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More on the New Federalism in Criminal Procedure

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BY DONALD E. WILKES, JR.*

The teachings of the Warren Court concerning the rights of criminal defendants have not fallen on deaf ears. Many state judiciaries have greeted the Burger Court's retreat from activism not with submission, but with a stubborn independence that displays a determination to keep alive the Warren Court's philosophical commitment to protection of the criminal suspect.

In an earlier article published in the *Kentucky Law Journal*, this author explored the contours of a startling new development in criminal procedure manifesting the unwillingness of a number of state courts to join in a constriction of the protections afforded criminal defendants in the Warren era.[1] State courts have been evading Burger Court review through the time-honored doctrine of adequate state grounds, whereby the Supreme Court refuses to disturb a state court judgment resting on an adequate state claim.[2] In a criminal case, the state ground alleged to be sufficient to support the judgment below is typically a state rule of procedure allowing the state court to disregard an improperly presented federal claim.[3] But the doctrine also embraces a state judgment resting on adequate state substantive grounds. Thus, the adequate state ground doctrine permits a state court to immunize its decision

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[1] Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974) [hereinafter cited as Wilkes].

[2] An "evasion" case has two characteristics. First, it rests on a state-based right which at a minimum is coextensive with a federal right. Second, the language of the opinion or the circumstances in which it was delivered make it apparent that the state court intended to use the adequate state ground doctrine to avoid Supreme Court review. *See* Wilkes, *supra* note 1, at 436.

[3] *Id.* at 429.

from Burger Court review by basing its judgment on a state right which is coextensive with or broader than rights afforded by federal law.[4]

> [T]here is not the slightest impropriety when the highest court of a state invalidates state legislation or state administrative action as violative of the state constitution. That remains true even where the state constitutional provision is similar or identical to the Federal Constitution, where the Federal Constitution's meaning is uncertain, or where the state court suspects or knows to a certainty that the United States Supreme Court would reject an analogous federal constitutional claim. Moreover, state courts ought to regard decisions of the United States Supreme Court interpreting like provisions of the Federal Constitution as binding only to the extent the Court's reasoning is intellectually persuasive.[5]

Since the previous article was prepared, the Burger Court has continued to relax federal constitutional restraints on the power of police and prosecutorial officials to detect and convict persons suspected of crime. During the 1973 Term, the fourth amendment right to be free from unreasonable search and seizure appears to have been the principal casualty of the Court's permissive attitude toward the exercise of governmental authority to enforce criminal laws. Although over half a dozen search and seizure cases were decided, in not a single one did the Court find that evidence had been obtained in violation of the fourth amendment.[6] Other decisions narrowly interpreted the fifth amendment privilege against self-incrimination[7] and the sixth amendment right to counsel.[8] The only federal constitutional rights receiving a liberal construction by the Burger

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[4] *Id.* at 430-31, 434-35.

[5] Falk, *The Supreme Court of California 1971-1972, Foreward: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273, 281-82 (1973).

[6] *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583 (1974); Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Matlock, 415 U.S. 164 (1974); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973). *See also* California Banker's Ass'n v. Shultz, 416 U.S. 21 (1974); United States v. Calandra, 414 U.S. 338 (1974).

[7] *See, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974).

[8] *See, e.g.*, Ross v. Moffit, 417 U.S. 600 (1974).

Court were those guaranteed under the first amendment[9] and the sixth amendment right to confrontation.[10] Moreover, the Burger Court reasserted its inclination, first manifested in *California v. Green*,[11] to set aside state judgments giving too generous an interpretation to a federal right.[12]

The Burger Court's continued reluctance to interfere with the enforcement of criminal laws has caused state courts to persist in their attempts at evasion, producing many recent cases worthy of examination.[13] This emerging "new federalism" also provokes speculation concerning its continued vitality and the Supreme Court's probable reaction.

I.

RECENT EVASION CASES

The "evasion" cases under examination may be divided into two broad categories: cases decided on state grounds alone, and cases whose judgments were grounded on both federal and state claims. All but two of the cases based solely on state law were designed to avoid past holdings of the Burger Court. In contrast, cases resting on both federal and state grounds appear to have been framed to evade Burger Court review that may further limit the claimed federal right.

A. *Cases Based Solely on State Grounds*

In *United States v. Robinson*[14] the Supreme Court construed the fourth amendment to permit a police officer making a custodial arrest for any offense, however minor, to conduct a full body search of the arrestee, even though the arresting offi-

[9] *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974); Jenkins v. Georgia, 418 U.S. 153 (1974); Smith v. Goguen, 415 U.S. 566 (1974). *But see* Hamling v. United States, 418 U.S. 87 (1974).

[10] *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974).

[11] 399 U.S. 149 (1970).

[12] *See, e.g.*, Pennsylvania v. Romberger, 417 U.S. 964 (1974).

[13] The majority of the recent "evasion" cases examined herein were reported after July 1, 1973, the cut-off date for most of the research done on the earlier article. However, a few of the cases were decided earlier but located only recently while the present article was being prepared. *See, e.g.*, Parham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972), discussed at notes 44-48 and accompanying text *infra*.

