trial judge’s publicity order clearly within the scope of the Sheppard rule.49

The Farr decision has been criticized, particularly by newsmen, as yet another in a series of decisions which countenance an abridgment of the first amendment.50 In the final analysis, however, the court’s determination that reporter Farr’s privilege was in this instance outweighed by a paramount interest may be less significant than its clear affirmation of the existence of such a privilege. Despite its telegraphic quality, the opinion may indeed offer considerable clarification of the nature and scope of the journalist’s privilege against compelled disclosure. First, the court has indicated that a claim of privilege by a newsmen is governed by Branzburg, with its divergent opinions. Second, newsmen do possess limited immunity from forced disclosure of confidential sources. The court has recognized the privilege as part of the first amendment guarantee of freedom of the press. Third, the need to protect a defendant’s sixth amendment right to a fair trial will abrogate the newsmen’s testimonial privilege.

The court’s failure to specify its criteria prevents clear prediction of what other interests might overwhelm the claim of privilege. Reference to a need to weigh the competing interests “in light of the surrounding facts and [strike] a balance”51 suggests that the Farr court adopted Justice Powell’s method, which requires that the validity of each claim be judged by balancing broad notions of freedom of the press against equally broad and ill-defined notions that citizens are obligated to give relevant testimony with respect to criminal conduct. Each claim of privilege would be adjudicated with reference to the balancing test. There is considerable ambiguity, however, in the Farr court’s reference to the “important and compelling”52

49. Appreciating the danger that sensational publicity could have transformed the Manson trial into an unconstitutional spectacle, the Farr court approved of the Los Angeles trial judge’s issuance of a “gag order.” 522 F.2d at 468. There was no authority in Sheppard for directly restraining press reporting, and the trial judge never attempted to prohibit publication of Farr’s story.


51. 522 F.2d at 468.

52. Id. at 469.
nature of the conflicting sixth amendment right—language which suggests the more exacting compelling state interest test of the Stewart dissent. But the distinction may be purely academic. Because the Ninth Circuit recognizes the newsperson’s privilege as rooted in the first amendment, it would seem that whether the test applied were the Powell balancing standard or the Stewart compelling interest rule, the conflicting state interest would have to be of constitutional dimension to outweigh a constitutional privilege. The use of contempt power to force disclosure of sources would seem valid only in instances where constitutional rights are being protected or enforced.

Such an interpretation of the Farr decision was recently made by the California Court of Appeal in Rosato v. Superior Court. A Fresno County grand jury investigating corruption indicted a city councilman, prominent land developer, and former planning commissioner on counts of bribery and conspiracy. A superior court judge, mindful of his Sheppard obligation in a trial of widespread public interest, ordered the transcripts of grand jury proceedings sealed, and issued an “Order re Publicity” similar to the one issued in Farr. When The Fresno Bee obtained and published portions of the transcripts, the superior court ordered Bee reporters and editors to reveal the identity of the person(s) who had supplied the transcripts. The newspersons refused, and were cited for contempt and ordered to jail until they complied with the order to disclose. Relying in part on the Farr decision, the California Court of Appeal found some constitutional merit in the claims of privilege.

As a result of the Farr and Rosato decisions, then, the limited testimonial privilege which the Branzburg plurality found unacceptable appears to be firmly established in California. If subsequent interpretations of Farr focus on the compel-

54. Id. at 199-201, 124 Cal. Rptr. at 433-34.
55. Id. at 201-05, 124 Cal. Rptr. at 434-36.
56. Id. at 199 n.2, 205, 124 Cal. Rptr. at 432 n.2, 436.
57. Id. at 230-31, 124 Cal. Rptr. at 454.
58. CAL. EVID. CODE § 1070 (West 1966) was amended in 1971 in response to the first Farr case to provide protection for any person who had been connected with or employed by newsgathering organizations. The 1973 amendment gave a shield to any newsperson who appeared before any body which had the power to subpoena. The 1974 amendment struck the requirement that information be published before shield protection could be afforded newspersons. The shield law presently states:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected
ling interest language, and if courts limit the Farr holding, as Rosato did, to its facts—that is, a collision of constitutional rights situation, where a valid protective order has admittedly been violated—then newsmen in California would seem to enjoy a broad privilege from forced testimony. They may refuse to disclose their confidential sources when the information at issue has come from persons other than those subject to a valid “Order re Publicity,” and when the answers demanded might reveal the identity of sources not affected by the court order.\(^{59}\)

If this is the case, courts will reject a claim of journalist’s privilege only when the privilege conflicts with a compelling interest of constitutional merit, or the newsmen has directly observed or participated in a breach of criminal statutes.\(^{60}\)

Farr is but one in a series of “free press v. fair trial” cases decided since Branzburg.\(^{61}\) Newsmen have consistently challenged court orders to reveal confidential sources. Despite facing indefinite incarceration for their silence, only a very few reporters have betrayed their confidants.\(^{62}\) Branzburg and subsequent reporter’s privilege opinions have not altered a long tradition of the American press honoring promises of confidentiality. Legal commentary on the continuing tension between the courtroom and pressroom might more usefully be directed to exploring remedies available to jailed reporters in their at-

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\(^{59}\) The Rosato court held that the shield law offers protection against the revelation of all sources other than court officers, and that a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court. Accordingly, the court reversed the contempt convictions which resulted from refusal to answer questions not precisely directed to discovering the identity of persons subject to the “Order re Publicity.” \(^{51}\) 51 Cal. App. 3d 190, 224-25, 242-47, 124 Cal. Rptr. 427, 450, 454-59 (1975).


\(^{62}\) C. WHALEN, YOUR RIGHT TO KNOW 45-47 (1973).
tempts to challenge the indeterminate nature of inevitable contempt sentences, rather than to chronicling and commenting upon the latest constitutional refinements of "free press v. fair trial" cases.\footnote{On February 16, 1976, a report of the Legal Advisory Committee on Fair Trial and Free Press dealing with judicial restrictive orders was offered for consideration by the ABA House of Delegates. The report recommended replacing Standing Orders concerning disclosure of information in criminal proceedings, which are punishable by contempt, with Standing Guidelines that would not be enforceable by contempt. It further recommended that entry of a Standing Order be permitted only after notice and opportunity to be heard had been given to all interested parties, including news-persons, and after facts had been set forth to show that less restrictive means would be inadequate to protect the rights of defendants. ABA Press Release No. 021576 (February 15, 1976). Consideration of the report was deferred until the annual meeting of the ABA in August, 1976. ABA Press Release No. 021976 (February 19, 1976).}

\textit{Thomas J. Flynn}

Late in the morning of February 6, 1973, four armed men entered a Crocker National Bank in Los Angeles.¹ Three of the men positioned themselves in various areas of the bank, guarding the customers and personnel, while the fourth emptied the tellers’ cages.² A surveillance camera photographed each of the participants in the robbery except the individual who had selected a position directly below the camera.³

Several months later, Robert Lee Nobles was arrested and tried in a Los Angeles federal district court for bank robbery.⁴ The Government attempted to prove that Nobles, a black man, was the individual who had not been photographed by the Crocker National Bank’s surveillance camera; but with the exception of a bank teller and one customer, none of the people in the bank at the time of the robbery were able to identify Nobles.⁵ On cross-examination by Nobles’ counsel, the teller testified that he did not recall telling an investigator for the Public Defender that he had seen only the back of the head of the robber beneath the camera.⁶ Similarly, the customer denied having told the investigator that all blacks look alike.⁷ The identification testimony of the teller and the customer was the only significant evidence against Nobles.⁸

After the Government completed its case, Nobles’ counsel sought to introduce the testimony of his investigator.⁹ However, the court conditioned that testimony on the defense agreeing to allow the Government to examine those portions of the investigator’s report which contained the statements of the

². Id.
³. Id.
⁴. Id.
⁵. Id. at 150.
⁷. Id. at 228.
⁸. The only other incriminating evidence was Nobles’ denial at the time of his arrest that he was Robert Nobles and a later statement that he was aware that the FBI had been looking for him. Id. at 227 n.1.
⁹. Id. at 229.
impeached witnesses. The court’s order provided for in camera inspection of the report after the investigator had given his testimony, with the court to excise all irrelevant material and turn the remainder over to the prosecutor. Nobles’ counsel refused to allow any inspection of the report, and the court ruled that the defendant could not offer the investigator’s testimony for the purpose of impeaching the prosecutor’s witnesses.

The Court of Appeals for the Ninth Circuit held that the fifth amendment privilege against self-incrimination prohibited the disclosure condition imposed by the district court. The circuit court relied principally on Prudhomme v. Superior Court, wherein the California Supreme Court stated that the privilege against self-incrimination “forbids compelled disclosure which could serve as a ‘link in a chain’ of evidence tending to establish guilt of a criminal offense.” The court of appeals also noted that this position had been taken in United States v. Frarello, and by the Court of Appeals for the District of Columbia Circuit in United States v. Wright. In addition, the Ninth Circuit held that rule 16 of the Federal Rules of Criminal Procedure applied to discovery at trial, and that rule 16(c)
precluded prosecutorial discovery of material contained in the investigator's report.

The United States Supreme Court reversed the Ninth Circuit's decision, holding that the district court's order was within the legitimate bounds of prosecutorial discovery. The Court held that the investigator's report was of evidentiary value since it related to the credibility of the investigator. Only the work product doctrine, it stated, would bar discovery of such a report. Conditioning the testimony of the investigator on the production of the report was proper, however, because the defendant waived his work product privilege by offering to have his investigator testify. The Nobles Court expanded the concept of prosecutorial discovery in the federal court system by holding that if an agent of the defendant's lawyer offers testimony impeaching a Government witness, reports of the agent's interviews with the witness are available for limited prosecutorial discovery.

The Nobles decision reversed the Ninth Circuit's holding that Federal Rule of Criminal Procedure 16 applied to at-trial
discovery. Rule 16(c) allows discovery by the Government only if discovery has been requested by the defendant. In addition, all reports of the defendant's attorneys and agents are expressly immunized from discovery by subsection (c). However, the Supreme Court stated that "the language and history of the rule indicate that it addresses only pretrial discovery." The Court conceded that the rule had some relevance to trial discovery procedure, since Congress had incorporated the Jencks Act into the rule. However, the Court held that the Jencks Act provision, which allows the defendant, for purposes of impeachment, to discover statements of Government witnesses who have testified at trial, did not convert the rule into "a general limitation on the trial court's broad discretion as to evidentiary questions at trial."

The Supreme Court then considered two sixth amendment arguments. The defendant argued that the district court's order deprived him of his sixth amendment rights to compulsory process and cross-examination. Although this claim was rejected, the Court seemed to suggest that the argument would have been compelling if the order had barred absolutely the investigator's testimony. However, since the order merely placed a condition on the admissibility of the investigator's testimony, Nobles had not been deprived of these rights. In addition, the Court held that the sixth amendment right to effective assistance of counsel was not violated because the order resulted from the defense counsel's "voluntary election to make testimonial use of his investigator's report." The Court further suggested that even had he not made this election, the right to effective assistance of counsel was not impaired in view of the limited nature of the district court's order.

The Court dispensed in summary fashion with Nobles' fifth amendment argument, characterizing the holding of the

25. Id. at 234-35.
26. See note 19 supra.
27. Id.
28. 422 U.S. at 235.
30. 422 U.S. at 236. See note 20 supra.
31. 422 U.S. at 236.
32. Id. at 241.
33. Id.
34. Id.
35. Id. at 240 n.15.
36. Id.
37. See id. at 233-34.
Ninth Circuit on this issue as an over-broad generalization.\(^{38}\) Placing principal reliance on *Couch v. United States*,\(^ {39}\) the Supreme Court held that "the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial."\(^ {40}\) Clear emphasis was placed on the limited scope of the privilege against self-incrimination.\(^ {41}\)

The *Couch* decision provides questionable authority for the proposition advanced by the Court. *Couch* involved an Internal Revenue Service Agent's demand to see a taxpayer's records.\(^ {42}\) An Internal Revenue Service summons was issued, directing an accountant to produce the business records supplied by the taxpayer for preparation of her tax returns from 1955 to 1968.\(^ {43}\) The accountant refused the demand and sent the records to the taxpayer's attorney.\(^ {44}\) The United States Supreme Court held that the fifth amendment did not protect the records and the attorney was compelled to produce them.\(^ {45}\)

However, the *Couch* Court carefully limited its decision to the right of an accountant to invoke the fifth amendment to protect the financial records of his client.\(^ {46}\) The Court called attention to the fact that the "rights and obligations of the parties became fixed when the summons was served . . . ."\(^ {47}\) Thus the fact that the records subsequently came into the possession of the taxpayer's attorney was irrelevant. The Court stated that there could be "little expectation of privacy where records are handed to an accountant."\(^ {48}\) "The basic complaint of petitioner," the Court ruled, "stems from the fact of divulgence of the possibly incriminating information, not from the manner in which or the person from whom it was extracted."\(^ {49}\) The issue in *Nobles* was precisely the converse of this.

