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State Constitutional Protection for Defendants in Criminal Prosecutions

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I. INTRODUCTION

A great debate has been raging in recent years concerning the application of state constitutional law in state criminal prosecutions. For many years, state constitutional provisions were essentially ignored with the entire emphasis placed on federal applications of the United States Constitution. In the last twenty years, however, many state judges have looked to their own state constitutions to determine if sufficient protections have been given to criminal defendants in state prosecutions. In this article, I shall look at this important development, focus on the debate about the propriety of the expanding scope of state constitutional law, and also review the relatively modest contribution which has been made by the Arizona courts.

II. THE TRADITIONAL APPROACH

The first eight amendments to the Constitution, the Bill of Rights, provide substantial protection to individuals in criminal prosecutions. Found within these amendments are protections relating to searches,[1] the privilege against self-incrimination,[2] the right to a speedy trial,[3] the right to counsel,[4] the ability to confront witnesses,[5] and the right to avoid cruel and unusual punishment.[6] Early in our jurisprudential history, however, the United States Supreme Court made clear that these protections were to be applied only to the federal government and not to the states.

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1. U.S. CONST. amend. IV.
2. U.S. CONST. amend. V.
3. U.S. CONST. amend. VI.
4. U.S. CONST. amend. VI.
5. U.S. CONST. amend. VI.
6. U.S. CONST. amend. VIII.

In *Barron v. Mayor and City Council of Baltimore*,[7] the Court refused to extend these protections beyond the precise language of the amendments, which apparently limited their application to the federal government. It was only with the passage of the fourteenth amendment, particularly the due process clause, that a basis was created so as to apply these protections to the states. Even then, it took almost a full century until many of the provisions of the Bill of Rights were applied to the states in criminal cases. The fourteenth amendment was passed in 1868, but cases such as *Gideon*,[8] *Miranda*,[9] and *Mapp*[10] were not decided until the 1960s. Thus, for most of the history of this country, the principal constitutional protection for individual defendants in criminal cases was not found under federal constitutional law. Instead, it was state law—both constitutional and statutory—that generally governed criminal cases. The states, however, generally construed protections for criminal defendants narrowly. Although a broader application of state constitutional law in criminal cases may now be among "the most significant current development[s] in our constitutional jurisprudence,"[11] it is of very recent vintage indeed. Justice Mosk of the California Supreme Court has effectively argued that an approach requiring state courts to look to state constitutions in criminal cases is not only appropriate, but historically based. He made the point clearly:

> Don't let anyone tell you state constitutions are redundant, even when their texts are similar to the federal Constitution. State charters do not get their inspiration from the U.S. Constitution. It was the converse: The Framers of the federal charter adopted almost all of the Bill of Rights from the charters of the original states.[12]

Many distinguished judges, both federal and state, have called upon state judges to look first to their state constitutions to determine whether

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7. 32 U.S. (7 Pet.) 243 (1833). *See generally* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144 (1985).

8. Gideon v. Wainwright, 372 U.S. 335 (1963) (giving a right to counsel under the sixth amendment for defendants, at trial, in serious felony cases).

9. Miranda v. Arizona, 384 U.S. 436 (1966) (requiring warnings, under the fifth amendment privilege against self-incrimination, for interrogation which results in statements given in response to custodial interrogation).

10. Mapp v. Ohio, 367 U.S. 643 (1961) (applying the fourth amendment search and seizure provision, along with the fourteenth amendment due process clause, to exclude evidence in state criminal prosecutions).

11. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

12. Mosk, *Beyond the Constitution*, 7 CAL. LAW. 100 (1987). Judge Wright of the District of Columbia Circuit cheered "state judges who have resumed their historic role as the primary defenders of civil liberties and equal rights." Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L. Q. 165, 188 (1984).

violations have occurred in criminal cases. Justice Brennan of the United States Supreme Court has written:

> State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretations of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[13]

Since the beginning of our country, state constitutional provisions have always existed as independent grounds upon which to decide cases. States have always been free to grant more protection to individual defendants than that given by the federal constitution. The United States Supreme Court has repeatedly noted that "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."[14]

This freedom has existed for almost two hundred years; the broader application of state constitutional law in criminal cases is, however, of very recent vintage. Two principal explanations have been offered. The first, and less cynical of the two, is that with so much activity by the federal courts in the two decades beginning in the early sixties, little

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13. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). The point was echoed by Justice Linde of the Oregon Supreme Court:

> It once again is becoming familiar learning that the federal Bill of Rights was drawn from the earlier state declarations of rights adopted at the time of independence, that most protection of people's rights against their own states entered the federal Constitution only in the Reconstruction amendments of the 1860's, and that it took another hundred years and much disputed reasoning to equate most of the first eight amendments with due process under the fourteenth.

Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984). Because the state protections existed prior to the Bill of Rights, Judge Newman refers to the current trend as "old federalism" in response to the labeling of this development as "new federalism." *See* Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21 (1982).

14. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original). *See also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) ("[We do not] limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the [f]ederal Constitution."). *See generally* O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) ("The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are 'independently responsible for safeguarding the rights of their citizens.' "); Abrahamson, *supra* note 7, at 1153.

room was left for state creativity in the criminal justice area.[15] And, of course, very little activity occurred prior to the early sixties in either federal or state courts in terms of applying constitutional protections to defendants in criminal cases.[16] The other explanation is simply that the states were, until recently, generally not interested in providing constitutional protections and remedies for defendants in criminal cases. Justice Linde has argued that most state courts did not take seriously individual rights and liberties set out in state constitutions:

> State courts issued and still issue gag orders against the press without much concern whether their constitutions guarantee freedom to speak, write, or publish on any subject whatever. State courts did not probe very deeply into what a state's promise of equal privileges and immunities might mean for blacks or for women. Issues such as prayer in the public schools or trials without counsel and the use of illegally seized evidence did not rank high among the state courts' priorities.[17]

Problems arose even when state courts appeared to be relying, at least in part, on state constitutional guarantees. That is, if a state court resolved a criminal case looking to both federal and state constitutional provisions, the Supreme Court on review could not easily determine whether to resolve the matter on a substantive basis. If the case truly involved federal law, of course, the Supreme Court felt obliged to consider it. On the other hand, if the state decision gave the defendant more protection under the state constitution than provided by the federal constitution, the matter was not reviewable. Ultimately, the United States Supreme Court in *Michigan v. Long*[18] made clear that it will not review cases where there are independent and adequate state grounds offered. The Court urged state judges, however, to clarify whether the state court opinion was one which rests "primarily on federal law [or is] interwoven with the federal law."[19]

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15. Abrahamson, *supra* note 7, at 1147. Justice Abrahamson noted that in the 1960s "it was almost as if state constitution law had disappeared."

16. Of course, there were numerous exceptions for the truly egregious cases in which general due process violations occurred. The most obvious examples are found in the confession cases where the conduct of the police was viewed as sufficiently shocking so as to render the confessions unlawful. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (suspects tied and beaten prior to confessing); Brooks v. Florida, 389 U.S 413 (1967) (defendant kept in small room with no bed or other furnishings and minimal food prior to confessing); Lynumm v. Illinois, 372 U.S. 528 (1963) (the defendant spoke in response to threats that her children would be taken away from her).

17. Linde, *supra* note 13, at 174.

18. 463 U.S. 1032 (1983).