[14] 414 U.S. 218 (1973).

cer has no reason to suspect that the search would produce weapons, evidence, or fruits of the crime. The Court therefore reinstated a narcotics possession conviction by allowing the admission of heroin seized from a cigarette package in the respondent's coat pocket pursuant to his arrest for driving with a revoked driver's license.[15]

The Burger Court's view that the fourth amendment sanctions "a no-holds-barred search after *any* custodial arrest"[16] was contrary to the preponderance of federal and state case law on the issue.[17] Prior to *Robinson*, a clear majority of state and lower federal court decisions had refused to categorically validate body searches conducted incident to arrests for traffic or other minor offenses.[18] Not surprisingly, therefore, it has been suggested that state courts are free to disagree with *Robinson* by furnishing arrestees with a broader scope of protection, provided it is afforded by rights arising under state law.[19] To date, Hawaii and California appear to be the only states to have openly adopted this suggestion.[20]

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[15] In a companion case, Gustafson v. Florida, 414 U.S. 260 (1973), the Court upheld the validity of the body search of a college student made incident to an arrest for driving without having a driver's license in possession. The search had uncovered marijuana in a cigarette box.

[16] Note, *Searches of the Person Incident to Traffic Arrests: State and Federal Approaches*, 26 HAST. L.J. 536, 537 (1974).

[17] *Id.*

[18] *Id.* at 537-38.

[19] *Id.* at 555-58. *See also* Harmon & Helbush, *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Contest*, 5 GOLDEN GATE L. REV. 1, 73-81 (1974); Note, *Search Incident to a Traffic Arrest: The Robinson-Gustafson Reasonable Per Se Rule*, 10 TULSA L.J. 256, 266 (1974).

[20] A trial court in one other state has refused to follow *Robinson*. In People v. Kelly, 353 N.Y.S.2d 111 (N.Y.C. Crim. Ct. 1974), the defendant moved to suppress pills which he was charged with possessing unlawfully and which had been seized from the underclothing he was wearing by two policemen who arrested him for failing to display his driver's license. Although the testimony concerning the circumstances of the arrest was in sharp conflict, the New York City Criminal Court determined the warrantless arrest to have been valid. The only remaining issue was whether the search of the defendant's underwear was properly incident to that arrest.

In approaching this issue the court found itself in a "judicial dilemma" because the precedents were conflicting. *Id.* at 116. On the one hand, in People v. Marsh, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967), the New York Court of Appeals had held that the usual rules regarding searches incident to a lawful arrest were inapplicable to arrests for traffic violations and that a police officer effecting a traffic arrest was

In the Hawaii case of *State v. Kaluna*[21] the woman defendant was arrested without a warrant on a charge of attempted robbery. The male police officers who took her into custody transported her to the police station without searching her. There a police matron directed her to remove her outer clothing preparatory to a search. After stripping to her undergarments, the defendant removed a piece of folded tissue paper from her

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authorized to search the person of the arrestee only in the event that he reasonably feared an assault. On the other hand, there was the decision in *Robinson*.

Quoting from Sibron v. New York, 392 U.S. 40 (1968), and Cooper v. California, 386 U.S. 58 (1967), two Warren Court decisions reaffirming the authority of the states to establish their own search and seizure standards provided federal rights were not infringed, the court decided that *Marsh*, rather than *Robinson*, was controlling and granted the motion to suppress.

Because the decision to suppress was "based solely on the Fourth Amendment of the United States Constitution," 353 N.Y.S.2d at 116, *Kelly* is not an "evasion" case in the correct sense of the term. Apparently the New York court was under the impression that *Sibron* and *Cooper* had held that a state court may disagree with Supreme Court interpretations of the fourth amendment so long as the state court's disagreement works in favor of individual liberty. This view is, of course, erroneous. While *Sibron* and *Cooper* do permit a state court to grant an individual more privacy under state law then he would be entitled to under the fourth amendment, it is nevertheless true that a state court is bound by authoritative Supreme Court interpretations of federal constitutional protections. A state court may not extend federal rights beyond the limits set by the Supreme Court, and any attempt to do so will result in the state judgment being set aside by the Supreme Court. Oregon v. Hass, 95 S. Ct. 1215 (1975). *See also* California v. Green, 399 U.S. 149 (1970).

It is, however, possible to interpret *Kelly* as an "evasion" case. Under this view, the language in the opinion regarding the fourth amendment is ignored. Instead, emphasis is placed on the court's reliance on *Marsh* in arriving at the conclusion that the search was illegal. (*Marsh*, it will be remembered, originally was decided on the basis of both federal and state law.) When *Robinson* is then interpreted as having eroded the federal grounds of *Marsh*, *Kelly* can be viewed as a decision grounded solely on New York law.

Interestingly, in Florida, where *Robinson's* companion case, *Gustafson*, originated, the impact of the Burger Court's decisions has been avoided by legislative enactment rather than court decision. A statute enacted by the Florida legislature in 1974 has decriminalized almost all traffic offenses. *See* Ch. 74-377, (1974) Laws of Florida 1187. With the exception of five serious offenses (including reckless driving and driving while intoxicated), traffic violations in Florida are now nonarrestable infractions, and violators may be given a citation but not arrested. By eliminating much of the authority of police officers to effect custodial arrests for traffic offenses, the statute severely limits the number of instances in which the types of searches approved in *Robinson* and *Gustafson* may be undertaken. While it would be intriguing to examine the extent to which other state legislatures have avoided Burger Court decisions by legislative enactment, such an inquiry would require a separate article.