After dismissing Nobles' constitutional arguments, the

\(^{38}\) 422 U.S. at 233.

\(^{39}\) 409 U.S. 322 (1972).

\(^{40}\) 422 U.S. at 234.

\(^{41}\) *Id.* at 233-34.

\(^{42}\) 409 U.S. at 335.

\(^{43}\) *Id.* at 338.

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 336.

\(^{46}\) *Id.* at 329.

\(^{47}\) *Id.* at 309 n.4.

\(^{48}\) *Id.* at 335.

\(^{49}\) *Id.* at 329.
Court held that the material contained in the investigator’s report fell under the work product privilege established in Hickman v. Taylor. The plaintiff in that civil case had sought discovery of statements of witnesses obtained by the defense counsel in preparation for trial. The Hickman Court recognized that some of the material in the possession of an attorney should be protected from the scrutiny of his adversary, and in recognition of this need it established a “qualified privilege for certain material prepared by an attorney acting for his client in anticipation of litigation.” The Court stated, “Proper presentation of a client’s case demands that the attorney assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”

Nonetheless, the Nobles Court held that the work product privilege is waived when counsel makes testimonial use of the protected material. From this premise, it determined that the defense counsel’s election to present the testimony of his investigator had waived the defendant’s privilege with respect to the investigator’s report insofar as the investigator’s testimony related to matters contained therein.

Thus, the work product privilege provides uncertain protection for reports by agents of an attorney. First, the Court did not limit the notion of waiver to situations in which testimonial use is made of the material. The Court stated broadly, “What constitutes a waiver with respect to work product materials depends, of course, upon the circumstances.” It would appear that the trial judge is invested with a significant amount of discretion in determining what constitutes a waiver. Second, even if the privilege is not waived, it may be overcome. The work product privilege was established to protect an attorney

51. Id. at 498-99.
52. Id. at 510-11.
53. Id. at 508. The Supreme Court added this qualification:
   We do not mean to say that all written materials obtained or prepared
   by an attorney’s counsel with an eye toward litigation are necessarily free
   from discovery in all cases. Where relevant and nonprivileged facts re-
   main hidden in an attorney’s file and where production is essential to the
   preparation of one’s case, discovery may be had.
329 U.S. at 511 (emphasis added).
54. 329 U.S. at 511.
55. 422 U.S. at 239 n.14.
56. Id. at 239.
57. Id. at 239 n.14.
from "undue and needless interference"; a showing of good cause is sufficient to overcome the protection of the privilege.\(^{58}\) If this burden is met by the prosecution, it would follow that discovery is allowed whether or not the material is intended for use at trial.

The Supreme Court completely ignored *Prudhomme*, the case upon which the Ninth Circuit relied for its conclusion that the report was protected by the privilege against self-incrimination. This omission is tacit acknowledgment that the California Supreme Court interprets the privilege against self-incrimination in a way that is fundamentally at odds with the interpretation of the United States Supreme Court. The California Supreme Court held in *Prudhomme* that the privilege against self-incrimination forbids compelled disclosures which "conceivably might lighten the prosecutor's burden of proving its case-in-chief."\(^{59}\) The *Prudhomme* rule allowed prosecutorial discovery only of material which "cannot possibly tend to incriminate the [defendant]."\(^{59}\) *Prudhomme* dealt with pretrial discovery, but the principles it enunciated, as the Ninth Circuit recognized, are equally applicable to discovery during trial.\(^{60}\)

This divergence between the state and federal standards stems from the California Supreme Court's reliance on the privilege against self-incrimination afforded by the California Constitution.\(^{62}\) Although the states may not abridge the fifth amendment privilege against self-incrimination as applied to the states by the fourteenth amendment,\(^{63}\) they may establish stricter standards.\(^{64}\) The fifth amendment, as interpreted by the United States Supreme Court, sets a minimum standard which does not foreclose California from providing enhanced protection.\(^{65}\)

The California Supreme Court in *Prudhomme* refused to permit discovery to drive a wedge between the defendant and

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60. Id. at 326, 466 P.2d at 677, 85 Cal. Rptr. at 134.
his counsel. Treating the material collected and prepared by the defense counsel as if it were information personal to the defendant, the Prudhomme court held that the "defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him."

The California court traced the underlying rationale for its position to earlier United States Supreme Court decisions. It quoted with approval Malloy v. Hogan, which stated that "governments, state and federal, are constitutionally compelled to establish guilt by evidence independently and freely secured," and reiterated the principle, often endorsed by the United States Supreme Court, that "[t]he People must 'shoulder the entire load' of their burden of proof in their case in chief...."

In contrast to Prudhomme, Nobles represents perhaps a final rejection of the view that the fifth amendment mandates the Government to "shoulder the entire load" when attempting to convict an individual of a crime. This argument was fully developed in the context of prosecutorial discovery by Mr. Justice Black, dissenting in Williams v. Florida, a case contemporaneous with Prudhomme. Mr. Justice Black contended that the Constitution guarantees an absolute, unqualified right to the defendant to "compel the State to investigate its own case,

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66. 2 Cal. 3d at 324, 466 P.2d at 676, 85 Cal. Rptr. at 131.
69.  In Miranda v. Arizona, 384 U.S. 436 (1965), the Court ruled that the constitutional foundation underlying the privilege against self-incrimination is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government to "shoulder the entire load," . . . to protect the inviolability of the human personality, our accusatorial system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors.  Id. at 460. For other examples, see Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964); Malloy v. Hogan, 378 U.S. 1, 7-8 (1963). See note 19 supra.
70.  Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 676, 85 Cal. Rptr. 129, 133 (1970). This rationale appears to have originated with Dean Wigmore. Our sense of fair-play, he wrote, demands "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government to shoulder the entire load." 8 J. WIGMORE, EVIDENCE 317 (McNaughton rev. 1961).
find its own witnesses, prove its own facts, and convince the
jury through its own resources.” 72 The Constitution, he stated,
gives the defendant a “tactical advantage” 73 designed to pro-
tect “freedom” in our political system. 74 Mr. Justice White, 75
Mr. Justice Stewart, 76 and Chief Justice Burger 77 have taken
similar positions in earlier opinions.

Although this argument appeared to have been accepted
by the Court in Miranda v. Arizona, 78 it was not accepted in
Williams, and has been rejected in many recent Supreme Court
decisions. 79 The Nobles opinion, by requiring the production of
evidence gathered by the defendant’s agent, is a sweeping ex-
ample of the Court’s present reluctance to endorse Justice
Black’s theory. Rather than emphasizing the Court’s duty to
protect the rights of the accused, Nobles emphasized the truth-
finding goal of our system of justice: “ ‘The need to develop all
relevant facts in the adversary system is both fundamental and
comprehensive. The ends of criminal justice would be defeated
if judgments were to be founded on a partial and speculative
presentation of the facts . . . . ’ ” 80

This justification for the expansion of prosecutorial dis-
cover had not been suggested by the Court prior to the Nobles
decision. In Williams, it had allowed pretrial prosecutorial dis-
cover of material which the defendant intended to produce as
evidence at trial, but the Court had based its action on the

72. Id. at 112.
73. Id. at 111.
74. Id. at 112.
75. Justice White once wrote:
The state has the obligation to present the evidence. Defense counsel
need present nothing, even if he knows what the truth is. He need not
furnish any witnesses to the police, or furnish other information to help
the prosecution’s case . . . . Our interest in not convicting the innocent
permits counsel to put the State to its proof.
opinion).
76. Justice Stewart once wrote:
The basic purposes behind the privilege against self-incrimination do not
relate to protecting the innocent from conviction, but rather in preserving
the integrity of the judicial system in which even the guilty are not to
be convicted unless the prosecution “shoulder the entire burden.”
77. See Levin v. Katzenbach, 363 F.2d 287, 294-95 (D.C. Cir. 1966) (Burger,
Circuit Judge, dissenting).
1002 (1972).
rationale that, since the material was going to be produced as
evidence by the defendant, it must be presumed to be exculpa-
tory and not inculpatory.\textsuperscript{81} Therefore, it held, the fifth amend-
ment privilege against self-incrimination could not be invoked
to protect the material.\textsuperscript{82} In contrast, Nobles allowed discovery
of material which the defendant wished to keep out of evi-
dence.\textsuperscript{83} Clearly, it could not be presumed that the material
was exculpatory. Consequently, the "truth-finding" justifica-
tion for discovery offered in Nobles treats as irrelevant the
question of whether the material is inculpatory or exculpa-
tory.\textsuperscript{84}

The favor with which the United States Supreme Court
views prosecutorial discovery was demonstrated by its willing-
ness to grant discovery despite the comparatively slight need
shown by the prosecution in Nobles.\textsuperscript{85} Pretrial discovery in
Williams was said to further the legitimate state interests of
avoiding undue surprise and unnecessary delay of the trial, by
allowing thorough prosecutorial preparation.\textsuperscript{86} The discovery
allowed in Nobles furthers none of these interests, and in effect
compensates the Government for its failure to prepare ade-
quately. The witnesses in Nobles were prosecution witnesses,
who should have been thoroughly interviewed before the trial
began. Also, the witnesses who had allegedly given the im-
peaching statements to the investigator were present at the
trial. The prosecutor could have adequately rebutted the testi-
mony of the investigator merely by calling the witnesses to the
stand. In other words, disclosure of the contents of the investi-
gator's report was not necessary to "develop all relevant
facts," and denial of discovery would not have kept from the
prosecutor any information it could not have obtained by its
own efforts. Only future decisions will determine the extent to
which the Court is willing to allow the prosecutor to profit by
the efforts of defense investigation.

While possibly facilitating the courts' truth-finding func-
tion, the effect of Nobles is to add to the State's already enor-
mous advantage over the defendant in its ability to gather

\textsuperscript{82} Id.
\textsuperscript{83} 422 U.S. at 228-29.
\textsuperscript{84} Id. at 231-32. See text accompanying notes 37-40 supra.
\textsuperscript{85} See 422 U.S. at 228 & n.4.
\textsuperscript{86} 399 U.S. at 81, 86.
The Nobles Court justified its expansion of prosecutorial discovery by pointing out that the Jencks Act would have allowed defense discovery of the report if the investigator had been a Government witness. This suggests that the Court’s notion of “reciprocal discovery” will not work to effect a true “balance of forces between the accused and the accuser,” given the inherent “superiority of the prosecution’s facilities for fact-finding.”

Prosecutorial discovery is a relatively recent procedural innovation and from its inception it has been clouded by constitutional considerations. Thus, for example, when rule 16 of the Federal Rules of Criminal Procedure was amended in 1966 to provide a limited right of discovery for the prosecutor, Justices Black and Douglas dissented, suggesting that there were fifth amendment difficulties with the rule. Other commentators, as well as the California Supreme Court, have thought the fifth amendment privilege against self-incrimination to be the chief constitutional impediment to prosecutorial discovery.

By restricting the application of rule 16(c) to pretrial discovery, and allowing a broader scope for discovery during trial, the Nobles decision dispells any lingering doubt as to the constitutionality of rule 16(c). In addition, Nobles places the new, broader amendment to rule 16, which was adopted five weeks after the Nobles decision, on sound constitutional footing. The most recent amendment to rule 16 enhances the federal prosecutor’s right of discovery in three significant respects: (1) the list of discoverable material is expanded to include photographs; (2) if discovery is granted to the de-

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87. See id. at 112 (Black, J., dissenting); Wardius v. Oregon, 412 U.S. 470, 473 (1973).
88. 422 U.S. at 231.
90. Id. at 474.
94. Id. at 276 (Douglas, J., dissenting).
95. See, e.g., Moore, Criminal Discovery, 19 Hast. L.J. 905-10 (1968); and note 92 supra.
97. This amendment was signed into law by President Ford on August 2, 1975, to become effective December 7, 1975.
98. Compare Fed. R. Crim. P. 16(b)(1)(A) with Fed. R. Crim. P. 16(c), 18
fense, reciprocal discovery by the prosecution is a matter of right, and not within the discretion of the trial judge; and (3) the prosecution is no longer required to show that its request is reasonable and material to the preparation of its case. These developments appear to serve the truth-finding function of the judicial system without impinging on the defendant’s constitutional rights as they were defined in *Nobles*. The United States Supreme Court’s present view of the role of the courts, coupled with the Court’s narrow interpretation of constitutional prohibitions, indicates that the Court views expansion of the discovery powers of the prosecutor with favor.