19. *Id.* at 1040. Justice Brennan in an earlier law review article explained:

Some state courts have vigorously followed the language of the United States Supreme Court in many criminal justice situations by vigorously applying state constitutional provisions in criminal prosecutions. The most telling example is undoubtedly the South Dakota Supreme Court's decision in *State v. Opperman*.[20] The first time the state court dealt with the issue of warrantless inventory searches of automobiles, it found that the police procedure was unreasonable under the fourth amendment. The United States Supreme Court disagreed.[21] The state supreme court then granted a rehearing and determined that the inventory search specifically violated the individual's rights under the South Dakota constitution, with the court noting that it was

> under no compulsion to follow the United States Supreme Court in that regard. . . . There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution. This court is the final authority on interpretation and enforcement of the South Dakota Constitution. We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution.[22]

The message has now become clear—state courts have an obligation to view their state constitutional provisions independent of the federal provisions. Moreover, they may be obliged to conduct that inquiry prior to any review of federal law. State judges throughout the United States are voicing this view strongly. A few comments are illustrative. Justice Quinn of the Colorado Supreme Court wrote: "We are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections."[23]

Justice Abrahamson of the Wisconsin Supreme Court said: "[t]he federal constitution establishes minimum rather than maximum guar-

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> And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.

Brennan, *supra* note 13, at 501.

20. 228 N.W.2d 152 (S.D. 1975).

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

22. 247 N.W.2d 673, 674 (S.D. 1976). The language of the South Dakota constitution was, in the state court's words, "almost identical to that found in the Fourth Amendment." *Id.*

23. People v. Sporleder, 666 P.2d 135, 140 (Colo. 1983).

antees of individual rights, and the state courts independently determine, according to their own law (generally their own state constitutions), the nature of the protection of the individual against state government."[24] Justice Stein of the New Jersey Supreme Court said: "[b]ecause a state constitution may afford enhanced protection for individual liberties, we 'should not uncritically adopt federal constitutional interpretations for the New Jersey Constitution merely for the sake of consistency.' "[25] To be sure, quite a number of judges now look back to the language of Justice Brandeis, which they view as applicable to judicial decision making, although it was originally intended to deal with legislative activities; "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[26]

III. THE NATIONAL APPLICATION

In a host of non-criminal cases, we have seen much activity by state supreme courts in recent years in which state constitutional law principles have been applied to provide greater protection to individuals than the federal law. The cases range from activism in enforcing church-state separation[27] to protecting interests of the mentally ill.[28] The most widely heralded case, however, comes very recently from the Oregon Supreme Court dealing with obscenity. The court in *State v. Henry*[29] received an appeal from a defendant who had been convicted, under a state obscenity statute, of disseminating obscene material. The court discussed at length whether the materials would be found unlawfully obscene in a federal prosecution; it particularly looked to the United States Supreme Court's definition of obscenity as found in the numerous

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24. Abrahamson, *supra* note 7, at 1153.

25. State v. Novembrino, 105 N.J. 95, 99, 519 A.2d 820, 823 (1987) (citing State v. Hunt, 91 N.J. 338, 355, 450 A.2d 952, 969 (1982)).

26. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), *discussed in* Pollock, *supra* note 11, at 717. The debate over the proper role and application of state constitutional law has been intense from the very beginning of this period of "new federalism" (or "old federalism" if you prefer). *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), where the majority and the dissenters vigorously debated the proper application of state law vis-a-vis federal law. *See infra* text accompanying notes 81-104.

27. *See* Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 634 (1985).

28. *See* Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7, 39-40 (1982).

29. 302 Or. 510, 732 P.2d 9 (1987).

cases handed down over the last 30 years.[30] The real question for the Oregon court, however, was not the United States Supreme Court's definition of obscenity, but whether the state statute violated the free speech clause of the Oregon constitution.[31] Oregon's free speech clause is somewhat broader than the federal first amendment: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."[32]

For the Oregon court, the chief analysis related to its own interpretation of the Oregon constitution, apart from any first amendment analysis which had previously been given by the United States Supreme Court. The court made clear that it would only "discuss the federal constitution and federal cases when of assistance in the analysis of the Oregon Constitution."[33] Upon reviewing the language of the state constitution, as well as Oregon history, the court took a very broad view of the freedom of speech protected in Oregon. The court found that even if the expression had been viewed as obscene under the United States Supreme Court test, such a characterization would not

> deprive it of protection under the Oregon constitution. . . . We emphasize that the prime reason that "obscene" expression cannot be restricted is that it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that "no law shall be passed restraining the expression of [speech] freely on any subject whatsoever."[34]

Recognizing the narrow protection offered by the United States Supreme Court, the Oregon court nevertheless took a much different view, relying exclusively on the Oregon constitution: "In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.' "[35]

Although much broad movement has occurred in numerous areas of substantive law, the most dramatic developments have been in the criminal justice field. A variety of reasons has been offered for this, but the most attractive explanation relates to United States Supreme Court developments over the past twenty-five years. In the 1960s, when

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30. *See* Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973).
31. OR. CONST. art I, § 8.
32. *Id.*
33. 302 Or. at 515, 732 P.2d at 11.
34. *Id.* at 525, 732 P.2d at 17.
35. *Id.* at 525, 732 P.2d at 18.

the Supreme Court was expanding the protections offered to individual defendants under the United States Constitution,[36] the state courts engaged in little activity independent of the federal constitution. As Justice Abrahamson of the Wisconsin Supreme Court has noted, "the state courts said little in the 1960s . . . it was almost as if state constitutions had disappeared."[37] When the composition of the Court changed and the Warren Court became the Burger Court, rulings in the constitutional criminal procedure area also changed. Limitations were imposed on *Miranda*,[38] and the exclusionary rule as originally enunciated in *Mapp*,[39] and a narrow reading was given to *Gideon v. Wainwright*.[40]

Many state judges, who had grown up professionally with the dictates of the Warren Court, recoiled against the Burger Court's narrow reading of these precedents. As Justice Brennan pointed out, "there has been an unmistakable trend in the Court to read the guarantees of individual liberty restrictively, which means that the content of the rights applied to the states is likewise diminished."[41] Justice Brennan has argued that more and more state courts are writing to support the defense view of broader state constitutional protection. "And state courts have taken seriously their obligation as coequal guardians of civil rights and liberties."[42] For Justice Brennan, the development is a very positive one and

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36. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (establishing the warnings requirement under the fifth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule under the fourth amendment to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (broadening the scope of the sixth amendment right to counsel).

37. Abrahamson, *supra* note 7, at 1147.

38. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (statements in violation of *Miranda* can be used at trial for impeachment purposes if the defendant takes the stand and makes a statement inconsistent with the earlier one); New York v. Quarles, 467 U.S. 649 (1984) (*Miranda* does not apply to statements where the questioning by the police officers was for purposes of protecting public safety rather than to obtain incriminating comments); Oregon v. Mathiason, 429 U.S. 492 (1977) (*Miranda* does not apply where the defendant was questioned at a police station but was free to leave).

39. The two main cases limiting *Mapp* are Illinois v. Gates, 462 U.S. 213 (1983) (the Supreme Court rejected precise criteria for the determination of the validity of an affidavit in support of a search warrant and instead directed magistrates to make "common sense" determinations), and United States v. Leon, 468 U.S. 897 (1984) (the Court would not exclude evidence obtained as a result of a search in which the police officers relied, in reasonable good faith, on a warrant that later turned out to be invalid).

40. 372 U.S. 335 (1963). *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979) (the Court held that *Gideon* would not apply to cases in which the defendant did not receive a term of imprisonment as a penalty); Ross v. Moffitt, 417 U.S. 600 (1974) (the Court refused to extend the right to counsel to cases involving discretionary appeals).