[21] 520 P.2d 51 (Hawaii 1974).

bra and handed it to the matron who, without any idea of what was inside, opened it and found capsules containing barbiturates. Thereafter the defendant was charged with unlawful possession of drugs. Her motion to suppress the capsules on grounds of unreasonable search and seizure was granted by the trial court. The state appealed, claiming that the evidence had been properly seized incident to a lawful custodial arrest.

In affirming the order of suppression, the Hawaii Supreme Court recognized that under the rule laid down in *Robinson* three months earlier, this seizure had not violated the defendant's federally protected rights.[22] The determination that the defendant's federal rights had not been violated was not, however, dispositive of the issue of whether the capsules had been lawfully seized. Because it disagreed with the proposition—implicit in *Robinson*—that a person under lawful arrest can have no reasonable expectations of privacy, the court turned to the question of whether the state constitutional provision prohibiting unreasonable search and seizure had been complied with in this case.

Relying in part on arguments derived from the dissenting opinions in *Robinson*, the court had little difficulty concluding that the seizure of the capsules, while permissible under federal law, was impermissible under state law:

> [A]s the ultimate judicial tribunal in this state, this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted. . . . In our view, the

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[22] The court said:

> In our interpretation of the United States Constitution, of course, we are bound to follow applicable pronouncements by the United States Supreme Court. There is no doubt that the search conducted in this case was reasonable under the fourth amendment as construed in *Robinson* and *Gustafson*. We have already indicated that the defendant's search at the police station was incident to her custodial arrest; assuming that arrest to be lawful, the search of her body and all personal effects in her possession did not violate her federal constitutional rights since "the fact of [her] lawful arrest" alone gave the police plenary authority to subject her to a detailed search.

Id. at 58.

> right to be free of "unreasonable" searches and seizures under article I, section 5 of the Hawaii Constitution is enforceable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary under the circumstances. In cases of searches incident to arrests, a contrary holding would lend unprecedented power to the police to subject individuals under custodial arrest for even the most trivial offenses to the indignities of an exhaustive body search when no articulable reason supports such an intrusion other than the bare fact that the arrestee is in custody. . . .
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> Certainly we are not prepared to hold, in interpreting the Hawaii Constitution, that since a lawful custodial arrest is a significant intrusion into an individual's privacy, further, "lesser" intrusions may be made without regard for their justifications. . . . Indeed, we cannot say that a strip search is a "lesser" intrusion into an individual's privacy than his loss of freedom by arrest. The integrity of one's person including the right to be free of arbitrary probing by government officials into the contents of the personal effects in one's possession is at least as significant in terms of human dignity as the right to be free of externally imposed confinement.[23]

The court buttressed its opinion by observing that, under the nation's federal system of government, a state court construing a state constitutional provision is free to disagree with United States Supreme Court constructions of similar federal constitutional provisions whenever the state interpretation does not entail denial of a federal right.[24]

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[23] *Id.* at 58-59 (citations omitted).

[24] The court said:

> [W]e are of the opinion that as a *search and seizure*, the conduct of the police in this case was unreasonable. While this results in a divergence of meaning between words which are the same in both the federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is *greater* protection of individual rights under state law than under federal law. . . . In this respect, the opinion of the United States Supreme Court on the meaning of the phrase "unreasonable searches and seizures" is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by article I, section 5 of the Hawaii Constitution.

Id. at 58 n.6 (citations omitted).

The California decision rejecting the *Robinson* rule on the basis of state law is *People v. Brisendine*.[25] In that case the California Supreme Court repudiated the notion that an arrest for any offense authorizes a full body search of the arrestee and held instead that a policeman making an arrest for a traffic or other minor offense is limited to conducting a good faith pat-down search for weapons.[26] Replying to the state's contention that *Robinson* and its companion case *Gufstafson* were controlling, the court said:

> We disagree. Whether or not the instant case is distinguishable from *Robinson-Gustafson*, as defendant claims, we note that those cases were decided under the Supreme Court's view of the *minimum* standards required in order to satisfy the Fourth Amendment's proscription of unreasonable searches. Our holding today is based exclusively on article I, section 13, of the California Constitution, which requires a more exacting standard for cases arising within this state.[27]

Moreover, the court made these statements concerning the obligation of a state court required to interpret a provision of its own bill of rights:

> It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. "By the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the 13 states (and Vermont as well) had enacted Constitutions to fill in the political gap caused by the overthrow of British authority. . . . ¶ . . . Eight of the Revolutionary Constitutions were prefaced by Bills of Rights, while four contained guarantees of many of the most important individual rights in the body of their texts. Included in these Revolutionary constitutional provisions were *all of the rights that were to be protected in the federal Bill of Rights*. By the time of the Treaty of Paris (1783) then, the American

[25] 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).
[26] *Id.* at 1105-10, 119 Cal. Rptr. at 321-26.
[27] *Id.* at 1110, 119 Cal. Rptr. at 326.