*Rand L. Koler*

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99. *Id.*

100. *Id.*

101. See text accompanying notes 32-41 *supra.*
ENVIRONMENTAL LAW—LOCAL AGENCY FORMATION COMMISSIONS MUST COMPLY WITH REQUIREMENTS OF CALIFORNIA ENVIRONMENTAL QUALITY ACT BEFORE APPROVING ANNEXATION PROPOSALS OF CITIES—Bozung v. LAFCO of Ventura County, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

In 1968, the Ventura County Local Agency Formation Commission (LAFCO) divided a 677-acre parcel known as Bell Ranch between the two “spheres of influence” allocated, respectively, to the city of Camarillo and the unincorporated area of Las Posas. In August, 1970, the Kaiser-Aetna Corporation, owner of the land, requested that LAFCO adjust the spheres of influence. LAFCO complied, assigning all of Bell Ranch to the Las Posas sphere. The following year, the Ventura LAFCO again shifted the sphere of influence lines, placing Bell Ranch entirely within the Camarillo sphere. The city of Camarillo and Kaiser-Aetna requested in April, 1972, that LAFCO approve Camarillo’s proposed annexation of Bell Ranch. Kaiser’s application stated that the land, presently used for agricultural purposes, was designated “for residential, commercial and recreational uses,” and that such development was “anticipated . . . in the near future.”

LAFCO approved the proposed annexation, and on July 26, 1972, Camarillo adopted an ordinance annexing Bell Ranch to the city.

A number of Ventura County taxpayers and residents living in the area brought an action in August, 1972, seeking declaratory relief and a writ of mandate requiring the Ventura County LAFCO to file an environmental impact report (EIR) before approving the annexation proposal. The plaintiffs alleged that the California Environmental Quality Act (CEQA), which requires local agencies to file an EIR on any project likely to affect the environment, applied to the LAFCO annex-

1. The creation of LAFCOs was an attempt by the legislature to coordinate the numerous agencies operating at the local level, many of them offering duplicative services in overlapping areas. See text accompanying notes 7-15 infra. One of the chief functions of LAFCO is to minimize this overlap by allocating “spheres of influence” to various local entities in order to facilitate such activities as annexation and land use planning. A sphere of influence is a plan for the probable ultimate physical boundaries and service areas of the local agency as determined by the Local Agency Formation Commission. Cal. Gov’t. Code § 54774 (West Supp. 1974).


ation approval in question, and that the defendant LAFCO had violated its duty by failing to prepare and file an EIR before holding hearings and approving the proposed annexation. The plaintiffs urged the trial court to set aside LAFCO's annexation approval and to prevent Camarillo from enacting the annexation ordinance. Ventura County LAFCO and Kaiser-Aetna filed demurrers to the complaint which were sustained without leave to amend. The California Court of Appeal reversed the judgment of the trial court, holding that under California law, an EIR should have been filed by the Ventura County LAFCO before it gave approval to Camarillo's proposed annexation of the Bell Ranch property.4 The California Supreme Court held that the court of appeal had correctly disposed of the issues involved and adopted, almost verbatim, the appellate court's opinion.5

The essence of the Bozung opinion is the court's determination that the powers and duties of LAFCOs are set forth not only in the Knox-Nisbet Act,6 the legislation which created LAFCOs, but also in CEQA. A brief history of these acts is helpful in appreciating the significance of Bozung.

Prior to 1963, rapid urban growth in California had helped create a virtually unmanageable situation in local government. Cities competing for unincorporated territories developed irregular boundaries marked by "strips," "cherry stems," and "corridors"; special districts proliferated, providing duplicative services in overlapping areas7 and there were many undesirable special interest incorporations.8 The Knox-Nisbet Act, passed in 1973 as an attempt to deal with these problems,9 created

5. 13 Cal. 3d at 267, 529 P.2d at 1019-20, 118 Cal. Rptr. at 251-52.
8. Id. at 7.
9. Id. at 4-6. One commentator observed:
   By 1963, conditions in California had become so anarchic that they were intolerable. The pressures of the population boom and the speed of urbanization were forcing continuous modifications in governmental structure throughout the state. Laws designed for a simpler era were not effective in controlling the avarice and myopia of contending entities. Various pressures were creating an unmanageable and inequitable patchwork of governments unresponsive to the needs of the people of California.

Id. at 8.
10. This legislation was a compromise between two opposing positions. The Governor's Commission on Metropolitan Area Problems favored a powerful statewide commission having final approval of all boundary changes, incorporation of cities, annexa-
LAFCO, a hybrid commission of state and local government sitting at the county level. The stated purposes of LAFCOs are "the discouragement of urban sprawl and the encouragement of the orderly formation and development of local governmental agencies based upon local conditions and circumstances." LAFCOs are given the power to review and approve or disapprove wholly, partially, or conditionally, proposals for (1) the incorporation of cities; (2) the formation of special districts; (3) the annexation of territory to local agencies; (4) the exclusion of territory from a city; (5) the disincorporation of a city; and (6) the consolidation of two or more cities.

In addition, LAFCOs are required to develop "spheres of influence" for each local governmental agency within the county for the purpose of minimizing duplication of services and coordinating land use planning. Among the factors to be considered in allocating a sphere of influence to a particular agency are the range of services the agency can provide, the projected population growth of the area, the type of development planned, and the social and economic interdependence and interaction between the area being considered and areas surrounding it.

The California Supreme Court had never dealt with any aspect of the Knox-Nisbet Act prior to Bozung. Furthermore, California appellate courts had handed down only three decisions dealing with LAFCOs, none of which did more than confirm or interpret powers enumerated in the Act itself.

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11. A LAFCO is composed of two city council members, two members of the county board of supervisors and a fifth member representing the general public. The statute also allows for two representatives of special districts to sit on the commission. Cal. Gov't Code § 54780 (West Supp. 1974).

12. Id. § 54774.

13. Id. § 54790(a). The powers of LAFCOs were further defined by the District Reorganization Act of 1965 which sets out a unified procedure for rationalizing the pattern of special district formation in California. Id. § 56000 et seq.

14. Id. § 54774.

15. Id. (b)-(f).

16. In San Mateo County Harbor Dist. v. Board of Supervisors, 273 Cal. App. 2d 165, 77 Cal. Rptr. 871 (1969), the court held that in considering a proposed dissolution of a harbor district, a LAFCO cannot delegate its authority to approve or disapprove this dissolution to the county; the LAFCO must make a clear and definite determination on the proposal. City of Ceres v. City of Modesto, 274 Cal. App. 2d 845,
ever, in *Bozung*, the Supreme Court has greatly broadened the scope of LAFCO by effectively incorporating CEQA into the Knox-Nisbet Act.

The California Environmental Quality Act, as originally enacted in 1970, requires local governmental agencies to prepare an environmental impact report on any project they intend to carry out which might have a significant effect on the environment. In 1972, the California Supreme Court, in the landmark decision of *Friends of Mammoth v. Board of Supervisors,* interpreted CEQA as requiring governmental agencies to prepare and consider an EIR for private activities that might have a significant effect on the environment and for which a governmental permit or other entitlement for use is required. In *Friends of Mammoth,* the supreme court concluded that the legislature intended CEQA “to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”

In response to *Friends of Mammoth,* the legislature amended CEQA in 1972 so that the Act would apply to all discretionary projects proposed to be carried out or approved by public agencies. Public agencies are now required to develop objectives, criteria and procedures for the evaluation of

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79 Cal. Rptr. 168 (1969), dealt with an annexation feud between two cities. The court here clarified the LAFCO’s functions and the importance of its decisions. LAFCO’s tentative designation of the cities’ future boundaries was not a final decision, and one city could legally extend its sewer line into the designated sphere of the other city. However, the court saw this as a futile and wasteful act since the allocation of the disputed area to the sphere of one city meant that only that city would be able to annex the area in the future. In *Meyers v. LAFCO of Tulare County,* 34 Cal. App. 3d 955, 110 Cal. Rptr. 422 (1973), the court made another clarification of LAFCOs’ duties, this time specifying that a LAFCO need only consider the criteria enumerated in the Knox-Nisbet Act when considering an annexation proposal; it need not consider contentions that the city had manipulated boundaries so that certain citizens could not vote on the proposed annexation. All these decisions confirm the fact that LAFCOs were intended by the legislature to exercise more than a merely advisory function, and that local entities are not free to evade or disregard LAFCO decisions.

LAFCO is the ‘watchdog’ of the legislature established to guard against the wasteful duplication of services that results from indiscriminate formation of new local agencies or haphazard annexation of territory to existing local agencies.

City of Ceres v. City of Modesto, supra at 553, 79 Cal. Rptr. at 172.
18. 8 Cal. 3d 247, 502 P.2d 1048, 104 Cal. Rptr. 761 (1972).
19. Id. at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.
projects and for the preparation of EIRs. The amended Act also requires that the State Office of Planning and Research adopt guidelines detailing criteria for public agencies to use in determining whether or not a proposed project may have a significant effect on the environment. Thus, the legislation has created a three-tier system: CEQA itself; the state Guidelines; and the regulations adopted by the public agencies.

Prior to Bozung, the Supreme Court had construed neither CEQA as amended in 1972, nor the Guidelines in the Administrative Code. The appellate decisions dealing with EIRs between 1972 and the Bozung case can be divided roughly into three categories: (1) those which consider the adequacy of a particular EIR; (2) those which deal with the applicability of CEQA to certain projects begun before the effective date of the 1972 amendments; and (3) those which are concerned with whether an EIR is required, regardless of the 1972 amendments. The Bozung decision falls in the last of these catego-

22. The Office of Planning and Research is a state planning agency in the Governor's office. One of its functions is to [c]oordinate, in conjunction with appropriate state, regional and local agencies, the development of objectives, criteria and procedures for the orderly evaluation and report of the impact of public and private actions on the environmental quality of the state and as a guide to the preparation of the environmental impact reports required of state local agencies

23. CAL. GOV'T CODE § 65040(g) (West Supp. 1974).
28. These cases include Plan for Arcadia, Inc. v. Arcadia City Council, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974) (shopping center and parking lot projects approved before 1972 do not require an EIR); People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974) (amendment to zoning ordinance requires an EIR); Friends of Lake Arrowhead v. San Bernardino County Bd. of Supervisors, 38 Cal. App. 3d 497, 113 Cal. Rptr. 539 (1974) (approval of tentative tract map and site development plan is entitlement for use, but if issued during moratorium created by 1972 amendments, does not require an EIR); Hixon v. County of Los Angeles, 38 Cal. App. 3d 370, 113 Cal. Rptr. 433 (1974) (street improvement completed before 1972 amendments does not require EIR, and negative declaration was proper for further street improve-
ries and is perhaps the farthest-reaching of this line of cases.

The Bozung court began its analysis by outlining the provisions of the Knox-Nisbet Act. The court noted that the statute requires LAFCOs to consider environmental factors when carrying out their two primary functions: (1) the development of spheres of influence for each local agency within the county, and (2) the approval or disapproval of annexation proposals.

The court then looked to CEQA to determine whether its provisions could be harmonized with the Knox-Nisbet Act “in such a way that the objective common to both acts, the prevention of damage to the environment, will be furthered to the greatest extent which the language of both statutes fairly permits.”

The first provision of CEQA which the court considered requires governmental agencies at all levels to “develop standards and procedures necessary to protect environmental quality.” The court found that a LAFCO is a “governmental agency”—specifically, a “local agency”—within the meaning of CEQA. The Bozung court, interpreting the CEQA section which requires all local agencies to prepare and certify an EIR on any project they intend to carry out or approve which may have a “significant effect on the environment,” held that the

ments); Concerned Citizens of Palm Desert, Inc. v. Riverside County Bd. of Supervisors, 38 Cal. App. 3d 257, 113 Cal. Rptr. 328 (1974) (zone changes and conditional use permits require an EIR if issued after 1972 amendments); County of Inyo v. Yorty, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973) (ground water extraction is an ongoing project requiring an EIR); San Francisco Planning and Urban Renewal Ass'n v. Central Permit Bureau, 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973) (permit to build high rise hotel issued before 1972 amendments).