41. Brennan, *The Bill of Rights in the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 547 (1986).

42. *Id.* at 548.

directly traceable to the line of cases where the Court stepped back from the broader holdings of the Warren Court in the criminal justice field.[43]

A. The Search and Seizure Issue

Whatever the particular observation or explanation which may be in vogue at the moment, the reality of the rapid development of state constitutional law in the criminal law area cannot be disputed. In some of the earlier cases, the state courts were hesitant to strike out on their own under the state constitutions; even when they did they tended to "rely heavily on general federal doctrines."[44] More recently, however, state judges have been highly critical of federal doctrine as unduly limiting individual rights and protections in the criminal justice field. The trend can be discerned from a review of cases geographically as well as by subject. There are far too many cases which can be considered here to make the point clearly.[45] They range from opinions exploring fairly narrow questions arising under the search and seizure provisions of state and federal constitutions,[46] to much broader search

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43. Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the . . . application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Brennan, *supra* note 13, at 495. *See also* Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1086 (1982) (discussing the movement of the state courts in response to the "Court's continual amendment of the Warren Court precedents over the past decade . . .").

44. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1494 (1982) [hereinafter *Developments*].

45. *See generally* Abrahamson, *supra* note 7; Linde, *supra* note 13; *Developments*, *supra* note 44.

46. *See, e.g.*, State v. Butterworth, 48 Wash. App. 152, 737 P.2d 1297 (1987) (under the state constitution defendant's privacy rights were violated when the police officers obtained defendant's unpublished telephone listing without a warrant); People v. Oates, 698 P.2d 811, 815 (Colo. 1985) (police could not use homing transmitters under the Colorado constitution because "the Colorado proscription against unreasonable searches and seizures protects a greater range of privacy interest than does its federal counterpart.")

questions,[47] to difficult problems surrounding statements obtained from suspects,[48] to questions exploring the reach of the counsel requirement under state and federal constitutions.[49]

I offer here, however, three very different cases from three very different parts of the country. The substantive legal issues all arise under the search and seizure provisions in the state and federal constitutions, and each of the cases emphasizes the state review of the problem.

1. The Massachusetts Decision

The Massachusetts Supreme Judicial Court was faced with a challenge concerning warrantless surveillance when a "one-party consent" had been obtained in *Commonwealth v. Blood.*[50] A one-party consent typically involves an informer who is "wired" for sound and then engages in a conversation with the defendant. The conversation contains incriminating remarks and is ultimately used against the defendant. The United State Supreme Court has consistently held that such activity is beyond the protective reach of the fourth amendment to the United States Constitution.[51] In essence, the Court has decided that the taping of such conversations does "not invade the defendant's constitutionally justifiable expectations of privacy."[52] The Massachusetts court acknowl-

47. *See* State v. Jackson, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984) (declining to follow, under the state constitution, the United States Supreme Court's *Gates* decision for a "totality of circumstances" review of an affidavit's validity); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (requiring police officers to warn suspects of their right to refuse warrantless searches, contradicting the United States Supreme Court's decision in Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

48. A classic—and early—opinion is People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), where the court rejected the United States Supreme Court's decision in Harris v. New York, 401 U.S. 222 (1971), which had allowed a defendant to be impeached with a statement which was otherwise inadmissible under *Miranda*. *See also* Hillard v. State, 406 A.2d 415 (Md. Ct. App. 1979) (considering the inadmissibility of an incriminating declaration under Maryland law, independent of the federal Constitution).

49. Probably the most significant early case is Blue v. State, 558 P.2d 636 (Alaska 1977), where the court refused to follow United States Supreme Court restrictions on the application of right to counsel provisions in the line-up setting. In particular, the court rejected the Supreme Court's decision in Kirby v. Illinois, 406 U.S. 682 (1972), where it had been held that the sixth amendment did not attach until the defendant had been formally charged with a criminal offense; thus the defendant was not entitled to counsel at a pre-indictment line up. The *Blue* court determined that a criminal defendant was entitled to counsel in connection with a pretrial identification proceeding as soon as he had been arrested.

50. 400 Mass. 61, 507 N.E.2d 1029 (1987).

51. United States v. Caceres, 440 U.S. 741 (1979); United States v. White, 401 U.S. 745 (1971).

52. United States v. White, 401 U.S. 745, 751 (1971).

edged contrary United States Supreme Court precedent, but looked instead to the protections offered under article 14 of the Massachusetts Declaration of Rights, which is worded in a similar fashion.[53] The question was whether, under Massachusetts law, "society at large would think it reasonable for the defendants to expect that, in normal course, conversations held in private homes will not be broadcast and recorded surreptitiously."[54] Strongly adopting the reasoning of the dissenters in *United States v. White*,[55] the Massachusetts court concluded that state law gave considerably more protection than did federal law. The *Blood* court further stated:

> [I]t is not just the right to a silent, solitary autonomy which is threatened by electronic surveillance: It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and thus to be whole as a free member of a free society.[56]

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53. The Massachusetts search and seizure provision states:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. pt. 1, art. XIV.

54. 400 Mass. at 68-69, 507 N.E.2d at 1033.

55. *See* 401 U.S. at 768 (especially Justice Harlan's opinion).

56. 400 Mass. at 69, 507 N.E.2d at 1034. The dissenting judges in *Blood* vigorously disagreed with the court, but not on the question of whether state law ought to be applied differently from federal law. Instead, the question the dissenters raised was whether Article 14 applied to the situation.

> This statute represents a modern response to a modern problem. The Framers of the Massachusetts Declaration of Rights did not foresee the development of electronic surveillance just as they could not imagine the formation of highly organized and disciplined criminal groups. They did, however, intend that art. 14 and the other provisions provide the framework in which the republican ideals of liberty and order could flourish. But the court demands a liberal interpretation of art. 14 so that modern privacy rights are protected, while it insists upon a narrow reading when the needs of modern law enforcement are considered. In the guise of protecting privacy, it only protects those who are its greatest threat.

Id. at 81, 507 N.E.2d at 1040 (Nolan, J., dissenting).

The Pennsylvania Superior Court, en banc, strongly agreed with the result in *Blood*. In Commonwealth v. Schaeffer, ___ Pa. Super. ___, 535 A.2d 354 (1987) the court found a warrant was required under article I, § 8 of the Pennsylvania Constitution because "no citizen should have to expect that the government may immediately and irrevocably seize his private thoughts every time he voices them to another person." *Id.* at ___, 535 A.2d at 360.

2. The Colorado Decision

In *People v. Sporleder*,[57] the trial court had suppressed evidence obtained by the use of a pen register.[58] The exact issue had previously come before the United States Supreme Court in *Smith v. Maryland*, where the Court found that there was no reasonable expectation of privacy in connection with these telephone numbers and hence no search had occurred under the fourth amendment.[59] The Colorado court on appeal began its opinion by recognizing that article 2, section 7 of the Colorado Constitution was "substantially similar to its federal counterpart."[60] Still, the court had on numerous occasions made clear that it was not required to follow the United States Supreme Court's interpretation of the fourth amendment when determining the scope of the state constitutional protection.[61] The court considered whether, under the state constitution, the defendant could have a reasonable expectation that the number that she dialed on her phone would remain free from government intrusion, absent a showing of probable cause and a warrant.[62] Although other states had taken a different view under their own state constitutions,[63] the Colorado court concluded that a citizen could properly have an expectation of privacy in the phone numbers and such an expectation would be reasonable. The court cited with approval the New Jersey Supreme Court's decision in *State v.*

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57. 666 P.2d 135 (Colo. 1983).