> inventory of individual rights had been virtually completed and included in the different state Constitutions whether in separate Bills of Rights or the organic texts themselves." In particular, the Rights of the Colonists (Boston, 1772) declared for the first time "the right against unreasonable searches and seizures that was to ripen into the Fourth Amendment," and that protection was embodied in every one of the eight state constitutions adopted prior to 1789 which contained a separate bill of rights.
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> We need not further extend this opinion to trace to their remote origins the historical roots of state constitutional provisions. Yet we have no doubt that such inquiry would confirm our view of the matter. The federal Constitution was designed to guard the states as sovereignities against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials. Thus in determining that California Citizens are entitled to greater protection under the California Constitution against unreasonable searches and seizures than that required by the United States Constitution, we are embarking on no revolutionary course. Rather we are simply reaffirming a basic principle of federalism—that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.[28]

Over the dissent of Justices Douglas, Harlan, and Marshall, the Burger Court, in *United States v. White*,[29] held that the fourth amendment is not violated when an undercover operative engages in a conversation with a criminal suspect and, without either a warrant or the suspect's consent, transmits the conversation to law enforcement agents by means of an electronic device concealed on his person. The plurality opinion by Justice White reasoned that there is no difference, for fourth amendment purposes, between the risk that one's confidential communications may be disclosed by the person to whom they were made and the risk that the person in whom one confides

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[28] *Id.* at 1113-14, 119 Cal. Rptr. at 329-30 (citations omitted).

[29] 401 U.S. 745 (1971).

may be wearing a surreptitious electronic transmitter.[30]

In *People v. Beavers*,[31] the Michigan Supreme Court was unpersuaded by Justice White's logic and instead found itself in agreement with Justice Harlan's dissenting opinion:

> Nevertheless, we are persuaded by the logic of Justice Harlan which recognizes a significant distinction between assuming the risk that communications directed to one party may subsequently be repeated to others and the simultaneous monitoring of a conversation by the uninvited ear of a third party functioning in cooperation with one of the participants yet unknown to the other.[32]

Accordingly, the court held that, absent consent, such "participant monitoring" was unlawful in Michigan unless pursuant to a search warrant.[33] The court expressly noted that its "conclusion is based upon the Michigan Constitution and the protection afforded the people of this state against unreasonable searches and seizures."[34]

In *Williams v. Florida*[35] the Burger Court held that the fifth amendment privilege against self-incrimination does not prevent a state from enforcing a rule of criminal procedure requiring a defendant to disclose before trial the names of his alibi witnesses. The decision in *Williams* was evaded by the Alaska Supreme Court in *Scott v. State*,[36] a case in which the defendant claimed that a pretrial court order granting broad

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[30] *Id.* at 750-52.

[31] 227 N.W.2d 511 (Mich. 1975).

[32] *Id.* at 515.

[33] *Id.* at 516.

[34] *Id.*

[35] 399 U.S. 78 (1970).

[36] 519 P.2d 774 (Alas. 1974). Additionally, in Reynolds v. Superior Court, 528 P.2d 45, 117 Cal. Rptr. 437 (1974), the California Supreme Court in dicta cast doubt on whether a discovery order permissible under *Williams* would pass muster under the California constitutional provision guaranteeing the privilege against self-incrimination. The court said:

> While *Williams* may have laid to rest the contention that notice-of-alibi procedures are inconsistent with the federally guaranteed privilege against self-incrimination, this privilege is also secured to the people of California by our state Constitution, whose construction is left to this court, informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions.

Id. at 49, 117 Cal. Rptr. at 441.

discovery to the prosecution invaded his privilege against self-incrimination under the fifth amendment and the corresponding provision of the state constitution. Among other things, the order of the trial court compelled the defendant to give advance notice of his alibi defense and to furnish the prosecution with the names of witnesses on whom he intended to rely in establishing his alibi defense.

The Alaska Supreme Court disagreed with the *Williams* logic that a notice of alibi requirement is not violative of the fifth amendment because it does not force the defendant to provide incriminating information but simply to disclose his alibi defense before trial rather than during trial. The state court found this rationale so "unpersuasive"[37] that it quoted extensively from Justice Black's dissenting opinion in *Williams*,[38] as well as from a law review note critical of *Williams*.[39] Moreover, the court did not feel obligated to interpret a state constitutional provision in accordance with what it considered an unsatisfactory Supreme Court decision construing a parallel provision of the Federal Constitution:

> In Baker v. City of Fairbanks, we acknowledged our responsibility to depart whenever necessary from constitutional interpretations enunciated by the United States Supreme Court and to develop rights and privileges under the Alaska constitution in accordance with our own unique legal background. In particular we stated:
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> > While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not

[37] 519 P.2d 774, 783.

[38] *Id.* at 781-82, 784.

[39] *Id.* at 784, *citing* Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1007-08 (1972).

> stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.
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> We are not bound to follow blindly a federal constitutional construction of a fundamental principle if we are convinced that the result is based on unsound reason or logic.
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> . . . .
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> We are therefore persuaded to interpret article I, section 9, of the Alaska constitution more broadly than the United States Supreme Court construed the fifth amendment in *Williams*. We hold that the privilege against compelled self-incrimination under the Alaska constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings.[40]

The court then ruled that the portion of the discovery order compelling the defendant to disclose the names of his alibi witnesses violated the state constitutional provision protecting the privilege against self-incrimination, even though such disclosure was not violative of the federal constitutional privilege.[41]

The Burger Court's decision in *Baldwin v. New York*[42] has been circumvented by two state courts. In *Baldwin* it was held that the sixth amendment right to jury trial, which was extended to the states in *Duncan v. Louisiana*,[43] applies to prosecution for "serious" offenses but not "petty" ones. For purposes of the sixth amendment, a "serious" offense was defined as an offense punishable by more than six months in jail. Under *Baldwin*, then, there is no federally guaranteed right to a jury trial when the potential punishment does not exceed six months' imprisonment.

In the South Dakota case of *Parham v. Municipal Court*,[44] the petitioner had been charged with violating a municipal ordinance forbidding driving while intoxicated. Apparently because the maximum punishment for the violation was less

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[40] *Id.* at 783, 785 (citations omitted).
[41] *Id.* at 785-87.
[42] 399 U.S. 66 (1970).
[43] 391 U.S. 145 (1968).
[44] 199 N.W.2d 501 (S.D. 1972).

than six months confinement, the municipal court denied his pretrial request for a jury trial. The petitioner then sought a writ of prohibition to restrain the municipal court from trying him without a jury.

The South Dakota Supreme Court granted the writ. Although the court realized that under *Baldwin* the violation charged constituted a "petty" offense insofar as the sixth amendment right to jury trial was concerned,[45] it nevertheless proceeded to satisfy itself that in view of the widespread condemnation of drunken driving, the offense of driving while intoxicated was "serious" enough to warrant a jury trial.[46] Nowhere in its opinion did the court explicitly say that the basis for its holding was the right to jury trial provision of the state constitution. However, the court's reference to the "fundamental constitutional rights" of the accused,[47] particularly its description of "a person's rights to trial by jury" as "a fundamental right" compels one to conclude that the decision was grounded on the right to jury trial guaranteed under state law.

The Maine Supreme Judicial Court more clearly enunciated the state law basis for its evasion of *Baldwin*. In *State v. Sklar*,[48] the court held that under a provision of the state constitution protecting the right to trial by jury "[i]n all criminal prosecutions,"[49] any criminal defendant in a Maine state court is entitled to a jury trial, irrespective of whether the offense is classified as "serious" or "petty" under the federal scheme. The court therefore directed that a defendant accused of speed-

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[45] *Id.* at 504.

[46] The court supported its decision by this rationale:

> Today the drinking driver is a major cause of death, loss of limb, and the destruction of property on the highway. Because of the consequences the offense of driving a motor vehicle while intoxicated must be considered mala in se and cannot reasonably be characterized as minor, trivial, or petty. Society regards the offense as serious. A conviction authorizes the imposition of "grave criminal sanctions not comparable to petty crimes at common law which were tried summarily". . . .

Id. at 505 (citations omitted).

[47] *Id.*

[48] 317 A.2d 160 (Me. 1974).

[49] In pertinent part, this provision provides that "[i]n all criminal prosecutions, the accused shall have a right . . . [t]o have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity." ME. CONST. art. 1, § 6 (1965).

ing, an offense punishable by imprisonment for not more than 90 days, be given a jury trial.[50]

The court knew that in *Baldwin* the Burger Court had restricted the federal right to jury trial to so-called "serious" offenses.[51] But because of historical and textual differences in the two analagous constitutional provisions the court did not regard Supreme Court interpretations of the scope of the federal constitutional right to trial by jury as "afford[ing] guidance beneficial in the assessment of the scope of the trial by jury guarantee of Article I, Section 6 of the Constitution of Maine."[52]

Recent Supreme Court decisions narrowly defining the right to counsel clause of the sixth amendment were avoided in the Michigan case of *People v. Jackson*.[53] The issue in *Jackson* was whether the defendant, convicted of attempted robbery, was entitled to the assistance of counsel at a pretrial lineup and a pretrial photographic identification. Since both the lineup and the display of photographs had occurred after arrest but prior to the filing of formal charges, it was clear that under *Kirby v. Illinois*[54] and *United States v. Ash*[55] the defendant had no federally protected right to the presence of counsel at the two pretrial identification sessions.

The Michigan Supreme Court gave "due consideration" to "the *Kirby* and *Ash* opinions"[56] but decided that they were unacceptable because they failed "to preserve best evidence eyewitness testimony from unnecessary alteration by unfair identification procedures."[57] Accordingly, the court reversed the conviction, holding that, "independent of any federal con-

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[50] 317 A.2d 160, 171.

[51] *Id.* at 164-65.

[52] *Id.* at 165. The historical reason was this: the common law's serious-petty distinction for purposes of jury trial did not apply in Maine, which had historically provided a jury trial in all criminal cases. The second reason was based on differences in the wording of the federal and state constitutional provisions regarding jury trial, referred to previously.

[53] 217 N.W.2d 22 (Mich. 1974).

[54] 406 U.S. 682 (1972).

[55] 413 U.S. 300 (1973).

[56] 217 N.W.2d 22, 27.