28. In County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973), the court said, in dicta, that the approval of the land exchange agreement between the county and a private developer in connection with the planned development of the bay as a harbor would definitely require an EIR. Id. at 714, 106 Cal. Rptr. at 842. The court in City of Orange v. Valenti, 37 Cal. App. 3d 240, 112 Cal. Rptr. 379 (1974), held that the lease of a building for use as an employment insurance office by the state required an EIR because the environmental impact of this “traffic snarling, parking congesting activity, slam-bang in the middle of a quiet, single-family residential area” was definitely significant. Id. at 249, 112 Cal. Rptr. at 386. In Pacific Palisades Property Owners Ass'n v. City of Los Angeles, 42 Cal. App 3d 781, 117 Cal. Rptr. 138 (1974), the court found that changing a building from rental units to condominiums did not create a significant impact on the environment and did not require an EIR. Russian Hill Improvement Ass'n v. Board of Permit Appeals, 44 Cal. App. 3d 158, 118 Cal. Rptr. 490 (1974), held that approval of building permits for two apartment towers must be set aside when the city planning commission and board of permit appeals did not comply with the reporting requirements of CEQA.

29. 13 Cal. 3d at 273-74, 529 P.2d at 1023-24, 118 Cal. Rptr. at 255-56.

30. Id. at 274, 529 P.2d at 1024, 118 Cal. Rptr. at 256.


32. Id. § 21151.
Ventura County LAFCO's activity relating to the Bell Ranch annexation was a "project" as defined by the Guidelines: that is, an activity "directly undertaken by any public agency . . . involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use by one or more public agencies."\(^3\) Furthermore, the Guidelines specifically mention that the enactment and amendment of zoning ordinances and the adoption of local general plans are "projects."\(^3\)

The defendants contended in Bozung that LAFCO approval of an annexation proposal was more in the nature of a feasibility or planning study,\(^3\) which the Guidelines explicitly exclude from CEQA coverage.\(^3\) The court responded by analogizing annexation approval by a LAFCO to the adoption of a general plan. If the adoption of a tentative, modifiable general plan is a project, the court reasoned, a LAFCO annexation approval or disapproval, which is an irrevocable step for the public agency involved, must surely qualify.\(^3\) The court also concluded that the Bell Ranch annexation was the type of "project" that would "ultimately culminate" in environmental change.\(^\)3

The defendants next argued that preparing an EIR at this stage was "premature and wasteful, since—at least in this case—a further EIR will be required before Camarillo can actually rezone the Bell Ranch."\(^3\) The court, referring to the Guidelines, replied that "EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence the project, program or design."\(^3\) In addition, the court noted that the Guidelines stress that EIRs

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33. Id. § 21065(a), (c).
35. 13 Cal. 3d at 278-79, 529 P.2d at 1026, 118 Cal. Rptr. at 258.
37. 13 Cal. 3d at 278, 529 P.2d at 1027, 118 Cal. Rptr. at 259.
38. The court reached this conclusion by turning to its decision in Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 252 P.2d at 1026, 118 Cal. Rptr. at 258, 529 P.2d at 1027, 118 Cal. Rptr. at 259.
39. Id. at 282, 529 P.2d at 1030, 118 Cal. Rptr. at 262.
must describe the environment from both local and regional perspectives, and that knowledge of the regional setting is critical to the assessment of environment impact. Because LAFCOs are organized on a county level, they are far better equipped to make such an analysis than the particular city or local entity requesting the annexation approval; and more importantly, LAFCOs can better balance the political forces involved in annexations. Furthermore, an early EIR permits a project to be studied in its entirety before it is broken down into smaller sub-projects. Citing the Guidelines, the court concluded that where related individual projects will ultimately produce a single environmental effect, one EIR should be prepared for the whole project.

The defendants also asserted that preparing an EIR was an idle act, since a LAFCO has no power to impose conditions regulating land use upon the annexation approval and thus cannot deal with a local agency’s various plans for later development. The court stated that consideration of an EIR by the LAFCO as a regional agency is still important, since it serves to inform the general public of the project’s potential impact on the environment.

The defendants’ final argument was that the city of Camarillo, not the Ventura County LAFCO, was the lead agency involved. A "lead agency" is defined in CEQA as the agency which has the principal responsibility for carrying out or approving projects which may have a significant effect on the environment and so is responsible for preparing the EIR. The court noted that the Guidelines define a lead agency as the qualifying public agency which acts first.

The court found that in this instance the Ventura County LAFCO was the lead agency.

42. 13 Cal. 3d at 283-84, 529 P.2d at 1030-31, 118 Cal. Rptr. at 262-63.
46. Id. at 285, 529 P.2d at 1032, 118 Cal. Rptr. at 264.
48. Id. § 21165.
50. 13 Cal. 3d at 285-86, 529 P.2d at 1033, 118 Cal. Rptr. at 264 (1975).
In summary, the Bozung court utilized the language of CEQA and of the Guidelines to find that LAFCOs are local governmental agencies; that an annexation approval involving land that is to be developed is a project having a significant effect on the environment and thus within the coverage of CEQA; that LAFCOs, as regional agencies, are in a better position to prepare EIRs on annexation proposals than are the local agencies requesting the LAFCO approval; and that in such projects the LAFCO is the lead agency. 51

The response by LAFCOs and other agencies interpreting the Bozung decision indicates that the court's straightforward reading of the statutory language may have a profound effect on the operation of LAFCOs and perhaps ultimately on the process of urban development in California. 52 Although the Knox-Nisbet Act requires that LAFCOs consider environmental factors in making decisions, 53 there is no detailed procedure specified. The Knox-Nisbet Act does state that LAFCOs must initiate and make studies of existing governmental agencies, 54 but these studies need not be filed with the county, nor are they

51. The legislature reacted almost immediately to the Bozung decision by amending CEQA on July 4, 1975, to specify that LAFCOs are local agencies (as opposed to state agencies) for the purposes of CEQA. Cal. Stats. (1975), ch. 222. This act amended section 21062 of the Public Resources Code and added sections 21175 and 21176. LAFCOs must now file their EIRs with the county clerk rather than with the Secretary of Resources, as is required of state agencies.

In an analysis of the bill proposing the amendment, Cal. A.B. 335 (1975-76), by the Assembly Committee on Resources and Land Use, it was noted that since a LAFCO is a local agency, the LAFCO EIRs would receive only local government notice and review: “Because LAFCO actions determine city limits, special districts' boundaries and their formation, it is clear that they strongly influence zoning and land use and, in general, have a great ultimate effect on local environmental quality.” Unkel, Bill Analysis, A.B. 335, Assembly Committee on Resources and Land Use 4 (1975) (mimeo) (on file at SANTA CLARA L. REV.). This amendment validates any LAFCO approvals before February 7, 1975, and allows an extension to the continuance of a governmental reorganization for as long as necessary to complete the requirements of CEQA.

52. See, e.g., a recent comment by the executive director of the Ventura County LAFCO (the defendant in Bozung):

[T]he ramifications of the Bozung decision are still being discovered. In my opinion, the primary effect will be to relate LAFCO decisions much more closely with land use considerations. Impacts will deal with the depth and detail of information which is presented to LAFCO to assist in the decision-making process. . . . Of special interest may be the impact of the decision on day-to-day LAFCO activities and the manner in which our relationships appear to be changing with local cities and special districts.

Letter from Robert L. Braitman, Executive Officer of Ventura County LAFCO, to Bonnie Packer, August 21, 1975 (on file at SANTA CLARA L. REV.).


54. Id. § 54774.
necessarily geared to any particular project. The requirement that a LAFCO file an EIR with the county on any project that will have a significant effect on the environment will formalize LAFCO procedures and increase the importance of the commission in county and city affairs.\footnote{55}{A detailed analysis of the response of the 57 California LAFCOs is beyond the scope of this note and probably premature at this time. A survey conducted by the Office of Planning and Research in December, 1974 (the Bozung decision by the court of appeal was handed down in March, 1974) indicates that 29 of the 46 LAFCOs which answered the survey had already adopted procedures for EIR preparation. Most of the other LAFCOs said that such procedures were in the process of being developed. Office of Planning and Research, A Report on Local Agency Formation Commissions 24, Sept., 1975 (draft) (on file at SANTA CLARA L. REV.) [hereinafter cited as OPR].}

The Bozung decision will affect the bulk of LAFCO activities. Recent studies show that most of the proposals submitted to LAFCO are requests for annexation approvals, the majority of which are granted.\footnote{56}{\textsc{Legates}, supra note 7, at 37, 41; OPR, supra note 55, at 19.} However, the Bozung decision may modify that situation. LAFCOs have no authority to regulate land use directly,\footnote{57}{\textsc{Cal. Gov't Code} § 45790(a)(3) (West Supp. 1974).} but it has been held that agencies making decisions on projects may not ignore potentially adverse environmental consequences revealed by the project EIR.\footnote{58}{Burger v. County of Mendocino, 45 Cal. App. 3d 322, 119 Cal. Rptr. 568 (1975), held that the board of supervisors did not proceed in the manner required by law when it ignored the adverse environmental effects outlined in the EIR in making a subdivision approval.} Since LAFCOs are now required to prepare and consider an EIR on all annexation proposals, that rule will presumably affect the decision-making process. In addition, there appears to be an increasing trend for some LAFCOs to impose conditions upon annexation approvals (other than conditions which directly affect land use), indicating that LAFCOs can play more of a policing role than originally anticipated.\footnote{59}{\textsc{Legates}, supra note 7, at 42; OPR, supra note 55, at 23.} It is too early to evaluate the effect the CEQA requirements will have on this trend, but there is no doubt that a detailed EIR can provide a more concrete basis upon which LAFCOs can base their conditioned approvals.\footnote{60}{But see OPR, supra note 55, at 25. Most LAFCOs use the EIR as “one of many factors considered in deliberations on a proposal. Rarely is the report used to condition approvals or to deny proposals. An EIR is generally not a controlling factor in LAFCO decisions.” \textit{Id.}}

The Bozung court left some issues unresolved, however. It did not clearly delineate the situations in which a LAFCO should be considered a lead agency. Bozung held that the Ven-

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tura County LAFCO was the lead agency in that particular instance since it was the first agency to act on the project. The "act-first" language in the Guidelines relied on by the court appears in a section which applies only to projects to be carried out by a non-governmental entity. Therefore, the "act-first" criterion is not necessarily applicable when the entity requesting approval from a LAFCO is a city. The court does not make clear why the city should not be required to prepare an EIR at the request of the LAFCO. There are also other criteria which could be used to determine which is the lead agency, such as the capacity and resources of the entities involved, or the agency which will actually carry out the activity.

However, if a LAFCO is not designated the lead agency in annexation approvals and is therefore not the agency which prepares the EIR, then the benefit of LAFCO's unique expertise in regional matters which the Bozung court found to be so important on the EIR issue, may be lost. It is to be hoped that the Guidelines will be amended to clarify when and how the lead agency principle should be applied.