58. A pen register is a device that can record numbers that are dialed on a telephone by monitoring electrical impulses that result from the dial on the phone being released. The register does not, however, record or monitor the actual phone conversation. 666 P.2d at 137.

59. 442 U.S. 735 (1979). The Court specifically held that the use of a pen register did not constitute a search within the meaning of the fourth amendment. *Id.* at 741-43.

60. 666 P.2d at 140. This surely was an understatement. Article 2, Section 7 of the Colorado constitution provides:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause supported by oath or affirmation reduced to writing.

COLO. CONST. art II, § 7.

61. 666 P.2d at 140. In Charnes v. DiGiacomo, 612 P.2d 1117 (Colo. 1980), the court rejected United States v. Miller, 425 U.S. 435 (1976), and held that a bank depositor did have a reasonable expectation of privacy in deposits slips and checks which were voluntarily given to the banks and exposed to bank employees during the normal course of business. *Id.* at 1120-21.

62. 666 P.2d at 141.

63. *See, e.g.*, Indiana Bell Tel. v. State, 409 N.E.2d 1089 (Ind. 1980); Hastetter v. Behan, 639 P.2d 510 (Mont. 1982); People v. Guerra, 116 Misc. 2d 272, 455 N.Y.S.2d 713 (1982). The Colorado court found the reasoning in these cases to be "unpersuasive for the very same reason we find unconvincing the United States Supreme Court's holding in *Smith v. Maryland*." 666 P.2d at 142-43 n.6.

Hunt[64] where it was held that the individual had a constitutionally protected privacy interest in the phone company's billing records for his telephone:

> It is unrealistic to say that the cloak of privacy has been shed because the telephone company and some of its employees are aware of this information. Telephone calls cannot be made except through the telephone company's property and without payment to it for the service. This disclosure has been necessitated because of the nature of the instrumentality, but more significantly the disclosure has been for a limited business purpose and not for release to other persons for other reasons. The toll billing record is part of the privacy package.[65]

3. The New Jersey Decision

A recent, and highly controversial, state court decision explicitly rejecting a major United States Supreme Court opinion in the search and seizure area is *State v. Novembrino*.[66] In *Novembrino*, the court reviewed whether the United States Supreme Court's decision in *United States v. Leon*[67] would be accepted under the New Jersey state constitution. The Supreme Court in *Leon* had rendered one of the major fourth amendment decisions of recent years when it held that evidence obtained as a result of a search would not be excluded if the police officer had, in good faith, reasonably relied on a warrant which turned out to be defective.[68] The New Jersey court considered the issue under its own constitutional provision, recognizing that it should not "uncritically adopt federal constitutional interpretations for the New Jersey constitution merely for the sake of consistency."[69] The court also echoed numerous statements of other courts that the state constitutional provisions may be a source of "individual liberties more expansive than those conferred by the federal constitution."[70] Although the language of the New Jersey constitution on point was "virtually identical" to that of the federal fourth amendment, the court refused to adopt the

64. 91 N.J. 338, 450 A.2d 952 (1982).

65. *Id.* at 347, 450 A.2d at 956, *quoted in* People v. Sporleder, 666 P.2d at 142.

66. 105 N.J. 95, 519 A.2d 820 (1987).

67. 468 U.S. 897 (1984).

68. *Id.* at 922.

69. 105 N.J. 98, 519 A.2d at 823 (citing State v. Hunt, 91 N.J. 338, 355, 450 A.2d 952, 969 (1982) (Pashman, J., concurring)).

70. *Id.* at 124, 519 A.2d at 849 (citing Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980)).

decision in *Leon*. Instead, the court held that the *Leon* rule "would tend to undermine the constitutionally-guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement. . . ."[71] The court concluded by noting the disruption brought by *Leon* "may reach such a level as to cause the [United States Supreme] Court to reconsider its experiment with the fourth amendment."[72]

B. The State Cases

The Massachusetts, Colorado, and New Jersey cases are striking in the clarity of their reliance on state constitutional language even when the wording of the state provisions is "almost identical to that found in the [federal constitution]."[73] The movement toward reliance on state constitutions is, however, very recent,[74] in response to the Burger and Rehnquist Courts' limitations of the criminal procedure decisions of the Warren Court.[75] Still, the movement is unmistakable, and almost unstoppable.[76] Some state judges have disagreed with the movement and strongly criticized different courses of action when the language of the state and federal constitutions is similar and where there appears to be no specific historical basis for different results.[77] Moreover,

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71. *Novembrino*, 105 N.J. at 132, 519 A.2d at 857.

72. *Id.*

73. State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976). Even with virtually identical language and with the mandate of the United States Supreme Court absolutely clear (the court, after all, was given the case a second time for proceedings not inconsistent with the Supreme Court's decision earlier) the South Dakota court held that *it* was the "final authority on interpretation and enforcement of the South Dakota constitution." It then rejected the United States Supreme Court's earlier decision finding that inventory searches did not violate the fourth amendment. *Id.*

74. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KAN. L. REV. 305, 306 (1985).

75. Abrahamson, *supra* note 7, at 1153.

76. The number of state court decisions in recent years applying state constitutional principles has dramatically risen. Collins, *et al*, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599 (1986). For an interesting ten year perspective, see Brennan, *supra* note 13, and Brennan, *supra* note 41.

77. In People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the majority of the California Supreme Court rejected the Supreme Court's holding in Harris v. New York, 401 U.S. 221 (1971) (*Miranda* does not apply to impeachment use of earlier statements). The dissenting justices vigorously attacked the court's application of the state constitution which had language virtually identical to that found in the United States Constitution.

> The very obvious and substantial identity of *phrasing* in the two Constitutions strongly suggests to me the wisdom, insofar as possible, of identity of *interpretation* of those clauses. . . . [N]o special, unique, or distinctive California conditions exist

heeding the advice of some judges,[78] a few states have amended their constitutions to provide either that the state language cannot be construed to provide more protection for the citizens of that state than the U.S. Constitution would provide, or that rather severe restrictions will be placed on the exclusion of evidence which contravenes such provisions.[79] In still other states, proposals are pending to limit the state constitution.[80] Nevertheless, the trend toward expanding the use of state constitutional provisions for protection of defendants appears almost certain now.[81]

IV. APPLYING STATE CONSTITUTIONAL ANALYSIS

The debate over the application of state constitutional provisions does not simply rest with the question of *whether* such provisions ought to be applied in the face of federal law. Instead, there are are also the questions of how one applies such provisions, when those provisions are to be applied, and the kinds of limitations that should be imposed.

> which justify a departure from a general principle favoring uniformity. In my view, in the absence of very strong counter-veiling circumstances, we should defer to the leadership of the nation's highest court in its interpretation of nearly identical constitutional language, rather than attempt to create a separate echelon of state constitutional interpretations to which we will avert whenever a majority of this court differ from a particular high court interpretation. The reason for the foregoing principle is that it promotes uniformity and harmony in the area of the law which peculiarly and uniquely requires them. The alternative required by the majority must inevitably lead to growth of a shadow tier of dual constitutional interpretations state by state which, with temporal variances, will add complexity to an already complicated body of law.