[57] *Id.*

stitutional mandate,"[58] a Michigan defendant is entitled to the assistance of counsel at *any* pretrial lineup or photographic identification procedure.[59] The state law basis for the decision was the court's "constitutional power to establish rules of evidence applicable to judicial proceedings in Michigan courts."[60]

Kirby was again evaded in *Commonwealth v. Richman*.[61] The issue before the Pennsylvania Supreme Court in *Richman* was whether the defendant was entitled to the assistance of counsel at a lineup conducted after arrest but before the defendant had been otherwise charged. The plurality opinion in *Kirby* had determined that there was no such right under the Constitution because the sixth amendment right to counsel did not attach until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[62] The Pennsylvania Supreme Court, however, sidestepped *Kirby* by holding that under Pennsylvania law the "initiation of adversary judicial criminal proceedings" occurs at the time of arrest, whether with or without a warrant.[63] Accordingly, the court concluded that the denial of counsel to the defendant had violated his rights.[64] By holding that the formal criminal process begins at an earlier state of the proceedings under state law than under federal law, the Pennsylvania Supreme Court extended to the defendant a right which had been denied him under federal law as interpreted by the Burger Court.

In *Commonwealth v. Compana*[65] the Pennsylvania Supreme Court adopted the "single transaction" test of double jeopardy, even though the court was aware that the Burger Court had declined, in *Ashe v. Swenson*,[66] to impose this test upon the states through the fifth amendment double jeopardy

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[58] *Id.*

[59] *Id.* at 28.

[60] *Id.* at 27.

[61] 320 A.2d 351 (Pa. 1974).

[62] Kirby v. Illinois, 406 U.S. 682, 689 (1972). The plurality opinion represented the views of Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist. Justice Powell concurred in the result. *Id.* at 691.

[63] Commonwealth v. Richman, 320 A.2d 351, 353-54 (Pa. 1974).

[64] *Id.* at 354.

[65] 304 A.2d 432 (Pa. 1973).

[66] 397 U.S. 436 (1970).

clause, and had denied certiorari in several other cases in which state convicts sought to raise the claim that the test is required by the fifth amendment.[67] Although not completely free from ambiguity, the language in *Compana* indicates that the decision was based on both the fifth amendment and provisions of state law regarding double jeopardy.[68] Thus, it seems clear that by grounding its decision at least partially on state law, the Pennsylvania court intended to evade any future decision of the Burger Court squarely holding that the "single transaction" test is not the test by which to judge whether the double jeopardy clause of the fifth amendment has been violated. Dissatisfied with the Pennsylvania Supreme Court's evasive decision, the Commonwealth filed a petition for certiorari under 28 U.S.C. § 1257(3). The Burger Court entered an order granting the writ, vacating judgment, and remanding to the Supreme Court of Pennsylvania for a determination of whether its judgment was based on federal or state constitutional grounds, or both.[69]

On remand, the Pennsylvania Supreme Court adhered to its adoption of the "single transaction" test.[70] At the same time, the court carefully insulated its decision from unfavorable review by stating:

> There are, of course, indications in some of the opinions supporting our judgments that a basis for the judgments was to be found in federal constitutional problems. However, there are also separate reason[s] advanced for the result that do not stand on a view of federal constitutional requirements.
>
> Our supervisory power over state criminal proceedings is broad, and this Court need not, as a matter of state law, limit its decision to the minimum requirements of federal constitutional law. . . .
>
> This Court views our May 4, 1973 judgments in *Compana* as state law determinations pursuant to our supervisory powers.[71]

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[67] The cases were Grubb v. State, 497 P.2d 1305 (Okla. Crim. App. 1972), *cert. denied*, 409 U.S. 1017 (1972); State v. Miller; 484 P.2d 1132 (Ore. App. 1971), *cert. denied*, 405 U.S. 1047 (1972).

[68] 304 A.2d at 434, 436-37, 441.

[69] Pennsylvania v. Compana, 414 U.S. 808 (1973).

[70] Commonwealth v. Compana, 314 A.2d 854 (Pa. 1974).

[71] *Id.* at 855-56. Concerning this statement, a dissenting justice wrote:

The Commonwealth then filed a second certiorari petition, alleging that *Compana* was "a federal constitutional decision, no matter what the Pennsylvania tribunal now wishes to label it."[72] It asserted that the "Supreme Court of Pennsylvania has failed to comply with the remand order of this Honorable Court and, in so doing, has attempted to abrogate the fundamental concept of federalism which underlies our union."[73] In spite of this argument, the petition for certiorari was denied.[74]

Apart from the Pennsylvania Supreme Court's final *Compana* decision, the only recent case grounded on state law alone which sought to avoid a future rather than a past decision of the Burger Court is *People v. McIntyre*.[75] The issue in this case was whether a person charged with crime has a right to represent himself. The New York Court of Appeals was aware[76] that the Supreme Court had already heard oral arguments in a case raising the same issue,[77] but concluded that it "need not reach the question of whether the right to defend *pro se* is

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> To my mind the above statement is evasive and equivocal, and I cannot subscribe to it. It represents a refusal to accept accountability for our decisions on federal constitutional law and an unwillingness to leave to the highest federal court the last word on questions of such law. If this court sees fit to base a holding in a case upon its interpretation of the Federal Constitution, as it clearly did in *Compana*, then it must tolerate review of such a decision by the Supreme Court of the United States. It will not do, when our decision is under challenge, to announce that we were merely exercising a supervisory power.