Another question not settled by the Bozung court is whether CEQA applies to LAFCOs' sphere of influence determinations. Sphere of influence plans for local agencies are tentative and analogous to the general plans of cities and counties. The Guidelines specify that general plans require EIRs, and in light of Bozung it is logical for a LAFCO to

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62. See id. (a). This is the position presently taken by the Office of Planning and Research. Letter from Preble Stolz, Director of Office of Planning and Research, to David Dorfman, Executive Director of Sonoma County LAFCO, April 10, 1975 (on file at Santa Clara L. Rev.) [hereinafter cited as Stolz].
63. See Resources Agency of California, Bozung v. LAFCO of Ventura County in California EIR Monitor 4-5 (April 8, 1975) [hereinafter cited as Resources Agency].
64. Cal. Admin. Code tit. 14, § 15065.5(a) (1975). The Office of Planning and Research found that in general the LAFCO was the lead agency and responsible for preparing impact reports on proposals from citizen's groups. However, on proposals from governmental agencies, the proposing agency was the lead agency and thus responsible for EIRs. OPR, supra note 55, at 24-25. This reflects the Guidelines criteria for determining which is the lead agency, rather than the Bozung "act-first" test.
66. See, e.g., Stolz, supra note 62.
67. Seneker, supra note 20, at 168-73, explains the logic of the applicability of CEQA to sphere of influence determinations.
69. Seneker, supra note 20, at 169-73.
presume that an EIR would be required for sphere of influence determinations as well. 71

Land use planning in California operates on a principle of local autonomy rather than on a regional basis. 72 Commentators have suggested that LAFCOs function as regional commissions with regard to land use planning within a county 73—a

71. In a survey conducted by the San Mateo County LAFCO, 53 LAFCOs were asked if they thought that sphere of influence determinations require an EIR. Nine answered in the affirmative. However, the answers to whether an EIR would be necessary for sphere of influence determinations were more complex. Ten said positively yes; 22 said no; but 15 indicated that EIRs would be necessary depending on the particular situation. San Mateo County LAFCO Survey on LAFCOs, Jan., 1975 (on file at SANTA CLARA L. REV.). Thus, it appears that 25 LAFCOs see CEQA as applying not only to annexation procedures, as a narrow reading of Bozung would indicate, but that it could apply to sphere of influence determinations as well.

San Diego County LAFCO, one of the more innovative commissions, has instituted a procedure whereby it combines the EIR with the sphere of influence study and produces a single document designed for multiple applications. This document is known as the Master EIR. Each subsequent proposal is tested against the Master EIR for conformance or nonconformance. As the Master EIR includes a system for updating its data, no new EIR is prepared for later projects. Thus, the Master EIR serves as the basic environmental review for LAFCO decisions and could also be used by a city or special district in drafting proposals to LAFCO. Memorandum from Michael Nieder- man, Environmental Management Coordinator of San Diego County LAFCO, to Cities Advisory Committee, April 2, 1975 (on file at SANTA CLARA L. REV.). The San Diego LAFCO finds support for the Master EIR approach in Bozung: “[T]here is nothing that prevents the local agency, in an appropriate case, from using the EIR prepared by LAFCO, suitably supplemented, as the basis for its decision-making process.” Id., citing Bozung v. LAFCO of Ventura County, 13 Cal. 3d 263, 286, 529 P.2d 1017, 1033, 118 Cal. Rptr. 249, 265 (1975).

The San Diego County LAFCO is also developing a Master EIR process in relation to its urban service areas. Broderson, CEQA and the Control of Urban Sprawl in Santa Clara County, California 71-97 (June, 1975) (Rep. EEP-51, Stanford University) (on file at SANTA CLARA L. REV.).

72. See Marks & Tabor, Prospects for Regional Planning in California, 4 PAC. L.J. 117 (1973) [hereinafter cited as Marks & Tabor]; Perry, The Local “General Plan” in California, 9 SAN DIEGO L. REV. 1 (1971); Seneker, supra note 20, at 183-84.

73. LEGATES, supra note 7, at 106-07, indicates that the planning function of LAFCOs is important but could be enhanced by the development of more meaningful standards and by the creation of a separate governmental services master plan for each county. “LAFCOs have obtained a slippery hold on general planning for the county as a region.” Goldbach, Boundary Change in California: LAFCOs 50 (1970), quoted in Marks & Tabor, supra note 72, at 118 n.3. See also OPR, supra note 55, at 2-3:

The decisions of LAFCO inherently affect the plans and future actions of local governments. Although the commissions are specifically prohibited from making decisions concerning land uses, paradoxically their decisions on governmental structure and the provision of services are, nevertheless, important planning decisions. In some counties the LAFCO is also developing a role as coordinator of planning decisions among local governments. These are roles that were not originally contemplated for LAFCO, but it is the only agency in a position to effectively serve these functions for local governments.
position that the *Bozung* court seems to support with its determination that LAFCOs are better qualified than other local agencies to assess a project from both a local and regional perspective. While prior court decisions involving CEQA dealt with projects of individual counties, cities, or districts, 74 *Bozung* is the first judicial determination that the legislature intended to include regional agencies under CEQA. The Guidelines, with their clear regional emphasis, can now be applied to any regional body having jurisdiction over the areas in which a project covered by CEQA is located. 75

*Bonnie Packer*

74. See note 16 supra.
75. See Seneker, *supra* note 20, at 183.

Plaintiff Hal F. Seibert maintained a revolving credit account with defendant Sears, Roebuck & Co., which he used for occasional credit purchases paid off in monthly installments. To compute the finance charge for this service, the defendant used the “previous balance” method. Plaintiff alleged that defendant’s use of the previous balance method to compute finance charges on its revolving credit accounts violated the Unruh Act because the monthly charge thus billed and collected exceeded the “outstanding balance” actually owed by the plaintiff when billed.

The Seibert case and 10 others which had originated as class actions were consolidated for appeal on the single issue of the legality of the previous balance method. The California Court of Appeal held that a retailer’s use of the previous balance computation method does not violate the Unruh Act requirement that all finance charges on installment or revolving accounts be calculated on the “outstanding balance.”

Retail installment credit in California is provided for and

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2. Id. at 10, 11, 13, 120 Cal. Rptr. at 241, 242, 243. There are four techniques recognized by the retail installment credit industry by which finance charges are calculated. (1) Previous Balance Method: charges are computed on the basis of the closing balance of the previous billing cycle, without regard for debits for new purchases or credits for payments made to the account during the current cycle. Should the sum of such credits equal or exceed the “previous balance,” however, no finance charge is assessed at all. (2) Adjusted Balance Method: charges are computed on the basis of the same balance, but less any credits granted during the current cycle. (3) Ending Balance Method: charges are computed on the same balance, but current debits and credits are both included to reflect an “adjusted” net owing, which is subject to the charges for the current cycle. (4) Average Daily Balance Method: the sum of the actual daily balances is divided by the number of days in the billing cycle, the quotient used to determine the balance for computation of finance charges. Id.
3. CAL. CIV. CODE § 1801 et seq. (West 1973) [hereinafter cited as the Unruh Act].
4. In the ordinary sense of the term, the “outstanding balance” of any account is a net total shown to be owed when debits and credits in the account are compared.
5. Id. at 13, 120 Cal. Rptr. at 242.
6. Id. at 14, 120 Cal. Rptr. at 244.
7. Id. at 18, 120 Cal. Rptr. at 246.
regulated by the Unruh Act. Installment purchase agreements are of two types: the "closed-end" contract, and the "revolving credit" account.8 Revolving credit accounts, first offered by most major California retailers in the 1950's,9 have largely replaced the closed-end contract in this state because of their convenience.10 The Seibert case involved the legality of a particular method of "finance charge" computation in the revolving credit scheme.11 Because the previous balance method has been the one predominantly used by stores since revolving credit was first established in California retail trade,12 the question of its legality is of considerable significance.

The Seibert court began its analysis by examining the various ways in which finance charges are computed in revolving credit arrangements. The court then considered the legislative history of the Unruh Act and the language of the Act itself, concluding that it was the intent of the legislature to allow use of the previous balance method in computing finance charges on revolving credit accounts.13

Upon opening a revolving credit account, the customer enters into a sequence of billing cycles14 and receives state-

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8. Id. at 10, 11, 120 Cal. Rptr. at 241, 242. Retail installment credit arrangements are of three types. (1) The "closed-end" contract, where the seller and buyer make an agreement at the time of purchase. Terms of sale are then established with amount and number of payments and a precomputed finance charge. Id. at 7, 120 Cal. Rptr. at 238. (2) The "revolving credit" account, which is established by a single instrument, providing for credit purchases without the necessity of forming a new agreement for each purchase. A certain minimum monthly payment is contracted for, but the finance charges are not precomputed as in the closed-end contract. Instead, the finance charges are calculated on the basis of the net indebtedness at the end of the accounting period. The finance charge may be avoided completely by making payment equal to or in excess of the indebtedness which is subject to such charges. Id. at 18, 120 Cal. Rptr. at 238. (3) The 30-day account, which is an agreement by which the entire net indebtedness is repaid within 30 days and is not, as such, an installment sale subject to the Unruh Act. Id. at 19, 120 Cal. Rptr. at 240. But to the extent the buyer fails to repay the net owing, the seller generally treats the account as a revolving account, and it then becomes subject to regulation according to the provisions of the Act. Id.

9. Id. at 8, 120 Cal. Rptr. at 240.

10. Id.

11. CAL. CIV. CODE § 1802.10 (West 1973) provides in pertinent part: "["Finance charge" means the amount . . . which the retail buyer contracts to pay or pays for the privilege of purchasing goods or services to be paid for by the buyer in installments."

12. 45 Cal. App. 3d at 11, 12, 120 Cal. Rptr. at 242.

13. Id. at 18, 120 Cal. Rptr. at 246.

14. CAL. CIV. CODE § 1802.17 (West 1973) defines the "billing cycle" as the time interval between regular monthly billing statement dates. A "billing cycle" need not be a named calendar month: in common practice, a given "cycle" will run from any date in one month to the corresponding date in the next one.
ments at the close of each, as required by section 1810.3 of the Act. The customer ordinarily makes periodic payments on his account at the agreed minimum rate, or in excess of that rate if he chooses. Purchases made during the cycle are debited to the account. In compliance with section 1810.3 of the Unruh Act, the statement covering the cycle will show debits incurred and credits given during that cycle, as well as a net indebtedness which will be reflected as a net closing balance.

Since the "closing balance" is also the "opening balance" of the following cycle, the statement received at the end of the next or "current" cycle will designate such balance as the "previous balance." This intercyclical progression of balances, together with continuing account activity during the "current" cycle, makes possible several different closing balances upon which the finance charge may be calculated.

Three methods are in common use in California to compute finance charges on revolving accounts. In each case, an account balance is determined at the end of the billing cycle. The methods differ only as to when the "closing balance" is computed and how it is used. The Seibert court held that the previous balance method is not fundamentally inequitable; although it was found to produce a higher aggregate finance charge than the adjusted balance method, it also produced a lower aggregate finance charge than either the ending balance method or the average daily balance method. Consequently, the court narrowed the issue. Since the variable in the three methods is the time at which the finance charge is computed and billed, the court concluded that this "disparity of timing . . . raises the question whether the Unruh Act requires the 'balance' [which will be used as the basis for the finance charge] . . . to be struck at any particular point in time."

The court determined that the time the closing balance is

15. Cal. Civ. Code § 1810.3 (West 1973) provides in pertinent part: “[T]he seller of any retail installment account shall mail or deliver to the buyer . . . a statement . . . which the buyer may retain . . . ."
16. 45 Cal. App. 3d at 9, 120 Cal. Rptr. at 240.
17. Id.
18. Id. at 10, 120 Cal. Rptr. at 241.
19. Id.
20. The methods in predominant use in California are the (a) ending balance method, (b) previous balance method, and (c) adjusted balance method. Id. at 11, 12, 120 Cal. Rptr. at 242.
21. Id. at 12 n.15, 120 Cal. Rptr. at 242 n.15.
22. Id. at 16, 120 Cal. Rptr. at 245.
to be struck depends upon the construction of section 1802.10, which requires that the finance charge be "computed on the outstanding balance from month to month." Plaintiff argued that "from month to month" modified "outstanding balance," and that the basis for the computation of finance charges was the "outstanding balance from month to month." Thus, Seibert contended, the closing balance, upon which the finance charges are assessed, must be reduced by the amount of the credits granted in the current cycle. Noting that "outstanding balances" can be measured only with reference to a particular point in time (that is, when the balance is struck), the Seibert court concluded that under the three methods of computing finance charges commonly used in California, this balance may be struck at the beginning or the end of a cycle, or be subject to daily adjustments for subsequent credits. There is nothing in the term "outstanding balances" that requires the balance to be struck at one particular point in time rather than another.

In addition, the court held that the words "from month to month" modify the verb "computed," not the term "outstanding balances." Construed this way, the Unruh Act requires only that the finance charges be calculated on a balance shown to be "outstanding" when struck at consistent monthly intervals—a procedure with which the previous balance method is consistent.