16 Cal. 3d at 118-19, 545 P.2d at 283-84, 127 Cal. Rptr. at 371-72 (Richardson, J., dissenting).

78. Chief Justice Burger, concurring in Florida v. Casal, 462 U.S. 637, 639 (1983), criticized the state court's interpretation of state laws requiring greater protection for individual defendants than the federal constitution as not being "rational law enforcement." He went on to point out that the citizens of that state could amend the state constitution to reverse state court opinions which extended individual rights. For a denunciation of the former Chief Justice's position, see the statement made by a dissenting justice in State v. Jackson, 672 P.2d 255, 264 (Mont. 1983): "the arrogance of a concurring opinion in *Florida v. Casal*. . . . The Chief Justice of the United States did not agree with the decision of the Florida Supreme Court and suggested the United States Supreme Court was the sole repository of judicial wisdom and rationality." For further discussion of this criticism, *see infra* text accompanying notes 81-111.

79. *See infra* text accompanying notes 154-56.

80. There is much discussion in Arizona at this point in time. Without question, this discussion comes up not as a matter of general constitutional interpretation, but as a result of criticism of a few Arizona Supreme Court cases which appear to give criminal defendants greater rights under the state constitution than would be given under the federal constitution. *See infra* text accompanying notes 112-151.

81. *See* Note, *Individual Rights and State Constitutional Interpretations: Putting First Things First*, 37 BAYLOR L. REV. 496, 497-98 (1985). *See generally* Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981).

At this point, state courts have taken four basic approaches to deal with claims that arise in criminal cases under both federal and state constitutional provisions. The first, and most restrictive, is simply a declaration by a state court that it will not apply a state constitutional provision in a manner different from a similar and parallel federal rule.[82] While not followed widely, it has become the model of various attempts to amend state constitutions so as to restrict independent interpretation.[83]

Another restricted view of the role of the state constitution is taken in a few states which actually consider state and federal claims in separate portions of a single opinion.[84] As noted by Justice Linde, the approach makes the discussion of the federal claim pure dicta when the state claim succeeds "[and] implies that the result could not be changed by amending the state constitution."[85]

A much broader scope of review was made most famous in a series of cases decided by the New Jersey Supreme Court. Here the court looked initially to the federal rules. If the federal doctrine does not provide sufficient protection, then—but only then—the state court will look to the parallel state constitutional provision.[86] The difficulty with this approach[87] is that reliance on federal law may prevent an orderly and—again in Justice Linde's words—coherent development of the state's independent review of its own constitutional law.[88]

The broadest view is that the state court should look to its own law "before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right."[89] This way, the court can look to the precise language of the state court rules, the tradition and history within its own boundaries, and the policies shared by citizens of that state.[90]

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82. This is the position strongly taken by Chief Justice Lucas of the California Supreme Court. *See infra* note 99.

83. Note, *supra* note 81, at 507. Of course, the most striking example is the Florida experience. The Florida constitution was amended in 1982 to require that the state constitutional exclusionary rule be interpreted in no broader fashion than is found in the United States Supreme Court's interpretation. FLA. CONST. art. I, § 12. *See generally* Florida v. Hume, 512 So. 2d 185 (Fla. 1987).

84. *See, e.g.*, State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982).

85. Linde, *supra* note 13, at 178.

86. *Id.*

87. Often called the "supplemental" or "interstial" approach. *See generally* Linde, *supra* note 13, at 175-79.

88. *Id.*

89. *Id.*

90. Abrahamson, *supra* note 7, at 1153.

The strongest proponents of independent state review of state constitutional provisions have vigorously argued in support of the approach requiring primary state constitutional review.[91] In their eyes, the result is correct either because "there has been an unmistakable trend in the [United States Supreme] Court to read the guarantees of individual liberty restrictively"[92] or because it allows for a truly independent development of state law.[93] Such a broad approach, however, has come under increasing criticism in recent years. Some contend that having individual states requiring different standards for law enforcement results in a constitutional system which does not promote "rational law enforcement."[94] Others assert that it will encourage individual states to resort to the amendment process to bring state constitutional doctrine into line with the prevailing federal view.[95] Powerful arguments have been advanced that state constitutional provisions should generally track the federal provisions when the language in both is sufficiently close, or there is an absence of clear historical reasons to require different treatment. On the former argument, then-Chief Justice Erickson's opinion in *Colorado v. Sporleder*[96] is probably the leading statement.

> The United States Supreme Court may err in its interpretation of the Constitution and should not be followed blindly by courts which disagree with the high Court's analysis. Lower courts, however, should explain their divergences from the interpretation of higher appellate courts in reaching different conclusions. Courts which fail to explain important divergences from precedent run the risk of being accused of making policy decisions based on subjective result-oriented reasons. . . . I do believe, however, that courts should be hesitant in interpreting identical language in state constitutions differently in their efforts to reach conclusions which differ from the United States Supreme Court. . . . [I] would be less quick than the majority in applying the Colorado Constitution to situations where there is no significant textual difference from its federal counterpart.[97]

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91. Justices Shirley Abrahamson and Hans Linde have been the most visible—and vocal—advocates.

92. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians*, 61 N.Y.U. L. REV. 535, 547 (1986).

93. For a good discussion of the numerous cases which emphasize this point, see Abrahamson, *supra* note 7, at 1172. *See also* Goldberg, *Stanley Mosk: A Federalist for the 1980's*, 12 HASTINGS CONST. L.Q. 395, 401-02 (1985); Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1086 (1982).

94. Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

95. Abrahamson, *supra* note 7, at 1154.

96. 666 P.2d 135 (Colo. 1983).

97. *Id.* at 149-50 (citations omitted) (Erickson, C.J., dissenting). *See also* Chief Justice

The argument concerning historical bases was made forcefully by Justice Garibaldi, dissenting from the New Jersey Supreme Court's rejection of the *Leon* good faith exception to the exclusionary rule doctrine in *New Jersey v. Novembrino*.[98] There he searched in vain for such historical or policy reasons which would distinguish New Jersey from the national experience. He argued that state law should follow federal rules unless one could point to prevailing historical or policy reasons.[99]

The criticism over expanding state development of state constitutional provisions may be vigorous, but it has not prevailed generally. Over the last decade, the trend has been toward greater reliance on state constitutional provisions at the expense of uniformity in law enforcement and general deference to United States Supreme Court interpretations of the federal Constitution. Many judges, lawyers and commentators strongly support such a movement, contending that for both historical and policy reasons, the state judiciary should not be restricted in its independent interpretation of state constitutional doctrine:

> Just as state courts need not pursue the chimera of completely autonomous state constitutional doctrines, neither need they confine their disagreements with federal constitutional law to those cases in which state constitutional decisions can be grounded in textual or

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Erickson's dissent in Colorado v. Oates, 698 P.2d 811, 823 (Colo. 1985) (Erickson, C.J., dissenting) (urging the majority not to depart from United States Supreme Court doctrine "without principled reasons for doing so").

98. 105 N.J. 95, 519 A.2d 820 (1987).

99. Consistent state and federal rulings are crucial to the rational development of criminal law and the guidance of our law-enforcement officials. Only a strong state purpose would justify divergence in this very sensitive area. An examination of the New Jersey Constitution, statutes, and cases reveals no such purpose, and in fact leads to the conclusion that adoption of the *Leon* and *Sheppard* limited good faith exception is consistent with New Jersey law.

Id. at 141, 519 A.2d at 866 (Garibaldi, J., concurring in part, dissenting in part). *See also* Houston, 42 Cal. 3d 595, 624, 724 P.2d 1166, 1185, 230 Cal. Rptr. 141, 160 (1986) (Lucas, J., dissenting), focusing on the law enforcement needs in this area:

> As a general rule, I take exception to basing holdings such as this on independent state constitutional grounds where the language of the applicable provisions is almost identical to the federal Constitution, and without some greater showing of an independent state interest needing additional protection. Any argument for such holdings is further weakened in this case by the majority's failure to realize that the guarantees of the [f]ifth and [s]ixth [a]mendments, which it invokes in its extension of rights here, protect the rights of *individuals* accused or suspected of crimes. They do not exist in the abstract to proscribe any police conduct of which the majority disapproves.