Id. at 859 (dissenting opinion of Pomeroy, J.).

[72] Petitioner's Brief for Certiorari at 9, Pennsylvania v. Compana, 417 U.S. 969 (1974).

[73] *Id.* at 10.

[74] Pennsylvania v. Compana, 417 U.S. 969 (1974).

[75] 324 N.E.2d 322, 364 N.Y.S.2d 837 (1974). *See also* Burrows v. Superior Court, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), in which the California Supreme Court held that the state constitutional provision forbidding unreasonable search and seizure was violated when prosecutorial authorities obtained copies of the defendant's bank records without legal process. It is arguable that the California court rested its decision on state rather than federal law because it believed that the Burger Court's decision in California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), indicated that the Burger Court might hold such a search and seizure permissible under the fourth amendment.

[76] 324 N.E.2d 322, 326, 364 N.Y.S.2d 837, 842.

[77] Faretta v. California, *cert. granted*, 415 U.S. 975 (1974). Thereafter, on June 30, 1975, the Burger Court held that a defendant in a state criminal trial has, under the sixth amendment, a right to proceed without counsel. 95 S. Ct. 2525 (1975).

founded in the Federal Constitution"[78] because the right was guaranteed under New York constitutional and statutory law.[79]

B. *Cases Based on Federal and Nonfederal Grounds*

Two of the three recent "evasion" cases resting on both federal and state grounds appear to have been framed so as to avoid possible Burger Court decisions eroding fourth amendment protections. In *Commonwealth v. Platou*[80] the Pennsylvania Supreme Court held that a seizure of marijuana by police officers had violated the defendant's right to be free from unreasonable search and seizure under both the fourth amendment and the corresponding state constitutional provision. The Commonwealth then filed a certiorari petition pursuant to 28 U.S.C. § 1257(3) which failed to mention that the decision rested on nonfederal as well as federal grounds.[81] Nevertheless, the Supreme Court denied the petition, determining that the judgment was in fact based on state law.[82]

Similarly, in *Adams v. State*,[83] both federal and state constitutional protections against unreasonable search and seizure were held to have been violated by a court-ordered operation to remove a bullet from the defendant's body. Although the state's petition for certiorari made no mention of the state law supporting the judgment,[84] the Burger Court again denied certiorari because it appeared that the judgment was based on adequate state grounds.[85]

The third case grounded on both federal and state law involved the issue of double jeopardy. The Michigan Supreme Court in *People v. White*[86] was cognizant of the Burger Court's refusal in *Ashe* to adopt the "single transaction" test of double

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[78] 324 N.E.2d 322, 326, 364 N.Y.S.2d 837, 842.

[79] *Id.*

[80] 312 A.2d 29 (Pa. 1973).

[81] *See* Petitioner's Brief for Certiorari at 1-4, Pennsylvania v. Platou, 417 U.S. 976 (1974).

[82] Pennsylvania v. Platou, 417 U.S. 976 (1974).

[83] 299 N.E.2d 834 (Ind. 1973).

[84] *See* Petitioner's Brief for Certiorari at 1-7, Indiana v. Adams, 415 U.S. 935 (1974).

[85] Indiana v. Adams, 415 U.S. 935 (1974).

[86] 212 N.W.2d 222 (Mich. 1973).

jeopardy for the states.[87] But it also knew that by statute or case law the test had been approved in a number of states as the appropriate standard for evaluating a claim of double jeopardy.[88] Therefore, the court held that the test was to be followed in Michigan under the authority of the double jeopardy provisions of both the fifth amendment and the state constitution.[89] Like *Compana, White* was apparently aimed at evading any future decision of the Burger Court holding the "single transaction" test inappropriate for determining whether the fifth amendment double jeopardy clause has been invaded.

II.

THE PROSPECTS FOR CONTINUED EVASION

The denials of certiorari in *Compana, Platou,* and *Adams* are not without significance. They tend to support the conclusion that the Burger Court is not prepared to alter the adequate state ground doctrine, even in instances in which the doctrine is being utilized by a state court to insulate its judgment from Supreme Court review. In one other case the Burger Court exhibited a similar disinclination to modify the doctrine, although again the doctrine operated to preclude the Court from reexamining a judgment which granted a defendant broader rights under state law than he would be entitled to under federal law.