In Zachary v. R.H. Macy & Co., cited by the Seibert court, the New York Court of Appeals found that much of the difficulty surrounding the previous balance method stems from the fact that, while the outstanding balance is a true "outstanding indebtedness" when struck, the finance charge computed on this balance is deferred for one entire cycle. Acknowledging that payment of all but a small portion of the balance in the succeeding ("current") cycle may result in

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23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. 31 N.Y.2d 443, 293 N.E.2d 80 (1972). This case was also a consolidated class action dealing with the legality of the previous balance method of computing finance charges on revolving credit accounts. In reaching its decision, the Zachary court cited the trial court in Seibert, 31 N.Y.2d at 456, 293 N.E.2d at 87, and the appellate court in Seibert cited Zachary. 45 Cal. App. 3d at 17, 120 Cal. Rptr. at 245.
30. 31 N.Y.2d at 452, 293 N.E.2d at 85.
31. Id.
seemingly excessive finance charges, the Zachary court noted that the customer has between 30 and 59 days in which to avoid the finance charge altogether, depending upon the date of purchase.\(^{32}\)

The New York court in Zachary found, therefore, that the previous balance method made "sound business sense."\(^{32}\) Consumers enjoy at least one monthly billing cycle to avoid the finance charge without worrying about inflating that charge by current purchases. The retailer is free to disregard partial payments made during the current cycle—his quid pro quo for exempting current purchases—and can compute the finance charge on the basis of the previous balance.\(^{34}\)

The dissent in Zachary, emphasizing the implication of the words "outstanding balance," felt that the words meant the net total of all current debits and credits in the account.\(^{35}\) This reasoning, used by the plaintiff in Seibert, is illusory.\(^{36}\) The fact is that the "outstanding balance," as it is used in the previous balance method, is the net total of all debits and credits as of the date it is struck. Thus the finance charge billed to the customer is computed on the net amount actually owed and subject to the agreement respecting installment payments on that date.\(^{37}\)

Another source of confusion is the inherent ambiguity of the term "finance charge" as used in the Unruh Act. It is not, as the name would suggest, the equivalent of interest on a loan.

\(^{32}\) \textit{Id.} Avoidance of the finance charge is accomplished by full payment of the "previous balance." A purchase made a day after a balance is struck will not be included in the "outstanding balance" until the next balance is struck, 29 days hence. In any event, the buyer has another 30 days to avoid the charge by full payment of the "previous balance." Thus, it is possible to obtain credit services for as long as 59 days, and always for at least 30 days, without incurring a finance charge.\(^{33}\)

\(^{33}\) \textit{Id.}\(^{34}\)

\(^{34}\) \textit{Id.}\(^{35}\)

\(^{35}\) 31 N.Y.2d at 462, 293 N.E.2d at 91.

\(^{36}\) The New York Court of Appeals reversed the appellate division decision striking down the previous balance method in favor of exclusive use of the adjusted balance method, noting:

As the term implies, under the adjusted balance method, finance charges are computed upon an amount which is an adjustment to the outstanding indebtedness in the account at the close of the billing period—payments and credits made during the current billing cycle are deducted, but purchases are not added. In any month, therefore, where purchases are made, the adjusted balance does not reflect all amounts owed at the time that balance is struck; it is not an outstanding indebtedness.

\(^{37}\) 45 Cal. App. 3d at 15, 16, 120 Cal. Rptr. at 244, 245.
The Zachary court, facing the same definitional problem with a statute of nearly identical wording, noted:

Unlike interest charges, which are assessed for the "loan or forbearance of any money," service charges on retail credit sales are generally defined as charges "for the privilege of purchasing on credit," expressed as a time-price differential.38

A very similar definition is codified in section 1802.10 of the Unruh Act, which designates as a finance charge any fee imposed by the seller for the privilege of using installment payments.39 The fact that a buyer is billed for a fee computed on the amount owing at the end of the previous cycle is not inconsistent with the Act.40 The closing balance merely reflects the extent to which the buyer has chosen to utilize the installment credit service offered by the seller.

The basis of the plaintiff's complaint in Seibert was that it is unfair to charge a fee for the use of money or credit when it is in fact not owing at the time the fee is billed.41 This argument confuses the definition of the term "finance charge." A customer is not compelled to make use of installment payments. The buyer may, during the current cycle, make payments equal to or in excess of the "previous balance," in which case the finance charges are excused entirely. The customer has declined to avail himself of the privilege of making installment payments.42

If the purchaser chooses, however, to accept the available installment credit, use of the previous balance method can result in a finance charge which is greater than the balance owing when billed.43 To determine if such an apparently anomalous result was contemplated by the legislature, the Seibert court turned to the legislative history of the Unruh Act. The court noted that legislative studies which had preceeded its enactment44 indicated that the legislature as a body was aware

38. 31 N.Y.2d at 457, 293 N.E.2d at 88.
39. See note 11 supra.
40. 45 Cal. App. 3d at 17, 120 Cal. Rptr. at 245.
41. Id. at 12, 13, 120 Cal. Rptr. at 243.
42. Id. at 15, 16, 120 Cal. Rptr. at 244, 245.
43. Id. at 12, 13, 120 Cal. Rptr. at 243.
44. Id. at 17, 120 Cal. Rptr. at 246. See Hearings before the Subcommittee on Lending and Fiscal Agencies of the Assembly Interim Committee on Finance and Insurance, 10 Assembly Interim Comm. R. No. 19 (1957-58).
that the previous balance method was in common use. The court concluded, therefore, that the language of section 1810.2 of the Act, drafted with full knowledge of the prevailing use of the previous balance method, must be construed as descriptive only, and consequently not prohibitive of the previous balance method.

In later hearings on a 1963 bill designed to ban use of the previous balance method, a legislative committee considering revisions of the Unruh Act decided that because complaints about the method were infrequent and involved small amounts, consumer protection would best be served by forcing the seller to disclose the method used, not by changing the law to require the use of one method to the exclusion of another.

It is clear from the history of the Unruh Act that the legislature has been satisfied with the previous balance method of calculating finance charges on revolving credit accounts, or at least has chosen not to prohibit its use. The Seibert court concluded that on the basis of this evidence the Act did permit the use of the previous balance method in the retail installment trade.

45. 45 Cal. App. 3d at 18, 120 Cal. Rptr. at 246.
46. Id.
47. Id. at 18, 19, 120 Cal. Rptr. at 247. A bill designed to prohibit use of the previous balance method has been introduced in every Assembly session from 1963 to 1972 and has been defeated each time. Id.
48. Id. at 17, 120 Cal. Rptr. at 247. For a recent case holding the previous balance method inconsistent with legislative intent, see Haas v. Pittsburgh Nat'l Bank, 4 CCH CONSUMER CREDIT GUIDE ¶ 98,532 (3d Cir., Sept. 25, 1975), where the court emphasized the specific language of the Pennsylvania Sales Act:

Under the disclosure provisions, a statement must be sent to the buyer “as of the end of each monthly period.” This statement must disclose (a) the balance due at the beginning of the monthly period, (b) the amount of purchases during the month, (c) payments and credits on behalf of the buyer during the monthly period, and (d) the amount of the service charge computed on the “unpaid balance.” Although this sequence need not be followed in the statement, we believe the order in which the items appear in the statute is indicative of the meaning attributed to them by the legislature. What the legislature seems to have intended is a computation which takes the beginning balance, adds purchases, subtracts payments and other credits, then arrives at the “unpaid balance” “as of the end of [the] monthly period.” The service charge is calculated on the basis of this “unpaid balance.” We believe the disclosure section of the Sales Act is inconsistent with the use of the previous balance method.

Id., at 87,998. The court also noted that “[d]efendants rely . . . particularly upon Seibert v. Sears, Roebuck & Co., which interprets the California . . . Unruh Act. The California statute, however, is quite different from the Pennsylvania Sales Act.” Id., at 87,999 (emphasis added).
This conclusion is supported by the language in other provisions of the Act. For instance, section 1810.1 requires the retailer to disclose "[t]he method of determining the balance upon which a finance charge may be imposed." The language of the section clearly indicates that alternative methods of calculation are contemplated.49

An important implication of the Seibert decision is that California, like New York in Zachary, is not prepared to further the cause of a limited class of consumers at the expense of all consumers. The previous balance method sometimes produces greater charges than the adjusted balance method. But it also produces lower charges than either the ending balance or the average balance methods.50 It is noteworthy that the previous balance method occupies a middle-ground: its use is consistently advantageous to neither buyer nor seller. To the extent that the buyer carries a large credit balance, the seller is favored; but to the extent the buyer repays his previous balance, he benefits.

Furthermore, the facts of commercial life suggest that the Seibert court's decision to sanction the previous balance method will prove more beneficial for consumers than a decision requiring the use of the adjusted balance method exclusively. The revenues generated by credit sales are not in the form of cash but of accounts receivable.51 Deferred revenues are obviously not available to cover the seller's costs of doing business. The seller must therefore obtain financing in order to maintain adequate inventories and pay his current operating expenses. Since his needs will vary with the volume of credit sales and the repayment habits of his customers, the retailer often obtains convenient short-term financing by selling, or discounting, his receivables to banks or specialized sales finance companies.52 If use of the adjusted balance method were

49. 45 Cal. App. 3d at 21, 120 Cal. Rptr. at 248. The court noted:
A pervasive theme in the... plaintiff's briefs is that the Unruh Act must be liberally construed in favor of the consumers it is designed to protect; and this rule requires us to construe the Act as permitting the adjusted balance method only, to the exclusion of all others, because that method produces the lowest consumer cost.

Id.

50. Id. at 12 n.15, 120 Cal. Rptr. at 242 n.15.

51. Black's Law Dictionary 36 (4th rev. ed. 1968). Defines "accounts receivable" as "contract obligations owing to a person on open account; installment balances."

required, the average retail seller would face significant problems beyond the mere fact of collecting less finance charge revenue.

First, the outstanding balance upon which the service charge is computed would be subject to constant downward adjustment as the customer made subsequent part payments. Thus the amount of the seller's receivables from revolving credit sales would be uncertain, making it virtually impossible for him to obtain vital financing by discounting those accounts receivable. This would seriously impair the seller's day-to-day operations and force him to employ alternate and more costly sources of financing.

In addition, the increased bookkeeping required with a mandatory adjusted balance method would conceivably raise the seller's credit costs dramatically. When added to higher financing costs and/or the costs of carrying his own credit, overall financing costs to the seller clearly would skyrocket. At the same time, the revenue derived from finance charges would decrease. The commercial community, with an eye on rising costs, would probably choose to increase prices rather than to limit the availability of credit and price increases would be imposed on cash buyers as well as users of installment credit. To the extent that such increases would result from an attempt to benefit users of installment credit, they would work an inequity on the cash buyer. Thus the Seibert court, by finding the previous balance method of computing finance charges on revolving credit accounts permissible, refused to favor the users of revolving credit at the expense of consumers as a whole. Rejecting Seibert's assertion that barring the previous balance method would produce consumer benefits, the court noted that the plaintiff "propose[s] to win a battle but ... could very well lose the war."

The Seibert decision recognizes that where the legislative intent is found to be consistent with its provisions, the Unruh
Act will be strictly construed. The mere fact that one method of computing finance charges produces higher charges than another method is not enough to cause the court to intervene in the function of the legislature, absent a clear showing of unfairness to consumers as a whole.

*Thomas Edward Jensen*
On the night of June 3, 1970, two deputy sheriffs arrested Michael Brisendine and three companions for having an illegal open campfire in a section of the San Bernadino National Forest that had been designated a "high fire hazard area." Before escorting the youths out of the restricted area, the deputies conducted a weapons search of each suspect's person and effects. One officer searched inside Brisendine's knapsack after determining that its outer layer was too solid to permit him to ascertain whether the interior contained weapons. The search of the knapsack yielded a quantity of marijuana within an opaque plastic bottle as well as a number of tablets wrapped in tinfoil and enclosed in envelopes.

Brisendine was charged with possession of marijuana and possession of a restricted dangerous drug. A motion to suppress the evidence as the product of an illegal search and seizure was denied. After an unsuccessful petition for a writ of mandamus, Brisendine's case was submitted to the trial court on the transcript of the preliminary hearing. He was found guilty on both counts and placed on probation. The case reached the California Supreme Court on appeal from the order granting probation.