Id.

> historical differences. The fact that state and federal texts are parallel or even identical does not mean that the state constitution's framers intended to incorporate federal constitutional law into their own constitutions. . . . "Different men may employ identical language yet intend vastly different meanings and consequences." Moreover, even if state and federal constitutional clauses are conceded to have identical meanings, state courts are not barred from independently determining what those meanings are. The United States Supreme Court simply has no monopoly over determining what constitutes an "unreasonable search" or an infringement on "freedom of speech."[100]

Moreover, it is not at all clear that the lack of law enforcement uniformity is creating a problem. Over the last twenty years there have been considerable differences in the way state courts apply various rules of criminal procedure, yet no hard evidence has been offered to show that the result has seriously and adversely affected law enforcement on a national level.[101]

Some state judges have resisted vigorously applying state constitutional law. Grassroots movements have developed in a few of the sun belt states.[102] Still, more and more state judges are looking to their own state constitutional provisions prior to reviewing parallel federal standards.[103] The California Supreme Court's decision in *People v. Houston*[104] illustrates this broader approach to the application of state constitutional law. The court there rejected the United States Supreme Court's decision in *Moran v. Burbine*.[105] In *Burbine*, the Court held that "the police

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100. *Developments*, *supra* note 44, at 1497 (footnote omitted) (quoting Falk, *The Supreme Court of California, 1971-1972: Forward—The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 282 (1973)).

101. *See* Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221, 259 (1983):

> Some concern has been expressed about the lack of uniformity in the law that would result in the widespread use of state constitutional rights. It is unclear, however, what serious problems this would create above and beyond the fact of diversity of interpretations. Moreover, it is uncertain that any of the problems that might result would outweigh the benefits of a revitalized state judiciary. As Professor Howard has written in his lengthy review of State Supreme Court activities: "Both constitutional history and theory support the case for an independent body of constitutional law."

Id.

102. Florida and California have already enacted constitutional amendments which restrict the ability of their state courts to take independent roles. *See* Abrahamson, *supra* note 7, at 1154. In a number of states, including Arizona, such proposals have recently been made and debated.

103. Brennan, *supra* note 41, at 551.

104. 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986).

105. 475 U.S. 412 (1986).

may conceal from a suspect the critical fact that his attorney is trying to reach him if the attorney is not *physically present* at the station."[106] In *Houston*, the majority of the court began its decision by recognizing that *it* was to be the court of last resort in explaining the meaning of the state constitutional provisions, California's "Declaration of Rights."[107] Recognizing that the Constitution of the United States allowed states to give their citizens greater individual rights than given by the federal constitution, the court noted that "state charters offer important local protection against the ebbs and flows of federal constitutional interpretation."[108] The court conceded that clear United States Supreme Court rulings were entitled to "respectful consideration":

> But they are to be followed in California "only where they provide no less individual protection than is guaranteed by California law." In appropriate cases we have forthrightly rejected adherence to United States Supreme Court precedent, even where it was necessary to overrule our own prior decision adopting the federal rule.[109]

Moreover, the court declared that its state constitution was not designed simply to track federal constitutional provisions or to rely on such provisions. Hence, an independent review of the state constitution was mandated:

> The debates at the Constitutional Convention of 1849 made quite clear that the language of the Declaration of Rights which comprises Article I of the California Constitution was not based upon the federal charter at all, but upon the constitutions of other states. When the 1849 Constitution was adopted, of course, the 14th Amendment to the Federal Constitution, by which certain federal constitutional rights have been applied to the states, did not yet exist. Indeed, a reading of *both* the 1849 and 1878 constitutional debates reflects a common understanding that it was the *state* constitution, and not the federal, which would protect the rights of California citizens against arbitrary action by the state.[110]

The court in *Houston* recognized the contrary federal holding dealing with defendant rights. By looking principally to state constitutional provisions, the court adopted a different and more expansive rule for

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106. 42 Cal. 3d at 614, 724 P.2d at 1177-78, 230 Cal. Rptr. at 152 (Bird, C.J., concurring and dissenting).

107. *Id.* at 609, 724 P.2d at 1174, 230 Cal. Rptr. at 148.

108. *Id.*

109. *Id.* at 609, 724 P.2d at 1174, 230 Cal. Rptr. at 149 (citations omitted).

110. *Id.* at 609 n.13, 724 P.2d at 1174 n.13, 230 Cal. Rptr. at 149 n.13 (citation omitted) (emphasis in original).

California actions, a rule reflecting the unique values and history of a sovereign state.[111]

V. The Arizona Experience

The application of purely state constitutional law to criminal cases has been sparse in Arizona. Those few cases which have been resolved by the state supreme court on state constitutional grounds have not been of particular significance. Arizona cases contrast with those in other states which have rejected the good faith exclusionary rule exemption of the *Leon* case,[112] the broad *Gates* affidavit validity test,[113] the narrow view of the rights of criminal defendants with respect to their attorneys,[114] and the United States Supreme Court's inventory search ruling.[115] Instead, the Arizona experience has been relatively moderate, narrow in application, and fairly limited in impact, for the Arizona courts have simply not dealt with these broader questions.[116]

This limited application is somewhat surprising, as Arizona is a state where the equivalent fourth amendment language is considerably different from that found in the United States Constitution. Article 2, § 8 of the Arizona Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded without authority of law."[117] This language is more specific than that found in the fourth amendment and—at least arguably—requires more governmental deference. In Arizona, specific constitutional reference is made to "private affairs," a phrase not present in the federal constitution.[118] Still, few cases have focused on the state constitution's privacy protection. Three principal cases have been decided, all in the last decade, which rely explicitly on state constitutional grounds.

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111. The Florida Supreme Court recently followed the California lead in rejecting Moran v. Burbine, 475 U.S. 412 (1986). *See* Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

112. State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987).

113. State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984).

114. People v. Houston, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986).

115. State v. Opperman, 247 N.W.2d 673 (S.D. 1976). Numerous other cases could also be discussed. *See, e.g.*, Commonwealth v. Johnston, 515 Pa. 454, 530 A.2d 74 (1987) (dog's "sniff search" for drugs is search under state constitution); State v. Dixson, 87 Or. App. 1, 740 P.2d 1224 (1987) (search of home, under state constitution, includes curtilage outside of house).

116. Thus, it is especially ironic that a political movement has apparently begun in Arizona to restrict the use of the state constitution to a level not to exceed that found in the federal constitution. *See* Carson, *Petition Drive to Seek Constitutional Amendment for Victim's Rights*, Ariz. Daily Star, Aug. 30, 1987, § B, at 5, col. 1.