In *People v. Jones*[90] an intermediate California appellate court affirmed an order suppressing conversations intercepted by electronic surveillance. Although the evidence had been obtained by federal law enforcement agents in conformity with Title III of the Omnibus Crime Control and Safe Streets Act of 1968[91] and was admissible in federal court, the evidence was held to have been properly suppressed under a state statute rendering wiretapping evidence inadmissible in a California court.[92]

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[87] *Id.* at 226.
[88] *Id.* at 226-27.
[89] *Id* at 227-28.
[90] 106 Cal. Rptr. 749 (Cal. Ct. App. 1973).
[91] 18 U.S.C. §§ 2510-2520 (1971).
[92] 106 Cal. Rptr. 749, 751. In response to the state's contention that the state

After unsuccessfully petitioning the California Supreme Court for review, the state filed an appeal with the Burger Court under the provisions of 28 U.S.C. § 1257(2). The state's jurisdictional statement[93] and several amicus curiae briefs filed by California prosecutorial officials[94] requested review on the ground that the state statute was preempted under Title III. The defendant's motion to dismiss or affirm raised two arguments in support of the judgment below: First, no substantial federal question was presented because a state is free to furnish guarantees of privacy greater than those provided under federal law;[95] and second, the decision below "was based on an adequate non-federal basis."[97] The Burger Court dismissed the appeal for want of a substantial federal question.[97]

There are indications, however, that the Burger Court may be on the verge of modifying the adequate state ground doctrine in "evasion" cases in which a criminal judgment rests on both federal and nonfederal grounds. This author's earlier article suggested that one step the Court might take to deal with state court evasion would be to redefine the doctrine so as to permit review of the federal aspects of a state judgment supported by federal and nonfederal grounds.[98] That article stated:

> The Court could adopt the position that the rule is not jurisdictional, thus establishing its power to review state judgments even though supported by an adequate nonfederal ground. Then in a case involving a federal question, the Court

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statute conflicted with Title III, the court said:

> The California law requiring exclusion of evidence does not conflict with these provisions of the federal law. The protection of privacy afforded by the federal standard has been increased, but in no way have the federal officers' powers to gather information under federal law been diminished by California's refusal to accept information provided by federal officers.

Id.

[93] Appellant's Jurisdictional Statement at 6-12, California v. Jones, 414 U.S. 804 (1973).

[94] Brief for Evelle J. Younger as Amicus Curiae at 5-11, California v. Jones, 414 U.S. 804 (1973); Brief for Cecil Hicks as Amicus Curiae at 4-11, California v. Jones, 414 U.S. 804 (1973).

[95] Appellee's Motion to Dismiss or Affirm Appeal from State Court at 3-5, California v. Jones, 414 U.S. 804 (1973).

[96] *Id.* at 6-8.

[97] California v. Jones, 414 U.S. 804 (1973).

[98] Wilkes, *supra* note 12, at 449.

> could exercise its power of review and affirm the judgment if the federal question had been decided correctly. If the federal question had been decided erroneously, the Court could correct the federal question and vacate, but not reverse, the judgment, leaving the state court free on remand to reinstate its prior judgment, but only on state grounds.[99]

In *Air Pollution Variance Board v. Western Alfalfa Corp.*,[100] the Burger Court appears to have adopted this suggestion in reviewing a state judgment in a civil case. The Colorado Court of Appeals had held that a pollution inspector's search violated a corporation's right to due process of law, as well as its right to privacy under the fourth amendment.[101] It was unclear from the language of the opinion whether the due process right infringed was that guaranteed under the fourteenth amendment, the state constitution, or both.[102] The pollution board then sought certiorari under 28 U.S.C. § 1257(3) on the ground that there had been no unreasonable search and seizure within the meaning of the fourth amendment.

Ordinarily, under these circumstances the proper procedure would be for the Court to grant certiorari, vacate the judgment, and remand the case to the state court for a determination of whether the judgment rested on federal or nonfederal grounds, or both.[103] Instead, the Court granted certiorari, reviewed the fourth amendment claim on its merits, found it unjustified, and reversed and remanded for a determination of whether federal or state due process of law, or both, had been violated.[104]

Assuming that the Burger Court adopts the *Western Alfalfa* approach in connection with its review of state criminal judgments, there is no reason to believe that state court evasion will be thwarted. Use of the new approach will simply permit the Court to correct federal errors in judgments resting on both

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[99] *Id.*

[100] 416 U.S. 861 (1974).

[101] Western Alfalfa Corp. v. Air Pollution Variance Bd., 510 P.2d 907, 909-10 (Colo. App. 1973), *rev'd*, 416 U.S. 861 (1974).

[102] *See* 416 U.S. at 866 & n.6.

[103] *See, e.g.*, California v. Krivda, 409 U.S. 33 (1972).

[104] Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 866 (1974).

federal and nonfederal grounds. On remand the state courts will be free to reinstate their judgments, provided that they do so on state grounds alone. Moreover, the technique will not affect evasion cases resting on state law alone.

CONCLUSION

Since this author's earlier article was prepared, the Burger Court has continued along its course of narrowly interpreting the federally protected rights of criminal suspects. As a result, increasing numbers of state courts have resolved to more fully secure the rights of the accused, deliberately resting their decisions on state grounds to avoid the possibility of unfavorable Supreme Court review. Although the Burger Court may be on the brink of modifying the adequate state ground doctrine in cases based on both federal and nonfederal substantive grounds, there is no evidence that this will interfere with the new found desire of some state courts to provide more extensive protection to the criminal defendant. If the present trend is any indication, then, state courts will play an increasingly independent role in defining the rights afforded criminal defendants. Some state courts, to be sure, will remain content to interpret state constitutional provisions in light of recent Burger Court decisions, but others will continue to take up the challenge to "make federalism more than a cliche for judicial conservatism, and state's rights more than a slogan for obstructionism."[105]

[105] Project Report, *Toward An Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271, 275 (1973).