The supreme court agreed with the trial court that the search of both Brisendine and his knapsack had been justified by a need to protect the arresting officers from possible attack during the prolonged close contact with the suspects. How-
ever, the supreme court concluded that the officers had exceeded the permissible scope of the search by examining the contents of the bottle and the envelopes, neither of which could reasonably have contained weapons,\(^ {12}\) The court found that the illegally seized evidence had improperly been admitted, and reversed.\(^ {13}\)

In reaching this result, the *Brisendine* court rejected as not dispositive the United States Supreme Court decision, *United States v. Robinson*.\(^ {14}\) In *Robinson*, the Supreme Court held that under the fourth amendment a custodial traffic arrest based on probable cause provided in and of itself a sufficient justification for a full search of the person of the arrestee without a warrant\(^ {15}\)—an interpretation the California court had previously rejected. Basing its decision on the "more exacting" standard of California's prior rule on searches incident to a traffic arrest,\(^ {16}\) and further determined that the rationale of the

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12. *Id.* at 544-45, 531 P.2d at 1109-10, 119 Cal. Rptr. at 325-26.
13. *Id.* at 545, 531 P.2d at 1110, 119 Cal. Rptr. at 326.
14. 414 U.S. 218 (1973); *see People v. Brisendine*, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1110, 119 Cal. Rptr. 315, 326 (1975). The *Brisendine* court also rejected *Gustafson v. Florida*, 414 U.S. 206 (1973), a decision which was argued together with *Robinson*. "For the purposes of our discussion there do not appear to be significant distinctions between the two cases, and accordingly references to *Robinson* should be taken to apply to *Gustafson* also." *People v. Brisendine*, 13 Cal. 3d 528, 546 n.13, 531 P.2d 1099, 1110 n.13, 119 Cal. Rptr. 315, 326 n.13 (1975).
15. 414 U.S. at 235. The California court noted that the United States Supreme Court never defined the term "custodial arrest" in the *Robinson* opinion. 13 Cal. 3d at 546 n.14, 531 P.2d at 1110 n.14, 119 Cal. Rptr. at 326 n.14. The only indication of the term's meaning is found in a footnote in which the court quoted a policeman's testimony that a full custodial arrest is one where an officer "would arrest a subject and subsequently transport him to a police facility for booking." *United States v. Robinson*, 414 U.S. 221 n.2 (1973). The opinion failed to reveal whether the arrest must be one requiring that the defendant be booked before it is considered a full custodial arrest. Neither did it indicate whether Robinson was himself booked. 13 Cal. 3d at 546 n.14, 531 P.2d at 1110 n.14, 119 Cal. Rptr. at 326 n.14. Within the opinion of the court of appeals, however, there is a reference to Robinson's ability to post bond and avoid the process of booking. *Id.*, citing *United States v. Robinson*, 471 F.2d 1082, 1102-03 (1972). Thus, the California court assumed that this option was open to him. 13 Cal. 3d at 546 n.14, 531 P.2d at 1110 n.14, 119 Cal. Rptr. at 326 n.14.
traffic arrest rule could properly be applied to non-traffic offenses as well. The court held that if the offense for which an arrest is made does not require booking or incarceration, a full search or a weapons search is justified only where the arresting officer can point to "specific and articulable facts" necessitating the intrusion.\(^7\)

Prior to Brisendine, California law on the validity of a full search incident to a custodial traffic arrest was uncertain.\(^18\) The California rules requiring independent justification for a full search were established in People v. Superior Court (Kiefer),\(^19\) and People v. Superior Court (Simon).\(^20\) If based on minimum standards required by the California Constitution, Kiefer and Simon remained good law;\(^21\) if based on the fourth amendment,
the higher standards set by the California Supreme Court would have had to yield to the Robinson rule. In rejecting

Several United States Supreme Court decisions were cited, including Chimel v. California, 395 U.S. 752 (1969), Terry v. Ohio, 392 U.S. 1 (1968), and Warden v. Hayden, 387 U.S. 294 (1967). 3 Cal. 3d at 813-14, 828-29, 831, 478 P.2d at 452, 463, 465, 91 Cal. Rptr. at 732, 743, 745. On the other hand, the Kiefer case also drew support from People v. Cruz, 61 Cal. 2d 861, 396 P.2d 889, 40 Cal. Rptr. 841 (1964) and People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955), two California cases which conceivably could have relied on the California Constitution. 3 Cal. 3d at 813, 478 P.2d at 452, 91 Cal. Rptr. at 732 (1970). Further, in People v. Gale, 9 Cal. 3d 788, 794-95, 511 P.2d 1204, 1209, 108 Cal. Rptr. 852, 857 (1973), a 1973 auto search decision, the California Supreme Court stated that the Kiefer opinion had been based in part on article I, section 19, of the California Constitution.

The foundation of Simon is equally unclear. Like Kiefer, Simon discussed the fourth amendment and relied on Supreme Court cases, e.g., Terry v. Ohio, 392 U.S. 1 (1968); and Sibron v. New York, 392 U.S. 40 (1968). 7 Cal. 3d at 186, 197 n.10, 198, 203-06, 210, 496 P.2d 1205, 1213 n.10, 1214, 1217-22, 101 Cal. Rptr. 837, 845 n.10, 846, 849-54. Another clue to Simon's basis is found in the court's discussion of People v. Graves, 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968). The Simon majority observed that the Graves court had misconstrued Terry v. Ohio, 392 U.S. 1 (1968), by applying it to traffic arrest cases. People v. Superior Court, 7 Cal. 3d 186, 204, 496 P.2d 1205, 1218, 101 Cal. Rptr. 837, 850 (1972). The Simon decision applied its interpretation of Terry's reasoning to its own fact situation, thus indicating that it was applying Terry's use of the fourth amendment. Id. at 206, 496 P.2d at 1219-20, 101 Cal. Rptr. at 851-52.

Again, however, the decision may also have been founded on the California Constitution. The opinion drew case support from various California decisions, any of which may have been based on the Constitution. See, e.g., People v. Mercurio, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970); People v. Hana, 7 Cal. App. 3d 664, 86 Cal. Rptr. 72 (1970); People v. Figueroa, 268 Cal. App. 2d 721, 74 Cal. Rptr. 74 (1969). People v. Superior Court (Simon), 7 Cal. 3d at 207, 496 P.2d at 1220, 101 Cal. Rptr. at 852. None of the cases cited states that it is founded on the California Constitution, but the California Supreme Court in People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), vacated and remanded sub nom. California v. Krivda, 409 U.S. 33 (1972), opinion reinstated, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973), cert. denied, 412 U.S. 33 (1973), held that it had relied on the California Constitution in reaching its conclusion despite the fact that its original opinion gave no indication that this was the case. 8 Cal. 3d 623-24, 504 P.2d 457, 105 Cal. Rptr. 521 (1973). Further, the supreme court later stated in People v. Triggs, 8 Cal. 3d 884, 516 P.2d 232, 106 Cal. Rptr. 408 (1973), that although it relied on both the California and the United States Constitutions in reaching its decision, it referred for the sake of convenience to state and federal constitutional guarantees against unreasonable searches and seizures “under the rubric of 'Fourth Amendment' rights . . . .” Id. at 892 n.5, 506 P.2d at 237 n.5, 106 Cal. Rptr. at 413 n.5. Consequently, it is possible that the Simon court may have relied on the California Constitution even though the opinion only mentioned “fourth amendment” rights.

In People v. McKinnon, 7 Cal. 3d 899, 910, 500 P.2d 1097, 1104, 103 Cal. Rptr. 897, 904 (1972), the California Supreme Court held that Chambers v. Maroney, 399 U.S. 42 (1970), obliged it to overrule an older California case, People v. McGrew, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969). The court noted that Chambers provided constitutional interpretations contrary to the reasoning in McGrew and concluded that the foundation of the McGrew opinion was thus undermined. It seemed to concede that the McGrew opinion was based on the United States Constitution. People v. McKinnon, supra at 910, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
Robinson, the Brisendine court not only reaffirmed California's rules regarding searches incident to arrest, but reexamined their basis and scope in order to determine whether they could rationally be applied to a citation-arrest situation.

Initially, the supreme court upheld the trial court's finding of fact that the officer's search of Brisendine was a weapons search and not "merely a facade . . . for an exploratory search." Consequently, the primary issue for the court to resolve was whether there was justification for a weapons search. The court held that a pat-down was appropriate because the arresting officers were required by the exigencies of the situation to travel in close proximity with the arrestees; the danger to the officer reasonably warranted such a relatively minor intrusion.

Having thus found that the weapons search was justified at its inception, the court also had to determine whether the search exceeded in intensity and scope the legitimate purpose for which it was authorized. The court found, first, that a pat-down search of the defendant's knapsack was authorized to insure the protection of the officers; and second, that a search of the interior of the knapsack was proper where "the pat-down of the exterior proved insufficient to allay the fear that the interior might contain a weapon." However, the majority rejected as unauthorized the search of a bottle and envelopes found within the knapsack: "No one can rationally maintain that such actions were necessary for [the officers'] protection." To exceed a pat-down without first discovering an object which feels reasonably like a knife, gun, or club, the court ruled that an officer

must be able to point to specific articulable facts which reasonably support a suspicion that the particular subject is armed with an atypical weapon which would feel like the object felt during the pat-down.

Throughout its analysis, the supreme court consistently

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23. 13 Cal. 3d at 534-35, 531 P.2d at 1102, 119 Cal. Rptr. at 318.
24. Id. at 537, 531 P.2d at 1104, 119 Cal. Rptr. at 320.
25. Id.
26. Id. at 538, 531 P.2d at 1105, 119 Cal. Rptr. at 321.
27. Id. at 541, 531 P.2d at 1107, 119 Cal. Rptr. at 323.
28. Id. at 543, 531 P.2d at 1108, 119 Cal. Rptr. at 324.
29. Id. at 544, 531 P.2d at 1109, 119 Cal. Rptr. at 325.
30. Id. at 543-44, 531 P.2d at 1108, 119 Cal. Rptr. at 324; see id. at 547-48 n.15, 531 P.2d at 1111 n.15, 119 Cal. Rptr. 327 n.15.
treated the *Brisendine* fact pattern as analogous to the traffic arrest situations of *Kiefer* and *Simon*. Thus in considering the justifications offered for the weapons search, the majority concluded that the situation resembled a traffic arrest where the arresting officer is required to bring the offender immediately before a magistrate. The officers in *Brisendine* were forced to travel in close proximity with the suspect during the physically demanding journey from the illegal campsite; in *Simon*, the arresting officers rode in the police car with the traffic offender to the courthouse. In both cases, the court reasoned, it was difficult for the arresting officers to continually watch a suspect who might have concealed weapons in his clothing.

The *Simon* court, skeptical of the average traffic offender's propensity for violence, had concluded that a weapons search incident to a traffic arrest was unwarranted except upon independent probable cause. The *Brisendine* court, however, adopted Just.

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31. In *Kiefer*, the supreme court had noted that the historical justification for a warrantless search incident to arrest was inappropriate when applied to a traffic citation. 3 Cal. 3d at 812, 814-15, 829, 478 P.2d at 451, 463-64, 91 Cal. Rptr. at 731, 743-44. Historically, searches incident to arrest had been justified on the grounds that they were needed to uncover (1) evidence or fruits of the crime, (2) contraband, or (3) weapons which might be used to effect an escape or harm the arresting officer. *Id.* at 812, 478 P.2d at 451, 91 Cal. Rptr. at 731. The *Kiefer* court pointed out that traffic violations produced no evidence capable of being carried on the suspect's person or in his vehicle. *Id.* at 813, 478 P.2d at 451, 91 Cal. Rptr. at 731. The court also noted that traffic offenses fail to provide the arresting officer with grounds on which to base a suspicion that the suspect or his vehicle were concealing contraband. *Id.* at 814-15, 478 P.2d at 452-53, 91 Cal. Rptr. at 732-33. Similarly, the majority concluded that by reason of the violations, the officer has no cause to suspect that a traffic violator will be armed: traffic arrestees are peaceful the vast majority of the time. *Id.* at 815, 829, 478 P.2d at 453, 463-64, 91 Cal. Rptr. at 733, 743-44.

On the basis of this reasoning, the *Kiefer* court held that a search of the traffic arrestee's vehicle was impermissible incident to a traffic arrest except upon independent probable cause. *Id.* at 829, 478 P.2d at 464, 91 Cal. Rptr. at 744. Two years later, the supreme court used the same reasoning in the *Simon* decision to disallow a full search of an arrestee's person. *People v. Superior Court*, 7 Cal. 3d 186, 201-02, 205-06, 496 P.2d 1205, 1216-17, 1219, 101 Cal. Rptr. 837, 848-49, 851 (1972).