117. Ariz. Const. art. II, § 8.

118. *Id.*

State v. Bolt[119] involved an appeal from the denial of a suppression motion where the defense claimed that the police had "secured" the defendant's house prior to obtaining a search warrant. Apparently the practice of securing the premises was a common one in which police entered a residence without a warrant (and without any emergency or exigent circumstances), rounded up occupants, and simply waited for an officer to arrive with a warrant. No one was allowed in or out of the premises during this waiting period. The Arizona Supreme Court concluded that federal law on this point was not clear.[120] The *Bolt* court focused exclusively on whether such an entry violates article 2, § 8 of the Arizona Constitution. The court spoke in somewhat expansive terms about the heightened level of protection offered by the Arizona Constitution:

> While we are cognizant of the need for uniformity in interpretation, we are also aware of our people's fundamental belief in the sanctity and privacy of the home and the consequent prohibition against warrantless entry. We believe that it was these considerations that caused the framers of our constitution to settle upon the specific wording in Article 2, § 8. While Arizona's constitutional provisions generally were intended to incorporate the federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy.[121]

Because of the wording of the Arizona Constitution, as well as the history and development within the state, the court found that officers could not make a warrantless entry unless an emergency situation were present. Such entries were held to be "per se unlawful" under the state constitution.[122] With no showing that any exigent circumstances existed, the court held that the police procedure violated the Arizona Constitution wholly "independent of federal authority."[123] On this point the court was unanimous. The disagreement resulted from the question of whether the court should follow the federal rule of exclusion (which would not suppress the evidence here because of an independent source exception) or whether a separate state exclusionary rule, under the

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119. 142 Ariz. 260, 689 P.2d 519 (1984).

120. After discussing Segura v. United States, 468 U.S. 796 (1984), the *Bolt* court noted that no majority of justices in *Segura* dealt with the crucial question of whether a "warrantless entry and inspection short of search is permitted by the [f]ourth [a]mendment absent exigent circumstances." 142 Ariz. at 264, 689 P.2d at 523.

121. 142 Ariz. at 264-65, 689 P.2d at 523-24 (citation omitted).

122. *Id.* at 265, 689 P.2d at 524.

123. *Id.* This came within the confines of the "independent state ground" principle set out in Michigan v. Long, 463 U.S. 1032 (1983). *See supra* text accompanying notes 18-19.

Arizona Constitution, should be enforced.[124] The court, having decided that Arizona law specifically prohibited the police conduct, seemed poised to make a broad and expansive ruling concerning the particular remedy available under the state constitution:

> While the independent source exception to the exclusionary rule approved by the Supreme Court . . . is a matter of federal law, we are certainly free to adopt a state version of the exclusionary rule that differs from the federal, so long as we do not fall below the federal standards. We could, therefore, under the appropriate circumstances, refuse to recognize the independent source exception as a matter of state law, even though it was recognized as a matter of federal law.[125]

The court moved slowly even though it conceded that "on occasion we may not agree with the parameters of the exclusionary rule as defined by the United States Supreme Court."[126] Instead, Justice Feldman, for the majority, argued that it was important "to keep the Arizona exclusionary rule uniform with the federal."[127] The result was a narrow holding, the majority stating: "the exclusionary rule to be applied as a matter of state law is no broader than the federal rule."[128]

The state supreme court took a somewhat more dramatic step toward the application of purely state constitutional law in *State v. Ault*.[129] At trial the defendant was convicted of burglary and child molestation. A major piece of evidence consisted of shoeprints that were found in the mud outside the victim's home.[130] When the police officers went to the defendant's house to arrest him, the defendant specifically told them they were not invited in.[131] Nevertheless, the police went inside, saw a pair of muddy tennis shoes, and took them.[132] These shoes were later used against the defendant because they matched the shoeprints found at the victim's home.[133] No warrant had been obtained prior to the seizure of the shoes.[134]

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124. Justices Cameron and Hays specially concurred, looking to a balancing test as opposed to the fixed exclusionary rule. 142 Ariz. at 270, 689 P.2d at 529.

125. *Id.* at 268, 689 P.2d at 527.

126. *Id.* at 269, 689 P.2d at 528.

127. *Id.*

128. *Id.*

129. 150 Ariz. 459, 724 P.2d 545 (1986).

130. *Id.* at 462, 724 P.2d at 548.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

One of the chief government arguments in *Ault* was that the shoes had been properly admitted in evidence under the "inevitable discovery doctrine," because they would have been seized pursuant to a search warrant which was executed later in the day.[135] As a result, the state contended the shoes were admissible. The supreme court disagreed, stating that even though the United States Constitution and the Arizona Constitution both proscribed unreasonable searches and seizures by the government, and were both designed to deal with the unlawful entry of homes, the "Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens. As a matter of Arizona law, officers may not make a warrantless entry into a home in the absence of exigent circumstances or other necessity."[136] Although recognizing that the inevitable discovery doctrine was established in Arizona,[137] the court refused to apply it to a case in which an illegal search of the defendant's home directly produced evidence against him.[138] The court once again noted that its holding was based on a violation of article 2, § 8 of the Arizona Constitution, and did not need to be consistent with the position the United States Supreme Court might take:

> While our constitutional provisions were generally intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy. . . . We strongly adhere to the policy that unlawful entry into homes and seizure of evidence cannot be tolerated. The exceptions to the warrant requirement are narrow and we choose not to expand them. No exigent circumstances existed to allow a warrantless entry into defendant's home.[139]

In the third case, double jeopardy, not fourth amendment rights were at issue. In *Pool v. Superior Court,*[140] the defendant claimed that his

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135. *Id.* at 463, 724 P.2d at 549. The court relied on Nix v. Williams, 467 U.S. 431 (1984), where the Supreme Court allowed the discovery and condition of the body of a murdered child to be admitted in evidence "because its discovery was found to be inevitable in spite of the fact that the location of the body was obtained in violation of the defendant's constitutional rights." 150 Ariz. at 465, 724 P.2d at 551.

136. 150 Ariz. at 463, 724 P.2d at 549 (citation omitted).

137. *Id.* at 465, 724 P.2d at 551 (citing State v. Castenada, 150 Ariz. 382, 724 P.2d 1 (1986)).

138. *Id.* at 465, 724 P.2d at 551.

139. *Id.* at 466, 724 P.2d at 552 (citation omitted). The dissent vigorously disagreed with the majority, arguing that there was "no explanation why the policy reasons in support of the inevitable discovery doctrine should magically disappear at the door of 'King Gary's castle.' " *Id.* at 468, 724 P.2d at 554 (Cameron, J. dissenting)

140. 139 Ariz. 98, 677 P.2d 261 (1984).

double jeopardy rights had been violated.[141] A new indictment had been filed after the defendant's motion to dismiss had been granted at trial.[142] The case was an unusual one with the trial judge granting the defense motion for a mistrial on the ground of improper conduct on the part of the prosecutor.[143] Still, the trial judge denied a double jeopardy motion, relying on United States Supreme Court precedent to the effect that no constitutional error occurs if the prosecutor had not intended to provoke a mistrial.[144] A unanimous state supreme court disagreed with the result, finding constitutional error.[145] This holding directly conflicted with the United States Supreme Court's ruling in *Oregon v. Kennedy*[146] where the Court found no double jeopardy problem because of the trial judge's finding that there was no prosecutorial intent to provoke a mistrial.[147]

The Arizona court once again explained that under the state constitution, article 2, § 10, the court would "ordinarily interpret [state law] in conformity to the interpretation given by the United States Supreme Court to the same clause in the federal constitution."[148] Once again, though, the court refused to find the United States Supreme Court's decisions binding even with language that was quite similar to the federal constitution:

> We acknowledge, with respect, that decisions of the United States Supreme Court have great weight in interpreting those provisions of the state constitution which correspond to the federal provisions. We acknowledge that uniformity is desirable. However, the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly.[149]

With this policy rationale in mind, the court had little difficulty in adopting the dissenting opinion in *Oregon v. Kennedy* and holding that jeopardy attaches under Arizona's article 2, § 10 when a mistrial is

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141. *Id.* at 104, 677 P.2d at 267-68.

142. *Id.* at 105, 677 P.2d at 269.