32. 13 Cal. 3d at 536-37, 531 P.2d at 1103-04, 119 Cal. Rptr. at 319-20. The Vehicle Code categories of arrest discussed in *Simon* include three different types of offenders:

1. those who are merely cited and immediately released,
2. those who may or must be taken before a magistrate and given the option to post bond, and
3. those who are arrested for felonies and booked according to the general Penal Code provisions on felony arrests.

*Id.* at 536, 531 P.2d at 1103-04, 119 Cal. Rptr. at 319-20 (footnotes omitted).

33. *Id.* at 537-38, 531 P.2d at 1104-05, 119 Cal. Rptr. at 320-21.

34. *Id.*

tice Wright's concurrence in *Simon* and held that the potential
danger to the officer during prolonged exposure to the suspect
was a valid justification for a pat-down weapons search.  

The court noted that hard and fast rules for determining
the validity of a pat-down incident to a citable arrest were
inadequate and unworkable. The validity of each search, it
held, depends on its reasonableness, and the determination
should be made on a case by case basis, weighing the suspect's
interest in protecting his person and effects from a search
against the officer's interest in his self-protection. Searches are
reasonable only where the need to search outweighs the inva-
sion of privacy the search entails.  

In the court's view, the same considerations that justified
the search of Brisendine's body also validated a search of his
knapsack. It based this conclusion on two considerations.
First, the knapsack had to be removed from the restricted area;
second, there was no reasonable way for the officers to withhold
the pack from Brisendine during the journey. The court rea-
soned that the potential danger to the officer was the same
whether a weapon was secreted on the suspect's person or
within the belongings he was carrying. Under the circumstanc-
es, the knapsack was in effect an extension of the suspect's
person. 

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36. People v. Brisendine, 13 Cal. 3d at 528, 537, 531 P.2d at 1099, 1104, 119 Cal.
Rptr. 315, 320 (1975).  
37. Id. at 538, 531 P.2d at 1104-05, 119 Cal. Rptr. at 320-21.  
38. Id., citing *Terry v. Ohio*, 392 U.S. 1 (1968). In concluding that the officers
acted reasonably in searching the defendant Brisendine, the court appears to have
been influenced by a number of factors: (1) the trail from the campsite leading out of
the restricted area of the forest was so narrow and primitive that travelers were forced
to use their hands in some places and occasionally could only pass by one at a time;
(2) the journey back took almost two hours, much of it in darkness after the batteries
in the officers' flashlights failed; (3) the hike was so demanding that traversing some
parts of the terrain required the cooperation of all six hikers; (4) the officers had no
idea where each of the suspects were during most of the trip back because the hikers
traveled in staggered groups; (5) the suspects carried no identification and the officers
did not know anything about their background; (6) the officers did not know whether
the suspects were wanted personnel who might have used the journey from the camp-
site for an opportunity to escape; and (7) the arrest and subsequent journey occurred
very late at night. 13 Cal. 3d at 533, 535, 537 n.8, 543, 531 P.2d at 1101, 1103, 1104
n.8, 1108, 119 Cal. Rptr. at 317, 319, 320 n.8, 324.  
These extreme conditions raise the possibility that only similarly extreme condi-
tions will cause a weapons search to be reasonable. However, the court also stated that
a ride in a patrol car is justification per se for a weapons search. Id. at 548 n.15, 531
P.2d at 1111 n.15, 119 Cal. Rptr. at 327 n.15.  
39. 13 Cal. 3d at 540, 531 P.2d at 1106, 119 Cal. Rptr. at 322.  
40. Id.  
41. Id. at 540-41, 531 P.2d at 1106-07, 119 Cal. Rptr. at 322-23. This point is also
Since the court accepted the illegality of the campsite as justification for requiring the knapsack to be removed, it avoided having to make a definitive ruling on the possible alternative of leaving the knapsack at the campsite unsearched. There are indications in the opinion, however, that had it been feasible, Brisendine might have been allowed to avoid the search of the pack by agreeing to let it stay behind. The reasoning used throughout the case supports this position. The court's justification for the search was limited to the need to protect the officers. Because suspects have easy access to weapons hidden in their clothing, they must be searched to eliminate this possible danger. It follows naturally that if a suspect cannot reach his effects in order to secure hidden weapons, there is no potential danger to the arresting officers. Hence, there would be no justification to search a suspect's effects.

A second indication that leaving the pack behind might have removed justification for its search was the court's apparent willingness to extend the rule developed in *People v. Miller* and *Mozzetti v. Superior Court*, two so-called "car inventory cases." *Miller* and *Mozzetti* stand for the proposition that the effects of an individual arrested on an outstanding traffic warrant may be left uninvetoried within his car. The
Brisendine court could have chosen to give the Miller-Mozzetti cases a narrow interpretation and limited their application to car inventory cases. Instead, the court cited the cases to counter the prosecution's argument that the pack could not have been left at the campsite because of the danger of theft.\(^7\) This suggests that a search might be prohibited if circumstances were such that the arrestee's personal effects could be left at the site of the arrest.\(^8\)

The alternative possibility that officers should have been required to withhold the pack from the suspect during the journey back without searching it was left similarly unclear. The court concluded that there were no “ready means” of limiting Brisendine's access to the pack.\(^9\) Apparently, the majority did not believe that the officers had a duty to act as “porters” for Brisendine's knapsack and camping gear simply to avoid having cause to search it.\(^9\) However, if the pack could have been withheld with only a reasonable amount of effort, the court

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\(^7\) Miller relied on the reasoning of Mozetti. 7 Cal. 3d at 223-24, 496 P.2d at 1231, 101 Cal. Rptr. at 863. The court merely applied the Mozetti principle to cover car inventory searches incident to an outstanding traffic warrant as well as to the on-the-scene inventory search of a car before it is towed away pursuant to statute. Id.

\(^8\) Id. at 540-41, 531 P.2d at 1106-07, 119 Cal. Rptr. at 322-23. The court did not indicate that it attached significance to the strong likelihood that the arrestee's belongings were permitted to remain uninvntoried in the cars in Mozetti and Miller because the cars involved afforded them a reasonable amount of protection. Consequently, it is not clear whether the Brisendine majority viewed those cases as standing for that proposition, or whether they construed the cases as supporting the position that a defendant can leave his belongings in an area where they are not protected as long as he is willing to accept the risk of theft.

Obviously, if an arrestee's belongings are reasonably secure from theft, one has a stronger argument that they should be left behind unsearched. This rationale is most consistent with the reasoning of Mozetti and Miller and would not represent a radical break from the supreme court's previous position.

\(^9\) The court stated:

If the defendant had been camped legally and it was necessary to temporarily remove him from the area for a citation unrelated to his presence in the forest we might well be persuaded that he could demand his effects remain at the camp, unsearched, pending his return.

13 Cal. 3d at 541, 531 P.2d at 1107, 119 Cal. Rptr. at 323.

\(^9\) Id. at 540, 531 P.2d at 1106, 119 Cal. Rptr. at 322.

\(^1\) Justice Burke agreed that this is the position the majority took. Id. at 558, 531 P.2d at 1118, 119 Cal. Rptr. at 334.
conceivably might have decided that the officers' search was unjustified.

The court reiterated, however, the permissible scope of a search is "determined in the light of the rationale which originally justified the search";\(^5\) when the justification is the protection of the arresting officer, the search must be strictly limited to weapons.\(^5\) In this regard, the court considered the rule stated in *People v. Collins*\(^3\) that any object which might reasonably contain a weapon can be inspected by police officers to determine whether a weapon is contained therein.\(^5\) Conversely, *Collins* also held that an object which could not reasonably contain a weapon may not be subjected to further examination.\(^5\) Accordingly, the *Brisendine* court found the officers' search into the plastic bottle and envelope unwarranted, as neither object was large enough to contain a typical weapon.\(^5\)

The supreme court also followed the *Collins* case in rejecting the argument that the need to search for atypical weapons\(^5\) justifies a greater intrusion. In the court's view there was no reason to suspect the presence of atypical weapons. Hence, the scope of the search could not be expanded to include a search for them, except upon independent probable cause.\(^5\) Apparently, the court concluded that an extended search would constitute an intrusion on the arrestee's privacy greater than the need to protect the officer from atypical weapons.

The *Brisendine* decision indicates that the California Supreme Court has deliberately avoided adopting the United State Supreme Court's rigid rule regarding searches incident

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51. *Id.* at 542, 531 P.2d at 1108, 119 Cal. Rptr. at 324.
52. *Id.* at 542, 531 P.2d at 1107, 119 Cal. Rptr. at 323.
55. *Id.*
56. *Id.*
57. The term "atypical weapons" is never defined in the *Brisendine* or the *Collins* opinions. From the context of the supreme court's use of the term, however, it appears that it refers to instrumentalities which may be used as weapons but which would not feel like typical weapons if encountered by an officer during a pat-down. People v. Brisendine, 13 Cal. 3d 528, 543-44, 531 P.2d 1099, 1108-09, 119 Cal. Rptr. 315, 324-25 (1975); People v. Collins, 1 Cal. 3d 658, 663, 463 P.2d 403, 406, 83 Cal. Rptr. 179, 182 (1970). According to the *Collins* decision, an example of an atypical weapon is razor blades concealed in a handkerchief. 1 Cal. 3d at 663, 463 P.2d at 406, 83 Cal. Rptr. at 182. *Brisendine* talks about a rubber water pistol filled with acid as if it is an atypical weapon. 13 Cal. 3d at 543, 531 P.2d at 1108, 119 Cal. Rptr. at 324.
58. *Id.* at 543-44, 531 P.2d at 1108-09, 119 Cal. Rptr. at 324-25.
to custodial arrest. Whereas the United States Supreme Court held that a full search is always permissible if incident to custodial arrest, the California Supreme Court, relying on the California Constitution, continues to determine the reasonableness of particular types of custodial-arrest searches in light of the practical considerations which justify them. Where the nature of the offense suggests no justification for a particular type of search, the court appears willing to rule categorically that such searches are unreasonable as a class. But according to Brisendine, arrests involving unusual circumstances must be judged individually.

Only by examining the reasonableness of searches incident to arrest on a case-by-case basis can the court afford arrestees the amount of protection against unreasonable searches required by the California Constitution while assuring the arresting officer of adequate protection from potential danger. California’s flexible approach insures that individuals arrested will be forced to submit to a search where the circumstances of the particular arrest warrant it.

Paul H. Miller

59. Since Brisendine was handed down, the California Supreme Court has twice rejected Robinson. See People v. Longwill, 14 Cal. 3d 943, 951-52, 538 P.2d 753, 758, 123 Cal. Rptr. 297, 302 (1975); People v. Norman, 14 Cal. 3d 929, 938-39, 538 P.2d 237, 244, 123 Cal. Rptr. 109, 116 (1975). In both cases, the court refused to recognize the rigid Robinson view that a full search was justified by the fact of the arrest itself. In Norman, the defendant was arrested for several traffic offenses. Because one of these violations was evading arrest, the officers at their option could have brought the defendant without booking him directly before the nearest or most accessible magistrate (the Simon situation). Alternatively, they could have released him after presenting him with a written notice to appear (a citation) and obtaining his promise that he would do so. Id. at 943, 538 P.2d at 241, 123 Cal. Rptr. at 113. Though rejecting both a full search and a weapons search incident to arrest, the court did hold that a ride in the patrol car is justification per se for a weapons search. Id. at 938-39, 538 P.2d at 244-45, 123 Cal. Rptr. at 116-17; see People v. Brisendine, 13 Cal. 3d 528, 547-48 n.15, 531 P.2d 1099, 1111 n.15, 119 Cal. Rptr. 315, 327 n.15 (1975).

In Longwill, the defendant was the passenger in a speeding car. The vehicle’s driver was arrested for reckless driving and the defendant was arrested for being intoxicated in public. The court agreed with the prosecution that preventing the introduction of contraband into the jail facility justified a full search of the defendant if he was going to be incarcerated. 14 Cal. 3d at 946, 538 P.2d at 755, 123 Cal. Rptr. at 299. However, it recognized that under the procedures involved in processing a suspect for public intoxication it was very likely that any particular arrestee would neither be booked nor jailed. Id. at 947-48, 538 P.2d at 755-56, 123 Cal. Rptr. at 299-300. Accordingly, the court felt that individuals arrested for public intoxication should not be subjected to a full search unless they were actually going to be incarcerated. Id. at 952, 538 P.2d at 758-59, 123 Cal. Rptr. at 302-03.