143. The prosecutor was angered by the defense and engaged in cross-examination in which "portions [were] only arguably proper and still others [were] irrelevant and rather prejudicial. . . . [T]he cross-examination [then] moved from the irrelevant and prejudicial to the egregiously improper." *Id.* at 101, 677 P.2d at 264.

144. *Id.* at 104, 677 P.2d at 267.

145. *Id.* at 108, 677 P.2d at 271.

146. 456 U.S. 667 (1982).

147. *Id.* at 671.

148. 139 Ariz. at 108, 677 P.2d at 271.

149. *Id.* (citing *Kennedy*, 295 Or. at 268-72, 666 P.2d at 1322-24).

granted because of improper activities by the prosecutor. The *Pool* court further wrote that prejudice to the defendant is present if the government conduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole amounts to intentional conduct which the prosecutor knows to be improper and prejudicial. . . ."[150]

There are few additional cases beyond *Bolt*, *Ault*, and *Pool* that are of much significance.[151] It can fairly be said that in Arizona the cases that are sharply different from federal law and which rely exclusively on the state constitution in resolving criminal questions are of recent vintage, few in number, and relatively mild in application. Unlike the experience in several other states such as California, Florida, Oregon, Pennsylvania, New Jersey, Massachusetts, and Colorado, Arizona's constitutional provisions have not been given much notice, either by counsel arguing in criminal justice cases, or by the state courts.

VI. THE WAVE OF THE FUTURE?

We have seen a tremendous and dramatic change in recent years in the way in which many state supreme courts view their own state constitutional law provisions in criminal justice cases. Many state justices have taken the strong position espoused by Justice Mosk of the California Supreme Court: "The federal constitution merely sets the floor for individual rights. State and international charters are free to prescribe the ceiling."[152] Judge Newman of the United States Court of Appeals for the Second Circuit agreed with this proposition: "The resurgence of the spirit of the Old Federalism affords new opportunities for the vitality of our state constitution. We have every right to expect it to have increased significance."[153]

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150. *Id.* at 108-09, 677 P.2d at 271-72.

151. There have been other important cases, but these are opinions which either do not differ substantially from federal law or do not particularly emphasize the language of the Arizona Constitution.

152. Mosk, *Beyond the Constitution*, 7 CAL. LAW. 100 (1987).

153. Newman, *The 'Old Federalism': Protection of Individual Rights by State Constitutions in an Era of Federal Courts Passivity*, 15 CONN. L. REV. 21, 28 (1982). *See also Developments*, *supra* note 44, at 1356:

> The duty to protect individual rights, a duty that both our federal structure and their own constitutions impose on the states, requires that state courts not regard their constitutions as mere mirrors of federal protections. The distinctive characters of state constitutions and state judiciaries reinforce the demand that state constitutional interpretation not merely follow the federal lead.

Id.

With such strong and widespread support for the state constitutional law movement, it would seem as if the state constitutional law express cannot be derailed. Still, one must have some pause before jumping fully on this train of optimism. Quite a number of courts have, up until this time, viewed their state constitutional provisions as essentially equivalent to the federal constitutional rules and have refused to substantively distinguish them.[154] Moreover, when a few courts have moved too quickly in enforcing state constitutional protections, the reaction in the world of politics has been swift and harsh. In a few states there have been movements to amend state constitutions to eliminate the added protections of the state constitution for criminal defendants. The two most prominent examples, of course, are Florida and California. In Florida, the constitution was amended by initiative petition so that the search and seizure clause "shall be construed in conformity with fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court."[155] In California, the limitation is linked to the exclusionary rule. The California Constitution now states: "Except as provided by statute . . . relevant evidence shall not be excluded in any criminal proceeding. . . ."[156]

Even with this pause, however, it seems clear that more attorneys will raise the issue[157] and more courts will look to the state constitution for questions arising out of criminal prosecutions. There are, undoubtedly, historical bases for such a first inquiry regarding the state constitution. As former Justice Goldberg has pointed out, Alexander Hamilton in the Federalist Papers remarked that the "one transcendent vantage belonging to the providence of the state governments [is] the ordinary administration of criminal and civil justice."[158] Moreover, if

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154. *See generally* Abrahamson, *supra* note 7, at 1166-67.

155. FLA. CONST. art. 1, § 12 (amended 1982).

156. CAL. CONST. art. 1, § 28(d) (amended 1982). For detailed discussions of the enactment of section 28(d) and its impact, see *In re* Lance, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) (compare the majority and dissenting opinions).

157. The statement made by Justice Pollock of the New Jersey Supreme Court is telling: "I hope that in the future lawyers claiming a violation of fundamental rights will always discuss the relevance of the state constitution. A lawyer who ignores the change in tide towards constitutions runs the same risk as a sailor who ignores a change in the tides of the sea." Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 715 (1983).

158. Goldberg, *Stanley Mosk: A Federalist for the 1980's*, 12 HASTINGS CONST. L.Q. 395, 396 (1985), referring to the statements in the Federalist Papers, No. 17. *See also* Note, *supra* note 81, at 497:

> Historically, the states' commitment to individual rights came first, as state bills of rights predate the federal Constitution. By 1784, each of the original thirteen states had adopted a constitution, and each of these constitutions contained provisions guaranteeing individual liberties against government action. However, the constitu-

the Rehnquist Court continues in the direction of the Burger Court and views the criminal justice decisions of the Warren Court restrictively,[159] many judges will be inclined to look to state constitutional provisions for a more expansive set of protections.[160] To be sure, from many quarters there is considerable encouragement given to the state courts to continue this revolution of the "Old (or "New") Federalism." The foremost proponent is, without question, Supreme Court Justice William Brennan, who has repeatedly encouraged just such activity:

> This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions and the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.[161]

Ultimately, many courts throughout the country will be asking—first and foremost—about their own state laws, declarations of rights, and constitutions, apart from the words or impact of the federal constitution. This is as it should be. The state courts have primary responsibility for reviewing their own state laws, and matters of criminal justice arise typically under the state law. In short, I believe that Justice Linde of

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> tional guarantees were by no means uniform. During the months preceding independence, the idea of uniform constitutions was debated, but was rejected. Instead, each state was left to write a constitution satisfactory to itself.

Id.

159. *See supra* text accompanying notes 39-44.

160. Professor Galie made the point well:

> The Warren Court's "Bill of Rights Revolution" can be fairly described as spectacular. One might even hazard a guess that the startling evidence of public ignorance of the Bill of Rights discovered in the forties has been dispelled. The fact is that few individuals have heard of or know what protections their state bills of rights contain. An examination of the scholarly literature on the subject finds the same neglect. No doubt there is some justification for this neglect as most state legislatures and courts have been acting for years as if these rights did not exist. Moreover, given the Warren Court's preemption of the field with one precedent shattering decision after another in the civil liberties area, there seemed to be little state courts could do, and few were inclined to do anything more than snipe at the Supreme Court or evade, where possible, the full impact of the court's decisions.

Galie, *supra* note 101, at 223.

161. Brennan, *supra* note 13, at 501. See also the statements made by former Justice Goldberg: "In the era of the Burger Court, the responsibility of protecting individual liberties has fallen on state courts. Some enlightened state jurists—such as Justice Mosk—have met the challenge. Others, regretfully, have been slower to respond." Goldberg, *supra* note 142, at 401.

the Oregon Supreme Court was correct when he identified the "right question" to be asked by state judges in such cases:

> The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under the federal law, assuming it has been raised. Courts are resuming their responsibility for the constitutional law of their states. As I have said, the questions for lawyers as well as judges is not whether to do so, but how.[162]

162. Linde, *supra* note 13, at 179.